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DEPARTMENT OF ENERGY

10 CFR Part 851

[EHSS–RM–20–WSHP]

RIN 1992–AA61

Worker Safety and Health Program

AGENCY: Office of Environment, Health, Safety and Security, U.S. Department of Energy.

ACTION: Final rule.

SUMMARY: On September 2, 2022, the U.S. Department of Energy (DOE or the Department) published a notice of proposed rulemaking (NOPR) for public comment in which it proposed to amend its current worker safety and health program regulation. In this final rule, DOE is adopting the amendments proposed in the NOPR without change. The amendments make corrections to the worker safety and health program regulation requirements related to beryllium and beryllium compounds for purposes of accuracy and consistency with DOE's Chronic Beryllium Disease Prevention Program regulation and clarify that DOE did not intend to adopt the 2016 American Conference of Governmental Industrial Hygienists threshold limit value for beryllium and beryllium compounds. In addition, in this final rule DOE is correcting minor typographical errors identified in the regulation.

DATES: This rule is effective January 16, 2024. The incorporation by reference of certain publications listed in this rule was approved by the Director of the Federal Register on January 17, 2018.

FOR FURTHER INFORMATION CONTACT: Mr. James Dillard, U.S. Department of Energy, Office of Environment, Health, Safety and Security, Mailstop EHSS–11, 1000 Independence Ave. SW, Washington, DC 20585, Telephone: 301–903–1165, or by email at: *james.dillard@hq.doe.gov.*

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I. Authority and Background

A. Authority

DOE has broad authority to regulate worker safety and health with respect to its nuclear and nonnuclear functions pursuant to the Atomic Energy Act of 1954 (AEA), 42 U.S.C. 2011 *et seq.;* the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. 5801 *et seq.;* and the Department of Energy Organization Act (DOEOA), 42 U.S.C. 7101 *et seq.* Specifically, the AEA authorized and directed the Atomic Energy Commission (AEC) to protect health and promote safety during the performance of activities under the AEA. (*See* sec. 31a.(5) of the AEA, 42 U.S.C. 2051(a)(5); sec. 161b. of the AEA, 42 U.S.C. 2201(b); sec. 161i.(3) of the AEA, 42 U.S.C. 2201(i)(3); and sec. 161p. of the AEA, 42 U.S.C. 2201(p)). In addition, Congress amended the AEA in 2002 by adding section 234C, 42 U.S.C. 2282c, which, among other things, directed DOE to ''promulgate regulations for industrial and construction health and safety at Department of Energy facilities that are operated by contractors covered by agreements of indemnification under section 2210(d) of'' title 42 of the United States Code. In 1974, the ERA abolished the AEC and replaced it with the Nuclear Regulatory Commission (NRC), which became responsible for the licensing of commercial nuclear activities, and the Energy Research and Development Administration (ERDA), which became responsible for the other functions of the AEC under the AEA, as well as several nonnuclear functions. The ERA authorized ERDA to use the regulatory authority under the AEA to carry out its nuclear and nonnuclear functions, including those functions that might become vested in ERDA in the future. (*See* sec. 105(a) of the ERA, 42 U.S.C. 5815(a); and sec. 107 of the ERA, 42 U.S.C. 5817). In 1977, the DOEOA transferred the functions and authorities of ERDA to DOE. (*See* sec. 301(a) of the DOEOA, 42 U.S.C. 7151(a); sec. 641 of the DOEOA, 42 U.S.C. 7251; and sec. 644 of the DOEOA, 42 U.S.C. 7254).

B. Background

In this final rule, DOE is adopting the amendments proposed in the NOPR published on September 2, 2022 (87 FR 54178) without any substantive change. The amendments make corrections to the worker safety and health program regulation requirements related to beryllium and beryllium compounds for purposes of accuracy and consistency with DOE's Chronic Beryllium Disease Prevention Program regulation and clarify that DOE did not intend to adopt the 2016 American Conference of Governmental Industrial Hygienists (ACGIH®) threshold limit value (TLV®) for beryllium and beryllium compounds. On February 9, 2006, when DOE promulgated 10 CFR part 851, *Worker Safety and Health Program* (71 FR 6858), it adopted several industry standards and guidelines to establish the baseline industrial and construction safety and health requirements for DOE workplace operations. The standards and guidelines with which DOE contractors performing work on DOE sites were required to comply included certain Occupational Safety and Health Administration (OSHA) regulations and TLVs® published by the ACGIH®. Compliance with these standards and guidelines were already required by DOE Order 440.1A, *Worker Protection Management for DOE Federal and Contractor Employees,* which

established a comprehensive worker protection program that provided the basic framework necessary for contractors to ensure the safety and health of their workforce. 10 CFR 851.23(a) requires DOE contractors to comply with 10 CFR part 850, *Chronic Beryllium Disease Prevention Program,* and certain OSHA regulations at 29 CFR parts 1910, 1915, and 1926, among others. In 2015, DOE amended 10 CFR part 851 and added § 851.2(d) to clarify DOE's intent to adopt only OSHA's permissible exposure limit for beryllium found in 29 CFR 1910.1000, and that the ancillary provisions (*e.g.,* exposure assessment, personal protective clothing and equipment, medical surveillance, medical removal, training, and regulated areas or access control) of OSHA's standard do not apply to DOE and DOE contractors and their employees (80 FR 69564, November 10, 2015).

On January 9, 2017, OSHA promulgated new regulations in 29 CFR parts 1910, 1915, and 1926 for the protection of workers from the effects of beryllium and beryllium compounds in the workplace (82 FR 2470). These new provisions had the potential to conflict with or overlap DOE's beryllium safety and health requirements in 10 CFR part 850.

On December 18, 2017 (82 FR 59947), DOE issued a technical amendment to 10 CFR part 851 that replaced the existing references to safety and health standards and guidelines with the latest versions of the standards and guidelines. In the December 2017 amendment, DOE updated the safety and health standards and guidelines that were incorporated by reference in 10 CFR part 851, including the ACGIH® TLVs® in the ''*Threshold Limit Values for Chemical Substances and Physical Agents and Biological Exposure Indices*'' (2016). The TLVs® included those for beryllium and beryllium compounds.

On September 2, 2022, the Department published the NOPR (87 FR 54178) which proposed to make amendments to 10 CFR part 851 with respect to the requirements for beryllium and beryllium compounds that would: (1) ensure accuracy and consistency with 10 CFR part 850, *Chronic Beryllium Disease Prevention Program;* (2) clarify that in adopting certain OSHA regulations and ACGIH® TLVs® in 10 CFR part 851, DOE did not intend to adopt OSHA's ancillary beryllium safety requirements and ACGIH® values for beryllium and beryllium compounds; and (3) clarify in § 851.2(d) that 10 CFR part 851 does not require compliance by DOE contractors with any OSHA requirements for beryllium or beryllium compounds except as provided in 10 CFR part 850. DOE stated in the NOPR that it believes these corrections are necessary to avoid potential conflicts with DOE's beryllium safety and health requirements in 10 CFR part 850 and to avoid potential confusion among DOE contractors as to the requirements with which they must comply at DOE sites.

The NOPR also proposed to make minor corrections to clarify the meaning of § 851.23(b) regarding contractor compliance with additional safety and health requirements that are necessary to protect workers at their covered workplace.

II. Discussion of Public Comments and Rule Provisions

The Department's NOPR invited public comments on the proposal and provided a public comment period that ended on October 3, 2022. The Department received three sets of comments, which were all in support of the proposed changes to the rule. Copies of the comments are in the docket for this rulemaking. To access the docket, which includes **Federal Register** notices, comments, and other supporting documents/materials, go to *www.regulations.gov/docket/DOE-HQ-2022-0030.* All documents in the docket are listed in the *www.regulations.gov* index. However, some documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available. In the docket every submission was assigned a document identification (Document ID) number that consists of the docket number (DOE–HQ–2022–0030) followed by an additional four-digit number. For example, the Document ID number for DOE's NOPR is DOE–HQ–2022–0030–0001. When citing commenters in the docket, DOE includes the term ''Document ID'' followed by the last four digits of the Document ID number.

In this section, DOE discusses the comments it received, the final rule provisions, and the minor typographical errors in §§ 851.3, 851.7 and 851.23(a)(2) that DOE identified since publication of the NOPR and will be correcting in this final rule.

In general, the commenters (Document ID 0002, 0003, 0004) agreed with and supported the proposed amendments to the rule. They appreciated the Department's efforts to protect its workers and to provide a safe and healthful workplace.

A. Section 851.2 Exclusions

In the NOPR, DOE stated the current § 851.2(d) provides that part 851 does not require compliance with any OSHA beryllium requirement except for any permissible exposure limit for beryllium in 29 CFR 1910.1000. DOE proposed text in § 851.2(d) that would modify the language by instead referring to DOE's beryllium rule and stating that part 851 does not require compliance with any OSHA requirements for beryllium and beryllium compounds except as provided in 10 CFR part 850, *Chronic Beryllium Disease Prevention Program.* DOE noted that 10 CFR 850.22, *Permissible exposure limit,* states that the responsible employer must assure that no worker is exposed to an airborne concentration of beryllium greater than the permissible exposure limit established in 29 CFR 1910.1000, as measured in the worker's breathing zone by personal monitoring, or a more stringent time weighted average permissible exposure limit that may be promulgated by OSHA as a health standard.

DOE did not receive any specific comments on this section, and DOE has not changed the language as proposed in the NOPR. Final § 851.2(d) states that this part does not require compliance with any OSHA requirements for beryllium or beryllium compounds except as provided in 10 CFR part 850, ''Chronic Beryllium Disease Prevention Program.'' This language ensures consistency between the language in 10 CFR parts 850 and 851 with respect to beryllium and beryllium compounds.

B. Section 851.23 Safety and Health Standards

In the NOPR, DOE stated that § 851.23(a) currently requires contractors to comply with safety and health standards and guidelines that are applicable to the hazards at their covered workplace, including those identified at paragraphs (a)(3), (a)(4), and (a)(7) of that section. DOE proposed to change § 851.23(a) to clarify that, while DOE currently adopts OSHA's permissible exposure limit for beryllium, it is not DOE's intention to adopt OSHA's remaining beryllium requirements in 29 CFR parts 1910, 1915, and 1926.

One commenter (Document ID 0003) specifically mentioned that it supported the proposed changes to § 851.23(a) and encouraged DOE to work with its stakeholders regarding OSHA's remaining beryllium requirements in 29 CFR part 1910. DOE appreciates this comment and has adopted the proposed changes to this paragraph in this final rule.

In this final rule, DOE adopts the changes to § 851.23(a)(3), (4), and (7) that were proposed in the NOPR. Final

§ 851.23(a)(3) corrects the reference to OSHA's regulations and refers instead to 29 CFR part 1910, *Occupational Safety and Health Standards,* excluding 29 CFR 1910.1096, *Ionizing Radiation;* 29 CFR 1910.1000, *Air Contaminants,* Tables Z–1 and Z–2, as they relate to beryllium and beryllium compounds; and 29 CFR 1910.1024, *Beryllium.*

Final § 851.23(a)(4) refers to 29 CFR part 1915, *Occupational Safety and Health Standards for Shipyard Employment*, except for 29 CFR 1915.1024, *Beryllium.* Final § 851.23(a)(7) refers to 29 CFR part 1926, *Safety and Health Regulations for Construction*, except for 29 CFR 1926.1124, *Beryllium.*

In the NOPR, DOE noted that in 2017, DOE adopted and incorporated by reference the ACGIH® *Threshold Limit Values for Chemical Substances and Physical Agents and Biological Exposure Indices,* (2016), but did not intend to adopt the ACGIH® TLV® for beryllium and beryllium compounds. DOE proposed to amend § 851.23(a)(9) to exclude the ACGIH® TLV® for beryllium and beryllium compounds. In addition, DOE noted that § 851.23(a)(9) only referred to two of OSHA's health standards for beryllium and beryllium compounds, 29 CFR part 1910 (general industry) and 29 CFR part 1926 (construction). DOE proposed to include in § 851.23(a)(9) a reference to 29 CFR part 1915, the OSHA standard for shipyards.

One commenter (Document ID 0003) specifically mentioned that it supported DOE's clarification that it did not intend to adopt the ACGIH® TLV® for beryllium and beryllium compounds. DOE agrees with this commenter and has clarified the language in final § 851.23(a)(9).

DOE adopts the language in final § 851.23(a)(9) proposed in the NOPR, with minor changes in phrasing to improve clarity. As stated in the NOPR, it is DOE's intent in § 851.27(b)(1) that the incorporation by reference of ACGIH®, *Threshold Limit Values for Chemical Substances and Physical Agents and Biological Exposure Indices,* (2016), excludes beryllium and beryllium compounds.

In the NOPR, DOE proposed minor editorial changes to § 851.23(b) to clarify that nothing in part 851 relieves contractors from the responsibility to comply with any additional safety and health requirements that are necessary to protect the safety and health of workers. One commenter (Document ID 0003) specifically mentioned that it supported the proposed changes to § 851.23(b). DOE appreciates the commenter's support for the proposed changes and has adopted the proposed changes to the paragraph in this final rule.

C. Minor Typographical Corrections

In addition to the changes proposed in the NOPR, DOE is correcting minor typographical errors in §§ 851.3, 851.7(b) and 851.23(a)(2).

DOE is revising § 851.3 to correct the spelling of the word ''contractor'' in the definition of ''Final notice of violation''.

DOE is revising § 851.7(b) to correct the spelling of the word ''envelope''.

DOE is revising § 851.23(a)(2) to correct the reference to ''Parts'' and add in its place ''Part'' followed by specific section numbers.

D. List of Commenters

Document ID	Commenter	Affiliation
0002	Thiên Phúc Lê	
0003	Steve Sallman ..	United Steelworkers.
0004	Anonymous	Anonymous.

III. Procedural Issues and Regulatory Review

A. Review Under Executive Orders 12866, 13563, and 14094

Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (Oct. 4, 1993), as supplemented and reaffirmed by Executive Order 13563, ''Improving Regulation and Regulatory Review,'' 76 FR 3821 (Jan. 21, 2011) and amended by Executive Order 14094, ''Modernizing Regulatory Review,'' 88 FR 21879 (April 11, 2023), requires agencies, to the extent permitted by law, to (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public. DOE emphasizes as well that Executive Order 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, the Office of Information and Regulatory Affairs (OIRA) has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. For the reasons stated in the preamble, this regulatory action is consistent with these principles.

Section 6(a) of Executive Order 12866 also requires agencies to submit ''significant regulatory actions'' to OIRA for review. OIRA determined that this regulatory action does not constitute a ''significant regulatory action'' within the scope of Executive Order 12866. Accordingly, this action is not subject to review by OIRA under that Executive Order.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires that an agency prepare a final regulatory flexibility analysis for any final rule where the agency was first required by law to publish a proposed rule for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities (5 U.S.C. 605(b)). As required by Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking,* 67 FR 53461 (Aug. 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE made its procedures and policies available on the Office of the General Counsel's website: *www.energy.gov/gc/office-general-counsel.*

This final rule updates DOE's worker safety and health program regulation and clarifies DOE's ongoing intent to exempt DOE contractors from specified OSHA regulations and the ACGIH® TLV® pertaining to beryllium and beryllium compounds. This rule applies only to activities conducted by DOE's contractors. DOE expects that any potential economic impact of this rule on small businesses will be minimal because work performed at DOE sites is under contracts with DOE or the prime contractor at the site. DOE contractors are reimbursed through their contracts for the costs of complying with worker

safety and health program requirements. Therefore, they will not be adversely impacted by the requirements in this final rule. For these reasons, DOE certifies that this final rule, if promulgated, will not have a significant economic impact on a substantial number of small entities, and therefore, no regulatory flexibility analysis was prepared for this final rule.

C. Review Under the Paperwork Reduction Act of 1995

This final rule does not impose a collection of information requirement subject to review and approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

D. Review Under the National Environmental Policy Act of 1969

Pursuant to the National Environmental Policy Act of 1969 (NEPA), DOE analyzed this final action in accordance with NEPA and DOE's NEPA implementing regulations (10 CFR part 1021). DOE determined that this rule is covered under the categorical exclusion found in DOE's NEPA regulations at paragraph A.5 of appendix A to subpart D, 10 CFR part 1021, because it is a rulemaking that interprets or amends an existing rule or regulation that does not change the environmental effect of the rule. *See* 10 CFR 1021.410. Therefore, DOE determined that this final rule is not a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA and does not require an Environmental Assessment or an Environmental Impact Statement.

E. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, Section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (February 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for the affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; (6) specifies whether administrative proceedings are to be required before parties may file suit in court and, if so, describes those proceedings and requires the exhaustion of administrative remedies; and (7) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of the standards. DOE completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

F. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 10, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. The Executive order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE examined this final rule and determined that it will not preempt State law and will not have a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

G. Review Under Executive Order 13175

Under Executive Order 13175 (65 FR 67249, November 9, 2000) on ''Consultation and Coordination with Indian Tribal Governments,'' DOE may not issue a discretionary rule that has ''Tribal'' implications and imposes substantial direct compliance costs on Indian Tribal governments unless DOE provides funds necessary to pay the costs of the Tribal governments or consults with Tribal officials before promulgating the rule. DOE determined the final rule will not have such effects and concluded Executive Order 13175 does not apply to this final rule.

H. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act (UMRA) of 1995 (Pub. L. 104–4) requires each Federal agency to assess the effects of a Federal regulatory action on State, local, and Tribal governments, and the private sector. (Pub. L. 104–4, sec. 201 *et seq.* (codified at 2 U.S.C. 1531 *et seq.*)). For a regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)). UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant Federal intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. (62 FR 12820) (This policy is also available at: *www.energy.gov/gc/guidance-opinions* under ''Guidance & Opinions'' (Rulemaking)). DOE examined this final rule according to UMRA and its statement of policy and determined the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any year. Accordingly, no further assessment or analysis is required under UMRA.

I. Review Under Executive Order 12630

DOE determined, under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights'' 53 FR 8859 (March 18, 1988), that this final regulation will not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001) requires Federal agencies to prepare and submit to the OIRA, which is part of OMB, a Statement of Energy Effects for any significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1)(i) is a significant regulatory action under Executive Order 12866, or any successor order; and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (2) is designated by the Administrator of OIRA as a significant energy action. For any significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

This final rule is not a significant regulatory action under Executive Order 12866 and DOE has concluded that this final rule will not have a significant adverse effect on the supply, distribution, or use of energy. Therefore, this final rule is not a significant energy action, and accordingly, DOE has not prepared a Statement of Energy Effects.

K. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family well-being (5 U.S.C. 601, note). This final rule will not impact the autonomy or integrity of the family as an institution. Accordingly, DOE concluded it is not necessary to prepare a Family Policymaking Assessment.

L. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for Federal agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). Pursuant to OMB Memorandum M–19–15, *Improving Implementation of the Information Quality Act* (April 24, 2019), DOE published updated guidelines which are available at: *www.energy.gov/sites/prod/files/2019/12/f70/DOE%20Final%20Updated%20IQA%20Guidelines%20Dec%202019.pdf.*

DOE reviewed this final rule under the OMB and DOE guidelines and concluded that it is consistent with applicable policies in those guidelines.

M. Materials Incorporated by Reference

DOE is excluding beryllium and beryllium compounds from its adoption of the TLVs® for chemical substances and physical agents and biological exposure indices published by the ACGIH® titled *Threshold Limit Values for Chemical Substances and Physical Agents and Biological Exposure Indices,* (2016), the currently approved version for incorporation by reference. Copies of the ACGIH® TLVs® are available on ACGIH®'s website at: *www.acgih.org.*

N. Congressional Notification

As required by 5 U.S.C. 801(2), DOE will submit to Congress a report regarding the issuance of this final rule prior to the effective date set forth at the outset of this rulemaking. The report will state it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

IV. Approval by the Office of the Secretary of Energy

The Secretary of Energy has approved publication of this final rule.

List of Subjects in 10 CFR Part 851

Federal buildings and facilities, Hazardous substances, Incorporation by reference, Occupational safety and health, Penalties, Reporting and recordkeeping requirements, Safety.

Signing Authority

This document of the Department of Energy was signed on December 8, 2023, by Jennifer Granholm, Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on December 12, 2023.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

For the reasons set forth in the preamble, the Department of Energy amends part 851 of chapter III of title 10 of the Code of Federal Regulations as set forth below:

PART 851—WORKER SAFETY AND HEALTH PROGRAM

■ 1. The authority citation for part 851 continues to read as follows:

Authority: 42 U.S.C. 2201(i)(3), (p); 42 U.S.C. 2282c; 42 U.S.C. 5801 *et seq.;* 42 U.S.C. 7101 *et seq.;* 50 U.S.C. 2401 *et seq.;* 28 U.S.C. 2461 note.

■ 2. Amend § 851.2 by revising paragraph (d) to read as follows:

§ 851.2 Exclusions.

* * * * *

(d) This part does not require compliance with any Occupational Safety and Health Administration requirements for beryllium or beryllium compounds except as provided in 10 CFR part 850, ''Chronic Beryllium Disease Prevention Program.''

* * * * *

§ 851.3 [Amended]

■ 3. Amend § 851.3 by removing the word ''contactor'' and adding in its place the word ''contractor'' in the definition for ''final notice of violation.''

§ 851.7 [Amended]

■ 4. Amend § 851.7(b) by removing the word ''envelop'' and adding in its place the word ''envelope''.

■ 5. Amend § 851.23 by revising paragraphs (a)(2), (3), (4), (7), and (9) and (b) to read as follows:

§ 851.23 Safety and health standards.

(a) * * *

(2) Title 29 CFR, part 1904, ''Recording and Reporting Occupational Injuries and Illnesses'', §§ 1904.4 through 1904.11, 1904.29 through 1904.33, and 1904.46.

(3) Title 29 CFR, part 1910, ''Occupational Safety and Health Standards,'' excluding 29 CFR 1910.1096, ''Ionizing Radiation''; 29 CFR 1910.1000, ''Air Contaminants,'' Tables Z–1 and Z–2, as they relate to beryllium and beryllium compounds; and 29 CFR 1910.1024, ''Beryllium.''

(4) Title 29 CFR, part 1915, ''Occupational Safety and Health Standards for Shipyard Employment,'' except for 29 CFR 1915.1024, ''Beryllium.''

* * * * *

(7) Title 29 CFR, part 1926, ''Safety and Health Regulations for Construction,'' except for 29 CFR 1926.1124, ''Beryllium.''

* * * * *

(9) American Conference of Governmental Industrial Hygienists (ACGIH®), *Threshold Limit Values for Chemical Substances and Physical Agents and Biological Exposure Indices,* (2016) (incorporated by reference, see § 851.27), excluding the threshold limit values (TLVs®) for beryllium and beryllium compounds, when the ACGIH® TLVs® are lower (more protective) than permissible exposure limits in 29 CFR part 1910 for general industry, 29 CFR part 1915 for shipyards, and/or 29 CFR part 1926 for construction. When the ACGIH® TLVs® are used as exposure limits, contractors must comply with the other provisions of any applicable expanded health standard found in 29 CFR parts 1910, 1915, and 1926.

* * * * *

(b) Nothing in this part relieves contractors from the responsibility to comply with any additional safety and health requirements that are necessary to protect the safety and health of workers.

* * * * *

■ 6. Amend § 851.27 by revising paragraph (a) to read as follows:

§ 851.27 Materials incorporated by reference.

(a) Certain material is incorporated by reference into this subpart with the approval of the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. To enforce any edition other than that specified in this section, the U.S. Department of Energy (DOE) must publish a document in the **Federal Register** and the material must be available to the public. All approved incorporation by reference (IBR) material is available for inspection at DOE and at the National Archives and Records Administration (NARA). Contact DOE: the U.S. Department of Energy, Office of Environment, Health, Safety and Security, Office of Worker Safety and Health Policy, Mailstop EHSS–11, 1000 Independence Ave. SW, Washington, DC 20585; (301) 903–1165. 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.* The material may be obtained from the sources in the following paragraphs of this section.

* * * * *

[FR Doc. 2023–27615 Filed 12–14–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1821; Project Identifier MCAI–2022–01045–A; Amendment 39–22601; AD 2023–22–17]

RIN 2120–AA64

Airworthiness Directives; Viking Air Limited (Type Certificate Previously Held by Bombardier Inc. and de Havilland, Inc.) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Viking Air Limited (type certificate previously held by Bombardier Inc. and de Havilland, Inc.) (Viking) Model DHC–3 airplanes. This AD was prompted by a report of cracking in the left-hand side (LHS) and right-hand side (RHS) lower engine mount pickup fittings. This AD requires a one-time inspection of the affected parts for cracking, deformation, corrosion, fretting or wear, paint or surface coating damage, and loose, missing, or broken fasteners, and applicable corrective actions. This AD also requires reporting the inspection results. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 19, 2024.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of January 19, 2024.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–1821; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

• For service information identified in this final rule, contact Viking Air Limited Technical Support, 1959 de Havilland Way, Sidney, British Columbia, Canada, V8L 5V5; phone: (800) 663–8444; fax: (403) 295–8888; email: *dh_technical.support@vikingair.com;* website: *vikingair.com/support/service-bulletins.*

• You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (817) 222–5110. It is also available at *regulations.gov* under Docket No. FAA–2023–1821.

FOR FURTHER INFORMATION CONTACT: Yaser Osman, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (917) 348–6266; email: *avs-nyaco-cos@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all Viking Model DHC–3 airplanes. The NPRM published in the **Federal Register** on September 7, 2023 (88 FR 61488). The NPRM was prompted by AD CF–2022–41, dated August 4, 2022 (also referred to as the MCAI), issued by Transport Canada, which is the aviation authority for Canada. The MCAI states that Viking received a post inspection report of fatigue cracking on the LHS and RHS of the lower engine mount pickup fittings on a Viking Model DHC–3 airplane. The two upper and two lower engine mount pickup fittings provide a rigid connection between the engine mount ring to which the engine is secured, and the firewall rear face. The MCAI also states that the current inspection requirements do not include a direct inspection of the lower and upper engine mount pickup fittings, and consequently, cracks or other damage to the engine mount pickup fittings may not be detected. Additionally, the MCAI states that an investigation determined that the upper engine mount pickup fittings can also have undetected fatigue cracks because they are manufactured from the same material as the lower engine mount pickup fittings.

Cracking of any of the engine mount pickup fittings can result in failure of the fitting, leading to a loose connection of the engine mount ring, which provides main support for the engine at the firewall. This condition, if not addressed, could, in the case of cracking of any of the engine mount pickup fittings, result in failure of the fitting, leading to a loose connection of the engine mount ring and consequent reduced control of the airplane. To address the unsafe condition, the MCAI requires a one-time inspection of the affected parts and applicable corrective

action. The MCAI also requires reporting the inspection results to Viking.

In the NPRM, the FAA proposed to require a one-time inspection of the affected parts for cracking, deformation, corrosion, fretting or wear, paint or surface coating damage, and loose, missing, or broken fasteners, and applicable corrective actions. Additionally, in the NPRM, the FAA proposed to require reporting the inspection results. The FAA is issuing this AD to address the unsafe condition on these products.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–1821.

Discussion of Final Airworthiness Directive

Comments

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

Conclusion

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

Related Service Information Under 1 CFR Part 51

The FAA reviewed Part 1 of Viking PSM 1–3–3, DHC–3 Otter Repair Manual, dated August 1, 1963. This service information specifies procedures for determining the damage classification and repair limits of any structural damage found on an engine mount pickup fitting and determining if an affected engine mount pickup fitting can be repaired or if it should be replaced. Although the watermarked words ''Uncontrolled for Reference Only'' appear on the title page and each page of the table of contents of this document, and the watermarked word ''Uncontrolled'' appears on each page of Part 1 of this document, this is the current version.

The FAA also reviewed Part 1 of Viking PSM 1–3–5, DHC–3 Otter Supplemental Inspection and Corrosion Control Manual, Revision IR, dated December 21, 2017 (Viking PSM 1–3–5, Revision IR). This service information specifies procedures for repairing any damaged paint or surface coating of an engine mount pickup fitting.

In addition, the FAA reviewed Viking Service Bulletin V3/0012, Revision NC, dated January 20, 2022. This service information specifies procedures for inspecting the upper and lower LHS and RHS engine mount pickup fittings, reporting the inspection results, and performing corrective actions. The corrective actions include replacing any loose, missing, or broken fastener; and replacing any cracked or deformed engine mount pickup fitting with a new or serviceable part.

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

Differences Between This AD and the MCAI

The MCAI requires contacting Viking for approval of proposed repair instructions if any corrosion, wear, or fretting damage to any engine mount pickup fitting is found and this AD does not. This AD requires contacting either the Manager, International Validation Branch, FAA; Transport Canada; or Viking's Transport Canada Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

Where Part 1 of Viking PSM 1–3–5, Revision IR, specifies contacting Viking if the alloy and condition of an affected engine mount pickup fitting cannot be identified, this AD requires contacting the Manager, International Validation Branch, FAA; Transport Canada; or Viking's Transport Canada DAO for instructions. If approved by the DAO, the approval must include the DAO-authorized signature.

Interim Action

The FAA considers that this AD is an interim action. If final action is later identified, the FAA might consider further rulemaking.

Costs of Compliance

The FAA estimates that this AD affects 65 airplanes of U.S. registry.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Detailed visual inspection of the engine mount pickup fitting.	2 work-hours × $85 per hour = $170	$0	$170	$11,050
Report results of inspection	1 work-hour × $85 per hour = $85	0	85	5,525

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

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Replace engine mount pickup fitting.	4 work-hours × $85 per hour = $340 (per engine mount pickup fitting).	Up to $692 per engine mount pickup fitting.	Up to $1,032 per engine mount pickup fitting.
Replace the fastener with a new fastener.	1 work-hour × $85 per hour = $85	Negligible	$85.
Perform a detailed visual inspection of the fastener hole.	1 work-hour × $85 per hour = $85	$0	$85.

Any repair that may be needed as a result of the detailed visual inspection of the engine mount pickup fitting could vary significantly from airplane to airplane. The FAA has no data to determine the costs to accomplish the repair or the number of airplanes that may require repair.

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 currently 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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2023–22–17 Viking Air Limited (Type Certificate Previously Held by Bombardier Inc. and de Havilland, Inc.): Amendment 39–22601; Docket No. FAA–2023–1821; Project Identifier MCAI–2022–01045–A.

(a) Effective Date

This airworthiness directive (AD) is effective January 19, 2024.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Viking Air Limited (type certificate previously held by Bombardier Inc. and de Havilland, Inc.) Model DHC–3 airplanes, all serial numbers, certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC) Code 7120, Engine Mount Section.

(e) Unsafe Condition

This AD was prompted by a report of cracking in the left-hand side (LHS) and right-hand side (RHS) lower engine mount pickup fittings. The FAA is issuing this AD to address cracking in the LHS and RHS lower engine mount pickup fittings. The unsafe condition, if not addressed, could, in the case of cracking of any of the engine mount pickup fittings, result in failure of the fitting, leading to a loose connection of the engine mount ring, which provides main support for the engine at the firewall, and consequent reduced control of the airplane.

(f) Compliance

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

(g) Required Actions

(1) Within 6 months after the effective date of this AD, do a detailed visual inspection of the lower engine mount pickup fittings part numbers (P/Ns) C3FS46–7 and C3FS46–8 and the upper engine mount pickup fittings P/Ns C3FS42–5 and C3FS42–6 for cracking, deformation (altered form or shape), corrosion, fretting or wear, paint or surface coating damage (loose, delaminating, flaking, peeling, chipping of the coating or paint, exposed bare metal, or corroded), and loose, missing, or broken fasteners, in accordance with Part A, steps 1 through 8, of the Accomplishment Instructions in Viking Service Bulletin V3/0012, Revision NC, dated January 20, 2022 (Viking SB V3/0012).

(2) If any crack or deformation (altered form or shape) of any engine mount pickup fitting is found during the detailed visual inspection required by paragraph (g)(1) of this AD, before further flight, replace the fitting with a new or serviceable part, in accordance with Part A, step 10, of the Accomplishment Instructions in Viking SB V3/0012. For purposes of this AD, ''new'' means zero hours time-in-service.

(3) If any paint or surface coating of the engine mount pickup fitting is found damaged (loose, delaminating, flaking, peeling, chipping of the coating or paint, exposed bare metal, or corroded) during the detailed visual inspection required by paragraph (g)(1) of this AD, before further flight, repair the fitting in accordance with Part 1 of Viking PSM 1–3–5, DHC–3 Otter Supplemental Inspection and Corrosion Control Manual, Revision IR, dated December 21, 2017 (Viking PSM 1–3–5, Revision IR), and Part A, step 12, of the Accomplishment Instructions in Viking SB V3/0012. Where Part 1 of Viking PSM 1–3–5, Revision IR, specifies contacting Viking if the alloy and condition of an affected engine mount pickup fitting cannot be identified, this AD requires contacting the Manager, International Validation Branch, FAA; Transport Canada; or Viking's Transport Canada Design Approval Organization (DAO) for instructions.

(4) If any loose, missing, or broken fastener is found during the detailed visual inspection required by paragraph (g)(1) of this AD, before further flight, replace the fastener with a new fastener, do a detailed visual inspection of the fastener hole to detect cracking, corrosion, an elongated bore hole, bore surface roughness, or other defects (abnormalities when compared to a new part), and repair any damage found or replace the engine mount pickup fitting with a new or serviceable part if damage is beyond repairable limits, in accordance with Part 1

of Viking PSM 1–3–3 DHC–3 Otter Repair Manual, dated August 1, 1963, and Part A, step 9, of the Accomplishment Instructions in Viking SB V3/0012.

(5) If any corrosion, wear, or fretting to any engine mount pickup fitting is found during the detailed visual inspection required by paragraph (g)(1) of this AD, before further flight, contact the Manager, International Validation Branch, FAA; Transport Canada; or Viking's Transport Canada DAO to obtain instructions for an approved repair and, within the compliance timeframe specified therein, do the repair. If approved by the DAO, the approval must include the DAO-authorized signature. Alternatively, before further flight, replace the engine mount pickup fitting with a new or serviceable part in accordance with Part A, step 10, of the Accomplishment Instructions in Viking SB V3/0012.

(h) Reporting Requirement

Report the inspection results from the detailed visual inspection required by paragraph (g)(1) of this AD at the applicable time specified in paragraph (h)(1) or (2) of this AD in accordance with Part A, step 14, of the Accomplishment Instructions in Viking SB V3/0012.

(1) For inspections done on or after the effective date of this AD: Submit the report within 30 days after the inspection.

(2) For inspections done before the effective date of this AD: Submit the report within 30 days after the effective date of this AD.

(i) 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 local Flight Standards District Office, as appropriate. If sending information directly to the manager of the International Validation Branch, mail it to the address identified in paragraph (j)(2) of this AD or email to: *9-AVS-AIR-730-AMOC@faa.gov.* If mailing information, also submit information by email. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local Flight Standards District Office/certificate holding district office.

(j) Additional Information

(1) Refer to Transport Canada AD CF–2022–41, dated August 4, 2022, for related information. This Transport Canada AD may be found in the AD docket at *regulations.gov* under Docket No. FAA–2023–1821.

(2) For more information about this AD, contact Yaser Osman, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (917) 348–6266; email: *Yaser.M.Osman@faa.gov.*

(k) Material Incorporated by Reference

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

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

(i) Viking PSM 1–3–3, DHC–3 Otter Repair Manual, Part 1, dated August 1, 1963.

Note 1 to paragraph (k)(2)(i): Although the document specified in paragraph (k)(2)(i) has the watermarked words ''Uncontrolled for Reference Only'' on the title page and each page of the table of contents, and the watermarked word ''Uncontrolled'' on each page of Part 1, this is a current version of that document.

(ii) Viking PSM 1–3–5, DHC–3 Otter Supplemental Inspection and Corrosion Control Manual, Revision IR, Part 1, dated December 21, 2017.

(iii) Viking Service Bulletin V3/0012, Revision NC, dated January 20, 2022.

(3) For Viking service information identified in this AD, contact Viking Air Limited Technical Support, 1959 de Havilland Way, Sidney, British Columbia, Canada, V8L 5V5; phone: (800) 663–8444; fax: (403) 295–8888; email: *dh_technical.support@vikingair.com;* website: *vikingair.com/support/service-bulletins.*

(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 November 3, 2023.

Victor Wicklund,

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

[FR Doc. 2023–27495 Filed 12–14–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1812; Project Identifier MCAI–2023–00726–A; Amendment 39–22602; AD 2023–22–18]

RIN 2120–AA64

Airworthiness Directives; Diamond Aircraft Industries Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for all Diamond Aircraft Industries Inc. Model DA 62 airplanes. This AD was prompted by reports of baggage nets installed with defective buckles, which may result in failure of the baggage net to restrain the baggage or cargo, which could lead to injury to the occupants in the case of an emergency landing. This AD requires identifying and replacing the affected part. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 19, 2024.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 19, 2024.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–1812; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Material Incorporated by Reference:

- For service information identified in this final rule, contact Diamond Aircraft Industries Inc., Att: Thit Tun, 1560 Crumlin Road, London, N5V 1S2, Canada; phone: (519) 457–4000; email: *t.tun@diamondaircraft.com;* website: *diamondaircraft.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. It is also available at *regulations.gov* under Docket No. FAA–2023–1812.

FOR FURTHER INFORMATION CONTACT: Fatin Saumik, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (516) 228–7350; email: *fatin.r.saumik@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all Diamond Aircraft Industries Inc. Model DA 62 airplanes. The NPRM published in the **Federal Register** on September 1, 2023 (88 FR 60406). The NPRM was prompted by AD CF–2021–24, dated July 21, 2021 (also referred to as the MCAI), issued by Transport Canada, which is the aviation authority for Canada. The MCAI states Diamond Aircraft Industries Inc. received reports of defective buckles installed on the baggage nets on DA 40 NG and DA 62

airplanes. An investigation revealed a quality issue during the manufacturing of the Quick Fix Baggage Net Assembly, part number (P/N) D44–2550–90–00 and P/N D67–2550–90–00_02, by the supplier. P/N D44–2550–90–00 baggage nets can also be installed on DA 40, DA 40 D, and DA 40 F airplanes. The baggage nets installed with defective buckles may not maintain sufficient holding force to restrain the baggage or cargo that is carried in the same compartment as passengers. Consequently, they may not provide adequate means to protect the passengers from injury. This condition, if not corrected, could result in the failure of the baggage net to restrain the baggage or cargo, which could lead to injury to the occupants in the case of an emergency landing. The MCAI mandates the removal and replacement of the affected baggage nets. The MCAI also renders any affected baggage nets not eligible for installation as a replacement part on Diamond Aircraft Industries Inc. Model DA 40, DA 40 D, DA 40 F, DA 40 NG, and DA 62 airplanes.

Previously, the FAA issued AD 2022–13–06, Amendment 39–22092 (87 FR 40435, July 7, 2022) (AD 2022–13–06) to address the unsafe condition on all Diamond Aircraft Industries Inc. Model DA 40, DA 40 F, and DA 40 NG airplanes (including Model DA 40 D airplanes that have been converted to Model DA 40 NG airplanes). AD 2022–13–06 requires removing and replacing the affected baggage nets. The Diamond Aircraft Industries Inc. Model DA 62 airplanes were not included in AD 2022–13–06. This AD requires these same actions on the Diamond Aircraft Industries Inc. Model DA 62 airplanes.

In the NPRM, the FAA proposed to require identifying and replacing affected baggage nets. The FAA is issuing this AD to prevent failure of the baggage net to restrain the baggage or cargo. This unsafe condition, if not corrected, could result in injury to occupants in the case of an emergency landing.

You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–1812.

Discussion of Final Airworthiness Directive

Comments

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

Conclusion

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

Related Service Information Under 1 CFR Part 51

The FAA reviewed Diamond Aircraft Industries Mandatory Service Bulletin MSB 62–028, Rev. 1, dated July 6, 2021, which specifies procedures for identifying, removing, and replacing the affected baggage nets.

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

Differences Between This AD and the MCAI

The MCAI applies to Diamond Aircraft Industries Inc. Model DA 40, DA 40 D, DA 40 F, DA 40 NG, and DA 62 airplanes. This AD only applies to Diamond Aircraft Industries Inc. Model DA 62 airplanes and does not apply to Model DA 40, DA 40 F, and DA 40 NG airplanes because those airplanes are already covered by AD 2022–13–06. This AD does not apply to Model DA 40 D airplanes because that model does not have an FAA type certificate.

Costs of Compliance

The FAA estimates that this AD affects 81 airplanes of U.S. registry.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Replace baggage net	0.25 work-hour × $85 per hour = $21.25	$441	$462.25	$37,442.25

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2023–22–18 Diamond Aircraft Industries Inc: Amendment 39–22602; Docket No. FAA–2023–1812; Project Identifier MCAI–2023–00726–A.

(a) Effective Date

This airworthiness directive (AD) is effective January 19, 2024.

(b) Affected ADs

AD 2022–13–06, Amendment 39–22092 (87 FR 40435, July 7, 2022) is related to this AD.

(c) Applicability

This AD applies to Diamond Aircraft Industries Inc. Model DA 62 airplanes, all serial numbers, certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC) Code 2550, Cargo Compartments.

(e) Unsafe Condition

This AD was prompted by reports of baggage nets installed with defective buckles. The FAA is issuing this AD to prevent failure of the baggage net to restrain the baggage or cargo. The unsafe condition, if not addressed, could result in injury to occupants in the case of an emergency landing.

(f) Compliance

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

(g) Definition

The following are ''affected baggage nets'' for purposes of this AD: Quick fix baggage net assembly part number D67–2550–90–00_02 with a date of manufacture of June 2016.

(h) Required Actions

(1) Within 12 months after the effective date of this AD or within 50 hours time-in-service after the effective date of this AD, whichever occurs first, inspect each baggage net to determine whether an affected baggage net is installed on your airplane.

Note 1 to the introductory text of paragraph (h)(1): The date of manufacture is located on the label with the abbreviation ''DMF.''

(i) If an affected baggage net is installed, before further flight, remove the baggage net from service.

(ii) Before the next flight carrying baggage or cargo in the baggage compartment, install a baggage net that is not an affected baggage net in accordance with Figure 1 of the Accomplishment Instructions in Diamond Aircraft Industries Mandatory Service Bulletin MSB 62–028, Rev. 1, dated July 6, 2021.

(2) As of the effective date of this AD, do not install an affected baggage net on any airplane.

(i) 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 local Flight Standards District Office, as appropriate. If sending information directly to the manager of the International Validation Branch, mail it to the address identified in paragraph (j)(2) of this AD or email to: *9-AVS-AIR-730-AMOC@faa.gov.* If mailing information, also submit information by email. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local Flight Standards District Office/certificate holding district office.

(j) Additional Information

(1) Refer to Transport Canada AD CF–2021–24, dated July 21, 2021, for related information. This Transport Canada AD may be found in the AD docket at *regulations.gov* under Docket No. FAA–2023–1812.

(2) For more information about this AD, contact Fatin Saumik, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (516) 228–7350; email: *fatin.r.saumik@faa.gov.*

(k) Material Incorporated by Reference

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

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

(i) Diamond Aircraft Industries Mandatory Service Bulletin MSB 62–028, Rev. 1, dated July 6, 2021.

(ii) [Reserved]

(3) For service information identified in this AD, contact Diamond Aircraft Industries Inc., Att: Thit Tun, 1560 Crumlin Road, London, N5V 1S2, Canada; phone: (519) 457–4000; email: *t.tun@diamondaircraft.com;* website: *diamondaircraft.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 November 3, 2023.

Victor Wicklund,

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

[FR Doc. 2023–27523 Filed 12–14–23; 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. 231211–0298]

RIN 0694–AI94 and 0694–AJ23

Export Controls on Semiconductor Manufacturing Items; Implementation of Additional Export Controls: Certain Advanced Computing Items; Supercomputer and Semiconductor End Use; Updates and Corrections; Extension of Comment Period

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

ACTION: Extension of comment period.

SUMMARY: On October 25, 2023, the Bureau of Industry and Security (BIS) published in the **Federal Register** the interim final rules (IFR), ''Export Controls on Semiconductor Manufacturing Items'' (SME IFR) and ''Implementation of Additional Export Controls: Certain Advanced Computing Items; Supercomputer and Semiconductor End Use; Updates and Corrections'' (AC/S IFR). This notification extends the deadline for submission of written comments on both rules to January 17, 2024. BIS is making this extension to allow commenters to have additional time to review the interim final rules and to benefit from the significant amount of public outreach that BIS is conducting on the rules prior to preparing and submitting their comments on the IFRs.

DATES: The comment period for the interim final rules published on October 25, 2023, at 88 FR 73424 and 88 FR 73458, is extended until January 17, 2024.

ADDRESSES: Comments on the SME IFR and the AC/S IFRs may be submitted to the Federal rulemaking portal (*www.regulations.gov*). The *regulations.gov* IDs for these rules are:

- *SME IFR: www.regulations.gov,* docket number BIS–2023–0016 (ref. 0694–AJ23)
- *AC/S IFR: www.regulations.gov,* docket number BIS–2022–0025 (ref. 0694–AI94)

All filers using the portal should use the name of the person or entity submitting the comments as the name of their files. Anyone submitting business confidential information should clearly identify the business confidential portion of the submission at the time of submission, file a statement justifying nondisclosure and referring to the

specific legal authority claimed, and provide a non-confidential version of the submission.

For comments submitted electronically containing business confidential information, the file name of the business confidential version should begin with the characters ''BC.'' Any page containing business confidential information must be clearly marked ''BUSINESS CONFIDENTIAL'' on the top of that page. The corresponding non-confidential version of those comments must be clearly marked ''PUBLIC.'' The file name of the non-confidential version should begin with the character ''P.'' Any submissions with file names that do not begin with either a ''BC'' or a ''P'' will be assumed to be public and will be made publicly available through *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For questions on the license requirements in the interim final rules, contact Eileen Albanese, Director, Office of National Security and Technology Transfer Controls, Bureau of Industry and Security, Department of Commerce, Phone: (202) 482–0092, Fax: (202) 482–482–3355, Email: *rpd2@bis.doc.gov.* For emails, include ''Advanced computing controls'' or ''Semiconductor manufacturing items control'' as applicable in the subject line.

SUPPLEMENTARY INFORMATION:

Background

On October 17, 2023, BIS released two interim final rules (IFR): ''Export Controls on Semiconductor Manufacturing Items'' (SME IFR) (88 FR 73424, October 25, 2023) and ''Implementation of Additional Export Controls: Certain Advanced Computing Items; Supercomputer and Semiconductor End Use; Updates and Corrections'' (AC/S IFR) (88 FR 73458, October 25, 2023). The October 17 AC/S IFR and SME IFR included a comment period deadline of December 18, 2023. The Department of Commerce has determined at this time that the extension of the comment period through January 17, 2024 is warranted to allow for commenters to have additional time to review the interim final rules and to benefit from the significant amount of public outreach that BIS is conducting on the rules prior to preparing and submitting comments. This extension notice specifies that comments may be submitted at any time but must be received by January 17, 2024, to be considered.

Thea D. Rozman Kendler,

Assistant Secretary for Export Administration.

[FR Doc. 2023–27588 Filed 12–14–23; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2023–0814]

RIN 1625–AA09

Drawbridge Operation Regulation; Atlantic Intracoastal Waterway, Savannah, GA

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is removing the existing drawbridge operation regulation for the Causton Bluff, SR 26, Bridge across the Atlantic Intracoastal Waterway, mile 579.9, near Causton Bluff, GA. The drawbridge was replaced with a fixed bridge and the bascule span leaves have been removed from the structure. The operating regulation is no longer applicable or necessary.

DATES: This rule is effective December 15, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov.* Type the docket number (USCG–2023–0814) in the ''SEARCH'' box and click ''SEARCH''. In the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email 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
Pub. L. Public Law
§ Section
GA Georgia
AICW Atlantic Intracoastal Waterway
U.S.C. United States Code

II. Background Information and Regulatory History

The Coast Guard is issuing this final 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), 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 unnecessary. The Causton Bluff, SR 26, Bridge, that once required draw operations in 33 CFR 117.353(b), was removed and replaced with a fixed bridge in October 2023. Therefore, the regulation is no longer applicable and shall be removed from publication. It is unnecessary to publish an NPRM because this regulatory action does not purport to place any restrictions on mariners but rather removes a restriction that has no use or value because the new bridge does not open.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective in less than 30 days after publication in the **Federal Register**. The bridge has been replaced with a fixed bridge and this rule merely requires an administrative change to the **Federal Register**, in order to omit a regulatory requirement that is no longer applicable or necessary. The modification has already taken place and the removal of the regulation will not affect mariners currently operating on this waterway. Therefore, a delayed effective date is unnecessary.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority 33 U.S.C. 499.

The Causton Bluff, SR 26, Bridge was removed and replaced with a fixed bridge in October 2023. The elimination of this drawbridge necessitates the removal of the drawbridge operation regulation, 33 CFR 117.353(b), that pertains to the former drawbridge.

The purpose of this rule is to remove the section (b) of 33 CFR 117.353 that refers to the Causton Bluff, SR 26, Bridge at mile 579.9, from the Code of Federal Regulations since it governs a bridge that is no longer able to be opened.

IV. Discussion of Final Rule

The Coast Guard is removing the regulation in 33 CFR 117.353 related to the draw operations for this bridge because it is no longer a drawbridge. The change removes the section (b) of the regulation governing Causton Bluff, SR 26, Bridge since the bridge has been

replaced with a fixed bridge. This final rule seeks to update the CFR by removing language that governs the operation of the Causton Bluff, SR 26, Bridge, which in fact is no longer a drawbridge. This change does not affect waterway or land traffic. This change does not affect, nor does it alter the operating schedules in 33 CFR 117.353 that govern the remaining active drawbridges on the Atlantic Intracoastal Waterway, Savannah River to St. Marys River.

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.

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 rule has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, it has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the fact that the bridge was replaced with a fixed bridge and no longer operates as a drawbridge. The removal of the operating schedule from 33 CFR 117 Subpart B will have no effect on the movement of waterway or land traffic.

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 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 bridge may be small entities, for the reasons stated in section V.A above this final rule would not have a significant economic impact on any vessel owner or operator.

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

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

C. Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Government

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 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 rule promulgates the operating regulations or procedures for drawbridges and is 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.

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard amends 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; Department of Homeland Security Delegation No. 00170.1. Revision No. 01.3.

§ 117.353 [Amended]

■ 2. Amend § 117.353 by removing and reserving paragraph (b).

Dated: December 11, 2023.

Douglas M. Schofield,

Rear Admiral, U.S. Coast Guard, Commander, Coast Guard Seventh District.

[FR Doc. 2023–27617 Filed 12–14–23; 8:45 am]

BILLING CODE 9110–04–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 10

[PS Docket Nos. 15–94, 15–91; FCC 23–88; FR ID 189576]

Emergency Alert System; Wireless Emergency Alerts

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) adopts rules for commercial mobile service providers that have elected to participate in the Wireless Emergency Alert system (WEA) (Participating CMS Providers) to support WEA messages in the 13 most commonly spoken languages in the U.S. as well as English and American Sign Language. Participating CMS Providers are to support this expanded multilingual alerting by enabling mobile devices to display message templates that will be pre-installed and stored on the mobile device. The Commission also directs its Public Safety and Homeland Security Bureau to seek comment on various implementation details of the multilingual alerting requirements and future expansion to additional languages. In addition, to help personalize emergency alerts, the Commission requires participating wireless providers to support the inclusion of maps in WEA messages that show the alert recipient's location relative to the geographic area where the emergency is occurring, and establishes a Commission-hosted database to provide the public with easy-to-access information on WEA availability. Wireless providers will be required to supply information on whether they participate in WEA and, if so, the extent of WEA availability in their service area and on the mobile devices that they sell. Last, to support more effective WEA performance and public awareness, the amended rules enable alerting authorities to send two local WEA tests per year that the public receives by default, provided that the alerting authority takes steps to ensure that the public is aware that the test is, in fact, only a test.

DATES: Effective December 15, 2026, except for the amendments to 47 CFR 10.210(b), (c), and (d)), 10.350(d), 10.480(a) and (b), and 10.500(e), which are delayed indefinitely. The Federal Communications Commission will announce the effective dates of the delayed amendments by publishing documents in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information regarding this Further Notice, please contact Michael Antonino, Cybersecurity and Communications Reliability Division, Public Safety and Homeland Security Bureau, (202) 418–7965, or by email to *michael.antonino@fcc.gov.* For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, send an email to *PRA@fcc.gov* or contact Nicole Ongele, Office of Managing Director, Performance and Program Management, 202–418–2991, or by email to *PRA@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Third Report and Order,* FCC 23–88, adopted on October 19, 2023, and released on October 20, 2023. The full text of this document is available by downloading the text from the Commission's website at: *https://docs.fcc.gov/public/attachments/FCC-23-88A1.pdf.*

This *Third Report and Order* addresses Wireless Emergency Alerts (WEA). Though this *Third Report and Order* is not specifically changing our Part 11 rules regarding the Emergency Alert System (EAS), the document references both the EAS and WEA dockets and we have historically sought comment on WEA in both dockets, including the underlying FNPRM and NPRM to which this *Third Report and Order* connects. The rules adopted here amend only Part 10 concerning WEA. We will consider improvements for the Emergency Alert System (EAS)—to include support for multilingual EAS—in a forthcoming item that will amend Part 11 of our rules.

Final Paperwork Reduction Act of 1995 Analysis

This document contains new and modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies will be invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.

Synopsis

I. Third Report and Order

1. It is essential that the public be able to receive in accessible language and format WEA Messages that are intended for them. It is also important that those who initiate these messages and those who rely upon them can access information about WEA's availability and performance. Through the requirements the Commission adopts in the *Third Report and Order,* the Commission intends to help the millions of people with access and functional needs, including people who primarily speak a language other than English or Spanish and those with disabilities, better understand and take protective actions in response to WEA messages; improve people's ability to understand and quickly take protective actions in response to WEAs that they receive; and provide the nation's alerting authorities with the information they need to plan for resilient communications during disasters and use WEA with confidence and foreknowledge. These requirements will meaningfully improve WEA. The Commission also recognizes that even more can be done and to that end, will consider improvements for the Emergency Alert System (EAS)—to include support for multilingual EAS—in a forthcoming item.

A. Making WEA Available to Millions of People Who Primarily Speak a Language Other Than English or Spanish and Accessible to People With Disabilities

2. To expand WEA's reach to millions of people who primarily speak a language other than English or Spanish who may not be able to understand the potentially life-saving alerts they receive, the Commission requires Participating CMS Providers to support multilingual WEA through the use of Alert Messages translated into the most common languages (referred to in this item as ''templates''). These templates would be pre-installed and stored on the mobile device itself. As described below, where an alerting authority chooses to send a multilingual Alert Message, the WEA-capable mobile device must be able to extract and display the relevant template in the subscriber's default language, if available. See, 47 CFR 10.500(e). If the default language for a WEA-capable mobile device is set to a language that is not among those supported by templates, the WEA-capable device must present the English-language version of the Alert Message.

3. The weight of the record supports expanding WEA's language capabilities

through the use of templates. Some alerting authorities are already using templates to deliver alerts in multiple languages. The approach the Commission adopts in the *Third Report and Order* improves upon other available methods of multilingual WEA messages (*e.g.,* through the use of an embedded reference that takes the recipient to a website with content in multiple languages), because the multilingual Alert Message will be displayed to the user by default.

4. The implementation of multilingual WEA through the use of templates, as described in the *Third Report and Order,* integrates two features that are available today. First, it requires the establishment of templates. Letters from some of the largest Participating CMS Providers indicate that implementing template-based WEAs in multiple languages is feasible. Second, it requires templates to be stored in the device and triggered upon receipt of a WEA. As the Commission noted in the *2023 WEA FNPRM,* Wireless Emergency Alerts, Amendments to Part 11 of the Commission's Rules Regarding the Emergency Alert System, PS Docket No. 15–91, 15–94, Further Notice of Proposed Rulemaking, FCC 23–30 (rel. Apr. 21, 2023) (*2023 WEA FNPRM*), through a partnership between ShakeAlert and Google, Android mobile devices are already able to display alert content pre-installed on mobile devices upon receipt of a signal from a network of seismic sensors. This application demonstrates how a template can be ''activated'' by a data element included in Alert Message metadata, which would prompt the mobile device to display the relevant template alert message in the mobile device's default language chosen by the consumer.

5. Promoting multilingual WEA through templates will enhance the flexibility that alerting authorities have in communicating with their communities. There may be times where the benefit of delivering an Alert Message to the public as soon as possible outweighs the need for additional context that freeform text could provide. The Commission does not require alerting authorities to use templates, but require CMS Providers to support them should alerting authorities wish to use them at their discretion. The Commission defers to alerting authorities on how best to utilize these new WEA functions for their communities.

6. The Commission further declines to require Participating CMS Providers to implement multilingual WEA using machine translation at this time. The Commission will continue to examine the feasibility of machine translation technologies and its application in connection with multilingual alerting.

7. As a baseline, the Commission requires Participating CMS Providers' WEA-capable mobile devices support templates in the 13 most commonly spoken languages in the United States, based on U.S. Census data, in addition to English templates. These languages include: Spanish, Chinese, Tagalog, Vietnamese, Arabic, French, Korean, Russian, Haitian Creole, German, Hindi, Portuguese, and Italian. This action is consistent with the request of numerous members of Congress who wrote a letter urging the Commission to make WEA capable of multilingual alerting, noting that, without sending WEAs in languages beyond English and Spanish, ''[l]ives are put at stake without this crucial information about impending inclement weather events, stay-at-home orders, AMBER alerts, and other emergencies.'' The Commission agrees that that the 13 languages for which we require support today would help make WEA content available to people who primarily speak a language other than English or Spanish for the first time, and that this change will most directly benefit those who have historically been underserved by WEA. The Commission believes that this action will mitigate a risk observed by researchers that individuals who primarily speak a language other than English or Spanish may not understand evacuation notices or instructions, raising the risk of harm.

8. In addition, the Commission requires Participating CMS Providers' WEA-capable mobile devices to support templates in ASL. The Commission received a robust record demonstrating that ASL templates would increase the effectiveness and accessibility of WEAs for people who are deaf and hard of hearing who use ASL. The Commission believes there is no adequate substitute for ASL for many individuals in the deaf and hard of hearing community, and unlike the other languages for which we require support, however, ASL is not a language to which a mobile device can be set. Because of this, the Commission requires Participating CMS Providers' WEA-capable mobile devices to provide subscribers with the ability to opt-in to receive ASL alerts. The Commission recognizes that, unlike textual translations, English language Alert Messages would be translated into ASL by video. To avoid the risk that ASL templates could unnecessarily consume mobile device resources for individuals that do not need them, the rules allow the user's voluntary selection of the option to receive WEAs in ASL to trigger the mobile device to download ASL templates to the device. WEA-capable mobile devices need not be sold with ASL templates pre-installed on them, so long as the templates are available to download in the manner described here

9. A consumer's choice to receive Alert Message templates in ASL should override the preferred language setting and the Alert Message should be extracted in ASL. This approach is necessary to give meaning to the consumer's choice. Template-based ASL Alert Messages would function like other template-based Alert Messages in other respects.

10. The Commission directs the Public Safety and Homeland Security Bureau (Bureau) to develop the specific implementation parameters for template-based multilingual alerting. In this regard, the *Third Report and Order* directs the Bureau to propose and seek comment on a set of emergency alert messages for support via template as they would be written in English, the 13 most commonly spoken languages in the U.S. (Spanish, Chinese, Tagalog, Vietnamese, Arabic, French, Korean, Russian, Haitian Creole, German, Hindi, Portuguese, and Italian), and ASL. In identifying this set of emergency alert messages for support via templates, the Bureau should seek comment on which messages are most commonly used by alerting authorities, as the *2023 WEA FNPRM* contemplated, as well as those which may be most time-sensitive and thus critical for immediate comprehension. The *Third Report and Order* also directs the Bureau to seek comment on whether this functionality can be made available on all devices.

11. The *Third Report and Order* further directs the Bureau to seek comment on whether the English version of the alert should be displayed in addition to the multilingual version of the alert, and whether templates can be customizable to incorporate event-specific information. The Commission recognizes commenters in the record who suggest that the multilingual template-based alert be displayed together with the English-language alert that includes additional details, to promote a fuller understanding of the nature of the emergency. Through the incorporation of event-specific information into templates, we also seek to address concerns that static template-based alerts may not be flexible enough to be useful, and would reduce an alerting authority's ability to create regionally and culturally relevant messages. The *Third Report and Order* directs the Bureau to assess and determine the parameters for what is

feasible and would best serve the public interest in this regard.

12. The *Third Report and Order* also directs the Bureau to seek comment on the costs of supporting additional languages after the 13 we identify today, as well as English and ASL. The Commission believes that, after the relevant stakeholders standardize and develop the technology necessary to support template-based multilingual WEA messages, the costs for adding additional language support via this process would be negligible, while the countervailing public interest benefits would be significant. There may be many large immigrant communities nationwide including some whose members have limited English proficiency, that are not included in these 13 languages. There is general agreement that additional languages should be supported, but there are different approaches for identifying those additional languages and the record did not coalesce around any particular languages or methods. The *Third Report and Order* directs the Bureau to seek comment on the best approach to determine which additional languages should be supported and what those languages should be.

13. If minimally burdensome to implement, the *Third Report and Order* directs the Bureau to designate additional languages—beyond English, ASL, and the 13 most commonly spoken languages in the United States—that should be supported through templates. The *Third Report and Order* also directs the Bureau to seek comment on the timeframe in which these additional languages could be supported. The Commission also delegate authority to the Bureau to ask any additional questions relating to the development and deployment of template-based multilingual alerting that would clarify the technical processes by which such alerts would be developed, updated, and delivered.

14. After an opportunity for comment, the Bureau will publish an Order in the **Federal Register** that establishes the specific implementation parameters for template-based multilingual alerting, including identification of the final set of emergency messages for multilingual WEA support, as well as their accompanying pre-scripted templates. By proceeding in this manner, the Commission creates an opportunity for interested parties to take an active role in ensuring we have selected the correct messages to support through templates and that we have accurately translated them. The *Third Report and Order* requires Participating CMS Providers to comply with the requirements to support template-based alerting, as well as English, ASL, and the 13 most common languages (Spanish, Chinese, Tagalog, Vietnamese, Arabic, French, Korean, Russian, Haitian Creole, German, Hindi, Portuguese, and Italian) within 30 months after the Bureau publishes its Order in the **Federal Register**. The *Third Report and Order* also directs the Bureau to identify the corresponding timeframe for supporting additional languages.

15. The Commission believes that 30 months is reasonable to implement the templates for the 13 languages, as well as English and ASL. As the *Third Report and Order* notes, both alert templates and the extraction of pre-loaded content on a mobile device to display an alert are functionalities that are already in use today. The Commission recognizes that additional work is necessary to combine these functionalities to support multilingual WEA templates and that implementation of this requirement will require updates to standards, design development, and deployment efforts. The Commission observes that mobile device manufacturers and OS vendors have previously proven capable of developing new functionalities for WEA that required standards development, design development, and additional deployment efforts within 30 months. The *Third Report and Order* does not adopt all the requirements that the *2023 WEA FNPRM* proposed, including the proposed performance reporting requirements.

16. Applying the 30-month compliance timeframe to all Participating CMS Providers affords sufficient time to comply. Irrespective of whether small and rural carriers choose to allocate resources to participate in the standards process in which wireless industry has routinely engaged to support compliance with the Commission's WEA requirements, the record suggests that this process can be completed within 12 months and will benefit all Participating CMS Providers equally. The remaining 18 months in the 30-month compliance timeframe include 12 months for software development and testing and 6 months for deployment in regular business cycles. The Commission believes that any delays that small and rural carriers may encounter in accessing the network equipment or mobile devices needed to support the requirements adopted today can be accommodated within the 6-month flexibility that we offer to all Participating CMS Providers. In proposing to require compliance within 30 months of the rule's publication in the **Federal Register**, the Commission used the same record-supported analysis as it has relied upon since 2016. The *Third Report and Order* also notes that the Commission has historically not provided small businesses extra time to comply with its WEA rules.

17. The Commission also agrees that languages should be maintained and reassessed to keep pace with evolving communities and technological capabilities. The Commission therefore anticipates that, in the years to come, as technology evolves and as language needs change, the Commission will continue to examine these issues to assess whether further adjustments are warranted.

18. For a multilingual WEA to reach the intended recipient, the subscriber must first set the phone to the default language of their choice. Raising public awareness about this critical step is an important component of ensuring consumers are able to take advantage of multilingual alerts. Equally important is helping consumers understand how to set a WEA-capable device to a default language that enables them to receive multilingual alerts. The Commission encourages all stakeholders involved in the distribution of WEA (CMS providers, device retailers, alerting authorities, and consumer advocates) to conduct outreach to educate the public about setting their WEA-capable devices to their preferred language to receive multilingual alerts. The *Third Report and Order* also directs the Bureau to work with the Consumer and Governmental Affairs Bureau in creating a consumer guide that helps consumers learn about how to set their WEA-enabled devices to their preferred language and making the guide available in the 13 languages that we are requiring for WEA today and ASL.

B. Integrating Location-Aware Maps Into Alert Messages

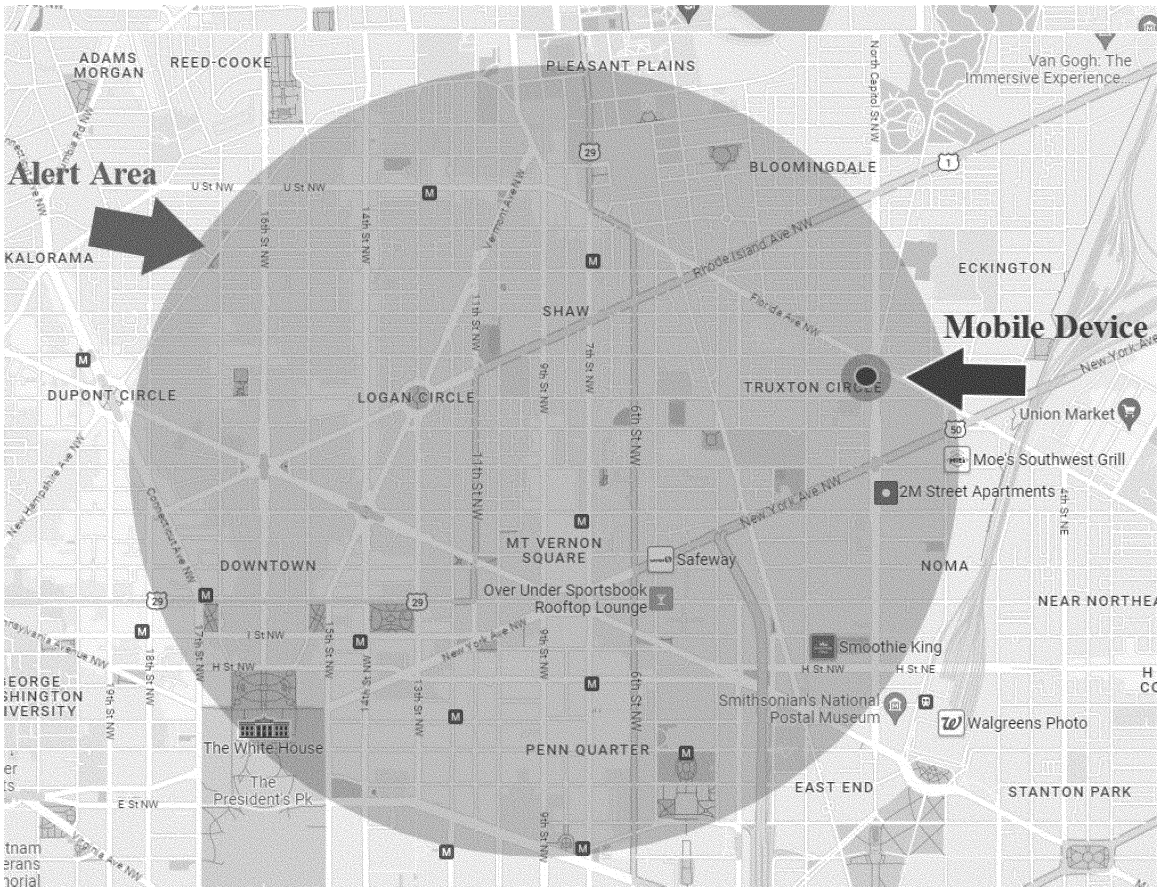
19. To help people personalize threats that potentially affect them, the *Third Report and Order* requires WEA-capable mobile devices to support the presentation of Alert Messages that link the recipient to a native mapping application on their mobile device to depict the recipient's geographic position relative to the emergency incident. The map must include the following features: the overall geographic area, the contour of the area subject to the emergency alert within that geographic area, and the alert recipient's location relative to these geographic areas. The *Third Report and Order* requires this functionality only on devices that have access to a mapping application, where the Alert Message's target area is specified by a circle or

polygon, and where the device has enabled location services and has granted location permissions to its native mapping application.

20. The record demonstrates a compelling public safety need for WEA messages to include location-aware maps. Location-aware maps will personalize threats so recipients will more quickly understand whether an alert applies to them and hasten protective actions. Providing such maps will spur people to take actions to protect their lives and property more quickly than they otherwise might, including in situations where a timely response can save lives. The Commission also agrees with commenters that location-aware maps could mitigate the effects of target area overshoot.

21. The *Third Report and Order* finds that it is technically feasible to present location-aware maps, provided location services are enabled and permissions for its use are granted to the native mapping application. Notably, the Commission's Communications Security, Reliability and Interoperability Council (CSRIC) VIII finds that it is technically feasible to integrate location-aware maps into WEA, stating that ''if the Alert Area is defined [by a circle or polygon,] the WEA text could be displayed on the device along with a map of the Alert Area and an indication on the map of the recipient's location.'' Further, the *Third Report and Order* requires this feature only where the target area is described as a circle or polygon because, as CSRIC VIII noted in its recent report on the feasibility of location-aware maps in connection with WEA, pursuant to our rules and relevant standards, these are the only target area descriptions that are transmitted to mobile devices. Mobile devices will need these target area descriptions to graphically depict the Alert Message's target area within the native mapping application. Such a mapping capability should only be required where location services are enabled and permissions for its use are granted to the native mapping application, because most modern devices require user permission for locations services to work. The Commission defers to industry to specify through the standards process exactly how WEA-capable mobile devices may connect the end user to the WEA-enabled map. The *Third Report and Order* only requires that Participating CMS Providers' WEA-capable mobile devices clearly present the map or the option to access the map concurrent with the Alert Message. A few ways this might be achieved are for WEA-capable mobile devices to display a WEA-enabled map within the WEA message itself, to display a clickable link to a native mapping application within the WEA message, or to provide a link via a separate pop-up message that directs the user to the WEA-enabled map. No additional information would need to be broadcast over CMS Provider infrastructure to enable this functionality under any of these approaches. Accordingly, whereas the Commission proposed to codify this requirement as an Alert Message requirement for Participating CMS Providers, the record shows that the only changes needed to effectuate this functionality are in the mobile device, so the *Third Report and Order* codifies it as an equipment requirement instead. See *Figure 1* below for an example of how a WEA location-aware map could look.

Figure 1



22. *Figure 1* is based on the look and feel of a common native mapping application using default settings. The large circle represents the Alert Message's geographic target area and the small dot with a lighter shaded uncertainty area around it represents the user's location. Consumers regularly use the mapping applications in which the WEA target areas will be presented and are already familiar with how those applications display user location relative to geographic features.

23. The *Third Report and Order* requires Participating CMS Providers to comply with this requirement 36 months from the rule's publication in the **Federal Register**, as proposed. The Commission finds that 36 months allows more than sufficient time for Participating CMS Providers to complete of all necessary steps to make location-aware maps available to their subscribers, including technical design, standards development, testing, and deployment. No commenter demonstrated that compliance in this timeframe would be a technological impossibility. Because the Alliance for Telecommunications Industry Solutions (ATIS) has already begun this work and the Commission believes this requirement is less complex than others the *Third Report and Order* has required to be implemented in similar timeframes, the Commission believe that 30 months would be sufficient, however, the *Third Report and Order* grants Participating CMS Providers an additional six months to implement mapping to accommodate their concerns.

24. A WEA-enabled map may not be accessible to screen readers, which means the map may not be useful to blind and low vision individuals. To ensure that this mapping capability is accessible to as many people as possible and that the inclusion of maps enhances the effectiveness of WEA, the *Third Report and Order* encourages alerting authorities to continue to include a text-based description of the Alert Message's target area in their Alert Message. This is of service to a broad range of users, including those individuals who choose not to enable location services or grant location permissions to their device's native mapping application, or those who use legacy devices without such an application. This will contribute to the overall clarity of the Alert Message and enable those with vision impairments and other access and function needs to understand the geographic area affected by an emergency by using screen readers to understand the Alert Message's text. The Commission also expects industry to consult with mobile accessibility experts in the process of standardizing and developing this functionality to determine whether there are advances in technology that would allow location information in the map, as well as the user's location, to be accessible to screen readers.

C. WEA Performance and Public Awareness Testing

25. To allow alerting authorities to develop a better understanding of how WEA operates within their unique jurisdictions and circumstances and to engage in important public awareness exercises, the *Third Report and Order* requires Participating CMS Providers to support up to two end-to-end WEA tests, per county (or county equivalent),

per year, that consumers receive by default. Alerting authorities may continue to use any Alert Message classification for these tests. A WEA Performance and Public Awareness Test is not a new or discrete Alert Message classification. In advance of conducting such a ''WEA Performance and Public Awareness Test,'' an alerting authority must do the following: (1) conduct outreach and notify the public in advance of the planned WEA test and that no emergency is, in fact, occurring; (2) include in its test message that the alert is ''only a test''; (3) coordinate the test among Participating CMS Providers that serve the geographic area targeted by the test, State, local, and Tribal emergency authorities, relevant State Emergency Communications Committees (SECCs), and first responder organizations and (4) provide notification to the public in widely accessible formats that the test is only a test and is not a warning about an actual emergency. Participating CMS Providers and alerting authorities should consider notifying domestic violence support organizations, so that these organizations can in turn advise those at risk who may have secret phones to turn off their phones in advance of the test. The *Third Report and Order* observes that these conditions also attend alerting authorities' conduct of EAS ''Live Code'' Tests, which the public receives by default. Commenters state that these conditions are also reasonable to apply in the WEA context. Permitting alerting authorities to conduct limited WEA Performance and Public Awareness Testing as a matter of course will boost alerting authority and consumer confidence in WEA, allow alerting authorities to determine if the communications tools they wish to use, such as website hyperlinks embedded in WEA messages, will function as intended when needed, and provide WEA stakeholders with a way to assess Participating CMS Providers' performance of WEA. WEA Performance and Public Awareness Tests will also allow alerting authorities to raise awareness about the types of disasters to which a region is susceptible and provide alerting authorities with the ability to verify how changes in wireless providers' service offerings affect the local availability of WEA. By making it easier for alerting authorities to conduct effective WEA tests, this action will make WEA more effective overall.

26. The *Third Report and Order* limits the number of WEA Performance and Public Awareness Tests that Participating CMS Providers must support each year by county or county equivalent (for example, by Tribal land), rather than by alerting authority, as proposed. Incidental overshoot into a county due to another county's test does not count against the number of tests a county is allowed to conduct that intentionally cover that county.

27. However, limiting the number of permissible tests by alerting authority may be insufficient to mitigate the risk of alerting fatigue because people in counties over which alerting authorities have overlapping jurisdictions could receive a large number of additional WEA tests each year. The *Third Report and Order* recognizes that public-facing tests can potentially result in consumers opting out of WEA or diminish the perceived urgency of responding to emergency alerts. The outreach that the *Third Report and Order* requires alerting authorities to undertake in advance of issuing a WEA Performance and Public Awareness Test also helps to address commenters' concerns about alert fatigue. The *Third Report and Order* distinguishes the negative affect that erroneous WEA tests can have on public confidence in WEA from WEA Performance and Public Awareness Tests issued pursuant to the requirements adopted today. Alerting authorities have the discretion and judgment to test WEA in a way that serves the interests of their communities.

28. With these revisions, the Commission removes regulatory obstacles to WEA performance testing and reduce time and cost burdens on alert originators by eliminating the need to obtain a waiver. Today, alerting authorities may conduct end-to-end tests of the WEA system only using a State/Local WEA Test, which the public does not receive by default. Instead, only those people who affirmatively opt in to receive State/Local WEA tests will receive them. Alerting authorities currently must obtain a waiver to conduct WEA tests that the public receives by default, which can be cumbersome and place an unnecessary administrative burden on alerting authorities and CMS Providers. By doing away with this paperwork requirement, the *Third Report and Order* enables alerting authorities to more easily access this important tool.

29. The Commission's experience with ''Live Code'' EAS tests over the years suggests that two WEA Performance and Public Awareness Tests per year is sufficient to meet alerting authorities' public safety objectives and that the preconditions pursuant to which they are issued are effective at limiting the potential for public confusion. The Commission has found that effective public awareness testing helps the public to understand how to respond to WEAs in the event of an actual emergency. Verizon states that public-facing tests can be a valuable public education tool. Alert originators who wish to conduct additional testing may continue to utilize the State/Local WEA test code, which allows alert originators to send test messages only to those who proactively opt in to receive them. As the Commission noted in the *2023 WEA FNPRM,* the Commission continues to believe that State/Local WEA Tests are valuable tools for system readiness testing and proficiency training. To the extent State/Local WEA Tests are used for proficiency training and alerting authorities' system checks, the fact that the public does not receive State/Local WEA Tests by default is beneficial.

30. Alerting authorities can use WEA Performance and Public Awareness Tests as a tool to gather data about how WEA works in practice, as the Commission has done repeatedly over the years. Multiple alerting authorities highlight the importance of receiving data about how WEA performs in their local jurisdictions. State/Local WEA Tests may be less effective than WEA Performance and Public Awareness Tests for this purpose because the amount of data that transmission of a State/Local WEA Test can generate is limited by the number of people within the target area that have affirmatively opted in to receive tests of this type. To further facilitate WEA testing for this purpose, the Commission offers alerting authorities access to a Commission survey instrument that has proven effective at gathering data about WEA's reliability, accuracy, and speed. The *Third Report and Order* directs the Bureau to develop translations of the survey materials in the 13 languages we require Participating CMS Providers to support for multilingual alerting as well as ASL.

31. While the Commission continues to evaluate the record on our proposed performance reporting requirements, the Commission believe that this revision of our testing rules will at least help address alerting authorities' immediate needs for WEA performance information in their jurisdictions.

32. The *Third Report and Order* requires Participating CMS Providers to comply with this requirement within 30 days of the **Federal Register** publication of notice that OMB has completed its review of these information collection requirements, as proposed. No commenter objected to this proposal.

D. Establishing a WEA Database for Availability Reporting

33. To equip alerting authorities with information that allows them to prepare for reliable emergency communications during disasters, the *Third Report and Order* requires all CMS Providers to refresh their WEA election status by filing this information in an electronic database hosted by the Commission. The WEA Database will be an interactive portal where CMS Providers submit information about the availability of WEA on their networks. CMS Providers are required to attest whether they participate in WEA ''in whole'' (meaning that they have ''agreed to transmit WEA Messages in a manner consistent with the technical standards, protocols, procedures, and other technical requirements implemented by the Commission in the entirety of their geographic service area,'' and that all mobile devices that they offer at the point of sale are WEA-capable), ''in part'' (meaning that that they offer WEA but the geographic service area condition does not apply, the mobile device condition does not apply, or both), or they may elect not to participate. Currently, CMS Providers have filed their WEA election attestations in a static format in a Commission docket, and many have not been updated since they were first filed over a decade ago.

34. The WEA Database will aggregate WEA participation information in one location for ease of access and understanding, increasing its utility for emergency planning purposes and for the public. Alerting authorities believe they need nuanced information about WEA's availability, specifically if WEA is *not* available in every CMS network in their alert and warning jurisdiction or in every geographic area in their alert and warning jurisdiction, so that they can make alternative arrangements to deliver emergency communications. While the *Third Report and Order* acknowledges that much of the information that the WEA Database will contain is already publicly available, the record shows that we can significantly increase this information's utility by aggregating it in one place. To the extent that this information is already publicly available, however, the Commission agrees that it will be minimally burdensome to provide. Aggregating this information in the WEA Database will also directly benefit consumers. Accordingly, the Commission finds that this requirement has potential to help people to protect their lives and property by encouraging and promoting the use of smartphones as emergency preparedness tools.

35. The *Third Report and Order* requires each CMS Provider to disclose the entities on behalf of which it files its election, irrespective of whether it elects to participate in WEA. WEA election attestation disclosures must include (a) the name and WEA participation of the CMS Provider; (b) the name and WEA participation status of any subsidiary companies on behalf of which the CMS Provider's election is filed, including when the subsidiary company is a Mobile Virtual Network Operator (MVNO) or wireless reseller wholly-owned or operated by the CMS Provider; (c) any ''doing business as'' names under which the CMS Provider or its subsidiaries offer wireless service to the public. The Commission agrees with the King County Emergency Management that disclosing all of the names under which a CMS Provider does business is necessary for consumers to meaningfully access the information that the WEA Database contains because consumers will often only know a corporate entity by the name under which it markets service. Similarly, the Commission finds that requiring CMS Providers to separately identify its WEA participation status and that of each of its subsidiary entities is necessary to allow consumers to understand potential nuances in WEA participation among subsidiary entities owned or controlled by the same parent company (*i.e.,* when the CMS Provider's participation status is different from an entity on behalf of which they file (*e.g.,* where one participates in WEA ''in whole'' and the other ''in part'')).

36. To empower alerting authorities with information about where WEA is and is not available within their communities, the *Third Report and Order* requires Participating CMS Providers to disclose the geographic areas in which they offer WEA. CMS Providers that offer WEA in an area that is geographically coextensive with their wireless voice coverage area may satisfy this requirement by simply attesting to that fact. For each such provider, the Commission will use the Graphical Information System (GIS) voice coverage area map that the provider has already submitted to the Commission in furtherance of their obligations to the Commission's Broadband Data Collection. We agree with AT&T that ''[t]he use of the voice GIS coverage areas would minimize the reporting burden on CMSPs while providing Alert Originators with relevant information about the availability of WEA'' because many CMS Providers likely already maintain information about their network coverage in GIS format. Verizon believes that most Participating CMS Providers do offer WEA in a geographic area that is coextensive with their wireless voice coverage area. For all such providers, the burden of compliance with this requirement will be negligible.

37. CMS Providers that offer WEA in an area that is not co-extensive with their wireless voice coverage area must submit a geospatial data file compatible with the WEA Database describing their WEA coverage area to satisfy this requirement. The Commission disagrees with Verizon and AT&T that the information about Participating CMS Providers' wireless coverage areas that is publicly available today, including via the Commission's National Broadband Map, is sufficient to inform alerting authorities' use of WEA. CMS Providers that choose to participate in WEA in part do not attest that their WEA service area is coextensive with their wireless voice coverage area. Without the additional attestation that the WEA Database will elicit, it would therefore be unreasonable for an alerting authority to infer that any information that these CMS Providers make available about their wireless voice coverage area is representative of their WEA service area.

38. The *Third Report and Order* requires Participating CMS Providers to complete their WEA election attestation by submitting to the WEA Database a list of all the mobile devices they offer at the point of sale, indicating for each such device whether it is WEA-capable. Participating CMS Providers will be able to fulfil this obligation by listing the devices that they sell and their WEA capabilities via the WEA Database's online interface.

39. Communities can only benefit from the many WEA enhancements that the Commission has required Participating CMS Providers to support to the extent that deployed mobile devices support them. Creating an aggregated account of the WEA capabilities of the mobile devices that Participating CMS Providers sell will allow alerting authorities to understand the extent to which their communities will benefit from messages crafted to take advantage of modern WEA functionalities, such as a longer, 360-character version of an Alert Message, a Spanish-language version of an Alert Message, or clickable hyperlinks. According to New York City Emergency Management (NYCEM), this information would ''allow for jurisdictions to supplement the alert with additional messaging as needed.'' The Association of Public-Safety Communications

Officials, Inc. (APCO) observes that this, in turn, will enable alerting authorities to use WEA more effectively as one emergency communications tool among many at their disposal. For these reasons, the Commission does not share AT&T's concern that ''the Commission's WEA Database is likely to suffer from the same underutilization as the Commission's database of hearing-aid compatible devices.'' Further, whereas the Hearing-Aid Compatible database is primarily intended to be consumer-facing (and each consumer is likely most concerned with the compatibility of devices that they are personally considering for purchase from a particular provider), the publication of the WEA data that will be collected in the WEA Database is primarily intended for use by alerting authorities that need to have the wholistic view of the WEA capabilities of mobile devices in use in their communities that the WEA Database will provide.

40. The *Third Report and Order* directs the Bureau, in coordination with the Wireless Telecommunications Bureau and the Office of Economics and Analytics, to implement the requirements of this collection and the publication of the data collected. The *Third Report and Order* further directs the Bureau to publish information about how Participating CMS Providers will be able to submit their data and to announce when the WEA Database is ready to accept filings. The *Third Report and Order* requires all CMS Providers, irrespective of whether they have already submitted a WEA election attestation in the WEA election docket, to refresh their elections to participate in WEA using the WEA Database within 90 days of the Bureau's publication of a public notice announcing (1) OMB approval of any new information collection requirements or (2) that the WEA Database is ready to accept filings, whichever is later.

41. Most CMS Providers have not updated their election to transmit alert messages since filing their initial election in 2008. As a result, the Commission is concerned that many WEA elections could now be outdated and do not accurately reflect WEA's current availability. The Commission agrees with Verizon that ''refreshing service provider elections are sensible, given the time that has lapsed since service providers submitted their elections over a decade ago and the many intervening changes in the wireless industry.'' The *Third Report and Order* also allows Participating CMS Providers to use the WEA Database to notify the Commission of any change of their election to participate in WEA, whether that change be an increase or decrease in WEA participation. Participating CMS Providers must continue to notify new and existing subscribers of their withdrawal using the specific notification language required by the rules, which triggers a subscriber's right to terminate their subscription without penalty or early termination fee. A CMS Provider withdraws from WEA if its participation status changes from ''in whole'' to ''in part'' or ''no'' or if it changes its participation status from ''in part'' to ''no.'' The Commission proposed to require compliance with this requirement within 30 days of the publication of this public notice. On our own initiative, however, the *Third Report and Order* extends this compliance timeframe to 90 days to allow Participating CMS Providers the 60-days' notice that our rules require them to provide to their subscribers in advance of any withdrawal of their WEA participation. After refreshing their elections, the *Third Report and Order* requires Participating CMS Providers to update their WEA election information in the WEA Database biannually as with the Commission's Broadband Data Collection (BDC). The *Third Report and Order* directs the Bureau to assess, in coordination with the Commission's Wireless Telecommunications Bureau and Office of Economics and Analytics the extent to which updates to geospatial voice coverage data in the Broadband Data Collection can automatically populate in the WEA Database, reducing the potential burden of compliance with this requirement. While the FNPRM proposed for this information to be updated within 30 days of any change to a Participating CMS Provider's WEA coverage areas or the WEA capabilities of the mobile devices it sells, the Commission is persuaded that filing every 6 months (biannually) is consistent with our BDC requirements would accomplish our goals without unduly burdening Participating CMS Providers.

42. The Commission is persuaded not to require Participating CMS Providers to provide an account of their roaming partners via the WEA Database at this time. The Commission agrees that ''given the comprehensive roaming arrangements across the industry, maintaining this information would be too unwieldy for individual providers and result in confusing, duplicative information for consumers.''

43. The Commission is also persuaded not to require CMS Providers to attest to the WEA capabilities of resellers of their facilities-based services at this time, unless those resellers are wholly-owned or controlled by the CMS Provider. The *Third Report and Order* agrees that Participating CMS Providers should not be required to provide information to which they may not have access, such as participation information for entities they do not control. The record demonstrates that Participating CMS Providers may not have access to WEA participation information about Mobile Virtual Network Operators (MVNOs) or wireless resellers, even when they have a direct business relationship with such entities. According to Verizon, ''[f]acilities-based providers do not directly control and may not have direct visibility into the WEA capabilities of . . . MVNO/resellers' customer devices, or all the particular facilities-based providers with whom the MVNO/reseller has a business relationship,'' and that ''CMS Providers do not ordinarily have visibility into whether a MVNO/reseller's mobile devices are WEA-capable or the extent to which an MVNO/reseller is provisioning its own wireless RAN facilities, for example through CBRS spectrum.''

44. The *Third Report and Order* also agrees with Verizon, however, that ''it is reasonable and appropriate for MVNO/resellers to publicly disclose the WEA capabilities of the devices and the facilities-based services they directly offer to their own customers'' because of their significant role in the wireless marketplace. The *Third Report and Order* observe that many MVNOs and wireless resellers have elected to participate in WEA. The Commission encourages these entities to use the WEA Database to keep their WEA election information up to date so that alerting authorities and consumers can be informed about the extent to which they should expect WEAs to be delivered via their networks.

45. The *Third Report and Order* determines that information submitted to the WEA Database under the rules does not warrant confidential treatment and should be available to the public, as proposed. The Commission observes that the WEA availability information that Participating CMS Providers would submit to the WEA Database is already publicly available, although not aggregated with other WEA information. The information that Participating CMS Providers would supply to the WEA Database about their WEA coverage area is already publicly available through the National Broadband Map, which makes available for download the mobile voice coverage areas collected through the Broadband Data Collection. Similarly, many Participating CMS Providers already make publicly available

information about the WEA-capable mobile devices that they offer at the point of sale. The Commission does not believe that the public availability of this information raises any concerns about national security or competitive sensitivity, and it would not include any personally identifiable information or consumer proprietary network information. No commenter objected to this proposal.

E. Legal Authority

46. The *Third Report and Order* finds that the Commission has ample legal basis to adopt the targeted revisions to the rules adopted that are designed to make WEA more accessible to a wider range of people, including members of the public who primarily speak a language other than English or Spanish and people with disabilities. These amendments are grounded in the Commission's authority under the Communications Act of 1934, as amended, as well as the WARN Act. The *Third Report and Order* rejects commenters' assertions to the contrary.

47. The Competitive Carrier Association (CCA) contends that there are limits on the Commission's authority to adopt enhancements to the system given the timing specifications in the WARN Act and its provision that the Commission ''shall have no rulemaking authority under this chapter, except as provided in paragraphs (a), (b), (c), and (f).'' See 47 U.S.C. 1201(a) and (d).

48. Consistent with the WARN Act, WEA ''enable[s] commercial mobile service alerting capability for commercial mobile service providers that voluntarily elect to transmit emergency alerts.'' The WEA system is a voluntary program designed to deliver life-saving emergency information to the public, and the Commission has worked hard to build enhancements into the system since it was created. The system now includes embedded links to additional information, Spanish-language alerts, and geotargeting designed to help messages reach the intended audience that needs the information to act in an emergency. Today's improvements, which will help reach audiences that speak additional languages or that have disabilities that could limit WEA's utility in its present form, build on these prior efforts. Those providers opting to support the system must be prepared to accommodate these enhancements and to follow the rules that the Commission adopts.

49. With that important context in mind, the Commission finds no merit in CCA's contentions. Contrary to CCA's view, the time periods set out in paragraphs (a), (b), and (c) only established deadlines for initial actions on the directives described in those provisions. Moreover, paragraph (f), which is also referenced in paragraph (d), contains no deadline for the Commission's regulatory authority over WEA technical testing. Under CCA's interpretation of the statute, the Commissoin's WEA rulemaking authority would have lapsed after establishing initial rules in 2008; yet this reading is inconsistent with Congress's amendment of the WARN Act in 2021, when it directed the Commission to examine the feasibility of expanding the reach of emergency alerts using new technologies. In fact, a bipartisan group of lawmakers representing both chambers of Congress has expressed keen interest in continuing to upgrade WEA to support multilingual capabilities. Over time, the Commission's enhancements to WEA and Congress's recognition of the importance of the system, including those enhancements, reflect Congress's endorsement of how the Commission was exercising its authority under the WARN Act.

50. In any event, however, the Commission's legal authority concerning emergency alerts is based not solely on the provisions of the WARN Act but also on several provisions of the Communications Act, which is the backdrop against which Congress adopted the WARN Act. In particular, section 303(b) directs the Commission to ''[p]rescribe the nature of the service to be rendered'' by licensees. The rule changes in the *Third Report and Order* do just that—lay down rules about the nature of services to be rendered by Participating CMS Providers. They do so pursuant to the Commission's finding that the ''public convenience, interest, or necessity requires'' doing so and in fulfillment of the statutory purpose of ''promoting safety of life and property through the use of wire and radio communications.'' To the extent that section 602(d) of the WARN Act limits the Commission's rulemaking authority, it does so only as to the authority granted under that Act and does not limit the Commission's preexisting and well-established authority under the Communications Act. To be clear, the phrase ''this chapter'' in 47 U.S.C. 1201 refers to chapter 11 of title 47 of the United States Code and corresponds to the phrase ''this title'' in the original Security and Accountability for Every Port Act, which referred to title VI thereof, *i.e.,* the WARN Act.

F. Assessing the Benefits and Costs

51. The Commission finds that the benefits from the improvements made to WEA by the *Third Report and Order* exceed their cost. In the *2023 WEA FNPRM,* the Commission estimated that the proposed rules would result in an industry-wide, one-time compliance cost of $39.9 million and an annually recurring cost of $422,500 to update the WEA standards and software necessary to comply with the rules adopted in this Report and Order. While the *Third Report and Order* does not adopt all the *2023 WEA FNPRM's* proposals, such as including thumbnail images, modifying the attention signal and vibration cadence capabilities, or requiring any performance-related benchmarking or reporting, the Commission believes that the *2023 WEA FNPRM's* estimate remains a reasonable ceiling for the cost of compliance with the rules adopted in the *Third Report and Order.* The activities in which industry will engage to comply with the requirements we adopt today (the creation and revision of standards and the development and testing of software) are not easily amenable to subdivision based on lines of text written or lines of code programmed. While the WEA standards will undoubtedly require less revision and less code will need to be written to comply with the requirements adopted by the *Third Report and Order,* the Commission does not attempt to quantify the extent of cost reduction that will result. The record reflects the significant benefits arising from WEA support for additional functionalities, including enhancing language support and providing location-aware maps. These enhanced functionalities of WEA will make WEAs comprehensible for some language communities for the first time, helping to keep these vulnerable communities safer during disasters. These enhancements will also encourage consumers to remain opted-in to receiving WEA messages and incentivize emergency managers that are currently not alerting authorities to become authorized with FEMA to use WEA as a tool for providing information in times of emergencies. With increased participation by both consumers and emergency managers, WEAs will be more likely to be both sent and received, leading to an incremental increase in lives saved, injuries prevented, and reductions in the cost of deploying first responders. The Commission bases its assessment of costs on the quantitative framework on which the Commission relied in the *2023 WEA FNPRM.* The Commission sought comment on the costs and benefits of our proposed rules

in the *2023 WEA FNPRM,* but received a sparse record in response, including no dollar figure estimates. Although most of the benefits are difficult to quantify, the Commission believes they outweigh the overall costs of the adopted rules.

52. The Commission believes that the rules adopted will result in benefits measurable in terms of lives saved and injuries and property damage prevented. The Commission agrees with Verizon that these rule changes could offer ''tangible safety benefits to consumers and alert originators.'' According to CTIA and Southern Communications Services, Inc. d/b/a Southern Linc (Southern Linc), WEA has become one of the most effective and reliable alert and warning tools for public safety and the public. The requirements adopted in the *Third Report and Order* will both promote the availability of those benefits for a greater number of people and enhance their benefit for those for whom they were already available. The Commission also recognizes that it is difficult to assign precise dollar values to changes to WEA that improve the public's safety, life, and health.

53. *Making WEA Accessible to Millions of People Who Primarily Speak a Language Other Than English or Spanish.* Currently, the 76 CMS Providers participating in WEA send alerts to 75% of mobile phones in the country. Among the 26 million people who do not primarily speak English or Spanish, nearly 15.4 million speak primarily one of the 12 languages that we integrate into the WEA system in addition to English and Spanish. Assuming 66% of these individuals are covered by the WEA system, approximately 11.5 million people who have been receiving WEA messages in languages they may have difficulty comprehending would understand the content of WEA messages under the proposed WEA language support. The Commission agrees with Verizon that ''the public safety benefits to non-English-speaking consumers and communities by improving access to life-saving information are self-evident.'' Even if alerts reach just 1% of this population per year (*i.e.,* roughly 150,000 people) the potential of WEA to prevent property damage, injuries, and deaths could be enormous. Further, over 12 million people are with a hearing difficulty. Requiring Participating CMS Providers to provide subscribers with the ability to opt-in to receive ASL alerts would help effectively prevent property damages, injuries, and loss of life for these individuals who are deaf or hard-of-hearing.

54. *Integrating Location-Aware Maps into Alert Messages.* Alert messages that link the recipient to a native mapping application would help the public to personalize alerts, allowing them to better understand the geographic area under threat and their location relative to it. The Commission agrees with ATIS and NYCEM that location-aware maps will provide the public with a better understanding of the emergency alerts they receive. It follows that this will likely cause recipients to take protective action more quickly than they otherwise would. This requirement will yield particular benefits in the most time-sensitive emergencies, such as earthquakes and wildfires, where every second can count.

55. *WEA Performance and Public Awareness Tests.* The Commission agrees with AT&T and Verizon, among others, that adopting rules to permit alerting authorities to conduct up to two WEA Performance and Public Awareness Tests per year may improve alerting authorities' awareness of and confidence in WEA and provide alerting authorities with a tool to improve consumer education about and confidence in WEA. This awareness and education will result in more prompt and effective public response to WEAs when issued, potentially saving lives, protecting property, and reducing the cost of deploying first responders. Further, this rule may encourage more alerting authorities to participate in WEA due to promoting a better understanding of it, and with increased participation by alerting authorities, more of the public will benefit from the lifesaving information conveyed by WEA. The Commission also agrees with APCO that ''[t]esting is fundamental to public safety communications and will improve the system's trustworthiness and effectiveness.'' The Commission further believes harmonizing WEA and EAS test rules would simplify alerting authorities' efforts to test and exercise their public alert and warning capability and allow EAS and WEA tests to be more closely and easily coordinated.

56. *Establishing a WEA Database for Availability Reporting.* The *Third Report and Order* determines that the rules establishing a WEA Database and requiring CMS Providers to refresh their WEA participation election will equip alerting authorities with information they need to plan for reliable communications during disasters and raise their confidence in WEA. The Commission agrees with alerting authorities that the WEA Database will allow them to know both where WEA is and is not available within their alert and warning jurisdictions, allowing them to maximize the public safety value derived from other emergency communications tools. Creating an aggregated account of the WEA capabilities of the mobile devices that Participating CMS Providers sell will also allow alerting authorities to understand the extent to which their communities will benefit from messages crafted to take advantage of modern WEA functionalities, such as a longer, 360-character version of an Alert Message, a Spanish-language version of an Alert Message, or clickable hyperlinks. The Commission also agrees with T-Mobile that ''this information will help the public and alert originators understanding which wireless providers support WEA, where the service is available, and what handsets can be obtained to reap the full benefits of WEA.''

57. The Third Report and Order estimates that the rules adopted in the *Third Report and Order* could result in an industry-wide, one-time compliance cost of, at most, $42.4 million to update the WEA standards and software necessary to comply with the rules adopted in this *Third Report and Order* and an annually recurring cost of $422,500 for recordkeeping and reporting. In the *Third Report and Order,* the Commission takes appropriate steps to ensure that these costs are not unduly burdensome. At the same time, as the Commission observed in the *2023 WEA FNPRM,* CMS Providers' participation in WEA is voluntary. Any Participating CMS Provider that does not wish to comply with the rules we adopt today may withdraw their election to participate in WEA without penalty, and incur no implementation costs as a result.

58. Consistent with prior estimates, the one-time cost of $42.4 million to update the WEA standards and software necessary to comply with the proposals in the Further Notice includes approximately a $845,000 to update applicable WEA standards and approximately a $41.5 million to update applicable software. The *Third Report and Order* quantifies the $845,000 cost of modifying standards as the annual compensation for 30 network engineers compensated at the national average wage for their field ($$62.25/hour), plus a 45% mark-up for benefits ($28.01/hour) working for the amount of time that it takes to develop a standard (one hour every other week for one year, 26 hours) for 12 distinct standards. The $41.5 million cost estimate for software updates consists of $12.2 million for software modifications and $29.3 million for software testing. The Commission quantified the cost of

modifying software as the annual compensation for one software developer compensated at the national average wage for their field ($132,930/year), plus a 45% mark-up for benefits ($59,819/year), working for the amount of time that it takes to develop software (ten months) at each of the 76 CMS Providers that participate in WEA. The Commission quantified the cost of testing these modifications (including integration testing, unit testing and failure testing) to require 12 software developers compensated at the national average for their field working for two months at each of the 76 CMS Providers that participate in WEA. In quantifying costs for software development, the Commission has used the same framework since 2016 for changes to software ranging from expanding WEA's maximum character limit to enhanced geo-targeting. Because the Commission received no comment to the aforementioned costs framework that specifies a different analytical framework or dollar figure estimate, the *Third Report and Order* finds that it remains accurate to describe the costs attendant to the rules the Commission proposed. Because the Commission does not adopt all the rules the Commission proposed in the *2023 WEA FNPRM,* the Commission believes the rules we adopted in the *Third Report and Order* will cost less than what was proposed in the *2023 WEA FNPRM,* but do not quantify how much less here.

59. The Commission determines that costs associated with our adopted rules related to WEA availability reporting to be relatively low for Participating CMS Providers that participate in WEA in whole or that otherwise offer WEA in the entirety of their geographic service area because such Participating CMS Providers have already provided the Commission with the geospatial data needed to fulfill a significant aspect of their reporting obligation in furtherance of their obligations to support the Commission's Broadband Data Collection. The Commission agrees with T-Mobile that ''[w]here WEA is available throughout a wireless provider's network, the GIS files used for the biannual Broadband Data Collection should serve this purpose. If a wireless provider does not offer WEA throughout its network, it should be allowed to submit a different GIS depicting WEA coverage.'' The Commission determines that in the Supporting Document of Study Area Boundary Data Reporting in Esri Shapefile Format, the Office of Information and Regulatory Affairs estimates that it takes an average of 26 hours for a data scientist to modify a shapefile. The Commission believes submitting WEA availability information in geospatial data format should require no more time than modifying a shapefile. Therefore, the Commission believes 26 hours would be an upper bound of the time required for a Participating CMS Provider to report its WEA availability in geospatial data format. Given that the average wage rate is $55.40/hour for data scientists, with a 45% markup for benefits, we arrive at $80.33 as the hourly compensation rate for a data scientist. The Commission estimates an aggregate cost of WEA availability reporting to be approximately $$160,000 (≈ $80.33 per hour × 26 hours × 76 providers = $158,732, rounded to $160,000), which may be recurring on an annual basis since availability may change and need to be updated over time. Within these 26 hours, the Commission believes that Participating CMS Providers will also be able to provide the availability information required by the rules adopted today, including lists of all the mobile devices the Participating CMS Provider offers at the point of sale, list of the Participating CMS Provider's DBAs and subsidiaries, and any changes of WEA service. Many Participating CMS Providers already create and maintain this information, and therefore, the Commission believes that providing this information to the WEA Database would require minimal time burdens and would be within the cost estimates.

60. No commenter objected to the belief that CMS Providers would not incur any cost to comply with our proposal to allow alerting authorities to conduct two public awareness tests per year. Based on the foregoing analysis, the Commission finds it reasonable to expect that these improvements will result in lives saved, injuries avoided, and a reduced need to deploy first responders. The Commission concludes that the expected public safety benefits exceed the costs imposed by the rules adopted today.

G. Procedural Matters

61. *Regulatory Flexibility Act.* The Regulatory Flexibility Act of 1980, as amended (RFA) requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' Accordingly, the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) concerning the potential impact of the rule and policy changes adopted and proposed in the *Third Report and Order,* on small entities.

62. *Congressional Review Act.* The Commission has determined, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, concurs, that this rule is non-major under the Congressional Review Act, 5 U.S.C. 804(2). The Commission will send a copy of this *Third Report and Order* to Congress and the Government Accountability Office pursuant 5 U.S.C. 801(a)(1)(A).

63. *People With Disabilities.* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice).

64. *Additional Information.* For additional information on this proceeding, contact Michael Antonino, Cybersecurity and Communications Reliability Division, Public Safety and Homeland Security Bureau (202) 418–7965, or by email to *Michael.Antonino@fcc.gov.*

H. Ordering Clauses

65. *Accordingly it is ordered,* pursuant to the authority contained in sections 1, 2, 4(i), 4(n), 301, 303(b), 303(e), 303(g), 303(j), 303(r), 307, 309, 316, 403, and 706 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i), 154(n), 301, 303(b), 303(e), 303(g), 303(j), 303(r), 307, 309, 403, and 606, as well as by sections 602(a), (b), (c), (f), 603, 604 and 606 of the Warning Alert and Response Network (WARN) Act, 47 U.S.C. 1201(a), (b), (c), (f), 1203, 1204 and 1206, that this *Third Report and Order is* hereby *adopted.*

66. *It is further ordered* that Part 10 of the Commission's rules *is amended* as specified, and such rules *will become effective* thirty-six (36) months after publication of this *Third Report and Order* in the **Federal Register**, changes to 47 CFR 10.210 and 10.350, which may contain new or modified information collection requirements, and will not become effective until the completion of any review by the Office of Management and Budget under the Paperwork Reduction Act that the Public Safety and Homeland Security Bureau (PSHSB) determines is necessary, and changes to 47 CFR 10.480 and 10.500(e), which are the subject of a further Bureau-level rulemaking, and will not become effective until thirty (30) months after the Bureau publishes a subsequent Order in the **Federal Register**. PSHSB

will publish a notice in the **Federal Register** announcing the relevant effective date for each of these sections.

67. *It is further ordered* that the Office of the Managing Director, Performance & Program Management, *shall send* a copy of this *Third Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, 5 U.S.C. 801(a)(1)(A).

Final Regulatory Flexibility Analysis

68. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the FNPRM released in June 2023 in this proceeding. The Commission sought written public comment on the proposals in the NPRM, including comment on the IRFA. Comments filed addressing the IRFA are discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

A. Need for, and Objectives of, the Final Rules

69. In this proceeding, the Commission adopts rules to enhance the utility of the Wireless Emergency Alert (WEA) system by making it more accessible and enabling WEAs to provide more personalized alerts. Specifically, the Commission requires Participating Commercial Mobile Service Providers (Participating CMS Providers) to enable alerting authorities to display translated Alert Message content via the use of emergency alert message templates. In addition, these efforts to make WEA messages more accessibility extend to the deaf and hard of hearing community pursuant to the requirement that Participating CMS Providers' WEA-capable mobile devices support templates in American Sign Language (ASL). The Commission concludes that enabling the display of translated Alert Message content via the use of emergency alert message templates will allow alert originators to inform those communities that primarily speak a language other than English or Spanish of emergencies and save more lives. The Commission also adopts rules to require Participating CMS Providers' WEA-capable mobile devices to support the presentation of WEA messages that link the recipient to a native mapping application. This requirement will allow alert originators to personalize alerts, spurring people to take protective action more quickly and to understand whether an alert applies to their them. Further, to allow alerting authorities to understand WEA's reliability, speed, and accuracy and to promote the use of WEA as a tool for raising public awareness about emergencies likely to occur, the Commission requires Participating CMS Providers to support up to two end-to-end WEA tests, per county or county equivalent, per year, that consumers receive by default, subject to the conditions described in the *Third Report and Order.* The adoption of this rule promotes compliance and presents a minimal burden for Participating CMS Providers. Finally, the Commission adopts rules to require Participating CMS Providers to submit certain information in the WEA Database. Requiring the disclosure of data outlined in the *Third Report and Order* will allow alert originators and consumers more insight into WEA's availability and enable a transparent understanding of WEA.

70. In light of the significant public safety benefits, which include the capacity to save lives, mitigate and prevent injuries, the Commission believes that the actions taken in the *Third Report and Order* further the public interest.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

71. Three commenters specifically addressed the proposed rules and policies presented in the IRFA. The Competitive Carriers Association (CCA) argued that flexibility of implementing the proposed rules would promote participation in WEA by smaller and regional carriers because the supply chain and level of support for handsets for smaller and regional carriers generally lags behind nationwide carriers. Further, CCA stated the additional requirements would disproportionately burden smaller and regional carriers that operate with small teams and limited resources. CCA suggested increased time for compliance for non-nationwide carriers.

72. Southern Communications Services, Inc. d/b/a Southern Linc (Southern Linc) raised concerns similar to those raised by CCA, namely, that the Commission should account for the disproportionate impact that the proposed requirements in the *2023 WEA FNPRM* would have on smaller and regional carriers and the Commission should provide small and medium-sized mobile service providers additional time to comply.

73. CTIA—The Wireless Association (CTIA) argued that to the extent the proposals made in the *2023 WEA FNPRM* would require a complete overhaul of the WEA System, that such changes to the WEA system also may disproportionately impact regional and smaller, rural carriers, who often rely on third-party vendors to implement WEA functions and may not be able to bear the additional technical and financial burdens, rendering their ongoing voluntary participation in WEA infeasible.

74. The Commission considered the potential impact of the rules proposed in the IRFA on small entities and we concluded that these mandates provide Participating CMS Providers with a sufficient measure of flexibility to account for any technical and/or cost-related concerns. The Commission has determined that implementing these improvements to WEA are technically feasible for small entities and other Participating CMS Providers and the cost of implementation is reasonable. To help facilitate compliance with the requirements in the *Third Report and Order,* the Commission adopted a compliance timeframe that is longer than the timeframe necessary to complete the requirements based on the record. The 30-month timeframe allows 12 months for the appropriate industry bodies to finalize and publish relevant standards, 12 months for Participating CMS Providers and device manufacturers to develop and integrate software upgrades consistent with those standards, and an additional 6 months to deploy this technology in WEA-capable-mobile devices. The Commission believes that the public interest benefits of expanding the reach and accessibility of WEA significantly outweigh the costs that small and other providers will incur to implement the requirements adopted in the *Third Report and Order.*

C. Response to Comments by Chief Counsel for Advocacy of the Small Business Administration

75. The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

D. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

76. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.'' A ''small business concern'' is one which:

(1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA. The types of entities that will be affected include Wireless Communications Services, Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, Software Publishers, Noncommercial Educational (NCE) and Public Broadcast Stations, Cable and Other Subscription Programming, All Other Telecommunications providers (primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation).

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

77. The *Third Report and Order* will adopt new or additional reporting, recordkeeping and/or other compliance obligations on small entities to report information about WEA availability in the WEA Database. Specifically, the rules require all CMS Providers to: (1) refresh their WEA election of whether to participate in WEA ''in whole'' or ''in part'' or not to participate in a Commission-hosted, publicly available WEA Database; (2) disclose the entities on behalf of which it files its election, irrespective of whether it elects to participate in WEA, including names of subsidiary companies and the ''doing business as'' names under which a CMS Provider offer wireless service; (3) disclose the geographic areas in which they offer WEA; (4) submit to the WEA Database a list of all the mobile devices they offer at the point of sale; and (5) use the WEA Database as a means of providing notice of withdrawing their election to Participating in WEA.

78. The Commission determined that costs associated with the adopted rules related to WEA availability reporting to be minimal for small entities that participate in WEA in whole or that otherwise offer WEA in the entirety of their geographic service area because such small entities may have already provided the Commission with the geospatial data needed to fulfill a significant aspect of their reporting obligation in furtherance of their obligations to support the Commission's Broadband Data Collection. Where WEA is available throughout a wireless provider's network, the GIS files used for the biannual Broadband Data Collection should serve this purpose. If a wireless provider does not offer WEA throughout its network, it should be allowed to submit a different GIS depicting WEA coverage. The Commission determined that in the Supporting Document of Study Area Boundary Data Reporting in Esri Shapefile Format, the Office of Information and Regulatory Affairs estimates that it takes an average of 26 hours for a data scientist to modify a shapefile. The Commission believes submitting WEA availability information in geospatial data format should require no more time than modifying a shapefile. Therefore, the Commission believes 26 hours would be an upper bound of the time required for a Participating CMS Provider to report its WEA availability in geospatial data format.

79. The Commission reasons that no additional, ongoing or annualized burdens will result from this reporting obligation for small entities and other Participating CMS Providers because the requirement that we adopt today does not change the approach that Participating CMS Providers must take to updating their elections once this one-time renewed election is completed. For example, the rules adopted in the *Third Report and Order* do not impose annual certification of a CMS Provider's participation in WEA, but rather require reporting in the WEA Database only in event of a change of a CMS Provider's participation in WEA. The Commission is not currently in a position to determine whether the rules adopted in the *Third Report and Order* will require small entities to hire attorneys, engineers, consultants, or other professionals to comply.

F. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

80. The Commission continues to adopt measures to improve WEA and continues to meet its obligation to develop the nation's emergency preparedness and response infrastructure by making WEA more accessible by adding multilingual (including ASL) functionality, integrating location-aware maps, enabling Performance and Public Awareness tests, and establishing a WEA Database for Participating CMS Providers to report information about WEA availability. While doing so, the Commission is mindful that small entities may incur costs; the Commission weighed these costs against the public interest benefits of the new obligations and determined the benefits outweigh the costs. The specific steps the Commission has taken to minimize costs and reduce the economic impact for small entities and alternatives considered are discussed below.

81. In adopting the rule to enable alerting authorities to display translated Alert Message content via the use of emergency alert message templates, the Commission found the record demonstrates that machine translation is not yet ripe for use today in WEA. The use of alert message templates should minimize the impact of the adopted requirements for small entities because it will limit developing software and standards to enable machine translations. Because the alert message templates will be produced by the Public Safety and Homeland Security Bureau after taking into account public feedback, small entities will not need to expend resources to translate emergency messages and develop template alert messages.

82. In response to concerns about our proposed compliance timeframe, the *Third Report and Order* provided additional time. The Commission believes the additional time will help minimize the burden on small entities. Additionally, the rules adopted in the *Third Report and Order* are technologically neutral to provide small entities the flexibility to comply with our rules using technologies offered by a variety of vendors.

G. Report to Congress

83. The Commission will send a copy of the *Third Report and Order,* including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the *Third Report and Order,* including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Third Report and Order* and FRFA (or summaries thereof) will also be published in the **Federal Register**.

List of Subjects in 47 CFR Part 10

Communications common carriers, Radio.

Federal Communications Commission.

Marlene Dortch,

Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 10 as follows:

PART 10—WIRELESS EMERGENCY ALERTS

■ 1. Effective December 15, 2026, the authority citation for part 10 is revised to read as follows:

Authority: 47 U.S.C. 151, 152, 154(i), 154(n), 201, 301, 303(b), 303(e), 303(g),

303(j), 303(r), 307, 309, 316, 403, 544(g), 606, 1201, 1202, 1203, 1204, and 1206.

■ 2. Delayed indefinitely, amend § 10.210 by revising paragraph (a) introductory text, redesignating paragraph (b) as paragraph (d), adding new paragraph (b), revising paragraph (c), and revising the newly redesignated paragraph (d).

The revisions and addition read as follows:

§ 10.210 WEA participation election procedures.

(a) A CMS provider that elects to transmit WEA Alert Messages must elect to participate in part or in whole, as defined by § 10.10(l) and (m), and shall electronically file in the Commission's WEA Database attesting that the Provider:

* * * * *

(b) A CMS Provider that elects to participate in WEA must disclose the following information in their election filed in the Commission's WEA Database:

(1) The entities on behalf of which the Participating CMS Provider files its election, including the subsidiary companies (whether those subsidiaries are wholly owned or operated CMS Providers, Mobile Virtual Network Operators, or wireless resellers) on behalf of which their election is filed and the ''doing business as'' names under which a Participating CMS Provider offers WEA;

(2) The geographic area in which the Participating CMS Provider agrees to offer WEA alerts, either as:

(i) An attestation that they offer WEA in the entirety of their voice coverage area as reported to the Commission in the Broadband Data Collection or any successors; or

(ii) Geospatial data submitted to the Commission through the WEA Database.

(3) The extent to which all mobile devices that the Participating CMS Provider offers at the point of sale are WEA-capable, as demonstrated by the following:

(i) The mobile devices, as defined in § 10.10(j), that the Participating CMS Provider offers at their point of sale; and

(ii) The WEA-capable mobile devices, as defined in § 10.10(k), that the Participating CMS Provider offers at their point of sale.

(c) If the terms of a CMS Provider's WEA participation change in any manner described by paragraph (b) of this section, it must update the information promptly such that the information in the WEA Database accurately reflects the terms of their WEA participation. Updates (if any) for the period from August 16 through February 15 must be filed by the following March 1, and updates for the period from February 16 through August 15 must be filed by the following September 1 of each year.

(d) A CMS Provider that elects not to transmit WEA Alert Messages shall file electronically in the Commission's WEA Database attesting to that fact. Their filing shall include any subsidiary companies on behalf of which the election is filed and the CMS Provider's ''doing business as'' names, if applicable.

■ 3. Delayed indefinitely, amend § 10.350 by adding paragraph (d) to read as follows:

§ 10.350 WEA testing and proficiency training requirements.

* * * * *

(d) *Performance and Public Awareness Tests.* Participating CMS Providers may participate in no more than two (2) WEA tests per county (or county equivalent), per calendar year that the public receives by default, provided that the entity conducting the test:

(1) Conducts outreach and notifies the public before the test that live event codes will be used, but that no emergency is, in fact, occurring;

(2) To the extent technically feasible, states in the test message that the event is only a test;

(3) Coordinates the test among Participating CMS Providers and with State and local emergency authorities, the relevant SECC (or SECCs, if the test could affect multiple States), and first responder organizations, such as PSAPs, police, and fire agencies); and

(4) Provides in widely accessible formats the notification to the public required by this paragraph that the test is only a test and is not a warning about an actual emergency.

■ 4. Delayed indefinitely, revise § 10.480 to read as follows:

§ 10.480 Language support.

(a) Participating CMS Providers are required to transmit WEA Alert Messages that are issued in the Spanish language or that contain Spanish-language characters.

(b) Participating CMS Providers are required to support the display of a pre-scripted alert pre-installed and stored in the mobile device that corresponds to the default language of the mobile device.

■ 5. Effective December 15, 2026, amend § 10.500 by adding paragraph (i) to read as follows:

§ 10.500 General requirements.

* * * * *

(i) For Alert Messages with a target area specified by a circle or polygon, when a device has location services enabled and has granted location permissions to its native mapping application, Participating CMS Providers must support the presentation of a map along with an emergency alert message that includes at least

(1) The shape of the target area,

(2) The user's location relative to the target area, and

(3) A geographical representation of a target area in which both the targeted area and user are located.

■ 6. Delayed indefinitely, further amend § 10.500 by revising paragraph (e) to read as follows:

§ 10.500 General requirements.

* * * * *

(e) Extraction of alert content in English and the subscriber-specified default language, if applicable.

(1) Storing pre-scripted alerts in English, Spanish, Chinese, Tagalog, Vietnamese, Arabic, French, Korean, Russian, Haitian Creole, German, Hindi, Portuguese, and Italian.

(2) Allowing the subscriber to choose to receive pre-scripted Alert Messages in American Sign Language (ASL) instead of or in addition to their mobile device's subscriber-specified default language setting.

* * * * *

[FR Doc. 2023–27236 Filed 12–14–23; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 221223–0282; RTID 0648–XD584]

Fisheries of the Northeastern United States; Summer Flounder Fishery; Quota Transfer From NC to VA

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

ACTION: Notification of quota transfer.

SUMMARY: NMFS announces that the State of North Carolina is transferring a portion of its 2023 commercial summer flounder quota to the Commonwealth of Virginia. This adjustment to the 2023 fishing year quota is necessary to comply with the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan quota transfer

provisions. This announcement informs the public of the revised 2023 commercial quotas for North Carolina and Virginia.

DATES: Effective December 12, 2023, through December 31, 2023.

FOR FURTHER INFORMATION CONTACT: Laura Deighan, Fishery Management Specialist, (978) 281–9184.

SUPPLEMENTARY INFORMATION: Regulations governing the summer flounder fishery are found in 50 CFR 648.100 through 648.111. These regulations require annual specification of a commercial quota that is apportioned among the coastal states from Maine through North Carolina. The process to set the annual commercial quota and the percent allocated to each state is described in § 648.102 and final 2023 allocations were published on January 3, 2023 (88 FR 11).

The final rule implementing Amendment 5 to the Summer Flounder Fishery Management Plan (FMP), as published in the **Federal Register** on December 17, 1993 (58 FR 65936), provided a mechanism for transferring summer flounder commercial quota from one state to another. Two or more states, under mutual agreement and with the concurrence of the NMFS Greater Atlantic Regional Administrator, can transfer or combine summer flounder commercial quota under § 648.102(c)(2). The Regional Administrator is required to consider three criteria in the evaluation of requests for quota transfers or combinations: the transfer or combinations would not preclude the overall annual quota from being fully harvested; the transfer addresses an unforeseen variation or contingency in the fishery; and the transfer is consistent with the objectives of the FMP and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The Regional Administrator has determined these three criteria have been met for the transfer approved in this notification.

North Carolina is transferring 23,319 pounds (lb; 10,577 kilograms (kg)) to Virginia through a mutual agreement between the states. This transfer was requested to repay landings made by out-of-state permitted vessels under safe harbor agreements. The revised summer flounder quotas for 2023 are North Carolina, 3,257,764 lb (1,477,697 kg), and Virginia, 2,788,223 lb (1,264,717 kg).

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR 648.102(c)(2)(i) through (iv), which was issued pursuant to section 304(b), and is exempted from review under Executive Order 12866.

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

Dated: December 12, 2023.

Everett Wayne Baxter,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023–27625 Filed 12–12–23; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 231211–0299]

RIN 0648–BM44

Fisheries Off West Coast States; Coastal Pelagic Species Fisheries; Biennial Specifications; 2023–2024 and 2024–2025 Specifications for Pacific Mackerel

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

ACTION: Final rule.

SUMMARY: NMFS is implementing allowable harvest levels and harvest reference points, including the overfishing limit, acceptable biological catch, and annual catch limit, for Pacific mackerel in the exclusive economic zone off the U.S. West Coast (California, Oregon, and Washington) for the fishing seasons 2023–2024 and 2024–2025. The allowable harvest levels include a harvest guideline and annual catch target for the 2023–2024 fishing season of 7,871 metric tons (mt) and 6,871 mt, respectively and a harvest guideline and annual catch target for the 2024–2025 fishing season of 8,943 mt and 7,943 mt, respectively. If the fishery attains the annual catch target in either fishing season, the directed fishery will close, reserving the 1,000-mt difference between the harvest guideline and annual catch target as a set-aside for incidental landings in other Coastal Pelagic Species fisheries and other sources of mortality. This final rule is made pursuant to the Coastal Pelagic Species Fishery Management Plan and is intended to conserve and manage the Pacific mackerel stock off the U.S. West Coast.

DATES: Effective December 15, 2023.

FOR FURTHER INFORMATION CONTACT: Heather Fitch, West Coast Region, NMFS, (360) 302–6549, *Heather.Fitch@noaa.gov.*

SUPPLEMENTARY INFORMATION: Under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1801 *et seq.,* NMFS manages the Pacific mackerel fishery in the U.S. exclusive economic zone (EEZ) off the West Coast in accordance with the Coastal Pelagic Species (CPS) Fishery Management Plan (FMP). The CPS FMP and its implementing regulations require NMFS to set annual harvest specifications for the Pacific mackerel fishery based on the annual specification framework and control rules in the FMP. The Pacific mackerel fishing season runs from July 1 to June 30. This final rule implements these harvest specifications, which include allowable harvest levels (*i.e.,* annual catch target (ACT) and harvest guideline (HG)), an annual catch limit (ACL), and annual catch reference points (*i.e.,* overfishing limit (OFL) and acceptable biological catch (ABC)). This final rule adopts, without changes, the harvest specifications that NMFS proposed in the rule published on September 29, 2023 (88 FR 67222). The proposed rule for this action included additional background on the specifications and details on how the Pacific Fishery Management Council (Council) derived its recommended specifications for Pacific mackerel. Those details are not repeated here.

The uncertainty surrounding the current biomass estimates for Pacific mackerel for the 2023–2024 and 2024–2025 fishing seasons was taken into consideration in the development of these harvest specifications. Any Pacific mackerel harvested between July 1, 2023, and the effective date of the final rule will count toward the 2023–2024 ACT and HG.

The Council recommended, and NMFS is implementing, Pacific mackerel harvest specifications for both the 2023–2024 and 2024–2025 fishing seasons. For the 2023–2024 Pacific mackerel fishing season these include an OFL of 11,693 mt, an ABC and ACL of 9,754 mt, a HG of 7,871 mt, and an ACT of 6,871 mt. For the 2024–2025 Pacific mackerel fishing season these include an OFL of 12,765 mt, an ABC and ACL of 10,073 mt, a HG of 8,943 mt, and an ACT of 7,943 mt. These catch specifications are based on the OFL and ABC control rules established in the CPS FMP, recommendations from the Council's SSC and other advisory bodies, and biomass estimates of 55,681 mt (2023–2024) and 60,785 mt (2024–2025). The biomass estimates are the result of a benchmark stock assessment

the NMFS Southwest Fishery Science Center completed in June 2023, which was reviewed by a Stock Assessment Review Panel.[1] At the June 2023 Council meeting, the Council's Scientific and Statistical Committee (SSC) reviewed and approved, and the Council adopted, the 2023 benchmark stock assessment and resulting biomass estimates as the best scientific information available for setting harvest specifications for the 2023–2024 and 2024–2025 Pacific mackerel fishing seasons.

Under this action, in the unlikely event that catch reaches the ACT in either fishing season, directed fishing will close, reserving the difference between the HG and ACT (1,000 mt) as a set-aside for incidental landings in other fisheries and other sources of mortality.[2] For the remainder of the fishing season, incidental landings in CPS fisheries will be constrained to a 45 percent incidental catch allowance (in other words, no more than 45 percent by weight of the CPS landed per trip may be Pacific mackerel); and in non-CPS fisheries, up to 3 mt of Pacific mackerel may be landed incidentally per fishing trip. The incidental set-aside is intended to allow continued operation of fisheries for other stocks, particularly other CPS stocks that may school with Pacific mackerel.

The NMFS West Coast Regional Administrator will publish a notice in the **Federal Register** announcing the date of any closure of directed fishing (when harvest levels are expected to reach or exceed the ACT). Additionally, to ensure the regulated community is informed of any closure, NMFS will also make announcements through other means available, including email to fishermen, processors, and state fishery management agencies.

NMFS published a proposed rule on September 29, 2023 (88 FR 67222) and received no public comments.

Classification

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

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

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

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

List of Subjects in 50 CFR Part 660

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: December 11, 2023.

Samuel D. Rauch, III

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

For the reasons set out in the preamble, NMFS amends 50 CFR part 660 as follows:

PART 660—FISHERIES OFF WEST COAST STATES

■ 1. The authority citation for part 660 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.,* 16 U.S.C. 773 *et seq.,* and 16 U.S.C. 7001 *et seq.*

■ 2. In § 660.511, revise paragraphs (i)(1) and (2) to read as follows:

§ 660.511 Catch restrictions.

* * * * *

(i) * * *

(1) For the Pacific mackerel fishing season July 1, 2023, through June 30, 2024, the harvest guideline is 7,871 mt and the ACT is 6,871 mt; and

(2) For the Pacific mackerel fishing season July 1, 2024, through June 30, 2025, the harvest guideline is 8,943 mt and the ACT is 7,943 mt.

* * * * *

[FR Doc. 2023–27532 Filed 12–14–23; 8:45 am]

BILLING CODE 3510–22–P

[1] Stock Assessment Review (STAR) Panel meetings are formal, public, multiple-day meetings of stock assessment experts who conduct a detailed technical evaluation of full (*e.g.,* benchmark) stock assessments. The 2023 Pacific Mackerel STAR Panel meeting was held April 11–13, 2023.

[2] Directed fishing for live bait and minor directed fishing is allowed to continue during a closure of the directed fishery.

Proposed Rules

Federal Register
Vol. 88, No. 240
Friday, December 15, 2023

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–2240; Project Identifier MCAI–2023–00936–T]

RIN 2120–AA64

Airworthiness Directives; Airbus SAS Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede Airworthiness Directive (AD) 2021–24–20, which apply to all Airbus SAS Model A350–941 and –1041 airplanes, and AD 2023–03–05, which apply to certain Airbus SAS Model A350–941 and –1041 airplanes. AD 2021–24–20 requires repetitive water drainage and plug cleaning of the left- and right-hand slat geared rotary actuators (SGRAs) having a certain part number installed on slat 5 track 12 with certain functional item numbers. AD 2023–03–05 requires revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. Since the FAA issued AD 2021–24–20 and AD 2023–03–05, the FAA has determined that new or more restrictive airworthiness limitations are necessary. This proposed AD would continue to require certain actions in AD 2021–24–20 and AD 2023–03–05 and would require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations, as specified in a European Union Aviation Safety Agency (EASA) AD, which is 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 proposed AD by January 29, 2024.

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–2023–2240; 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 EASA material that is proposed for IBR in this NPRM, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* website *easa.europa.eu.* You may find this material on the EASA website at *ad.easa.europa.eu.* It is also available at *regulations.gov* under Docket No. FAA–2023–2240.
- 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: Dat Le, 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–2023–2240; Project Identifier MCAI–2023–00936–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 Dat Le, 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 that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA issued AD 2021–24–20, Amendment 39–21841 (86 FR 72838, December 23, 2021) (AD 2021–24–20), for all Airbus SAS Model A350–941 and –1041 airplanes. AD 2021–24–20 was prompted by an MCAI originated by EASA, which is the Technical Agent for the Member States of the European Union. EASA issued AD 2021–0130R1, dated June 10, 2021 (EASA 2021–0130R1) (which corresponds to FAA AD

2021–24–20), to correct an unsafe condition.

AD 2021–24–20 requires repetitive water drainage and plug cleaning of the left- and right-hand SGRAs having a certain part number installed on slat 5 track 12 with certain functional item numbers. The FAA issued AD 2021–24–20 to address SGRA jams, which could result in reduced control of the airplane.

The FAA also issued AD 2023–03–05, Amendment 39–22330 (88 FR 10011, February 16, 2023) (AD 2023–03–05), for certain Airbus SAS Model A350–941 and –1041 airplanes. AD 2023–03–05 was prompted by an MCAI originated by EASA, which is the Technical Agent for the Member States of the European Union. EASA issued AD 2022–0127, dated June 28, 2022 (EASA 2022–0127) (which corresponds to FAA AD 2023–03–05), to correct an unsafe condition.

AD 2023–03–05 requires revising the existing maintenance or inspection program, as applicable, to incorporate additional new or more restrictive airworthiness limitations. The FAA issued AD 2023–03–05 to address hazardous or catastrophic airplane system failures. In addition, paragraph (m) of AD 2023–03–05 specifies terminating action for repetitive greasing of certain thrust reverser actuators required by paragraph (g) of AD 2019–20–01, Amendment 39–19754 (84 FR 55495, October 17, 2019). This proposed AD would therefore continue to allow that terminating action.

Actions Since AD 2021–24–20 and AD 2023–03–05 Were Issued

Since the FAA issued AD 2021–24–20 and AD 2023–03–05, EASA superseded AD 2021–0130R1 and AD 2022–0127 and issued EASA AD 2023–0157, dated July 31, 2023 (EASA AD 2023–0157) (referred to after this as the MCAI), for all Airbus SAS Model A350–941 and –1041 airplanes. The MCAI states that new or more restrictive airworthiness limitations have been developed.

Airplanes with an original airworthiness certificate or original export certificate of airworthiness issued after June 1, 2023, must comply with the airworthiness limitations specified as part of the approved type design and referenced on the type certificate data sheet; this proposed AD therefore does not include those airplanes in the applicability.

The FAA is proposing this AD to address hazardous or catastrophic airplane system failure. You may examine the MCAI in the AD docket at *regulations.gov* under Docket No. FAA–2023–2240.

Related Service Information Under 1 CFR Part 51

The FAA reviewed EASA AD 2023–0157. This service information specifies new or more restrictive airworthiness limitations for airplane structures and safe life limits.

This proposed AD would also require EASA AD 2022–0127, dated June 28, 2022, which the Director of the Federal Register approved for incorporation by reference as of March 23, 2023 (88 FR 10011, February 16, 2023).

This proposed AD would also require EASA AD 2021–0130R1, dated June 10, 2021, which the Director of the Federal Register approved for incorporation by reference as of January 27, 2022 (86 FR 72838, December 23, 2021).

This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in **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 retain certain requirements of AD 2021–24–20 and AD 2023–03–05. This proposed AD would also require revising the existing maintenance or inspection program, as applicable, to incorporate additional new or more restrictive airworthiness limitations, which are specified in EASA AD 2023–0157 already described, as proposed for incorporation by reference. Any differences with EASA AD 2023–0157 are identified as exceptions in the regulatory text of this AD.

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 (AMOC) according to paragraph (q)(1) of this proposed AD.

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 EASA ADs by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA ADs 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 an EASA AD does not mean that operators need comply only with that section. For example, where the AD requirement refers to ''all required actions and compliance times,'' compliance with this AD requirement is not limited to the section titled ''Required Action(s) and Compliance Time(s)'' in EASA AD 2023–0157. Service information required by EASA ADs for compliance will be available at regulations.gov by searching for and locating Docket No. FAA–2023–2240 after the FAA final rule is published.

Airworthiness Limitation ADs Using the New Process

The FAA's process of incorporating by reference MCAI ADs as the primary source of information for compliance with corresponding FAA ADs has been limited to certain MCAI ADs (primarily those with service bulletins as the primary source of information for accomplishing the actions required by the FAA AD). However, the FAA is now expanding the process to include MCAI ADs that require a change to airworthiness limitation documents, such as airworthiness limitation sections.

For these ADs that incorporate by reference an MCAI AD that changes airworthiness limitations, the FAA requirements are unchanged. Operators must revise the existing maintenance or inspection program, as applicable, to incorporate the information specified in the new airworthiness limitation document. The airworthiness limitations must be followed according to 14 CFR 91.403(c) and 91.409(e).

The previous format of the airworthiness limitation ADs included a paragraph that specified that no alternative actions (*e.g.,* inspections) or intervals may be used unless the actions and intervals are approved as an AMOC in accordance with the procedures specified in the AMOCs paragraph under ''Additional AD Provisions.'' This new format includes a ''New Provisions for Alternative Actions and Intervals'' paragraph that does not specifically refer to AMOCs, but operators may still request an AMOC to use an alternative action or interval.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 30 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR RETAINED ACTIONS FROM AD 2021–24–20

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Retained actions from AD 2021–24–20	4 work-hours × $85 per hour = $340	$0	$340	$10,200

The FAA estimates the total cost per operator for the retained actions from AD 2023–03–05 to be $7,650 (90 work-hours × $85 per work-hour).

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

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

Authority for This Rulemaking

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

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

Regulatory Findings

The FAA 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:

■ a. Removing Airworthiness Directive (AD) 2021–24–20, Amendment 39–21841 (86 FR 72838, December 23, 2021); and AD 2023–03–05, Amendment 39–22330 (88 FR 10011, February 16, 2023); and

■ b. Adding the following new AD:

Airbus SAS: Docket No. FAA–2023–2240; Project Identifier MCAI–2023–00936–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by January 29, 2024.

(b) Affected ADs

(1) This AD replaces AD 2021–24–20, Amendment 39–21841 (86 FR 72838, December 23, 2021) (AD 2021–24–20); and AD 2023–03–05, Amendment 39–22330 (88 FR 10011, February 16, 2023) (AD 2023–03–05).

(2) This AD affects AD 2019–20–01, Amendment 39–19754 (84 FR 55495, October 17, 2019) (AD 2019–20–01).

(c) Applicability

This AD applies to Airbus SAS Model A350–941 and –1041 airplanes, certificated in any category, with an original airworthiness certificate or original export certificate of airworthiness issued on or before June 1, 2023.

(d) Subject

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

(e) Unsafe Condition

This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The FAA is issuing this AD to address hazardous or catastrophic airplane system failures.

(f) Compliance

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

(g) Retained Requirements of AD 2021–24–20, With No Changes

This paragraph restates the requirements of paragraph (g) of AD 2021–24–20, with no changes. Except as specified in paragraph (h) of this AD, comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2021–0130R1, dated June 10, 2021 (EASA AD 2021–0130R1). Accomplishing the revision of the existing maintenance or inspection program required by paragraph (m) of this AD terminates the requirements of this paragraph.

(h) Retained Exceptions to EASA AD 2021–0130R1, With No Changes

This paragraph restates the exceptions specified in paragraph (h) of AD 2021–24–20, with no changes.

(1) Where EASA AD 2021–0130R1 refers to ''the effective date of the original issue of this [EASA] AD,'' this AD requires using January 27, 2022 (the effective date of AD 2021–24–20).

(2) The ''Remarks'' section of EASA AD 2021–0130R1 does not apply to this AD.

(i) Retained No Reporting for EASA AD 2021–0130R1, With No Changes

This paragraph restates the no reporting requirement of paragraph (i) of AD 2021–24–20, with no changes. Although the service information referenced in EASA AD 2021–0130R1 specifies to submit certain information to the manufacturer, this AD does not include that requirement.

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

This paragraph restates the requirements of paragraph (j) of AD 2023–03–05, with no changes. For airplanes with an original airworthiness certificate or original export certificate of airworthiness issued on or before May 2, 2022: Except as specified in paragraph (k) of this AD, comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2022–0127, dated June 28, 2022 (EASA AD 2022–0127). Accomplishing the revision of the existing maintenance or inspection program required by paragraph (m) of this AD terminates the requirements of this paragraph.

(k) Retained Exceptions to EASA AD 2022–0127, With No Changes

This paragraph restates the exceptions specified in paragraph (k) of AD 2023–03–05, with no changes.

(1) The requirements specified in paragraphs (1) and (2) of EASA AD 2022–0127 do not apply to this AD.

(2) Paragraph (3) of EASA AD 2022–0127 specifies to revise ''the AMP'' within 12 months after its effective date, but this AD requires revising the existing maintenance or inspection program, as applicable, within 90 days after March 23, 2023 (the effective date of AD 2023–03–05).

(3) The initial compliance time for doing the tasks specified in paragraph (3) of EASA AD 2022–0127 is at the applicable ''limitations'' as incorporated by the requirements of paragraph (3) of EASA AD 2022–0127, or within 90 days after March 23, 2023 (the effective date of AD 2023–03–05), whichever occurs later.

(4) The provisions specified in paragraphs (4) and (5) of EASA AD 2022–0127 do not apply to this AD.

(5) The ''Remarks'' section of EASA AD 2022–0127 does not apply to this AD.

(l) Retained Restrictions on Alternative Actions and Intervals With a New Exception

This paragraph restates the requirements of paragraph (l) of AD 2022–0127, with a new exception. Except as required by paragraph (m) of this AD, after the existing maintenance or inspection program has been revised as required by paragraph (j) of this AD, no alternative actions (*e.g.,* inspections) and intervals are allowed unless they are approved as specified in the provisions of the ''Ref. Publications'' section of EASA AD 2022–0127.

(m) New Revision of the Existing Maintenance or Inspection Program

Except as specified in paragraph (n) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2023–0157, dated July 31, 2023 (EASA AD 2023–0157). Accomplishing the revision of the existing maintenance or inspection program required by this paragraph terminates the requirements of paragraphs (g) and (j) of this AD.

(n) Exceptions to EASA AD 2023–0157

(1) This AD does not adopt the requirements specified in paragraphs (1) and (2) of EASA AD 2023–0157.

(2) Paragraph (3) of EASA AD 2023–0157 specifies revising ''the AMP'' within 12 months after its effective date, but this AD requires revising the existing maintenance or inspection program, as applicable, within 90 days after the effective date of this AD.

(3) The initial compliance time for doing the tasks specified in paragraph (3) of EASA 2023–0157 is at the applicable ''limitations'' and ''associated thresholds'' as incorporated by the requirements of paragraph (3) of EASA AD 2023–0157, or within 90 days after the effective date of this AD, whichever occurs later.

(4) This AD does not adopt the provisions specified in paragraphs (4) and (5) of EASA AD 2023–0157.

(5) This AD does not adopt the ''Remarks'' section of EASA AD 2023–0157.

(o) New Provisions for Alternative Actions and Intervals

After the existing maintenance or inspection program has been revised as required by paragraph (m) of this AD, no alternative actions (*e.g.,* inspections) and intervals are allowed unless they are approved as specified in the provisions of the ''Ref. Publications'' section of EASA AD 2023–0157.

(p) Terminating Action for Certain Tasks Required by AD 2019–20–01

After the maintenance or inspection program has been revised as required by paragraph (j) or (m) of this AD, the repetitive greasing specified in EASA AD 2018–0234R1, dated November 13, 2018, and EASA AD 2018–0234R2, dated September 17, 2019, as required by AD 2019–20–01, is terminated for thrust reverser actuators, having part number (P/N) 351D9908–689, P/N 351D9908–691 or P/N 351D9908–693.

(q) 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 (r) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.* Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the responsible Flight Standards Office.

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

(r) Additional Information

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

(s) Material Incorporated by Reference

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

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

(3) The following service information was approved for IBR on [DATE 35 DAYS AFTER PUBLICATION OF THE FINAL RULE].

(i) European Union Aviation Safety Agency (EASA) AD 2023–0157.

(ii) [Reserved]

(4) The following service information was approved for IBR on March 23, 2023 (88 FR 10011, February 16, 2023).

(i) European Union Aviation Safety Agency (EASA) AD 2022–0127, dated June 28, 2022.

(ii) [Reserved]

(5) The following service information was approved for IBR on January 27, 2022 (86 FR 72838, December 23, 2021).

(i) European Union Aviation Safety Agency (EASA) AD 2021–0130R1, dated June 10, 2021.

(ii) [Reserved]

(6) For EASA ADs 2021–0130R1, 2022–0127, and 2023–0157, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* website *easa.europa.eu*. You may find this EASA AD on the EASA website at *ad.easa.europa.eu.*

(7) 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.

(8) 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 December 8, 2023.

Victor Wicklund,

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

[FR Doc. 2023–27386 Filed 12–14–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–107423–23]

RIN 1545–BQ85

Section 45X Advanced Manufacturing Production Credit

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and public hearing.

SUMMARY: This document contains proposed regulations to implement the advanced manufacturing production credit established by the Inflation Reduction Act of 2022 to incentivize the production of eligible components within the United States. Eligible components include certain solar energy components, wind energy components, inverters, qualifying battery components, and applicable critical minerals. The proposed regulations would affect eligible taxpayers who produce and sell eligible components and intend to claim the benefit of an advanced manufacturing production credit, including by making elective payment or credit transfer elections. This document also provides notice of a public hearing on the proposed regulations.

DATES: Written or electronic comments must be received by February 13, 2024.

A public hearing on this proposed regulation has been scheduled for February 22, 2024, at 10 a.m. ET. Requests to speak and outlines of topics to be discussed at the public hearing must be received by February 13, 2024. If no outlines are received by February 13, 2024, the public hearing will be cancelled.

Requests to attend the public hearing must be received by 5 p.m. ET on February 20, 2024. The public hearing will be made accessible to people with disabilities. Requests for special assistance during the public hearing must be received by 5 p.m. ET on February 16, 2024.

ADDRESSES: Commenters are strongly encouraged to submit public comments electronically via the Federal eRulemaking Portal at *https://www.regulations.gov* (indicate IRS and REG–107423–23) by following the online instructions for submitting comments. Requests for a public hearing must be submitted as prescribed in the ''Comments and Public Hearing'' section. 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 to the IRS's public docket. Send paper submissions to: CC:PA:01:PR (REG–107423–23), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Mindy Chou, John Deininger, or Alexander Scott at (202) 317–6853 (not a toll-free number); concerning submissions of comments 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

This document contains proposed amendments to the Income Tax Regulations (26 CFR part 1) to implement section 45X of the Internal Revenue Code (Code). Section 45X was added to the Code on August 16, 2022, by section 13502(a) of Public Law 117–169, 136 Stat. 1818, 1971, commonly referred to as the Inflation Reduction Act of 2022 (IRA). Section 13502(c) of the IRA provides that section 45X applies to components produced and sold after December 31, 2022.

I. Overview of Section 45X

Section 45X(a)(1) provides that, for purposes of the general business credit under section 38 of the Code, the advanced manufacturing production credit (section 45X credit) for any taxable year is an amount equal to the sum of the credit amounts determined under section 45X(b) with respect to each eligible component, as defined in section 45X(c)(1), which is produced by the taxpayer, and during the taxable year, sold by such taxpayer to an unrelated person. Section 45X(a)(2) provides that any eligible component produced and sold by the taxpayer is taken into account only if the production and sale is in a trade or business of the taxpayer.

Section 45X(a)(3) provides rules regarding the sale of components to an unrelated person, and generally provides a special rule that, for purposes of section 45X(a), treats a taxpayer as selling a component to an unrelated person if that component is sold to the unrelated person by a person related to the taxpayer. Under section 45X(a)(3)(B), if a taxpayer makes an election in the form and manner prescribed by the Secretary of the Treasury or her delegate (Secretary), a sale of components by the taxpayer to a related person will be treated as if made to an unrelated person for purposes of section 45X(a) (Related Person Election). As a condition of, and prior to, a taxpayer making the Related Person Election, the Secretary may require such information or registration as the Secretary deems necessary for purposes of preventing duplication, fraud, or any improper or excessive credit amount.

Section 45X(b)(1)(A) through (M) and section 45X(b)(2) set forth the credit amounts for each type of eligible component, which amounts, except for purposes of determining the credit amount for any applicable critical mineral, are subject to phase out rules set forth in section 45X(b)(3). For any eligible component (except applicable critical minerals) sold after December 31, 2029, the credit amount for such component equals the product of the amount determined under section 45X(b)(1) for such component multiplied by the applicable phase out percentage under section 45X(b)(3)(B)(i) through (iv). In the case of an eligible component sold during calendar year 2030, 2031, and 2032, the phase out percentages are 75 percent, 50 percent, and 25 percent, respectively. In the case of an eligible component sold after December 31, 2032, the phase out percentage is zero percent. Thus, current law provides no section 45X credit after 2032 for eligible components other than for applicable critical minerals.

Section 45X(b)(4) provides capacity limitations used to compute the credit amount for eligible battery cells and battery modules under sections 45X(b)(1)(K)(ii) and (L)(ii). To compute the credit for these eligible components, section 45X(b)(4)(A) provides that the capacity determined with respect to a battery cell or battery module must not exceed a capacity-to-power-ratio of 100:1. Section 45X(b)(4)(B) defines the term ''capacity-to-power-ratio'' as the ratio of the capacity of a battery cell or battery module to the maximum discharge amount of such cell or module.

Section 45X(c)(1)(A) defines the term ''eligible component'' to mean any solar energy component, any wind energy component, any inverter described in section 45X(c)(2)(B) through (G), any

qualifying battery component, and any applicable critical mineral. Section 45X(c)(1)(B) clarifies that the term ''eligible component'' does not include any property that is produced at a facility if the basis of any property that is part of such facility is taken into account for purposes of the qualifying advanced energy project credit allowed under section 48C after August 16, 2022 (the date of enactment of the IRA).

Section 45X(c)(2)(A) generally defines an ''inverter'' as an end product that is suitable to convert direct current (DC) electricity from one or more solar modules or certified distributed wind energy systems into alternating current (AC) electricity. Section 45X(c)(2)(B) through (G) define the following different types of eligible inverters: central inverter, commercial inverter, distributed wind inverter, microinverter, residential inverter, and utility inverter.

Section 45X(c)(3)(A) defines a ''solar energy component'' as a solar module, photovoltaic cell, photovoltaic wafer, solar grade polysilicon, torque tube, structural fastener, or polymeric backsheet. Section 45X(c)(3)(B) defines these different types of eligible solar energy components as well as the term ''solar tracker.''

Section 45X(c)(4)(A) defines a ''wind energy component'' as blades, nacelles, towers, offshore wind foundations, and related offshore wind vessels. Section 45X(c)(4)(B) defines these different types of eligible wind energy components.

Section 45X(c)(5)(A) defines a ''qualifying battery component'' as electrode active materials, battery cells, and battery modules. Section 45X(c)(5)(B) defines these different types of qualifying battery components.

Section 45X(c)(6) provides the following list of 50 minerals that if converted or purified to specified purities are considered an ''applicable critical mineral'' for purposes of the section 45X credit: aluminum, antimony, arsenic, barite, beryllium, bismuth, cerium, cesium, chromium, cobalt, dysprosium, erbium, europium, fluorspar, gadolinium, gallium, germanium, graphite, hafnium, holmium, indium, iridium, lanthanum, lithium, lutetium, magnesium, manganese, neodymium, nickel, niobium, palladium, platinum, praseodymium, rhodium, rubidium, ruthenium, samarium, scandium, tantalum, tellurium, terbium, thulium, tin, titanium, tungsten, vanadium, ytterbium, yttrium, zinc, and zirconium.

Section 45X(d) provides special rules that are applicable to the section 45X credit. Section 45X(d)(1) provides that persons are treated as related to each other if they would be treated as a single employer under the regulations prescribed under section 52(b) of the Code. Section 52(b) generally provides that trades or businesses that are partnerships, trusts, estates, corporations, or sole proprietorships under common control are members of a controlled group and are treated as a single employer. *See* § 1.52–1(b). Section 52(b) requires the regulations under section 52(b) to be based on principles similar to the principles that apply for purposes of section 52(a), which generally provides that corporations that are members of a controlled group of corporations are treated as a single employer. Section 52(a) provides that a controlled group of corporations is defined with reference to section 1563(a) of the Code. Section 52(b) and § 1.52–1 provide rules similar to those under section 52(a), but with certain modifications to account for different types of ownership interests.

Section 45X(d)(2) provides that sales of eligible components are taken into account under section 45X only for eligible components that are produced within the United States (including continental shelf areas described in section 638(1) of the Code), or a U.S. territory (including continental shelf areas described in section 638(2)). (For purposes of this document, the term ''U.S. territory'' has the meaning of the term ''possession'' as defined in section 638(2).) Section 45X(d)(3) directs the Secretary to promulgate regulations adopting rules similar to the rules of section 52(d) to apportion credit amounts between estates or trusts and their beneficiaries on the basis of the income of the estates or trusts allocable to each, and to pass-thru any apportioned credit amounts to the beneficiaries. Section 45X(d)(4) provides that for purposes of the section 45X credit, a person is treated as having sold an eligible component to an unrelated person if such component is integrated, incorporated, or assembled into another eligible component that is sold to an unrelated person.

II. Notice 2022–47

On October 24, 2022, the Treasury Department and the IRS published Notice 2022–47, 2022–43 I.R.B. 312. The notice requested general comments on issues arising under section 45X, as well as specific comments concerning: (1) definitions (including the definitions of eligible components); (2) the Related Person Election; (3) capacity-to-power ratios for battery cells or battery modules; (4) credit amount for components used in systems of varying capacity; (5) offshore wind vessels; (6) applicable critical minerals; and (7) apportionment and pass-thru of credit amounts to beneficiaries of estates or trusts. The Treasury Department and the IRS received over 300 comments from industry participants and other stakeholders. The Treasury Department and the IRS appreciate the commenters' interest and engagement on these issues. These comments have been carefully considered in the preparation of these proposed regulations.

III. Notices 2023–18 and 2023–44

On March 6, 2023, the Treasury Department and the IRS published Notice 2023–18, 2023–10 I.R.B. 508, to establish the qualifying advanced energy projects program (section 48C(e) program). On June 20, 2023, the Treasury Department and the IRS published Notice 2023–44, 2023–25 I.R.B. 924, to provide additional guidance on the section 48C(e) program, including rules for the interaction between sections 45X and 48C. The rules regarding the interaction between sections 45X and 48C provided in Notices 2023–18 and 2023–44 have been incorporated into these proposed regulations and upon finalization of this rulemaking, section 5.05 of Notice 2023–18 and section 3 of Notice 2023–44 will be superseded.

Explanation of Provisions

I. Overview of Proposed Regulations

Consistent with section 45X(a)(1), these proposed regulations would provide that for purposes of section 38, the section 45X credit for any taxable year is an amount equal to the sum of the credit amounts determined under section 45X(b) with respect to each eligible component, as defined in section 45X(c), produced by the taxpayer, and, during the taxable year, sold by that taxpayer to an unrelated person. Consistent with section 45X(a)(2), only eligible components that are produced and sold in a trade or business of the taxpayer are taken into account for purposes of the section 45X credit.

These proposed regulations are organized into four sections, proposed §§ 1.45X–1 through 1.45X–4. Proposed § 1.45X–1 would provide general rules applicable to the section 45X credit, including the definition of the term ''produced by the taxpayer'' for both primary and secondary production. Primary production involves producing an eligible component using non-recycled materials while secondary production involves producing an eligible component using recycled

materials. Proposed § 1.45X–2 would provide rules for sales to unrelated persons through a person related to the taxpayer, including the rules for a taxpayer to make an election to treat sales of eligible components to related persons (Related Person Election) as if made to unrelated persons. Proposed § 1.45X–3 would provide definitions and credit amounts for certain eligible components, including solar energy components, wind energy components, inverters, and qualifying battery components, and phase-out rules. Proposed § 1.45X–4 would provide definitions and credit amounts for applicable critical minerals that are eligible components.

II. General Rules Applicable to the Advanced Manufacturing Production Credit

A. Overview

Proposed § 1.45X–1(a) would provide an overview of the general rules regarding the advanced manufacturing production credit under section 45X.

B. Credit Amount

Proposed § 1.45X–1(b) would explain how to calculate the amount of the credit provided under section 45X for any taxable year.

C. Definition of Produced by the Taxpayer

Proposed § 1.45X–1(c) would define the term ''produced by the taxpayer'' for both primary and secondary production. Proposed § 1.45X–1(c)(1) would provide the general definition of the term. Proposed § 1.45X–1(c)(1)(i) would state that partial transformation that does not result in a substantial transformation of inputs into a complete and distinct eligible component is not included in the definition of ''produced by the taxpayer.'' Proposed § 1.45X–1(c)(1)(ii) would state that neither minor assembly of constituent inputs nor superficial modification of a final eligible component are included in the definition of ''produced by the taxpayer.'' Proposed § 1.45X–1(c)(1)(iii) would provide examples illustrating the definition of ''produced by the taxpayer.'' Proposed § 1.45X–1(c)(2) would provide a special rule for applying the definition of ''produced by the taxpayer'' for solar grade polysilicon, electrode active materials, and applicable critical minerals.

Proposed § 1.45X–1(c)(3)(i) would state that the taxpayer claiming a section 45X credit with respect to an eligible component must be the person that performs the actual production activities that bring about a substantial transformation resulting in the eligible component and that sells such eligible component to an unrelated person. Proposed § 1.45X–1(c)(3)(ii)(A) would provide that if the production of an eligible component is performed in whole or in part subject to a contract that is a contract manufacturing arrangement, then the party to such contract that may claim the section 45X credit with respect to such eligible component, provided all other requirements in section 45X are met, is the taxpayer that performs the actual production activities that bring about a substantial transformation resulting in the eligible component. This proposed rule is intended to provide an administrable rule that provides taxpayers clarity and certainty in determining which taxpayer may claim the section 45X credit in a contract manufacturing arrangement.

Proposed § 1.45X–1(c)(3)(ii)(B) would define the term ''contract manufacturing arrangement'' to mean any agreement providing for the production of an eligible component if the agreement is entered into before the production of the eligible component to be delivered under the contract is completed. Proposed § 1.45X–1(c)(3)(ii)(B) would further provide that a routine purchase order for off-the-shelf property is not treated as a contract manufacturing arrangement for purposes of proposed § 1.45X–1(c)(3). Proposed § 1.45X–1(c)(3)(ii)(B) would also provide that an agreement will be treated as a routine purchase order for off-the-shelf property if the contractor is required to make no more than de minimis modifications to the property to tailor it to the customer's specific needs, or if at the time the agreement is entered into, the contractor knows or has reason to know that the contractor can satisfy the agreement out of existing stocks or normal production of finished goods. This definition of the term ''routine purchase order'' is based on the definition found in § 1.263A–2(a)(1)(ii)(B)(2)(ii). The Treasury Department and the IRS request comments on whether this definition should be further clarified or modified.

Proposed § 1.45X–1(c)(3)(iii) would explain the special rule allowing parties to a contract manufacturing arrangement to agree on which party to the contract will claim the section 45X credit for eligible components produced subject to such contract. Proposed § 1.45X–1(c)(3)(iv) would explain the certification requirements for the special rule. Proposed § 1.45X–1(c)(3)(v) would provide examples illustrating the application of the special rule.

Proposed § 1.45X–1(c)(4)(i) would explain the requirements for the timing of production and sale of eligible components. Proposed § 1.45X–1(c)(4)(ii) would provide an example illustrating the application of these requirements.

D. Produced in the United States

Proposed § 1.45X–1(d)(1) would state that sales are taken into account for purposes of the section 45X credit only for eligible components produced within the United States, as defined in section 638(1) of the Code, or a United States territory, which for purposes of section 45X has the meaning of the term ''possession'' provided in section 638(2) of the Code. Proposed § 1.45X–1(d)(2) would clarify that constituent elements, materials and subcomponents used in the production of eligible components are not subject to the domestic production rule. It would also be permissible for elements, materials, and subcomponents used in the production of eligible components to be recycled rather than newly created elements, materials, and subcomponents.

E. Production and Sale in a Trade or Business

Proposed § 1.45X–1(e) would state that an eligible component must be produced and sold in a trade or business of the taxpayer, with the term ''trade or business'' defined as a trade or business within the meaning of section 162 of the Code.

F. Integrated, Incorporated, or Assembled

Proposed § 1.45X–1(f)(1) would state that a taxpayer is treated as having produced and sold an eligible component to an unrelated person if such component is integrated, incorporated, or assembled into another eligible component that is then sold to an unrelated person. This proposed rule would further define the term ''integrated, incorporated, or assembled'' to mean the production activities by which eligible components that are constituent elements, materials, or subcomponents are substantially transformed into another complete and distinct eligible component functionally different from that which would result from mere assembly or superficial modification of the eligible components used as elements, materials or subcomponents and other elements, materials or subcomponents. Proposed § 1.45X–1(f)(2)(i) would clarify that a taxpayer may claim a section 45X credit for each eligible component the taxpayer produces and sells to an unrelated person, including any eligible component the taxpayer produces that was used as a constituent element,

material, or subcomponent and integrated, incorporated, or assembled into another complete and distinct eligible component or another complete and distinct product that the taxpayer also produces and sells to an unrelated person. Proposed § 1.45X–1(f)(2)(ii) would provide an example of the credit eligibility of a sale of a product with incorporated eligible components to an unrelated person.

G. Interaction Between Sections 48C and 45X

Proposed § 1.45X–1(g)(1) would, consistent with section 45X(c)(1)(B), provide that for purposes of section 45X, an eligible component must be produced at a section 45X facility and does not include any property (produced property) that is produced at a facility if the basis of any property that is part of the production unit that produces the produced property is eligible property that is included in a section 48C facility and is taken into account for purposes of a credit allowed under section 48C (section 48C credit) after August 16, 2022. Proposed § 1.45X–1(g)(2)(i) would define a section 45X facility to include all tangible property that comprises an independently functioning production unit that produces one or more eligible components. Proposed § 1.45X–1(g)(2)(ii) would provide that a production unit is comprised of the tangible property that substantially transforms material inputs to complete the production process of an eligible component. Proposed § 1.45X–1(g)(3)(i) would define a section 48C facility to include all eligible property included in a qualifying advanced energy project for which a taxpayer receives an allocation of section 48C credits and claims such credits after August 16, 2022. Proposed § 1.45X–1(g)(3)(ii) would define eligible property included in a section 48C facility. Proposed § 1.45X–1(g)(4) would provide examples to illustrate the application of these rules.

H. Pass-Thru From Estates and Trusts

The Treasury Department and the IRS intend to provide rules addressing how the section 45X credit applies in the case of pass-thru from estates and trusts. The Treasury Department and the IRS request comments on how such rules should be implemented and whether there are any special considerations for estates and trusts claiming the section 45X credit. Proposed § 1.45X–1(h) is reserved for this purpose.

I. Anti-Abuse Rule

Proposed § 1.45X–1(i)(1) provides a general anti-abuse rule that would make the section 45X credit unavailable in extraordinary circumstances in which, based on a consideration of all the facts and circumstances, the primary purpose of the production and sale of an eligible component is to obtain the benefit of the section 45X credit in a manner that is wasteful, such as discarding, disposing of, or destroying the eligible component without putting it to a productive use.

In cases where the cost of producing certain eligible components is less than the amount of the section 45X credit that would be available, the Treasury Department and the IRS are concerned that taxpayers may have an incentive to produce such components solely for the purpose of exploiting the section 45X credit in a manner that is inconsistent with a purpose of section 45X, which is to provide an incentive to produce eligible components that contribute to the development of secure and resilient supply chains. Producing and selling eligible components with the primary purpose of obtaining the benefit of the section 45X credit in a wasteful manner would not satisfy the requirement for the eligible component to be produced and sold in a trade or business of the taxpayer under section 45X(a)(2) in certain circumstances. Proposed § 1.45X–1(i)(2) would provide an example illustrating this anti-abuse rule.

III. Sale to An Unrelated Person

Proposed § 1.45X–2(a) would state the general rule that the amount of the section 45X credit for any taxable year is equal to the sum of the credit amounts determined under section 45X(b) (and described in §§ 1.45X–3 and 1.45X–4) with respect to each eligible component that is produced by the taxpayer and, during the taxable year, sold by the taxpayer to an unrelated person (as defined in section 45X(a)(3) and described in § 1.45X–2(b)(3)).

A. Definitions

Section 45X(d)(1) provides that persons are treated as related to each other if such persons would be treated as a single employer under the regulations prescribed under section 52(b). Proposed § 1.45X–2(b) would provide definitions of the terms ''person,'' ''related person,'' and ''unrelated person'' for purposes of the section 45X credit.

B. Special Rule for Sale to Related Person

Section 45X(a)(3)(A) provides a special rule for purposes of section 45X that a taxpayer is treated as selling components to an unrelated person if such component is sold to such person by a person related to the taxpayer. Proposed § 1.45X–2(c) would provide this rule and an example to illustrate its application.

C. Related Person Election

Section 45X(a)(3)(B)(i) provides that at the election of the taxpayer (in such form and manner as the Secretary may prescribe), a sale of components by such taxpayer to a related person is treated as if made by the taxpayer to an unrelated person for purposes of section 45X(a) (Related Person Election). Thus, the Related Person Election is only available if an eligible component is sold by a taxpayer to a related person. The Related Person Election is not available if a taxpayer does not actually sell the eligible component to another person, for example, if an eligible component is transferred between a person and an entity that is not regarded as separate from the person under § 301.7701–3 of the Procedure and Administration Regulations (26 CFR part 301) or between divisions of a single corporation. Section 45X(a)(3)(B)(ii) provides that as a condition of, and prior to, any election described in clause (i), the Secretary may require such information or registration as the Secretary deems necessary for purposes of preventing duplication, fraud, or any improper or excessive amount determined under section 45X(a)(1).

Proposed § 1.45X–2(d)(1) would provide that the Related Person Election must be made in the form and manner prescribed in guidance. The term ''guidance'' is defined as guidance published in the **Federal Register** or Internal Revenue Bulletin, as well as administrative guidance such as forms, instructions, publications, or other guidance on the *IRS.gov* website. *See* §§ 601.601 and 601.602 of the Statement of Procedural Rules (26 CFR part 601). For members of a consolidated group (as defined in § 1.1502–1(h)), the election is made by each member, in the manner set forth in proposed § 1.45X–2(d)(4)(i). In addition, if a member of a consolidated group sells eligible components to another member of the group, the selling member may make the Related Person Election to claim the section 45X credit in the taxable year of sale. Proposed § 1.45X–2(d)(1) would also provide that as a condition of, and prior to, a taxpayer making a Related Person Election, the Secretary may require such information or registration as the Secretary deems necessary for purposes of preventing duplication, fraud, or any improper or excessive credit amount determined under section 45X(a)(1).

Proposed § 1.45X–2(d)(2) would provide the time and manner for a

taxpayer to make the Related Person Election. Proposed § 1.45X–2(d)(2)(i) would state that a taxpayer must make an affirmative Related Person Election annually in the form and manner prescribed in guidance (currently Form 7207, *Advanced Manufacturing Production Credit,* and its instructions), and filed with the taxpayer's timely filed original Federal income tax return, including extensions. Proposed § 1.45X–2(d)(2)(i) would also provide that the Related Person Election will be applicable to all sales of eligible components to related persons by the taxpayer for each trade or business that the taxpayer engages in during the taxable year that resulted in a credit claim and for which the taxpayer has made the Related Person Election. Proposed § 1.45X–2(d)(2)(ii) would provide the required information to make a Related Person Election.

Proposed § 1.45X–2(d)(3) would describe the scope and effect of the Related Person Election and provide that a separate Related Person Election must be made with respect to related person sales made by a taxpayer in each eligible trade or business of the taxpayer. Proposed § 1.45X–2(d)(3) would also provide that a Related Person Election applies to all sales to related persons (including between members of the same consolidated group, notwithstanding the rules provided in § 1.1502–13) of eligible components produced by the taxpayer during the taxable year for which that election is made and is irrevocable for that taxable year. Additionally, proposed § 1.45X–2(d)(3) would provide that a Related Person Election applies solely for purposes of the section 45X credit, the provisions of proposed §§ 1.45X–1 through 1.45X–4, and so much of sections 6417 and 6418 and the regulations under sections 6417 and 6418 related to the section 45X credit.

Proposed § 1.45X–2(d)(3)(ii) and (iii) would apply the provisions of proposed § 1.45X–2(d)(2) and (d)(3)(i) to consolidated groups and partnerships. Proposed § 1.45X–2(d)(3)(ii) would apply the provisions of proposed § 1.45X–2(d)(2) and (d)(3)(i) to consolidated groups by providing that for a trade or business of a consolidated group (as defined in § 1.1502–1(h)), a Related Person Election is made by the agent for the group on behalf of the member claiming the section 45X credit and filed with the group's timely filed original Federal income tax return, including extensions, with respect to each trade or business that the consolidated group conducts. *See* § 1.1502–77 (providing rules regarding the status of the common parent as agent for its members). A separate election must be filed on behalf of each member claiming the section 45X credit, and each election must include the name and employer identification number (EIN) of the agent for the group and the member on whose behalf the form is being filed.

Proposed § 1.45X–2(d)(3)(iii) would apply the provisions of proposed § 1.45X–2(d)(2) and (d)(3)(i) to partnerships by stating that an election for a partnership must be filed with the partnership's timely filed original Federal income tax return, including extensions, with respect to each trade or business that the partnership conducts. Additionally, proposed § 1.45X–2(d)(3)(iii) provides that an election by a partnership does not apply to any trade or business conducted by a partner outside the partnership.

Proposed § 1.45X–2(d)(4) would provide an anti-abuse rule for the Related Person Election that is necessary for preventing duplication, fraud, or any improper or excessive amount of the section 45X credit. This anti-abuse rule would make the Related Person Election unavailable in extraordinary cases where a taxpayer seeks to use the Related Person Election to exploit the section 45X credit in an improper and wasteful manner or sell defective components to a related person. Proposed § 1.45X–2(d)(4)(i) would provide that a Related Person Election may not be made if the taxpayer fails to provide the information required by proposed § 1.45X–2(d)(2) with respect to the relevant eligible components, the taxpayer provides information that shows such components were put to an improper use or were defective, or such components were actually put to an improper use or were defective.

Proposed § 1.45X–2(d)(4)(ii) would provide that an eligible component is put to an improper use if it is so used by the related person to which the eligible component is sold. The term ''improper use'' would mean a use that is wasteful, such as discarding, disposing of, or destroying the eligible component without putting it to a productive use.

As discussed previously, in cases in which the cost of producing certain eligible components may be less than the amount of the section 45X credit that is available, the Treasury Department and the IRS are concerned that taxpayers may have an incentive to produce such components solely for the purpose of exploiting the section 45X credit without putting such components to a productive use. In such cases, the Related Person Election would remove an important safeguard against the improper and wasteful production of eligible components that an unrelated-person-sale requirement would provide. The Treasury Department and the IRS request comments on this definition of the term ''improper use'' and whether any clarifications to its scope are necessary.

Proposed § 1.45X–2(d)(4)(iii) would provide that an eligible component is ''defective'' if it does not meet the requirements of section 45X. The Treasury Department and the IRS are concerned that the Related Person Election may be used by taxpayers to claim a credit for eligible components that are defective, not capable of being used for its intended purpose, do not meet the requirements for the section 45X credit, and therefore are not eligible for the section 45X credit. For example, a taxpayer that mass produces a large quantity of an eligible component may find that some of those components are defective, cannot be used for its intended purposes, and are not eligible for the section 45X. Such components could also be difficult to sell to an unrelated person because they are defective. In such cases, the Related Person Election would remove an important safeguard against improper credit claims for defective components that an unrelated-person-sale requirement would provide. The Treasury Department and the IRS request comments on the definition of the term ''defective components'' and whether clarifications to its scope are necessary.

D. Related Person Sale of Integrated Components

Section 45X(d)(4) provides that for purposes of section 45X, a person is treated as having sold an eligible component to an unrelated person if such component is integrated, incorporated, or assembled into another eligible component that is sold to an unrelated person. See part II.F of this Explanation of Provisions for rules applicable to eligible components that are integrated, incorporated or assembled into other eligible components and sold to an unrelated person.

Proposed § 1.45X–2(e)(1) would provide that a taxpayer that produces and then sells an eligible component to a related person who then integrates, incorporates, or assembles the taxpayer's eligible component into another complete and distinct eligible component that is subsequently sold to an unrelated person may claim a section 45X credit in the taxable year of the sale to the unrelated person. Proposed

§ 1.45X–2(e)(2) would provide examples to illustrate the treatment of sales of multiple incorporated eligible components to related and unrelated persons if the taxpayer makes the Related Person Election.

Proposed § 1.45X–2(e)(3)(i) would provide that if a taxpayer makes the Related Person Election and produces and sells an eligible component to a related person who then integrates, incorporates, or assembles the taxpayer's eligible component into another complete and distinct eligible component that is subsequently sold to an unrelated person, the taxpayer's sale of the eligible component to the related person would be treated as if made to an unrelated person in the taxable year in which the sale to the related person occurs. Proposed § 1.45X–2(e)(3)(ii) would provide an example to illustrate the treatment of sales of multiple integrated eligible components to related and unrelated persons with a Related Person Election.

IV. Eligible Components

For solar energy components, wind energy components, inverters, and qualifying battery components, proposed § 1.45X–3 would provide definitions, rules for determining the credit amount, and documentation requirements. Proposed § 1.45X–3 would also provide rules for applying the phase out of the section 45X credit. Proposed § 1.45X–4 would provide such information for applicable critical minerals (other than rules for applying the phase out which do not apply to applicable critical minerals).

A. Eligible Components Generally

Proposed § 1.45X–3(a) defines the term ''eligible component'' as any solar energy component, any wind energy component, any inverter, any qualifying battery component, and any applicable critical mineral.

B. Solar

Proposed § 1.45X–3(b) would define the term ''solar energy component'' as a solar module, photovoltaic cell, photovoltaic wafer, solar grade polysilicon, torque tube, structural fastener, or polymeric backsheet. Proposed § 1.45X–3(b) would clarify the definition of each type of solar energy component.

Proposed § 1.45X–3(b) would also clarify the calculation of the credit amount for each type of solar energy component. Proposed § 1.45X–3(b)(1)(ii) and (b)(5)(ii) would require the capacity of a solar module or photovoltaic cell to be determined by the nameplate capacity in direct current watts using Standard Test Conditions, as defined by the International Electrotechnical Commission.

Proposed § 1.45X–3(b) would also require taxpayers to maintain specific documentation with respect to certain solar energy components. For example, for structural fasteners to be eligible for the section 45X credit, section 45X(c)(3)(B)(vii)(II) provides that structural fasteners must be used (1) to connect the mechanical and drive system components of a solar tracker to the foundation of such solar tracker, (2) to connect torque tubes to drive assemblies, or (3) to connect segments of torque tubes to one another. Proposed § 1.45X–3(b)(8)(iii) would require taxpayers to document that a structural fastener meets this use requirement with a bill of sale, or other similar documentation that explicitly describes such use. Proposed § 1.45X–3(b)(7)(iii) would apply similar documentation rules to torque tubes because section 45X(c)(3)(B)(vii)(I)(aa) requires a torque tube to be ''part of a solar tracker'' to be eligible for the section 45X credit.

C. Wind

Proposed § 1.45X–3(c) would define the term ''wind energy component'' as a blade, nacelle, tower, offshore wind foundation, or related offshore wind vessel. Proposed § 1.45X–3(c) would clarify the definition of each type of wind energy component.

Proposed § 1.45X–3(c)(4)(i) would clarify the definition of the term ''related offshore wind vessel.'' Section 45X(c)(4)(B)(iv) defines the term ''related offshore wind vessel'' as any vessel that is purpose-built or retrofitted for purposes of the development, transport, installation, operation, or maintenance of offshore wind energy components. Proposed § 1.45X–3(c)(4)(i) would clarify that a vessel is purpose-built for development, transport, installation, operation, or maintenance of offshore wind energy components if it is built to be capable of performing such functions and it is of a type that is commonly used in the offshore wind industry. Proposed § 1.45X–3(c)(4)(i) would further clarify that a vessel is retrofitted for development, transport, installation, operation, or maintenance of offshore wind energy components if such vessel was incapable of performing such functions prior to being retrofitted, the retrofit causes the vessel to be capable of performing such functions, and the retrofitted vessel is of a type that is commonly used in the offshore wind industry.

Proposed § 1.45X–3(c) would also clarify the calculation of the credit amount for each type of wind energy component. The credit amount for a blade, nacelle, tower, or offshore wind foundation is based on the total rated capacity of the completed wind turbine for which such component is designed. Proposed § 1.45X–3(c)(6) would define ''total rated capacity of the completed wind turbine'' as, for the completed wind turbine for which a blade, nacelle, offshore wind foundation, or tower was manufactured and sold, the nameplate capacity at the time of sale as certified to the relevant national or international standards, such as International Electrotechnical Commission (IEC) 61400, or ANSI/ACP 101–1–2021, the Small Wind Turbine Standard. Certification of the turbine to such standards must be documented by a certificate issued by an accredited certification body. The total rated capacity of a wind turbine must be expressed in watts.

For a related offshore wind vessel, the credit amount is equal to 10 percent of the sales price of the vessel. The sales price of the vessel does not include the price of maintenance or other services that may be sold with the vessel. Proposed § 1.45X–3(c)(4)(ii) would confirm that, for a related offshore wind vessel with respect to which a Related Person Election (as discussed in part III.C of this Explanation of Provisions) has been made, the effect of the election is limited to allowing the related person sale to qualify for a credit under section 45X (despite the fact that it is not actually between unrelated persons) and, therefore, the election does not also treat the sale price as an arm's length price that was determined between uncontrolled taxpayers for purposes of section 482 of the Code and the regulations thereunder.

For blades, nacelles, offshore wind foundations, or towers, proposed § 1.45X–3(c)(7) would require a taxpayer to document the turbine model for which such component is designed and the total rated capacity of the completed wind turbine in technical documentation associated with the sale of such component.

D. Inverters

Proposed § 1.45X–3(d) would define the term ''inverter'' as an end product that is suitable to convert DC electricity from one or more solar modules or certified distributed wind energy systems into AC electricity. An end product is suitable to convert DC electricity from one or more solar modules or certified distributed wind energy systems into AC electricity if, in the form sold by the manufacturer, it is able to connect with such modules or systems and convert DC electricity to

AC electricity from such connected source. For purposes of section 45X, the term inverter includes a central inverter, commercial inverter, distributed wind inverter, microinverter, or residential inverter. Proposed § 1.45X–3(d) would clarify the definition of each of these types of inverters.

Section 45X(c)(2) requires certain types of inverters be ''suitable to'' or ''suitable for'' a statutorily required use or application to be considered an eligible component. For example, section 45X(c)(2)(B) requires a central inverter to be ''suitable for large utility-scale systems.'' Proposed § 1.45X–3(d)(2)(i) would clarify that an inverter is suitable for large utility-scale systems if, in the form sold by the manufacturer, it is capable of serving as a component in a large utility-scale system and meets the core engineering specifications for such application.

Proposed § 1.45X–3(d)(5) would clarify that a direct current optimized inverter system (DC optimized inverter system) may qualify as a microinverter. Proposed § 1.45X–3(d)(5)(i) would define a microinverter as an inverter that is suitable to connect with one solar module, has a rated output of 120 or 240 volt single-phase power, or 208 or 480 volt three-phase power, and has a capacity, expressed on an AC watt basis, that is not greater than 650 watts. Proposed § 1.45X–3(d)(5)(iii)(A) would clarify that an inverter is suitable to connect to one solar module if, in the form sold by the manufacturer, it is capable of connecting to one or more solar modules and regulating the DC electricity from each module independently before that electricity is converted into alternating current electricity. Proposed § 1.45X–3(d)(5)(iii)(B) would provide that a DC optimized inverter system is an inverter that is comprised of an inverter connected to multiple DC optimizers that are each designed to connect to one solar module.

Proposed § 1.45X–3(d)(5)(iv)(B) would clarify how to determine the credit amount for a DC optimized inverter system that qualifies as a microinverter. For a DC optimized inverter system to qualify as a microinverter, the inverter must meet the requirements of section 45X(c)(2)(E) and a taxpayer must produce and sell the inverter and the DC optimizers in the DC optimized inverter system together as a single end product.

Proposed § 1.45X–3(d)(5) would clarify that, similar to a DC optimized inverter system, a multi-module inverter may also qualify as a microinverter. The term ''multi-module inverter'' means an inverter that is comprised of an inverter with independent connections and DC optimizing components for two or more modules. Proposed § 1.45X–3(d)(5)(iv)(C) would provide that the credit amount for a multi-module inverter that qualifies as a microinverter is equal to the product of 11 cents multiplied by the total alternating current capacity of the DC optimizers in the multi-module inverter when paired with the inverter in the multi-module inverter.

Proposed § 1.45X–3(d) would also clarify the calculation of the credit amount for each type of inverter. In general, the credit amount for each type of inverter would be equal to the product of the inverter's total rated capacity and the amount prescribed in section 45X(b)(2)(B) for such inverter.

Proposed § 1.45X–3(d) would generally require taxpayers to document whether an inverter is suitable to or suitable for a statutorily required use or application, the inverter's rated output, and the inverter's capacity, as applicable, in a specification sheet, bill of sale, or other similar documentation.

E. Battery Components

Proposed § 1.45X–3(e)(1) would define the term ''qualifying battery component'' as electrode active materials, battery cells, or battery modules. Proposed § 1.45X–3(e)(2)(i)(A) would define the term ''electrode active materials'' to include cathode electrode materials, anode electrode materials, and electrochemically active materials that contribute to the electrochemical processes necessary for energy storage. In general, electrode active materials are materials that are capable of being used within a battery for energy storage. Proposed § 1.45X–3(e)(2)(i)(A) would also provide that the following materials in a battery or vehicle would not qualify for the section 45X credit as an electrode active material: battery management systems, terminal assemblies, cell containments, gas release valves, module containments, module connectors, compression plates, straps, pack terminals, bus bars, thermal management systems, and pack jackets.

Proposed § 1.45X–3(e)(2)(i)(B) would define ''cathode electrode materials'' to mean the materials that comprise the cathode of a commercial battery technology, such as binders, and current collectors (that is, cathode foils). Proposed § 1.45X–3(e)(2)(i)(C) would define ''anode electrode materials'' to mean the materials that comprise the anode of a commercial battery technology, including anode foils. Proposed § 1.45X–3(e)(2)(i)(D) would define ''electrochemically active materials that contribute to the electrochemical processes necessary for energy storage'' to mean the battery-grade materials that enable the electrochemical storage within a commercial battery technology. In addition to the list of electrochemically active materials provided in section 45X(c)(5)(B)(i) (solvents, additives, and electrolytic salts), these may include electrolytes, catholytes, anolytes, separators, and metal salts and oxides. Proposed § 1.45X–3(e)(2)(i)(E) would also include an example illustrating this concept. Proposed § 1.45X–3(e)(2)(i)(F) would define ''battery-grade materials'' to mean the processed materials found in a final battery cell or an analogous unit, or the direct battery-grade precursors to those processed materials.

Proposed § 1.45X–3(e)(2)(v) would clarify that a taxpayer may claim only one section 45X credit with respect to a material that qualifies as both an electrode active material and an applicable critical mineral.

F. Production Costs Incurred

Proposed § 1.45X–3(e)(2)(ii) would provide that for an electrode active material the credit amount is equal to 10 percent of the costs incurred by the taxpayer with respect to production of such materials. Proposed § 1.45X–3(e)(2)(iii) would also provide the definition of purified and converted with respect to electrode active materials. Proposed § 1.45X–3(e)(2)(iv) would clarify that the costs incurred for purposes of determining the credit amount includes costs as defined in § 1.263A–1(e) that are paid or incurred within the meaning of section 461 of the Code by the taxpayer for the production of an electrode active material only. Thus, production costs with respect to an electrode active material would not include any costs incurred after the production of the electrode active material. For example, the costs to incorporate the electrode active material into a battery component would not be taken into account as costs incurred in producing the electrode active material. These proposed regulations apply section 263A and the regulations under section 263A (section 263A regulations) solely to identify the types of costs that are includible in production costs incurred for purposes of computing the amount of the section 45X credit, but do not apply section 263A or the section 263A regulations for any other purposes, such as to determine whether a taxpayer is engaged in production activities.

Direct material costs as defined in § 1.263A–1(e)(2)(i)(A), or indirect material costs as defined in § 1.263A–1(e)(3)(ii)(E), and any costs related to the extraction or acquisition of raw

materials would not be taken into account as production costs. A wide range of costs that are attributable to the production of an electrode active material would be taken into account as a cost incurred in producing the electrode active material, including, but not limited to, labor, electricity used in the production of the electrode active material, storage costs, depreciation or amortization, recycling, and overhead. However, the cost of acquiring the raw material used to produce the electrode active material, the cost of materials used for conversion, purification, or recycling of the raw material, and other material costs related to the production of the electrode active material would not be taken into account.

The Treasury Department and the IRS seek to appropriately provide a credit for the costs associated with production activities that add value to the electrode active material and are conducted by the taxpayer that produces the electrode active material. Merely purchasing raw materials may enable a taxpayer to produce an electrode active material but it is not by itself an activity that adds value. Excluding material costs would also mitigate the risk of crediting the same costs multiple times. For example, if material costs are included in production costs for electrode active materials, the costs of producing an applicable critical mineral that is later incorporated into an electrode active material could be credited more than once, and such material costs could make up a significant share of the cost of producing the electrode active material.

The Treasury Department and the IRS recognize that a wide range of costs are incurred in the production of electrode active materials. The Treasury Department and the IRS request comments on this proposed rule for determining the costs incurred with respect to the production of electrode active materials, specifically whether and how extraction and other similar value-added activities in the production of raw materials used in electrode active materials should be taken into account. The Treasury Department and the IRS welcome an assessment of the magnitude of extraction costs and other direct and indirect material costs relative to the overall costs incurred in the production of an electrode active material, and the extent to which these costs are incurred by the taxpayer that also produces the electrode active material and add value to the electrode active material. The Treasury Department and the IRS also welcome comments on how extraction should be defined for this purpose, and whether it should be defined consistent with proposed § 1.30D–3(c)(8).

The Treasury Department and the IRS are considering including in production costs the costs of extraction and other similar value-added activities in the production of raw materials used in electrode active materials. However, such costs would only be included if the IRS could effectively administer such an approach and there are sufficient assurances that adopting such an approach would pose a limited risk of (i) crediting the same production costs multiple times and (ii) increasing other forms of fraud, waste, and abuse. The Treasury Department and the IRS request comments on whether and to what extent including these costs might raise such risks.

The Treasury Department and the IRS intend for the production cost incurred rules in proposed § 1.45X–3(e)(2) to apply to a credit claimant in a contract manufacturing arrangement. The Treasury Department and the IRS request comments on whether the proposed rules need further clarification or modification as applied to contract manufacturing arrangements.

G. Battery Cells and Modules

Proposed § 1.45X–3(e)(3) and (4) would provide definitions, rules for measuring capacity, and documentation requirements for battery cells and battery modules. Proposed § 1.45X–3(e)(4)(i) would define a ''battery module'' as a module, in the case of a module using battery cells, with two or more battery cells that are configured electrically, in series or parallel, to create voltage or current, as appropriate, to a specified end use, or a module with no battery cells, and, in each case, with an aggregate capacity of not less than 7 kilowatt-hours (or, in the case of a module for a hydrogen fuel cell vehicle, not less than 1 kilowatt-hour). Proposed § 1.45X–3(e)(4)(i)(A) would define a ''module using battery cells'' as a module with two or more battery cells that are configured electrically, in series or parallel, to create voltage or current (as appropriate), to a specified end use, meaning an end-use configuration of battery technologies. An end-use configuration is the product that ultimately serves a specified end use. It is the collection of interconnected cells, configured to that specific end-use and interconnected with the necessary hardware and software required to deliver the required energy and power (voltage and current) for that use. As applied to batteries commonly used in electric vehicles, proposed § 1.45X–3(e)(4)(i)(A) would permit a credit for the production and sale of the battery pack in the electric vehicle, but it would not permit a credit for the production of a module that is not the end-use configuration. The Treasury Department and the IRS request comments on this proposed interpretation of the phrase ''to a specified end use'' in section 45X(c)(5)(B)(iii)(I)(aa).

Proposed § 1.45X–3(e)(4)(i)(B) would define the term ''module with no battery cells'' as a product with a standardized manufacturing process and form that is capable of storing and dispatching useful energy, that contains an energy storage medium that remains in the module (for example, it is not consumed through combustion), and that is not a custom-built electricity generation or storage facility. This proposed definition would allow battery technologies such as flow batteries and thermal batteries to be eligible for the section 45X credit, but it would not permit technologies that do not meet this definition such as standalone fuel storage tanks or fuel tanks connected to engines or generation systems to qualify as a module with no battery cells.

Proposed § 1.45X–3(e) would clarify how capacity must be determined for battery cells and battery modules. Proposed § 1.45X–3(e)(3)(ii) would provide that taxpayers must measure the capacity of a battery cell in accordance with a national or international standard, such as IEC 60086–1 (Primary Batteries), or an equivalent standard. Taxpayers can reference the United States Advanced Battery Consortium (USABC) Battery Test Manual for additional guidance. Proposed § 1.45X–3(e)(4)(ii)(A) would provide that, for modules using battery cells, taxpayers must measure the capacity of a module using battery cells with a testing procedure that complies with a national or international standard published by a recognized standard setting organization. The capacity of a battery module using battery cells may not exceed the total capacity of the battery cells in the module. Proposed § 1.45X–3(e)(4)(ii)(B) would provide that, for modules with no battery cells, taxpayers must measure the capacity using a testing procedure that complies with a national or international standard published by a recognized standard setting organization. If no such standard applies to a type of module with no battery cells, taxpayers must measure the capacity of such module as the Secretary may prescribe in regulations or other guidance. The Treasury Department and the IRS request comments on what recognized national or international standards are currently available for measuring capacity of modules with no battery cells and

whether further guidance may be required.

H. Phase Out

Proposed § 1.45X–3(f) would provide the rules for the phase out of the section 45X credit. In the case of any eligible component that is not an applicable critical mineral and is sold after December 31, 2029, the amount of the section 45X credit determined with respect to such eligible component would be equal to the product of the amount determined under proposed § 1.45X–3 with respect to such eligible component, multiplied by the phase out percentage. Proposed § 1.45X–3(f)(2) would provide the phase out percentages. The phase out percentage would be equal to 75 percent for eligible components sold during calendar year 2030; 50 percent for eligible components sold during calendar year 2031; 25 percent for eligible components sold during calendar year 2032, and zero percent for eligible components sold after calendar year 2032. The phase out percentages would be determined based on the year the eligible component is sold rather than the year in which the eligible component is produced by the taxpayer. Proposed § 1.45X–3(f)(3) would clarify that the phase out rules described in proposed § 1.45X–3(f) do not apply to applicable critical minerals as defined in proposed § 1.45X–4(b).

V. Applicable Critical Minerals

A. In General

Section 45X(c)(6) defines applicable critical minerals that are eligible components for purposes of the section 45X credit. Congress enacted section 45X to incentivize the domestic production of eligible components, including certain applicable critical minerals, that are vital to strengthening the country's renewable energy and energy storage supply chains. In addition, Congress amended section 30D in the IRA to provide that section 30D credit eligibility and credit amount is based in part on the sourcing of applicable critical minerals contained in the battery of new clean vehicles from secure and resilient supply chains, with applicable critical minerals defined by cross-reference to section 45X(c)(6). See section 30D(d)(7)(A) and (e)(1). The Treasury Department and the IRS interpret the applicable critical minerals described in section 45X(c)(6) through this lens.

Proposed § 1.45X–4(b) adopts, with some clarifications, the definitions of applicable critical minerals provided in section 45X(c)(6). In particular, section 45X(c)(6)(N) provides that the term ''graphite'' means graphite (both natural and synthetic) that is purified to a minimum purity of 99.9 percent graphitic carbon by mass. Some stakeholders have questioned whether this definition could be interpreted to refer to a particular crystalline structure of carbon, that is, 99.9 percent carbon in a graphitic form. After consulting with experts at the Department of Energy, U.S. Geological Survey, and Department of the Interior, the Treasury Department and the IRS are unaware of a current application in the energy sector for graphite that is at least 99.9 percent carbon in the graphitic form. However, graphite that is at least 99.9 percent carbon by mass is used in electric vehicle batteries to facilitate the electrochemical processes necessary for energy storage, as well as in other energy sector applications. Consistent with the general intent of section 45X, proposed § 1.45X–4(b)(14) would clarify that the term ''99.9 percent graphitic carbon by mass'' means graphite that is 99.9 percent carbon by mass. This interpretation reflects that various forms of matter are 99.9 percent carbon, such as carbon black, so the word ''graphitic'' is providing additional clarification regarding the particular application of the carbon. This interpretation provides an incentive for the domestic production of the type of graphite that is used in the renewable energy and energy storage industry, including both synthetic and natural graphite for use in electric vehicle batteries. This interpretation also supports the secure supply chain objectives expressed by Congress in amendments to section 30D that cross-reference the section 45X definition of applicable critical minerals.

Section 45X(c)(6)(A) provides that aluminum that is converted from bauxite to a minimum purity of 99 percent alumina by mass or purified to a minimum purity of 99.9 percent aluminum by mass, qualifies as an applicable critical mineral. Some stakeholders have requested clarification whether commercial grade aluminum that is 99.7 percent aluminum by mass may qualify as an applicable critical mineral under section 45X(c)(6)(A).

Section 45X(c)(6)(A) should be interpreted in light of the dynamics of the aluminum industry and the role that critical materials like aluminum play in the renewable energy and energy storage industry. Aluminum oxide, commonly known as alumina, is a form of aluminum that is referred to in section 45X(c)(6)(A)(i). Proposed § 1.45X–4(b)(1) would interpret section 45X(c)(6)(A) to mean aluminum, including commodity-grade aluminum, described in section 45X(c)(6)(A)(i) and (ii). Proposed § 1.45X–4(b)(1) would define ''commodity-grade aluminum'' as aluminum that has been produced directly from aluminum that is described in proposed § 1.45X–4(b)(1)(i) or (ii) and is in a form that is sold on international commodity exchanges, which would include commercial grade aluminum that is 99.7 percent aluminum by mass.

Proposed § 1.45X–4(b)(1) clarifies that the term ''commodity-grade aluminum'' is limited to primary production of unwrought forms by specifying that commodity-grade aluminum must be ''produced directly'' from certain forms of aluminum. The Treasury Department and the IRS currently understand that the ability to ascertain and substantiate the process or processes used in an earlier point in the lifecycle of feedstock aluminum for secondary production is limited. Such limitations would pose significant substantiation and administrability issues if secondary production were permitted for commodity-grade aluminum under proposed § 1.45X–4(b)(1). Excluding secondary production would also avoid significant administrability challenges that would arise if the process or processes used at previous points in the lifecycle of feedstock aluminum used in secondary production had to be verified to determine eligibility for the section 45X credit.

The Treasury Department and the IRS request comments on this interpretation of section 45X(c)(6)(A).

B. Credit Amount

Section 45X(b)(1) generally provides the credit amount determined with respect to any eligible component, including any eligible component it incorporates, subject to the credit phase out provided at section 45X(b)(3). Section 45X(b)(3)(C) provides that the credit phase out does not apply with respect to any applicable critical mineral.

Section 45X(b)(1)(M) provides that in the case of any applicable critical mineral, the credit amount is an amount equal to 10 percent of the costs incurred by the taxpayer with respect to production of such mineral.

Proposed § 1.45X–4(c)(1) would provide that for an applicable critical mineral the credit amount is equal to 10 percent of the costs incurred by the taxpayer with respect to production of such materials. Proposed § 1.45X–4(c)(2) would provide definitions of production processes for applicable critical minerals. Proposed § 1.45X–1(c)(2)(i)

would provide that for purposes of section 45X, the term ''conversion'' means a chemical transformation from one species to another. Proposed § 1.45X–1(c)(2)(ii) would provide that for purposes of section 45X, the term ''*purification*'' means increasing the mass fraction of a certain element.

C. Production Costs Incurred

Proposed § 1.45X–4(c)(3) would clarify that the costs incurred for purposes of determining the credit amount includes costs as defined in § 1.263A–1(e) that are paid or incurred within the meaning of section 461 of the Code by the taxpayer for the production of an applicable critical mineral only. Thus, production costs with respect to an applicable critical mineral would not include any costs incurred after the production of the applicable critical mineral. For example, the costs to incorporate the applicable critical mineral into another product would not be taken into account as costs incurred in producing the applicable critical mineral. These proposed regulations apply section 263A and the section 263A regulations solely to identify the types of costs that are includible in production costs incurred for purposes of computing the credit amount, but do not apply section 263A or the section 263A regulations for any other purposes, such as to determine whether a taxpayer is engaged in production activities.

Direct or indirect materials costs as defined in § 1.263A–1(e)(2)(i)(A) and (e)(3)(ii)(E), respectively, and any costs related to the extraction or acquisition of raw materials would not be taken into account as production costs. A wide range of costs that are attributable to the production of an applicable critical mineral would be taken into account as a cost incurred in producing the applicable critical mineral, including, but not limited to, labor, electricity used in the production of the applicable critical mineral, storage costs, depreciation or amortization, recycling, and overhead. However, the cost of acquiring the raw material used to produce the applicable critical mineral, the cost of materials used for conversion, purification, or recycling of the raw material, and other material costs related to the production of the applicable critical mineral would not be taken into account.

The Treasury Department and the IRS seek to appropriately provide a credit for the costs associated with production activities that add value to the applicable critical mineral and are conducted by the taxpayer that produces the applicable critical mineral. Merely purchasing raw materials may enable a taxpayer to produce an applicable critical mineral but it is not by itself an activity that adds value. Excluding material costs would also mitigate the risk of crediting the same costs multiple times. For example, if material costs are included in production costs for an applicable critical mineral, the costs of producing an applicable critical mineral that is later incorporated into another applicable critical mineral could be credited more than once, and such material costs could make up a significant share of the cost of producing the applicable critical mineral. This might be the case if, for instance, Taxpayer 1 produces Applicable Critical Mineral 1 and then sells it to Taxpayer 2 who uses it to create Applicable Critical Mineral 2. The cost of producing Applicable Critical Mineral 1 would be credited twice if material costs are included in production costs, once by Taxpayer 1 for the initial production of Applicable Critical Mineral 1 and then again by Taxpayer 2 because Taxpayer 2 would include its cost of purchasing Applicable Critical Mineral 1 in its production costs for Applicable Critical Mineral 2.

The Treasury Department and the IRS recognize that a wide range of costs are incurred in the production of applicable critical minerals. The Treasury Department and the IRS request comments on this proposed rule for determining the costs incurred with respect to the production of applicable critical minerals, specifically whether and how extraction and other similar value-added activities in the production of raw materials used in applicable critical minerals should be taken into account. The Treasury Department and the IRS welcome an assessment of the magnitude of extraction costs and other direct and indirect material costs relative to the overall costs incurred in the production of an applicable critical mineral, and the extent to which these costs are incurred by the taxpayer that also produces the applicable critical mineral and add value to the applicable critical mineral. The Treasury Department and the IRS also welcome comments on how extraction should be defined, and whether it should be defined consistent with proposed § 1.30D–3(c)(8).

The Treasury Department and the IRS are considering including in production costs the costs of extraction and other similar value-added activities in the production of raw materials used in applicable critical minerals. However, such costs would only be included if the IRS could effectively administer such an approach and there are sufficient assurances that adopting such an approach would pose a limited risk of (i) crediting the same production costs multiple times and (ii) increasing other forms of fraud, waste, and abuse. The Treasury Department and the IRS request comments on whether and to what extent including these costs might raise such risks.

Proposed § 1.45X–4(c)(3) would also provide that the rules regarding ownership and property produced under a contract with a taxpayer under § 1.263A–2(a)(1)(ii) that are used to determine whether a taxpayer is engaged in production or resale activities for purposes of section 263A do not apply for purposes of determining the taxpayer that is engaged in production activities for purposes of section 45X and the section 45X regulations.

D. Substantiation

Proposed § 1.45X–4(c)(4) would require the taxpayer to document that their product meets the criteria for an applicable critical mineral as described in section 45X(c)(6) with a certificate of analysis (COA) provided by the taxpayer to the person to which the taxpayer sold the applicable critical mineral. The Treasury Department and the IRS request comments on this substantiation requirement, including whether a similar requirement should be applied to electrode active materials.

VI. Substantiation Required Under Section 6001

Section 6001 of the Code provides that every person liable for any tax imposed by the Code, or for the collection thereof, must keep such records as the Secretary may from time to time prescribe. Section 1.6001–1(a) provides that any person subject to income tax must keep such permanent books of account or records as are sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax. Section 1.6001–1(e) provides that the books and records required by § 1.6001–1 must be retained so long as the contents thereof may become material in the administration of any internal revenue law. Various provisions under proposed §§ 1.45X–1 through 1.45X–4 would require taxpayers to maintain specific documentation regarding certain eligible components that are produced by a taxpayer. These requirements would be part of the general recordkeeping requirements

under section 6001 and the regulations under section 6001.

Severability

If any provision in this proposed rulemaking is held to be invalid or unenforceable facially, or as applied to any person or circumstance, it shall be severable from the remainder of this rulemaking, and shall not affect the remainder thereof, or the application of the provision to other persons not similarly situated or to other dissimilar circumstances.

Effect on Other Documents

Section 5.05 of Notice 2023–18 and section 3 of Notice 2023–44, which relate to the interaction between sections 45X and 48C, will be superseded upon the publication in the **Federal Register** of a Treasury Decision addressing the interaction between sections 45X and 48C.

Proposed Applicability Dates

Each of proposed §§ 1.45X–1 through 1.45X–4 is proposed to apply to eligible components for which production is completed and sales occur after December 31, 2022, and during taxable years ending on or after the date of publication of the final regulations in the **Federal Register**.

Special Analyses

I. Regulatory Planning and Review—Economic Analysis

Pursuant to the Memorandum of Agreement, Review of Treasury Regulations under Executive Order 12866 (June 9, 2023), tax regulatory actions issued by the IRS are not subject to the requirements of section 6 of Executive Order 12866, as amended. Therefore, a regulatory impact assessment is not required.

II. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (PRA) generally requires that a Federal agency obtain the approval of the Office of Management and Budget (OMB) before collecting information from the public, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit. The collections of information in these proposed regulations contain reporting and recordkeeping requirements that are required to validate eligibility to claim a section 45X credit. These collections of information would generally be used by the IRS for tax compliance purposes and by taxpayers to facilitate proper reporting and compliance. The general recordkeeping requirements mentioned within these proposed regulations are considered general tax records under § 1.6001–1(e). Specific certification statements under § 1.45X–1(c)(3) are considered general tax records and are required for the IRS to validate the taxpayer that may claim a section 45X credit. For PRA purposes, general tax records are already approved by OMB under 1545–0074 for individuals, 1545–0123 for business entities, and under 1545–0092 for trust and estate filers.

These proposed regulations also provide reporting requirements related to making the Related Person Election as described in § 1.45X–2(d) and calculating the section 45X credit amount as described in § 1.45X–1. The Related Person Election will be made by taxpayers with Forms 1040, 1041, 1120–S, 1065, and 1120, on Form 7207 (or any successor forms); and credit calculations will be made on Form 3800 and supporting forms including Form 7207 (and any successor forms). These forms are approved under 1545–0074 for individuals, 1545–0123 for business entities, 1545–2306 for trust and estate filers of Form 7207, and 1545–0895 for trust and estate filers of Form 3800. These proposed regulations are not changing or creating new collection requirements not already approved by OMB or will be approved under 5 CFR 1320.10 by OMB.

III. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a proposal is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires the agency to present an initial regulatory flexibility analysis (IRFA) of the proposed rule. The Treasury Department and the IRS have not determined whether the proposed rule, when finalized, will likely have a significant economic impact on a substantial number of small entities. This determination requires further study. However, because there is a possibility of significant economic impact on a substantial number of small entities, an IRFA is provided in these proposed regulations. The Treasury Department and the IRS invite comments on both the number of entities affected and the economic impact on small entities.

Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel of the Office of Advocacy of the Small Business Administration for comment on its impact on small business.

A. Need for and Objectives of the Rule

The proposed regulations would provide greater clarity to taxpayers that intend to claim a section 45X credit. The proposed regulations would provide necessary definitions, the time and manner to make the Related Person Election and rules regarding the determination of credit amounts. The Treasury Department and the IRS intend and expect that giving taxpayers guidance that allows them to claim the section 45X credit will beneficially impact various industries. In particular, the section 45X credit encourages the domestic production of eligible components and incentivizes taxpayers to invest in clean energy projects that generate eligible credits.

B. Affected Small Entities

The RFA directs agencies to provide a description of, and if feasible, an estimate of, the number of small entities that may be affected by the proposed rules, if adopted. The Small Business Administration's Office of Advocacy estimates in its 2023 Frequently Asked Questions that 99.9 percent of American businesses meet its definition of a small business. The applicability of these proposed regulations does not depend on the size of the business, as defined by the Small Business Administration.

As described more fully in the preamble to this proposed regulation and in this IRFA, section 45X and these proposed regulations may affect a variety of different entities across several different clean energy industries as multiple types of eligible components are provided for under the statute and manufacturers may produce more than one type. Although there is uncertainty as to the exact number of small businesses within this group, the current estimated number of respondents to these proposed rules is 13,450 taxpayers. The estimated total annual reporting burden and estimated average annual burden per respondent will be computed when Form 7207 and the instructions to Form 7207 are updated to reflect these proposed regulations.

The Treasury Department and the IRS expect to receive more information on the impact on small businesses through comments on this proposed rule and after taxpayers start to claim the section 45X credit using the guidance and

procedures provided in these proposed regulations.

C. Impact of the Rules

The proposed regulations provide rules for how taxpayers can claim the section 45X credit. Taxpayers that claim the section 45X credit will have administrative costs related to reading and understanding the rules as well as recordkeeping and reporting requirements because of the Related Person Election, computation of the section 45X credit and tax return requirements. The costs will vary across different-sized entities and across the type of production activities in which such entities are engaged.

The Related Person Election allows a taxpayer to make an irrevocable election annually with their Federal income tax return by providing the information required on Form 7207 (or any successor form), including, for example, the name, EIN of the taxpayer; a description of the taxpayer's trade or business; the name, address and EINs of all related persons; a list of the eligible components that are sold, and the intended purpose of the eligible components sold by the related person. To make the Related Person Election and claim the section 45X credit, the taxpayer must file an annual Federal income tax return. The reporting and recordkeeping requirements for that Federal income tax return would be required for any taxpayer that is claiming a general business credit, regardless of whether the taxpayer was making a Related Person Election under section 45X.

D. Alternatives Considered

The Treasury Department and the IRS considered alternatives to the proposed regulations. For example, the Treasury Department and the IRS considered whether to impose certain pre-return filing requirements as a condition of making the Related Person Election as authorized in section 45X(a)(3)(B)(ii) to prevent duplication, fraud, or improper or excessive credits. The proposed regulations were designed to minimize burdens for taxpayers while ensuring that the IRS has sufficient information to determine eligibility for the section 45X credit. The Treasury Department and the IRS determined that requiring registration before a taxpayer makes the Related Person Election is unnecessary at this time. The proposed regulations would allow taxpayers to make an irrevocable Related Person Election annually with their Federal income tax return by providing the information required on Form 7207 (or any successor form), which would provide the IRS with sufficient information to assist in preventing duplication, fraud, or the claiming of improper or excessive credits if eligible components are produced and then sold to related persons.

Comments are requested on the requirements in the proposed regulations, including specifically, whether there are less burdensome alternatives that ensure the IRS has sufficient information to administer the advanced manufacturing production credit.

E. Duplicative, Overlapping, or Conflicting Federal Rules

The proposed rule would not duplicate, overlap, or conflict with any relevant Federal rules. As discussed above, the proposed rule would merely provide procedures and definitions to allow taxpayers to claim the section 45X credit. The Treasury Department and the IRS invite input from interested members of the public about identifying and avoiding overlapping, duplicative, or conflicting requirements.

IV. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a State, local, or Indian Tribal government, in the aggregate, or by the private sector, of $100 million (updated annually for inflation). This proposed rule does not include any Federal mandate that may result in expenditures by State, local, or Indian Tribal governments, or by the private sector in excess of that threshold.

V. Executive Order 13132: Federalism

Executive Order 13132 (Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on State and local governments, and is not required by statute, or preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. This proposed rule does not have federalism implications and does not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of the Executive order.

VI. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments) prohibits an agency from publishing any rule that has Tribal implications if the rule either imposes substantial, direct compliance costs on Indian Tribal governments, and is not required by statute, or preempts Tribal law, unless the agency meets the consultation and funding requirements of section 5 of the Executive order. This proposed rule does not have substantial direct effects on one or more federally recognized Indian tribes and does not impose substantial direct compliance costs on Indian Tribal governments within the meaning of the Executive order.

Comments and Public Hearing

Before these proposed amendments to the regulations are adopted as final regulations, consideration will be given to comments regarding the notice of proposed rulemaking that are submitted timely to the IRS as prescribed in this preamble under the **ADDRESSES** section. The Treasury Department and the IRS request comments on all aspects of the proposed regulations. All comments will be made available at *https://www.regulations.gov.* Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn.

A public hearing with respect to this notice of proposed rulemaking has been scheduled for February 22, 2024, beginning at 10 a.m. ET, in the Auditorium at the Internal Revenue Building, 1111 Constitution Avenue NW, Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. Participants may alternatively attend the public hearing by telephone.

The rules of 26 CFR 601.601(a)(3) apply to the public hearing. Persons who wish to present oral comments at the public hearing must submit an outline of the topics to be discussed and the time to be devoted to each topic by February 13, 2024. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of

charge at the public hearing. If no outline of the topics to be discussed at the public hearing is received by February 13, 2024, the public hearing will be cancelled. If the public hearing is cancelled, a notice of cancellation of the public hearing will be published in the **Federal Register**.

Individuals who want to testify in person at the public hearing must send an email to *publichearings@irs.gov* to have your name added to the building access list. The subject line of the email must contain the regulation number REG–107423–23 and the language TESTIFY In Person. For example, the subject line may say: Request to TESTIFY In Person at Hearing for REG–107423–23.

Individuals who want to testify by telephone at the public hearing must send an email to *publichearings@irs.gov* to receive the telephone number and access code for the public hearing. The subject line of the email must contain the regulation number REG–107423–23 and the language TESTIFY Telephonically. For example, the subject line may say: Request to TESTIFY Telephonically at Hearing for REG–107423–23.

Individuals who want to attend the public hearing in person without testifying must also send an email to *publichearings@irs.gov* to have your name added to the building access list. The subject line of the email must contain the regulation number REG–107423–23 and the language ATTEND In Person. For example, the subject line may say: Request to ATTEND Hearing In Person for REG–107423–23. Requests to attend the public hearing must be received by 5 p.m. ET on February 20, 2024.

Individuals who want to attend the public hearing by telephone without testifying must also send an email to *publichearings@irs.gov* to receive the telephone number and access code for the public hearing. The subject line of the email must contain the regulation number REG–107423–23 and the language ATTEND Hearing Telephonically. For example, the subject line may say: Request to ATTEND Hearing Telephonically for REG–107423–23. Requests to attend the public hearing must be received by 5 p.m. ET on February 20, 2024.

Public hearings will be made accessible to people with disabilities. To request special assistance during a public hearing please contact the Publications and Regulations Branch of the Office of Associate Chief Counsel (Procedure and Administration) by sending an email to *publichearings@irs.gov (preferred)* or by telephone at (202) 317–6901 (not a toll-free number) and must be received by 5 p.m. ET on February 16, 2024.

Statement of Availability of IRS Documents

Guidance cited in this preamble is published in the Internal Revenue Bulletin and is available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at *https://www.irs.gov.*

Drafting Information

The principal authors of these proposed regulations are Mindy Chou, John Deininger and Alexander Scott, Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, the Treasury Department and the IRS propose to amend 26 CFR part 1 as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding entries in numerical order for §§ 1.45X–1 through 1.45X–4 to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.45X–1 also issued under 26 U.S.C. 45X.

Section 1.45X–2 also issued under 26 U.S.C. 45X(b) and (d) and 1502.

Section 1.45X–3 also issued under 26 U.S.C. 45X(b) and (c).

Section 1.45X–4 also issued under 26 U.S.C. 45X(b) and (c).

* * * * *

■ **Par. 2.** Sections 1.45X–0 through 1.45X–4 are added to read as follows:

Sec.

* * * * *

1.45X–0 Table of contents.

1.45X–1 General rules applicable to the advanced manufacturing production credit.

1.45X–2 Sale to unrelated person.

1.45X–3 Eligible components.

1.45X–4 Applicable critical minerals.

* * * * *

§ 1.45X–0 Table of contents.

This section lists the captions contained in §§ 1.45X–1 through 1.45X–4.

§ 1.45X–1 General rules applicable to the advanced manufacturing production credit.

(a) Overview.
(b) Credit amount.
(c) Definition of produced by the taxpayer.
(d) Produced in the United States.
(e) Production and sale in a trade or business.
(f) Sale of integrated components.
(g) Interaction between sections 45X and 48C.
(h) [Reserved]
(i) Anti-abuse rule.
(j) Severability.
(k) Applicability date.

§ 1.45X–2 Sale to unrelated person.

(a) In general.
(b) Definitions.
(c) Special rule for sale to related person.
(d) Related person election.
(e) Sales of integrated components to related person.
(f) Severability.
(g) Applicability date.

§ 1.45X–3 Eligible components.

(a) In general.
(b) Solar energy components.
(c) Wind energy components.
(d) Inverters.
(e) Qualifying battery component.
(f) Phase out rule.
(g) Severability.
(h) Applicability date.

§ 1.45X–4 Applicable critical minerals.

(a) In general.
(b) Definitions.
(c) Credit amount.
(d) Severability.
(e) Applicability date.

§ 1.45X–1 General rules applicable to the advanced manufacturing production credit.

(a) *Overview*—(1) *In general.* This section provides general rules regarding the advanced manufacturing production credit determined under section 45X of the Code (section 45X credit). Paragraph (a)(2) of this section provides definitions of certain terms that apply for purposes of section 45X and the section 45X regulations (defined in paragraph (a)(2)(xiv) of this section). Paragraphs (b) through (j) of this section provide the basic rules regarding the section 45X credit, including the definition of the term *produced by the taxpayer,* and rules to determine the taxpayer that produces an eligible component and whether such taxpayer is entitled to claim a section 45X credit in contract manufacturing arrangements; where the production of eligible components must occur; the treatment of integrated, incorporated or assembled eligible components; and the interaction between sections 45X and 48C of the Code. *See* § 1.45X–2 for rules regarding sales to unrelated persons, sales to related persons, and the Related Person Election, including rules regarding the time, place, and manner of making the

Related Person Election. *See* § 1.45X–3 for the definitions of all eligible components (except applicable critical minerals) and the credit amounts available for each of these eligible components, including certain phase-out percentages. *See* § 1.45X–4 for the definitions of applicable critical minerals and the rules regarding the determination of the credit amount for applicable critical minerals.

(2) *Generally applicable definitions.* This paragraph (a)(2) provides definitions of terms that apply for purposes of section 45X and the section 45X regulations.

(i) *Applicable critical mineral.* The term *applicable critical mineral* means any of the minerals that are listed in section 45X(c)(6) and defined in § 1.45X–4(b).

(ii) *Code.* The term *Code* means the Internal Revenue Code.

(iii) *Contract manufacturing arrangement.* The term *contract manufacturing arrangement* is defined in paragraph (c)(3)(ii)(B) of this section.

(iv) *Electrode active materials.* The term *electrode active materials* is defined in § 1.45X–3(e)(2).

(v) *Eligible component.* The term *eligible component* is defined in section 45X(c)(1)(A) and described in §§ 1.45X–3 and 1.45X–4.

(vi) *Eligible taxpayer.* The term e*ligible taxpayer* is defined in paragraph (c)(3) of this section.

(vii) *Guidance.* The term *guidance* means guidance published in the **Federal Register** or Internal Revenue Bulletin, as well as administrative guidance such as forms, instructions, publications, or other guidance on the IRS.gov website. *See* §§ 601.601 and 601.602 of this chapter.

(viii) *IRA.* The term *IRA* means Public Law 117–169, commonly known as the Inflation Reduction Act of 2022.

(ix) *IRS.* The term *IRS* means the Internal Revenue Service.

(x) *Produced by the taxpayer.* The term *produced by the taxpayer* is defined in paragraph (c) of this section, and the related terms *production activities* and *production process* have the meaning given those terms in paragraph (c) of this section.

(xi) *Related person.* The term *related person* is defined in § 1.45X–2(b)(2).

(xii) *Related Person Election.* The term *Related Person Election* is defined in § 1.45X–2(d)(1).

(xiii) *Secretary.* The term *Secretary* means the Secretary of the Treasury or her delegate.

(xiv) *Section 45X regulations.* The term *section 45X regulations* means the provisions of this section, §§ 1.45X–2 through 1.45X–4, and the regulations in this chapter under sections 6417 and 6418 of the Code that relate to the section 45X credit.

(xv) *Unrelated person.* The term *unrelated person* is defined in section 45X(a)(3) and described in § 1.45X–2(b)(3).

(b) *Credit amount.* Except as otherwise provided in section 45X(b)(3) and § 1.45X–3(f), for purposes of section 38 of the Code, the amount of the section 45X credit for any taxable year is equal to the sum of the credit amounts provided under section 45X(b) and described in §§ 1.45X–3 and 1.45X–4 with respect to each eligible component that is produced by the taxpayer and, within the taxable year, sold by the taxpayer to an unrelated person. *See* § 1.45X–2 for rules regarding sales of eligible components to related persons that may be treated as if sold to unrelated persons for purposes of section 45X(a).

(c) *Definition of produced by the taxpayer*—(1) *In general.* The term *produced by the taxpayer* means a process conducted by the taxpayer that substantially transforms constituent elements, materials, or subcomponents into a complete and distinct eligible component that is functionally different from that which would result from mere assembly or superficial modification of the elements, materials, or subcomponents.

(i) *Partial transformation.* The term *produced by the taxpayer* does not include partial transformation that does not result in substantial transformation of constituent elements, materials, or subcomponents into a complete and distinct eligible component as described in this paragraph (c)(1).

(ii) *Mere assembly or superficial modification.* The term *produced by the taxpayer* does not include minor assembly of two or more constituent elements, materials, or subcomponents, or superficial modification of the final eligible component, if the taxpayer does not also engage in the process resulting in a substantial transformation described in this paragraph (c)(1).

(iii) *Examples.* The following examples illustrate the application of this paragraph (c)(1).

(A) *Example 1.* Taxpayers X, Y, and Z each produce one of three sections of a wind tower that together make up the wind tower. No taxpayer has produced an eligible component within the meaning of section 45X(a)(1)(A) because no taxpayer has produced all sections of the wind tower.

(B) *Example 2.* Same facts as paragraph (c)(1)(iii)(A) of this section (*Example 1*), but taxpayers X, Y, and Z instead form Partnership XYZ. Partnership XYZ produces all three sections of the wind tower. Partnership XYZ has produced an eligible component within the meaning of section 45X(a)(1)(A).

(C) *Example 3.* Taxpayer V puts the external casing on a battery module (within the meaning of § 1.45X–3(e)(4)(i)(A)) that already had cells, battery management systems, and other components integrated into it. Taxpayer V has engaged in minor assembly and has not produced an eligible component within the meaning of section 45X(a)(1)(A).

(D) *Example 4.* Taxpayer U purchases two finished halves of a wind turbine nacelle and combines them into a single nacelle. Taxpayer U has engaged in minor assembly and has not produced an eligible component within the meaning of section 45X(a)(1)(A).

(E) *Example 5.* Taxpayer T purchases a dry cell battery and fills the electrolyte of the battery. Taxpayer T has engaged in minor assembly and has not produced an eligible component within the meaning of section 45X(a)(1)(A).

(F) *Example 6.* Taxpayer W purchases a prefabricated wind turbine blade and applies paint and finishes. Taxpayer W has engaged in superficial modification of the blade and has not produced an eligible component within the meaning of section 45X(a)(1)(A).b

(2) *Special rule for certain eligible components.* For solar grade polysilicon, electrode active materials, and applicable critical minerals, the term *produced by the taxpayer* means processing, conversion, refinement, or purification of source materials, such as brines, ores, or waste streams, to derive a distinct eligible component.

(3) *Eligible taxpayer*—(i) *In general.* Except as otherwise provided in paragraph (c)(3)(iii) of this section, a taxpayer claiming a section 45X credit with respect to an eligible component must be the taxpayer that directly performs the production activities that bring about a substantial transformation resulting in the eligible component, and must sell such eligible component to an unrelated person.

(ii) *Contract manufacturing arrangement*—(A) *In general.* If the production of an eligible component is performed in whole or in part pursuant to a contract that is a contract manufacturing arrangement, then, provided the other requirements of section 45X are met, the party to such contract that may claim the section 45X credit with respect to such eligible component is the party that performs the actual production activities that bring about a substantial transformation resulting in the eligible component.

(B) *Contract manufacturing arrangement defined.* The term *contract manufacturing arrangement* means any agreement (or agreements) providing for the production of an eligible component if the agreement is entered into before the production of the eligible component to be delivered under the contract is completed. A routine purchase order for off-the-shelf property is not treated as a contract manufacturing arrangement for purposes of this paragraph (c)(3). An agreement will be treated as a routine purchase order for off-the-shelf property if the contractor is required to make no more than de minimis modifications to the property to tailor it to the customer's specific needs, or if at the time the agreement is entered into, the contractor knows or has reason to know that the contractor can satisfy the agreement out of existing stocks or normal production of finished goods.

(iii) *Special rule for contract manufacturing arrangements.* If an eligible component is produced by a taxpayer pursuant to a contract manufacturing arrangement, the parties to such agreement may determine by agreement the party that may claim the section 45X credit. If a taxpayer enters into contract manufacturing arrangements with multiple fabricators to produce an eligible component, the parties to such agreements may determine by agreement the party that may claim the section 45X credit. The IRS will not challenge the agreement of the parties provided all the parties submit signed certification statements (as described in paragraph (c)(3)(iv) of this section) indicating that all parties agree as to the party that may claim the section 45X credit.

(iv) *Certification statement requirements.* A certification statement indicating that all parties to a contract manufacturing arrangement agree as to the party that will claim the section 45X credit must include—

(A) All required information set forth in guidance; and

(B) A properly signed penalty of perjury statement.

(v) *Examples.* The following examples illustrate the application of this paragraph (c)(3).

(A) *Example 1: Contract manufacturing with sale.* Taxpayers X, Y and Z are unrelated C corporations that have calendar year taxable years. In 2024, pursuant to a contract manufacturing arrangement as described in paragraph (c)(3)(ii)(B) of this section, X hires Y to produce a solar module. The contract is a tolling arrangement and provides that Y will produce the solar module according to X's designs and specifications and using the materials and subcomponents that X provides. X and Y enter an agreement providing that X is the sole party that may claim a section 45X credit for the production and sale of the solar module, and X and Y each sign a certification statement as described in paragraph (c)(3)(iv) of this section reflecting this agreement. In 2025, Y produces and delivers the solar module to X, and in 2026, X sells the solar module to Z. X may claim a section 45X credit in taxable year 2026 for the solar module it sold to Z provided all other requirements of section 45X are met and the certification statements signed by X and Y meet the requirements described in paragraph (c)(3)(iv) of this section and are properly submitted by X. Similarly, Y could claim a section 45X credit if the agreement between X and Y had designated Y as the sole party that could claim a section 45X credit for the production and sale of the solar module provided all other requirements of section 45X are met and the certification statements signed by X and Y meet the requirements described in paragraph (c)(3)(iv) of this section and are properly submitted by Y.

(B) *Example 2: Contract manufacturing with no sale.* Assume the facts are the same as in paragraph (c)(3)(v)(A) of this section (*Example 1*), except that X does not sell the solar module and instead X uses it to generate electricity for use in X's trade or business. Because there has been no sale, neither X nor Y may claim a section 45X credit for the solar module regardless of whether X and Y submit signed certification statements described in paragraph (c)(3)(iv) of this section.

(C) *Example 3: Multiple contract manufacturing arrangements.* Taxpayers V, W, X, Y and Z are unrelated C corporations that have calendar year taxable years. In 2024, pursuant to three separate contract manufacturing arrangements as described in paragraph (c)(3)(ii)(B) of this section, V hires W, X, and Y to produce the bottom, middle and top segments, respectively, of a single wind tower that V designed. W, X, Y and V enter into an agreement providing that V is the sole party that may claim a section 45X credit for the production and sale of the wind tower, and W, X, Y and V each sign a certification statement as described in paragraph (c)(3)(iv) of this section reflecting this agreement. In 2024, W and X both produce and deliver their respective wind tower segments to the installation site, and in 2025, Y produces and delivers its wind tower segment to the installation site. In 2026, V sells the completed wind tower to Z. V may claim a section 45X credit in taxable year 2026 for the wind tower it sold to Z provided all other requirements of section 45X are met and the certification statements signed by V, W, X and Y meet the requirements described in paragraph (c)(3)(iv) of this section and are properly submitted by V. Similarly, W or X or Y could be the party that could claim a section 45X credit if the agreement between V, W, X and Y had designated W or X or Y as the sole party that could claim a section 45X credit for the production and sale of the wind tower provided all other requirements of section 45X are met and the certification statements signed by V, W, X and Y meet the requirements described in paragraph (c)(3)(iv) of this section and are properly submitted by the party designated as the sole party that could claim a section 45X credit.

(4) *Timing of production and sale*—(i) *In general.* Production of eligible components for which a taxpayer is claiming a section 45X credit may begin before December 31, 2022. Production of eligible components must be completed, and sales of eligible components must occur, after December 31, 2022.

(ii) *Example.* Taxpayer X has a calendar year taxable year. Taxpayer X begins production of a related offshore wind vessel (as defined in section 45X(4)(B)(iv) and described in § 1.45X–3(c)(4)) in January 2022. Production is completed in December 2024 and the sale to an unrelated person occurs in 2025. Taxpayer X is eligible to claim the section 45X credit in 2025, assuming that all other requirements of section 45X are met.

(d) *Produced in the United States*—(1) *In general.* Sales are taken into account for purposes of the section 45X credit only for eligible components that are produced within the United States, as defined in section 638(1) of the Code, or a United States territory, which for purposes of section 45X and the section 45X regulations has the meaning of the term *possession* provided in section 638(2).

(2) *Subcomponents.* Constituent elements, materials, and subcomponents used in the production of eligible components are not subject to the domestic production requirement provided in paragraph (d)(1) of this section.

(e) *Production and sale in a trade or business.* An eligible component produced and sold by the taxpayer is taken into account for purposes of the section 45X credit only if the production and sale are in a trade or business (within the meaning of section 162 of the Code) of the taxpayer.

(f) *Sale of integrated components*—(1) *In general.* For purposes of the section 45X credit, section 45X(d)(4) provides that a taxpayer is treated as having produced and sold an eligible component to an unrelated person if such component is integrated, incorporated, or assembled into another eligible component that is then sold to an unrelated person.

(i) *Integrated, incorporated, or assembled.* The term *integrated, incorporated, or assembled* means the production activities by which an eligible component that is a constituent element, material, or subcomponent is substantially transformed into another complete and distinct eligible component that is not solar grade polysilicon, an electrode active material, or an applicable critical mineral. The term *integrated, incorporated, or assembled* does not mean the mere assembly or superficial modification of an eligible component used as an element, material, or subcomponent and other elements, materials, or subcomponents that results in a distinct product.

(ii) *Special rule for eligible components resulting in solar grade polysilicon, electrode active materials, or applicable critical minerals.* For solar grade polysilicon, electrode active material, and applicable critical minerals, the term *integrated, incorporated, or assembled* means the production activities in which an eligible component is processed, converted, refined, or purified to derive a distinct eligible component that is solar grade polysilicon, an electrode active material, or an applicable critical mineral. The term *integrated, incorporated,* or *assembled* does not mean mere assembly or superficial modification of an eligible component used as an element, material, or subcomponent and other elements, materials, or subcomponents that results in a distinct product.

(2) *Application*—(i) *In general.* A taxpayer may claim a section 45X credit for each eligible component the taxpayer produces and sells to an unrelated person, including any eligible component the taxpayer produces that was used as a constituent element, material, or subcomponent and integrated, incorporated, or assembled into another complete and distinct eligible component or another complete and distinct product (that is not itself an eligible component) that the taxpayer also produces and sells to an unrelated person.

(ii) *Example: Sale of product with incorporated eligible components to unrelated person.* In 2022, X, a domestic corporation that has a calendar year taxable year, begins production of electrode active materials (EAMs) that are completed in 2023 and incorporated into battery cells that X also produces. In 2024, X incorporates those battery cells into battery modules (within the meaning of § 1.45X–3(e)(4)(i)(A)) and integrates the battery modules into electric vehicles. X sells the electric vehicles to Z, an unrelated person, in 2024. X may claim a section 45X credit for the EAMs, the battery cells, and the battery modules in 2024.

(g) *Interaction between sections 45X and 48C*—(1) *In general.* For purposes of the section 45X credit, consistent with section 45X(c)(1)(B), an eligible component—

(i) Must be produced by a section 45X facility; and

(ii) Does not include any property (produced property) that is produced at a facility if the basis of any property that is part of the production unit (within the meaning of paragraph (g)(2)(ii) of this section) that produces the produced property—

(A) Is eligible property that is included in a section 48C facility; and

(B) Is taken into account for purposes of the credit allowed under section 48C (section 48C credit) after August 16, 2022.

(2) *Section 45X facility*—(i) *In general.* A *section 45X facility* includes all tangible property that comprises an independently functioning production unit that produces one or more eligible components.

(ii) *Production unit.* The production unit is the tangible property that substantially transforms the material inputs to complete the production process of an eligible component.

(3) *Section 48C facility*—(i) *In general.* A *section 48C facility* includes all eligible property included in a qualifying advanced energy project for which a taxpayer receives an allocation of section 48C credits under the allocation program established under section 48C(e) and claims such credits after August 16, 2022.

(ii) *Eligible property. Eligible property* is property that—

(A) Is necessary for the production or recycling of property described in section 48C(c)(1)(A)(i), re-equipping an industrial or manufacturing facility described in section 48C(c)(1)(A)(ii), or re-equipping, expanding, or establishing an industrial facility described in section 48C(c)(1)(A)(iii);

(B) Is tangible personal property, or other tangible property (not including a building or its structural components), but only if such property is used as an integral part of the qualified investment credit facility; and

(C) With respect to which depreciation (or amortization in lieu of depreciation) is allowable.

(4) *Examples.* The following examples illustrate the application of this paragraph (g):

(i) *Example 1: Two independent production units*—(A) *Facts.* Taxpayer owns and operates a manufacturing site that contains Production Unit A and Production Unit B, each of which function independently and are arranged in serial fashion. Photovoltaic wafers produced by Production Unit A are utilized in Production Unit B to manufacture photovoltaic cells. Taxpayer was allocated a section 48C credit under the section 48C(e) program for a section 48C facility that includes Production Unit A and subsequently placed the section 48C facility and Production Unit A in service in taxable year 2026. Taxpayer claimed a section 48C credit for Production Unit A for taxable year 2026.

(B) *Analysis.* Production Unit A is eligible property that is include in Taxpayer's section 48C facility. Therefore, Production Unit A cannot qualify as a section 45X facility under section 45X(c)(1)(B) and paragraph (g)(2) of this section. Production Unit B, however, is tangible property that comprises an independently functioning production unit that produces eligible components. Production Unit B can be treated as a section 45X facility because the tangible property comprising Production Unit B is not eligible property that is included in a section 48C facility.

(ii) *Example 2: Single production unit*—(A) *Facts.* Taxpayer owns and operates two manufacturing sites. Manufacturing Site 1 includes tangible property that forms ingots from polysilicon to partially produce photovoltaic wafers. Manufacturing Site 2 completes the production process of the photovoltaic wafers. Taxpayer was allocated a section 48C credit under the section 48C(e) program for tangible property that is used to produce the ingots at Manufacturing Site 1.

(B) *Analysis.* Manufacturing Site 1 and Manufacturing Site 2 comprise a single production unit. As a result, Taxpayer may not claim the section 45X credit for the photovoltaic wafers it produced at Manufacturing Site 1 and Manufacturing Site 2 because Taxpayer claimed the section 48C credit for the tangible property that was used to produce the ingots at Manufacturing Site 1, which is part of a single production unit.

(iii) *Example 3: Independent production units and production of subcomponent*—(A) *Facts.* Taxpayer owns and operates two manufacturing sites. Manufacturing Site 1 contains Production Unit A and Production Unit B, which are arranged in parallel fashion and each produce photovoltaic cells. Manufacturing Site 2 contains Production Unit C and Production Unit D, which are arranged in serial fashion. Production Unit C produces photovoltaic cells. Production Unit D produces solar modules, in part, by combining the photovoltaic cells produced by Production Units A, B and C. Taxpayer was allocated a section 48C credit under the section 48C(e) program for a section 48C facility that includes Production Unit C. Subsequently, Taxpayer places the section 48C facility and Production Unit C in service in taxable year 2026. Taxpayer claimed a section 48C credit for Production Unit C in taxable year 2026.

(B) *Analysis.* Production Units A and B each comprise a single production unit that produces eligible components. Production Units A and B can be treated as a section 45X facility because the tangible property comprising Production Units A and B are not eligible property that is included in a section 48C facility. Production Unit C cannot qualify as a section 45X facility under section 45X(c) because Production Unit C is eligible property that is included in a section 48C facility. Production Unit D is tangible property that comprises an independently functioning production unit that produces eligible components utilizing subcomponents produced by Taxpayer in a separate, independently functioning production unit. Therefore, Production Unit D can be treated as a section 45X facility because the tangible property comprising Production Unit D is not eligible property that is included in a section 48C facility.

(iv) *Example 4: Two independent production units manufacturing under a contract manufacturing arrangement*—(A) *Facts.* X is hired by Y to manufacture photovoltaic cells. X owns and operates a manufacturing site that contains Production Unit A and Production Unit B. Production Unit A and Production Unit B function independently and are arranged in serial fashion. Photovoltaic wafers produced by Production Unit A are utilized in Production Unit B to manufacture photovoltaic cells. X was allocated a section 48C credit under the section 48C(e) program for a section 48C facility that includes Production Unit A and subsequently placed the section 48C Facility and Production Unit A in service in taxable year 2026. X claimed a section 48C credit for Production Unit A in taxable year 2026.

(B) *Analysis.* Production Unit A is eligible property that is included in X's section 48C facility. Therefore, Production Unit A cannot qualify as a section 45X facility under section 45X(c)(1)(B) and paragraph (g)(2) of this section and X does not qualify for a section 45X credit with respect to Production Unit A. Production Unit B is, however, tangible property that comprises an independently functioning production unit that produces eligible components. Production Unit B can be treated as a section 45X facility by X, the party who produces the eligible components, because the tangible property comprising Production Unit B is not eligible property that is included in a section 48C facility.

(v) *Example 5: Two independent production units manufacturing under a contract manufacturing arrangement*—(A) *Facts.* Assume the facts are the same as in paragraph (g)(4)(iv) of this section (*Example 4*), except that Y owns Production Units A and B and hires X to operate Production Units A and B to produce the eligible components.

(B) *Analysis.* Production Unit A is eligible property that is included in Y's section 48C facility. Y claimed a section 48C credit for Production Unit A in taxable year 2026. Therefore, Production Unit A cannot qualify as a section 45X facility under section 45X(c)(1)(B) and paragraph (g)(2) of this section and X does not qualify for a section 45X credit with respect to Production Unit A. Production Unit B, however, is tangible property that comprises an independently functioning production unit that produces eligible components. Production Unit B can be treated as a section 45X facility by X (and not Y) because the tangible property comprising Production Unit B is not eligible property that is included in a section 48C facility.

(h) [Reserved]

(i) *Anti-abuse rule*—(1) *In general.* The rules of section 45X and the section 45X regulations must be applied in a manner consistent with the purposes of section 45X and the section 45X regulations (and the regulations in this chapter under sections 6417 and 6418 related to the section 45X credit). A purpose of section 45X and the section 45X regulations (and the regulations in this chapter under sections 6417 and 6418 related to the section 45X credit) is to provide taxpayers an incentive to produce eligible components in a manner that contributes to the development of secure and resilient supply chains. Accordingly, the section 45X credit is not allowable if the primary purpose of the production and sale of an eligible component is to obtain the benefit of the section 45X credit in a manner that is wasteful, such as discarding, disposing of, or destroying the eligible component without putting it to a productive use. A determination of whether the production and sale of an eligible component is inconsistent with the purposes of section 45X and the section 45X regulations (and the regulations in this chapter under sections 6417 and 6418 related to the section 45X credit) is based on all facts and circumstances.

(2) *Example*—(i) *Facts.* Taxpayer is engaged in the activity of producing and selling multiple units of Eligible Component 1 (EC1). Taxpayer engages in no other activities. The cost of producing each unit of EC1 is less than the amount of the section 45X credit that would be available if each EC1 qualified for the section 45X credit. Taxpayer sells some of its units of EC1 to related persons and makes a Related Person Election pursuant to section 45X(a)(3)(B)(i). Taxpayer also sells some of its units of EC1 to unrelated persons. Taxpayer sells all units of EC1 at an amount equal to cost plus a markup to reflect an anticipated accommodation fee and establishes corresponding accounts receivable at the time of the respective sales. In addition, Taxpayer knows or reasonably expects that after acquiring the units of EC1, the related and unrelated transferees will not resell the units of EC1 or use them in their trades or businesses. Taxpayer intends to obtain the benefit from the section 45X credit by claiming such credits itself or monetizing such credits through an election under sections 6417 or 6418. Taxpayer eliminates the aforementioned accounts receivable at the time it claims the section 45X credit or receives related payments attributable to the section 45X credit, and further makes payments to the related and unrelated transferees as accommodation fees computed as a percentage of such benefits.

(ii) *Analysis.* Based on all of the facts and circumstances in paragraph (i)(2)(i) of this section, the primary purpose of Taxpayer's production and sale of EC1 is to obtain the benefit of the section 45X credit in a manner that is wasteful and will not be treated as the production and sale of eligible components in a trade or business of Taxpayer for purposes of section 45X(a)(1) and (2). Taxpayer is not eligible for the section 45X credit with respect to units of EC1 that it produced and sold. See sections 6417(d)(6)

(excessive payments) and 6418(g)(2) (excessive credit transfer).

(j) *Severability.* The provisions of this section are separate and severable from one another. If any provision of this section is stayed or determined to be invalid, it is the agencies' intention that the remaining provisions shall continue in effect.

(k) *Applicability date.* This section applies to eligible components for which production is completed and sales occur after December 31, 2022, and during a taxable year ending on or after [date of publication of final regulations in the **Federal Register**].

§ 1.45X–2 Sale to unrelated person.

(a) *In general.* The amount of the section 45X credit for any taxable year is equal to the sum of the credit amounts determined under section 45X(b) (and described in §§ 1.45X–3 and 1.45X–4) with respect to each eligible component that is produced by the taxpayer and, during the taxable year, sold by the taxpayer to an unrelated person. Applicable Federal income tax principles apply to determine whether a transaction is in substance a sale (or the provision of a service, or some other disposition). *See* § 1.45X–1(d) and (e) for additional requirements relating to sales.

(b) *Definitions.* This paragraph (b) provides definitions of terms that apply for purposes of this section.

(1) *Person.* The term *person* means an individual, a trust, estate, partnership, association, company or corporation, as provided in section 7701(a)(1) of the Code. For purposes of this section, an entity disregarded as separate from a person (for example, under § 301.7701–3 of this chapter) is not a person.

(2) *Related person.* The term *related person* means a person who is related to another person if such persons would be treated as a single employer under the regulations in this chapter under section 52(b) of the Code.

(3) *Unrelated person.* The term *unrelated person* means a person who is not a related person as defined in paragraph (b)(2) of this section.

(c) *Special rule for sale to related person*—(1) *In general.* For purposes of section 45X(a), a taxpayer is treated as selling an eligible component to an unrelated person if such component is sold to such person by a person who is a related person with respect to the taxpayer.

(2) *Example.* X and Y are members of a group of trades or businesses under common control under section 52(b), and thus are related persons under section 45X(d)(1). Each of X and Y has a calendar year taxable year. Z is an unrelated person. X is in the trade or business of producing and selling solar modules. X produces and sells solar modules to Y in 2023. Y sells the solar modules to Z in 2024. X may claim a section 45X credit for the sale of the solar modules in 2024, the taxable year of X in which Y sells the solar modules to Z.

(d) *Related person election*—(1) *Availability of election*—(i) *In general.* In such form and manner as the Secretary may prescribe, a taxpayer may make an election under section 45X(a)(3)(B) (Related Person Election), to treat a sale of eligible components by such taxpayer to a related person as if made to an unrelated person. As a condition of, and prior to, a taxpayer making a Related Person Election (as described in paragraph (d)(2) of this section), the Secretary may require such information or registration as the Secretary deems necessary for purposes of preventing duplication, fraud, or any improper or excessive credit amount determined under section 45X(a)(1).

(ii) *Members of a consolidated group.* A Related Person Election is made by a member of a consolidated group (as defined in § 1.1502–1(h)) in the manner described in paragraph (d)(3)(ii) of this section. A member of a consolidated group that sells eligible components in an intercompany transaction (as defined in § 1.1502–13(b)(1)) may make the Related Person Election to claim the section 45X credit in the year of the intercompany sale. For the treatment of the selling member's gain or loss from that sale, *see* § 1.1502–13.

(2) *Time and manner of making election*—(i) *In general.* A taxpayer must make an affirmative Related Person Election annually on the taxpayer's timely filed original Federal income tax return, including extensions in such form and in such manner as may be prescribed in Internal Revenue Service forms or instructions or in publications or guidance published in the Internal Revenue Bulletin. *See* § 601.601 of this chapter. The Related Person Election will be applicable to all sales of eligible components to related persons by the taxpayer for each trade or business that the taxpayer engages in during the taxable year that resulted in a credit claim and for which the taxpayer has made the Related Person Election.

(ii) *Required information.* For all sales of eligible components to related persons, the taxpayer must provide all required information set forth in guidance. Such information may include, for example, the taxpayer's name, employer identification number (EIN), a description of the taxpayer's trade or business (including principal business activity code); the name(s) and EINs of all related persons; a listing of the eligible components that are sold; and the intended purpose of any sales of eligible components to or from related persons.

(3) *Scope and effect of election*—(i) *In general.* A separate Related Person Election must be made with respect to related person sales made by a taxpayer for each eligible trade or business of the taxpayer. The election applies only to such trade or business for which the Related Person Election is made. An election under this section applies to all sales to related persons (including between members of the same consolidated group) of eligible components produced by the taxpayer during the taxable year with respect to each trade or business for which the Related Person Election is made and is irrevocable for the taxable year for which the election is made. An election under paragraph (d)(2)(i) of this section applies solely for purposes of the section 45X credit and the section 45X regulations (and the regulations in this chapter under sections 6417 and 6418 related to the section 45X credit).

(ii) *Application to consolidated groups.* For a trade or business of a consolidated group, a Related Person Election must be made by the agent for the group on behalf of the members claiming the section 45X credit and filed with the group's timely filed original Federal income tax return, including extensions, with respect to each trade or business that the consolidated group conducts. *See* § 1.1502–77 (providing rules regarding the status of the common parent as agent for its members). A separate election must be filed on behalf of each member claiming the section 45X credit, and each election must include the name and EIN of the agent for the group and the member on whose behalf the election is being made.

(iii) *Application to partnerships.* The Related Person Election for a partnership must be made on the partnership's timely filed original Federal income tax return, including extensions, with respect to each trade or business that the partnership conducts. The election applies only to such trade or business for which the Related Person Election is made. An election by a partnership does not apply to any trade or business conducted by a partner outside the partnership.

(4) *Anti-abuse rule*—(i) *In general.* A Related Person Election may not be made if, with respect to the eligible components relevant to such election, the taxpayer fails to provide the information described in paragraph

(d)(2) of this section, provides information described in paragraph (d)(2) of this section that shows that such components are described in paragraph (d)(4)(ii) or (iii) of this section, or such components are described in paragraph (d)(4)(ii) or (iii) of this section.

(ii) *Improper use.* For purposes of this paragraph (d)(4) the term *improper use* means a use that is wasteful, such as discarding, disposing of, or destroying the eligible component without putting it to a productive use by the related person to which the eligible component is sold.

(iii) *Defective components.* The term *defective component* means a component that does not meet the requirements of section 45X and the section 45X regulations.

(e) *Sales of integrated components to related person*—(1) *In general.* For purposes of section 45X and the section 45X regulations (and the regulations in this chapter under sections 6417 and 6418 related to the section 45X credit), a taxpayer that produces and then sells an eligible component to a related person, who then integrates, incorporates, or assembles the taxpayer's eligible component into another complete and distinct eligible component that is subsequently sold to an unrelated person, may claim a section 45X credit (or make an election under section 6417 or 6418) with respect to the taxable year in which the related person's sale to the unrelated person occurs.

(2) *Examples.* The following examples illustrate the rules provided in paragraph (e)(1) of this section.

(i) *Example 1: Sales of multiple incorporated eligible components to related persons.* X and Y are C corporations that are members of a group of trades or businesses under common control under section 52(b), and thus are related persons under section 45X(d)(1) and paragraph (b)(2) of this section. Each of X and Y has a calendar year taxable year. Z is an unrelated person. X and Y are in the trade or business of producing and selling photovoltaic wafers and cells. X produces and sells photovoltaic wafers to Y in 2023. Y incorporates the photovoltaic wafers into photovoltaic cells and sells the photovoltaic cells to Z in 2024. X may claim a section 45X credit for the sale of the photovoltaic wafers in 2024, the taxable year of X in which Y sells the photovoltaic cells to Z.

(ii) *Example 2: Sales of multiple incorporated eligible components to related and unrelated persons.* W, X, and Y are domestic C corporations that are members of a group of trades or businesses under common control under section 52(b), and thus are related persons under section 45X(d)(1) and paragraph (b)(2) of this section. Each of W, X, and Y has a calendar year taxable year. W produces electrode active materials (EAMs) and sells the EAMs to X in 2023. In 2024, X incorporates the EAMs into battery cells that it produces and sells the battery cells to Y. In 2025, Y incorporates the battery cells into battery modules (within the meaning of § 1.45X–3(e)(4)(i)(A)) that it produces and sells the battery modules to Z, an unrelated person. W may claim a section 45X credit for EAMs sold to X, X may claim a section 45X credit for the battery cells sold to Y, and Y may claim a section 45X credit for the battery modules sold to Z in 2025, the taxable year of each of W, X, and Y in which the battery modules are sold to Z.

(3) *Special rules applicable to related person election*—(i) *In general.* If a taxpayer makes a valid Related Person Election under section 45X(a)(3)(B)(i) and paragraph (d)(1) of this section, and the taxpayer produces and then sells an eligible component to a related person, who then integrates, incorporates, or assembles the taxpayer's eligible component into another complete and distinct eligible component that is subsequently sold to an unrelated person, the taxpayer's sale of the eligible component to the related person is treated (solely for purposes of the section 45X credit and the section 45X regulations, and the regulations in this chapter under sections 6417 and 6418 related to the section 45X credit) as if made to an unrelated person in the taxable year in which the sale to the related person occurs.

(ii) *Example: Sales of multiple integrated eligible components to related and unrelated persons with a related person election.* W, X, and Y are domestic C corporations that are members of a group of trades or businesses under common control and thus are related persons under section 45X(d)(1) and paragraph (b)(2) of this section. Each of W, X, and Y has a calendar year taxable year. W produces electrode active materials (EAMs) and sells the EAMs to X in 2023. W makes a valid Related Person Election under paragraph (d)(1) of this section in 2023 with regard to the sale. In 2024, X incorporates the EAMs into battery cells that it produces and sells the battery cells to Y. X makes a valid Related Person Election under paragraph (d)(1) of this section in 2024 with regard to the sale. In 2025, Y incorporates the battery cells into battery modules that it produces and sells the battery modules to Z, an unrelated person. W may claim a section 45X credit for the sale of the EAMs in 2023 because the sale to X is treated as if made to an unrelated person solely for purposes of section 45X(a). X may claim a section 45X credit for the sale of the battery cells in 2024 because the sale to Y is treated as if made to an unrelated person solely for purposes of section 45X(a). Y may claim a section 45X credit for the sale of battery modules in 2025 because Z is an unrelated person.

(f) *Severability.* The provisions of this section are separate and severable from one another. If any provision of this section is stayed or determined to be invalid, it is the agencies' intention that the remaining provisions shall continue in effect.

(g) *Applicability date.* This section applies to eligible components for which production is completed and sales occur after December 31, 2022, and during a taxable year ending on or after [date of publication of the final regulations in the **Federal Register**].

§ 1.45X–3 Eligible components.

(a) *In general.* For purposes of the section 45X credit, *eligible component* means any solar energy component (as defined in paragraph (b) of this section), any wind energy component (as defined in paragraph (c) of this section), any inverter (as defined in paragraph (d) of this section), any qualifying battery component (as defined in paragraph (e) of this section), and any applicable critical mineral (as defined in § 1.45X–4(b)). See paragraph (f) of this section for certain phase-out rules applicable to eligible components other than applicable critical minerals.

(b) *Solar energy components. Solar energy component* means a solar module, photovoltaic cell, photovoltaic wafer, solar grade polysilicon, torque tube, structural fastener, or polymeric backsheet, each as defined in this paragraph (b).

(1) *Photovoltaic cell*—(i) *Definition. Photovoltaic cell* means the smallest semiconductor element of a solar module that performs the immediate conversion of light into electricity that is either a thin film photovoltaic cell or a crystalline photovoltaic cell.

(ii) *Credit amount.* For a photovoltaic cell, the credit amount is equal to the product of 4 cents multiplied by the capacity of such photovoltaic cell. The capacity of each photovoltaic cell is expressed on a direct current watt basis. Capacity is the nameplate capacity in direct current watts using Standard Test Conditions, as defined by the International Electrotechnical Commission. In the case of a tandem

technology produced in serial fashion, such as a monolithic multijunction cell composed of two or more sub-cells, capacity must be measured at the point of sale at the end of the single cell production unit. In the case of a four-terminal tandem technology produced by mechanically stacking two distinct cells or interconnected layers, capacity must be measured for each cell at each point of sale.

(iii) *Substantiation.* The taxpayer must document the capacity of a photovoltaic cell in a bill of sale or design documentation, such as an International Electrotechnical Commission certification (for example, IEC 61215 or IEC 60904).

(2) *Photovoltaic wafer*—(i) *Definition. Photovoltaic wafer* means a thin slice, sheet, or layer of semiconductor material of at least 240 square centimeters that comprises the substrate or absorber layer of one or more photovoltaic cells. A photovoltaic wafer must be produced by a single manufacturer by forming an ingot from molten polysilicon (for example, Czochralski method) and then subsequently slicing it into wafers, forming molten or evaporated polysilicon into a sheet or layer, or depositing a thin-film semiconductor photon absorber into a sheet or layer (that is, thin-film deposition).

(ii) *Credit amount.* For a photovoltaic wafer, the credit amount is $12 per square meter.

(3) *Polymeric backsheet*—(i) *Definition. Polymeric backsheet* means a sheet on the back of a solar module that acts as an electric insulator and protects the inner components of such module from the surrounding environment.

(ii) *Credit amount.* For a polymeric backsheet, the credit amount is 40 cents per square meter.

(4) *Solar grade polysilicon*—(i) *Definition. Solar grade polysilicon* means silicon that is suitable for use in photovoltaic manufacturing and purified to a minimum purity of 99.999999 percent silicon by mass.

(ii) *Credit amount.* For solar grade polysilicon, the credit amount is $3 per kilogram.

(5) *Solar module*—(i) *Definition. Solar module* means the connection and lamination of photovoltaic cells into an environmentally protected final assembly that is—

(A) Suitable to generate electricity when exposed to sunlight; and

(B) Ready for installation without an additional manufacturing process.

(ii) *Credit amount.* For a solar module, the credit amount is equal to the product of 7 cents multiplied by the capacity of such module. The capacity of each solar module is expressed on a direct current watt basis. Capacity is the nameplate capacity in direct current watts using Standard Test Conditions, as defined by the International Electrotechnical Commission.

(iii) *Substantiation.* The taxpayer must document the capacity of a solar module in a bill of sale or design documentation, such as an International Electrotechnical Commission certification (for example, IEC 61215 or IEC 61646).

(6) *Solar tracker. Solar tracker* means a mechanical system that moves solar modules according to the position of the sun and to increase energy output. A torque tube (as defined in paragraph (b)(7) of this section) or structural fastener (as defined in paragraph (b)(8) of this section) are solar tracker components that are eligible components for purposes of the section 45X credit.

(7) *Torque tube*—(i) *Definition. Torque tube* means a structural steel support element (including longitudinal purlins) that—

(A) Is part of a solar tracker;

(B) Is of any cross-sectional shape;

(C) May be assembled from individually manufactured segments;

(D) Spans longitudinally between foundation posts;

(E) Supports solar panels and is connected to a mounting attachment for solar panels (with or without separate module interface rails); and

(F) Is rotated by means of a drive system.

(ii) *Credit amount.* For a torque tube, the credit amount is 87 cents per kilogram.

(iii) *Substantiation.* The taxpayer must document that a torque tube is part of a solar tracker with a specification sheet, bill of sale, or other similar documentation that explicitly describes its application as part of a solar tracker.

(8) *Structural fastener*—(i) *Definition. Structural fastener* means a component that is used—

(A) To connect the mechanical and drive system components of a solar tracker to the foundation of such solar tracker;

(B) To connect torque tubes to drive assemblies; or

(C) To connect segments of torque tubes to one another.

(ii) *Credit amount.* For a structural fastener, the credit amount is $2.28 per kilogram.

(iii) *Substantiation.* The taxpayer must document that a structural fastener is used in a manner described in paragraph (b)(8)(i)(A), (B), or (C) of this section with a bill of sale or other similar documentation that explicitly describes such use.

(c) *Wind energy components. Wind energy component* means a blade, nacelle, tower, offshore wind foundation, or related offshore wind vessel, each as defined in this paragraph (c).

(1) *Blade*—(i) *Definition. Blade* means an airfoil-shaped blade that is responsible for converting wind energy to low-speed rotational energy.

(ii) *Credit amount.* For a blade, the credit amount is equal to the product of 2 cents multiplied by the total rated capacity of the completed wind turbine for which the blade is designed.

(2) *Offshore wind foundation*—(i) *Definition. Offshore wind foundation* means the component (including transition piece) that secures an offshore wind tower and any above-water turbine components to the seafloor using—

(A) Fixed platforms, such as offshore wind monopiles, jackets, or gravity-based foundations; or

(B) Floating platforms and associated mooring systems.

(ii) *Credit amount.* For a fixed offshore wind foundation platform, the credit amount is equal to the product of 2 cents multiplied by the total rated capacity of the completed wind turbine for which the fixed offshore wind foundation platform is designed. For a floating offshore wind foundation platform, the credit amount is equal to the product of 4 cents multiplied by the total rated capacity of the completed wind turbine for which the floating offshore wind foundation platform is designed.

(3) *Nacelle*—(i) *Definition. Nacelle* means the assembly of the drivetrain and other tower-top components of a wind turbine (with the exception of the blades and the hub) within their cover housing.

(ii) *Credit amount.* For a nacelle, the credit amount is equal to the product of 5 cents multiplied by the total rated capacity of the completed wind turbine for which the nacelle is designed.

(4) *Related offshore wind vessel*—(i) *Definition. Related offshore wind vessel* means any vessel that is purpose-built or retrofitted for purposes of the development, transport, installation, operation, or maintenance of offshore wind energy components. A vessel is purpose-built for development, transport, installation, operation, or maintenance of offshore wind energy components if it is built to be capable of performing such functions and it is of a type that is commonly used in the offshore wind industry. A vessel is retrofitted for development, transport, installation, operation, or maintenance of offshore wind energy components if such vessel was incapable of performing

such functions prior to being retrofitted, the retrofit causes the vessel to be capable of performing such functions, and the retrofitted vessel is of a type that is commonly used in the offshore wind industry.

(ii) *Credit amount.* For a related offshore wind vessel, the credit amount is equal to 10 percent of the sales price of the vessel. The sales price of the vessel does not include the price of maintenance, services, or other similar items that may be sold with the vessel. For a related offshore wind vessel with respect to which an election under section 45X(a)(3)(B)(i) has been made, such election shall not cause the sale price of such vessel to be treated as having been determined with respect to a transaction between uncontrolled taxpayers for purposes of section 482 of the Code and the regulations in this chapter.

(5) *Tower*—(i) *Definition. Tower* means a tubular or lattice structure that supports the nacelle and rotor of a wind turbine.

(ii) *Credit amount.* For a tower, the credit amount is equal to the product of 3 cents multiplied by the total rated capacity of the completed wind turbine for which the tower is designed.

(6) *Total rated capacity of the completed wind turbine.* For purposes of this section, *total rated capacity of the completed wind turbine* means, for the completed wind turbine for which a blade, nacelle, offshore wind foundation, or tower was manufactured and sold, the nameplate capacity at the time of sale as certified to the relevant national or international standards, such as International Electrotechnical Commission (IEC) 61400, or ANSI/ACP 101–1–2021, the Small Wind Turbine Standard. Certification of the turbine to such standards must be documented by a certificate issued by an accredited certification body. The total rated capacity of a wind turbine must be expressed in watts.

(7) *Substantiation.* Taxpayers must maintain specific documentation regarding wind energy components for which a section 45X credit is claimed. For blades, nacelles, offshore wind foundations, or towers, a taxpayer must document the turbine model for which such component is designed and the total rated capacity of the completed wind turbine in technical documentation associated with the sale of such component.

(d) *Inverters*—(1) *In general. Inverter* means an end product that is suitable to convert direct current (DC) electricity from 1 or more solar modules or certified distributed wind energy systems into alternating current electricity. An end product is suitable to convert DC electricity from 1 or more solar modules or certified distributed wind energy systems into alternating current electricity if, in the form sold by the manufacturer, it is able to connect with such modules or systems and convert DC electricity to alternating current electricity from such connected source. The term inverter includes a central inverter, commercial inverter, distributed wind inverter, microinverter, or residential inverter. Only an inverter that meets at least one of the requirements in paragraphs (d)(2) through (7) of this section is an eligible component for purposes of the section 45X credit.

(2) *Central inverter*—(i) *Definition. Central inverter* means an inverter that is suitable for large utility-scale systems and has a capacity that is greater than 1,000 kilowatts. The capacity of a central inverter is expressed on an alternating current watt basis. An inverter is suitable for large utility-scale systems if, in the form sold by the manufacturer, it is capable of serving as a component in a large utility-scale system and meets the core engineering specifications for such application.

(ii) *Credit amount.* For a central inverter the total rated capacity of which is expressed on an alternating current watt basis, the credit amount is equal to the product of 0.25 cents multiplied by the total rated capacity of the central inverter.

(iii) *Substantiation.* The taxpayer must document that a central inverter meets the core engineering specifications for use in a large utility-scale system and has a capacity that is greater than 1,000 kilowatts with a specification sheet, bill of sale, or other similar documentation that explicitly describes such specifications and capacity.

(3) *Commercial inverter*—(i) *Definition. Commercial inverter* means an inverter that—

(A) Is suitable for commercial or utility-scale applications;

(B) Has a rated output of 208, 480, 600, or 800 volt three-phase power; and

(C) Has a capacity expressed on an alternating current watt basis that is not less than 20 kilowatts and not greater than 125 kilowatts.

(ii) *Suitable for commercial or utility-scale applications.* An inverter is suitable for commercial or utility-scale applications if, in the form sold by the manufacturer, it is capable of serving as a component in commercial or utility-scale systems and meets the core engineering specifications for such application.

(iii) *Credit amount.* For a commercial inverter the total rated capacity of which is expressed on an alternating current watt basis, the credit amount is equal to the product of 2 cents multiplied by the total rated capacity of the commercial inverter.

(iv) *Substantiation.* The taxpayer must document that a commercial inverter meets the core engineering specifications for use in commercial or utility-scale applications, the inverter's rated output, and the inverter's capacity in a specification sheet, bill of sale, or other similar documentation.

(4) *Distributed wind inverter*—(i) *In general. Distributed wind inverter* means an inverter that is used in a residential or non-residential system that utilizes 1 or more certified distributed wind energy systems and has a total rated output, expressed on an alternating current watt basis, of not greater than 150 kilowatts.

(ii) *Certified distributed wind energy system. Certified distributed wind energy system* means a wind energy system that is certified by an accredited certification agency to meet Standard 9.1–2009 of the American Wind Energy Association; International Electrotechnical Commission 61400–1, 61400–2, 61400–11, 61400–12; or ANSI/ACP 101–1–2021, the Small Wind Turbine Standard, including any subsequent revisions to or modifications of such Standard that have been approved by the American National Standards Institute.

(iii) *Credit amount.* For a distributed wind inverter the total rated capacity of which is expressed on an alternating current watt basis, the credit amount is equal to the product of 11 cents multiplied by the total rated capacity of the distributed wind inverter.

(iv) *Substantiation.* The taxpayer must document that a distributed wind inverter is used in a residential or non-residential system that utilizes one or more certified distributed wind energy systems with a specification sheet, bill of sale, or other similar documentation that explicitly describes such use and the total rated output of the inverter on an alternating current watt basis.

(5) *Microinverter*—(i) *Definition. Microinverter* means an inverter that—

(A) Is suitable to connect with one solar module;

(B) Has a rated output described in paragraph (d)(5)(ii) of this section; and

(C) Has a capacity, expressed on an alternating current watt basis, that is not greater than 650 watts.

(ii) *Rated output.* For purposes of paragraph (d)(5)(i)(B) of this section, for an inverter to be a microinverter, the inverter must have a rated output of—

(A) 120 or 240 volt single-phase power; or

(B) 208 or 480 volt three-phase power.

(iii) *Suitable to connect to one solar module*—(A) *In general.* An inverter is suitable to connect to one solar module if, in the form sold by the manufacturer, it is capable of connecting to one or more solar modules and regulating the DC electricity from each module independently before that electricity is converted into alternating current electricity.

(B) *Application to direct current (DC) optimized inverter systems.* A *DC optimized inverter system* means an inverter that is comprised of an inverter connected to multiple DC optimizers that are each designed to connect to one solar module. A DC optimized inverter system is suitable to connect with one solar module if, in the form sold by the manufacturer, it is capable of connecting to one or more solar modules and regulating the DC electricity from each module independently before that electricity is converted into alternating current electricity.

(C) *Application to multi-module inverters.* A *multi-module inverter* means an inverter that is comprised of an inverter with independent connections and DC optimizing components for two or more modules. A multi-module microinverter is suitable to connect with one solar module if it is capable of connecting to one or more solar modules and regulating the DC electricity from each module independently before that electricity is converted into alternating current electricity.

(iv) *Credit amount*—(A) *In general.* For a microinverter the total rated capacity of which is expressed on an alternating current watt basis, the credit amount is equal to the product of 11 cents multiplied by the total rated capacity of the microinverter.

(B) *DC optimized inverter systems.* A DC optimized inverter system qualifies as a microinverter if it meets the requirements of paragraph (d)(5)(i) of this section. For purposes of paragraph (d)(5)(i)(C) of this section, a DC optimized inverter system's capacity is determined separately for each DC optimizer paired with the inverter in a DC optimized inverter system. If each DC optimizer paired with the inverter in a DC optimized inverter system meets the requirements of paragraph (d)(5)(i) of this section, then the DC optimized inverter system qualifies as a microinverter. The credit amount for a DC optimized inverter system that qualifies as a microinverter is equal to the product of 11 cents multiplied by the lesser of the sum of the alternating current capacity of each DC optimizer when paired with the inverter in the DC optimized inverter system or the alternating current capacity of the inverter in the DC optimized inverter system. For purposes of this paragraph (d)(5)(iv)(B), capacity must be measured in watts of alternating current converted from DC electricity by the inverter in a DC optimized inverter system. For a DC optimized inverter system to qualify as a microinverter, a taxpayer must produce and sell the inverter and the DC optimizers in the DC optimized inverter system together as a combined end product.

(C) *Multi-module inverters.* A multi-module inverter qualifies as a microinverter if it meets the requirements of paragraph (d)(5)(i) of this section. For purposes of paragraph (d)(5)(i)(C) of this section, a multi-module inverter's capacity is determined separately for each internal DC optimizer paired with the inverter. The credit amount for a multi-module inverter is equal to the product of 11 cents multiplied by the total alternating current capacity of the DC optimizers in the multi-module inverter when paired with the inverter in the system. For purposes of this paragraph (d)(5)(iv)(C), capacity must be measured in watts of alternating current converted from DC electricity by the inverter in a multi-module microinverter.

(v) *Substantiation.* The taxpayer must document that a microinverter meets the core engineering specifications to be suitable to connect with one solar module, the inverter's rated output, and the inverter's capacity in a specification sheet, bill of sale, or other similar documentation. In the case of a DC optimized inverter system, the taxpayer must also document that the DC optimizers and the inverter in such system were sold as a combined end product.

(6) *Residential inverter*—(i) *Definition. Residential inverter* means an inverter that—

(A) Is suitable for a residence;

(B) Has a rated output of 120 or 240 volt single-phase power; and

(C) Has a capacity expressed on an alternating current watt basis that is not greater than 20 kilowatts.

(ii) *Suitable for a residence.* An inverter is suitable for a residence if, in the form sold by the manufacturer, it is capable of serving as a component in a residential system and meets the core engineering specifications for such application.

(iii) *Credit amount.* For a residential inverter the total rated capacity of which is expressed on an alternating current watt basis, the credit amount is equal to the product of 6.5 cents multiplied by the total rated capacity of the residential inverter.

(iv) *Substantiation.* The taxpayer must document that a residential inverter meets the core engineering specifications for use in a residence, the inverter's rated output, and the inverter's capacity in a specification sheet, bill of sale, or other similar documentation.

(7) *Utility inverter*—(i) *Definition. Utility inverter* means an inverter that—

(A) Is suitable for commercial or utility-scale systems;

(B) Has a rated output of not less than 600 volt three-phase power; and

(C) Has a capacity expressed on an alternating current watt basis that is greater than 125 kilowatts and not greater than 1000 kilowatts.

(ii) *Suitable for commercial or utility-scale systems.* An inverter is suitable for commercial or utility-scale systems if, in the form sold by the manufacturer, it is capable of serving as a component in such systems and meets the core engineering specifications for such application.

(iii) *Credit amount.* For a utility inverter the total rated capacity of which is expressed on an alternating current watt basis, the credit amount is equal to the product of 1.5 cents multiplied by the total rated capacity of the utility inverter.

(iv) *Substantiation.* The taxpayer must document that a utility inverter meets the core engineering specifications for use in commercial or utility-scale systems, the inverter's rated output, and the inverter's capacity in a specification sheet, bill of sale, or other similar documentation.

(e) *Qualifying battery component*—(1) *In general. Qualifying battery component* means electrode active materials, battery cells, or battery modules, each as defined in this paragraph (e).

(2) *Electrode active materials*—(i) *Definitions*—(A) *Electrode active materials.* Electrode active materials means cathode electrode materials, anode electrode materials, and electrochemically active materials that contribute to the electrochemical processes necessary for energy storage. Electrode active materials do not include battery management systems, terminal assemblies, cell containments, gas release valves, module containments, module connectors, compression plates, straps, pack terminals, bus bars, thermal management systems, and pack jackets.

(B) *Cathode electrode materials.* Cathode electrode materials means the

materials that comprise the cathode of a commercial battery technology, such as binders, and current collectors (for example, cathode foils).

(C) *Anode electrode materials.* Anode electrode materials means the materials that comprise the anode of a commercial battery technology, including anode foils.

(D) *Electrochemically active materials.* Electrochemically active materials that contribute to the electrochemical processes necessary for energy storage means battery-grade materials that enable the electrochemical storage within a commercial battery technology. In addition to solvents, additives, and electrolyte salts, electrochemically active materials that contribute to the electrochemical processes necessary for energy storage may include electrolytes, catholytes, anolytes, separators, and metal salts and oxides.

(E) *Example.* A commercial battery technology contains Cathode Active Material (CAM), which is a powder used in the battery that is made by processing and combining Battery-Grade Materials A and B. Battery-Grade Material A is a derivative of Material C, which has been refined to the necessary level to enable electrochemical storage. The production costs for CAM and its direct inputs (Battery-Grade Material A and Battery-Grade Material B) are eligible for the section 45X credit for electrode active materials, but the unrefined Material C is not.

(F) *Battery-grade materials.* Battery-grade materials means the processed materials found in a final battery cell or an analogous unit, or the direct battery-grade precursors to those processed materials.

(ii) *Credit amount.* For an electrode active material, the credit amount is equal to 10 percent of the costs incurred by the taxpayer with respect to production of such materials.

(iii) *Production processes for electrode active materials*—(A) *Conversion.* For purposes of section 45X, the term *conversion* means a chemical transformation from one species to another.

(B) *Purification.* For purposes of section 45X, the term *purification* means increasing the mass fraction of a certain element.

(iv) *Production costs incurred.* Costs incurred by the taxpayer with respect to production of electrode active materials includes all costs as defined in § 1.263A–1(e) that are paid or incurred within the meaning of section 461 of the Code by the taxpayer for the production of an electrode active material only, except direct materials costs as defined in § 1.263A–1(e)(2)(i)(A), or indirect materials costs as defined in § 1.263A–1(e)(3)(ii)(E), and any costs related to the extraction of raw materials. Section 263A of the Code and the regulations in this chapter under section 263A apply solely to identify the types of costs that are includible in production costs incurred for purposes of computing the amount of the section 45X credit, but do not apply for any other purpose, such as to determine whether a taxpayer is engaged in production activities.

(v) *Materials that are both electrode active materials and applicable critical minerals*—(A) *In general.* A material that qualifies as an electrode active material and an applicable critical material is eligible for the section 45X credit. A taxpayer may claim the section 45X credit with respect to such material either as an electrode active material or an applicable critical material, but not both.

(B) *Example.* Lithium carbonate is an electrode active material because it is a direct battery-grade precursor to electrolyte salts, which are processed materials found in a final battery cell. Lithium carbonate is also eligible for the 45X critical minerals credit. A taxpayer who produces and sells lithium carbonate may claim either the electrode active material credit or the critical mineral credit for its production and sale of lithium carbonate but may not take both credits.

(3) *Battery cells*—(i) *Definition. Battery cell* means an electrochemical cell—

(A) Comprised of one or more positive electrodes and one or more negative electrodes;

(B) With an energy density of not less than 100 watt-hours per liter; and

(C) Capable of storing at least 12 watt-hours of energy.

(ii) *Capacity measurement.* Taxpayers must measure the capacity of a battery cell in accordance with a national or international standard, such as IEC 60086–1 (Primary Batteries), or an equivalent standard. Taxpayers can reference the United States Advanced Battery Consortium (USABC) Battery Test Manual for additional guidance.

(iii) *Credit amount.* For a battery cell, the credit amount is equal to the product of $35 multiplied by the capacity of such battery cell, subject to the limitation provided in paragraph (e)(5) of this section. The capacity of a battery cell is expressed on a kilowatt-hour basis.

(4) *Battery module definitions and applicable rules*—(i) *Battery module defined.* The term *battery module* means a module described in paragraph (e)(4)(i)(A) or (B) of this section with an aggregate capacity of not less than 7 kilowatt-hours (or, in the case of a module for a hydrogen fuel cell vehicle, not less than 1 kilowatt-hour).

(A) *Modules using battery cells.* A module using battery cells, is a module with two or more battery cells that are configured electrically, in series or parallel, to create voltage or current, as appropriate, to a specified end use, meaning an end-use configuration of battery technologies. An end-use configuration is the product that ultimately serves a specified end use. It is the collection of interconnected cells, configured to that specific end-use and interconnected with the necessary hardware and software required to deliver the required energy and power (voltage and current) for that use.

(B) *Modules with no battery cells.* A *module with no battery cells* means a product with a standardized manufacturing process and form that is capable of storing and dispatching useful energy, that contains an energy storage medium that remains in the module (for example, it is not consumed through combustion), and that is not a custom-built electricity generation or storage facility. For example, neither standalone fuel storage tanks nor fuel tanks connected to engines or generation systems qualify as modules with no battery cells.

(ii) *Capacity measurement*—(A) *Modules using battery cells.* Taxpayers must measure the capacity of a module using battery cells with a testing procedure that complies with a national or international standard published by a recognized standard setting organization. The capacity of a battery module may not exceed the total capacity of the battery cells in the module. Taxpayers must measure the capacity of a battery cell in accordance with a national or international standard, such as IEC 60086–1 (Primary Batteries), or an equivalent standard. Taxpayers can reference the USABC Battery Test Manual for additional guidance.

(B) *Modules with no battery cells.* Taxpayers must measure the capacity of a module with no battery cells with a testing procedure that complies with a national or international standard published by a recognized standard setting organization. If no such standard applies to a type of module with no battery cells, taxpayers must measure the capacity of such module as the Secretary may prescribe in regulations or other guidance.

(iii) *Credit amount*—(A) *Modules using battery cells.* For a battery module with cells, the credit amount is equal to the product of $10 multiplied by the

capacity of such battery module, subject to the limitation provided in paragraph (e)(5) of this section. The capacity of each battery module is expressed on a kilowatt-hour basis.

(B) *Modules with no battery cells.* For a battery module without cells, the credit amount is equal to the product of $45 multiplied by the capacity of such battery module, subject to the limitation provided in paragraph (e)(5) of this section. The capacity of each battery module is expressed on a kilowatt-hour basis.

(5) *Limitation on capacity of battery cells and battery modules*—(i) *In general.* For purposes of paragraphs (e)(3)(iii) and (e)(4)(iii) of this section, the capacity determined with respect to a battery cell or battery module must not exceed a capacity-to-power ratio of 100:1.

(ii) *Capacity to power ratio.* For purposes of paragraph (e)(5)(i) of this section, *capacity-to-power ratio* means, with respect to a battery cell or battery module, the ratio of the capacity of such cell or module to the maximum discharge amount of such cell or module.

(f) *Phase out rule*—(1) *In general.* Except as provided in paragraph (f)(3) of this section, in the case of any eligible component sold after December 31, 2029, the amount of the section 45X credit determined with respect to such eligible component must be equal to the product of—

(i) The amount determined under this section with respect to such eligible component, multiplied by;

(ii) The phase out percentage under paragraph (f)(2) of this section.

(2) *Phase out percentages.* The phase out percentage is equal to 75 percent for eligible components sold during calendar year 2030; 50 percent for eligible components sold during calendar year 2031; 25 percent for eligible components sold during calendar year 2032, and zero percent for eligible components sold after calendar year 2032.

(3) *Exception for applicable critical minerals.* The phase out rules described in paragraphs (f)(1) and (2) of this section apply to all eligible components except applicable critical minerals.

(g) *Severability.* The provisions of this section are separate and severable from one another. If any provision of this section is stayed or determined to be invalid, it is the agencies' intention that the remaining provisions shall continue in effect.

(h) *Applicability date.* This section applies to eligible components for which production is completed and sales occur after December 31, 2022, and during a taxable year ending on or after [date of publication of the final regulations in the **Federal Register**].

§ 1.45X–4 Applicable critical minerals.

(a) *In general.* The term *applicable critical mineral* means any of the minerals that are listed in section 45X(c)(6) and defined in paragraph (b) of this section.

(b) *Definitions*—(1) *Aluminum.* The term *commodity-grade aluminum* means aluminum that has been produced directly from aluminum described in paragraph (b)(1)(i) or (ii) of this section and is in a form that is sold on international commodity exchanges. The term *aluminum* means aluminum, including commodity-grade aluminum, that is—

(i) Converted from bauxite to a minimum purity of 99 percent alumina by mass; or

(ii) Purified to a minimum purity of 99.9 percent aluminum by mass.

(2) *Antimony.* The term *antimony* means antimony that is—

(i) Converted to antimony trisulfide concentrate with a minimum purity of 90 percent antimony trisulfide by mass; or

(ii) Purified to a minimum purity of 99.65 percent antimony by mass.

(3) *Barite.* The term *barite* means barite that is barium sulfate purified to a minimum purity of 80 percent barite by mass.

(4) *Beryllium.* The term *beryllium* means beryllium that is—

(i) Converted to copper-beryllium master alloy; or

(ii) Purified to a minimum purity of 99 percent beryllium by mass.

(5) *Cerium.* The term *cerium* means cerium that is—

(i) Converted to cerium oxide that is purified to a minimum purity of 99.9 percent cerium oxide by mass; or

(ii) Purified to a minimum purity of 99 percent cerium by mass.

(6) *Cesium.* The term *cesium* means cesium that is—

(i) Converted to cesium formate or cesium carbonate; or

(ii) Purified to a minimum purity of 99 percent cesium by mass.

(7) *Chromium.* The term *chromium* means chromium that is—

(i) Converted to ferrochromium consisting of not less than 60 percent chromium by mass; or

(ii) Purified to a minimum purity of 99 percent chromium by mass.

(8) *Cobalt.* The term *cobalt* means cobalt that is—

(i) Converted to cobalt sulfate; or

(ii) Purified to a minimum purity of 99.6 percent cobalt by mass.

(9) *Dysprosium.* The term *dysprosium* means dysprosium that is—

(i) Converted to not less than 99 percent pure dysprosium iron alloy by mass; or

(ii) Purified to a minimum purity of 99 percent dysprosium by mass.

(10) *Europium.* The term *europium* means europium that is—

(i) Converted to europium oxide that is purified to a minimum purity of 99.9 percent europium oxide by mass; or

(ii) Purified to a minimum purity of 99 percent of europium by mass.

(11) *Fluorspar.* The term *fluorspar* means fluorspar that is—

(i) Converted to fluorspar that is purified to a minimum purity of 97 percent calcium fluoride by mass; or

(ii) Purified to a minimum purity of 99 percent fluorspar by mass.

(12) *Gadolinium.* The term *gadolinium* means gadolinium that is—

(i) Converted to gadolinium oxide that is purified to a minimum purity of 99.9 percent gadolinium oxide by mass; or

(ii) Purified to a minimum purity of 99 percent gadolinium by mass.

(13) *Germanium.* The term *germanium* means germanium that is—

(i) Converted to germanium tetrachloride; or

(ii) Purified to a minimum purity of 99.99 percent germanium by mass.

(14) *Graphite.* The term *graphite* means natural or synthetic graphite that is purified to a minimum purity of 99.9 percent graphitic carbon by mass. The term *99.9 percent graphitic carbon by mass* means graphite that is 99.9 percent carbon by mass.

(15) *Indium.* The term *indium* means indium that is—

(i) Converted to—

(A) Indium tin oxide; or

(B) Indium oxide that is purified to a minimum purity of 99.9 percent indium oxide by mass; or

(ii) Purified to a minimum purity of 99 percent indium by mass.

(16) *Lithium.* The term *lithium* means lithium that is—

(i) Converted to lithium carbonate or lithium hydroxide; or

(ii) Purified to a minimum purity of 99.9 percent lithium by mass.

(17) *Manganese.* The term *manganese* means manganese that is—

(i) Converted to manganese sulphate; or

(ii) Purified to a minimum purity of 99.7 percent manganese by mass.

(18) *Neodymium.* The term *neodymium* means neodymium that is—

(i) Converted to neodymium-praseodymium oxide that is purified to a minimum purity of 99 percent neodymium-praseodymium oxide by mass;

(ii) Converted to neodymium oxide that is purified to a minimum purity of

99.5 percent neodymium oxide by mass; or

(iii) Purified to a minimum purity of 99.9 percent neodymium by mass.

(19) *Nickel.* The term *nickel* means nickel that is—

(i) Converted to nickel sulphate; or

(ii) Purified to a minimum purity of 99 percent nickel by mass.

(20) *Niobium.* The term *niobium* means niobium that is—

(i) Converted to ferronibium; or

(ii) Purified to a minimum purity of 99 percent niobium by mass.

(21) *Tellurium.* The term *tellurium* means tellurium that is—

(i) Converted to cadmium telluride; or

(ii) Purified to a minimum purity of 99 percent tellurium by mass.

(22) *Tin.* The term *tin* means tin that purified to low alpha emitting tin that—

(i) Has a purity of greater than 99.99 percent by mass; and

(ii) Possesses an alpha emission rate of not greater than 0.01 counts per hour per centimeter square.

(23) *Tungsten.* The term *tungsten* means tungsten that is converted to ammonium paratungstate or ferrotungsten.

(24) *Vanadium.* The term *vanadium* means vanadium that is converted to ferrovanadium or vanadium pentoxide.

(25) *Yttrium.* The term *yttrium* means yttrium that is—

(i) Converted to yttrium oxide that is purified to a minimum purity of 99.999 percent yttrium oxide by mass; or

(ii) Purified to a minimum purity of 99.9 percent yttrium by mass.

(26) *Other minerals.* The following minerals are also applicable critical minerals provided that such mineral is purified to a minimum purity of 99 percent by mass:

(i) Arsenic.
(ii) Bismuth.
(iii) Erbium.
(iv) Gallium.
(v) Hafnium.
(vi) Holmium.
(vii) Iridium.
(viii) Lanthanum.
(ix) Lutetium.
(x) Magnesium.
(xi) Palladium.
(xii) Platium.
(xiii) Praseodymium.
(xiv) Rhodium.
(xv) Rubidium.
(xvi) Ruthemium.
(xvii) Samarium.
(xviii) Scandium.
(xix) Tantalum.
(xx) Terbium.
(xxi) Thulium.
(xxii) Titanium.
(xxiii) Ytterbium.
(xxiv) Zinc.
(xxv) Zirconium.

(c) *Credit amount*—(1) *In general.* For any applicable critical mineral, the credit amount is equal to 10 percent of the costs incurred by the taxpayer with respect to production of such mineral.

(2) *Production processes for applicable critical minerals*—(i) *Conversion.* For purposes of section 45X, the term *conversion* means a chemical transformation from one species to another.

(ii) *Purification.* For purposes of section 45X, the term *purification* means increasing the mass fraction of a certain element.

(3) *Production costs incurred.* Costs incurred by the taxpayer with respect to the production of applicable critical minerals includes all costs as defined in § 1.263A–1(e) that are paid or incurred within the meaning of section 461 of the Code by the taxpayer for the production of an applicable critical mineral only, except direct or indirect materials costs as defined in § 1.263A–1(e)(2)(i)(A) and (e)(3)(ii)(E), respectively, and any costs related to the extraction of raw materials. Section 263A of the Code and the regulations in this chapter under section 263A apply solely to identify the types of costs that are includible in production costs incurred for purposes of computing the amount of the section 45X credit, but do not apply for any other purpose, such as to determine whether a taxpayer is engaged in production activities.

(4) *Substantiation.* The taxpayer must document that an applicable critical mineral meets the requirements of section 45X(c)(6) with a certificate of analysis provided by the taxpayer to the person to which the taxpayer sold the applicable critical mineral.

(d) *Severability.* The provisions of this section are separate and severable from one another. If any provision of this section is stayed or determined to be invalid, it is the agencies' intention that the remaining provisions shall continue in effect.

(e) *Applicability date.* This section applies to eligible components for which production is completed and sales occur after December 31, 2022, and during a taxable year ending on or after [date of publication of the final regulations in the **Federal Register**].

Douglas W. O'Donnell,

Deputy Commissioner for Services and Enforcement.

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BILLING CODE 4830–01–P

POSTAL SERVICE

39 CFR Part 111

New Mailing Standards for Hazardous Materials Outer Packaging and Nonregulated Toxic Materials

AGENCY: Postal Service™.

ACTION: Proposed rule.

SUMMARY: The Postal Service is proposing to amend Publication 52, *Hazardous, Restricted, and Perishable Mail* (Pub 52) by requiring specific outer packaging strength standards when mailing hazardous materials or dangerous goods and remove quantity restrictions for nonregulated toxic materials. Additionally, the Postal Service proposes to allow mailers to use poly or padded bags as outer packaging for shipments containing lithium batteries installed in the equipment they operate if the shipment does not display hazardous text, markings or labels as permitted in sections 349 and 622.

DATES: Submit comments on or before January 16, 2024.

ADDRESSES: Mail or deliver written comments to the Director, Product Classification, U.S. Postal Service, 475 L'Enfant Plaza SW, Room 4446, Washington, DC 20260–5015. If sending comments by email, include the name and address of the commenter and send to *PCFederalRegister@usps.gov,* with a subject line of ''New Mailing Standards for Hazardous Materials Outer Packaging and Nonregulated Toxic Materials.'' Faxed comments will not be accepted.

You may inspect and photocopy all written comments, by appointment only, at USPS® Headquarters Library, 475 L'Enfant Plaza SW, 11th Floor North, Washington, DC 20260. These records are generally available for review Monday through Friday, 8 a.m. to 4 p.m., by calling 202–268–2906.

FOR FURTHER INFORMATION CONTACT: Dale Kennedy, (202) 268–6592, or Jennifer Cox, (202) 268–2108.

SUPPLEMENTARY INFORMATION: All submitted comments and attachments are part of the public record and subject to disclosure. Do not enclose any material in your comments that you consider to be confidential or inappropriate for public disclosure.

The Postal Service proposes to amend Publication 52, *Hazardous, Restricted, and Perishable Mail* (Pub 52), with the provisions set forth herein. While not codified in Title 39, Code of Federal Regulations (CFR), Publication 52 is a regulation of the Postal Service, and changes to it may be published in the **Federal Register**. 39 CFR 211.2(a)(2).

Moreover, Publication 52 is incorporated by reference into *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM) section 601.8.1, which is incorporated by reference, in turn, into the Code of Federal Regulations. 39 CFR 111.1, 111.3. Publication 52 is publicly available, in a read-only format, via the Postal Explorer® website at *https://pe.usps.com.* In addition, links to Postal Explorer are provided on the landing page of *USPS.com,* the Postal Service's primary customer-facing website, and on *Postal Pro,* an online informational source available to postal customers.

Proposal

Except as otherwise specified, the Postal Service proposes to require mailers shipping hazardous materials (HAZMAT) or dangerous goods (DG) to utilize rigid outer packaging that meets minimum edge crush test requirements as part of its ongoing efforts to improve safety within the Postal Service network. The Postal Service is proposing these requirements to increase the capability of packages to withstand normal processing and handling from induction to delivery point while reducing potential HAZMAT or DG incidents.

Additionally, the Postal Service proposes to allow mailers to use padded or poly bags as outer packaging for shipments containing lithium batteries installed in the equipment they operate that do not display hazardous text, marks or labels as permitted in sections 349.221a6, 622.51f and 622.52g, but only when packed in an inner container that can withstand a 1.7-meter drop test. Currently, the use of padded and poly bags as outer packaging is permitted only when the mailpiece contains button cell batteries installed in the equipment they operate.

The Postal Service is cognizant that the existing regulations in Pub 52 pertaining to other nonregulated toxic materials (Pub 52, section 346.232) are more stringent than other transportation regulatory agencies and commercial carriers and is therefore proposing to align its regulations with the transportation industry. If the proposal is adopted, the Postal Service will amend Pub 52 to remove quantity restrictions for nonregulated liquid and solid toxic materials, for products such as pesticides, insecticides and herbicides. The Postal Service believes this proposal will provide mailers a clearer understanding of its rules when shipping nonregulated toxic materials and align its regulations with the Pipeline and Hazardous Materials Safety Administration (PHMSA).

The Postal Service proposes to adopt the following changes to Publication 52, *Hazardous, Restricted, and Perishable Mail,* incorporated by reference into *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM) section 601.8.1, which is further incorporated by reference in the Code of Federal Regulations. Publication 52 is also a regulation of the Postal Service, changes to which may be published in the **Federal Register**. Accordingly, for the reasons stated in the preamble, the Postal Service proposes to amend Publication 52 as follows:

Publication 52, Hazardous, Restricted and Perishable Mail

* * * * *

1 Introduction

13 Additional Information

[Add new section 131 to read as follows:]

131 Hazardous Materials Outer Packaging

Except as otherwise specified, rigid outer packaging must be used for shipments containing hazardous materials. Outer packaging, as defined in Appendix D, is the outer most enclosure that holds the primary receptacle, and if applicable, secondary packaging, absorbent and/or cushioning material.

When shipping hazardous materials, the following rigid outer packaging is required:

(a) Hazardous materials shipments weighing 20 pounds or less, the outer package must be 200 lb. burst test or 32-edge crush test package or equivalent, at minimum.

(b) Hazardous materials shipments weighing more than 20 pounds, outer packages must be 275 lb. burst test or 44-edge crush test or equivalent, at minimum.

Lithium batteries installed in the equipment they operate that are permitted to be mailed under section 349, are afforded adequate protection by that equipment, and do not display hazardous text, markings or labels as permitted in 349.221a6, 622.51f and 622.52g may utilize padded or poly bags as outer packaging, provided they are within a container that can withstand a 1.7-meter drop test before placing inside the padded or poly bag. See 349.221.a(3).

* * * * *

3 Hazardous Materials

* * * * *

34 Mailability by Hazard Class

* * * * *

346 Toxic Substances and Infectious Substances (Hazard Class 6)

* * * * *

346.232 Other Nonregulated Toxic Materials

[Revise paragraph to read as follows:]

Liquids and solids such as pesticides, insecticides, herbicides and irritating material (346.11e), that are not regulated as hazardous materials under 49 CFR 172.101 are mailable but must be packaged in rigid outer packaging (see 131) and be able to withstand normal transit and handling. Liquids must also follow 451.3a.

* * * * *

349 Miscellaneous Hazardous Materials (Hazard Class 9)

* * * * *

[Insert new 349.221 to read as follows:]

349.221 Lithium Batteries

a. *General.* The following applies to the mailability of all lithium batteries:

1. Each cell or battery must meet the requirements of each test in the UN Manual of Tests and Criteria, part III, and subsection 38.3 as referenced in 49 CFR 171.7.

2. Lithium battery outer packaging must be rigid (see 131), sealed and of adequate size.

3. The use of padded or poly bags as outer packaging is permitted only when:

a. Mailpieces contain lithium batteries properly installed in the equipment/product they intend to operate.

b. The batteries are afforded adequate protection by the equipment/product, and

c. The secondary container (*e.g.,* original manufacturer packaging), containing the equipment or product prevents damage and accidental activation, can retain the product without puncture of the packaging under normal conditions of transport and can withstand a 1.7-meter drop test. Button cell batteries, meeting the classification criteria in 349.11d, installed in the device they operate are not required to be within a secondary container that can withstand a 1.7-meter drop test prior to utilizing a padded or poly bag as outer packaging.

d. The package containing batteries does not display hazardous materials text, marks.

4. All outer packages must have a complete delivery and return address.

5. Lithium battery marks are required on mailpieces containing 5 to 8 lithium cells installed in the equipment they operate.

a. The marks must be applied to the address side without being folded or

applied in such a manner that parts of the mark appear on different sides of the mailpiece. See 325.1.

b. The mark must be a DOT-approved lithium battery mark, as specified in 49 CFR 173.183(c)(3)(i) and Exhibit 325.2a.

c. The mark must include a telephone number for those who need to obtain additional information.

d. Lithium metal cells or batteries must be marked with UN3090.

e. Lithium metal cells or batteries installed in or packed with the equipment they intend to operate must indicate UN3091.

f. Lithium-ion cells or batteries must be marked UN3480.

g. Lithium-ion cells or batteries installed in or packed with the equipment they intend to operate must indicate UN3481.

6. Lithium battery marks are not required on packages containing only lithium button cell batteries, no more than 4 lithium cells or 2 lithium batteries installed in the equipment they operate.

7. All used, damaged, or defective electronic devices with lithium cells or batteries contained in or packed with device (excluding electronic devices that are new in original packaging, and manufacturer-certified new or refurbished devices) must be marked with the text ''Restricted Electronic Device'' and ''Surface Transportation Only'' on the address side of the mailpiece.

* * * * *

[Renumber existing section 349.221 to 349.222]

349.222 Lithium Metal (Nonrechargeable) Cells and Batteries—Domestic

[Revise item a. as follows:]

a. General. The following restrictions apply to the mailability of all lithium metal (or lithium alloy) cells and batteries:

1. Each cell must contain no more than 1.0 gram (g) of lithium content per cell.

2. Each battery must contain no more than 2.0 g aggregate lithium content per battery.

* * * * *

[Renumber existing section 349.222 to 349.223]

349.223 Lithium-Ion (Rechargeable) Cells and Batteries—Domestic

[Revise item a. as follows:]

a. *General.* The following additional restrictions apply to the mailability of all secondary lithium-ion or lithium polymer cells and batteries:

1. The watt-hour rating must not exceed 20 Wh per cell.

2. The watt-hour rating must not exceed 100 Wh per battery.

3. Each battery must bear the ''Watt-hour'' or ''Wh'' marking on the battery to determine if it is within the limits defined in items 1 and 2.

* * * * *

62 Hazardous Materials: International Mail

621 General Requirements

* * * * *

[Insert new section 621.2 and renumber existing 621.2 through 621.4 as 621.3 through 621.5]

621.2 Outer Packaging Requirements

Except as otherwise specified, rigid outer packaging must be used for shipments containing dangerous goods following the instructions in 131.

* * * * *

Appendix C

USPS Packaging Instruction 9D

[Revise third bullet in the Required Packaging section to read as follows:]

Required Packaging

Lithium Metal and Lithium-Ion Batteries

▪ Lithium batteries permitted to be mailed under section 349 that are installed in the device they operate, are afforded adequate protection by that equipment, and do not display hazardous text, markings or labels as permitted in 349.221a6, 622.51f and 622.52g may utilize padded and poly bags as outer packaging provided the device is within a secondary container that can withstand a 1.7-meter drop test. Button cell batteries, meeting the classification criteria in 349.11d, installed in the device they operate are not required to be within a secondary container that can withstand a 1.2-meter drop test prior to utilizing a padded or poly bag as outer packaging.

* * * * *

USPS Packaging Instruction 9E

[Insert new second bullet in the Required Packaging section to read as follows:]

Required Packaging

Lithium Metal and Lithium-Ion Batteries

▪ Lithium batteries installed in the device they operate that are permitted to be mailed under section 622.5, may utilize padded and poly bags as outer packaging provided the device is within a secondary container that can withstand a 1.7-meter drop test. Button cell batteries, meeting the classification criteria in 349.11d, installed in the device they operate are not required to be within a secondary container that can withstand a 1.7-meter drop test prior to utilizing a padded or poly bag as outer packaging.

* * * * *

Appendix D

Hazardous Materials Definitions

* * * * *

[Revise definition of Rigid to read as follows:]

Rigid means unable to bend or be forced out of shape; not flexible. Rigid outer packaging is generally interpreted to mean a fiberboard (cardboard) box or outer packaging of equivalent strength, durability, and rigidity. See 131.

* * * * *

Colleen Hibbert-Kapler,

Attorney, Ethics and Legal Compliance.

[FR Doc. 2023–27643 Filed 12–14–23; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2023–0588; FRL–11585–01–R9]

Air Plan Revisions; California; Sacramento Metropolitan Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a revision to the Sacramento Metropolitan Air Quality Management District (SMAQMD) portion of the California State Implementation Plan (SIP) concerning a rule submitted to address section 185 of the Clean Air Act (CAA or the Act). We are taking comments on this proposal and plan to follow with a final action.

DATES: Comments must be received on or before January 16, 2024.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R09–OAR–2023–0588 at *https://www.regulations.gov.* For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI)

or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.* If you need assistance in a language other than English or if you are a person with a disability who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Mae Wang, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105. By phone: (415) 947–4137 or by email at *wang.mae@epa.gov.*

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

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I. The State's Submittal

A. What rule did the State submit?

Table 1 lists the rule addressed by this proposal with the date that it was amended by the local air agency and submitted by the California Air Resources Board (CARB).

TABLE 1—SUBMITTED RULE

Local agency	Rule #	Rule title	Amended	Submitted
SMAQMD	307	Clean Air Act Penalty Fees	03/23/2023	05/11/2023

On November 6, 2023, the EPA determined that the submittal for SMAQMD Rule 307 met the completeness criteria in 40 CFR part 51 Appendix V, which must be met before formal EPA review.

B. Are there other versions of this rule?

We approved an earlier version of Rule 307 into the SIP on August 26, 2003 (68 FR 51184). The SMAQMD adopted revisions to the SIP-approved version on March 23, 2023, and CARB submitted them to us on May 11, 2023. If we take final action to approve the March 23, 2023 version of Rule 307, this version will replace the previously approved version of this rule in the SIP.

C. What is the purpose of the submitted rule?

Under sections 182(d)(3), (e), (f) and 185 of the Act, states with ozone nonattainment areas classified as ''Severe'' or ''Extreme'' are required to submit a SIP revision that requires major stationary sources of volatile organic compounds (VOC) or oxides of nitrogen (NO_X) emissions in the area to pay a fee if the area fails to attain the standard by the attainment date. The required SIP revision must provide for annual payment of the fees, computed in accordance with CAA section 185(b).

The Sacramento Metro ozone nonattainment area has been classified as Severe for the 1-hour, 1997, and 2008 ozone National Ambient Air Quality Standards (NAAQS). Additionally, on January 17, 2023 (88 FR 2541), the EPA issued a finding that the State of California failed to submit CAA section 185 fee programs for the 2008 ozone NAAQS for portions of the Sacramento Metro nonattainment area, including the portion under the jurisdiction of the SMAQMD. The SMAQMD submitted Rule 307 to satisfy the requirement to submit a CAA section 185 fee program for each federal ozone NAAQS for which the Sacramento Metro area is classified as Severe or Extreme.

II. The EPA's Evaluation and Action

A. How is the EPA evaluating the rule?

Rules in the SIP must be enforceable (see CAA section 110(a)(2)), must not interfere with applicable requirements concerning attainment and reasonable further progress or other CAA requirements (see CAA section 110(l)), and must not modify certain SIP control requirements in nonattainment areas without ensuring equivalent or greater emissions reductions (see CAA section 193). The EPA is also evaluating the rule for consistency with the statutory requirements of CAA section 185.

Guidance and policy documents that we used to evaluate enforceability, revision/relaxation and rule stringency requirements for the applicable criteria pollutants include the following:

1. ''State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990,'' 57 FR 13498 (April 16, 1992); 57 FR 18070 (April 28, 1992).
2. ''Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations,'' EPA, May 25, 1988 (the Bluebook, revised January 11, 1990).
3. ''Guidance Document for Correcting Common VOC & Other Rule Deficiencies,'' EPA Region 9, August 21, 2001 (the Little Bluebook).

B. Does the rule meet the evaluation criteria?

This rule meets CAA requirements and is consistent with relevant guidance regarding enforceability and SIP revisions. The EPA's technical support document (TSD) has more information on our evaluation.

C. The EPA's Recommendations to Further Improve the Rule

The TSD includes recommendations for the next time the local agency modifies the rule.

D. Proposed Action and Public Comment

As authorized in section 110(k)(3) of the Act, the EPA proposes to fully approve submitted Rule 307 because it fulfills all relevant requirements. We will accept comments from the public on this proposal until January 16, 2024. If we take final action to approve the submitted rule, our final action will incorporate this rule into the federally enforceable SIP. Our final action to approve SMAQMD Rule 307 will also remove the EPA's obligation to promulgate a FIP associated with the January 17, 2023 action.

III. Incorporation by Reference

In this rule, the EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with

requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference SMAQMD Rule 307, Clean Air Act Penalty Fees, amended on March 23, 2023, which addresses the CAA section 185 fee program requirements. The EPA has made, and will continue to make, these materials available through *https://www.regulations.gov* and at the EPA Region IX Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

IV. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 14094 (88 FR 21879, April 11, 2023);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it proposes to approve a state program;
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); and
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act.

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

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, Feb. 16, 1994) directs Federal agencies to identify and address ''disproportionately high and adverse human health or environmental effects'' of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. The EPA defines environmental justice (EJ) as ''the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'' The EPA further defines the term fair treatment to mean that ''no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.''

The State did not evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. The EPA did not perform an EJ analysis and did not consider EJ in this action. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of E.O. 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

List of Subjects in 40 CFR Part 52

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

Dated: December 8, 2023.

Martha Guzman Aceves,

Regional Administrator, Region IX.

[FR Doc. 2023–27514 Filed 12–14–23; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register

Vol. 88, No. 240

Friday, December 15, 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–SC–23–0069]

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 0581–0268 for the Christmas Tree Promotion, Research and Information Program.

DATES: Comments must be received by February 13, 2024.

ADDRESSES: Interested persons are invited to submit written comments concerning this notice. All comments must be submitted through the Federal e-rulemaking portal at *https://www.regulations.gov* and should reference the document number and the date and page number of this issue of the **Federal Register**. All comments submitted in response to this notice will be included in the rulemaking record and will be made available to the public. The identity of the individuals or entities submitting comments will be made public on the internet at *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Katie Cook, Marketing Specialist at telephone: (202) 720–8085, or electronic mail: *Katie.Cook@usda.gov,* or Sarah Richardson, Marketing Specialist at telephone: 202–720–8085 electronic mail: *Sarah.Richardson@usda.gov,* Market Development Division, Specialty Crops Program, AMS, USDA, Stop 0244, Room 1406–S, 1400 Independence Avenue SW, Washington, DC 20250–0244.

SUPPLEMENTARY INFORMATION:

Title: Christmas Tree Promotion, Research, and Information Program.

OMB Number: 0581–0268.

Expiration Date of Approval: June 30, 2024.

Type of Request: Extension and revision of a currently approved information collection.

Abstract: The Christmas Tree Promotion, Research, and Information program was created to help strengthen the position of Christmas trees in the marketplace, and maintain, develop, and expand markets for Christmas trees in the United States. The Christmas Tree Promotion, Research, and Information Order (Order) (7 CFR part 1214) is authorized under the Commodity Promotion, Research, and Information Act of 1996 (1996 Act) (7 U.S.C. 7411–7425).

The Order was implemented November 2011, and immediately stayed. The stay was lifted on April 7, 2014, in accordance with the provisions of the Agriculture Act of 2014 (2014 Farm Bill). Currently, the Christmas tree program is administered by the Christmas Tree Promotion Board (Board) which is appointed by the Secretary of Agriculture and financed by a mandatory assessment on producers and importers of fresh cut Christmas trees. The assessment rate is $0.15 per Christmas tree cut and sold domestically or imported into the United States. The program provides an exemption for producers and importers that cut and sell or import fewer than 500 Christmas trees annually. In 2019, a referendum was held among eligible producers and importers to determine whether they favor continuation of the program. Fifty-five percent of Christmas tree producers and importers who voted were in favor of continuing the program, and therefore, the program continues to help maintain and expand markets for Christmas trees.

The information collection requirements in this request are essential to carry out the intent of the Order and the 1996 Act. The objective in carrying out this responsibility includes assuring the following: (1) funds are collected and properly accounted for; (2) expenditures of all funds are for the purposes authorized by the 1996 Act and Order; and (3) the board's administration of the programs conforms to USDA policy.

The Order's provisions have been carefully reviewed and every effort has been made to minimize any unnecessary recordkeeping costs or requirements, including efforts to utilize information already submitted under other Christmas tree programs administered by USDA and other State programs.

The forms covered under this collection require the minimum information necessary to effectively carry out the requirements of the program. Such information can be supplied without data processing equipment or outside technical expertise. In addition, there are no additional training requirements for individuals filling out reports and remitting assessments to the Board. The forms are simple, easy to understand, and place as small a burden as possible on the person required to file the information.

Collecting information yearly would coincide with normal industry business practices. The timing and frequency of collecting information are intended to meet the needs of the industry while minimizing the amount of work necessary to fill out the required reports. The requirement to keep records for two years beyond the fiscal period of their applicability is consistent with normal industry practices. In addition, the information to be included on these forms is not available from other sources because such information relates specifically to individual producers and importers who will be subject to the provisions of the Order and 1996 Act. Therefore, there is no practical method for collecting the required information without the use of these forms.

AMS is committed to complying with the E-Government Act, which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

Estimate of Burden: Public recordkeeping burden for this collection of information is estimated to average 0.43 hour per response.

Respondents: Producers and importers.

Estimated Number of Respondents: 5,000.

Estimated Total Annual Responses: 9,143.

Estimated Number of Responses per Respondent: 1.83.

Estimated Total Annual Burden on Respondents: 3,956 hours.

The Board utilizes a variety of forms including domestic sales report and importer sales report; application for exemption; nomination form and ballot form; reimbursement of assessments and refund application forms; donation form; and recordkeeping requirements. The forms and information covered under this information collection require minimum information necessary to effectively carry out the requirements of the program and their use is necessary to fulfill the intent of the applicable authority. Lastly, the board is always looking to provide electronic versions of the forms for easier access and submission.

Forms were updated to add a box to allow respondents to include both mailing and physical addresses, if they differ. This change allows Board staff to better record contact information for producers and importers. ''Domestic Sales Report'', ''Importer Sales Report'', and ''Application for Exemption'' were all updated to add this additional box. Forms requesting a fax number from respondents were revised to remove the box due to the expanded use of electronic mail.

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 responses to this document will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

Authority: 44 U.S.C. Chapter 35.

Erin Morris,

Associate Administrator, Agriculture Marketing Service.

[FR Doc. 2023–27534 Filed 12–14–23; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. FSIS–2023–0027]

Notice of Request for a New Information Collection: Web-Based Surveys

AGENCY: Food Safety and Inspection Service (FSIS), U.S. Department of Agriculture (USDA).

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and Office of Management and Budget (OMB) regulations, FSIS is announcing its intention to collect information using web surveys to test new labels for safe handling of raw and partially cooked meat and poultry products. This is a new information collection with 3,550 hours.

DATES: Submit comments on or before February 13, 2024.

ADDRESSES: FSIS invites interested persons to submit comments on this **Federal Register** notice. Comments may be submitted by one of the following methods:

- *Federal eRulemaking Portal:* This website provides commenters the ability to type short comments directly into the comment field on the web page or to attach a file for lengthier comments. Go to *https://www.regulations.gov.* Follow the on-line instructions at that site for submitting comments.
- *Mail:* Send to Docket Clerk, U.S. Department of Agriculture, Food Safety and Inspection Service, 1400 Independence Avenue SW, Mailstop 3758, Washington, DC 20250–3700.
- *Hand- or courier-delivered submittals:* Deliver to 1400 Independence Avenue SW, Jamie L. Whitten Building, Room 350–E, Washington, DC 20250–3700.

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2023–0027. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to *https://www.regulations.gov.*

Docket: For access to background documents or comments received, call 202–720–5046 to schedule a time to visit the FSIS Docket Room at 1400 Independence Avenue SW, Washington, DC 20250–3700.

FOR FURTHER INFORMATION CONTACT: Gina Kouba, Office of Policy and Program Development, Food Safety and Inspection Service, USDA, 1400 Independence Avenue SW, Mailstop 3758, South Building, Washington, DC 20250–3700; 202–720–5046.

SUPPLEMENTARY INFORMATION:

Title: Consumer Labeling Research Web-based Surveys.

OMB Number: 0583–NEW.

Type of Request: Request for a new information collection.

Abstract: FSIS has been delegated the authority to exercise the functions of the Secretary (7 CFR 2.18 and 2.53), as specified in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601, *et seq.*), the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451, *et seq.*), and the Egg Products Inspection Act (EPIA) (21 U.S.C. 1031, *et seq.*). These statutes mandate that FSIS protect the public by verifying that meat, poultry, and egg products are safe, wholesome, and properly labeled.

Safe handling instructions (SHI) are required on the labels of raw or partially cooked (*i.e.,* not considered ready to eat) meat and poultry products if the product is destined for household consumers or institutional uses (9 CFR 317.2(l) and 9 CFR 381.125(b)). FSIS has required the SHI label for raw and partially cooked meat and poultry products since 1994 (59 FR 40209).

In response to inquiries from consumer groups and other stakeholders about potential changes to SHI requirements, FSIS gathered input from members of academia, industry, and consumer stakeholders concerning the label in November 2013. FSIS presented the results of the input in the form of suggestions to the National Advisory Committee on Meat and Poultry Inspection (NACMPI) in January 2014. The NACMPI Subcommittee on Food Handling Labels recommended that FSIS pursue changes in the existing SHI label and conduct consumer research to determine the effectiveness of any revisions to the SHI label.

In 2015, FSIS conducted six consumer focus groups (OMB No. 0583–0166; 11/30/2017) to evaluate understanding of the current SHI label and responses to possible revisions. The results from the focus groups suggested that consumers would find certain revisions to the SHI label useful. Participants recommended changes to improve consumer comprehension and adherence to recommended safe handling practices (*e.g.,* add recommendations to use a food thermometer and endpoint temperatures for different cuts of meat and poultry). Based on the results of these focus groups, FSIS determined that additional research using more rigorous, quantitative approaches with a

larger sample of consumers was needed. FSIS also surmised this research would help inform potential revisions to the current SHI label and assess whether a label revision would improve consumer food safety behaviors.

In 2020, FSIS completed a study that comprised a web-based experimental survey and an experimental behavior change study that included meal preparation in a test kitchen environment, eye tracking, and in-depth interviews to design and evaluate potential revised SHI labels (OMB No. 0583–0177; 4/30/2022). For this study, FSIS created new labels based on recommendations from NACMPI, which focused on updating the existing text and icons in the current SHI label and adding information on recommended internal minimum temperatures for different cuts of meat and poultry. This study found that the three labels tested did not perform better than the current SHI label with regard to visual saliency (*i.e.,* noticeability) and behavior change for the safe handling practices displayed on the label (*e.g.,* using a food thermometer or washing hands with soap and water for 20 seconds and then drying) (final report available at *https://www.fsis.usda.gov/sites/default/files/media_file/2022-02/SHI_Behavior_Change_Study%20Final%20Report_9_23_20.pdf*).

Consumer groups and other stakeholders have continued to advocate for improved labeling for raw and partially cooked meat and poultry products. In response, FSIS is pursuing research to create and assess consumer responses to new labeling not included in previous studies. FSIS plans to start with a ''blank slate'' (*i.e.,* freely develop the label with no restrictions, ideas, or characteristics instead of simply revising the current SHI label). To do this FSIS will take into consideration recent research via a literature review and input from key stakeholders and experts via listening sessions.

In December 2022 and January 2023, through a contractor, FSIS conducted listening sessions with consumer groups; representatives from the meat and poultry industry; and experts in health communications, food science, and food safety education to collect information on factors to consider when creating new labeling for raw and partially cooked meat and poultry products. Additionally, a literature review was conducted to identify and summarize best practices for label design for attracting attention and motivating behavior change and recommendations for label design based on human factors research. The findings from the listening sessions and literature review were used for the current study to create new labels for safe handling of raw and partially cooked meat and poultry products.

FSIS plans to use an iterative approach with multiple rounds of consumer research to obtain feedback on the new label designs and make refinements during the study. In Phase 1, the new label designs are being tested in consumer focus groups to obtain qualitative feedback on the labels, and the findings will be used to refine the label design and messaging. In accordance with the Paperwork Reduction Act, FSIS published a 60-day notice (88 FR 30713 May 12, 2023) and a 30-day notice requesting comments regarding this information collection request (88 FR 65359 September 22, 2023). The Agency received no comments, and the information collection request is currently being reviewed by OMB.

In Phase 2, the revised label designs will be tested in an exploratory web survey, and the quantitative findings from this survey will be used to revise and prepare the final labels for testing in a web-based experimental survey to identify the top performing labels based on the outcomes of interest, such as noticeability, changed food safety–related beliefs, and induced thinking about the risks of contracting foodborne illness. In Phase 3, an observation study will be conducted in experimental test kitchens to obtain empirical evidence on the label design that is most effective at encouraging consumers to follow recommended safe handling practices for raw and partially cooked meat and poultry products and will include the use of eye tracking to measure visual saliency for the new labels compared with the control, the current SHI label.

FSIS is requesting approval for a new information collection to conduct Phase 2, consumer web-based surveys. Phase 2 is a new information collection with 3,550 hours. FSIS plans to submit an additional information collection request for approval of Phase 3, the observation studies.

FSIS has contracted with RTI International to conduct the Phase 2 web-based surveys. FSIS will use the exploratory web survey to refine the labeling format, layout, design features (*e.g.,* icons, colors), and messaging and to collect other information such as awareness of the current SHI and risk perceptions of contracting foodborne illness. The exploratory survey will be important for testing and refining the labels for understanding, readability, visual receptivity, and perceived effectiveness.

The experimental survey will use a limited time exposure (LTE) experiment to measure label saliency (*i.e.,* noticeability) and identify the top performing labels. Respondents will be randomly assigned to 1 of 10 conditions (up to 9 test labels and the current SHI label). A mock meat or poultry product bearing the assigned label will be briefly displayed on the screen (*e.g.,* 20 seconds), and respondents will be asked to recall whether specific text or images were present on the label. Using statistical analysis, we can determine the relative saliency of the labels tested. Additionally, we will ask a series of questions to measure other outcomes, such as whether the labels provided new information, induced thinking about the risks of contracting foodborne illness, and changed food safety–related beliefs.

To administer the surveys, RTI will partner with Kantar's Lightspeed *Global* Market Insite Panel, an opt-in panel. RTI will use quotas to ensure that the survey respondents mirror the demographics of the U.S. population (*e.g.,* age, education level, race, ethnicity) based on the most recent Census data. Kantar will conduct a pilot for each survey, 50 respondents for the exploratory survey and 100 respondents for the experimental survey. For the full-scale survey, Kantar will select samples that are sufficient to yield 1,000 respondents for the exploratory survey and 2,400 respondents for the experimental survey.

Kantar will conduct a separate set of cognitive interviews for the survey instruments for the exploratory and experimental surveys. Up to nine cognitive interviews will be conducted to evaluate and refine each survey instrument before receiving OMB approval. After receiving OMB approval, Kantar will conduct separate pilot studies for the exploratory and web-based surveys to ensure that the programming logic for the online survey is correct before the full-scale study is implemented.

Estimate of Burden: For the pilot for the exploratory survey, it is expected that 1,000 panel members selected by Kantar will receive email invitations and that 50 of the eligible panel members will subsequently complete the questionnaire. For the full-scale study, it is expected that 20,000 panel members selected by Kantar will receive email invitations and that 1,000 of the eligible panel members will subsequently complete the questionnaire. The email invitations for the pilot and full-scale study are expected to take 2 minutes to read. The

exploratory survey is expected to take 20 minutes to complete.

For the pilot for the experimental survey, it is expected that 2,000 panel members selected by Kantar will receive email invitations and that 100 of the eligible panel members will subsequently complete the questionnaire. For the full-scale study, it is expected that 48,000 panel members selected by Kantar will receive email invitations and that 2,400 of the eligible panel members will subsequently complete the questionnaire. The email invitations for the pilot and the full-scale study are expected to take 2 minutes to read. The exploratory survey is expected to take 20 minutes to complete.

The total estimated burden of the web-based surveys are 3,550 hours (1,050.00 hours for the exploratory survey and 2,500 hours for the experimental survey).

ESTIMATED ANNUAL REPORTING BURDEN FOR THE EXPLORATORY SURVEY

Study component	Sample size	Freq	Responses				Non-responses				Total burden hours
			Count	Freq X count	Min/ resp	Burden hours	Count	Freq X count	Min/ resp	Burden hours	
Pilot:	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Email invitation	1,000	1	50	50	2	1.67	950	950	2	31.67	33.34
Questionnaire	50	1	[a] 50	50	20	16.67	0	0	0	0	16.67
Full-Scale:	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Email invitation	20,000	1	1,000	1,000	2	33.33	19,000	19,000	2	633.33	666.66
Questionnaire	1,000	1	[a] 1,000	1,000	20	333.33	0	0	0	0	333.33
Total Burden hours	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	1,050.00

[a] A subset of the people who received the invitation.

ESTIMATED ANNUAL REPORTING BURDEN FOR THE EXPERIMENTAL SURVEY

Study component	Sample size	Freq	Responses				Non-responses				Total burden hours
			Count	Freq X count	Min/ resp	Burden hours	Count	Freq X count	Min/ resp	Burden hours	
Pilot:	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Email invitation	2,000	1	100	100	2	3.33	1,900	1,900	2	63.33	66.66
Questionnaire	100	1	[a] 100	100	20	33.33	0	0	0	0	33.33
Full-Scale:	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Email invitation	48,000	1	2,400	2,400	2	80.00	45,600	45,600	2	1,520	1,600
Questionnaire	2,400	1	[a] 2,400	2,400	20	800.00	0	0	0	0	800
Total Burden hours	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	2,499.99

[a] A subset of the people who received the invitation.

Respondents: Consumers.

Estimated No. of Respondents: 3,550.

Estimated No. of Annual Responses per Respondent: 1.

Estimated Total Burden: 3,550 hours.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record. Copies of this information collection assessment can be obtained from Gina Kouba, Office of Policy and Program Development, Food Safety and Inspection Service, USDA, 1400 Independence Avenue SW, Mailstop 3758, South Building, Washington, DC 20250–3700; (202) 937–4272.

Comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of FSIS' functions, including whether the information will have practical utility; (b) the accuracy of FSIS' estimate of the burden of the proposed collection of information, including the validity of the method and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology. Comments may be sent to both FSIS, at the addresses provided above, and the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20253.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, FSIS will announce this **Federal Register** publication on-line through the FSIS web page located at: *https://www.fsis.usda.gov/federal-register.*

FSIS will also announce and provide a link to this **Federal Register** publication through the FSIS *Constituent Update,* which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The *Constituent Update* is available on the FSIS web page. Through the web page, FSIS can provide information to a much broader, more diverse audience. In addition, FSIS offers an email subscription service which provides automatic and customized access to selected food safety news and information. This service is available at: *https://www.fsis.usda.gov/subscribe.* Options range from recalls to export information, regulations, directives, and notices. Customers can add or delete subscriptions themselves and have the option to password protect their accounts.

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(1) Mail: U.S. Department of Agriculture Office of the Assistant Secretary for Civil Rights 1400 Independence Avenue SW, Washington, DC 20250–9410;

(2) Fax: (833) 256–1665 or (202) 690–7442; or

(3) Email: program.intake@usda.gov.

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Paul Kiecker,

Administrator.

[FR Doc. 2023–27602 Filed 12–14–23; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Forest Service

Proposed New Recreation Fee Sites

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice.

SUMMARY: The Ouachita National Forest is proposing to establish several new recreation fee sites. Recreation fee revenues collected at the new recreation fee sites would be used for operation, maintenance, and improvement of the sites. An analysis of nearby recreation fee sites with similar amenities shows the recreation fees that would be charged at the new recreation fee sites are reasonable and typical of similar recreation fee sites in the area.

DATES: If approved, the new fees would be implemented no earlier than six months following the publication of this notice in the **Federal Register**.

ADDRESSES: Ouachita National Forest, P.O. Box 1270, Hot Springs, Arkansas 71902.

FOR FURTHER INFORMATION CONTACT: Bill Jackson, Forest Recreation Program Manager, 501–321–5202 or *r8_ouachita_recreation@usda.gov.*

SUPPLEMENTARY INFORMATION: The Federal Lands Recreation Enhancement Act (16 U.S.C. 6803(b)) directs the Secretary of Agriculture to publish a six-month advance notice in the **Federal Register** of establishment of new recreation fee sites. In accordance with Forest Service Handbook 2309.13, Chapter 30, the Forest Service will publish the proposed new recreation fee sites in local newspapers and other local publications for public comment. Most of the new recreation fee revenues would be spent where they are collected to enhance the visitor experience at the new recreation fee sites.

An expanded amenity recreation fee of $100 per night would be charged for rental of Shady Lake Caretakers Cabin and an additional $10 per tent adjacent to the cabin. A standard amenity recreation fee of $5 per day per vehicle would be charged at Little Missouri Falls Day Use developed recreation site. The America the Beautiful—the National Parks and Federal Recreational Lands Pass would be honored at these standard amenity recreation fee sites. A special recreation permit fee of $10 per off-highway vehicle (OHV) per day, or a $60 annual pass, is proposed at the Wolf Pen Gap OHV Trail Complex.

Expenditures from recreation fee revenues collected at the new recreation fee sites would enhance recreation opportunities, improve customer service, and address maintenance needs. Once public involvement is complete, these new fees will be reviewed by a Resource Advisory Committee prior to a final decision and implementation. Reservations for the cabin could be made online at *www.recreation.gov* or by calling 877–444–6777. Reservations would cost $8.00 per reservation.

Dated: December 8, 2023.

Jacqueline Emanuel,

Associate Deputy Chief, National Forest System.

[FR Doc. 2023–27515 Filed 12–14–23; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

Proposed New Recreation Fee Sites

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice.

SUMMARY: The Salmon-Challis National Forest is proposing to establish several new recreation fee sites. Recreation fee revenues collected at the new recreation fee sites would be used for operation, maintenance, and improvement of the sites. An analysis of nearby recreation fee sites with similar amenities shows the recreation fees that would be charged at the new recreation fee sites are reasonable and typical of similar recreation fee sites in the area.

DATES: If approved, the new recreation fees would be implemented no earlier than six months following the publication of this notice in the **Federal Register**.

ADDRESSES: Salmon-Challis National Forest. 1206 S Challis St., Salmon, ID 83467.

FOR FURTHER INFORMATION CONTACT: James Townley, Recreation Management Specialist, at 208–756–5100 or *james.townley@usda.gov.*

SUPPLEMENTARY INFORMATION: The Federal Lands Recreation Enhancement Act (16 U.S.C. 6803(b)) requires the Forest Service to publish a six-month advance notice in the **Federal Register** of establishment of new recreation fee sites. In accordance with Forest Service Handbook 2309.13, chapter 30, the Forest Service will publish the proposed new recreation fee sites in local newspapers and other local publications for public comment. Most of the new recreation fee revenues would be spent where they are collected to enhance the visitor experience at the new recreation fee sites.

An expanded amenity recreation fee of $10 per night would be charged for Big Creek, Broad Canyon, Little Bayhorse, Morse Creek, Pass Creek Narrows, Big Bayhorse, Cougar Point, and Tin Cup Campgrounds. An expanded amenity recreation fee of $30 per night would be charged for double campsites at Meadow Lake Campground. An expanded amenity recreation fee of $15 per night would be

charged for Mosquito Flat Reservoir and Yellowjacket Lake Campgrounds. In addition, an expanded amenity recreation fee of $65 per night would be charged for rental of Basin Butte Lookout, and an expanded amenity recreation fee of $50 per night would be charged for rental of Bonanza Guard Station.

Expenditures from recreation fee revenues collected at the new recreation fee sites would enhance recreation opportunities, improve customer service, and address maintenance needs. Once public involvement is complete, these new recreation fees will be reviewed by a Resource Advisory Committee prior to a final decision and implementation. Reservations for Basin Butte Lookout and Bonanza Guard Station could be made online at *www.recreation.gov* or by calling 877–444–6777. Reservations would cost $8.00 per reservation.

Dated: December 8, 2023.

Jacqueline Emanuel,

Associate Deputy Chief, National Forest System.

[FR Doc. 2023–27511 Filed 12–14–23; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–893]

Certain Frozen Warmwater Shrimp From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2022–2023

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

SUMMARY: The U.S. Department of Commerce (Commerce) continues to determine that the 139 companies subject to this administrative review of the antidumping duty order on certain frozen warmwater shrimp (shrimp) from the People's Republic of China (China) are part of the China-wide entity because they did not demonstrate eligibility for separate rates. The period of review (POR) is February 1, 2022, through January 31, 2023.

DATES: Applicable December 15, 2023.

FOR FURTHER INFORMATION CONTACT: Colin Thrasher, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3004.

SUPPLEMENTARY INFORMATION:

Background

On September 27, 2023, Commerce published the *Preliminary Results* of this administrative review in the **Federal Register**.[1] We invited interested parties to comment on the *Preliminary Results.* For a complete description of the events that occurred since the *Preliminary Results, see* the Issues and Decision Memorandum.[2]

Commerce is conducting this review in accordance with section 751(a)(1)(B) of the Tariff Act of 1930, as amended (the Act).

Scope of the Order [3]

The product covered by this *Order* is shrimp from China. For a complete description of the scope, *see* the Issues and Decision Memorandum.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs are addressed in the Issues and Decision Memorandum. A list of the issues that parties raised and to which we responded in the Issues and Decision Memorandum is attached to this notice as Appendix I. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Changes Since the Preliminary Results

Based on a review of the record and comments received from an interested party, we have made clarifications to the *Preliminary Results* in the Issues and Decision Memorandum. Specifically, we have clarified that Commerce's China-wide entity rate determination with respect to Zhanjiang Guolian Aquatic Products Co., Ltd. (Guolian) applies only to merchandise that was not both produced by and exported to the United States during the POR by Guolian. Merchandise which was both produced and exported by Guolian to the United States is excluded from the *Order.*[4] For a more detailed discussion of this clarification, *see* the Issues and Decision Memorandum.

China-Wide Entity

Commerce considers all companies for which a review was requested to be part of the China-wide entity because they did not demonstrate their separate rate eligibility.[5] Accordingly, the companies listed in Appendix II are part of the China-wide entity. Apart from the clarification above, no party commented on the *Preliminary Results* with respect to these companies' separate rate ineligibility. Therefore, for these final results, we determine that these 139 companies are part of the China-wide entity.

Because no party requested a review of the China-wide entity and Commerce no longer considers the China-wide entity as an exporter conditionally subject to administrative reviews, we did not conduct a review of the China-wide entity.[6] The rate previously established for the China-wide entity is 112.81 percent and is not subject to change as a result of this review.[7]

Assessment Rates

Commerce will determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries covered by this review in accordance with section 751(a)(2)(C) of the Act. For the 139 companies subject to this review, we will instruct CBP to apply the China-wide rate of 112.81 percent to all entries of subject merchandise during the POR. Commerce intends to issue assessment

[1] *See Certain Frozen Warmwater Shrimp from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2022–2023,* 88 FR 66377 (September 27, 2023) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

[2] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order: Certain Warmwater Frozen Shrimp from the People's Republic of China; 2022–2023,'' dated concurrently with and hereby adopted by this notice (Issues and Decision Memorandum).

[3] *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from the People's Republic of China,* 70 FR 5149 (February 1, 2005) (*Order*).

[4] *See Order* (''Pursuant to {section} 735(c)(1)(B) of the Act, we will instruct CBP to suspend liquidation of all entries of certain frozen warmwater shrimp and prawns from {China} (except merchandise produced and exported by Zhanjiang Guolian because this company has a *de minimis* margin) entered, or withdrawn from warehouse, for consumption on or after July 16, 2004, the date of publication of the *Preliminary Determination.*'').

[5] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 88 FR 21609, 21620 (April 11, 2023) (''All firms listed below that wish to qualify for separate rate status in the administrative reviews involving NME countries must complete, as appropriate, either a Separate Rate Application or Certification, as described below.'').

[6] *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings,* 78 FR 65963, 65969–70 (November 4, 2013).

[7] *See Order.*

instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for shipments of the subject merchandise from China entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) for previously investigated or reviewed Chinese and non-Chinese exporters that have separate rates and for which a review was not requested, the cash deposit rate will continue to be the exporter-specific rate published for the most recently completed segment of this proceeding; (2) for all Chinese exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be the rate for the China-wide entity (*i.e.,* 112.81 percent); and (3) for all non-Chinese exporters of subject merchandise that have not received their own rate, the cash deposit rate will be the rate applicable to the Chinese exporter that supplied that non-Chinese exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Administrative Protective Order

This notice also serves as the only reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation subject to sanction.

Notification to Importers

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

These final results of administrative review are issued and published in accordance with sections 751(a)(1) and 777(i)(l) of the Act, and 19 CFR 351.221(b)(5).

Dated: December 8, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix I

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. Discussion of the Issue
Comment: Application of China-Wide Rate
V. Recommendation

Appendix II

Companies Not Eligible for a Separate Rate

1. Allied Kinpacific Food (Dalian) Co.
2. Allied Pacific Aquatic Products (Zhanjiang) Co., Ltd./Allied Pacific Food (Dalian) Co., Ltd.
3. Anhui Fuhuang Sungem Foodstuff Group Co., Ltd.
4. Asian Seafoods (Zhanjiang) Co., Ltd.
5. Beihai Anbang Seafood Co., Ltd.
6. Beihai Boston Frozen Food Co., Ltd.
7. Beihai Evergreen Aquatic Product Science and Technology Company Limited
8. Beihai Tianwei Aquatic Food Co. Ltd.
9. Changli Luquan Aquatic Products Co., Ltd.
10. Chengda Development Co Ltd.
11. Colorful Bright Trade Co., Ltd.
12. Dalian Beauty Seafood Company Ltd.
13. Dalian Changfeng Food Co., Ltd.
14. Dalian Guofu Aquatic Products and Food Co., Ltd.
15. Dalian Haiqing Food Co., Ltd.
16. Dalian Hengtai Foods Co., Ltd.
17. Dalian Home Sea International Trading Co., Ltd.
18. Dalian Philica International Trade Co., Ltd.
19. Dalian Rich Enterprise Group Co., Ltd.
20. Dalian Shanhai Seafood Co., Ltd.
21. Dalian Sunrise Foodstuffs Co., Ltd.
22. Dalian Taiyang Aquatic Products Co., Ltd.
23. Dandong Taihong Foodstuff Co., Ltd.
24. Dongwei Aquatic Products (Zhangzhou) Co., Ltd.
25. Ferrero Food
26. Fujian Chaohui Group
27. Fujian Chaowei International Trading
28. Fujian Dongshan County Shunfa Aquatic Product Co., Ltd.
29. Fujian Dongwei Food Co., Ltd.
30. Fujian Dongya Aquatic Products Co., Ltd.
31. Fujian Fuding Seagull Fishing Food Co., Ltd.
32. Fujian Haihun Aquatic Product Company
33. Fujian Hainason Trading Co., Ltd.
34. Fujian Hongao Trade Development Co.
35. Fujian R & J Group Ltd.
36. Fujian Rongjiang Import and Export Co., Ltd.
37. Fujian Zhaoan Haili Aquatic Co., Ltd.
38. Fuqing Chaohui Aquatic Food Co., Ltd.
39. Fuqing Dongwei Aquatic Products Industry Co., Ltd.
40. Fuqing Longhua Aquatic Food Co., Ltd.
41. Fuqing Minhua Trade Co., Ltd.
42. Fuqing Yihua Aquatic Food Co., Ltd.
43. Gallant Ocean Group
44. Guangdong Evergreen Aquatic Food Co., Ltd.
45. Guangdong Foodstuffs Import & Export (Group) Corporation
46. Guangdong Gourmet Aquatic Products Co., Ltd.
47. Guangdong Jinhang Foods Co., Ltd.
48. Guangdong Rainbow Aquatic Development
49. Guangdong Savvy Seafood Inc.
50. Guangdong Shunxin Marine Fishery Group Co., Ltd.
51. Guangdong Taizhou Import & Export Trade Co., Ltd.
52. Guangdong Universal Aquatic Food Co. Ltd.
53. Guangdong Wanshida Holding Corp.
54. Guangdong Wanya Foods Fty. Co., Ltd.
55. HaiLi Aquatic Product Co., Ltd
56. Hainan Brich Aquatic Products Co., Ltd.
57. Hainan Golden Spring Foods Co., Ltd.
58. Hainan Qinfu Foods Co., Ltd.
59. Hainan Xintaisheng Industry Co., Ltd.
60. Huazhou Xinhai Aquatic Products Co. Ltd.
61. Kuehne Nagel Ltd. Xiamen Branch
62. Leizhou Bei Bu Wan Sea Products Co., Ltd.
63. Longhai Gelin Foods Co., Ltd.
64. Maoming Xinzhou Seafood Co., Ltd.
65. New Continent Foods Co., Ltd.
66. Ningbo Prolar Global Co., Ltd.
67. North Seafood Group Co.
68. Pacific Andes Food Ltd.
69. Penglai Huiyang Foodstuff Co., Ltd.
70. Penglai Yuming Foodstuff Co., Ltd.
71. Qingdao Fusheng Foodstuffs Co., Ltd.
72. Qingdao Yihexing Foods Co., Ltd.
73. Qingdao Yize Food Co., Ltd.
74. Qingdao Zhongfu International
75. Qinhuangdao Gangwan Aquatic Products Co., Ltd.
76. Rizhao Meijia Aquatic Foodstuff Co., Ltd.
77. Rizhao Meijia Keyuan Foods Co. Ltd.
78. Rizhao Rongjin Aquatic
79. Rizhao Rongxing Co. Ltd.
80. Rizhao Smart Foods Company Limited
81. Rongcheng Sanyue Foodstuff Co., Ltd.
82. Rongcheng Yinhai Aquatic Product Co., Ltd.
83. Ruian Huasheng Aquatic Products
84. Rushan Chunjiangyuan Foodstuffs Co., Ltd.
85. Rushan Hengbo Aquatic Products Co., Ltd.
86. Savvy Seafood Inc.
87. Sea Trade International Inc.
88. Shanghai Finigate Integrated
89. Shanghai Zhoulian Foods Co., Ltd.
90. Shantou Freezing Aquatic Product Foodstuffs Co.
91. Shantou Haili Aquatic Product Co. Ltd.
92. Shantou Haimao Foodstuff Factory Co., Ltd.
93. Shantou Jiazhou Food Industrial Co., Ltd.

94. Shantou Jinping Oceanstar Business Co., Ltd.
95. Shantou Jintai Aquatic Product Industrial Co., Ltd.
96. Shantou Longsheng Aquatic Product Foodstuff Co., Ltd.
97. Shantou Ocean Best Seafood Corporation
98. Shantou Red Garden Food Processing Co., Ltd./Shantou Red Garden Foodstuff Co., Ltd.
99. Shantou Ruiyuan Industry Co., Ltd.
100. Shantou Wanya Foods Fty. Co., Ltd.
101. Shantou Yuexing Enterprise Company
102. Shengyuan Aquatic Food Co., Ltd.
103. Suizhong Tieshan Food Co., Ltd.
104. Thai Royal Frozen Food Zhanjiang Co., Ltd.
105. Time Seafood (Dalian) Company Limited
106. Tongwei Hainan Aquatic Products Co., Ltd.
107. Xiamen East Ocean Foods Co., Ltd.
108. Xiamen Granda Import and Export Co., Ltd.
109. Yangjiang Dawu Aquatic Products Co., Ltd.
110. Yangjiang Guolian Seafood Co., Ltd.
111. Yangjiang Haina Datong Trading Co.
112. Yantai Longda Foodstuffs Co., Ltd.
113. Yantai Tedfoods Co., Ltd.
114. Yantai Wei-Cheng Food Co., Ltd.
115. Yixing Magnolia Garment Co., Ltd.
116. Zhangzhou Donghao Seafoods Co., Ltd.
117. Zhangzhou Fuzhiyuan Food Co., Ltd.
118. Zhangzhou Hongwei Foods Co., Ltd.
119. Zhangzhou Tai Yi Import & Export Trading Co., Ltd.
120. Zhangzhou Xinhui Foods Co., Ltd.
121. Zhangzhou Xinwanya Aquatic Product Co., Ltd.
122. Zhangzhou Yanfeng Aquatic Product & Foodstuff Co., Ltd.
123. Zhanjiang Evergreen Aquatic Product Science and Technology Co., Ltd.
124. Zhanjiang Fuchang Aquatic Products Co., Ltd.
125. Zhanjiang Fuchang Aquatic Products Freezing Plant
126. Zhanjiang Go-Harvest Aquatic Products Co., Ltd.
127. Zhanjiang Guolian Aquatic Products Co., Ltd.[8]
128. Zhanjiang Longwei Aquatic Products Industry Co., Ltd.
129. Zhanjiang Regal Integrated Marine Resources Co., Ltd.
130. Zhanjiang Universal Seafood Corp.
131. Zhaoan Yangli Aquatic Co., Ltd.
132. Zhejiang Evernew Seafood Co.
133. Zhejiang Tianhe Aquatic Products
134. Zhejiang Xinwang Foodstuffs Co., Ltd.
135. Zhenye Aquatic (Huilong) Ltd.
136. Zhoushan Genho Food Co., Ltd.
137. Zhoushan Green Food Co., Ltd.
138. Zhoushan Haizhou Aquatic Products
139. Zhuanghe Yongchun Marine Products

[FR Doc. 2023–27548 Filed 12–14–23; 8:45 am]

BILLING CODE 3510–DS–P

[8] As discussed in the Issues and Decision Memorandum, only entries exported by Zhanjiang Guolian Aquatic Products Co., Ltd. and produced by another entity are subject to this review. Subject merchandise imports produced and exported by Zhanjiang Guolian Aquatic Products Co., Ltd. are excluded from the *Order. See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 88 FR 21609, 21627 (April 11, 2023).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–601]

Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Final Results of the Expedited Fifth Sunset Review of Antidumping Duty Order

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

SUMMARY: As a result of this expedited sunset review, the U.S. Department of Commerce (Commerce) finds that revocation of the antidumping duty (AD) order on tapered roller bearings (TRBs) from the People's Republic of China (China) would be likely to lead to continuation or recurrence of dumping at the levels indicated in the ''Final Results of Expedited Sunset Review'' section of this notice.

DATES: Applicable December 15, 2023.

FOR FURTHER INFORMATION CONTACT: Benjamin Nathan, AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3834.

SUPPLEMENTARY INFORMATION:

Background

On June 15, 1987, Commerce published in the **Federal Register** the AD order on TRBs from China.[1] On September 1, 2023, Commerce published the *Initiation Notice* of the fifth sunset review of the *Order* pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).[2] In accordance with 19 CFR 351.218(d)(1)(i) and (ii), Commerce received a notice of intent to participate in this sunset review from The Timken Company (the domestic interested party) within 15 days after the date of publication of the *Initiation Notice.*[3] The domestic interested party claimed interested party status under section 771(9)(C) of the Act as a producer of a domestic like product in the United States.

Commerce received a timely, adequate substantive response to the *Initiation Notice* from the domestic interested party within the 30-day period specified in 19 CFR 351.218(d)(3)(i).[4] Commerce did not receive substantive responses from any other interested parties, and no party requested a hearing.

On October 25, 2023, Commerce notified the U.S. International Trade Commission that it did not receive an adequate substantive response from other interested parties.[5] As a result, in accordance with section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), Commerce conducted an expedited, *i.e.,* 120-day, sunset review of the *Order.*

Scope of the Order

The products covered by the *Order* are tapered roller bearings and parts thereof, finished and unfinished, from China; flange, take up cartridge, and hanger units incorporating tapered roller bearings; and tapered roller housings (except pillow blocks) incorporating tapered rollers, with or without spindles, whether or not for automotive use. For a complete description of the scope of the *Order, see* the Issues and Decision Memorandum.[6]

Analysis of Comments Received

All issues raised in this sunset review are addressed in the Issues and Decision Memorandum, including the likelihood of continuation or recurrence of dumping and the magnitude of the margin of dumping likely to prevail if the *Order* were revoked.[7] A list of topics discussed in the Issues and Decision Memorandum is included as an appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's

[1] *See Antidumping Duty Order; Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People's Republic of China,* 52 FR 22667 (June 15, 1987), as amended by *Tapered Roller Bearings from the People's Republic of China; Amendment to Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order in Accordance with Decision Upon Remand,* 55 FR 6669 (February 26, 1990) (*Order*).

[2] *See Initiation of Five-Year (Sunset) Reviews,* 88 FR 42688 (July 3, 2023) (*Initiation Notice*).

[3] *See* Domestic Interested Party's Letter, ''Notice of Intent to Participate in the Five-Year Review of the Antidumping Duty Order on Tapered Roller Bearings from China (Case No. A–570–601),'' dated September 13, 2023.

[4] *See* Domestic Interested Party's Letter, ''Substantive Response to the Notice of Initiation,'' dated September 29, 2023.

[5] *See* Commerce's Letter, ''Sunset Reviews Initiated on September 1, 2023,'' dated October 25, 2023.

[6] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the Expedited Fifth Sunset Review of the Antidumping Duty Order on Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[7] *Id.*

Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Final Results of Expedited Sunset Review

Pursuant to sections 751(c)(1) and 752(c)(1) and (3) of the Act, Commerce determines that revocation of the *Order* would likely lead to the continuation or recurrence of dumping and that the magnitude of the margin of dumping likely to prevail would be at a rate up to 60.25 percent.

Administrative Protective Order

This notice serves as the only reminder to interested parties subject to an administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation subject to sanction.

Notification to Interested Parties

We are issuing and publishing the results in accordance with sections 751(c), 752(c), and 777(i)(1) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2).

Dated: December 8, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the *Order*
IV. History of the *Order*
V. Legal Framework
VI. Discussion of the Issues
  1. Likelihood of Continuation or Recurrence of Dumping
  2. Magnitude of the Margin of Dumping Likely to Prevail
VII. Final Results of Expedited Sunset Review
VIII. Recommendation

[FR Doc. 2023–27547 Filed 12–14–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD586]

Schedules for Atlantic Shark Identification Workshops and Protected Species Safe Handling, Release, and Identification Workshops

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

ACTION: Notice of public workshops.

SUMMARY: Free Atlantic Shark Identification Workshops and Safe Handling, Release, and Identification Workshops will be held in January, February, and March of 2024. Certain fishermen and shark dealers are required to attend a workshop to meet regulatory requirements and to maintain valid permits. Specifically, the Atlantic Shark Identification Workshop is mandatory for all federally permitted Atlantic shark dealers. The Safe Handling, Release, and Identification Workshop is mandatory for vessel owners and operators who use bottom longline, pelagic longline, or gillnet gear, and who have also been issued shark or swordfish limited access permits. Additional free workshops will be conducted in 2024 and will be announced in a future notice. In addition, NMFS has implemented online recertification workshops for persons who have already taken an in-person training.

DATES: The Atlantic Shark Identification Workshops will be held on January 18, 2024, February 22, 2024, and March 21, 2024. The Safe Handling, Release, and Identification Workshops will be held on January 16, 2024, February 2, 2024, and March 7, 2024.

ADDRESSES: The Atlantic Shark Identification Workshops will be held in Kenner, LA, Fort Pierce, FL, and Medford, NY. The Safe Handling, Release, and Identification Workshops will be held in Portsmouth, NH, Key Colony Beach, FL, and Houston, TX.

FOR FURTHER INFORMATION CONTACT: Elsa Gutierrez by email at *elsa.gutierrez@noaa.gov* or by phone at 301–427–8503.

SUPPLEMENTARY INFORMATION: Atlantic highly migratory species (HMS) fisheries are managed under the 2006 Consolidated HMS Fishery Management Plan (FMP) and its amendments, pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. 1801 *et seq.*) and consistent with the Atlantic Tunas Convention Act (16 U.S.C. 971 *et seq.*). HMS implementing regulations are at 50 CFR part 635. Section 635.8 describes the requirements for the Atlantic Shark Identification Workshops and Safe Handling, Release, and Identification Workshops. The workshop schedules, registration information, and a list of frequently asked questions regarding the Atlantic Shark Identification and Safe Handling, Release, and Identification workshops are available online at: *https://www.fisheries.noaa.gov/atlantic-highly-migratory-species/atlantic-shark-identification-workshops* and *https://www.fisheries.noaa.gov/atlantic-highly-migratory-species/safe-handling-release-and-identification-workshops.*

Atlantic Shark Identification Workshops

Since January 1, 2008, Atlantic shark dealers have been prohibited from receiving, purchasing, trading, or bartering for Atlantic sharks unless a valid Atlantic Shark Identification Workshop certificate is on the premises of each business listed under the shark dealer permit that first receives Atlantic sharks (71 FR 58057, October 2, 2006). Dealers who attend and successfully complete a workshop are issued a certificate for each place of business that is permitted to receive sharks. These certificate(s) are valid for 3 years. Thus, certificates that were initially issued in 2021 will expire in 2024.

Currently, permitted dealers may send a proxy to an Atlantic Shark Identification Workshop. However, if a dealer opts to send a proxy, the dealer must designate a proxy for each place of business covered by the dealer's permit that first receives Atlantic sharks. Only one certificate will be issued to each proxy. A proxy must be a person who is currently employed by a place of business covered by the dealer's permit; is a primary participant in the identification, weighing, and/or first receipt of fish as they are offloaded from a vessel; and who fills out dealer reports. Atlantic shark dealers are prohibited from renewing a Federal shark dealer permit unless a valid Atlantic Shark Identification Workshop certificate for each business location that first receives Atlantic sharks has been submitted with the permit renewal application. Additionally, a copy of a valid dealer or proxy Atlantic Shark Identification Workshop certificate must be in any trucks or other conveyances that are extensions of a dealer's place of business.

Workshop Dates, Times, and Locations

1. January 18, 2024, 12 p.m.–4 p.m., Home2 Suites Kenner Airport, 1112 Veterans Memorial Boulevard, Kenner, LA 70062.
2. February 22, 2024, 12 p.m.– 4 p.m., Hampton Inn & Suites Fort Pierce, 1985 Reynolds Drive, Fort Pierce, FL 34945.
3. March 21, 2024, 12 p.m.–4 p.m., Comfort Inn—Medford, 2695 Route 112, Medford, NY 11763.

Registration

To register for a scheduled Atlantic Shark Identification Workshop, please contact Eric Sander at *ericssharkguide@yahoo.com* or at 386–852–8588. Pre-registration is highly recommended, but not required.

Registration Materials

To ensure that workshop certificates are linked to the correct permits, participants will need to bring the following specific items to the workshop:

- Atlantic shark dealer permit holders must bring proof that the attendee is an owner or agent of the business (such as articles of incorporation), a copy of the applicable permit, and proof of identification.
- Atlantic shark dealer proxies must bring documentation from the permitted dealer acknowledging that the proxy is attending the workshop on behalf of the permitted Atlantic shark dealer for a specific business location, a copy of the appropriate valid permit, and proof of identification.

Workshop Objectives

The Atlantic Shark Identification Workshops are designed to reduce the number of unknown and improperly identified sharks reported in the dealer reporting form and increase the accuracy of species-specific dealer-reported information. Reducing the number of unknown and improperly identified sharks will improve quota monitoring and the data used in stock assessments. These workshops will train shark dealer permit holders or their proxies to properly identify Atlantic shark carcasses.

Safe Handling, Release, and Identification Workshops

Since January 1, 2007, shark limited access and swordfish limited access permit holders who fish with longline or gillnet gear have been required to submit a copy of their Safe Handling, Release, and Identification Workshop certificate in order to renew either permit (71 FR 58057, October 2, 2006). These certificate(s) are valid for 3 years. Certificates issued in 2021 will expire in 2024. As such, vessel owners who have not already attended a workshop and received a NMFS certificate, or vessel owners whose certificate(s) will expire prior to the next permit renewal, must attend a workshop to fish with, or renew, their swordfish and shark limited access permits. Additionally, new shark and swordfish limited access permit applicants who intend to fish with longline or gillnet gear must attend a Safe Handling, Release, and Identification Workshop and submit a copy of their workshop certificate before either of the permits will be issued.

In addition to vessel owners, at least one operator on board vessels issued a limited access swordfish or shark permit that uses longline or gillnet gear is required to attend a Safe Handling, Release, and Identification Workshop and receive a certificate. Vessels that have been issued a limited access swordfish or shark permit and that use longline or gillnet gear may not fish unless both the vessel owner and operator have valid workshop certificates on board at all times. Vessel operators who have not already attended a workshop and received a NMFS certificate, or vessel operators whose certificate(s) will expire prior to their next fishing trip, must attend a workshop to operate a vessel with swordfish and shark limited access permits on which longline or gillnet gear is used.

Workshop Dates, Times, and Locations

1. January 16, 2024, 9 a.m.–2 p.m., Residence Inn by Marriott Downtown Portsmouth, 100 Deer Street, Portsmouth, NH 03801.
2. February 2, 2024, 9 a.m.–2 p.m., Key Colony Inn, 700 W Ocean Drive OS, Key Colony Beach, FL 33051.
3. March 7, 2024, 9 a.m.–2 p.m., Holiday Inn Express—Houston Medical Center, 9300 S Main Street, Houston, TX 77025.

Registration

To register for a scheduled Safe Handling, Release, and Identification Workshop, please contact Angler Conservation Education at 386–682–0158. Pre-registration is highly recommended, but not required.

Registration Materials

To ensure that workshop certificates are linked to the correct permits, participants will need to bring the following specific items with them to the workshop:

- Individual vessel owners must bring a copy of the appropriate swordfish and/or shark permit(s), a copy of the vessel registration or documentation, and proof of identification;
- Representatives of a business-owned or co-owned vessel must bring proof that the individual is an agent of the business (such as articles of incorporation), a copy of the applicable swordfish and/or shark permit(s), and proof of identification; and
- Vessel operators must bring proof of identification.

Workshop Objectives

The Safe Handling, Release, and Identification Workshops are designed to teach the owner and operator of a vessel that fishes with longline or gillnet gear the required techniques for the safe handling and release of entangled and/or hooked protected species, such as sea turtles, marine mammals, smalltooth sawfish, Atlantic sturgeon, and prohibited sharks. In an effort to improve reporting, the proper identification of protected species and prohibited sharks will also be taught at these workshops. Additionally, individuals attending these workshops will gain a better understanding of the requirements for participating in these fisheries. The overall goal of these workshops is to provide participants with the skills needed to reduce the mortality of protected species and prohibited sharks, which may prevent additional regulations on these fisheries in the future.

Online Recertification Workshops

NMFS implemented an online option for shark dealers and owners and operators of vessels that fish with longline and gillnet gear to renew their certificates in December 2021. To be eligible for online recertification workshops, dealers and vessel owners and operators need to have previously attended an in-person workshop. Information about the courses is available online at *https://www.fisheries.noaa.gov/atlantic-highly-migratory-species/atlantic-shark-identification-workshops* and *https://www.fisheries.noaa.gov/atlantic-highly-migratory-species/safe-handling-release-and-identification-workshops.* To access the course please visit: *https://hmsworkshop.fisheries.noaa.gov/start.*

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

Dated: December 12, 2023.

Everett Wayne Baxter,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2023–27627 Filed 12–14–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Middle Mile Grant Program Reporting Requirements

The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on August 23, 2023 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: National Telecommunication and Information Administration (NTIA), Department of Commerce.

Title: Middle Mile Grant Program Reporting Requirements.

OMB Control Number: 0060–0052.

Form Number(s): None.

Type of Request: Revision of a current information collection.

Number of Respondents: 39.

Average Hours per Response: 38.22 Hours.

Burden Hours: 4,471.74 Estimated Total Annually.

Needs and Uses: Modifying the Middle Mile Bi-Annual Performance Reports and Final Report to include questions regarding equipment purchases, which will enable the Commerce Department and NTIA to ensure recipient compliance with the Build America, Buy America Act (''BABA'') and facilitate NTIA's ability to collect data to comply with BABA reporting requirements. NTIA will also use the information collected to effectively administer and monitor the grant program to ensure the achievement of the Middle Mile Grant Program purposes and account for the expenditure of federal funds to deter waste, fraud, and abuse.

Affected Public: Grant award recipients consisting of States, political subdivisions of a State, Tribal governments, technology companies, electric utilities, utility cooperatives, public utility districts, telecommunications companies, telecommunications cooperatives, nonprofit foundations, nonprofit corporations, nonprofit institutions, nonprofit associations, regional planning councils, Native entities, economic development authorities, or any partnership of two (2) or more of these entities.

Frequency: Bi-annually and at the end of the Period of Performance.

Respondent's Obligation: Mandatory.

Legal Authority: Section 60401 of the Infrastructure Investment and Jobs Act of 2021, Public Law 117–58, 135 Stat. 429 (November 15, 2021).

This information collection request may be viewed at *http://www.reginfo.gov/.* Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the collection or the OMB Control Number 0060–0052.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary of Economic Affairs, Commerce Department.

[FR Doc. 2023–27610 Filed 12–14–23; 8:45 am]

BILLING CODE 3510–60–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Deletions from the Procurement List.

SUMMARY: This action deletes product(s) from the Procurement List that were furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: *Date deleted from the Procurement List:* January 14, 2024.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 355 E Street SW, Suite 325, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Michael R. Jurkowski, Telephone: (703) 785–6404, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION:

Deletions

On 11/3/2023 and 11/10/2023, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed deletions from the Procurement List. This notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51–2.3.

After consideration of the relevant matter presented, the Committee has determined that the product(s) and service(s) listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.
2. The action may result in authorizing small entities to furnish the product(s) to the Government.
3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the product(s) deleted from the Procurement List.

End of Certification

Accordingly, the following product(a) are deleted from the Procurement List:

Product(s)

NSN(s)—Product Name(s):

7930–01–619–1848—Protectant, Liquid, Water-Based, Vehicle Interior Surface, (4) 1–GL Container/BX
7930–01–619–1849—Protectant, Liquid, Water-Based, Vehicle Interior Surface, 5 GL
7930–01–619–1852—Detergent, Oil and Water Separating, Heavy Duty, Biodegradable, Trucks and Trailers, 5 GL
7930–01–619–1853—Detergent, Liquid, High-foaming, Car and Truck Washing, (4) 1–GL Container/BX
7930–01–619–1854—Detergent, Liquid, High-foaming, Car and Truck Washing, 5 GL
7930–01–619–1855—Liquid Solution, Truck and Trailer Wash, 5 GL
7930–01–619–1856—Detergent, Oil and Water Separating, Heavy Duty, Biodegradable, Trucks and Trailers, 55 GL
7930–01–619–1857—Cleaner/Degreaser, Heavy Duty, Biodegradable, Car and Trucks, 5 GL
7930–01–619–1858—Liquid Solution, Truck and Trailer Wash, 55 GL
7930–01–619–1859—Cleaner/Degreaser, Heavy Duty, Biodegradable, Car and Trucks, 55 GL

7930–01–619–1860—Liquid Solution, Concentrated, Vehicle, Wash and Shine, With Wax polymer, (4) 1–GL Container/BX
7930–01–619–2631—Liquid Solution, Concentrated, Vehicle, Wash and Shine, W/Wax polymer, 5 GL
Designated Source of Supply: Central Association for the Blind and Visually Impaired, Utica, NY
Contracting Activity: GSA/FSS GREATER SOUTHWEST ACQUISITI, FORT WORTH, TX

NSN(s)—Product Name(s):
7520–01–441–9130—Kit, Fingerprint
Contracting Activity: GSA/FAS ADMIN SVCS ACQUISITION BR(2, NEW YORK, NY

NSN(s)—Product Name(s):
7510–01–579–9319—Binder, Removable Slant-D Rings, 100% Recyclable, Turned Edge, Black, 3″ Capacity, Letter
7510–01–579–9325—Binder, Removable Slant-D Rings, 100% Recyclable, Turned Edge, Blue, 3″ Capacity, Letter
7510–01–579–9324—Binder, Removable Slant-D Rings, 100% Recyclable, Turned Edge, Blue, 2″ Capacity, Letter
7510–01–579–9317—Binder, Removable Slant-D Rings, 100% Recyclable, Turned Edge, Black, 2″ Capacity, Letter
Designated Source of Supply: South Texas Lighthouse for the Blind, Corpus Christi, TX
Contracting Activity: STRATEGIC ACQUISITION CENTER, FREDERICKSBURG, VA

NSN(s)—Product Name(s):
7510–01–579–9319—Binder, Removable Slant-D Rings, 100% Recyclable, Turned Edge, Black, 3″ Capacity, Letter
7510–01–579–9325—Binder, Removable Slant-D Rings, 100% Recyclable, Turned Edge, Blue, 3″ Capacity, Letter
7510–01–579–9324—Binder, Removable Slant-D Rings, 100% Recyclable, Turned Edge, Blue, 2″ Capacity, Letter
7510–01—579–9317—Binder, Removable Slant-D Rings, 100% Recyclable, Turned Edge, Black, 2″ Capacity, Letter
Designated Source of Supply: South Texas Lighthouse for the Blind, Corpus Christi, TX
Contracting Activity: GSA/FAS ADMIN SVCS ACQUISITION BR (2, NEW YORK, NY

Michael R. Jurkowski,
Acting Director, Business Operations.
[FR Doc. 2023–27577 Filed 12–14–23; 8:45 am]
BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed additions to and deletions from the Procurement List.

SUMMARY: The Committee is proposing to add service(s) to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and delete product(s) previously furnished by such agencies.

DATES: *Comments must be received on or before:* January 14, 2024.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 355 E Street SW, Suite 325, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: For further information or to submit comments contact: Michael R. Jurkowski, Telephone: (703) 785–6404, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Additions

If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice will be required to procure the service(s) listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

The following service(s) are proposed for addition to the Procurement List for production by the nonprofit agencies listed:

Service(s)

Service Type: Official Mail Center and Operation of Postal Service Center
Mandatory for: US Air Force, Postal Service Center, Edwards Air Force Base, CA
Designated Source of Supply: VersAbility Resources, Inc., Hampton, VA
Contracting Activity: DEPT OF THE AIR FORCE, FA9301 AFTC PZIO

Service Type: Document Destruction
Mandatory for: DOI IBC, Denver Federal Center, Building 48, Lakewood, CO
Designated Source of Supply: Bayaud Enterprises, Inc., Denver, CO
Contracting Activity: DEPARTMENTAL OFFICES, IBC ACQ SVCS DIRECTORATE (00004)

Deletions

The following product(s) are proposed for deletion from the Procurement List:

Product(s)

NSN(s)—Product Name(s):
7520–01–529–1850—Pen, Ball Point, Retractable, Refillable, Americana, Medium Point, Black Ink
Designated Source of Supply: Industries for the Blind and Visually Impaired, Inc., West Allis, WI
Contracting Activity: GSA/FAS ADMIN SVCS ACQUISITION BR(2, NEW YORK, NY

NSN(s)—Product Name(s):
7510–01–591–5821—Tape, Duct, Premium Grade, Waterproof, 3″ x 60 yd, Camouflage
Designated Source of Supply: CINCINNATI ASSOCIATION FOR THE BLIND AND VISUALLY IMPAIRED, Cincinnati, OH
Contracting Activity: GSA/FAS ADMIN SVCS ACQUISITION BR(2, NEW YORK, NY

NSN(s)—Product Name(s):
8520–01–691–2733—Advanced Instant Hand Sanitizer, Green Certified Gel, 64 oz
Designated Source of Supply: Travis Association for the Blind, Austin, TX
Contracting Activity: GSA/FSS GREATER SOUTHWEST ACQUISITI, FORT WORTH, TX

NSN(s)—Product Name(s):
8115–01–544–2416—Kit, Humanitarian Airdrop, Tri-Wall Aerial Distribution System (TRIADS)
8115–01–582–2197—Kit, TRIADS, Modified
Designated Source of Supply: Tarrant County Association for the Blind, Fort Worth, TX
Contracting Activity: GSA/FAS ADMIN SVCS ACQUISITION BR(2, NEW YORK, NY

Michael R. Jurkowski,
Acting Director, Business Operations.
[FR Doc. 2023–27576 Filed 12–14–23; 8:45 am]
BILLING CODE 6353–01–P

DEPARTMENT OF DEFENSE

Department of the Air Force

Notice of Intent To Prepare an Environmental Impact Statement for Department of the Air Force F–15 Beddown and Infrastructure Upgrades at Andersen Air Force Base, Guam

AGENCY: Department of the Air Force, Department of Defense.

ACTION: Notice of Intent.

SUMMARY: On April 20, 2021, the Department of the Air Force (DAF), and the U.S. Navy acting as a cooperating agency, issued a Notice of Intent to prepare an Environmental Impact Statement (EIS) for Infrastructure Upgrades at Andersen Air Force Base (AFB), Guam. The DAF and U.S. Navy are now reissuing this Notice of Intent to prepare an EIS for the proposed F–15 Beddown and Infrastructure Upgrades at Andersen AFB, Guam. In addition to the originally proposed infrastructure upgrades, the EIS will assess the potential social, economic, and environmental impacts associated with supporting the beddown of 12

Republic of Singapore Air Force (RSAF) F–15 fighter aircraft and constructing proposed infrastructure upgrades at Andersen AFB. The beddown of 12 RSAF F–15 fighter aircraft is in addition to what was previously proposed.

DATES: A public scoping period of 30 days, to update the public on changes to the DAF's proposal that have occurred since the original scoping period ended on May 30, 2021, will take place starting from the date of this NOI publication in the **Federal Register**. Comments will be accepted at any time during the environmental impact analysis process; however, to ensure the DAF has sufficient time to consider public scoping comments during preparation of the Draft EIS, please submit comments within the 30-day scoping period. The Draft EIS is anticipated mid-2024. The Final EIS and a decision on the Proposed Action are expected in early to mid-2025.

ADDRESSES: For EIS inquires or requests for printed or digital copies of scoping materials, please contact Mr. David Martin, phone: (210) 925–4266 or *david.martin.127@us.af.mil,* or postal address provided below. The project website (*www.AAFBInfraandF15EIS.com*) provides additional information on the EIS and can be used to submit scoping comments. Scoping comments may also be submitted via postal mail to 36th Civil Engineer Squadron, ATTN: CEV (AAFB F–15 and Infrastructure EIS), Unit 14007, APO, AP 96543–4007. For printed material requests, the standard U.S. Postal Service shipping timeline will apply. Please consider the environment before requesting printed material.

SUPPLEMENTARY INFORMATION: The DAF is proposing to beddown and support the mission of 12 RSAF F–15 fighter aircraft, and construct infrastructure upgrades at Andersen AFB, Guam. Following the initial scoping period conducted in April to May 2021 (86 FR 20487, April 20, 2021), the DAF placed the EIS on a strategic pause to further consider the scope of the EIS, including the requirements of evolving strategic initiatives in the Indo-Pacific region and how the Proposed Action could best support these initiatives. As a result of the strategic pause, the DAF revised the scope of the Proposed Action to include the beddown of 12 RSAF F–15 fighter aircraft and associated mission support. The purpose of the Proposed Action is to provide critical infrastructure that enhances U.S. posture west of the International Date Line. Additionally, the purpose of the Proposed Action is to beddown and operate Republic of Singapore Air Force fighter aircraft at Andersen AFB to support training requirements. The Proposed Action is needed to enhance DAF capability to support U.S. and partner nation forces within the Indo-Pacific region and strengthen the U.S.'s ability to respond regionally and worldwide, through construction of infrastructure upgrades and increased support of fighter aircraft, in alignment with evolving DAF and DoD strategies and initiatives for the region. Increasing and improving airfield and munitions infrastructure would address capability gaps and allow for greater efficiencies and agility in the way ground operations are conducted. The DAF is the National Environmental Policy Act (NEPA) lead agency, and the U.S. Navy is a cooperating agency for this EIS process.

Under this proposal, the DAF is considering the beddown and mission support of 12 RSAF F–15 fighter aircraft, increase in annual airfield operations, increase in personnel to support the mission, and new infrastructure upgrades adjacent to the northwest corner of the airfield and within the munitions storage area at Andersen AFB. Construction would take place over approximately 3 to 7 years and would include airfield pavements, an aircraft hangar, maintenance and utilities buildings, fuel systems, fencing and utilities, roadways and parking, stormwater management infrastructure, and earth covered magazines. Approximately 209 total acres would be disturbed during construction, which would be either developed sites or maintained vegetation once construction is complete. The proposed infrastructure has multiple uses and could support both the RSAF F–15 beddown and other DAF, service component, and partner nation aircraft or missions operating from Andersen AFB now or in the future. The DAF reviewed requirements for strategic capabilities within the Indo-Pacific region and identified Andersen AFB for enhanced capabilities, including beddown of 12 RSAF F–15 aircraft and upgrade of operationally relevant infrastructure, dismissing five other potential alternative locations within the Pacific Air Forces area of responsibility from consideration. Once Andersen AFB was identified for enhanced strategic capabilities, the DAF considered other locations on Andersen AFB for construction of infrastructure upgrades; however, only the Proposed Action locations were determined to meet the criteria for the infrastructure upgrades. The No Action Alternative will also be addressed in the EIS.

Additional review and consultation which will be incorporated into the preparation of the Draft EIS will include, but are not necessarily limited to, consultation under Section 7 of the Endangered Species Act and consultation under Section 106 of the National Historic Preservation Act. The DAF will conduct cultural and natural resources surveys in the areas proposed for upgrades and consult with appropriate resource agencies to determine the potential for significant impacts on those resources. The Draft EIS will present the analysis of the potential effects of the Proposed Action and alternatives, which may include effects on historic properties, sensitive species or habitat, socioeconomics, and the noise environment among other currently unknown potential effects. Any required permits or authorizations will be determined through the EIS analysis process and presented in the Draft EIS.

Scoping and Agency Coordination: To effectively define the full range of issues to be evaluated in the EIS, the DAF is soliciting comments from interested local, territorial, and federal elected officials and agencies, as well as interested members of the public and other stakeholders. Comments are requested on potential alternatives and impacts, and identification of any relevant information, studies, or analyses of any kind concerning impacts affecting the quality of the human environment. Concurrent with the publication of this Notice of Intent, public scoping notices will be announced locally. Public scoping updates will be accomplished via the project website at *www.AAFBInfraandF15EIS.com.* The website provides posters, an informational brochure, and other scoping materials, and the capability for the public to provide public scoping comments.

Tommy W. Lee,

Acting Air Force Federal Liaison Officer.

[FR Doc. 2023–27166 Filed 12–14–23; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Intent To Prepare an Environmental Impact Statement/ Overseas Environmental Impact Statement for Hawaii-California Training and Testing Activities

AGENCY: Department of the Navy (DoN), Department of Defense (DoD).

ACTION: Notice.

SUMMARY: Pursuant to the National Environmental Policy Act (NEPA) of 1969, and regulations implemented by the Council on Environmental Quality, the Department of the Navy (DoN)(including both the U.S. Navy and the U.S. Marine Corps) in cooperation with the U.S. Coast Guard, U.S. Army, and U.S. Air Force, announces its intent to prepare the Hawaii-California Training and Testing (HCTT) Environmental Impact Statement (EIS)/ Overseas EIS (OEIS). The HCTT EIS/ OEIS will include an analysis of range sustainment and modernization activities, training activities; and research, development, testing, and evaluation activities (hereafter referred to as ''testing'') that will be conducted in the HCTT Study Area. When discussed together, training and testing are also referred to as ''military readiness activities.'' The DoN is initiating a 45-day public scoping process to receive comments on the scope of the EIS/OEIS including identification of potential alternatives and environmental concerns, information and analyses relevant to the Proposed Action, issues the public would like to see addressed in the EIS/ OEIS, and the project's potential to affect historic properties pursuant to section 106 of the National Historic Preservation Act (NHPA) of 1966.

DATES: The 45-day public scoping period begins on December 15, 2023, and extends to January 29, 2024. The scoping period is extended 15 calendar days (from the usual 30-day period) since it overlaps with the holidays. Comments must be postmarked or submitted electronically via the website no later than 11:59 p.m. Pacific time on January 29, 2024 for consideration in the Draft EIS/OEIS. The DoN will host a virtual open house presentation on the project website during the scoping period to provide information related to the Proposed Action, its purpose and need, environmental resource areas to be analyzed in the EIS/OEIS, the NEPA process, the consultation under NHPA, and public involvement opportunities.

ADDRESSES: The DoN invites all interested parties to submit scoping comments on the EIS/OEIS or information regarding historic properties or section 106 consulting party interest through the project website at *http://www.nepa.navy.mil/ hctteis* or by mail to: Naval Facilities Engineering Systems Command, Pacific, Attention: HCTT EIS/OEIS Project Manager, 258 Makalapa Drive, Suite 100, Pearl Harbor, HI 96860–3134.

FOR FURTHER INFORMATION CONTACT: U.S. Pacific Fleet Command, Attn: Mr. Sean Gano, Environmental Public Affairs Specialist, 808–474–8441, or visit the project website: *http://www.nepa. navy.mil/hctteis.*

SUPPLEMENTARY INFORMATION: Commander, U.S. Pacific Fleet is the DoN's lead action proponent. Additional DoN action proponents include Naval Sea Systems Command, Naval Air Systems Command, Naval Information Warfare Systems Command, Office of Naval Research, Naval Facilities Engineering Expeditionary Warfare Center, and the U.S. Marine Corps (USMC). In addition, this EIS/ OEIS includes certain activities by the U.S. Coast Guard, U.S. Army, and U.S. Air Force when those activities are similar to Navy or Marine Corps activities and are scheduled on Navy controlled at-sea ranges.

Proposed military readiness activities are consistent with those analyzed in the 2018 Hawaii-Southern California Training and Testing (HSTT) EIS/OEIS and the 2022 Point Mugu Sea Range (PMSR) EIS/OEIS, and are representative of training and testing activities that have been conducted off Hawaii and California for more than 80 years.

The EIS/OEIS will include an analysis of military readiness activities using new information including an updated acoustic effects analysis, updated marine mammal density data, and evolving and emergent best available science.

The HCTT Study Area (hereafter referred to as the (''Study Area'') is comprised of established operating and warning areas across the Pacific Ocean, from California west to Hawaii and the International Date Line. The HCTT Study Area differs from the HSTT Study Area in that HCTT includes an extended Southern California (SOCAL) Range Complex; special use airspace corresponding to the new extensions (Proposed W–293 and W–294); two existing training and testing ranges, the PMSR and Northern California (NOCAL) Range Complex; areas along the Southern California coastline from approximately Dana Point to Port Hueneme; and four amphibious approach lanes providing land access from the NOCAL Range Complex and PMSR. The Study Area also includes in-water areas of San Diego Bay, Port Hueneme, and Pearl Harbor, including select pierside facilities associated with DoN ports and naval shipyards and a transit corridor on the high seas and the channels and routes to and from those ports that are not part of the range complexes, where training and testing may occur during vessel transit.

The purpose of the Proposed Action is to ensure U.S. military services are able to organize, train, and equip service members and personnel to meet their respective national defense missions in accordance with their Congressionally mandated requirements [1] and advance joint interoperability in Navy led exercises with other military service.

The Proposed Action is to conduct at-sea military readiness activities and range modernization within HCTT the Study Area. Activities include the use of active sonar and explosives while employing marine species protective mitigation measures.

The Navy has identified two preliminary action alternatives to carry forward for analysis in the EIS/OEIS along with the No Action Alternative. Alternative 1 reflects a representative year of training and testing to account for the natural fluctuation of training cycles and deployment schedules that generally limit the maximum level of training occurring every year over any seven-year period. Alternative 2 reflects the maximum number of training and testing activities that could occur within a given year and assumes that the maximum level of activity would occur every year over any seven-year period. As required by NEPA for the purpose of establishing a baseline for analysis, a No Action Alternative will be evaluated which represents a scenario where no military readiness activities are conducted in the Study Area. The tempo and types of training and testing activities have fluctuated because of the introduction of new technologies, the evolving nature of international events, advances in war fighting doctrine and procedures, and changes in force structure (organization of ships, submarines, aircraft, weapons, and Sailors). Such developments influence the frequency, duration, intensity, and location of required training and testing activities. The HCTT EIS/OEIS will reflect the current compilation of training and testing activities required to fulfill the military readiness requirements, and therefore both action alternatives include the analysis of newly proposed activities and changes to previously analyzed activities. Additionally, both action alternatives will include modernization and sustainment of ranges necessary to support military readiness activities. Modernization and sustainment

[1] 10 United States Code (U.S.C.), sections 8062 (Navy), 8063 (USMC), 7062 (U.S. Army), 9062 (U.S. Air Force) and 14 U.S.C., sections 101 and 102 (USCG).

proposals include new special use airspace in Southern California, an expansion of an underwater training range near San Clemente Island, and installation and maintenance of mine training areas off Hawaii and California.

Environmental resources that are determined to be potentially affected are carried forward for full analysis. Resources to be evaluated include, but are not limited to, biological resources (including marine mammals, reptiles, fishes, vegetation, invertebrates, habitats, birds, and other protected species), sediments and water quality, air quality, cultural resources, socioeconomic resources, and public health and safety. The EIS/OEIS will also analyze measures that would avoid, minimize, or mitigate environmental effects. The Navy will conduct all coordination and consultation activities required by the Marine Mammal Protection Act (MMPA), NHPA, Endangered Species Act (ESA), National Marine Sanctuaries Act, Magnuson-Stevens Fishery Conservation and Management Act, Clean Water Act, Rivers and Harbor Act, Coastal Zone Management Act, Clean Air Act, and other laws and regulations determined to be applicable to the project. As part of this process, the DoN will seek the issuance of regulatory permits and authorizations under MMPA and ESA to support at-sea mission readiness activities within the Study Area, beginning in December 2025.

Pursuant to 40 CFR 1501.8, the DoN invited the National Marine Fisheries Service and the Federal Aviation Administration to be cooperating agencies in preparation of the EIS/OEIS.

The scoping process invites comments on the scope of the EIS/OEIS including identification of potential alternatives, information and analyses relevant to the Proposed Action, identification of environmental concerns, issues the public would like to see addressed in the EIS/OEIS, and the projects potential to affect historic properties pursuant to Section 106 of the NHPA. Parties with demonstrated interest in the undertaking and its effects on historic properties may request to become a consulting party in the section 106 process. Federal agencies, State agencies, local agencies, Native American Indian Tribes and Nations, Native Hawaiian Organizations, the public, and interested persons are encouraged to provide comments.

Comments must be postmarked or submitted electronically via the website no later than 11:59 p.m. Pacific time on January 29, 2024 for consideration during the development of the Draft EIS/OEIS. Comments can be submitted electronically via the project website at *http://www.nepa.navy.mil/hctteis* or mailed to the address noted above.

After the scoping period, DoN will coordinate with participating and cooperating agencies to develop a Draft EIS/OEIS. The DoN intends to release the Draft EIS/OEIS in the fall of 2024, release the Final EIS/OEIS in the fall of 2025, and sign a Record of Decision following the 30-day Final EIS/OEIS wait period.

Dated: December 4, 2023.

J.E. Koningisor,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2023–26905 Filed 12–14–23; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0212]

Agency Information Collection Activities; Comment Request; U.S. Department of Education Grant Performance Report Form (ED 524B)

AGENCY: Office of Finance and Operations (OFO), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a revision of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before February 13, 2024.

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–0212. 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 Cleveland Knight, 202–987–0064.

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: U.S. Department of Education Grant Performance Report Form (ED 524B).

OMB Control Number: 1894–0003.

Type of Review: Revision of a currently approved ICR.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 13,300.

Total Estimated Number of Annual Burden Hours: 297,800.

Abstract: The ED 524B form and instructions are used by many ED discretionary grant programs to enable grantees to meet ED deadline dates for submission of performance reports to the Department.

As an interim (usually annual) performance report, ED uses the information submitted by grantees in the ED 524B to evaluate grantee performance and progress and to

determine whether non-competing continuation funds should be awarded in multi-year grants. Only grantees that can demonstrate that they are making substantial progress (or, if not, have submitted an acceptable plan for meeting their objectives in subsequent budget periods) are eligible for continuation funding.

ED uses the information submitted on the ED 524B as a final performance report to determine whether grantees whose projects have ended have achieved project objectives and met or exceeded the Government Performance and Results Act and/or other program performance measures and grant requirements. This determination enables ED to assure that grants can be closed out in compliance.

Dated: December 11, 2023.

Stephanie Valentine,

PRA Coordinator, Strategic Collections and Clearance Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–27533 Filed 12–14–23; 8:45 am]

BILLING CODE 4000–01–P

ELECTION ASSISTANCE COMMISSION

Sunshine Act Meetings

AGENCY: Election Assistance Commission.

ACTION: Sunshine Act Notice; Notice of public meeting agenda.

SUMMARY: Public Meeting: U.S. Election Assistance Commission Local Leadership Council 2024 Annual Meeting.

DATES: Monday, January 8, 1:00 p.m.–5:00 p.m. Eastern and Tuesday, January 9, 9:00 a.m.–5:00 p.m. Eastern.

ADDRESSES: DoubleTree by Hilton Hotel Crystal City, 300 Army Navy Drive, Arlington, Virginia, 22202.

FOR FURTHER INFORMATION CONTACT: Kristen Muthig, Telephone: (202) 897–9285, Email: *kmuthig@eac.gov.*

SUPPLEMENTARY INFORMATION:

Purpose: In accordance with the Government in the Sunshine Act (Sunshine Act), Public Law 94–409, as amended (5 U.S.C. 552b), the U.S. Election Assistance Commission (EAC) will conduct an annual meeting of the EAC Local Leadership Council to conduct regular business and discuss EAC updates and upcoming programs.

Agenda: The U.S. Election Assistance Commission (EAC) Local Leadership Council will hold its 2024 Annual Meeting primarily to conduct regular business, and discuss EAC updates and upcoming programs, such as election technology and preparing for the 2024 elections. The meeting will include moderated discussion on topics such as communications, continuity of operations planning, and presentations from federal election partners. Throughout the meeting, there will be opportunities for members to ask questions.

Background: The Local Leadership Council was established in June 2021 under agency authority pursuant to and in accordance with the provisions of the Federal Advisory Committee Act, as amended (5 U.S.C. App. 2). The Advisory Committee is governed by the Federal Advisory Committee Act, which sets forth standards for the formation and use of advisory committees. The Advisory Committee advises the EAC on how best to fulfill the EAC's statutory duties set forth in 52 U.S.C. 20922 as well as such other matters as the EAC determines. It shall provide a relevant and comprehensive source of expert, unbiased analysis and recommendations to the EAC on local election administration topics.

The Local Leadership Council consists of 100 members. The Election Assistance Commission appoints two members from each state after soliciting nominations from each state's election official professional association. At the time of submission, the Local Leadership Council has 89 appointed members. Upon appointment, Advisory Committee members must be serving or have previously served in a leadership role in a state election official professional association.

The full agenda will be posted in advance on the EAC website: *https://www.eac.gov.*

Status: This meeting will be open to the public.

Camden Kelliher,

Deputy General Counsel, U.S. Election Assistance Commission.

[FR Doc. 2023–27755 Filed 12–13–23; 4:15 pm]

BILLING CODE 4810–71–P

FEDERAL ENERGY REGULATORY COMMISSION

[Project No. 8615–047]

Fiske Hydro, Inc.; Notice Soliciting Pre-Application Documents and Notices of Intent To File a Subsequent License Application

On November 30, 2020, Fiske Hydro, Inc. (Fiske Hydro), the current licensee for the Fiske Mill Hydroelectric Project No. 8615 (project), filed a Notice of Intent (NOI) to file an application for an exemption from licensing for the project.[1] The existing license for the project expires on November 30, 2025.[2] On September 20, 2023, Fiske Hydro filed an application to surrender its license for the project.[3]

Pursuant to section 16.20 of the Commission's regulations, an existing licensee with a minor license not subject to sections 14 and 15 of the Federal Power Act must file an application for a subsequent license or exemption at least 24 months prior to the expiration of the current license, which with respect to the Fiske Mill Project, was November 30, 2023.[4]

Pursuant to section 16.25(a) of the Commission's regulations, when an existing licensee, having previously filed an NOI to file an application for an exemption subsequently does not file an application, the Commission must solicit applications from potential applicants other than the existing licensee.[5] Any party interested in filing an application for the project must file an NOI document within 90 days from the date of this notice.[6] In addition, NOIs for a subsequent license must also include a pre-application document (PAD). Moreover, while the integrated licensing process is the default process for preparing an application for a subsequent license, a potential applicant for a subsequent license may include with the NOI and PAD a request to use alternative licensing procedures.[7] An application for the Fiske Mill Hydroelectric Project No. 8615 must be filed within 18 months of the date of filing the NOI.

Questions concerning the process for filing an NOI should be directed to Robert Haltner at 202–502–8612 or *robert.haltner@ferc.gov.*

Dated: December 8, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–27520 Filed 12–14–23; 8:45 am]

BILLING CODE 6717–01–P

[1] 18 CFR 16.19(b) (2022).

[2] The license for the project was issued with an effective date of December 1, 1985, for a term of 40 years. *Fiske Hydro Inc.,* 33 FERC ¶ 62,299 (1985).

[3] The surrender application filing may be viewed at *https://elibrary.ferc.gov/eLibrary/filedownload?fileid=E18CC70E-85D5-C3FB-9C8C-8AB7E1600000.* The Commission is not seeking public comment on the surrender application at this time.

[4] 18 CFR 16.20(c) (2022).

[5] 18 CFR 16.25(a) (2022).

[6] Pursuant to section 16.24(b)(2) of the Commission's regulations, the existing licensee, Fiske Hydro, Inc., is prohibited from filing an application for the project, either individually or in conjunction with other entities. 18 CFR 16.24(b)(2) (2022).

[7] 18 CFR 5.3(b) (2022).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL24–13–000]

Shady Oaks Wind 2, LLC; Notice of Institution of Section 206 Proceeding and Refund Effective Date

On December 11, 2023, the Commission issued an order in Docket No. EL24–13–000, pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. 824e, instituting an investigation to determine whether Shady Oaks Wind 2, LLC's Rate Schedule is unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. *Shady Oaks Wind 2, LLC,* 185 FERC ¶ 61,180 (2023).

The refund effective date in Docket No. EL24–13–000, established pursuant to section 206(b) of the FPA, will be the date of publication of this notice in the **Federal Register**, or the date Shady Oaks Wind 2, LLC's Rate Schedule becomes effective, whichever is later, provided, however, if the Rate Schedule does not become effective until after 5 months from the date of publication of the notice, the refund effective date shall be 5 months from the date of publication of the notice.

Any interested person desiring to be heard in Docket No. EL24–13–000 must file a notice of intervention or motion to intervene, as appropriate, with the Federal Energy Regulatory Commission, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 CFR 385.214 (2022), within 21 days of the date of issuance of the order.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field. User assistance is available for eLibrary and the FERC's website during normal business hours from FERC 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.*

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFile'' link at *http://www.ferc.gov.* In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

The 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: December 11, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–27566 Filed 12–14–23; 8:45 am]

BILLING CODE 6717–01–P

FEDERAL ENERGY REGULATORY COMMISSION

[Docket No. CP23–507–000]

Equitrans, L.P.; Notice of Availability of the Environmental Assessment for the Proposed the Swarts and Hunters Cave Well Replacement Project

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared an environmental assessment (EA) for the Swarts and Hunters Cave Well Replacement Project, proposed by Equitrans, L.P. (Equitrans) in the above-referenced docket. Equitrans requests authorization to abandon 19 injection/withdrawal wells, and construct two horizontal wells, and associated pipelines and appurtenances, at its existing certificated Swarts and Hunters Cave Storage Fields in Greene County, Pennsylvania.

The EA assesses the potential environmental effects of the construction, operation, and abandonment activities associated with the Swarts and Hunters Cave Well Replacement Project in accordance with the requirements of the National Environmental Policy Act (NEPA). The FERC staff concludes that approval of the proposed project, with appropriate mitigating measures, would not constitute a major federal action significantly affecting the quality of the human environment.

The proposed Swarts and Hunters Cave Well Replacement Project includes the following facilities and activities:

- abandonment by-sale of 19 injection/withdrawal wells at Equitrans' Hunters Cave Storage Field;
- abandonment in-place of the associated well pipelines and any associated facilities;
- construction and operation of a new horizontal well, associated pipelines, and ancillary facilities at the Hunters Cave Storage Field;
- construction and operation of a new horizontal well, associated pipelines, and ancillary facilities at the Swarts Complex;
- expansions of the existing Morris Interconnect and Pierce Gates Valve Yards at the Hunters Cave Storage Field;
- acquisition of non-jurisdictional gathering assets from EQM Gathering Opco, LLC (EQM) (pipelines and related equipment) for operation of the new Swarts Horizontal Storage Well; and
- the sale of 580 million cubic feet of base gas from the Swarts Complex.

The Commission mailed a copy of the *Notice of Availability* to Federal, State, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American tribes; potentially affected landowners and other interested individuals and groups; and newspapers and libraries in the project area. The EA is only available in electronic format. It may be viewed and downloaded from the FERC's website (*www.ferc.gov*), on the natural gas environmental documents page (*https://www.ferc.gov/industries-data/natural-gas/environment/environmental-documents*). In addition, the EA may be accessed by using the eLibrary link on the FERC's website. Click on the eLibrary link (*https://elibrary.ferc.gov/eLibrary/search*), select ''General Search'' and enter the docket number in the ''Docket Number'' field, excluding the last three digits (*i.e.,* CP23–507). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

The EA is not a decision document. It presents Commission staff's independent analysis of the environmental issues for the Commission to consider when addressing the merits of all issues in this proceeding. Any person wishing to comment on the EA may do so. Your

comments should focus on the EA's disclosure and discussion of potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that the Commission has the opportunity to consider your comments prior to making its decision on this project, it is important that we receive your comments in Washington, DC on or before 5 p.m. Eastern Time on January 8, 2024.

For your convenience, there are three methods you can use to file your comments to the Commission. The Commission encourages electronic filing of comments and has staff available to assist you at (866) 208–3676 or *FercOnlineSupport@ferc.gov.* Please carefully follow these instructions so that your comments are properly recorded.

(1) You can file your comments electronically using the eComment feature on the Commission's website (*www.ferc.gov*) under the link to FERC Online. This is an easy method for submitting brief, text-only comments on a project;

(2) You can also file your comments electronically using the eFiling feature on the Commission's website (*www.ferc.gov*) under the link to FERC Online. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''eRegister.'' You must select the type of filing you are making. If you are filing a comment on a particular project, please select ''Comment on a Filing''; or

(3) You can file a paper copy of your comments by mailing them to the Commission. Be sure to reference the project docket number (CP23–507–000) on your letter. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Filing environmental comments will not give you intervenor status, but you do not need intervenor status to have your comments considered. Only intervenors have the right to seek rehearing or judicial review of the Commission's decision. At this point in this proceeding, the timeframe for filing timely intervention requests has expired. Any person seeking to become a party to the proceeding must file a motion to intervene out-of-time pursuant to Rule 214(b)(3) and (d) of the Commission's Rules of Practice and Procedures (18 CFR 385.214(b)(3) and (d)) and show good cause why the time limitation should be waived. Motions to intervene are more fully described at *https://www.ferc.gov/how-intervene.*

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website (*www.ferc.gov*) using the eLibrary link. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

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.*

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. Go to *https://www.ferc.gov/ferc-online/overview* to register for eSubscription.

Dated: December 8, 2023.

Kimberly D. Bose,

Secretary.

[FR Doc. 2023–27519 Filed 12–14–23; 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: EC24–19–000.
Applicants: NMRD Data Center II, LLC, NMRD Data Center III, LLC.
Description: Supplement to November 13, 2023 Joint Application for Authorization Under Section 203 of the Federal Power Act of NMRD Data Center II, LLC, et al.
Filed Date: 12/8/23.
Accession Number: 20231208–5196.
Comment Date: 5 p.m. ET 12/18/23.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2178–042; ER10–2184–029; ER10–2192–042; ER11–2005–027; ER11–2013–027; ER11–2014–027; ER13–1536–026.
Applicants: Constellation Energy Generation, LLC, Cow Branch Wind Power, LLC, CR Clearing, LLC, Wind Capital Holdings, LLC, Constellation Energy Commodities Group Maine, LLC, CER Generation, LLC, Constellation NewEnergy, Inc.
Description: Triennial Market Power Analysis for Southeast Region of Constellation NewEnergy, Inc., et al.
Filed Date: 12/8/23.
Accession Number: 20231208–5213.
Comment Date: 5 p.m. ET 2/6/24.

Docket Numbers: ER22–2776–002.
Applicants: Shelby County Energy Center, LLC.
Description: Compliance filing: Compliance to 9 to be effective 11/1/2022.
Filed Date: 12/11/23.
Accession Number: 20231211–5072.
Comment Date: 5 p.m. ET 1/2/24.

Docket Numbers: ER22–2777–002.
Applicants: Tilton Energy LLC.
Description: Compliance filing: Compliance to 2124 to be effective 11/1/2022.
Filed Date: 12/11/23.
Accession Number: 20231211–5075.
Comment Date: 5 p.m. ET 1/2/24.

Docket Numbers: ER23–691–002; ER23–692–002.
Applicants: Hecate Energy Albany 2 LLC, Hecate Energy Albany 1 LLC.
Description: Notice of Non-Material Change in Status of Hecate Energy Albany 1 LLC, et al.
Filed Date: 12/11/23.
Accession Number: 20231211–5076.
Comment Date: 5 p.m. ET 1/2/24.

Docket Numbers: ER23–1492–001.
Applicants: Santa Paula Energy Storage, LLC.
Description: Notice of Non-Material Change in Status of Santa Paula Energy Storage, LLC.
Filed Date: 12/8/23.
Accession Number: 20231208–5197.
Comment Date: 5 p.m. ET 12/29/23.

Docket Numbers: ER23–2952–001.
Applicants: Wind Stream Properties, LLC.
Description: Tariff Amendment: Wind Stream Amended MBR Application Filing to be effective 1/1/2024.

Filed Date: 12/8/23.
Accession Number: 20231208–5206.
Comment Date: 5 p.m. ET 12/18/23.

Docket Numbers: ER24–98–001.
Applicants: PJM Interconnection, L.L.C.
Description: Tariff Amendment: Deficiency Response on Capacity Market Reforms Revisions in ER24–98 to be effective 12/12/2023.
Filed Date: 12/8/23.
Accession Number: 20231208–5201.
Comment Date: 5 p.m. ET 12/29/23.

Docket Numbers: ER24–171–000.
Applicants: Skysol, LLC.
Description: Supplement to October 20, 2023 Skysol, LLC tariff filing.
Filed Date: 12/8/23.
Accession Number: 20231208–5194.
Comment Date: 5 p.m. ET 12/15/23.

Docket Numbers: ER24–615–000.
Applicants: FirstEnergy Pennsylvania Electric Company.
Description: 205(d) Rate Filing: 2023–12–08 Modifications to Generation Facility Interconnection Agreement to be effective 12/31/9998.
Filed Date: 12/8/23.
Accession Number: 20231208–5210.
Comment Date: 5 p.m. ET 12/29/23.

Docket Numbers: ER24–616–000.
Applicants: PJM Interconnection, L.L.C.
Description: 205(d) Rate Filing: Original NSA, SA No. 7139; Queue No. AD2–086/AE1–090 to be effective 11/10/2023.
Filed Date: 12/11/23.
Accession Number: 20231211–5045.
Comment Date: 5 p.m. ET 1/2/24.

Docket Numbers: ER24–617–000.
Applicants: Midcontinent Independent System Operator, Inc., American Transmission Company LLC.
Description: 205(d) Rate Filing: Midcontinent Independent System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: 2023–12–11_SA 4211 ATC-Rock Energy PCA to be effective 2/10/2024.
Filed Date: 12/11/23.
Accession Number: 20231211–5079.
Comment Date: 5 p.m. ET 1/2/24.

Docket Numbers: ER24–618–000.
Applicants: PJM Interconnection, L.L.C.
Description: Compliance filing: Compliance Filing Substituting Real-Time Values for Temporary Exceptions to be effective 11/30/2023.
Filed Date: 12/11/23.
Accession Number: 20231211–5081.
Comment Date: 5 p.m. ET 1/2/24.

Docket Numbers: ER24–619–000.
Applicants: MS Solar 5, LLC.
Description: Baseline eTariff Filing: MS Solar 5, LLC MBR Application Filing to be effective 2/10/2024.
Filed Date: 12/11/23.
Accession Number: 20231211–5086.
Comment Date: 5 p.m. ET 1/2/24.

Docket Numbers: ER24–620–000.
Applicants: PJM Interconnection, L.L.C.
Description: 205(d) Rate Filing: Original NSA, Service Agreement No. 7148; Queue No. AF1–158 to be effective 2/10/2024.
Filed Date: 12/11/23.
Accession Number: 20231211–5122.
Comment Date: 5 p.m. ET 1/2/24.

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 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: December 11, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–27574 Filed 12–14–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Privacy Act of 1974; System of Records

AGENCY: Federal Energy Regulatory Commission (FERC), DOE.

ACTION: Notice of a modified system of records.

SUMMARY: In accordance with the Privacy Act of 1974, all agencies are required to publish in the **Federal Register** a notice of their systems of records. Notice is hereby given that the Federal Energy Regulatory Commission (FERC) is publishing a notice of modifications to an existing FERC system of records titled ''*FERC–55* ''*Identity, Credential, and Access Management Records.*''

DATES: Please submit comments on this modified system of records on or before January 16, 2024. These new routine uses are effective January 16, 2024. If no public comment is received during this period or unless otherwise published in the **Federal Register** by FERC, the modified system of records will become effective a minimum of 30 days after the date of publication in the **Federal Register**. If FERC receives public comments, FERC shall review the comments to determine whether any changes to the notice are necessary.

ADDRESSES: Comments may be submitted in writing to Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426 or electronically to *privacy@ferc.gov.* Comments should indicate that they are submitted in response to ''Identity, Credential, and Access Management Records (FERC–55)''.

FOR FURTHER INFORMATION CONTACT: Mittal Desai, Chief Information Officer & Senior Agency Official for Privacy, Office of the Executive Director, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, (202) 502–6432.

SUPPLEMENTARY INFORMATION: In accordance with the Privacy Act of 1974, and to comply with the Office of Management and Budget (OMB) Memorandum M–17–12, *Preparing for and Responding to a Breach of Personally Identifiable Information,* January 3, 2017, this notice has twelve (12) new routine uses, including two routine uses that will permit FERC to disclose information as necessary in response to an actual or suspected breach that pertains to a breach of its own records or to assist another agency in its efforts to respond to a breach that was previously published separately at 87 FR 35543.

The following sections have been updated to reflect changes made since the publication of the last notice in the **Federal Register**: dates, addresses; for further contact information; system name and number; system manager; purpose of the system; categories of

individuals covered by the system; categories of records in the system; record source categories; routine uses of records maintained in the system, including categories of users and the purpose of such; policies and practices for storage of records; policies and practices for retrieval of records; policies and practices for retention and disposal of records; administrative, technical, physical safeguards; records access procedures; contesting records procedures; notification procedures; and history.

SYSTEM NAME AND NUMBER:

Identity, Credential, and Access Management Records (FERC–55).

SECURITY CLASSIFCATION:

Unclassified.

SYSTEM LOCATION:

Federal Energy Regulatory Commission, Office of the Executive Director, Chief Security Officer Directorate, Mission Integrity Division, 888 First Street NE, Washington, DC 20426.

SYSTEM MANAGER(S):

Director, Federal Energy Regulatory Commission, Chief Security Officer Directorate, Mission Integrity Division, 888 First Street NE, Washington, DC 20426, (202) 502–6296.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

44 U.S.C. 3542; 41 CFR 102–74.375, HSPD–12/FIPS 201.

PURPOSE(S) OF THE SYSTEM:

The purpose of the system is the completion of sponsorship and adjudication of individuals, issuance of PIV credentials, identity management and logical access.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The following categories of individuals are covered by this system: current and former employees, current and former contractors, and current and former interns.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records include: individual's full name, current address, date of birth, place of birth, work email address, work telephone number, government-issued cell number, citizenship, office of assignment, digital photograph, digital and/or paper fingerprint images, social security number, results of background check, PIV credential number, PIV expiration date, and any other information needed to provide or deny logical access and to personalize levels of access.

RECORD SOURCE CATEGORIES:

Records are obtained from the individual to whom the records pertain.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, information maintained in this system may be disclosed to authorized entities outside FERC for purposes determined to be relevant and necessary as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

1. To appropriate agencies, entities, and persons when (1) FERC suspects or has confirmed that there has been a breach of the system of records; (2) FERC has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, the Commission (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Commission's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

2. To another Federal agency or Federal entity, when FERC determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

3. To a congressional office from the record of an individual in response to an inquiry from that congressional office made at the request of that individual.

4. To the Equal Employment Opportunity Commission (EEOC) when requested in connection with investigations of alleged or possible discriminatory practices, examination of Federal affirmative employment programs, or other functions of the Commission as authorized by law or regulation.

5. To the Federal Labor Relations Authority or its General Counsel when requested in connection with investigations of allegations of unfair labor practices or matters before the Federal Service Impasses Panel.

6. To disclose information to another Federal agency, to a court, or a party in litigation before a court or in an administrative proceeding being conducted by a Federal agency, when the Government is a party to the judicial or administrative proceeding. In those cases where the Government is not a party to the proceeding, records may be disclosed if a subpoena has been signed by a judge.

7. To the Department of Justice (DOJ) for its use in providing legal advice to FERC or in representing FERC in a proceeding before a court, adjudicative body, or other administrative body, where the use of such information by the DOJ is deemed by FERC to be relevant and necessary to the advice or proceeding, and such proceeding names as a party in interest: (a) FERC; (b) any employee of FERC in his or her official capacity; (c) any employee of FERC in his or her individual capacity where DOJ has agreed to represent the employee; or (d) the United States, where FERC determines that litigation is likely to affect FERC or any of its components.

8. To non-Federal Personnel, such as contractors, agents, or other authorized individuals performing work on a contract, service, cooperative agreement, job, or other activity on behalf of FERC or Federal Government and who have a need to access the information in the performance of their duties or activities.

9. To the National Archives and Records Administration in records management inspections and its role as Archivist.

10. To the Merit Systems Protection Board or the Board's Office of the Special Counsel, when relevant information is requested in connection with appeals, special studies of the civil service and other merit systems, review of OPM rules and regulations, and investigations of alleged or possible prohibited personnel practices.

11. To appropriate Federal, State, or local agency responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, or order, if the information may be relevant to a potential violation of civil or criminal law, rule, regulation, order.

12. To appropriate agencies, entities, and person(s) that are a party to a dispute, when FERC determines that information from this system of records is reasonably necessary for the recipient to assist with the resolution of the dispute; the name, address, telephone number, email address, and affiliation; of the agency, entity, and/or person(s) seeking and/or participating in dispute resolution services, where appropriate.

13. To sponsors, employers, contractors, facility operators, grantees, experts, fiscal agents, and consultants in connection with establishing an access

account for an individual or maintaining appropriate points of contact.

14. To FERC officials to serve as a data source in determining appropriate logical access to FERC networks.

15. To the news media and the public, with the approval of the Senior Agency Official for Privacy, or their designee, in consultation with counsel, when there exists a legitimate public interest in the disclosure of the information or when disclosure is necessary to preserve confidence in the integrity of FERC or is necessary to demonstrate the accountability of FERC's officers, employees, or individuals covered by the system, except to the extent it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

16. To contractors, grantees, experts, consultants, detailees, and other no-FERC employees performing or working on a contract, service, grant cooperative agreement, or other assignment from the Federal government, when necessary to accomplish an agency function related to this system of records.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Electronic records are stored on a shared drive within FERC's network. Some electronic records are also stored in the sponsorship or vendor portal. Access to electronic records is controlled by User ID and password combination and/or the organizations Single Sign-On and Multi-Factor Authentication solution. Access to electronic records is restricted to those individuals whose official duties require access.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are retrieved by last name and date of birth or social security number and date of birth. Records may also be retrieved by an identification number assigned to a computer; name; or email address.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records are retained and disposed of in accordance with the schedule approved under the National Archives and Records Administration's General Records Schedule 5.6: Security Management Records; Disposition Authority: DAA–GRS–2021–0001–0005. Temporary. Destroy six (6) years after the end of an employee or contractor's tenure, but longer retention is authorized if required for business use.

ADMINISTRATIVE. TECHNICAL, AND PHYSICAL SAFEGUARDS:

See Policies and Practices for Storage of Records.

RECORD ACCESS PROCEDURES:

Individuals requesting access to the contents of records must submit a request through the Freedom of Information Act (FOIA) office. The FOIA website is located at: *https://www.ferc.gov/foia.* Requests may be submitted through the following portal: *https://www.ferc.gov/enforcement-legal/foia/electronic-foia-privacy-act-request-form.* Written requests for access to records should be directed to: Director, Office of External Affair, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

CONTESTING RECORD PROCEDURES:

See Record Access Procedures.

NOTIFICATION PROCEDURES:

Generalized notice is provided by the publication of this notice. For specific notice, see Records Access Procedure, above.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

70 FR 61612.

Dated: December 11, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–27573 Filed 12–14–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP24–231–000.
Applicants: Destin Pipeline Company, L.L.C.
Description: 4(d) Rate Filing: Destin Pipeline Negotiated Rate Agreement Filing to be effective 12/10/2023.
Filed Date: 12/8/23.
Accession Number: 20231208–5130.
Comment Date: 5 pm ET 12/20/23.

Docket Numbers: RP24–232–000.
Applicants: El Paso Natural Gas Company, L.L.C.
Description: 4(d) Rate Filing: Non-Conforming Agreement Update (SRP OPASA) to be effective 1/1/2024.
Filed Date: 12/8/23.
Accession Number: 20231208–5142.
Comment Date: 5 pm ET 12/20/23.

Docket Numbers: RP24–233–000.
Applicants: Natural Gas Pipeline Company of America LLC.
Description: 4(d) Rate Filing: Negotiated Rate Agreements Filing—MRP Elgin to be effective 12/8/2023.
Filed Date: 12/8/23.
Accession Number: 20231208–5183.
Comment Date: 5 pm ET 12/20/23.

Docket Numbers: RP24–234–000.
Applicants: NorthWestern Corporation, NorthWestern Energy Public Service Corporation.
Description: Joint Petition for Limited Waiver of Capacity Release Regulations, et. al. of NorthWestern Corporation et. al.
Filed Date: 12/8/23.
Accession Number: 20231208–5214.
Comment Date: 5 pm ET 12/15/23.

Docket Numbers: RP24–235–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: 4(d) Rate Filing: 12.11.23 Twin Eagle Resource Management, LLC R–7300–28 to be effective 1/1/2024.
Filed Date: 12/11/23.
Accession Number: 20231211–5041.
Comment Date: 5 pm ET 12/26/23.

Docket Numbers: RP24–236–000.
Applicants: Iroquois Gas Transmission System, L.P.
Description: 4(d) Rate Filing: 12.11.23 Twin Eagle Resource Management, LLC R–7300–29 to be effective 1/1/2024.
Filed Date: 12/11/23.
Accession Number: 20231211–5042.
Comment Date: 5 pm ET 12/26/23.

Docket Numbers: RP24–237–000.
Applicants: Northwest Pipeline LLC.
Description: 4(d) Rate Filing: Shipper Imbalance Penalty Assessment to be effective 1/11/2024.
Filed Date: 12/11/23.
Accession Number: 20231211–5077.
Comment Date: 5 pm ET 12/26/23.

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.

Filings in Existing Proceedings

Docket Numbers: RP24–193–000.
Applicants: El Paso Natural Gas Company, L.L.C.
Description: Report Filing: Notice of Delayed Service in Docket No. RP24–193–000 to be effective N/A.
Filed Date: 12/8/23.

Accession Number: 20231208–5139.
Comment Date: 5 pm ET 12/20/23.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

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Dated: December 11, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–27579 Filed 12–14–23; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–11465–01–R5]

Clean Air Act Operating Permit Program; Order on Petition for Objection to State Operating Permit for Chicago Department of Aviation, Cook County, Illinois

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of final order on petition.

SUMMARY: The Environmental Protection Agency (EPA) Administrator signed an order dated September 29, 2023, denying a petition dated January 5, 2023, submitted by an anonymous petitioner identified as C23D32 (the Petitioner). The petition requested that EPA object to a Clean Air Act (CAA) title V operating permit issued by the Illinois Environmental Protection Agency (IEPA) to the Chicago Department of Aviation located in Cook County, Illinois.

ADDRESSES: The final order, the petition, and other supporting information are available for public inspection during normal business hours at the following address: Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays and facility closures due to COVID–19. We recommend that you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section before visiting the Region 5 office. Additionally, the final order and petitions are available electronically at: *https://www.epa.gov/title-v-operating-permits/title-v-petition-database.*

FOR FURTHER INFORMATION CONTACT: Dan Wolski, Air Permits Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–0557, *wolski.daniel@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA received a petition from C23D32 dated January 5, 2023, requesting that EPA object to the issuance of operating permit no. 95110002, issued by IEPA to Chicago Department of Aviation in Cook County, Illinois. On September 29, 2023, the EPA Administrator issued an order denying the petition. The order explains the basis for EPA's decision.

Sections 307(b) and 505(b)(2) of the CAA provide that a petitioner may request judicial review of those portions of an order that deny issues in a petition. Any petition for review shall be filed in the United States Court of Appeals for the appropriate circuit no later than February 13, 2024.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: December 11, 2023.

Debra Shore,

Regional Administrator, Region 5.

[FR Doc. 2023–27553 Filed 12–14–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2023–0265; FRL–11109–02–OCSPP]

Tris(2-chloroethyl) Phosphate (TCEP); Draft Risk Evaluation Under the Toxic Substances Control Act (TSCA); Letter Peer Review; Notice of Availability, Public Meeting and Request for Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is announcing the availability of and soliciting public comment on the document titled: ''2023 Draft Risk Evaluation for Tris(2-chloroethyl) Phosphate (TCEP)'' and related draft charge questions. EPA will be submitting the Draft Risk Evaluation and public comments to peer reviewers who will consider the approach and methodologies utilized. The letter peer review will include review of the analysis of physical-chemical properties, the fate of TCEP in the environment, releases of TCEP to the environment, environmental hazard and risk characterization for terrestrial and aquatic species, and human health hazard and risk characterization for workers, consumers, and the general population. The letter peer review is expected to begin on March 13, 2024, and end on April 12, 2024. A preparatory virtual public meeting will be held on March 5, 2024, for reviewers and the public to comment on and ask questions regarding the scope and clarity of the draft charge questions. Feedback from the letter peer review will be considered in the development of the final TCEP risk evaluation.

DATES:

Virtual Public Meeting: March 5, 2024, 1–4 p.m. EST. To receive the webcast meeting link and audio teleconference information before the meeting, you must register by 5 p.m. EST on March 1, 2024.

Special Accommodations: To allow EPA time to process your request for special accommodations, please submit the request by February 23, 2024.

Written Comments: Comments must be received on or before February 13, 2024.

ADDRESSES: Submit written comments identified by docket identification (ID) number EPA–HQ–OPPT–2023–0265, through *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 information on commenting or visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: The Peer Review Leader (PRL), Alaa Kamel, Ph.D., Mission Support Division, Office of Program Support, Office of Chemical Safety and Pollution Prevention, Environmental Protection Agency;

telephone number: (202) 564–5336 or call the main office number: (202) 564–8450; email address: *kamel.alaa@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. What action is the Agency taking?

EPA is announcing the availability of and soliciting public comment on the document titled: ''2023 Draft Risk Evaluation for Tris(2-chloroethyl) Phosphate (TCEP)''. A letter peer review is expected to begin on March 13, 2024, and end on April 12, 2024, to review the approach and methodologies utilized in this document. A preparatory virtual public meeting will be held on March 5, 2024, for reviewers and the public to comment on and ask questions regarding the scope and clarity of the draft charge questions.

B. What is the Agency's authority for taking this action?

Section 6(b) of the Toxic Substances Control Act (TSCA) (15 U.S.C. 2605(b)), requires that EPA conduct risk evaluations on existing chemical substances and identifies the minimum components EPA must include in all chemical substance risk evaluations. The risk evaluation must not consider costs or other non-risk factors (15 U.S.C. 2605(b)(4)(F)(iii)). The specific risk evaluation process is set out in 40 CFR part 702 and summarized on EPA's website at *https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/risk-evaluations-existing-chemicals-under-tsca.*

C. Does this action apply to me?

This action is directed to the public in general. This action may, however, be of interest to those involved in the manufacture, processing, distribution, and disposal of chemical substances and mixtures, and/or those interested in the assessment of risks involving chemical substances regulated under TSCA. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

D. What should I consider as I submit my comments to EPA?

1. Submitting Confidential Business Information (CBI).

Do not submit CBI or other sensitive information to EPA through *https://www.regulations.gov* or email. If you'd like to include information in your comment that you consider to be CBI or otherwise protected, please contact the PRL listed under **FOR FURTHER INFORMATION CONTACT** to obtain special instructions before submitting that information.

2. *Tips for preparing comments.* When preparing and submitting your comments, see Tips for Effective Comments at *https://www.epa.gov/dockets.*

II. Request for Comment

EPA is seeking public comment on both the draft risk evaluation and the draft charge questions for the letter peer review. Both documents are available in EPA Docket ID No. EPA–HQ–OPPT–2023–0265 at *https://www.regulations.gov* and may also be accessed through EPA's website at *https://www.epa.gov/tsca-peer-review.* As additional background materials become available, EPA will include those additional background documents (*e.g.,* reviewers participating in this letter peer review) in the docket and on the website.

III. Preparatory Meeting

EPA will publish instructions on how to register for the virtual public meeting that will be held on March 5, 2024, from 1–4 p.m. EST. After registering, you will receive the webcast meeting link and audio teleconference information for this public meeting. You may register and participate as a listen-only attendee at any time up to the end of the meeting on March 5, 2024. Requests to make brief (up to five minutes) oral comments during the preparatory meeting can be submitted when registering and will be accepted until Friday, March 1, 2024.

IV. Letter Peer Review

A. What is the purpose of this Letter Peer Review?

The focus of this Letter Peer Review is on the approach and methodologies utilized in the ''2023 Draft Risk Evaluation for Tris(2-chloroethyl) Phosphate (TCEP).'' Feedback from this review will be considered in the development of the final TCEP risk evaluation.

B. Why did EPA develop these documents?

TCEP is a High-Priority substance undergoing the TSCA risk evaluation process. TCEP has been primarily used in paint and coating manufacturing, and in polymers used in aerospace equipment and products. In the past it has also been used in commercial and consumer products, including fabric and textile products, foam seating, and construction materials. TCEP may also be imported in articles intended for consumer use.

In August 2020, EPA published a final scope document for 20 High-Priority substances, including TCEP, outlining the hazards, exposures, conditions of use, and the potentially exposed or susceptible subpopulations the Agency expects to consider in its risk evaluation.

EPA is submitting the ''2023 Draft Risk Evaluation for Tris(2-chloroethyl) Phosphate (TCEP)'' and associated supporting documents for Letter Peer Review. The Letter Peer Review will include review of the analysis of physical chemical properties, the fate of TCEP in the environment, releases of TCEP to the environment, environmental hazard and risk characterization for terrestrial and aquatic species, and human health hazard and risk characterization for workers, consumers, and the general population. Specifically, EPA is seeking comment on the following issues:

- The list of considerations EPA used to arrive at the human health hazard confidence levels and the specific confidence levels chosen for individual human health hazard outcomes (neurotoxicity, reproductive/developmental effects, kidney effects, and cancer) in the TCEP risk evaluation.
- Whether the approach used to estimate anaerobic degradation in the absence of data is appropriate for assessing anaerobic degradation in sediment.
- Use of the model, Web-based Interspecies Correlation Estimation (Web-ICE), to predict acute toxicity hazard values for aquatic species not represented in the available studies.

This is the first time EPA has used Web-ICE in a TSCA risk evaluation. These predictions were used with available empirical data to create a Species Sensitivity Distribution (SSD). The SSD was used to calculate a hazardous concentration for 5% of species (HC_{05}). EPA is also using a data-driven way of accounting for uncertainty for environmental hazard and is soliciting comment on its characterization of this uncertainty, specifically its use of the lower bound of the 95% confidence interval of the hazardous HC_{05}.

- Human health hazard benchmark dose modeling of animal toxicity data for TCEP.
- The list of considerations EPA used to arrive at the human health hazard confidence levels and the specific confidence levels chosen for individual human health hazard outcomes (neurotoxicity, reproductive/developmental effects, kidney effects, and cancer) to quantitatively evaluate risk from TCEP.
- Use of several approaches for estimating exposures to humans and

environmental receptors: (1) The use of Verner 2008 Multi-compartment model, which was used to assess TCEP exposure to infants through human milk for the first time in a TSCA risk evaluation; (2) the use of Verner 2008 Multi-compartment model and associated uncertainties in extrapolating from the inhalation to oral routes of exposure; (3) the use of the American Meteorological Society/Environmental Protection Agency Regulatory Model (AERMOD) to estimate air deposition of TCEP. EPA has used AERMOD in previous TSCA risk evaluations; however, its use in estimating air deposition is novel for TSCA risk evaluations.

• Approach for modeling drinking water contamination from wells near municipal solid waste landfills, which is a new approach for TSCA risk evaluations.

C. How can I access the documents submitted for review?

The ''2023 Draft Risk Evaluation for Tris(2-chloroethyl) Phosphate (TCEP)'' and all background documents, related supporting materials, and draft charge questions are available at *https://www.regulations.gov* in Docket ID No. EPA–HQ–OPPT–2023–0265 and through the TSCA Scientific Peer Review Committees website at *https://www.epa.gov/tsca-peer-review.* In addition, as additional background materials become available (*e.g.,* reviewers participating in the letter peer review), EPA will include those additional background documents in the docket and through the website.

Authority: 15 U.S.C. 2601 *et seq.*

Dated: December 12, 2023.

Michal Freedhoff,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2023–27600 Filed 12–14–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL OP–OFA–101]

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 December 4, 2023 10 a.m. EST Through December 11, 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. 20230175, Draft, Caltrans, CA, Last Chance Grade Permanent Restoration Project, Comment Period Ends: 02/13/2024, Contact: Steve Croteau 707–572–7149.

EIS No. 20230176, Draft, USACE, FL, Comprehensive Everglades Restoration Plan Western Everglades Restoration Project Draft Integrated Project Implementation Report and Environmental Impact Statement, Comment Period Ends: 01/29/2024, Contact: Melissa Nasuti 904–251–9597.

EIS No. 20230177, Draft, BLM, AK, ANCSA 17(d)(1) Withdrawals, Comment Period Ends: 02/14/2024, Contact: Racheal Jones 907–290–0307.

EIS No. 20230178, Final, BOEM, NY, Sunrise Wind Project, Review Period Ends: 01/16/2024, Contact: Genevieve Brune 703–787–1553.

Dated: December 12, 2023.

Julie Smith,

Acting Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2023–27642 Filed 12–14–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2023–0067; FRL–10578–11–OCSPP]

Pesticide Product Registration; Receipt of Applications for New Uses November 2023

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received applications to register new uses for pesticide products containing currently registered active ingredients. Pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is hereby providing notice of receipt and opportunity to comment on these applications.

DATES: Comments must be received on or before January 16, 2024.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2023–0067, through the *Federal eRulemaking Portal* at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting and visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Charles Smith, Registration Division (RD) (7505T), main telephone number: (202) 566–2427, email address: *RDFRNotices@epa.gov.* The mailing address for each contact person is Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001. As part of the mailing address, include the contact person's name, division, and mail code. The division to contact is listed at the end of each application summary.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

• Crop production (NAICS code 111).

• Animal production (NAICS code 112).

• Food manufacturing (NAICS code 311).

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at

https://www.epa.gov/dockets/commenting-epa-dockets.

II. Registration Applications

EPA has received applications to register new uses for pesticide products containing currently registered active ingredients. Pursuant to the provisions of FIFRA section 3(c)(4) (7 U.S.C. 136a(c)(4)), EPA is hereby providing notice of receipt and opportunity to comment on these applications. Notice of receipt of these applications does not imply a decision by the Agency on these applications.

Notice of Receipt—New Uses

1. *EPA Registration Number:* 100–1254, 100–1281, 100–1687. *Docket ID number:* EPA–HQ–OPP–2023–0533. *Applicant:* Syngenta Crop Protection, LLC., P.O. Box 18300, Greensboro, NC 27419–8300. *Active ingredient:* Mandipropamid. *Product type:* Fungicide. *Proposed use:* Non-bearing uses on tree nuts group 14–12 and strawberry in nurseries. *Contact:* RD.

2. *EPA Registration Number:* 71512–27. *Docket ID number:* EPA–HQ–OPP–2023–0431. *Applicant:* ISK Biosciences Corporation, 7470 Auburn Road, Suite A, Concord, Ohio 44077. *Active ingredient:* Cyclaniliprole. *Product type:* Insecticide. *Proposed use:* Greenhouse lettuce and greenhouse cucumber. *Contact:* RD.

Authority: 7 U.S.C. 136 *et seq.*

Dated: December 11, 2023.

Delores Barber,

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

[FR Doc. 2023–27592 Filed 12–14–23; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK

[Public Notice: 2023–3050]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Notice of Claim and Proof of Loss, Working Capital Guarantee

AGENCY: Export-Import Bank of the United States.

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Export-Import Bank of the United States (Ex-Im Bank), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal Agencies to comment on the proposed information collection, as required by the Paperwork Reduction Act of 1995. The purpose of this Notice is to announce the initiation of a 30-day period for public comment.

DATES: Comments must be received on or before January 16, 2024 to be assured of consideration.

ADDRESSES: Comments may be submitted electronically on *www.regulations.gov* (EIB 10–04) or by email to *donna.schneider@exim.gov,* or by mail to Donna Schneider, Export-Import Bank of the United States, 811 Vermont Ave. NW, Washington, DC 20571, telephone 202–565–3612.

SUPPLEMENTARY INFORMATION: By neutralizing the effect of export credit support offered by foreign governments and by absorbing credit risks that the private sector will not accept, Ex-Im Bank enables U.S. exporters to compete fairly in foreign markets on the basis of price and product. Under the Working Capital Guarantee Program, Ex-Im Bank provides repayment guarantees to lenders on secured, short-term working capital loans made to qualified exporters. The guarantee may be approved for a single loan or a revolving line of credit. In the event that a borrower defaults on a transaction guaranteed by Ex-Im Bank the guaranteed lender may seek payment by the submission of a claim.

This collection of information is necessary, pursuant to 12 U.S.C. 635(a)(1), to determine if such claim complies with the terms and conditions of the relevant working capital guarantee. The Notice of Claim and Proof of Loss, Working Capital Guarantee is used to determine compliance with the terms of the guarantee and the appropriateness of paying a claim. Export-Import Bank customers are submitting this form electronically.

The information collection tool can be reviewed at: https://img.exim.gov/s3fs-public/forms/eib10-04.pdf.

Title and Form Number: EIB 10–04 Notice of Claim and Proof of Loss, Working Capital Guarantee.

OMB Number: 3048–0035.

Type of Review: Renewal.

Need and Use: This collection of information is necessary, pursuant to 12 U.S.C. 635(a)(1), to determine if such claim complies with the terms and conditions of the relevant guarantee.

Affected Public:

This form affects entities involved in the export of U.S. goods and services.

Annual Number of Respondents: 10.

Estimated Time per Respondent: 6 hours.

Annual Burden Hours: 60 hours.

Frequency of Reporting of Use: As needed to request a working capital claim payment.

Dated: December 12, 2023.

Kalesha Malloy,

IT Specialist.

[FR Doc. 2023–27612 Filed 12–14–23; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL ELECTION COMMISSION

[Notice 2023—18]

Filing Dates for the New York Special Election in the 3rd Congressional District

AGENCY: Federal Election Commission.

ACTION: Notice of filing dates for special election.

SUMMARY: New York has scheduled a special election on February 13, 2024, to fill the U.S. House of Representatives seat in the 3rd Congressional District that became vacant when Representative George Santos was expelled from Congress.

Committees required to file reports in connection with the Special General Election on February 13, 2024, shall file a 12-day Pre-General and a 30-Day Post-General Report.

FOR FURTHER INFORMATION CONTACT: Ms. Elizabeth S. Kurland, Information Division, 1050 First Street NE, Washington, DC 20463; Telephone: (202) 694–1100; Toll Free (800) 424–9530.

SUPPLEMENTARY INFORMATION:

Principal Campaign Committees

All principal campaign committees of candidates who participate in the New York Special General Election shall file a 12-day Pre-General Report on February 1, 2024, and a 30-day Post-General Report on March 14, 2024. (See chart below for the closing date for each report.)

Note that these reports are in addition to the campaign committee's regular quarterly filings. (See chart below for the closing date for each report).

Unauthorized Committees (PACs and Party Committees)

Political committees not filing monthly are subject to special election reporting if they make previously undisclosed contributions or expenditures in connection with the New York Special General Election by the close of books for the applicable report(s). (See chart below for the closing date for each report.)

Since disclosing financial activity from two different calendar years on one

report would conflict with the calendar year aggregation requirements stated in the Commission's disclosure rules, unauthorized committees that trigger the filing of the Pre-General Report will be required to file this report on two separate forms: One form to cover 2023 activity, labeled as the Year-End Report; and the other form to cover only 2024 activity, labeled as the Pre-General Report. Both forms must be filed by February 1, 2024.

Committees filing monthly that make contributions or expenditures in connection with the New York Special General Election will continue to file according to the monthly reporting schedule.

Additional disclosure information for the New York special election may be found on the FEC website at *https://www.fec.gov/help-candidates-and-committees/dates-and-deadlines/.*

Disclosure of Lobbyist Bundling Activity

Principal campaign committees, party committees and leadership PACs that are otherwise required to file reports in connection with the special election must simultaneously file FEC Form 3L if they receive two or more bundled contributions from lobbyists/registrants or lobbyist/registrant PACs that aggregate in excess of the lobbyist bundling threshold during the special election reporting periods. (See chart below for closing date of each period.) 11 CFR 104.22(a)(5)(v), (b), 110.17(e)(2), (f).

The lobbyist bundling disclosure threshold for calendar year 2023 is $21,800. This threshold amount may change in 2024 based upon the annual cost of living adjustment (COLA). As soon as the adjusted threshold amount is available, the Commission will publish it in the **Federal Register** and post it on its website. 11 CFR 104.22(g) and 110.17(e)(2).

CALENDAR OF REPORTING DATES FOR NEW YORK SPECIAL ELECTION

Report	Close of books[1]	Reg./cert. & overnight mailing deadline	Filing deadline
Political Committees Involved in the Special General (02/13/2024) Must File			
Year-End	—WAIVED—		
Pre-General	01/24/2024	01/29/2024	02/01/2024
Post-General	03/04/2024	03/14/2024	03/14/2024
April Quarterly	03/31/2024	04/15/2024	04/15/2024

[1] The reporting period always begins the day after the closing date of the last report filed. If the committee is new and has not previously filed a report, the first report must cover all activity that occurred before the committee registered as a political committee up through the close of books for the first report due.

Dated: December 12, 2023.

On behalf of the Commission,

Dara S. Lindenbaum,

Chair, Federal Election Commission.

[FR Doc. 2023–27582 Filed 12–14–23; 8:45 am]

BILLING CODE 6715–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than December 29, 2023.

A. Federal Reserve Bank of Atlanta (Erien O. Terry, Assistant Vice President) 1000 Peachtree Street NE, Atlanta, Georgia 30309; Comments can also be sent electronically to *Applications.Comments@atl.frb.org:*

1. *Martha Sigmon Spurlock, Big Stone Gap, Virginia; Rachel Sigmon West, Harrogate, Tennessee; and Andra Sigmon Ostergard, Bluffton, South Carolina;* as a group acting in concert, to retain voting shares of Unified Shares, LLC, Harrogate, Tennessee. Unified Shares, LLC, controls Commercial Bancgroup, Inc., which controls Commercial Bank, both of Harrogate, Tennessee. Commercial Bancgroup, Inc., also controls AB&T Financial Corporation, which in turn controls Alliance Bank & Trust Company, both of Gastonia, North Carolina.

In addition, *Rachel Sigmon West, Harrogate, Tennessee; and Martha Sigmon Spurlock and Charles Kenneth Spurlock, Jr., both of Big Stone Gap, Virginia;* as part of a group acting in concert with Unified Shares, LLC, to retain voting shares of Commercial Bancgroup, Inc.''

B. Federal Reserve Bank of Kansas City (Jeffrey Imgarten, Assistant Vice President) One Memorial Drive, Kansas City, Missouri 64198–0001. Comments can also be sent electronically to *KCApplicationComments@kc.frb.org:*

1. *The Bruce Jessup Trust, Bruce Jessup and Terrie Jessup, as co-Trustees, all of Butler, Missouri;* to retain voting shares of Community First Bancshares, Inc. and thereby indirectly retain voting shares of Community First Bank, both of Butler, Missouri. Bruce Jessup, individually, was previously permitted to control Community First Bancshares, Inc.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–27512 Filed 12–14–23; 8:45 am]

BILLING CODE P

GENERAL SERVICES ADMINISTRATION

[Notice-Q–2023–06; Docket No. 2023–0002; Sequence No. 42]

Federal Secure Cloud Advisory Committee Notification of Upcoming Meeting

AGENCY: Federal Acquisition Service (Q), General Services Administration (GSA).

ACTION: Meeting notice.

SUMMARY: As stipulated by the Federal Advisory Committee Act (FACA), GSA is hereby giving notice of an open public meeting of the Federal Secure Cloud Advisory Committee (FSCAC). Information on attending and providing public comment is under the **SUPPLEMENTARY INFORMATION** section.

DATES: The open public meeting will be held on Thursday, January 18, 2024, from 1 p.m. to 3:30 p.m., Eastern Standard Time (EST). The agenda for the meeting will be made available prior to the meeting online at *https://gsa.gov/fscac.*

ADDRESSES: The meetings will be accessible via webcast. Registrants will receive the webcast information before the meeting.

FOR FURTHER INFORMATION CONTACT: Michelle White, Designated Federal Officer (DFO), FSCAC, GSA, 703–489–4160, *fscac@gsa.gov.* Additional information about the Committee, including meeting materials and agendas, will be available online at *https://gsa.gov/fscac.*

SUPPLEMENTARY INFORMATION:

Background

GSA, in compliance with the FedRAMP Authorization Act of 2022, established the FSCAC, a statutory advisory committee in accordance with the provisions of FACA (5 U.S.C. 10). The Federal Risk and Authorization Management Program (FedRAMP) within GSA is responsible for providing a standardized, reusable approach to security assessment and authorization for cloud computing products and services that process unclassified information used by agencies.

The FSCAC will provide advice and recommendations to the Administrator of GSA, the FedRAMP Board, and agencies on technical, financial, programmatic, and operational matters regarding the secure adoption of cloud computing products and services. The FSCAC will ensure effective and ongoing coordination of agency adoption, use, authorization, monitoring, acquisition, and security of cloud computing products and services to enable agency mission and administrative priorities. The purposes of the Committee are:

- To examine the operations of FedRAMP and determine ways that authorization processes can continuously be improved, including the following:
  - Measures to increase agency reuse of FedRAMP authorizations.
  - Proposed actions that can be adopted to reduce the burden, confusion, and cost associated with FedRAMP authorizations for cloud service providers.
  - Measures to increase the number of FedRAMP authorizations for cloud computing products and services offered by small businesses concerns (as defined by section 3(a) of the Small Business Act (15 U.S.C. 632(a)).
  - Proposed actions that can be adopted to reduce the burden and cost of FedRAMP authorizations for agencies.
- Collect information and feedback on agency compliance with, and implementation of, FedRAMP requirements.
- Serve as a forum that facilitates communication and collaboration among the FedRAMP stakeholder community.

The FSCAC will meet no fewer than three (3) times a calendar year. Meetings shall occur as frequently as needed, called, and approved by the DFO.

Purpose of the Meeting and Agenda

As a continuation of the FSCAC meeting series from October 19, 2023 through November 9, 2023, the January 18, 2024 public meeting will be dedicated to the Committee members reviewing their finalized feedback regarding their initial recommendations to the GSA Administrator and to vote on their deliverable to the GSA Administrator. The Committee will provide initial recommendations on their priority initiatives, to include authorization path improvements, continuous monitoring (ConMon) process improvements, and automation initiatives and opportunities. The meeting agenda and draft deliverable will be posted on *https://gsa.gov/fscac* prior to the January 18, 2024 meeting.

Meeting Attendance

This virtual meeting is open to the public. Meeting registration and information is available at *https://gsa.gov/fscac.* Registration for attending the virtual meeting is highly encouraged by 5:00 p.m. EST, on Tuesday, January 16, 2024. After registration, individuals will receive instructions on how to attend the meeting via email.

For information on services for individuals with disabilities, or to request accommodation for a disability, please email the FSCAC staff at *FSCAC@gsa.gov* at least 10 days prior to the meeting date. Live captioning may be provided virtually.

Public Comment

Members of the public will have the opportunity to provide oral public comment during the FSCAC meeting on January 18, 2024. Written public comments can be submitted at any time by completing the public comment form on our website, *https://gsa.gov/fscac.* All written public comments will be provided to FSCAC members in advance of the meeting if received by Wednesday, January 10, 2024.

Elizabeth Blake,

Senior Advisor, Federal Acquisition Service, General Services Administration.

[FR Doc. 2023–27537 Filed 12–14–23; 8:45 am]

BILLING CODE 6820–34–P

GENERAL SERVICES ADMINISTRATION

[Notice-MA–2023–11; Docket No. 2023–0002; Sequence No. 44]

Notice of Request for Information on the Computers for Veterans and Students Act of 2022

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

ACTION: Notice; request for information (RFI).

SUMMARY: GSA is responsible for implementing the Computers for Veterans and Students Act of 2022 (COVS Act), which aims to close the digital divide and provide access to surplus computers and technology equipment to eligible recipients. GSA is seeking information from nonprofit computer refurbishers and other nongovernmental entities to better understand the industry as GSA develops regulations to implement the COVS Act.

DATES: Interested parties should submit written comments to the address shown below on or before February 13, 2024.

ADDRESSES: Comments to the RFI must be provided in writing. Interested parties are to submit their written comments electronically to *https://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching for ''RFI Computers for Veterans and Students Act of 2022''.

Select the link ''Comment Now'' that corresponds with the RFI and follow the instructions provided on the screen. Please include your name, company name (if any), and ''RFI Computers for Veterans and Students Act of 2022'' on your attached document. If your comment cannot be submitted using *https://www.regulations.gov,* call or email the points of contact in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

You are not required to answer all of the questions in the RFI, but the more information we receive, the better GSA will understand the nonprofit computer refurbisher industry.

Comments received generally will be posted without change to *https://www.regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *https://www.regulations.gov* approximately two-to-three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Mr. William Garrett, Director, Personal Property Policy Division, Office of Government-wide Policy, Office of Asset and Transportation Management (MA), at 202–368–8163 or *personalpropertypolicy@gsa.gov* for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or *GSARegSec@gsa.gov.* Please cite RFI Computers for Veterans and Students Act of 2022.

SUPPLEMENTARY INFORMATION:

Background

GSA oversees the disposal of federal excess and surplus personal property. Under the COVS Act (codified at *40 U.S.C. 549a*), GSA is required, as appropriate, to transfer full title of eligible surplus computers and technology equipment to nonprofit computer refurbishers.

Nonprofit computer refurbishers are responsible for the repair, distribution, and subsequent transfer of the equipment to eligible recipients. The term ''eligible recipient'' means an educational institution, individual with a disability, low-income individual, student, senior in need, or veteran that is residing or based in the United States. If the equipment cannot be repaired or reused, nonprofit computer refurbishers must use recyclers to the maximum extent practicable. Nonprofit computer refurbishers must also offer training programs to eligible recipients on the use of the repaired computers and technology equipment, and report required information to GSA.

Purpose

The purpose of this RFI is to gather information from nonprofit computer refurbishers and other nongovernmental entities to better understand the industry's experience in and ability to (1) refurbish computers and technology equipment; (2) recycle computers and technology equipment if the property can't be repaired or reused; (3) distribute property to eligible recipients; (4) provide training programs; and (5) report data to GSA as required. GSA is also requesting information from nongovernmental entities that may be able to facilitate the identification and participation of nonprofit computer refurbishers.

This information will help GSA evaluate the eligibility and suitability of nonprofit computer refurbishers for participating in the COVS Act program and receiving surplus computers and technology equipment from Federal agencies. This information will also help GSA identify nongovernmental entities for potential partnerships and to develop a framework for the COVS Act program and implementing regulations.

GSA is providing the following information to help the industry understand the amount of personal property reported to GSA as excess under Federal Supply Group (FSG) 70 with a condition code of repairable. It's important to note that the amount of property available for transfer under the COVS Act will be less than the amount of property reported to GSA as excess since the COVS Act authorizes the transfer of surplus computer or technology equipment. Excess personal property is available for transfer to other Federal agencies and may be utilized at the excess level before it could be declared surplus, thereby it would not be available for transfer as surplus property under the COVS Act. Additionally, the amount of reported property varies each fiscal year and numbers decreased due to the impact of COVID–19.

DEFINITIONS

Federal Supply Group (FSG)	2-digit numeric code representing a group of Federal Supply Classes.
Condition Code	The current condition or usability of the property (new/unused; usable; repairable; salvage; or scrap).
Fiscal Year	Begins on October 1 of each year and ends on September 30 of the following year.
Line Item	A single line entry, on a reporting form or transfer order, for items of property of the same type having the same description, condition code, and unit cost.
Quantity	The number of units of issue of available property.
Unit of Issue	The way the property quantity is normally measured, sold, or counted in an inventory (e.g., each, lot, box).
Original Acquisition Cost (OAC)	The price an agency originally paid for an item when they acquired it (not the fair market value).

REPORTED EXCESS PERSONAL PROPERTY:FSG 70 & CONDITION CODE REPAIRABLE

Fiscal year	Line items	Quantity	OAC
19	36,875	146,038	$219,972,562.45
20	23,384	87,190	115,469,580.08
21	20,339	60,824	121,137,177.77
22	19,906	55,555	118,602,707.33
23 (10/1/22–6/30/23)	11,095	34,372	58,470,951.90
Total	111,599	383,979	633,652,979.53

This RFI is for general fact-gathering purposes. Interested parties will not be reimbursed for any costs related to providing information in response to this RFI. The Government does not intend to award a contract on the basis of this RFI.

Requested Information From Industry

To help GSA assess the ability of nonprofit computer refurbishers or other industry partners to participate in the COVS Act program, please answer the following questions:

General

• If you are a nonprofit computer refurbisher, what is the name, mission, vision, location, and history of your nonprofit organization? How long have you been operating as a nonprofit computer refurbisher or industry partner?

• What are your sources of funding and support? How do you ensure financial sustainability and accountability?

• How many staff members and volunteers do you have? What are their roles and qualifications? How do you recruit, train, and retain them?

Refurbishing

• How many computers and technology equipment do you refurbish per year? What are the types, models, brands, and specifications of the equipment you refurbish? What are the standards and procedures you follow for refurbishing?

• When do you consider computer or technology equipment obsolete or unrepairable? Is there any type of surplus computer or technology equipment that you will not accept? For example, computers without hard drives or equipment over a certain age.

• Do you provide data sanitization services? Do you follow the National Institute of Standards and Technology (NIST Special Publication 800–88, Rev. 1) guidelines? Do you provide evidence/reports that sanitization was completed?

Recycling

• If computer or technology equipment cannot be repaired or reused, what do you do with the property? Are you a certified electronics recycler? If so, under which standard? If not, do you partner with certified electronics recyclers?

• How many computers and technology equipment do you recycle per year? What are the types, models, brands, and specifications of the equipment you recycle? What are the standards and procedures you follow for recycling?

Distribution

• What process would you use to identify recipients eligible to receive surplus computer or technology equipment in accordance with 40 U.S.C. 549a? How would you verify eligibility to prevent ineligible persons from obtaining equipment? How would you determine who receives the equipment to ensure fair and equitable distribution?

• Would recipients be required to pay for the equipment? How would you determine the price or fee in compliance with 40 U.S.C. 549a(b)(3)(B)?

• Is your organization able to segregate equipment received under the COVS Act from other sources to ensure this equipment is only provided to eligible recipients?

• Federal agencies are generally unable to pay for shipping and transportation to refurbishers. Would you cover shipping costs? Would you be able to pick up computers and equipment from agency locations?

• How would you distribute refurbished computers and technology equipment to recipients? What would be your distribution network and criteria? How would you ensure quality control and customer service?

• How long (in days) would it take to refurbish computers (from the date the equipment is received) and provide them to eligible recipients?

Training

• Do you offer training programs on the use of the repaired computers and technology equipment? Is this training provided at no cost, or for a fee? If there is a charge for the classes, how is this fee determined?

• Please describe the training programs, platforms (*e.g.,* in person, virtual) and the target audiences.

Reporting

• Nonprofit computer refurbishers receiving surplus computer or technology equipment under the COVS Act are required to report information to GSA on a recurring basis. This includes information about the distribution of the equipment and which eligible recipients received the equipment. Would you be able to provide the required recipient data and reports to GSA? How soon could you provide reports about who received the equipment (taking into account the time to repair and transfer them)? Do you foresee any challenges in providing this data to GSA?

Partnerships

• Do you have any experience working with Federal agencies or receiving surplus computers and technology equipment from them? If so, please provide examples.

• How do you envision nongovernmental entities partnering with GSA? Do you anticipate any challenges with GSA establishing partnerships with nongovernmental entities to facilitate the identification and participation of nonprofit computer refurbishers?

• Are you aware of any nonprofit computer refurbisher groups, alliances, or associations? If yes, please list them. Are there other types of groups we need to be aware of in the industry?

• Are you a member of a nonprofit computer refurbisher group, alliance, or association? If yes, which one? What are the eligibility and certification requirements to join? Are you required to pay any fees to participate? Why did you decide to join one or choose one particular group, alliance, or association over another?

• If you're not part of a group, alliance, or association, is there a reason you have not joined or are you opposed to joining one?

Other

• Please provide any additional comments or challenges you anticipate related to participating in the COVS Act program.

Krystal J. Brumfield,

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

[FR Doc. 2023–27536 Filed 12–14–23; 8:45 am]

BILLING CODE 6820–14–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–24–0909; Docket No. CDC–2023–0096]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies to comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995. This notice invites comment on the proposed data collection titled, CDC Diabetes Prevention Recognition Program (DPRP). The Diabetes Prevention Recognition Program (DPRP) continues the collection of nationwide, de-identified data for the

implementation of the National Diabetes Prevention Program (National DPP) lifestyle change program using a set of evidence-based standards.

DATES: CDC must receive written comments on or before February 13, 2024.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2023–0096 by either of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. CDC will post, without change, all relevant comments to *www.regulations.gov.*

Please note: Submit all comments through the Federal eRulemaking portal (*www.regulations.gov*) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329; Telephone: 404–639–7570; Email: *omb@cdc.gov.*

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. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to the OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected;
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses; and
5. Assess information collection costs.

Proposed Project

CDC Diabetes Prevention Recognition Program (DPRP)—Revision—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

CDC's Division of Diabetes Translation (DDT) established and administers the National Diabetes Prevention Recognition Program (DPRP), which recognizes organizations that deliver a diabetes prevention program according to evidence-based requirements set forth in the CDC's Diabetes Prevention Recognition Program Standards and Operating Procedures (DPRP Standards). Additionally, the Centers for Medicare & Medicaid Services (CMS) Medicare Diabetes Prevention Program (MDPP) expansion of CDC's National DPP was announced in early 2016, when the Secretary of Health and Human Services (HHS) determined that the Diabetes Prevention Program met the statutory criteria for inclusion in Medicare's expanded list of health care services for beneficiaries (*https://cmmi.my.site.com/mdpp/*). This was the first time a preventive service model from the CMS Innovation Center was expanded into Medicare. After extensive testing of this model in 17 sites across the US from 2014–2016, CMS proposed the MDPP in Sections 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh section 424.59), authorizing CDC-recognized organizations to prepare for enrollment as MDPP suppliers beginning in January 2018 in order to bill CMS for these services. Only organizations in good standing with the CDC DPRP are eligible as MDPP suppliers. CDC continues to work with CMS to support the MDPP.

CDC requests an additional three years of OMB approval to continue collecting the information needed to administer the DPRP and provide information needed by CMS to support the MDPP benefit. Based on experience with the DPRP from 2011–2023, including data analysis and feedback from applicant organizations and internal and external partners, CDC plans to revise the DPRP Standards and the associated information collection. Key changes are a direct result of DPRP data analyses, recent literature reviews, and discussion with National DPP stakeholders, including those serving socially vulnerable populations. Key changes to the evaluation data collection instrument allow for the collection of participant zip codes (for aggregate reporting only, not to be reported per each individual participant); an OMB-recommended 6-point disability variable; a health equity-related social determinants of health (SDOH) variable set (to assess whether there was a social needs assessment conducted; key SDOH issues identified; and whether any action was taken); a Middle Eastern or North African write-in option within the current race/ethnicity variable; and two new options for the current payersource variable.

Key changes to the application data collection instrument allow for: (1) a yes/no drop-down question asking if an organization's zip code is in an area of high social vulnerability based on the Social Vulnerability Index, which would permit an in-person organization to be fast-tracked to preliminary recognition status to allow the organization to apply to CMS to become an MDPP supplier; (2) revisions to the Combination delivery mode to include an option for in-person delivery with a distance learning component; and (3) collection of a projected program start-date.

During the period of this Revision, CDC estimates receipt of approximately 200 DPRP application forms per year from new organizations. The estimated burden per one-time application response is one hour. In addition, CDC estimates receipt of semi-annual evaluation data submissions from the same 200 additional organizations per year, estimated at two hours per response. The total estimated average annualized evaluation burden to new respondents is 2,400 hours. This includes an estimate of the time needed to extract and compile the required data records and fields from an existing electronic database, review the data, and enter the data via the DPRP Data Portal. CDC also has 1,500 currently recognized organizations that will continue to submit semi-annual evaluation data. The estimated burden per response is modest, since the information requested

for DPRP recognition is routinely collected by most organizations that deliver the National DPP lifestyle change program for their own internal evaluation and possible insurance reimbursement purposes, including the MDPP benefit. Participation in the DPRP is voluntary, data are de-identified, no personally identifiable information (PII) is collected by CDC, and there are no costs to respondents other than their time. CDC is requesting a three-year revised approval. The total estimated annual burden hours requested is 7,400.

ESTIMATED ANNUALIZED BURDEN HOURS FOR NEW ORGANIZATIONS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Avg. burden per response (in hours)	Total burden (in hours)
Public sector organizations that deliver the National DPP lifestyle change program.	DPRP Application Form	80	1	1	80
	DPRP Evaluation Data	680	2	2	2,720
Private sector organizations that deliver the National DPP lifestyle change program.	DPRP Application Form	120	1	1	120
	DPRP Evaluation Data	1,120	2	2	4,480
Total					7,400

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Public Health Ethics and Regulations, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2023–27550 Filed 12–14–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–24–1186; Docket No. CDC–2023–0099]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies the opportunity to comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed information collection project titled Information Collection for Tuberculosis Data from Referring Entities to CureTB. The CureTB program works to prevent the spread of tuberculosis (TB) among people who cross international borders by providing linkage to care for patients with active/suspected TB when they leave the U.S., accurate and up-to-date information for receiving providers, motivation and resources for mobile individuals to continue care, linkage for comorbidities, and facilitation of positive outcomes and communication between partners.

DATES: CDC must receive written comments on or before February 13, 2024.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2023–0099 by either of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. CDC will post, without change, all relevant comments to *www.regulations.gov.*

Please note: Submit all comments through the Federal eRulemaking portal (*www.regulations.gov*) or by U.S. mail to the address listed above.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H21–8, Atlanta, Georgia 30329; Telephone: 404–639–7570; Email: *omb@cdc.gov.*

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. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to the OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected;
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses; and
5. Assess information collection costs.

Proposed Project

Information Collection for Tuberculosis Data from Referring Entities to CureTB (OMB Control No. 0920–1186, Exp. 2/29/2024)—Extension—National Center for Emerging and Zoonotic Infectious Diseases (NCEZID), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The CureTB program at CDC works to prevent the spread of tuberculosis (TB) among people who cross international borders. To reduce disease transmission and the emergence of drug-resistant TB,

CureTB connects people with TB to healthcare services as they move between the United States and other countries. The program is a collaboration between CDC's Division of Global Migration Health (DGMH) and the County of San Diego's Tuberculosis Control Program. CureTB collaborates with health authorities throughout the United States and around the world to link people with TB to care at their destinations. Health departments, healthcare providers, and others seeking help in linking patients to ongoing TB care in other countries can refer patients to CureTB. CureTB has an interagency agreement with ICE (Immigration and Custom Enforcement) to refer those patients with suspected or confirmed TB when they are repatriated to their countries of origin.

CureTB collects the following types of information: (1) referring entities (referring agency and jurisdiction) information including name of referring person, telephone numbers, fax numbers, email addresses; (2) patient's name and last name(s), demographics date of birth, gender, address (U.S. and outside of the U.S), telephone numbers, email address, patient's contact persons including name and telephone number; and (3) TB clinical information, including diagnostic testing (radiology reports, laboratory testing reports, other diagnostic methods used, treatment regimen and information about comorbidities).

CDC is requesting OMB approval for an additional three years. CDC requests approval for an estimated 1,125 annual burden hours. There is not cost to respondents other than their time to participate.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
U.S. health departments	CureTB Transnational Notification	80	4	30/60	160
TB patients referred by U.S. health departments.	CureTB Transnational Notification	214	1	5/60	18
Tb patients referred by ICE	CureTB Transnational Notification	587	1	45/60	440
TB treating physicians in new country	CureTB Clinician Public Health Department Follow-up Script.	870	3	10/60	435
U.S. health departments	CureTB Contact/Source Investigation (CI/CS) Notification.	20	5	30/60	50
U.S. health departments	CureTB Program Partner Satisfaction Assessment Questionnaire 1.	100	1	10/60	17
U.S. health departments	CureTB Program Partner Satisfaction Assessment Questionnaire 2.	50	1	6/60	5
Total					1,125

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Public Health Ethics and Regulations, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2023–27549 Filed 12–14–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–1800–N2]

Inflation Reduction Act (IRA) Revised Program Guidance

AGENCY: Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing the availability of CMS' revised guidance for the Medicare Part B and Part D Prescription Drug Inflation Rebate Program for the implementation of the Inflation Reduction Act. CMS will be releasing additional Inflation Reduction Act-related guidance; all can be viewed on the dedicated Inflation Reduction Act section of the CMS website.

FOR FURTHER INFORMATION CONTACT: Inquiries related to the revised guidance should be sent to *IRARebateand Negotiation@cms.hhs.gov* with the relevant subject line, ''Medicare Inflation Rebate Program Guidance.''

SUPPLEMENTARY INFORMATION: The Inflation Reduction Act was signed into law on August 16, 2022. Section 11101 of the Inflation Reduction Act added a new section 1847A(i) to the Social Security Act (the Act), which establishes a requirement for manufacturers to pay Medicare Part B rebates for single source drugs and biological products with prices that increase faster than the rate of inflation for a calendar quarter to the Federal Supplementary Medical Insurance Trust Fund, and provides for lower Part B beneficiary cost sharing on these drugs and biologicals. Section 11102 of the Inflation Reduction Act added a new section 1860D–14B to the Act, which establishes a requirement for manufacturers to pay rebates to the Federal Supplementary Medical Insurance Trust Fund for certain Part D drugs when prices increase faster than the rate of inflation for each 12-month applicable period. Collectively, this program to implement these rebates is referred to as the Medicare Prescription Drug Inflation Rebate Program, or the Inflation Rebate Program.

To obtain copies of the revised guidance and the responses to comments from the initial guidance, as well as other Inflation Reduction Act-related documents, please access the CMS Inflation Reduction Act website by copying and pasting the following web address into your web browser: *https://www.cms.gov/inflation-reduction-act-and-medicare.* If interested in receiving CMS Inflation Reduction Act updates by email, individuals may sign up for CMS Inflation Reduction Act's email updates at *https://www.cms.gov/About-CMS/Agency-Information/Aboutwebsite/EmailUpdates.*

The Administrator of the Centers for Medicare & Medicaid Services (CMS), Chiquita Brooks-LaSure, having reviewed and approved this document, authorizes Vanessa Garcia, who is the Federal Register Liaison, to electronically sign this document for

purposes of publication in the **Federal Register**.

Dated: December 12, 2023.

Vanessa Garcia,

Federal Register Liaison, Centers for Medicare & Medicaid Services.

[FR Doc. 2023–27551 Filed 12–14–23; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers: CMS–304/–304a, CMS–368/–R–144, and CMS–10249]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by February 13, 2024.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number: ____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, please access the CMS PRA website by copying and pasting the following web address into your web browser: *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.*

FOR FURTHER INFORMATION CONTACT: William N. Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–304/–304a Reconciliation of State Invoice (ROSI) (CMS–304) and Prior Quarter Adjustment Statement (PQAS) (CMS–304a)

CMS–368/–R–144 State Agency Contact Form (CMS–368) and Quarterly State Invoice (CMS–R–144)

CMS–10249 Administrative Requirements for Section 6071 of the Deficit Reduction Act

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:* Extension of a currently approved collection; *Title of Information Collection:* Reconciliation of State Invoice (ROSI) and Prior Quarter Adjustment Statement (PQAS); *Use:* Form CMS–304 (ROSI) is used by manufacturers to respond to the state's rebate invoice for current quarter utilization. Form CMS–304a (PQAS) is required only in those instances where a change to the original rebate data submittal is necessary. *Form Number:* CMS–304 and –304a (OMB control number: 0938–0676); *Frequency:* Quarterly; *Affected Public:* Private sector (business or other for-profits); *Number of Respondents:* 749; *Total Annual Responses:* 5,841; *Total Annual Hours:* 248,584. (For policy questions regarding this collection contact Robert Giles at 667–290–8626.)

2. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Medicaid Drug Rebate Program State Reporting Forms; *Use:* Form CMS 368 is a report of contact for the State to name the individuals involved in the Medicaid Drug Rebate Program (MDRP) and is required only in those instances where a change to the originally submitted data is necessary. The ability to require the reporting of any changes to these data is necessary to the efficient operation of these programs. Form CMS–R–144 is required from States quarterly to report utilization for any drugs paid for during that quarter. *Form Number:* CMS–368 and –R–144 (OMB control number: 0938–0582); *Frequency:* Quarterly and on occasion; *Affected Public:* State, local, or Tribal governments; *Number of Respondents:* 56; *Total Annual Responses:* 290; *Total Annual Hours:* 13,669. (For policy questions regarding this collection contact Robert Giles at 667–290–8626.)

3. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Administrative Requirements for Section 6071 of the Deficit Reduction Act; *Use:* State Operational Protocols should provide enough information such that: the CMS Project Officer and other Federal officials may use it to understand the operation of the demonstration, prepare for potential site visits without needing additional information, or both; the State Project Director can use it as the manual for program implementation; and external stakeholders may use it to understand the operation of the demonstration. The financial

information collection is used in our financial statements and shared with the auditors who validate CMS' financial position. The Money Follows the Person Rebalancing Demonstration (MFP) Finders File, MFP Program Participation Data file, and MFP Services File are used by the national evaluation contractor to assess program outcomes while we use the information to monitor program implementation. The MFP Quality of Life data is used by the national evaluation contractor to assess program outcomes. The evaluation is used to determine how participants' quality of life changes after transitioning to the community. The semi-annual progress report is used by the national evaluation contractor and CMS to monitor program implementation at the grantee level. *Form Number:* CMS–10249 (OMB control number: 0938–1053); *Frequency:* Yearly, quarterly, and semi-annually; *Affected Public:* State, local, or Tribal governments; *Number of Respondents:* 41; *Total Annual Responses:* 410; *Total Annual Hours:* 4,326. (For policy questions regarding this collection contact Alicia Ryce at 410–786–1075.)

Dated: December 12, 2023.

William N. Parham, III

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2023–27614 Filed 12–14–23; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–3369]

Adam Michael Nagy: Final Debarment Order

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is issuing an order under the Federal Food, Drug, and Cosmetic Act (the FD&C Act) debarring Adam Michael Nagy for a period of 15 years from importing or offering for import any drug into the United States. FDA bases this order on a finding that Mr. Nagy was convicted of three relevant felony counts under Federal law. The factual basis supporting Mr. Nagy's conviction, as described below, is conduct relating to the importation into the United States of a drug or controlled substance. Mr. Nagy was given notice of the proposed debarment and was given an opportunity to request a hearing to show why he should not be debarred. As of October 22, 2023 (30 days after receipt of the notice), Mr. Nagy had not responded. Mr. Nagy's failure to respond and request a hearing constitutes a waiver of his right to a hearing concerning this matter.

DATES: This order is effective December 15, 2023.

ADDRESSES: Any application by Mr. Nagy for termination of debarment under section 306(d)(1) of the FD&C Act (21 U.S.C. 335a(d)(1)) may be submitted as follows:

Electronic Submissions

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

Written/Paper Submissions

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

Instructions: All applications must include the Docket No. FDA–2023–N–3369. Received applications will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

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

Docket: For access to the docket, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852 between 9 a.m. and 4 p.m., Monday through Friday. Publicly available submissions may be seen in the docket.

FOR FURTHER INFORMATION CONTACT: Jaime Espinosa, Division of Compliance and Enforcement, Office of Policy, Compliance, and Enforcement, Office of Regulatory Affairs, Food and Drug Administration, at 240–402–8743, or *debarments@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Section 306(b)(1)(D) of the FD&C Act (21 U.S.C. 335a(b)(1)(D)) permits debarment of an individual from importing or offering for import any drug into the United States if the FDA finds, as required by section 306(b)(3)(C) of the FD&C Act, that the individual has been convicted of a felony for conduct relating to the importation into the United States of any drug or controlled substance.

On May 1, 2023, Mr. Nagy was convicted, as defined in section 306(l)(1) of FD&C Act, in the U.S. District Court for the Western District of Pennsylvania, when the court entered judgment against him for multiple

offenses he pled guilty to, including the offenses of: (1) importation into the United States a quantity of ethylone, a Schedule I Controlled Substance in violation of 21 U.S.C. 952(a) and 960(a)(1); (2) importation into the United States quantities of TURINABOL and DIANABOL, anabolic steroids, and Schedule III Controlled Substances in violation of 21 U.S.C. 952(b) and 960(a)(1); and (3) smuggling goods into the United States, that is, alpha-PVP ethylone, Schedule I Controlled Substances, and TURINBOL and DIANABOL, Schedule III Controlled Substances, in violation of 18 U.S.C. 545. FDA's finding that debarment is appropriate is based on the felony conviction referenced herein. The factual basis for this conviction is as follows:

As contained in the superseding indictment, filed on March 22, 2018, the Defendant's motion for downward variance, filed on April 24, 2023, and the Government's sentencing memorandum, filed April 24, 2023, from Mr. Nagy's case, Mr. Nagy was the owner and operator of Prescription Nutrition, Prescription Protein, and N.O.B. Industries located in Pennsylvania. From on or about June 2014 to on or about September 2014, Mr. Nagy imported various types of controlled substances which he then capsuled and distributed to clients. Specifically, from on or about June 2014 to on or about July 2014, Mr. Nagy illegally imported ethylone. In July 2014, he also illegally imported TURINABOL and DIANABOL. In addition, from June 2014 until on or about September 2014, Mr. Nagy illegally imported alpha-PVP, ethylone, TURINABOL, and DIANABOL. All the controlled substances Mr. Nagy imported and smuggled into the country came from China.

As a result of this conviction, FDA sent Mr. Nagy, by certified mail, on September 20, 2023, a notice proposing to debar him for a 15-year period from importing or offering for import any drug into the United States. The proposal was based on a finding under section 306(b)(3)(C) of the FD&C Act that Mr. Nagy's three felony convictions that included: (1) importation into the United States a quantity of ethylone, a Schedule I Controlled Substance in violation of 21 U.S.C. 952(a) and 960(a)(1); (2) importation into the United States quantities of TURINABOL and DIANABOL, anabolic steroids and Schedule III Controlled Substances in violation of 21 U.S.C. 952(b) and 960(a)(1); and (3) smuggling goods into the United States, that is, alpha-PVP ethylone, Schedule I Controlled Substances, and TURINBOL, DIANABOL, Schedule III Controlled Substances in violation of 18 U.S.C. 545, were for conduct relating to the importation into the United States of any drug or controlled substance because he imported controlled substances into the United States in order to capsule portions of the drugs to sell to clients. In proposing a debarment period, FDA weighed the considerations set forth in section 306(c)(3) of the FD&C Act that it considered applicable to Mr. Nagy's offenses and concluded that each offense warranted the imposition of a 5-year period of debarment, to run consecutively, for a total of a 15-year period of debarment.

The proposal informed Mr. Nagy of the proposed debarment and offered him an opportunity to request a hearing, providing him 30 days from the date of receipt of the letter in which to file the request, and advised him that failure to request a hearing constituted a waiver of the opportunity for a hearing and of any contentions concerning this action. Mr. Nagy received the proposal and notice of opportunity for a hearing on September 22, 2023. Mr. Nagy failed to request a hearing within the timeframe prescribed by regulation and has, therefore, waived his opportunity for a hearing and waived any contentions concerning his debarment (21 CFR part 12).

II. Findings and Order

Therefore, the Assistant Commissioner, Office of Human and Animal Food Operations, under section 306(b)(3)(C) of the FD&C Act, under authority delegated to the Assistant Commissioner, finds that Adam Michael Nagy been convicted of three felonies under federal law for conduct relating to the importation into the United States of any drug or controlled substance. FDA finds that the offense should be accorded a debarment period of 15 years as provided by section 306(c)(2)(A)(iii) of the FD&C Act.

As a result of the foregoing finding, Mr. Nagy is debarred for a period of 15 years from importing or offering for import any drug into the United States, effective (see DATES). Pursuant to section 301(cc) of the FD&C Act (21 U.S.C. 331(cc)), the importing or offering for import into the United States of any drug by, with the assistance of, or at the direction of Mr. Nagy is a prohibited act.

Dated: December 11, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–27557 Filed 12–14–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Meeting of the National Advisory Council on Nurse Education and Practice

AGENCY: Health Resources and Services Administration, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In accordance with the Federal Advisory Committee Act, this notice announces that the National Advisory Council on Nurse Education and Practice (NACNEP) will hold public meetings for the 2024 calendar year (CY). Information about NACNEP, agendas, and materials for these meetings can be found on the NACNEP website at *https://www.hrsa.gov/advisory-committees/nursing.*

DATES: NACNEP meetings will be on (all in Eastern Time):

- March 14, 2024, 10 a.m.–4 p.m. and March 15, 2024, 10 a.m.–4 p.m.;
- May 9, 2024, 10 a.m.–4 p.m.;
- August 7, 2024, 10 a.m.–4 p.m. and August 8, 2024, 10 a.m.–4 p.m.; and
- December 5, 2024, 8 a.m.–5 p.m. and December 6, 2024, 8 a.m.–2 p.m.

ADDRESSES: Meetings may be held in person, via teleconference, and/or video conference. In-person meetings will be held at 5600 Fishers Lane, Rockville, Maryland 20857. For updates on how the meeting will be held and instructions for joining meetings, visit the NACNEP website at *https://www.hrsa.gov/advisory-committees/nursing/meetings* 14 business days before the date of the meeting.

FOR FURTHER INFORMATION CONTACT: Justin Bala-Hampton, Designated Federal Official, NACNEP, Bureau of Health Workforce, Division of Nursing and Public Health, Health Resources and Services Administration, 5600 Fishers Lane, 11N100D, Rockville, Maryland 20857; 301–443–5260; or *Jbala-hampton@hrsa.gov.*

SUPPLEMENTARY INFORMATION: NACNEP provides advice and recommendations to the Secretary of Health and Human Services on policy, program development, and other matters of significance concerning the activities under title VIII of the Public Health Service Act, including the range of issues relating to the nurse workforce, education, and practice improvement. NACNEP also prepares and submits an annual report to the Secretary of Health and Human Services and Congress describing its activities, including

NACNEP's findings and recommendations concerning activities under Title VIII, as required by the Public Health Service Act.

Since priorities dictate meeting times, be advised that times and agenda items are subject to change. For CY 2024 meetings, agenda items may include, but are not limited to, the nursing workforce (*e.g.,* nursing shortage, distribution, supply, and access) nursing practice improvement, nursing education, nursing work environment and support, and other Title VIII program activities. Refer to the NACNEP website listed above for all current and updated information concerning the CY 2024 NACNEP meetings. Agendas and meeting materials that will be posted up to 30 calendar days but no later 14 calendar days before the meeting.

Members of the public will have the opportunity to provide comments. Public participants may submit written statements in advance of the scheduled meeting(s). Oral comments will be honored in the order they are requested and may be limited as time allows. Requests to submit a written statement or make oral comments to NACNEP should be sent to Justin Bala-Hampton using the contact information above at least 5 business days before the meeting.

Individuals who need special assistance or another reasonable accommodation should notify Justin Bala-Hampton at the email address and phone number listed above at least 10 business days before the meeting(s) they wish to attend. In-person meetings occur in a federal government building, and attendees must pass a security check to enter the building. Non-U.S. citizen attendees must notify Justin Bala-Hampton of their planned attendance at least 20 business days prior to the meeting to facilitate their entry into the building. All attendees are required to present government-issued identification prior to entry.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2023–27618 Filed 12–14–23; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Meeting of the Council on Graduate Medical Education

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: In accordance with the Federal Advisory Committee Act, this notice announces that the Council on Graduate Medical Education (COGME or Council) will hold public meetings for the 2024 calendar year (CY). Information about COGME, agendas, and materials for these meetings can be found on the COGME website at *https://www.hrsa.gov/advisory-committees/graduate-medical-edu/meetings.*

DATES: COGME meetings will be held on:

- March 4, 2024, 9:00 a.m.–5:00 p.m. Eastern Time (ET) and March 5, 2024, 9:00 a.m.–2:00 p.m. ET; and
- September 12, 2024, 10:00 a.m.–5:00 p.m. ET and September 13, 2024, 10:00 a.m.–3:00 p.m. ET.

ADDRESSES: The meeting scheduled for March 2024 will be held in-person at 5600 Fishers Lane, Rockville, Maryland 20857. The meeting scheduled for September 2024 will be held remotely by teleconference/webinar. The meeting format is subject to change as needed. For any updates on how the meetings will be held, visit the COGME website 30 business days before the date of the meeting, where instructions for joining meetings will be posted. For meeting information updates, go to the COGME website meeting page at *https://www.hrsa.gov/advisory-committees/graduate-medical-edu/meetings.*

FOR FURTHER INFORMATION CONTACT: Dr. Curi Kim, Designated Federal Official, Division of Medicine and Dentistry, Bureau of Health Workforce, HRSA, 5600 Fishers Lane, Room 15N35, Rockville, Maryland 20857; 301–945–5827; or *CKim@hrsa.gov.*

SUPPLEMENTARY INFORMATION: COGME provides advice and recommendations to the Secretary of HHS and Congress on policy, program development, and other matters of significance regarding the issues listed in section 762(a)(1) of the Public Health Service Act. Issues addressed by the COGME include the supply and distribution of the physician workforce in the United States, including any projected shortages or excesses; international medical graduates; the nature and financing of undergraduate and graduate medical education; appropriation levels for certain programs under Title VII of the Public Health Service Act; and deficiencies in databases concerning the supply and distribution of the physician workforce and postgraduate programs for training physicians. COGME submits reports to the Secretary of HHS; the Senate Committee on Health, Education, Labor and Pensions; and the House of Representatives Committee on Energy and Commerce. Additionally, COGME encourages entities providing graduate medical education to conduct activities to voluntarily achieve the recommendations of the Council related to appropriate efforts to be carried out by hospitals, schools of medicine, schools of osteopathic medicine, and accrediting bodies with respect to the supply and distribution of physicians in the United States; current and future shortages or excesses of physicians in medical and surgical specialties and subspecialties; and issues relating to international medical graduates, including efforts for changes in undergraduate and graduate medical education programs.

Since priorities dictate meeting times, be advised that start times, end times, and agenda items are subject to change. For CY 2024 meetings, agenda items may include, but are not limited to, discussions on team-based care, graduate medical education data, and the topic areas listed above. Refer to the COGME website listed above for all current and updated information concerning the CY 2024 COGME meetings, including draft agendas and meeting materials that will be posted 30 calendar days before the meeting.

Members of the public will have the opportunity to provide comments. Public participants may submit written statements in advance of the scheduled meeting(s). Oral comments will be honored in the order they are requested and may be limited as time allows. Requests to submit a written statement or make oral comments to COGME should be sent to Dr. Kim using the contact information above at least 5 business days before the meeting date(s).

Individuals who need special assistance or another reasonable accommodation should notify Dr. Kim using the contact information listed above at least 10 business days before the meeting(s) they wish to attend. Since all in-person meetings occur in a federal government building, attendees must go through a security check to enter the building. Non-U.S. Citizen attendees must notify HRSA of their planned attendance at least 20 business days prior to the meeting in order to facilitate their entry into the building. All attendees are required to present government-issued identification prior to entry.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2023–27500 Filed 12–14–23; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Meeting of the Advisory Committee on Training and Primary Care Medicine and Dentistry

AGENCY: Health Resources and Services Administration, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In accordance with the Federal Advisory Committee Act, this notice announces that the Advisory Committee on Training in Primary Care Medicine and Dentistry (ACTPCMD) will hold public meetings for the 2024 calendar year (CY). Information about ACTPCMD, agendas, and materials for these meetings can be found on the ACTPCMD website at *https://www.hrsa.gov/advisory-committees/primarycare-dentist/meetings.*

DATES: ACTPCMD meetings will be held on:

- March 25, 2024, 8 a.m.–5 p.m. Eastern Time (ET) and March 26, 2024, 8 a.m.–4 p.m. ET; and
- August 2, 2024, 10 a.m.–5 p.m. ET.

ADDRESSES: Meetings will be held in-person, by teleconference, and/or on a video conference. In-person meetings will be held at 5600 Fishers Lane, Rockville, Maryland 20857, and broadcast virtually on a video conference platform. For updates on how the meetings will be held and instructions for joining the meetings, visit the ACTPCMD website at *https://www.hrsa.gov/advisory-committees/primarycare-dentist/meetings* 30 business days before the date of the meeting.

FOR FURTHER INFORMATION CONTACT: Shane Rogers, Designated Federal Officer, Division of Medicine and Dentistry, Bureau of Health Workforce, Health Resources and Services Administration, 5600 Fishers Lane, Room 15N102, Rockville, Maryland 20857; 301–443–5260; or *SRogers@hrsa.gov.*

SUPPLEMENTARY INFORMATION: ACTPCMD provides advice and recommendations to the Secretary of Health and Human Services on policy, program development, and other matters of significance concerning the activities under section 747 of title VII of the Public Health Service (PHS) Act, as it existed upon the enactment of section 749 of the PHS Act in 1998. ACTPCMD prepares an annual report describing the activities of the committee, including findings and recommendations made by the committee concerning the activities under section 747, as well as training programs in oral health and dentistry. The annual report is submitted to the Secretary of Health and Human Services as well as the Chair and ranking members of the Senate Committee on Health, Education, Labor and Pensions and the House of Representatives Committee on Energy and Commerce. ACTPCMD also develops, publishes, and implements performance measures and guidelines for longitudinal evaluations of programs authorized under title VII, part C of the PHS Act, and recommends appropriation levels for programs under this part.

Since priorities dictate meeting times, be advised that start times, end times, and agenda items are subject to change. For CY 2024 meetings, agenda items may include, but are not limited to, upskilling clinicians to serve in underserved areas; diversity, equity, and inclusion; integrated medical and dental training models; and matters pertaining to policy, program development, and other matters of significance concerning medicine and dentistry activities authorized under the relevant sections of the PHS Act. Refer to the ACTPCMD website listed above for all current and updated information concerning the CY 2024 ACTPCMD meetings. Agendas and meeting materials will be posted 30 calendar days before the meeting.

Members of the public will have the opportunity to provide comments. Public participants may submit written statements in advance of the scheduled meeting(s). Oral comments will be honored in the order they are requested and may be limited as time allows. Requests to submit a written statement or make oral comments to ACTPCMD should be sent to Shane Rogers using the contact information above at least 5 business days before the meeting date(s).

Individuals who need special assistance or another reasonable accommodation should notify Shane Rogers using the contact information listed above at least 10 business days before the meeting(s) they wish to attend. Since all in-person meetings will occur in a federal government building, attendees must go through a security check to enter the building. Members of the public must notify Shane Rogers of their intent to attend the in-person meeting 10 business days before the meeting. Non-U.S. Citizen attendees must notify the Designated Federal Officer of their planned attendance at least 20 business days prior to the meeting to facilitate their entry into the building. All attendees are required to present government-issued identification prior to entry.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2023–27619 Filed 12–14–23; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Meeting of the National Advisory Council on the National Health Service Corps

AGENCY: Health Resources and Services Administration, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In accordance with the Federal Advisory Committee Act, this notice announces that the National Advisory Council on the National Health Service Corps (NACNHSC) will hold public meetings for the 2024 calendar year (CY). Information about NACNHSC, agendas, and materials for these meetings can be found on the NACNHSC website at *https://www.hrsa.gov/advisory-committees/national-health-service-corps.*

DATES: NACNHSC meetings will be on (all in Eastern Time):

- March 19, 2024, 9 a.m.–5 p.m. and March 20, 2024, 9 a.m.–2 p.m.;
- June 25, 2024, 9 a.m.–5 p.m. and June 26, 2024, 9 a.m.–2 p.m.; and
- November 19, 2024, 9 a.m.–5 p.m. and November 20, 2024, 9 a.m.–2 p.m.

ADDRESSES: Meetings may be held in person, by teleconference, and/or video conference. In-person meetings will be held at 5600 Fishers Lane, Rockville, Maryland 20857. For updates on how the meeting will be held and instructions for joining the meeting, visit the NACNHSC website at *https://www.hrsa.gov/advisory-committees/national-health-service-corps/meetings* 30 business days before the date of the meeting.

FOR FURTHER INFORMATION CONTACT: Diane Fabiyi-King, Designated Federal Official, Division of National Health Service Corps, HRSA, 5600 Fishers Lane, Rockville, Maryland 20857; phone (301) 443–3609; or *NHSCAdvisoryCouncil@hrsa.gov.*

SUPPLEMENTARY INFORMATION: NACNHSC consults with, advises, and makes recommendations to the Secretary of Health and Human Services with respect to the Secretary's

responsibilities in carrying out subpart II, part D of title III of the Public Health Service Act (42 U.S.C. 254d–254k), as amended, including the designation of areas of the United States with health professional shortages and assignment of National Health Service Corps (NHSC) clinicians to improve the delivery of health services in health professional shortage areas.

Since priorities dictate meeting times, be advised that start times, end times, and agenda items are subject to change. For CY 2024 meetings, agenda items may include, but are not limited to, the identification of NHSC priorities for future program issues and concerns; proposed policy changes by using the varying levels of expertise represented on the NACNHSC to advise on specific program areas; updates from clinician workforce experts; and education and practice improvement in the training development of primary care clinicians. More general items may include presentations and discussions on the current and emerging needs of the health workforce, public health priorities, health care access and evaluation, NHSC-approved sites, HRSA priorities, and other federal health workforce and education programs that impact the NHSC. Refer to the NACNHSC website listed above for all current and updated information concerning the CY 2024 NACNHSC meetings. Agendas and meeting materials will be posted 30 calendar days before the meeting.

Members of the public will have the opportunity to provide comments. Public participants may submit written statements in advance of the scheduled meeting(s). Oral comments will be honored in the order they are requested and may be limited as time allows. Requests to submit a written statement or make oral comments to NACNHSC should be sent to Diane Fabiyi-King using the contact information above at least 5 business days before the meeting date(s).

Individuals who need special assistance or another reasonable accommodation should notify Diane Fabiyi-King using the contact information listed above at least 10 business days before the meeting(s) they wish to attend. In-person meetings will occur in a federal government building, and attendees must go through a security check to enter the building. Non-U.S. Citizen attendees must notify Diane Fabiyi-King of their planned attendance at an in-person meeting at least 20 business days prior to the meeting to facilitate their entry into the building. All attendees are required to present government-issued identification prior to entry.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2023–27604 Filed 12–14–23; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Submission to OMB for Review and Approval; Public Comment Request; Maternal Health Portfolio Evaluation Design

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, HRSA submitted an Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public during the review and approval period. OMB may act on HRSA's ICR only after the 30-day comment period for this notice has closed.

DATES: Comments on this ICR should be received no later than January 16, 2024.

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 Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: To request a copy of the clearance requests submitted to OMB for review, email Joella Roland, the HRSA Information Collection Clearance Officer, at *paperwork@hrsa.gov* or call (301) 443–3983.

SUPPLEMENTARY INFORMATION:

Information Collection Request Title: Maternal Health Portfolio Evaluation Design OMB No. 0906–0059—Revision.

Abstract: HRSA programs provide health care to people who are geographically isolated, economically, or medically vulnerable. HRSA programs help those in need of high-quality primary health care, such as pregnant women and mothers. Improving maternal health outcomes and access to quality maternity care services is a key component of the HRSA mission. HRSA's Maternal and Child Health Bureau provides funding to address some of the most urgent issues influencing the high rates of maternal mortality. With this emphasis on improving maternal health across the life course and promoting optimal health for all mothers, HRSA is employing a multipronged strategy to address maternal mortality and severe maternal morbidity through the following suite of programs:

1. The State Maternal Health Innovation Program,
2. The Alliance for Innovation on Maternal Health Program,
3. The Alliance for Innovation on Maternal Health—Community Care Initiative,
4. The Rural Maternity and Obstetrics Management Strategies Program, and
5. The Supporting Maternal Health Innovation Program.

HRSA's Maternal and Child Health Bureau is conducting a portfolio-wide evaluation of HRSA-supported maternal health programs with a primary focus on reducing maternal mortality. Through this evaluation, HRSA seeks to identify individual and/or collective strategies, interrelated activities, and common themes within and across the maternal health programs that may be contributing to or driving improvements in key maternal health outcomes. HRSA seeks to ascertain which components should be elevated and replicated to the national level, as well as inform future investments to reduce rates of maternal mortality and severe maternal morbidity.

A 60-day notice published in the **Federal Register** on September 18, 2023, 88 FR 63965–66. There were three public comments received. Two comments were informational and did not require changes and one comment was a request for more information, which was provided.

Need and Proposed Use of the Information: HRSA seeks to understand the impact of HRSA's investments into maternal health programs. These five HRSA maternal health programs represent a total of 12 state-based grantees and three grantees with the potential for national reach. In understanding the strategies that are most effective in reducing maternal morbidity and mortality, HRSA will be able to determine which program elements could be replicated and/or scaled up nationally.

Likely Respondents: Likely respondents are recipients of the

cooperative agreements mentioned above (State Maternal Health Innovation Program, Alliance for Innovation on Maternal Health Program, Alliance for Innovation on Maternal Health—Community Care Initiative, and Supporting Maternal Health Innovation Program) which include state health agencies, national organizations, and academic organizations.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose, or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
Instrument 1: Interview guide for grantee staff	60	1.0	60	1.125	67.50
Instrument 2: Interview guide for HRSA Project Officers	7	1.0	7	1.500	10.50
Instrument 3: Partnership Survey	290	0.5	145	0.250	36.25
Instrument 4: Web-based data collection tool	12	1.0	12	0.500	6.00
Total	369		224		120.25

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2023–27567 Filed 12–14–23; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; 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: National Institute on Drug Abuse Special Emphasis Panel; Addressing Racial Equity in Substance Use and Addiction Research Through Community-Engaged Research.

Date: January 30, 2024.

Time: 12:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Health, National Institute on Drug Abuse, 301 North Stonestreet Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Sindhu Kizhakke Madathil, Ph.D., Scientific Review Officer, Division of Extramural Research, Scientific Review Branch, National Institute on Drug Abuse, NIH, 301 North Stonestreet Avenue, MSC 6021, Bethesda, MD 20892, (301) 827–5702, *sindhu.kizhakkemadathil@nih.gov*.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; Patient Engagement Resource Centers to Inform SUD Treatment Services Research.

Date: January 31, 2024.

Time: 11:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Health, National Institute on Drug Abuse, 301 North Stonestreet Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Shareen Iqbal, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, National Institute on Drug Abuse, NIH, 301 North Stonestreet Avenue, MSC 6021, Bethesda, MD 20892, (301) 443–4577, *shareen.iqbal@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.277, Drug Abuse Scientist Development Award for Clinicians, Scientist Development Awards, and Research Scientist Awards; 93.278, Drug Abuse National Research Service Awards for Research Training; 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: December 11, 2023.

Lauren A. Fleck,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–27540 Filed 12–14–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; 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: National Institute on Alcohol Abuse and Alcoholism Initial Review Group; Epidemiology, Prevention and Behavior Research Study Section.

Date: February 27, 2024.

Time: 9:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Health, National Institute on Alcohol Abuse and Alcoholism, 6700B Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Anna Ghambaryan, M.D., Ph.D., Scientific Review Officer, Extramural Project Review Branch, Office of Extramural Activities, National Institute on Alcohol Abuse and Alcoholism, 6700B Rockledge Drive, Room 2120, MSC 6902, Bethesda, MD 20892, 301–443–4032, *anna.ghambaryan@nih.gov*.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Initial Review Group; Neuroscience and Behavior Study Section.

Date: March 1, 2024.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Health, National Institute on Alcohol Abuse and Alcoholism, 6700B Rockledge Drive, Bethesda, MD 20892.

Contact Person: Beata Buzas, Ph.D., Scientific Review Officer, Extramural Project Review Branch, Office of Extramural Activities, National Institute on Alcohol Abuse and Alcoholism, 6700B Rockledge Drive, Room 2116, MSC 6902, Bethesda, MD 20892, 301–443–0800, *bbuzas@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.273, Alcohol Research Programs, National Institutes of Health, HHS)

Dated: December 12, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–27581 Filed 12–14–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Closed Meetings

Pursuant to section 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: National Institute of Mental Health Special Emphasis Panel; Suicide Prevention.

Date: December 18, 2023.

Time: 1:00 p.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Nicholas Gaiano, Ph.D., Review Branch Chief, Division of Extramural Activities, National Institute of Mental Health, National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Bethesda, MD 20892–9606, 301–443–2742, *nick.gaiano@nih.gov*.

This meeting is to evaluate an application that needed to be deferred from a prior review meeting. The timing of that deferral and the need to have this review completed in the same council round has resulted in an accelerated timeline.

Name of Committee: National Institute of Mental Health Special Emphasis Panel; Jointly Sponsored Institutional Predoctoral Training Programs in the Neurosciences (T32).

Date: December 19, 2023.

Time: 10:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Jasenka Borzan, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institutes of Mental Health, 6001 Executive Blvd., Neuroscience Center, Bethesda, MD 20892, 301–435–1260, *jasenka.borzan@nih.gov*.

This is a review meeting for 3 deferred applications from this council round. The applications could not be discussed at the original meeting because one of the assigned reviewers was not present.

(Catalogue of Federal Domestic Assistance Program No. 93.242, Mental Health Research Grants, National Institutes of Health, HHS)

Dated: December 11, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–27518 Filed 12–14–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Mobile Collections & Receipts (MCR): Implementation of Phase Two

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

ACTION: General notice.

SUMMARY: U.S. Customs and Border Protection (CBP) is conducting a test to allow for the payment of certain commercial vessel taxes and fees with electronic methods, including credit cards. Payment can be made through the existing Mobile Collections & Receipts (MCR) system's payment portal at eCBP (*https://e.cbp.dhs.gov*) or at the ports of entry for any commercial vessel arriving at a maritime port of entry. Participation in the test is voluntary. CBP will continue to accept payments by cash or check at the ports of entry. This notice describes the test and invites public comment on any aspect of the test.

DATES: The test will begin no earlier than January 16, 2024 and will continue for two years. Comments concerning this notice and all aspects of the test may be submitted at any time during the test to the address set forth below.

ADDRESSES: Written comments concerning any aspect of the test should be submitted to the CBP Revenue Modernization Office at *revmod@cbp.dhs.gov.* In the subject line of your email please indicate ''Comment on Mobile Collections & Receipts Test.''

FOR FURTHER INFORMATION CONTACT: Clint Kiehl, Rev Mod Program Manager, Office of Finance, U.S. Customs and Border Protection, via email at *clinton.kiehl@cbp.dhs.gov* or by telephone at (317) 677–4579.

SUPPLEMENTARY INFORMATION:

I. Background

A. Mobile Collections & Receipts (MCR) System

U.S. Customs and Border Protection (CBP) is committed to modernizing the payment and processing of various taxes and fees paid by the public. In furtherance of this goal, CBP developed the Mobile Collections & Receipts (MCR) system.[1] The MCR system calculates the amount of taxes and fees due based on information pulled from other CBP databases electronically or entered by an authorized CBP employee. The MCR system then automatically populates an electronic receipt, which is a single, combined electronic equivalent of two separate paper forms—CBP Form 368 Collection Receipt (CBP Form 368) and CBP Form 1002 Certificate of Payment of Tonnage Tax (CBP Form 1002). This notice refers to this electronic receipt as the electronic Form 368/1002. The MCR system sends the electronic Form 368/1002 via email to the entity responsible for payment.

The MCR system also allows the public to pay applicable taxes and fees through electronic methods, such as online or through Europay, Mastercard and Visa (EMV) card readers, which enables contactless payments through various methods, including credit cards and digital wallets. For online payment, MCR's public-facing payment website is located at the eCBP portal (*https://e.cbp.dhs.gov*), which directs the entity making the payment to complete the transaction on *Pay.gov*.[2] Currently, the MCR system, through eCBP and its interface with *Pay.gov,* allows the

[1] For more information on the Mobile Collections and Receipts initiative, visit: *https://www.cbp.gov/trade/priority-issues/revenue/revenue-modernization/automation-368-and-1002-receipts.*

[2] *Pay.gov* is a website managed by the Department of the Treasury that enables entities to make online payments to the federal government using various forms of payment.

public to make payments related to the Customs Broker License Exam and Triennial Status Report, with additional fees to be added in the future.

The MCR system largely replaced what is a paper-based, manual, and burdensome process for the calculation and processing of payments. Under the manual process, CBP officers (CBPOs) and other authorized CBP employees are required to manually calculate the amount due for a particular transaction, manually complete a paper version of CBP Forms 368 and 1002 (if applicable), and manually enter the payment information in CBP's systems after collecting payment.[3] *See, e.g.,* sections 4.23 and 24.2 of title 19 of the Code of Federal Regulations (19 CFR 4.23, 24.2). Since the implementation of MCR for the calculation and processing of certain maritime fees, maritime ports have adopted MCR and generally no longer use the manual method.

B. Phase One of the MCR Test

Phase One of the MCR test, the Mobile Collections and Receipts (MCR) Pilot, was announced on December 8, 2017, in the **Federal Register** (82 FR 58008) (2017 MCR Pilot). The 2017 MCR Pilot allowed for the electronic payment of and receipt generation for certain commercial vessel taxes and fees through the MCR system. 82 FR at 58008. Specifically, the 2017 MCR Pilot permitted online payment and developed electronic receipts for the following taxes and fees: regular and special tonnage tax; light money; Consolidated Omnibus Budget Reconciliation Act (COBRA) user fees, including the prepayment of the annual COBRA fee; Agriculture Quarantine and Inspection (AQI) Fees; and navigation fees. *See* 82 FR at 58010. However, when CBP began operating the MCR system and issuing electronic receipts, CBP was unable to begin accepting online payments for these specified commercial vessel taxes and fees.

The 2017 MCR Pilot was limited to commercial vessels arriving at one of four designated ports of entry: Los Angeles-Long Beach, California; New Orleans, Louisiana; Gulfport, Mississippi; and, Mobile, Alabama. *See* 82 FR at 58010. Any entity responsible for the payment of the taxes and fees for vessels arriving at one of the four designated ports of entry could participate in the 2017 MCR Pilot by providing the processing CBPO or other authorized CBP employee with an email address. 82 FR at 58009. The MCR system generated an electronic version of Forms 368 and 1002 and sent an electronic copy via email to the entity responsible for payment. 82 FR 58009. The 2017 MCR Pilot Notice was also the first time that CBP announced the implementation of the MCR system in the **Federal Register** and described the electronic receipt process, including the creation and issuance of electronic versions of Forms 368 and 1002, and the use of electronic devices that CBP employees could use to access the MCR system outside the port office. *See* 82 FR at 58009.

CBP is now able to accept online payments and is implementing Phase Two of the MCR test, which will authorize entities to pay commercial vessel taxes and fees online, in order to allow these entities to fully benefit from the efficiencies of the MCR system.

C. Purpose of the MCR Test: Phase Two

CBP regulations currently restrict the payment methods available for various taxes and fees. For example, in general, CBP will accept payment of Customs duties, taxes, fees, interest, and other charges with cash or check only. *See* 19 CFR 24.1 and 24.2. Payment with a credit or charge card is limited to non-commercial entries. 19 CFR 24.1(a)(7). Additionally, a CBPO who collects payment for an amount over $100 in the form of a government check, personal check, traveler's check, or money order must obtain the approval and signature of the CBPO in charge in order to accept the payment. *See* 19 CFR 24.1(b)(2).

Phase Two of the MCR test will allow CBP to test the feasibility of accepting electronic payment options for five categories of commercial vessel taxes and fees that cannot be paid electronically under CBP's current regulations. The five categories of commercial vessel taxes and fees are: tonnage tax (regular and special) and light money (19 CFR 4.20), Consolidated Omnibus Budget Reconciliation Act (COBRA) user fees (19 CFR 24.22(b)), Agriculture Quarantine and Inspection (AQI) fees (7 CFR 354.3(b)), and navigation fees (19 CFR 4.98). By CBP's allowing for electronic payments of these commercial vessel taxes and fees, vessel owners/operators and vessel agents will be able to take full advantage of the MCR system. This will provide numerous benefits for CBP and the trade. For example, the MCR system reduces the number of mistakes in the calculation of taxes and fees due because the MCR system can implement any changes to the fee calculations quickly and efficiently for all ports. Additionally, the MCR system eliminates the need for CBP employees to manually enter information into CBP's systems or to perform other tasks necessary to maintain the security or inventory of the paper versions of CBP Forms 368 and 1002. This enables CBP employees to spend less time on administrative tasks and more time focusing on higher priority mission support activities.

II. MCR Test: Phase Two

Phase Two of the MCR test will allow for the electronic payment of certain vessel maritime taxes and fees for commercial vessels. Payment through electronic methods will be voluntary and CBP will continue to accept cash or check payments consistent with current requirements and practice. The collection of payments under Phase Two will operate largely the same as described in the initial 2017 MCR Pilot, except that Phase Two will allow for electronic payments for vessels arriving at any maritime port of entry (as opposed to the four ports of entry designated in the 2017 MCR Pilot) and will include online payments and using an EMV card reader at the port. Details of Phase Two of the MCR test are provided below.

A. Participation in the Test

Any commercial vessel agent or other entity responsible for payment of commercial vessel taxes and fees may participate in the test. No application is required to participate. However, in order to receive notification emails from the MCR system, a commercial vessel agent or other entity submitting payment must register an email address with the CBPO or other authorized CBP employee processing the vessel arrival in the MCR system. When a commercial vessel arrives at a port of entry, the vessel's agent or other entity wishing to receive email notifications or receive the electronic Form 368/1002 will be able to confirm any email addresses with an authorized CBP employee and provide additional email addresses for receipt of electronic receipts.

B. Eligible Taxes and Fees

Phase Two allows for the electronic payment of the following commercial vessel taxes and fees: tonnage tax (regular and special) and light money (19 CFR 4.20), Consolidated Omnibus Budget Reconciliation Act (COBRA) user fees (19 CFR 24.22(b)), Agriculture Quarantine and Inspection (AQI) fees (7 CFR 354.3(b)), and navigation fees (19 CFR 4.98).

Additionally, CBPOs and other authorized CBP employees, at the time of inspection, will have the option to

[3] For additional details on the paper-based process for commercial vessel taxes and fees, see the notice published in the **Federal Register** (82 FR 58008) on December 8, 2017, announcing the 2017 MCR Pilot.

add applicable non-commercial fees and taxes for which credit or charge cards have been authorized by the Commissioner of CBP pursuant to 19 CFR 24.1(a)(7) to the vessel's overall transaction. Such non-commercial fees and taxes are not part of Phase Two of the MCR test.[4] However, for the convenience of the vessel owner/agent and CBP, all taxes and fees, whether authorized for electronic payment by this MCR test or by current regulations, can be combined for purposes of making a single payment and receipt.

CBP may further expand the MCR test in the future to allow for the electronic payment of additional commercial taxes and fees. Any expansion of Phase Two of the MCR test will be announced in the **Federal Register**.

C. Electronic Payment Process at the Ports of Entry

The MCR system will automatically identify the commercial vessels that are due to arrive at the designated ports of entry. The CBPO or other authorized CBP employee will use the MCR system to then determine whether the arrival information submitted to CBP through approved electronic data interchange systems is sufficient to calculate the applicable maritime taxes and fees due for each commercial vessel. If there is not sufficient information, the CBPO or other authorized CBP employee can obtain the necessary information at the time of inspection or payment.

Once the CBPO has sufficient information, the vessel agent or carrier will be asked whether the agent or carrier wants to pay online or with the EMV card reader, which accepts various forms of payment, including credit cards and digital wallet payments at the point of collection. If online payment is selected, CBP will send a notification email to the relevant carrier or vessel agent at the email address they registered with eCBP. The notification email will state that the applicable taxes and fees have been calculated for a specific commercial vessel and payment can now be made on the eCBP payment portal. The entity responsible for payment will then have the opportunity to log on to the MCR system's customer-facing eCBP payment portal, review the calculated amount of taxes and fees due, and, through eCBP's interface with *Pay.gov,* submit payment online through *Pay.gov* with a credit or debit card, or any other payment option available on *Pay.gov* at the time of payment. Alternatively, the entity responsible for payment may pay using an EMV card reader. Additionally, for test participants who make payment online, through the EMV card reader, or by check or money order, CBPOs will not be required to obtain the signature of the CBPO in charge, as is otherwise required for payments over $100 made with a government check, personal check, traveler's check, or money order pursuant to 19 CFR 24.1(b)(2).

After payment is accepted, the MCR system will send an electronic Form 368/1002 to the email address/addresses provided by the entity that made the payment. Electronic payments will be accepted up to the time the vessel is cleared by CBP. Payments required for CBP clearance must be made before clearance is granted. In all situations, CBPOs and other authorized CBP employees will have the ability to review, amend, or add data as needed to accurately calculate applicable taxes and fees prior to entering or clearing a vessel.

Payment though electronic methods, including credit cards, is voluntary. Throughout the test, commercial vessel agents and other entities responsible for payment for commercial vessel taxes and fees will continue to be able to pay by cash or check in accordance with current requirements. CBP will provide the electronic Form 368/1002 as a receipt for all payments made by test participants, regardless of whether payment was made in person by cash or check, online, or in-person using a card reader. However, the port office will provide paper copies of electronic Form 368/1002 upon request.

This test will not affect the amount of taxes and fees due or the requirement that all applicable fees must be paid prior to CBP issuing a clearance certificate. Additionally, vessel operators will continue to be required to present paper copies of Forms 368 and 1002 as proof of payment at subsequent ports and entries. This means that vessel owners/operators must print out the electronic Form 368/1002 to present it to CBP.

D. Eligible Ports of Entry

Phase Two of the MCR test allows for electronic payments for commercial vessels arriving at any of the U.S. maritime ports of entry.

E. Duration of the Test

The test will begin no earlier than January 16, 2024 and will continue for two years.

III. Privacy

CBP will ensure that all Privacy Act requirements and applicable policies are adhered to during the implementation of this test.

IV. Paperwork Reduction Act

The Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3507(d)) requires that CBP consider the impact of paperwork and other information collection burdens imposed on the public. An agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by the Office of Management and Budget. There is no information collection associated with this test, so the provisions of the PRA do not apply.

V. Authorization for the Test

This test is being conducted in accordance with 19 CFR 101.9(a), which authorizes the Commissioner to impose requirements different from those specified in the CBP regulations for the purposes of conducting a test program or procedure designed to evaluate the effectiveness of new technology or operational procedures regarding the processing of passengers, vessels, or merchandise. Consequently, the regulatory provisions set forth in chapter 1 of title 19 of the CFR will be suspended to the extent that they conflict with the terms of this test. Such regulatory suspension will remain in effect for the duration of this test and will only apply to test participants; the regulatory provisions remain in effect for all non-test participants.

As explained above, for participants in this test, CBP will waive the requirements to pay commercial vessel taxes and fees with cash or check, as required by 19 CFR 24.1, at the time of arrival or when the applicable service is provided, if the participant has paid all applicable taxes and fees electronically pursuant the procedures of this test and prior to the time the vessel is cleared by CBP. The test also permits CBPOs to process the payment of over $100 made by check, money order, online, or through the EMV card reader without

[4] Examples of non-commercial fees that may be applicable to a particular vessel include duties for passenger or crew baggage, excise taxes imposed on crew and passengers, and immigration fees applicable to crew and passengers, such as fees for port of entry parole of crewmembers. A complete list of the eligible fees will be available at the MCR website (*https://www.cbp.gov/trade/priority-issues/revenue/revenue-modernization*).

obtaining authorization from the CBP officer in charge.

Jeffrey Caine,

CBP Chief Financial Officer and Assistant Commissioner, Office of Finance, U.S. Customs and Border Protection.

[FR Doc. 2023–27626 Filed 12–14–23; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2023–0002; Internal Agency Docket No. FEMA–B–2394]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice lists communities where the addition or modification of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or the regulatory floodway (hereinafter referred to as flood hazard determinations), as shown on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports, prepared by the Federal Emergency Management Agency (FEMA) for each community, is appropriate because of new scientific or technical data. The FIRM, and where applicable, portions of the FIS report, have been revised to reflect these flood hazard determinations through issuance of a Letter of Map Revision (LOMR), in accordance with Federal Regulations. The currently effective community number is shown in the table below and must be used for all new policies and renewals.

DATES: These flood hazard determinations will be finalized on the dates listed in the table below and revise the FIRM panels and FIS report in effect prior to this determination for the listed communities.

From the date of the second publication of notification of these changes in a newspaper of local circulation, any person has 90 days in which to request through the community that the Deputy Associate Administrator for Insurance and Mitigation reconsider the changes. The flood hazard determination information may be changed during the 90-day period.

ADDRESSES: The affected communities are listed in the table below. Revised flood hazard information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

Submit comments and/or appeals to the Chief Executive Officer of the community as listed in the table below.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The specific flood hazard determinations are not described for each community in this notice. However, the online location and local community map repository address where the flood hazard determination information is available for inspection is provided.

Any request for reconsideration of flood hazard determinations must be submitted to the Chief Executive Officer of the community as listed in the table below.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

These flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. The flood hazard determinations are in accordance with 44 CFR 65.4.

The affected communities are listed in the following table. Flood hazard determination information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Nicholas A. Shufro,

Deputy Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Arizona:						
Pima	Town of Marana (22–09–1156P).	The Honorable Ed Honea, Mayor, Town of Marana, 11555 West Civic Center Drive, Marana, AZ 85653.	Engineering Department, Marana Municipal Complex, 11555 West Civic Center Drive, Marana, AZ 85653.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 16, 2024	040118
Pinal	Town of Queen Creek (22–09–0772P).	The Honorable Julia Wheatley, Mayor, Town of Queen Creek, 22358 South Ellsworth Road, Queen Creek, AZ 85142.	Town Hall, 22358 South Ellsworth Road, Queen Creek, AZ 85142.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 16, 2024	040132

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Pinal	Unincorporated Areas of Pinal County (22–09–0772P).	The Honorable Jeff Serdy, Chair, Board of Supervisors, Pinal County, P.O. Box 827, Florence, AZ 85132.	Pinal County Engineering Division, 31 North Pinal Street, Building F, Florence, AZ 85132.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 16, 2024	040077
California:						
Kern	City of Bakersfield (22–09–0517P).	The Honorable Karen K. Goh, Mayor, City of Bakersfield, 1501 Truxtun Avenue, Bakersfield, CA 93301.	Public Works Department, 1501 Truxtun Avenue, Bakersfield, CA 93301.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 7, 2024	060077
Kern	Unincorporated Areas of Kern County (22–09–0517P).	The Honorable Jeff Flores, Chair, Board of Supervisors, Kern County, 1115 Truxtun Avenue, 5th Floor, Bakersfield, CA 93301.	Kern County Planning Department, 2700 M Street, Suite 100, Bakersfield, CA 93301.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 7, 2024	060075
Napa	City of Calistoga (22–09–1525P).	The Honorable Donald Williams, Mayor, City of Calistoga, City Hall, 1232 Washington Street, Calistoga, CA 94515.	Planning and Building Department, 1232 Washington Street, Calistoga, CA 94515.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 12, 2024	060206
Napa	Unincorporated Areas of Napa County (22–09–1525P).	The Honorable Belia Ramos, Chair, Board of Supervisors, Napa County, 1195 3rd Street, Napa, CA 94559.	Napa County, Public Works Department, 1195 3rd Street, Suite 101, Napa, CA 94559.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 12, 2024	060205
Riverside	City of Menifee (22–09–1366P).	The Honorable Bill Zimmerman, Mayor, City of Menifee, 29844 Haun Road, Menifee, CA 92586.	Public Works and Engineering Department, 29714 Haun Road, Menifee, CA 92586.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 26, 2024	060176
Riverside	City of Perris (22–09–1366P).	The Honorable Michael Vargas, Mayor, City of Perris, 101 North D Street, Perris, CA 92570.	Engineering Department, 24 South D Street, Suite 100, Perris, CA 92570.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 26, 2024	060258
Riverside	Unincorporated Areas of Riverside County (23–09–0988P).	The Honorable Kevin Jeffries, Chair, Board of Supervisors, Riverside County, 4080 Lemon Street, 5th Floor, Riverside, CA 92501.	Riverside County, Flood Control and Water Conservation District, 1995 Market Street, Riverside, CA 92501.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 13, 2024	060245
San Diego	City of San Diego (23–09–0040P).	The Honorable Todd Gloria, Mayor, City of San Diego, 202 C Street, 11th Floor, San Diego, CA 92101.	Development Services Department, 1222 1st Avenue, MS 301, San Diego, CA 92101.	*https://msc.fema.gov/portal/advanceSearch.*	Apr. 2, 2024	060295
San Joaquin	City of Lathrop (23–09–0600P).	The Honorable Sonny Dhaliwal, Mayor, City of Lathrop, 390 Towne Centre Drive, Lathrop, CA 95330.	Community Development Department, Planning Division, 390 Towne Centre Drive, Lathrop, CA 95330.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 27, 2024	060738
Ventura	City of Simi Valley (22–09–1318P).	The Honorable Fred D. Thomas, Mayor, City of Simi Valley, 2929 Tapo Canyon Road, Simi Valley, CA 93063.	Department of Public Works, 2929 Tapo Canyon Road, Simi Valley, CA 93063.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 20, 2024	060421
Florida:						
Duval	City of Jacksonville (22–04–5474P).	The Honorable Donna Deegan, Mayor, City of Jacksonville, 117 West Duval Street Suite 400, Jacksonville, FL 32202.	Edward Ball Building Development Services, Room 2100, 214 North Hogan Street, Jacksonville, FL 32202.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 28, 2024	120077
St. Johns	Unincorporated Areas of St. Johns County (23–04–1421P).	Christian Whitehurst, Chair, St. Johns County Board of County Commissioners, 500 San Sebastian View, St. Augustine, FL 32084.	St. Johns County Permit Center, 4040 Lewis Speedway, St. Augustine, FL 32084.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 4, 2024	125147
Idaho: Elmore	Unincorporated Areas of Elmore County (23–10–0206P).	Al Hofer, Chair, Elmore County, 150 South 4th East Street, Mountain Home, ID 83647.	Elmore County Courthouse Planning and Zoning Department, 150 South 4th East Street, Mountain Home, ID 83647.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 29, 2024	160212
Illinois:						

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Cook	Village of Richton Park (23–05–2566P).	Rick Reinbold, Village President, Village of Richton Park, 4455 Sauk Trail, Richton Park, IL 60471.	Municipal Building, 4455 Sauk Trail, Richton Park, IL 60471.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 18, 2024	170149
Kane	Village of Gilberts (23–05–1813P).	Guy Zambetti, Village President, Village of Gilberts, 87 Galligan Road, Gilberts, IL 60136.	Village Hall, 87 Galligan Road, Gilberts, IL 60136.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 28, 2024	170326
Lake	City of Waukegan (23–05–2407P).	The Honorable Ann B. Taylor, Mayor, City of Waukegan, 100 North Martin Luther King, Jr. Avenue, Waukegan, IL 60085.	City Hall, 100 North Martin Luther King, Jr. Avenue, Waukegan, IL 60085.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 21, 2024	170397
Lake	City of Zion (23–05–2407P).	The Honorable Billy McKinney, Mayor, City of Zion, 2828 Sheridan Road, Zion, IL 60099.	City Hall, 2828 Sheridan Road, Zion, IL 60099.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 21, 2024	170399
Lake	Unincorporated Areas of Lake County (23–05–2407P).	Gary Gibson, Lake County Administrator, 18 North County Street 9th Floor, Waukegan, IL 60085.	Lake County, Central Permit Facility, 500 West Winchester Road, Unit 101, Libertyville, IL 60048.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 21, 2024	170357
Lake	Village of Beach Park (23–05–2407P).	The Honorable John Hucker, Mayor, Village of Beach Park, 11270 West Wadsworth Road, Beach Park, IL 60099.	Village Hall, 11270 West Wadsworth Road, Beach Park, IL 60099.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 21, 2024	171022
Lake	Village of Grayslake (23–05–2407P).	The Honorable Rhett Taylor, Mayor, Village of Grayslake, 10 South Seymour Avenue, Grayslake IL 60030.	Village Hall, 10 South Seymour Avenue, Grayslake, IL 60030.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 21, 2024	170363
Lake	Village of Old Mill Creek (23–05–2407P).	Tempel (Tim) Smith, President, Village of Old Mill Creek, P.O. Box 428, Old Mill Creek, IL 60083.	Village Hall, 19020 Old Grass Lake Road, Old Mill Creek, IL 60046.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 21, 2024	170385
Lake	Village of Third Lake (23–05–2407P).	Rodney Buckley, President, Village of Third Lake, 87 North Lake Avenue, Third Lake, IL 60030.	Village Hall, 87 North Lake Avenue, Third Lake, IL 60030.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 21, 2024	170392
Lake	Village of Winthrop Harbor (23–05–2407P).	The Honorable Mike Bruno, Mayor, Village of Winthrop Harbor, 830 Sheridan Road, Winthrop Harbor, IL 60096.	Village Hall, 830 Sheridan Road, Winthrop Harbor, IL 60096.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 21, 2024	170398
La Salle	City of Peru (23–05–1547P).	The Honorable Ken Kolowski, Mayor, City of Peru, 1901 4th Street, Peru, IL 61354.	City Hall, 1901 4th Street, Peru, IL 61354.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 12, 2024	170406
Will	Unincorporated Areas of Will County (22–05–2651P).	Jennifer Bertino-Tarrant, Will County Executive, Will County Office Building, 302 North Chicago Street, Joliet, IL 60432.	Will County Land Use Department, 58 East Clinton Street, Suite 100, Joliet, IL 60432.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 20, 2024	170695
Kansas: Johnson	Unincorporated Areas of Johnson County (23–07–0167P).	Mike Kelly, Chair, Johnson County Board of Supervisors, County Courthouse, 111 South Cherry Street, Olathe, KS 66061.	Johnson County Courthouse, Planning Office, 111 South Cherry Street Suite 3500, Olathe, KS 66061.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 7, 2024	200159
Michigan: Genesee	City of Flint (22–05–2748P).	The Honorable Sheldon Neeley, Mayor, City of Flint, 1101 South Saginaw Street, Flint, MI 48502.	City Council, 1101 South Saginaw Street, Flint, MI 48502.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 19, 2024	260076
Nevada: Clark	City of Henderson (23–09–0113P).	The Honorable Michelle Romero, Mayor, City of Henderson, 240 South Water Street, Henderson, NV 89015.	Public Works Department, 240 South Water Street, Henderson, NV 89015.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 6, 2024	320005
New York:						
Erie	City of Tonawanda (23–02–0651X).	The Honorable John L. White, Mayor, City of Tonawanda, 200 Niagara Street, Tonawanda, NY 14150.	City Hall, 200 Niagara Street, Tonawanda, NY 14150.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 13, 2024	360259

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Erie	Town of Grand Island (23–02–0651X).	John Whitney, P.E., Town Supervisor, Town of Grand Island, 2255 Baseline Road, 1st Floor, Grand Island, NY 14072.	Town Hall, 2255 Baseline Road, Grand Island, NY 14072.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 13, 2024	360242
Wisconsin:						
Buffalo	City of Durand (22–05–1633P).	The Honorable Patrick Milliren, Mayor, City of Durand, 511 6th Avenue East, Durand, WI 54736.	City Hall, 104 East Main Street, Durand, WI 54736.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 9, 2024	550320
Buffalo	Unincorporated Areas of Buffalo County (22–05–1633P).	Dennis Bork, Chair, Buffalo County Board of Supervisors, P.O. Box 58, Alma, WI 54610.	Buffalo County Courthouse, 407 South 2nd Street, Alma, WI 54610.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 9, 2024	555547
Pepin	Unincorporated Areas of Pepin County (22–05–1633P).	Tom Milliren, Chair, Pepin County Board of Supervisors, 740 7th Avenue West, Durand, WI 54736.	Pepin County Government Center, 740 7th Avenue West, Durand, WI 54736.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 9, 2024	555570
Clark	Unincorporated Areas of Clark County (23–05–1325P).	Wayne Hendrickson, Chair, Clark County Board of Supervisors, Emergency Government Department, 517 Court Street, Neillsville, WI 54456.	Clark County, Emergency Government Department, 517 Court Street, Neillsville, WI 54456.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 29, 2024	550048

[FR Doc. 2023–27631 Filed 12–14–23; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2023–0002; Internal Agency Docket No. FEMA–B–2395]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice lists communities where the addition or modification of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or the regulatory floodway (hereinafter referred to as flood hazard determinations), as shown on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports, prepared by the Federal Emergency Management Agency (FEMA) for each community, is appropriate because of new scientific or technical data. The FIRM, and where applicable, portions of the FIS report, have been revised to reflect these flood hazard determinations through issuance of a Letter of Map Revision (LOMR), in accordance with Federal Regulations. The currently effective community number is shown in the table below and must be used for all new policies and renewals.

DATES: These flood hazard determinations will be finalized on the dates listed in the table below and revise the FIRM panels and FIS report in effect prior to this determination for the listed communities.

From the date of the second publication of notification of these changes in a newspaper of local circulation, any person has 90 days in which to request through the community that the Deputy Associate Administrator for Insurance and Mitigation reconsider the changes. The flood hazard determination information may be changed during the 90-day period.

ADDRESSES: The affected communities are listed in the table below. Revised flood hazard information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

Submit comments and/or appeals to the Chief Executive Officer of the community as listed in the table below.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The specific flood hazard determinations are not described for each community in this notice. However, the online location and local community map repository address where the flood hazard determination information is available for inspection is provided.

Any request for reconsideration of flood hazard determinations must be submitted to the Chief Executive Officer of the community as listed in the table below.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

These flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any

existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. The flood hazard determinations are in accordance with 44 CFR 65.4.

The affected communities are listed in the following table. Flood hazard determination information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Nicholas A. Shufro,

Deputy Assistant Administrator for Risk Management, Federal Emergency Management Agency, Department of Homeland Security.

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Connecticut: Middlesex.	Town of Old Saybrook (23–01–0694P).	Carl P. Fortuna Jr., First Selectman, Town of Old Saybrook Board of Selectmen, 302 Main Street, Old Saybrook, CT 06475.	Planning Department, 302 Main Street, Old Saybrook, CT 06475.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 23, 2024	090069
District of Columbia: Washington DC.	District of Columbia (23–03–0624P).	The Honorable Muriel Bowser, Mayor, District of Columbia, 1350 Pennsylvania Avenue Northwest, Washington DC 20004.	Department of Energy and Environment, 1200 1st Street Northeast, 5th Floor, Washington DC 20002.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 4, 2024	110001
Florida:						
Hillsborough ...	City of Tampa (23–04–4679P).	The Honorable Jane Castor, Mayor, City of Tampa, 306 East Jackson Street, Tampa, FL 33602.	Building Department, 1400 North Boulevard, Tampa, FL 33607.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 20, 2024	120114
Lee	City of Fort Myers (23–04–3031P).	Marty K. Lawing, Manager, City of Fort Myers, 2200 2nd Street, Fort Myers, FL 33901.	Building Department, 1825 Hendry Street, 2200 2nd Street, Fort Myers, FL 33901.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 8, 2024	125106
Monroe	City of Marathon (23–04–5034P).	The Honorable Luis Gonzalez, Mayor, City of Marathon, 9805 Overseas Highway, Marathon, FL 33050.	City Hall, 9805 Overseas Highway, Marathon, FL 33050.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 5, 2024	120681
Monroe	Unincorporated areas of Monroe County (23–04–5520P).	The Honorable Craig Cates, Mayor, Monroe County Board of Commissioners, 500 Whitehead Street, Suite 102, Key West, FL 33040.	Monroe County Building Department, 2798 Overseas Highway, Suite 300, Marathon, FL 33050.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 1, 2024	125129
Monroe	Village of Islamorada (23–04–5499P).	The Honorable Joseph Buddy Pinder III, Mayor, Village of Islamorada, 86800 Overseas Highway, Islamorada, FL 33036.	Building Department, 86800 Overseas Highway, Islamorada, FL 33036.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 1, 2024	120424
Osceola	Unincorporated areas of Osceola County (23–04–0702P).	Don Fisher, Manager, Osceola County, 1 Courthouse Square, Suite 4700, Kissimmee, FL 34741.	Osceola County Public Works Department, 1 Courthouse Square, Suite 3100, Kissimmee, FL 34741.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 1, 2024	120189
Polk	Unincorporated areas of Polk County (23–04–2443P).	Bill Beasley, Manager, Polk County, 330 West Church Street, Bartow, FL 33830.	Polk County Land Development Division, 330 West Church Street, Bartow, FL 33830.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 1, 2024	120261
Georgia: Fannin	City of Blue Ridge (22–04–4037P).	The Honorable Rhonda Haight, Mayor, City of Blue Ridge, 480 West 1st Street, Blue Ridge, GA 30513.	City Hall, 480 West 1st Street, Blue Ridge, GA 30513.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 22, 2024	130445
Massachusetts: Essex.	City of Gloucester (22–01–0881P).	The Honorable Greg Verga, Mayor, City of Gloucester, 9 Dale Avenue, Gloucester, MA 01930.	City Hall, 3 Pond Road, 2nd Floor, Gloucester, MA 01930.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 2, 2024	250082
Nevada:						
Clark	City of Henderson (23–09–0536P).	The Honorable Michelle Romero, Mayor, City of Henderson, 240 South Water Street, Henderson, NV 89015.	City Hall, 240 South Water Street, Henderson, NV 89015.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 8, 2024	320005

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Clark	Unincorporated areas of Clark County (23–09–0536P).	James B. Gibson, Chair, Clark County Board of Commissioners, 500 South Grand Central Parkway, Las Vegas, NV 89155.	Clark County Government Center, 500 South Grand Central Parkway, Las Vegas, NV 89155.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 8, 2024	320003
Oklahoma:						
Tulsa	City of Jenks (23–06–0740P).	The Honorable Cory Box, Mayor, City of Jenks, P.O. Box 2007, Jenks, OK 74037.	City Hall, 211 North Elm Street, Jenks, OK 74037.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 15, 2024	400209
Tulsa	City of Tulsa (23–06–0740P).	The Honorable G.T. Bynum, Mayor, City of Tulsa, 175 East 2nd Street, Suite 15–87, Tulsa, OK 74103.	City Hall, 175 East 2nd Street, Suite 450, Tulsa, OK 74103.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 15, 2024	405381
Tulsa	Muscogee (Creek) Nation (23–06–0740P).	David Hill, Principal Chief, Muscogee (Creek) Nation, P.O. Box 580, Okmulgee, OK 74447.	Muscogee (Creek) Nation, 1000 OK–56, Okmulgee, OK 74447.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 15, 2024	405384
Tennessee:						
Wilson	City of Lebanon (22–04–5900P).	The Honorable Rick Bell, Mayor, City of Lebanon, 200 North Castle Heights Avenue, Lebanon, TN 37087.	Engineering Department, 200 North Castle Heights Avenue, Lebanon, TN 37087.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 15, 2024	470208
Wilson	Unincorporated areas of Wilson County (22–04–5900P).	The Honorable Randall Hutto, Mayor, Wilson County, 228 East Main Street, Lebanon, TN 37087.	Wilson County Engineering Department, 228 East Main Street, Lebanon, TN 37087.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 15, 2024	470207
Texas:						
Bexar, Comal and Kendall.	City of Fair Oaks Ranch (21–06–2766P).	Scott M. Huizenga, Interim City Manager, City of Fair Oaks Ranch, 7286 Dietz Elkhorn Road, Fair Oaks Ranch, TX 78015.	Public Works and Engineering Services Department, 7286 Dietz Elkhorn Road, Fair Oaks Ranch, TX 78015.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 12, 2024	481644
Dallas	City of Cedar Hill (23–06–1951P).	The Honorable Stephen Mason, Mayor, City of Cedar Hill, 285 Uptown Boulevard Cedar Hill, TX 75104.	City Hall, 285 Uptown Boulevard Cedar Hill, TX 75104	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 12, 2024	480168
Dallas	City of DeSoto (23–06–1951P).	The Honorable Rachel L. Proctor, Mayor, City of DeSoto, 211 East Pleasant Run Road, DeSoto, TX 75115.	Engineering Department, 211 East Pleasant Run Road, DeSoto, TX 75115.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 12, 2024	480172
Dallas	City of Duncanville (23–06–1951P).	The Honorable Barry L. Gordon, Mayor, City of Duncanville, P.O. Box 380280 Duncanville, TX 75138.	City Hall, 203 East Wheatland Road, Duncanville, TX 75116.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 12, 2024	480173
Denton	City of Aubrey (23–06–1953P).	The Honorable Chris Rich, Mayor, City of Aubrey, 107 South Main Street, Aubrey, TX 76227.	City Hall, 107 South Main Street, Aubrey, TX 76227.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 12, 2024	480776
Denton	City of Denton (23–06–0680P).	The Honorable Gerard Hudspeth, Mayor, City of Denton, 215 East McKinney Street, Denton, TX 76201.	Engineering Services Department, 401 North Elm Street, Denton, TX 76201.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 2, 2024	480194
Denton	Unincorporated areas of Denton County (23–06–1953P).	The Honorable Andy Eads, Denton County Judge, 1 Courthouse Drive, Suite 3100, Denton, TX 76208.	Denton County Development Services Department, 3900 Morse Street, Denton, TX 76208.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 12, 2024	480774
Hays	Unincorporated areas of Hays County (23–06–0869P).	The Honorable Ruben Becerra, Hays County Judge, 111 East San Antonio Street, Suite 300, San Marcos, TX 78666.	Hays County Development Services Department, 2171 Yarrington Road, Suite 100, Kyle, TX 78640.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 1, 2024	480321
Johnson	City of Burleson (23–06–0273P).	The Honorable Chris Fletcher, Mayor, City of Burleson, 141 West Renfro Street, Burleson, TX 76028.	City Hall, 141 West Renfro Street, Burleson, TX 76028.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 12, 2024	485459

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Parker	City of Willow Park (23–06–0997P).	Bryan Grimes, Manager, City of Willow Park, 120 El Chico Trail, Suite A, Willow Park, TX 76087.	City Hall, 120 El Chico Trail, Suite A, Willow Park, TX 76087.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 14, 2024	481164
Parker	Unincorporated areas of Parker County (23–06–0997P).	The Honorable Pat Deen, Parker County Judge, 1 Courthouse Square, Weatherford, TX 76086.	Parker County Courthouse, 1 Courthouse Square, Weatherford, TX 76086.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 14, 2024	480520
Palo Pinto	City of Mineral Wells (22–06–3015P).	The Honorable Regan Johnson, Mayor, City of Mineral Wells, 115 Southwest 1st Street, Mineral Wells, TX 76067.	City Hall, 115 Southwest 1st Street, Mineral Wells, TX 76067.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 4, 2024	480517
Tarrant	City of Mansfield (23–06–0544P).	The Honorable Michael Evans, Mayor, City of Mansfield, 1200 East Broad Street, Mansfield, TX 76063.	City Hall, 1200 East Broad Street, Mansfield, TX 76063.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 11, 2024	480606
Travis	Unincorporated areas of Travis County, (22–06–2280P).	The Honorable Andy Brown, Travis County Judge, P.O. Box 1748, Austin, TX 78767.	Travis County Transportation and Natural Resources Department, 700 Lavaca Street, 5th Floor, Austin, TX 78701.	*https://msc.fema.gov/portal/advanceSearch.*	Feb. 12, 2024	481026
Virginia: Loudoun	Unincorporated areas of Loudoun County (23–03–0390P).	Tim Hemstreet, Loudoun County Administrator, 1 Harrison Street, Southeast, 5th Floor, Leesburg, VA 20175.	Loudoun County Government Center, 1 Harrison Street, Southeast, 3rd Floor, MSC #60, Leesburg, VA 20175.	*https://msc.fema.gov/portal/advanceSearch.*	Mar. 4, 2024	510090

[FR Doc. 2023–27635 Filed 12–14–23; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0106]

Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection: Petition for Qualifying Family Member of a U–1 Nonimmigrant

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 60-Day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration (USCIS) invites the general public and other Federal agencies to comment upon this proposed extension of a currently approved collection of information. In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the **Federal Register** to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments.

DATES: Comments are encouraged and will be accepted for 60 days until February 13, 2024.

ADDRESSES: All submissions received must include the OMB Control Number 1615–0106 in the body of the letter, the agency name and Docket ID USCIS–2009–0010. Comments must be submitted in English, or an English translation must be provided. Submit comments via the Federal eRulemaking Portal website at *http://www.regulations.gov* under e-Docket ID number USCIS–2009–0010.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, telephone number (240) 721–3000 (This is not a toll-free number. Comments are not accepted via telephone message). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *https://www.uscis.gov,* or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

SUPPLEMENTARY INFORMATION:

Comments

You may access the information collection instrument with instructions, or additional information by visiting the Federal eRulemaking Portal site at: *http://www.regulations.gov* and enter USCIS–2009–0010 in the search box. Comments must be submitted in English, or an English translation must be provided. All submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

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

Overview of This Information Collection

(1) *Type of Information Collection:* Extension, Without Change, of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Petition for Qualifying Family Member of a U–1 Nonimmigrant.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* Form I–929; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals and Households. Section 245(m) of the Immigration and Nationality Act (Act) allows certain qualifying family members who have never held U nonimmigrant status to seek lawful permanent residence or apply for immigrant visas. Before such family members may apply for adjustment of status or seek immigrant visas, the U–1 nonimmigrant who has been granted adjustment of status must file an immigrant petition on behalf of the qualifying family member using Form I–929. Form I–929 is necessary for USCIS to make a determination that the eligibility requirements and conditions are met regarding the qualifying family member.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–929 is 1,500 and the estimated hour burden per response is 1 hour.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 1,500 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $183,750.

Dated: December 11, 2023.

Samantha L. Deshommes,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2023–27629 Filed 12–14–23; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0135]

Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection: Application for Carrier Documentation.

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 60-Day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration

(USCIS) invites the general public and other Federal agencies to comment upon this proposed extension of a currently approved collection of information. In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the **Federal Register** to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (*i.e.* the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments.

DATES: Comments are encouraged and will be accepted for 60 days until February 13, 2024.

ADDRESSES: All submissions received must include the OMB Control Number 1615–0135 in the body of the letter, the agency name and Docket ID USCIS–2015–0004. Comments must be submitted in English, or an English translation must be provided. Submit comments via the Federal eRulemaking Portal website at *http://www.regulations.gov* under e-Docket ID number USCIS–2015–0004.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, telephone number (240) 721–3000 (This is not a toll-free number. Comments are not accepted via telephone message). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *https://www.uscis.gov,* or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

SUPPLEMENTARY INFORMATION:

Comments

You may access the information collection instrument with instructions, or additional information by visiting the Federal eRulemaking Portal site at: *http://www.regulations.gov* and enter USCIS–2015–0004 in the search box. Comments must be submitted in English, or an English translation must be provided. All submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

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

Overview of This Information Collection

(1) *Type of Information Collection:* Extension, Without Change, of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Carrier Documentation.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* Form I–131A; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* USCIS uses the information provided on Form I–131A to verify the status of permanent or conditional residents and holders of advance parole documents (Form I–512/Form I–512L/Form I–512T, Advance Parole Document, or Form I–765, Employment Authorization Document with travel endorsement) and determine whether the applicant is eligible for the requested travel document.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–131A is 5,100 and the estimated hour burden per response is .92 hours; biometrics processing is 5,100 and the estimated hour burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 10,659 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $919,275.

Dated: December 11, 2023.

Samantha L. Deshommes,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2023–27633 Filed 12–14–23; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7076–N–18]

60-Day Notice of Proposed Information Collection: Form 50900: Elements for the Annual Moving To Work Plan and Annual Moving To Work Report; OMB Control No.: 2577–0216

AGENCY: Office of the Assistant Secretary for Public and Indian Housing (PIH), HUD.

ACTION: Notice.

SUMMARY: HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

DATES: *Comments Due Date:* February 13, 2024.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection can be submitted within 60 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 60-day Review—Open for Public Comments'' or by using the search function. Interested persons are also invited to submit comments regarding this proposal by name and/or OMB Control Number and can be sent to: Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410–5000 or email at *PaperworkReductionActOffice@hud.gov.* Please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

FOR FURTHER INFORMATION CONTACT: Danielle Miller, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410, telephone 202–402–3689. This is not a toll-free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: Elements for the Annual MTW Plan and Annual MTW Report.

OMB Approval Number: 2577–0216.

Type of Request: Revision of a currently approved collection.

Form Number: 50900.

Description of the need for the information and proposed use: All public housing authorities (PHA) are required to submit a five (5) year plan and annual plans as stated in Section 5A of the 1937 Act, as amended, the Moving to Work (MTW) PHAs that are subject to the Standard MTW Agreement, the Annual MTW Plan and Annual MTW Report (also known as the HUD Form 50900) are submitted in lieu of the standard annual and 5 year PHA plans.

The Standard MTW Agreement was developed in 2007 and was transmitted to the existing MTW agencies in January 2008. As additional MTW PHAs were selected they too were provided with the Standard MTW Agreement. 39 MTW PHAs (known as the ''Initial'' MTW PHAs) currently operate under this agreement. In 2016, HUD extended the term of the Standard Agreement to the end of each agency's 2028 Fiscal Year (FY).

The HUD Form 50900 is a required element as part of the Standard MTW Agreement and contains important information regarding the MTW PHA's upcoming FY activities and a retrospective look back at the MTW PHA's preceding FY. HUD collects the information in this form in order to evaluate the impacts of MTW activities, accurately and timely respond to congressional and other inquiries regarding outcome measures, and identify promising practices learned through the MTW demonstration.

Revisions are being made to the HUD Form 50900 to reduce the reporting and administrative burden on MTW PHAs. All standard metrics within the HUD Form 50900 that were previously required for MTW activities will be eliminated, though they will remain optional for MTW PHAs to report. In addition to eliminating previously required standard metrics, MTW PHAs will now have the option to share an annual narrative, self-reported PHA data, and participant success stories. In lieu of the agency-reported standard metrics, HUD will pull data already reported by the agencies through required HUD systems. This will reduce burden on the agencies.

Through the Annual MTW Plan and Report, each MTW PHA will continue to inform HUD, its residents and the public of the PHA's mission for serving the needs of low-income and very low-income families, and the PHA's strategy for addressing those needs. The Annual MTW Plan, like the Annual PHA Plan, provides an easily identifiable source by which residents, participants in tenant-based programs, and other members of the public may locate policies, rules, and requirements concerning the PHA's operations, programs, and services.

The appropriations act in 2016 authorized an additional 100 MTW slots

and additional slots may be added through future appropriations acts. Eligible applicants interested in obtaining MTW designation are required to submit applications to HUD, as explained in the applicable HUD Notice. The information collection covers the information needed from applicants to determine which applicants should be selected. The information provided demonstrates the applicants' plans to implement a local MTW program and includes related applicant history. The application includes such information as narrative exhibits, certifications, data forms, and supporting documentation. The information will be used by HUD staff to evaluate threshold requirements and review applications.

Respondents (i.e. affected public): The respondents to this PRA are the 39 Public Housing Authorities (PHAs) that had MTW designation as of December 15, 2015 and potential applicants that may be submitting applications to participate in the program.

Estimated Number of Respondents: The estimated number of respondents is 39.

Estimated Number of Responses: There are 78 submissions per year, reflecting the 39 PHAs. Each submission is comprised of 7 sections each requiring a response. All 7 sections are completed with the first annual submission (Plan), and 5 of the 7 sections are completed with the second annual submission (Report). This results in a total of 2 submissions per PHA, across all 39 affected PHAs or 78 total responses, that include 468 sections.

Frequency of Response: MTW PHAs complete requirements associated with this Form twice per year (Plan and Report). In the Plan, the PHA completes each of the 7 sections of the Form. In the Report, the PHA completes only 5 of the 7 sections of the Form.

Average Hours per Response: The estimated average burden is 33 hours per response (or 66 total hours per year).

Total Estimated Burdens: The total estimated burdens are 66, given each PHA completes the form twice per year (Plan and Report).

	Respondents	Annual responses/ respondent	Total responses per year	Burden per year per respondent	Total burden hours	Cost burden [1]
Program Information:						
Application	0	0	0	0	0	$0
50900 "Annual MTW Plan and Report Elements":						
Introduction	39	[2] 2	78	3	234	3,978
General Housing Authority Information	39	* 2	78	8	624	10,608
Proposed MTW Activities	39	[3] 1	39	25	975	16,575
Ongoing MTW Activities	39	* 2	78	10	780	13,260
Sources and Uses of Funding	39	* 2	78	8	624	10,608
Administrative	39	* 2	78	[4] 7	546	9,282
Certifications of Compliance	39	[5] 1	39	5	195	3,315
Total Burden	39	varies	468	66	3,978	67,626

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including annual reporting based on the activities performance as related to the MTW program statutory objectives and through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35.

Nicholas J. Bilka,

Chief, Office of Policy, Programs, and Legislative Initiatives.

[FR Doc. 2023–27516 Filed 12–14–23; 8:45 am]

BILLING CODE 4210–67–P

[1] Based on an average hourly cost of $17.

[2] Submits 2 responses each year: once in Annual MTW Plan, once in Annual MTW Report.

[3] Submits 1 response each year: once in Annual MTW Plan.

[4] MTW Agencies do not have to submit HUD form 50077, Plan certification, and elements of this form have been included in this collection process and the total number of burden hours has been adjusted accordingly.

[5] Submits one response each year: in Annual MTW Report.

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[245A2100DD/AAKC001030/ A0A501010.999900]

Indian Gaming; Extension of Tribal-State Class III Gaming Compacts in California

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice announces the extension of the Class III gaming compacts between two Tribes in California and the State of California.

DATES: The extension takes effect on December 15, 2023.

FOR FURTHER INFORMATION CONTACT: Ms. Paula L. Hart, Director, Office of Indian Gaming, Office of the Assistant Secretary—Indian Affairs, Washington, DC 20240, *IndianGaming@bia.gov;* (202) 219–4066.

SUPPLEMENTARY INFORMATION: An extension to an existing Tribal-State Class III gaming compact does not require approval by the Secretary if the extension does not modify any other terms of the compact. 25 CFR 293.5. The

following Tribes and the State of California have reached an agreement to extend the expiration date of their existing Tribal-State Class III gaming compacts to December 31, 2024: the Ewiiaapaayp Band of Kumeyaay Indians, California; and the Picayune Rancheria of Chukchansi Indians of California. This publication provides notice of the new expiration date of the compacts.

Bryan Newland,

Assistant Secretary—Indian Affairs.

[FR Doc. 2023–27539 Filed 12–14–23; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_AK_FRN_MO4500169067]

Notice of Availability of the Draft ANCSA 17(d)(1) Withdrawals Environmental Impact Statement, Alaska

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In compliance with the National Environmental Policy Act of 1969, as amended (NEPA), and the Federal Land Policy and Management Act of 1976, as amended (FLPMA), the Bureau of Land Management (BLM) announces the availability of the Draft ANCSA 17(d)(1) Withdrawals Environmental Impact Statement.

DATES: To afford the BLM the opportunity to consider comments in the Final EIS, please ensure that the BLM receives your comments within 60 days following the date the Environmental Protection Agency (EPA) publishes its Notice of Availability (NOA) of the Draft EIS in the **Federal Register**. The EPA usually publishes its NOAs on Fridays.

ADDRESSES: The Draft EIS is available for review on the BLM ePlanning project website at *https://eplanning.blm.gov/eplanning-ui/project/2018002/510*.

Written comments related to the Draft ANCSA 17(d)(1) Withdrawals EIS may be submitted by any of the following methods:

- *ePlanning website: https://eplanning.blm.gov/eplanning-ui/project/2018002/510*.
- *Mail:* ANCSA 17(d)(1) EIS, BLM Anchorage District Office, Attn: Racheal Jones, 4700 BLM Road. Anchorage, Alaska 99507.
- *Hand Deliver comments to:* BLM Alaska State Office, BLM Alaska Public Information Center, 222 West 7th Avenue (First Floor), Anchorage, Alaska.

Documents pertinent to this proposal may be examined online at *https://eplanning.blm.gov/eplanning-ui/project/2018002/510,* at the Anchorage Field Office, and at the BLM Alaska State Office, BLM Alaska Public Information Center.

FOR FURTHER INFORMATION CONTACT: Racheal Jones, BLM Project Manager, telephone (907) 290–0307; address ANCSA 17(d)(1) EIS, BLM Anchorage District Office, Attn: Racheal Jones, 4700 BLM Road. Anchorage, Alaska 99507; email *rajones@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 for contacting Ms. Jones. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: *Introduction:* The U.S. Department of the Interior (DOI), BLM Alaska State Office, prepared this EIS to evaluate the effects of any Secretarial decision to open lands subject to the Alaska Native Claims Settlement Act (ANCSA) Section 17(d)(1) withdrawals within the lands described in Public Land Orders (PLOs) 7899 through 7903. (The potential opening of the lands subject to these 17(d)(1) withdrawals is hereafter referred to as the *project*). PLOs 7900, 7901, 7902, and 7903, which would revoke withdrawals of lands in the Ring of Fire, Bay, Bering Sea-Western Interior, and East Alaska planning areas, respectively, were signed on January 15 and 16, 2021; however, they were never published in the **Federal Register**. PLO 7899, which would revoke withdrawals of lands in the Kobuk-Seward Peninsula planning area, was signed on January 11, 2021, and published in the **Federal Register** on January 19, 2021 (86 FR 5236). Subsequently, the DOI identified certain procedural and legal defects in the decision-making process for these PLOs, as described in the April 16, 2021, **Federal Register** notice (86 FR 20193), including an insufficient analysis under NEPA. The DOI extended the opening order for PLO 7899 until August 31, 2024, to provide an opportunity to review the decisions and to ensure the orderly management of the public lands (88 FR 21207). The BLM is using this time to address identified deficiencies and update the NEPA analysis supporting the decisions regarding the PLOs now under review (the 2021 Action).

Purpose and Need for Action: The 2021 Action under review is revocation of the ANCSA 17(d)(1) withdrawals as described in PLOs 7899, 7900, 7901, 7902, and 7903. This EIS evaluates the resource conditions on these lands and incorporates and describes additional coordination with other Federal agencies, State and local governments, federally recognized Tribes, Alaska Native Corporations, and stakeholders to ensure that the environmental analysis previously conducted will be updated and expanded upon as appropriate. This additional analysis is necessary to understand the impacts of revocation of the ANCSA 17(d)(1) withdrawals; to correct errors in the previous decision-making process regarding these withdrawals; and to ensure that opening these lands is consistent with the purposes of ANCSA 17(d)(1), which requires that ''the public interest in these lands is properly protected,'' including factors such as subsistence hunting and fishing, habitat connectivity, protection of cultural resources, and protection of threatened and endangered species. This evaluation is needed to make an informed public interest determination to support revocation in full, revocation in part, or full retention of the ANCSA 17(d)(1) withdrawals.

Alternatives: The BLM considered alternatives that would provide different configurations of 17(d)(1) withdrawals that would be retained or revoked in the five planning areas (Bay, Bering Sea-Western Interior, East Alaska, Kobuk-Seward, and Ring of Fire). Each of the alternatives identifies 17(d)(1) withdrawals in the five planning areas as retained or revoked. The alternatives range from retaining the withdrawals on all lands (Alternative A) to revoking the withdrawals on all lands (Alternative D). Alternatives B and C include partial revocations of the withdrawals.

Summary of Expected Impacts: The revocation of the withdrawal on lands subject to State top filings under the Statehood Act would result in the State's selections becoming effective and a resulting loss of Federal subsistence priority applying to those lands. No development plans have been submitted, and no stipulations are attached to the lands that would prevent any specific development. Therefore, the EIS provides a Reasonably Foreseeable Development scenario that identifies and quantifies potential development activity in the decision area, including the extraction of leasable, locatable, and salable minerals, as well as the establishment of

associated rights-of-way, assuming the land is not withdrawn from availability for such activities.

Full or partial revocation of the ANCSA 17(d)(1) withdrawals may result in changes to land use that could affect local residents, wildlife, vegetation, cultural resources, subsistence, and recreation across up to 28 million acres of BLM-administered land in Alaska.

Schedule for the Decision-Making Process: The BLM will provide opportunities for public participation consistent with the NEPA processes, including a 60-day comment period on the Draft EIS. A Secretarial decision is anticipated in Summer 2024, following the publication of a Final EIS.

Public Involvement Process: This notice of availability initiates the public comment period, which will guide the development and analysis of the Final EIS. The BLM will evaluate all comments received and is specifically soliciting comments related to how to minimize effects to subsistence, cultural resources, and natural resources. The BLM will be holding virtual and in-person public meetings and Alaska National Interest Lands Conservation Act section 810 subsistence hearings. The specific date(s) and location(s) of these meetings will be announced in advance through email, social media, radio public service announcements, local media, newspapers, and on the ePlanning project page *https://eplanning.blm.gov/eplanning-ui/project/2018002/510.*

The input of Alaska Native Tribes and Corporations is of critical importance to this EIS. Therefore, during the NEPA process, the BLM will continue to consult with potentially affected Tribal Nations on a government-to-government basis, and with affected Alaska Native Corporations in accordance with Executive Order 13175, as well as Public Law 108–199, Div. H, sec. 161, 118 Stat. 452, as amended by Public Law 108–447, Div. H, sec. 518, 118 Stat. 3267, and other Department and Bureau policies. The BLM respectfully requests participation in consultation by Alaska Native Tribes and Alaska Native Corporations to provide their views and recommendations on the analysis, including effects from the proposed activities. The BLM will hold individual consultation meetings upon request.

It is important that reviewers provide their comments at such times and in such manner as are useful to the agency's preparation of the Final EIS. Therefore, comments should be provided prior to the close of the comment period and should clearly articulate the reviewer's concerns and contentions.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

(Authority: 40 CFR 1506.6, 40 CFR 1506.10)

Steven Cohn,

Alaska State Director.

[FR Doc. 2023–27647 Filed 12–14–23; 8:45 am]

BILLING CODE 4331–10–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

Fish and Wildlife Service

[BLM_FRN_MO4500175331]

Notice of Intent To Prepare a Supplemental Environmental Impact Statement To Reconsider a Highway Right-of-Way Application and Associated Amendment of an Incidental Take Permit, Washington County, Utah; Correction

AGENCY: Bureau of Land Management, Fish and Wildlife Service, Interior.

ACTION: Notice of Intent; correction.

SUMMARY: This notice corrects the scoping comment period of the Notice of Intent to Prepare a Supplemental Environmental Impact Statement to Reconsider a Highway Right-of-Way Application and Associated Amendment of an Incidental Take Permit, Washington County, Utah, published in the **Federal Register** on November 16, 2023. The initial notice had an incorrect end date of the scoping period of December 18, 2023. The correct end date of the scoping period is December 21, 2023.

FOR FURTHER INFORMATION CONTACT: Dawna Ferris-Rowley, NCA Manager, Red Cliffs and Beaver Dam Wash NCAs, telephone (435) 688–3200; address 345 East Riverside Drive, St. George, UT 84790; email *BLM_UT_NorthernCorridor@blm.gov.* Contact Ms. Ferris-Rowley to have your name added to our mailing list. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services for contacting Ms. Ferris-Rowley. 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:

Correction

In the **Federal Register** of November 16, 2023, in FR Doc. 2023–25252, on page 78781, in the second column, correct the **DATES** caption to read:

DATES: This notice initiates the public scoping process for the SEIS. The BLM and FWS request the public submit comments concerning the scope of the analysis, potential alternatives, impacts of the proposed action and alternatives, and identification of relevant information and studies by December 21, 2023. To afford the BLM and FWS the opportunity to consider comments in the Draft SEIS, please ensure your comments are received prior to the close of the 30-day scoping period or 15 days after the last public meeting, whichever is later.

Gregory Sheehan,

Utah State Director.

Anna Munoz,

Deputy Regional Director.

[FR Doc. 2023–27545 Filed 12–14–23; 8:45 am]

BILLING CODE 4331–25–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRSS–WRD–NPS0036931, 2380, PPMRSNR1Y.NM0000, PPWONRADW0 (244); OMB Control Number 1024–NEW]

Agency Information Collection Activities; National Park Service Creel Survey

AGENCY: National Park Service, Interior.

ACTION: Notice of Information Collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the National Park Service (NPS) are proposing a new information collection.

DATES: Interested persons are invited to submit your comment on or before February 13, 2024.

ADDRESSES: Please provide a copy of your comments to the NPS Information Collection Clearance Officer (ADIR–ICCO), 13461 Sunrise Valley Drive (MS–244) Reston, VA 20192 (mail); or *phadrea_ponds@nps.gov* (email). Please reference OMB Control Number 1024–NEW (Creel Survey) in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about

this information collection request (ICR), contact Christine Lipsky, Marine Ecologist at *christine_lipsky@nps.gov* (email); or 970–267–2133 (telephone). Please reference OMB Control Number 1024–NEW (Creel Survey) in the subject line of your comments. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States. You may also view the ICR at *https://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995 (PRA, 44 U.S.C. 3501 *et seq.*) and 5 CFR 1320.8(d)(1), all information collections require approval under the PRA. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are especially interested in public comment addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of our estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How might the agency minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of response.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: Recreational fishing in NPS units is allowed where it is authorized by Federal law or where it is not specifically prohibited and does not interfere with the functions of natural aquatic or riparian habitats. Angling opportunities exist in over 170 NPS units that encompass diverse aquatic environments and fish communities, including numerous species of interest to anglers. Authorized by 36 CFR 2.3 individual parks and regions, along with State agencies, are responsible for managing their fisheries and associated natural resources. This information collection is intended to create a standard Creel Survey that can be used by park units open to recreational and sports fishing. The information collected will allow park managers to assess fishing pressure, angler catch rates, and potential effects on park resources.

Creel surveys are a common fishery management technique designed to determine the angler's catch of each species and the fishing time required to catch the fish. The information collected describes angler use, fishing pressure, fish harvest, and distribution of several important species of fish.

Title of Collection: National Park Service Creel Survey.

OMB Control Number: 1024–NEW.

Form Number: None.

Type of Review: This is a new collection.

Respondents/Affected Public: Individuals, General public.

Total Estimated Number of Annual Respondents: 10,000.

Total Estimated Number of Annual Responses: 10,000.

Estimated Completion Time per Response: 5 minutes.

Total Estimated Number of Annual Burden Hours: 833 hours.

Respondent's Obligation: Voluntary.

Frequency of Collection: One-time, on occasion.

Total Estimated Annual Nonhour Burden Cost: None.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Phadrea Ponds,

Information Collection Clearance Officer, National Park Service.

[FR Doc. 2023–27585 Filed 12–14–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

[Docket No. BOEM–2023–0056]

Notice of Availability of a Final Environmental Impact Statement for Sunrise Wind, LLC's Proposed Sunrise Wind Farm Offshore New York, Massachusetts, and Rhode Island

AGENCY: Bureau of Ocean Energy Management, Interior.

ACTION: Notice of availability; final environmental impact statement.

SUMMARY: The Bureau of Ocean Energy Management (BOEM) announces the availability of the final environmental impact statement (FEIS) on Sunrise Wind, LLC's (Sunrise Wind) construction and operations plan (COP) for its proposed Sunrise Wind Farm Project (Project) offshore New York, Massachusetts, and Rhode Island. The FEIS analyzes the potential environmental impacts of the Project as described in the COP (the proposed action) and the alternatives to the proposed action, including the no action alternative. The FEIS will inform BOEM's decision whether to approve, approve with modifications, or disapprove the COP.

ADDRESSES: The FEIS and detailed information about the Project, including the COP, can be found on BOEM's website at: *https://www.boem.gov/renewable-energy/state-activities/sunrise-wind-activities.*

FOR FURTHER INFORMATION CONTACT: Jessica Stromberg, BOEM Office of Renewable Energy Programs, 45600 Woodland Road, Sterling, Virginia 20166, (703) 787–1730 or *jessica.stromberg@boem.gov.*

SUPPLEMENTARY INFORMATION:

Proposed Action: Sunrise Wind seeks approval to construct, operate, and maintain a wind energy facility and its associated export cables on the Outer Continental Shelf (OCS) offshore New York, Massachusetts, and Rhode Island. The Project would be developed within the range of design parameters outlined

in the Sunrise Wind COP, subject to the applicable mitigation measures.

The Project as proposed in the COP would include up to 94 wind turbine generators (WTGs) within 102 potential locations, one offshore converter station, inter-array cables linking the individual WTGs to the offshore substation, one offshore export cable, one onshore converter station, one fiber optic cable co-located with the onshore transmission route, and onshore interconnection cables connecting to the existing electrical grid in New York. The WTGs, offshore substation, and inter-array cables would be located on the OCS approximately 16.4 nautical miles (nm) (18.9 statute miles (mi)) south of Martha's Vineyard, Massachusetts, approximately 26.5 nm (30.5 mi) east of Montauk, New York, and 14.5 nm (16.7 mi) from Block Island, Rhode Island, within the area defined by Renewable Energy Lease OCS–A 0487. The offshore export cables would be buried below the seabed surface on the U.S. OCS and State of New York-owned submerged lands. The onshore export cables, substation, and grid connection would be located in Holbrook, New York.

Alternatives: BOEM considered 16 alternatives when preparing the draft environmental impact statement and carried forward three alternatives for further analysis in the FEIS. These three alternatives include two action alternatives and the no action alternative. Thirteen alternatives were not analyzed in detail because they did not meet the purpose and need for the proposed action or did not meet screening criteria, which are presented in FEIS chapter 2. The screening criteria included consistency with law and regulations; technical and economic feasibility; environmental impacts; and geographic considerations.

Availability of the FEIS: The FEIS, Sunrise Wind COP, and associated information are available on BOEM's website at: *https://www.boem.gov/renewable-energy/state-activities/sunrise-wind-activities.* BOEM has distributed digital copies of the FEIS to all parties listed in FEIS appendix M. If you require a flash drive or paper copy, BOEM will provide one upon request, as long as supplies are available. You may request a flash drive or paper copy of the FEIS by contacting Genevieve Brune at (703) 787–1553 or *genevieve.brune@boem.gov.*

Cooperating Agencies: The following Federal agencies and State governmental entities participated as cooperating agencies under the National Environmental Policy Act in the preparation of the FEIS: Bureau of Safety and Environmental Enforcement; U.S. Environmental Protection Agency; National Marine Fisheries Service; U.S. Army Corps of Engineers; U.S. Coast Guard; National Park Service; U.S. Fish and Wildlife Service; New York Department of State; Massachusetts Office of Coastal Zone Management; Rhode Island Coastal Resources Management Council; and the Rhode Island Department of Environmental Management.

Authority: 42 U.S.C. 4231 *et seq.* (NEPA, as amended) and 40 CFR 1506.6.

Karen Baker,

Chief, Office of Renewable Energy Programs, Bureau of Ocean Energy Management.

[FR Doc. 2023–27561 Filed 12–14–23; 8:45 am]

BILLING CODE 4340–98–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 332–601]

Recent Trends in U.S. Services Trade, 2024 Annual Report

AGENCY: United States International Trade Commission.

ACTION: Schedule for 2024 report and opportunity to submit information.

SUMMARY: The Commission has prepared and published annual reports in this series since 1996 under the investigation title *Recent Trends in U.S. Services Trade.* The 2024 report, which the Commission plans to publish in May 2024, will provide aggregate data on cross-border trade in services for the period ending in 2022, and transactions by affiliates based outside the country of their parent firm for the period ending in 2021. The 2024 report's analysis will focus on financial services (including banking services, insurance services, and securities services). The Commission is inviting interested members of the public to furnish information and views in connection with the 2024 report.

DATES:

January 29, 2024: Deadline for filing written submissions.

May 24, 2024: Anticipated date for online publication of the report.

ADDRESSES: All Commission offices, including the Commission's hearing rooms, are located in the U.S. International Trade Commission Building, 500 E Street SW, Washington, DC. All written submissions should be addressed to the Secretary, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. The public record for this investigation may be viewed on the Commission's electronic docket information system (EDIS) at *https://edis.usitc.gov/.*

FOR FURTHER INFORMATION CONTACT: Information specific to this investigation may be obtained from George Serletis, Project Leader, Office of Industry and Competitiveness Analysis, Services Division (202–205–3315; *george.serletis@usitc.gov*), Rudy Telles Jr., Project Leader, Office of Industry and Competitiveness Analysis, Services Division (202–205–3164; *rodolfo.telles@usitc.gov),* Theron Gray, Deputy Project Leader, Office of Industry and Competitiveness Analysis, Services Division (202–205–3132; *theron.gray@usitc.gov*), or Services Division Chief Martha Lawless (202–205–3497; *martha.lawless@usitc.gov*). For information on the legal aspects of this investigation, contact Brian Allen (202–205–3034; *brian.allen@usitc.gov*) or William Gearhart (202–205–3091; *william.gearhart@usitc.gov*) of the Commission's Office of the General Counsel. The media should contact Jennifer Andberg, Office of External Relations (202–205–3404; *jennifer.andberg@usitc.gov*). Hearing-impaired individuals may obtain information on this matter by contacting the Commission's TDD terminal at 202–205–1810. General information concerning the Commission may also be obtained by accessing its website (*https://www.usitc.gov*). 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.

SUPPLEMENTARY INFORMATION:

Background: The 2024 annual U.S. services trade report will provide aggregate data on cross-border trade in services for 2018–2022 and affiliate transactions in services for 2017–2021, and more specific data and information on trade in financial services (including banking services, insurance services, and securities services). The Commission publishes two self-initiated annual reports: a report on trends in services trade (*Recent Trends in U.S. Services Trade*),[1] and a report on trends in merchandise trade, presented as a data compilation (*Shifts in U.S. Merchandise Trade*). The Commission's 2023 *Recent Trends in U.S. Services Trade* report is available online at *https://www.usitc.gov/publications/industry_econ_analysis_332/2023/recent_trends_us_services_trade_2023_annual_report.*

[1] While previous reports in the Recent Trends series used investigation number 332–345, each report will now be issued with a separate investigation number.

The initial notice of institution of this series of investigations was published in the **Federal Register** on September 8, 1993 (58 FR 47287) and provided for a report on merchandise trade. The Commission expanded the scope of the investigation to cover services trade in a separate report, which it announced in a notice published in the **Federal Register** on December 28, 1994 (59 FR 66974). The separate report on services trade has been published annually since 1996, except in 2005. As in past years, the 2024 report will summarize U.S. trade in services in the aggregate and provide analyses of trends and developments in selected services industries during the latest 5-year period for which data are published by the U.S. Department of Commerce, Bureau of Economic Analysis.

Written submissions: Interested persons are invited to file written submissions and other information concerning the matters to be addressed by the Commission in its 2024 report. For the 2024 report, the Commission is particularly interested in receiving information relating to trade in financial services (including banking services, insurance services, and securities services). Submissions should be addressed to the Secretary. To be assured of consideration by the Commission, written submissions related to the Commission's report should be submitted at the earliest practical date and should be received not later than 5:15 p.m., January 29, 2024. All written submissions must conform to the provisions of section 201.8 of the Commission's Rules of Practice and Procedure (19 CFR 201.8), as temporarily amended by 85 FR 15798 (March 19, 2020). Under that rule waiver, the Office of the Secretary 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. Persons with questions regarding electronic filing should contact the Office of the Secretary, Docket Services Division (202–205–1802), or consult the Commission's *Handbook on Filing Procedures.*

Confidential business information: Any submissions that contain CBI must also conform with the requirements in section 201.6 of the Commission's Rules of Practice and Procedure (19 CFR 201.6). Section 201.6 of the rules requires that the cover of the document and the individual pages be clearly marked as to whether they are the ''confidential'' or ''nonconfidential'' version, and that the CBI is clearly identified by means of brackets. All written submissions, except for CBI, will be made available for inspection by interested persons.

The Commission intends to prepare only a public report in this investigation. The report that the Commission makes available to the public will not contain CBI. However, all information, including CBI, submitted in this investigation may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. appendix 3; or (ii) by U.S. Government employees and contract personnel for cybersecurity or other security purposes. The Commission will not otherwise disclose any CBI in a manner that would reveal the operations of the firm supplying the information.

Summaries of written submissions: Persons wishing to have a summary of their position included in the report should include a summary with their written submission on or before January 29, 2024, and should mark the summary as having been provided for that purpose. The summary should be clearly marked as ''summary for inclusion in the report'' at the top of the page. The summary may not exceed 500 words and should not include any CBI. The summary will be published as provided if it meets these requirements and is germane to the subject matter of the investigation. The Commission will list the name of the organization furnishing the summary and will include a link where the written submission can be found.

By order of the Commission.

Issued: December 11, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–27478 Filed 12–14–23; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Resilient Infrastructure + Secure Energy Consortium

Notice is hereby given that, on October 3, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), the Resilient Infrastructure + Secure Energy Consortium (''RISE'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Beacon Industries, Inc., Newington, CT; IEEECyber Security, Inc., York, PA; Mechanical Solutions, Inc., Whippany, NJ; MPR Associates, Inc., Alexandria, VA; NGU Sports Lighting, Palm Beach Gardens, FL; Potorti Enterprises, Inc., Floyds Knobs, IN; and Venturi LLC, Huntsville, AL have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and RISE intends to file additional written notifications disclosing all changes in membership.

On July 2, 2021, RISE filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on August 23, 2021 (86 FR 47155).

The last notification was filed with the Department on July 7, 2023. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on September 26, 2023 (88 FR 66057).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–27559 Filed 12–14–23; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Countering Weapons of Mass Destruction

Notice is hereby given that, on October 9, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Countering Weapons of Mass Destruction (''CWMD'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the

Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Specifically, Bowler Pons Solutions Consultants LLC, Annapolis, MD; BlackSky Geospatial Solutions, Inc., Herndon, VA; Kemp Proteins LLC, Frederick, MD; KRI at Northeastern University LLC, Burlington, MA; Peerless Technologies Corp., Fairborn, OH; Resilience Government Services, Inc., Alachua, FL; and Tetramer Technologies LLC, Pendleton, SC have been added as parties to this venture.

Also, Decon7 Systems LLC, Scottsdale, AZ; Fire Safety International, Inc., Sheffield Lake, OH; Firefly Photonics LLC, Coralville, IA; Luna Labs USA LLC, Charlottesville, VA; Paratek Pharmaceuticals, King of Prussia, PA; Quantitative Scientific Solutions LLC, Arlington, VA; Re:Build CR LLC, Rock Hill, SC; Saint-Gobain Crystals, Hiram, OH; Shipcom Federal Solutions LLC, Arlington, VA; and Veritech LLC, Glendale, AZ have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and CWMD intends to file additional written notifications disclosing all changes in membership.

On January 31, 2018, CWMD filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on March 12, 2018 (83 FR 10750).

The last notification was filed with the Department on July 10, 2023. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on September 26, 2023 (88 FR 66058).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–27596 Filed 12–14–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Senior Healthcare Innovation Consortium

Notice is hereby given that, on October 5, 2023, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Senior Healthcare Innovation Consortium (''SHIC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Center to Stream Healthcare In Place, Tucson, AZ; Interdisciplinary Consortium on Advanced Motion Performance, Houston, TX; and Mentia, Novato, CA, have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and SHIC intends to file additional written notifications disclosing all changes in membership.

On November 02, 2022, SHIC filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on November 23, 2022 (87 FR 71677).

The last notification was filed with the Department on July 11, 2023. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on September 26, 2023 (88 FR 66056).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–27565 Filed 12–14–23; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Open Grid Alliance, Inc.

Notice is hereby given that, on August 30, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Open Grid Alliance, Inc. (''OGA'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Quintecon, Inc., Mountain View, CA, has been added as a party to this venture.

Also, Crown Castle Fiber LLC, Houston, TX; and DartPoints Operating Company LLC, Greenville, SC, have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and OGA intends to file additional written notifications disclosing all changes in membership.

On March 31, 2022, OGA filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on May 12, 2022 (87 FR 29180).

The last notification was filed with the Department on June 16, 2023. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on August 23, 2023 (88 FR 57478).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–27591 Filed 12–14–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Electrified Vehicle and Energy Storage Evaluation

Notice is hereby given that, on August 29, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Electrified Vehicle and Energy Storage Evaluation (''EVESE'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Allison Transmission, Inc., Indianapolis, IN, has withdrawn as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and EVESE intends to file additional written notifications disclosing all changes in membership.

On September 24, 2020, EVESE filed its original notification pursuant to section6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section6(b) of the Act on October 15, 2020, (85 FR 65423).

The last notification was filed with the Department on June 15, 2023. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on August 23, 2023, (88 FR 57470).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–27590 Filed 12–14–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—National Armaments Consortium

Notice is hereby given that, on October 10, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), National Armaments Consortium (''NAC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Specifically, Altio Labs LLC, Frisco, TX; Amazon Web Services Seattle, WA; Anactisis LLC, Pittsburgh, PA; Applied Technology Solutions, Inc., Huntsville, AL; Castelion Corporation, El Segundo, CA; Concordia Technologies, Inc. Huntsville, AL; Critical Communications, Controls and Instruments, LLC dba C3I, Exeter, NH; Dayton T. Brown, Bohemia, NY; DRS Training & Control Systems, LLC, Fort Walton Beach, FL; E.O. Solutions LLC, Kula, HI; Global Tungsten and Powders Corp., Towanda, PA; Goldbelt Hawk LLC, Newport News, VA; Lightforce USA, Inc. dba Nightforce Optics, Orofino, ID; Lynas USA LLC, San Antonio, TX; MetalTek International, Waukesha, WI; MP Mine Operations LLC, Mountain Pass, CA; Northrop Grumman Advanced Weapons Business Unit (AWBU), Northridge, CA; NWI Defense LLC, Albany, OR; OToole Tek, LLC, Rocky Hill, CT; Poplicus, Inc., Arlington, VA; Powdermet, Inc., Euclid, OH; PR Tactical Corporation Incorporated, Pearland, TX; Royce Geospatial Consultants, Arlington, VA; Safety Management Services, Inc., West Jordan, UT; SCHOTT North America, Duryea, PA; Sentenai Inc., Cambridge, MA; SIG SAUER, Inc., Newington, NH; SPAARK, Inc., Chambersburg, PA; TeraSense, Inc., Baltimore, MD; The Barnes Global Advisors, Sewickley, PA; Triverus, LLC, Palmer, AK; VideoRay, LLC, Pottstown, VA; Winkelmann Flowform Technology, LP, Auburn, AL; and Wyzkyds Consulting, LLC, Tucson, AZ have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and NAC intends to file additional written notifications disclosing all changes in membership.

On May 2, 2000, NAC filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on June 30, 2000 (65 FR 40693).

The last notification was filed with the Department on July 7, 2023. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on September 26, 2023 (88 FR 66058).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–27594 Filed 12–14–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—AI Infrastructure Alliance, Inc.

Notice is hereby given that, on October 26, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), AI Infrastructure Alliance, Inc. (''AIIA'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Colorado College, Colorado Springs, CO; Çukurova University, Industrial Engineering Department, Adana, TURKEY; SEMATIC, San Francisco, CA; and deepset GmbH, Berlin, GERMANY, have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and AIIA intends to file additional written notifications disclosing all changes in membership.

On January 5, 2022, AIIA filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on March 10, 2022 (87 FR 13759).

The last notification was filed with the Department on July 3, 2023. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on September 26, 2023 (88 FR 66058).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–27609 Filed 12–14–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Decentralized Storage Alliance Association

Notice is hereby given that, on October 17, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Decentralized Storage Alliance Association (''DSAA'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Intel, Santa Clara, CA; and Seal Storage, Toronto, CANADA, have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and DSAA intends to file additional written notifications disclosing all changes in membership.

On August 1, 2023, DSAA filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal**

Register pursuant to section 6(b) of the Act on October 6, 2023 (88 FR 69670).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–27586 Filed 12–14–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Telemanagement Forum

Notice is hereby given that, on October 13, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), TM Forum, A New Jersey Non-Profit Corporation (''The Forum'') filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, the following entities have become members of the Forum: Qarbon Technologies PTE LTD, Singapore, SINGAPORE; vitroconnect GmbH, Gütersloh, GERMANY; NTT QONOQ, INC., Tokyo, JAPAN; Stechs, Miami, FL; Quantexa, London, UNITED KINGDOM; Broadleaf Commerce, Plano, TX; BAINZ Consulting Limited, Wellington, NEW ZEALAND; Idea Helix Inc., Fremont, CA; XACRIA s.r.l, Catania, ITALY; Vanrise Solutions, Beirut, LEBANON; The Value Engineers, Soest, NETHERLANDS; Alliance Best Practice Ltd, Warwick, UNITED KINGDOM; Crown Castle, Houston, TX; Digitata Networks, Irving, TX; Ooredoo Kuwait, Mirqab Kuwait City, KUWAIT; Yemen Mobile, Sana'a, REPUBLIC OF YEMEN; MTN Nigeria, Lagos, NIGERIA; Summit Tech, Montreal, CANADA.

Also, the following members have changed their names: T-Mobile Netherlands BV to Odido Netherlands B.V., Den Haag, NETHERLANDS; Telekom Malaysia Berhad (TM) to TM Technology Services Sdn Bhd, Kuala Lumpur, MALAYSIA; StarHub to StarHub Ltd, Singapore, SINGAPORE; Epam Systems, Inc. to Epam Systems Ltd, Newtown, PA; Claro El Salvador to Claro El Salvador (CTE Telecom Personal, SA de CV), San Salvador, EL SALVADOR; Indra Brasil to Minsait Brasil LTDA, São Paulo, BRAZIL; Kratos RT Logic, Inc. to Kratos, Colorado Springs, CO; ITgma DOO Skopje to ITgma, Skopje, MACEDONIA.

In addition, the following parties have withdrawn as parties to this venture: Alepo Technologies Inc, Austin, TX; Celcom Axiata Berhad, Kuala Lumpur, MALAYSIA; Circles Life Asia Technology Pte. Ltd., Singapore, SINGAPORE; Civity, Zeist, THE NETHERLANDS; Dotlines Pte Ltd., Singapore, SINGAPORE; Fibrasil infraestrutura e fibra otica S.A., São Paulo, BRAZIL; KCOM Group Limited, Hull, UK; Nae Costa Rica Business and Services S.R.L, San Jose, COSTA RICA; Nexign, St.Petersburg, RUSSIA; Shaanxi Fast Gear Co., LTD, Xi'an, CHINA; Soaint Peru SAC, Lima, PERU; TIBCO Software Inc., Palo Alto, CA; Universidad Argentina de la Empresa, Ciudad Autonoma de Buenos Aires, ARGENTINA; Universitat der Bundeswehr, Neubiberg, GERMANY; University of Bonn, Bonn, GERMANY; VETRO FiberMap, Portland, ME; VMware, Inc., Palo Alto, CA.

No other changes have been made to either the membership or planned activity of the group research project. Membership in this group research project remains open, and The Forum intends to file additional written notifications disclosing all changes in membership.

On October 21, 1988, The Forum filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on December 8, 1988 (53 FR 49615).

The last notification was filed with the Department on July 13, 2023. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on September 26, 2023 (88 FR 66059).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–27584 Filed 12–14–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Medical Technology Enterprise Consortium

Notice is hereby given that, on October 2, 2023, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Medical Technology Enterprise Consortium (''MTEC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Advanced Surgical Retractor Systems, Inc., Shavano Park, TX; Biomedical Commercialization LLC, Clifton, VA; Colorado State University, Fort Collins, CO; Corvent Medical, Inc., Fargo, ND; CSSi LifeSciences LLC, Columbia, MD; DexTech Corp., Blue Bell, PA; Enzyre BV, Nijmegen, NLD; ERI Group, Golden, CO; ExcelCoat Technologies, Inc., Frederick, MD; Flambeau Diagnostics LLC, Madison, WI; Georgia Southern University, Statesboro, GA; Global Military Expert Consulting And Instruction LLC dba Spotlight Labs, Camden, NJ; Legionarius LLC, Sudbury, MA; Microbion Corp., Bozeman, MT; Molecular Rebar Design LLC, Austin, TX; MY01, Inc., Montreal, CAN; Nurami Medical, Haifa, ISR; OXOS Medical, Inc., Atlanta, GA; Peptilogics, Inc., Pittsburgh, PA; Phare Bio, Inc., Boston, MA; Pivot Path Solutions LLC, Gaithersburg, MD; Precision Trauma LLC, Columbus, GA; Protinhi B.V., Nijmegen, NLD; Quorum Innovations LLC, Sarasota, FL; Ragged Edge Solutions, Greenville, NC; Resilience Government Services, Inc., Alachua, FL; Safeguard Surgical, Tampa, FL; Sibel Health, Inc., Chicago, IL; SLSCO, Ltd., Galveston, TX; Sophic Synergistics LLC, Houston, TX; Stephenson & Stephenson Research & Consulting, Batavia, OH; Swaza, Inc., Mountain View, CA; University of California Los Angeles, Los Angeles, CA; University of Malta, Msida, MLT; University of Miami, Coral Gables, FL; University of Washington, Seattle, WA; U-Smell-It LLC, Guilford, CT; Vocxi Health, Inc., Arden Hills, MN; Wayne State University, Detroit, MI; and Xheme, Inc., Newton, MA have been added as parties to this venture.

Also, Bionica Labs LLC, Richmond, VA, has withdrawn as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and MTEC intends to file additional written notifications disclosing all changes in membership.

On May 9, 2014, MTEC filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal**

Register pursuant to Section 6(b) of the Act on June 9, 2014 (79 FR 32999).

The last notification was filed with the Department on July 5, 2023. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on August 23, 2023 (88 FR 57476).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–27578 Filed 12–14–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Open Source Imaging Consortium, Inc.

Notice is hereby given that, on September 28, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Open Source Imaging Consortium, Inc. (''Open Source Imaging Consortium'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, China Medical University Hospital, Taichung City, TAIWAN, has been added as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Open Source Imaging Consortium intends to file additional written notifications disclosing all changes in membership.

On March 20, 2019, Open Source Imaging Consortium filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on April 12, 2019 (84 FR 1497).

The last notification was filed with the Department on May 23, 2023. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on June 13, 2023 (88 FR 4211).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–27572 Filed 12–14–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Z-Wave Alliance, Inc.

Notice is hereby given that, on November 1, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (the ''Act''), Z-Wave Alliance, Inc. (the ''Joint Venture'') filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Specifically, Institute of Digital Guangdong, Guangzhou, PEOPLE'S REPUBLIC OF CHINA; Versa Wireless Inc., Surrey, CANADA; Omar Abed Alkarim Darwish, Ypsilanti, MI; and Trident IoT LLC, Carlsbad, CA have joined as parties to the venture.

Also, Technicolor Connected Home Rennes, Cesson-Sevigne Cedex, FRANCE; Technicolor Connected Home USA, LLC, Lawrenceville, GA; Control & More, Riyadh, SAUDI ARABIA; Smart AT For You, Teneriffe, AUSTRALIA; Namron AS, Oslo, NORWAY; Takacs Milan EV, Szigetmonostor, HUNGARY; and Octo Telematics SpA, Rome, ITALY have withdrawn as parties to the venture.

In addition, an existing member, Allterco Robotics EOOD, has changed its name to Shelly Europe Ltd., Sofia, BULGARIA.

No other changes have been made in either the membership or the planned activity of the venture. Membership in this venture remains open, and the Joint Venture intends to file additional written notifications disclosing all changes in membership.

On November 19, 2020, the Joint Venture filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on December 1, 2020 (85 FR 77241).

The last notification was filed with the Department on August 4, 2023. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on October 6, 2023 (88 FR 69672).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–27583 Filed 12–14–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Consortium for Rare Earth Technologies

Notice is hereby given that, on October 23, 2023, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Consortium for Rare Earth Technologies (''CREaTe'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Specifically, Beacon Industries, Inc., Newington, CT; Blue Technology LLC, Lindenhurst, NY; Capitol Integration, Bradenton, FL; Corinne Young LLC, Duxbury, MA; Cornerstone Government Affairs, Washington, DC; Creative Engineers, Inc., New Freedom, PA; GE Chaplin, Flemington, NJ; Infinite Elements, El Paso, TX; Los Alamos National Lab, Los Alamos, NM; Montana Technological University, Butte, MT; Naval Research Laboratory, Washington, DC; Rare Earth Technologies, Inc., Cincinnati, OH; Raytheon Technologies, Cambridge, MA; ReElement Technologies, Fishers, IN; South Dakota School of Mines and Technology, Rapid City, SD; Tetramer Technologies, Pendleton, SC; and, The Process Group LLC, Chesterfield, MO have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and CREaTe intends to file additional written notifications disclosing all changes in membership.

On April 22, 2022, CREaTe filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on May 13, 2022 (87 FR 29384).

The last notification was filed with the Department on May 1, 2023. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on June 13, 2023 (88 FR 38540).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–27608 Filed 12–14–23; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Naval Surface Technology & Innovation Consortium

Notice is hereby given that, on October 11, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Naval Surface Technology & Innovation Consortium (''NSTIC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Specifically, Altus Technical Solutions LLC, Hanover, MD; Astro Machine Holdings dba Astro Machine Works, Ephrata, PA; Azure Summit Technology, Inc., Fairfax, VA; Breault Research Organization, Inc., Tucson, AZ; C3I, Exeter, NH; Core4ce LLC, Reston, VA; DRS Training & Control Systems LLC, Fort Walton Beach, FL; Elevan LLC dba Elevate Systems, San Antonia, TX; Flexible Concepts, Inc., Elkhart, IN; FN America LLC, Columbia, SC; Goldbelt Hawk LLC, Newport News, VA; Luna Labs USA LLC, Charlottesville, VA; MetalTek International, Inc., Waukesha, WI; Michael Fry Defense LLC, Dutton, VA; Mistral, Inc., Bethesda, MD; Oceanit Laboratories, Inc., Honolulu, HI; Optowares, Inc., Woburn, MA; OToole Tek LLC, Rocky Hill, CT; Purdue Applied Research Institute LLC, West Lafayette, IN; Smart Shooter, Inc., Herndon, VA; Titan Diversified Holdings, Inc., Charlotte, NC; and TMGcore, Inc., Plano, TX, have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and NSTIC intends to file additional written notifications disclosing all changes in membership.

On October 8, 2019, NSTIC filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on November 12, 2019 (84 FR 61071).

The last notification was filed with the Department on July 7, 2023. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on September 26, 2023 (88 FR 66060).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–27605 Filed 12–14–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—National Spectrum Consortium

Notice is hereby given that, on October 5, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), National Spectrum Consortium (''NSC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Altio Labs LLC, Frisco, TX; Blacksky Geospatial Solutions, Inc., Herndon, VA; Commdex LLC, Smyrna, GA; Core4ce LLC, Reston, VA; Information Systems Laboratories, Inc., Poway, CA; have been added as parties to this venture.

Also, Veritech LLC, Glendale, AZ, has withdrawn as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and NSC intends to file additional written notifications disclosing all changes in membership.

On September 23, 2014, NSC filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on November 4, 2014 (79 FR 65424).

The last notification was filed with the Department on July 19, 2023. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on October 5, 2023(88 FR 69232).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–27589 Filed 12–14–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—America's Datahub Consortium

Notice is hereby given that, on October 6, 2023, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), America's DataHub Consortium (''ADC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Action Engineering LLC, Golden, CO; Annapurna Solutions LLC, Houston, TX; Clinovations Government + Health, Inc., Washington, DC; Datavant, Inc., San Francisco, CA; Department of Health Outcomes and Biomedical Informatics, Gainesville, FL; dibdobai, Bethesda, MD; HealthVerity, Inc., Philadelphia, PA; Marshall University, Huntington, WV; Mathematica, Inc., Princeton, NJ; National Science and Engineering Alliance, Lake City, SC; Neoskye, Inc., Newington, CT; Seven Bridges Genomics, Inc. dba Velsera, Charlestown, MA; Stealth Software Technologies, Inc., Los Angeles, CA; Strategix, Sheridan, WY; Theta LLC, Baltimore, MD and TMGcore, Inc., Plano, TX, have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and ADC intends to file additional written notifications disclosing all changes in membership.

On November 11, 2021, ADC filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on December 22, 2021 (86 FR 72628).

The last notification was filed with the Department on July 13, 2023. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on September 26, 2023 (88 FR 66060).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–27563 Filed 12–14–23; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—PXI Systems Alliance, Inc.

Notice is hereby given that, on November 17, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), PXI Systems Alliance, Inc. (''PXI Systems'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Kinetic Systems, Lockport, IL, has withdrawn as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and PXI Systems intends to file additional written notifications disclosing all changes in membership.

On November 22, 2000, PXI Systems filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on March 8, 2001 (66 FR 13971).

The last notification was filed with the Department on September 5, 2023. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on October 6, 2023 (88 FR 69672).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–27622 Filed 12–14–23; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Utility Broadband Alliance, Inc.

Notice is hereby given that on November 9, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq* (the ''Act''), Utility Broadband Alliance, Inc. (''UBBA'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Specifically, MosoLabs, Sacramento, CA; National Grid, Waltham, MA; CPS Energy, San Antonio, TX; Advantech Co., Ltd., Blue Ash, OH; Dominion Energy, Richmond, VA; ST Microelectronics International N.V., Geneva, SWITZERLAND; and Intel Corporation, Santa Clara, CA have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open and UBBA intends to file additional written notifications disclosing all changes in membership.

On May 4, 2021, UBBA filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on June 10, 2021 (86 FR 30981).

The last notification was filed with the Department on August 18, 2023. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on October 6, 2023 (88 FR 69672).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–27613 Filed 12–14–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Defense Electronics Consortium

Notice is hereby given that, on October 11, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Defense Electronics Consortium (''DEC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Specifically, Della Systems, Inc., Ronkonkoma, NY; Eagle Circuits, Inc., Dallas, TX; Intrinsix Corp., Marlborough, MA; and Northrop Grumman Systems Corp., Linthicum, MD have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and DEC intends to file additional written notifications disclosing all changes in membership.

On April 12, 2023, DEC filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on August 8, 2023 (88 FR 53520).

The last notification was filed with the Department on July 14, 2023. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on September 27, 2023 (88 FR 66507).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–27603 Filed 12–14–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Rust Foundation

Notice is hereby given that, on October 3, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Rust Foundation has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Filecoin Foundation for the Decentralized Web, Middletown, DE;

Helsing, Munich, GERMANY; and JetBrains GmbH, München, GERMANY, have been added as parties to this venture.

Also, JFrog Inc., Sunnyvale, CA; Matter Labs, George Town, CAYMAN ISLANDS; Toyota Connected North America, Inc., Plano, TX; and Check Point Software Technologies Ltd., Tel Aviv, ISRAEL, have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Rust Foundation intends to file additional written notifications disclosing all changes in membership.

On April 14, 2022, Rust Foundation filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on May 13, 2022 (87 FR 29384).

The last notification was filed with the Department on July 19, 2023. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on October 5, 2023 (88 FR 69234).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–27560 Filed 12–14–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Maritime Sustainment Technology and Innovation Consortium

Notice is hereby given that, on October 6, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Maritime Sustainment and Technology Innovation Consortium (''MSTIC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Anderson Contract Engineering, Inc., Melbourne, FL; Bath Iron Works Corp., Bath, ME; Bosch Rexroth Corp., Bethlehem, PA; C3I, Exeter, NH; Core4ce LLC, Reston, VA; Delta Group Electronics, Inc., San Diego, CA; Divergent Technologies, Inc., Torrance, CA; JR3 Consulting LLC, Huntsville, AL; KAIROS, Inc., California, MD; KCG Engineering Group, Inc., Virginia Beach, VA; MacTaggart Scott USA LLC, Virginia Beach, VA; Martinez and Turek, Inc., Rialto, CA; National Instruments Corp., Austin, TX; Nikira Labs, Inc., Mountain View, CA; Optowares, Inc., Woburn, MA; P&J Robinson Corp., Boerne, TX; Real Time Innovations, Inc., Sunnyvale, CA; RSL Fiber Systems LLC, East Hartford, CT; Sciaky, Inc., Chicago, IL; Snowflake, Inc., Bozeman, MT; Systems Planning and Analysis, Inc., Alexandria, VA; and TMGcore, Inc., Plano, TX have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and MSTIC intends to file additional written notifications disclosing all changes in membership.

On October 21, 2020, MSTIC filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on November 19, 2020 (85 FR 73750).

The last notification was filed with the Department on July 7, 2023. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on September 26, 2023(88 FR 66060).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–27601 Filed 12–14–23; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Bytecode Alliance Foundation

Notice is hereby given that, on October 3, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Bytecode Alliance Foundation has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Stellar Development Foundation, San Francisco, CA, has been added as a party to this venture.

Also, Suborbital, Ottawa, CANADA, has withdrawn as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Bytecode Alliance Foundation intends to file additional written notifications disclosing all changes in membership.

On April 20, 2022, Bytecode Alliance Foundation filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on May 13, 2022 (87 FR 29379).

The last notification was filed with the Department on July 19, 2023. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on October 5, 2023 (88 FR 69231).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–27562 Filed 12–14–23; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—1Edtech Consortium, Inc.

Notice is hereby given that, on November 10, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), 1EdTech Consortium, Inc. (''1EdTech Consortium'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Specifically, Anne Arundel County Public Schools, Annapolis, MD; Dallas ISD, Dallas, TX; Digival IT Solutions Limited, Dubai, UNITED ARAB EMIRATES; Lennections Inc., Canton, GA; MarkAny Chainverse Inc., Seoul, SOUTH KOREA; Montgomery County Public Schools (MD), Rockville, MD; Navigatr, Leeds, UNITED KINGDOM; Temple University, Philadelphia, PA; Tuscaloosa County Schools, Tuscaloosa, AL; and William Marsh Rice University-

OpenStax, Houston, TX, have been added as parties to this venture.

Also, Coins For College, Antioch, CA; Cambridge Assessment, Cambridge, UNITED KINGDOM; and Virtual Arkansas, Plumerville, AR, have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and 1EdTech Consortium intends to file additional written notifications disclosing all changes in membership.

On April 7, 2000, 1EdTech Consortium filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on September 13, 2000 (65 FR 55283).

The last notification was filed with the Department on August 25, 2023. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on October 6, 2023 (88 FR 69670).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–27621 Filed 12–14–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—National Fire Protection Association

Notice is hereby given that, on October 2, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), National Fire Protection Association (''NFPA'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing additions or changes to its standards development activities. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, NFPA has provided an updated and current list of its standards development activities, related technical committee and conformity assessment activities. Information concerning NFPA regulations, technical committees, current standards, standards development and conformity assessment activities are publicly available at *nfpa.org.*

On September 20, 2004, NFPA filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on October 21, 2004 (69 FR 61869).

The last notification was filed with the Department on May 22, 2023. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on August 22, 2023 (88 FR 57129).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–27556 Filed 12–14–23; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Information Warfare Research Project Consortium

Notice is hereby given that, on October 4, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Information Warfare Research Project Consortium (''IWRP'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, 3ONE1, Inc., Dover, DE; 901 D LLC, Airmont, NY; Ad Hoc Research Associates LLC, Havre de Grace, MD; Akima Systems Engineering LLC, Herndon, VA; Anokiwave, Inc., Billerica MA; Blacksky Geospatial Solutions, Inc., Herndon, VA; Braetr FP LLC, Hanahan, SC; C3.ai, Inc., Redwood City, CA; Chameleon Consulting Group LLC, Herndon, VA; Creative Global Consulting LLC, Laurel, MD; Daniel H. Wagner Associates, Inc., Exton, PA; Dynamic Systems, Inc., El Segundo, CA; GaN Corp., Huntsville, AL; Graf Research Corp., Blacksburg, VA; Hunter Strategy LLC, Pompano Beach, FL; In-Depth Engineering Corp., Fairfax, VA; Kairos, Inc., California, MD; KCG Engineering Group, Inc., Virginia Beach, VA; Liteye Systems, Inc., Centennial, CO; Logistic Specialties, Inc., Layton, UT; Lone Star Aerospace, Inc., Addison, TX; Nighthawk Cyber LLC, Orlando, FL; Oakman Aerospace LLC, Littleton, CO; Objective Interface Systems, Inc., Herndon, VA; Parallax Advanced Research Corp., Beavercreek, OH; REDLattice, Inc., Chantilly, VA; Saab, Inc., East Syracuse, NY; Shadow-Soft LLC, Sandy Springs, GA; Snowflake, Inc., Bozeman, MT; Southwest Research Institute, San Antonio, TX; Stratascor dba StratasCorp Technologies LLC, Virginia Beach, VA; Swain Online Inc dba Swain Techs, Newtown, PA; Systems Innovation Engineering LLC, Mullica Hill, NJ; The Kenific Group, Inc., Leesburg, VA; Three Wire Systems LLC, Mclean, VA; Trillion Technology Solutions, Inc., Reston, VA; University Technical Services, Inc., Greenbelt, MD; Vantiq, Inc., Walnut Creek, CA; VARIABLECONSTANT LLC, Arlington, VA; Vergence LLC, Escondido, CA; VetAble Technologies LLC, Brandon, FL; Vision Point Systems, Inc., Fairfax, VA; and Xage Security, Inc., Palo Alto, CA, have been added as parties to this venture.

Also, ARKS Enterprises, Inc., Virginia Beach, VA; Cummings Aerospace, Inc., Huntsville, AL; DeVilliers Technology Solutions, Stafford, VA; GE Flight Efficiency Services, Inc., Auston, TX; HII Technical Solutions Corp., Virginia Beach, VA; Omni Federal, Gainesville, VA; Omnispace LLC, Tysons, VA; Technology Advancement Group, Inc., Dulles, VA; and Unified Experience LLC, Mount Pleasant, SC, have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and IWRP intends to file additional written notifications disclosing all changes in membership.

On October 15, 2018, IWRP filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on October 23, 2018 (83 FR 53499).

The last notification was filed with the Department on July 7, 2023. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on September 26, 2023 (88 FR 66057).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–27568 Filed 12–14–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Medical CBRN Defense Consortium

Notice is hereby given that, on October 13, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Medical CBRN Defense Consortium (''MCDC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Compleo Technologies LLC, Newtown, CT; Core4ce LLC, Reston, VA; KRI at Northeastern University LLC, Burlington, MA; and North American Rescue LLC, Greer, SC, have been added as parties to this venture.

Also, Alltropic Tech, Halethorpe, MD; California Institute for Biomedical Research, La Jolla, CA; GenArraytion Inc., Rockville, MD; Integrated Biotherapeutics, Inc., Rockville, MD; International Business Machines Corp., Yorktown Heights, NY; Luna Labs USA LLC, Charlottesville, VA; Mesa Tech International, San Diego, CA; Qorvo Biotechnologies LLC, Bend, OR; Sentinel Analytics Software, Inc., Davis, CA; SGSD Partners LLC, Washington, DC; Synthetic Genomics Vaccines, Inc., La Jolla, CA; Unify R&D, Elkridge, MD; and Vector RX LLC, Elkridge, MD, have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and MCDC intends to file additional written notifications disclosing all changes in membership.

On November 13, 2015, MCDC filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on January 6, 2016 (81 FR 513).

The last notification was filed with the Department on July 17, 2023. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on October 5, 2023 (88 FR 69231).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–27575 Filed 12–14–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Training & Readiness Accelerator II

Notice is hereby given that, on October 20, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Training & Readiness Accelerator II (''TReX II'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Specifically, ActioNet, Inc, Vienna, VA; Altio Labs LLC, Frisco, TX; Analex Corp. dba Arcfield, Hunstville, AL; Atlantic Diving Supply, Inc. dba ADS, Inc., Virginia Beach, VA; BAE Systems Land & Armaments, L.P., Sterling Heights, MI; Boecore LLC, Colorado Springs, CO; Cornerstone Research Group, Inc., Miamisburg, OH; DAGER Technology LLC, Fairfax, VA; Grove Resource Solutions LLC, Bethesda, MD; Hiller Measurements, Inc., Austin, TX; Industrial Smoke & Mirrors, Inc., Orlando, FL; Joy Lab Consulting LLC dba Mobilize, Arvada, CO; KCG Engineering Group, Inc., Virginia Beach, VA; MATBOCK LLC, Virginia Beach, VA; ObjectSecurity LLC, San Diego, CA; PURVIS Systems, Inc., Middletown, RI; Sensormetrix, Inc., San Diego, CA; Soar Technology, Inc., Ann Arbor, MI; Stratolaunch LLC, Mojave, CA; TMGcore, Inc., Plano, TX; Triton Systems, Inc., Chelmsford, MA; University of Central Florida Board of Trustees, Orlando, FL; Vadum, Inc., Raleigh, NC; Wittenstein Motion Control, Inc., Bartlett, IL; and 910 FACTOR, Inc., Gastonia, NC have been added as parties to this venture.

Also, ARCTOS Technology Solutions LLC, Dayton, OH; Black Source Software LLC, Dayton, OH; Cignal LLC, Reedsville, PA; CyOne, Inc., Aberdeen, MD; Discovery Machine, Inc., Williamsport, PA; DMAero LLC, Byron, GA; dSPACE, Inc., Wixom, MI; EZ–A Consulting LLC, Bel Air, MD; Hiller Measurements, Inc., Austin, TX; Infinity Systems Engineering LLC, Colorado Springs, CO; IntelliGenesis LLC, Columbia, MD; Joint Research & Development, Inc., Stafford, VA; Life Cycle Engineering, Inc., North Charleston, SC; MaXentric Technologies LLC, Fort Lee, NJ; NIRSense LLC dba Bionica Labs LLC, Richmond, VA; Palantir USG, Inc., Palo Alto, CA; Polaris Sensor Technologies, Inc., Huntsville, AL; RDA Technical Services, Fort Meyers, FL; Rocky Mountain Scientific Laboratory, Littleton, CO; SGSD Partners LLC dba Elevate Government Solutions, Washington, DC; Technica Corp., Sterling, VA; The EXPANSIA Group LLC, Nashua, NH; and Uptake Technologies, Inc., Chicago, IL, have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and TReX II intends to file additional written notifications disclosing all changes in membership.

On February 17, 2023, TReX II filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on June 13, 2023 (88 FR 38536).

The last notification was filed with the Department on July 11, 2023. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on September 26, 2023 (88 FR 66055).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–27607 Filed 12–14–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Integrated Photonics Institute for Manufacturing Innovation Operating Under the Name of the American Institute for Manufacturing Integrated Photonics

Notice is hereby given that, on October 11, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), the Integrated Photonics Institute for

Manufacturing Innovation operating under the name of the American Institute for Manufacturing Integrated Photonics (''AIM Photonics'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Specifically, Georgia Tech Applied Research Corporation, Atlanta, GA; and Northrop Grumman Systems Corporation, Falls Church, VA, have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and AIM Photonics intends to file additional written notifications disclosing all changes in membership.

On June 16, 2016, AIM Photonics filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on July 25, 2016 (81 FR 48450).

The last notification was filed with the Department on August 1, 2023. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on October 6, 2023 (88 FR 69671).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–27564 Filed 12–14–23; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—MLCommons Association

Notice is hereby given that, on November 2, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), MLCommons Association (''MLCommons'') filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, AI & Partners, Amsterdam, NETHERLANDS; Juniper Networks, Sunnyvale, CA; Fuzzy Sequence Pte. Ltd., Singapore, SINGAPORE; Ying-Jung Chen (individual member), Cupertino, CA; Robert Kubicek (individual member), Darmstadt, GERMANY; Jiachen Liu (individual member), Ann Arbor, MI; Jae-Won Chung (individual member), Ann Arbor, MI; and Regis Pierrard (individual member), Paris, FRANCE have been added as parties to this venture.

Also, Cognitiviti Pty Ltd., West End, AUSTRALIA; Cerebras Systems, Los Altos, CA; Gigantor Technologies, Inc., Melbourne Beach, FL; Huawei Technologies Co., Ltd. (ELO), Shenzhen, PEOPLE'S REPUBLIC OF CHINA; Tetra, Seattle, WA; and Nebuly Societa Benefit S.r.l., Torino, ITALY have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and MLCommons intends to file additional written notifications disclosing all changes in membership.

On September 15, 2020, MLCommons filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on September 29, 2020 (85 FR 61032).

The last notification was filed with the Department on August 17, 2023. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on October 6, 2023 (88 FR 69671).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–27587 Filed 12–14–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Undersea Technology Innovation Consortium

Notice is hereby given that, on October 6, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Undersea Technology Innovation Consortium (''UTIC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Amphenol Maryland, Inc., Frederick, MD; Aveox, Inc., Simi Valley, CA; Beacon Industries, Inc., Newington, CT; Breault Research Organization, Inc., Tucson, AZ; CAE USA, Inc., Tampa, FL; Jaia Robotics, Inc., Bristol, RI; Michael Fry Defense LLC, Dutton, VA; and Oteemo, Inc., Reston, VA have been added as parties to this venture.

Also, Constellation Software Engineering Corp., Annapolis, MD; iArchimedes, Inc., Arlington, VA; KULR Technology Corp., San Diego, CA; Mainstream Engineering Corp., Rockledge, FL; and Sterling Design, Inc., Oceanside, CA have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and UTIC intends to file additional written notifications disclosing all changes in membership.

On October 9, 2018, UTIC filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on November 2, 2018 (83 FR 55203).

The last notification was filed with the Department on July 5, 2023. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on August 23, 2023 (88 FR 57479).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–27599 Filed 12–14–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Alliance for OpenUSD Series LLC

Notice is hereby given that, on October 30, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Alliance for OpenUSD Series LLC (''AOUSD'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the name and principal place of business of the standards development organization and (2) the nature and scope of its standards development activities. The notifications were filed for the purpose

of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to section 6(b) of the Act, the name and principal place of business of the standards development organization is: Alliance for OpenUSD Series LLC, series of Joint Development Foundation Projects, LLC, Dover, DE. The nature and scope of AOUSD's standards development activities are: standardizing, developing, and evolving Universal Scene Description (USD) in an open forum to promote interoperability of 3D content to empower creators and consumers worldwide. AOUSD will initially focus on standardizing essential features of USD (including technical details or requirements on composition model, file format, data model, and schema) that are stable, understood, implemented and important for 3D authoring and transmission. In the future, AOUSD may also develop additional standards specifications to promote interoperability of 3D content through USD. AOUSD will also develop educational, marketing, and informational materials to facilitate the understanding and adoption of its standards.

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–27580 Filed 12–14–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Cooperative Research Group on Numerical Propulsion System Simulation

Notice is hereby given that, on November 10, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Southwest Research Institute—Cooperative Research Group on <<Project_Name>> (''<<Acronym>>'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Specifically, GEII, Cambridge, MA, has been added as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open and NPSS intends to file additional written notifications disclosing all changes in membership or planned activities.

On December 11, 2013, NPSS filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on February 20, 2014, (79 FR 9767).

The last notification was filed with the Department on April 25, 2022. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on May 13, 2023, (87 FR 29380).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–27624 Filed 12–14–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—The Open Group, L.L.C.

Notice is hereby given that, on September 29, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), The Open Group, L.L.C. (''TOG'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, 5HART–IT OPLEIDINGEN B.V., Velp, THE NETHERLANDS; Actenum Corporation, Vancouver, CANADA; Apogee Semiconductor, Inc., Plano, TX; ARK CLS, Bedford, UNITED KINGDOM; Beijing Jurassic Software Co., Ltd., Beijing,PEOPLE'S REPUBLIC OF CHINA; BKO Services, Houston, TX; Boomi, Chesterbrook, PA; C3RiOS Systems, Inc., Montreal, CANADA; CNPC USA Corporation, Houston, TX; COMPETENSIS, Fontaines St Martin, FRANCE; Cornet Technology Inc., Springfield, VA; Denodo Technologies Inc., Palo Alto, CA; Docaposte Institute, Ivry Sur Seine, FRANCE; Dragos, Inc., Hanover, MD; EastSea Star Software Ltd, Ho Chi Minh, VIETNAM; Engineering Simulation and Scientific Software LTDA, Florianópolis, BRAZIL; Freelance Provider, Lac 1, TUNISIA; Glasspaper Learning AS, Oslo, NORWAY; GooBiz—Goal Oriented Business, Cergy, FRANCE; Indra Soluciones Tecnologías de la Información S.L.U., Alcobendas, SPAIN; Innoflight, LLC, San Diego, CA; LearnQuest s.r.o., Prague, CZECH REPUBLIC; Lin and Associates, Inc., Phoenix, AZ; Marine Corps Systems Command, Product Manager EWS, Stafford, VA; Microchip Technology Inc., Chandler, AZ; National Aeronautics and Space Administration (NASA), Washington, DC; Net Zero Matrix Ltd., Douglas, UNITED KINGDOM; One Stop Systems, Inc., Escondido, CA; OnTime Networks, LLC, Latham, NY; Onyx Data LLC, Engelwood, CO; ORSYS Formation, Paris, FRANCE; Palladio Consulting GmbH & Co. KG, Bavaria, GERMANY; Petroleum Development Oman L.L.C., Muscat, SULTANATE OF OMAN; Red Hat Inc., McLean, VA; and SAS Acceliance, Le Raincy, FRANCE, have been added as parties to this venture.

Also, Akridata, Inc., Los Altos, CA; Buurst, Inc., Houston, TX; CommandPrompt, Inc., Bellingham, WA; CRI2M SRL, Brussels, BELGIUM; DeepIQ, LLC, Houston, TX; EnergyVue Services Limited; Aberdeen, UNITED KINGDOM; G42 Cloud Technology L.L.C., Al Reem Island, UNITED ARAB EMIRATES; Galp Exploração e Produção Petrolífera S.A., Lisbon, PORTUGAL; Geopost Consultoria em Geologia e Geofísica Ltda; Rio de Janeiro, BRAZIL; GeoSynergy Pty Ltd, Brisbane, AUSTRALIA; Green Horizon AS, Sandnes, NORWAY; JourneyOne, West Perth, AUSTRALIA; Luxembourg Institute of Science and Technology (LIST), Luxembourg-Kirchberg, LUXEMBOURG; Magseis Fairfield ASA, Lysaker, NORWAY; Midwest Microwave Solutions, Inc., Hiawatha, IA; PAS Global LLC, Houston, TX; PM Expert Group UK LIMITED, Noida, INDIA; Prediktor AS, Fredrikstad, NORWAY; RDRTec, Inc., Roebling, NJ; Ruths Analytics and Innovation, Inc. (d/b/a ''Petro.ai''), Houston, TX; Security Compass, Ontario, CANADA; Softeam, Paris, FRANCE; Softserve Inc, Austin, TX; Tech Mahindra Limited, Mumbai, INDIA; The Board of Supervisors of Louisiana State University, Baton Rouge, LA; VMTC—Vincenzo Marchese Training & Consulting, London, UNITED KINGDOM; and Zodiac Data Systems, Alpharetta, GA, have withdrawn as parties to this venture.

Additionally, Koch Industries has changed its name to Koch Capabilities,

LLC, Wichita, KS; Oriola Defense & Security LLC to Safran Federal Systems, Inc., Rochester, NY; Integrata AG to Cegos Integrata GmbH, Stuttgart, GERMANY; and NovaTech Process Solutions to Valmet Automation Oy, Vespoo, FINLAND.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and TOG intends to file additional written notifications disclosing all changes in membership.

On April 21, 1997, TOG filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on June 13, 1997 (62 FR 32371).

The last notification was filed with the Department on June 29, 2023. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on August 23, 2023 (88 FR 57478).

Suzanne Morris,

Deputy Director Civil Enforcement Operations, Antitrust Division.

[FR Doc. 2023–27558 Filed 12–14–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 22–48]

APEXX Pharmacy, LLC; Decision and Order

I. Introduction

On August 2, 2022, the Administrator of the Drug Enforcement Administration (DEA or Government) issued an Order to Show Cause and Immediate Suspension of Registration (collectively, OSC) to APEXX Pharmacy, LLC (Respondent), of Hudson, Florida. OSC, at 1, 9. The OSC immediately suspended, and proposes the revocation of, Respondent's DEA registration No. FA5493363, pursuant to 21 U.S.C. 824(d) and (a)(4), and 21 U.S.C. 823(g)(1).[1] *Id.* at 1. The OSC more specifically alleges that Respondent's ''continued registration is inconsistent with the public interest.'' *Id.* It also alleges violations of Florida law. *Supra* n.1.

The hearing Respondent requested was held on December 13 and 14, 2022. Hearing Transcript. The Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision of the Administrative Law Judge (RD) concludes that Respondent's registration should be revoked. RD, at 27. This Decision and Order, based solely on OSC allegations that Respondent filled controlled substances under the names of three individuals who, at the time, were deceased, agrees.[2] Fla. Admin. Code r. 64B16–27.1001(4). Accordingly, the Agency will revoke Respondent's registration. *Infra* Order.

II. Findings of Fact

The Allegation That Respondent Filled Controlled Substance Prescriptions Issued to Deceased Individuals

The OSC alleges, among other things, that Respondent filled controlled substance prescriptions issued to individuals who, at the time, were deceased. OSC, at 9. According to the Government's evidence, Respondent filled at least forty-seven such controlled substance prescriptions. *See, e.g.,* GX 6–GX 8 and GX 12–GX 14.

Respondent does not dispute that it filled the forty-seven Schedule II controlled substance prescriptions. *See, e.g.,* Tr. 366. It does not, however, take responsibility for doing so. Instead, it maintains that it acted properly and suggests, without any documentary or evidentiary support, a complex and layered theory of misconduct by others.

According to the testimony of Respondent's owner/Pharmacist-in-Charge (PIC), whom the Agency finds to be not credible, *infra,* the ''only way'' he can determine the validity of a prescription is to call the issuing doctor and ask whether the doctor wrote the specific elements of the order for the individual to whom the prescription is issued. *Id.* at 368–69. He testified that he does this for all of the prescriptions presented to his pharmacy. *Id.* at 369. He also testified that, for the forty-seven controlled substance prescriptions, each issuing doctor provided the verification. *Id.*

Further, Respondent's owner/PIC testified, for the forty-seven prescriptions, as with all other prescriptions, that ''every patient that comes into the pharmacy ha[s] to have an ID,'' that he ''get[s] their ID,'' and that he has ''to have an ID that matches the person in front of . . . [him].'' Tr. 367. He specifically testified that he ''always'' makes a copy of the IDs to put in the pharmacy's files, and that those prescriptions were not an exception.[3] *Id.*

While he acknowledged the Government-sponsored testimony that no copies of IDs presented for the forty-seven prescriptions were found in Respondent's files, the owner/PIC testified that ''that is impossible'' because ''[f]or every patient there ha[s] to be an ID to match the—the patient. They have to fill the information sheet and they have to give me an ID to match them and the prescription that they are filling.'' *Id.* at 368. He further testified that he was provided IDs for the three deceased individuals' prescriptions, that he made copies of them, and that ''those IDs seem to match the prescriptions that were presented to'' him. *Id.* The owner/PIC could not recall whether, for each of the forty-seven prescriptions, the individual presenting the Schedule II controlled substance prescription provided an ID in hard copy or electronically. *Id.* at 367; *see also* RD, at 23 (owner/PIC's ''testimony is undermined by his statement that he could not remember whether the customer presented a physical identification or emailed him one from a phone application''). Regardless, as already noted, Respondent's owner/PIC testified that he has ''to have an ID that matches the person in front of . . . [him].'' Tr. 367.

When asked for his explanation as to how Respondent filled any of the forty-seven Schedule II controlled substance prescriptions issued to deceased

[1] Effective December 2, 2022, the Medical Marijuana and Cannabidiol Research Expansion Act, Public Law 117–215, 136 Stat. 2257 (2022) (Marijuana Research Amendments or MRA), amended the Controlled Substances Act (CSA) and other statutes. Relevant to this matter, the MRA redesignated 21 U.S.C. 823(f), cited in the OSC, as 21 U.S.C. 823(g)(1). Accordingly, this Decision cites to the current designation, 21 U.S.C. 823(g)(1), and to the MRA-amended CSA throughout.

The Federal and state substantive violations alleged in the OSC include 21 U.S.C. 841(a)(2) and 842(a)(1); 21 CFR 1306.04(a) and 1306.06; Fla. Stat. 893.055(3)(a)(3); and Fla. Admin. Code r. 64B16–27.810(1) and (2), Fla. Admin. Code r. 64B16–27.831(1)(b) and (c), (2)(c), and (4), and Fla. Admin. Code r. 64B16–27.1001(4).

[2] The OSC's substantive headings describe the allegations as ''Improper Filling of Prescriptions to Undercover Officers,'' specifically referencing July 7, 2022, July 14, 2022, and July 15, 2022, ''Issuing Prescriptions to Dead Patients,'' and ''Imminent Danger.'' The OSC cites federal and state authorities as the bases of its allegations. *Supra* n.1.

This Decision is adjudicating only OSC allegations that Respondent filled controlled substance prescriptions issued to individuals who were deceased. Because these allegations alone are sufficient to revoke Respondent's registration, the Agency does not reach the other OSC allegations. The other OSC allegations include various references to conduct observed by and involving undercover officers; the record evidence related to those observations and interactions is periodically referenced herein as relevant to the analysis of Respondent's credibility and trustworthiness.

[3] The admitted exhibits do not support the owner/PIC's testimony that he always makes a copy of the IDs. GX 4; GX 5. They indicate that the owner/PIC made copies of controlled substance prescriptions and patient history forms. *E.g.,* GX 5, at 1, 5. They do not indicate, however, that the owner/PIC made a copy of any of the IDs that the undercover officers handed him. *See, e.g.,* GX 5, at 2, 10. Accordingly, the Agency finds that the testimony of Respondent's owner/PIC lacks credibility. *See also infra* section V (credibility discussion).

persons, Respondent's owner/PIC testified that the ''only thing'' he ''can think of is identity theft.'' Tr. 366. In other words, instead of acknowledging the possibility that his actions led, in any way, to the diversion of Schedule II controlled substances ordered on any of the forty-seven prescriptions, Respondent's owner/PIC engaged in speculation and misdirection.

Respondent offered no documentary evidence to support the identity theft theory. Indeed, it should have had evidence to prove or disprove the identity theft theory had Respondent's owner/PIC, as he testified (though not credibly), required the production of an ID that matched the individual presenting any of the forty-seven Schedule II controlled substance prescriptions, copied the ID, and put the copy in the pharmacy's files. *See supra* n.3. The Diversion Investigator (DI), though, credibly testified that he did not see any such IDs in Respondent's files for any of the forty-seven controlled substance prescriptions. Tr. 276–77; *infra.*

Again, though, instead of acknowledging the possibility that its actions or inactions led, in any way, to there being no copies of IDs in the pharmacy's files for any of the forty-seven prescriptions, Respondent suggested that the Government's seizure of its files was the cause. *See, e.g.,* Respondent Prehearing Statement, at 8 (''Proposed Documents—None because the Government seized all APEXX Pharmacy documents without a valid search warrant, as required pursuant to F.S. 465'').

Respondent did not, however, successfully develop its suggestions of Government responsibility for Respondent's allegedly missing pharmacy records. Instead, the Special Agent (S/A) testified about the seizure of Respondent's files, the DI testified about the content of those seized files, and the ALJ explicitly invited Respondent to develop its position through the cross-examination of both Government witnesses. *See, e.g.,* Tr. 123–31, 132–34, 136–37 (S/A testimony); *id.* at 126–27, 130, 134–36, 139, 277 (Administrative Law Judge-Respondent colloquy); *see also id.* at 206–09, (Respondent's cross examination of S/A); *id.* at 272–73, 275–77 (Respondent's cross examination of DI). However, Respondent did not successfully develop, on cross-examination of those two witnesses, its suggestion that Government error is the reason that there are no IDs in Respondent's seized files for any of the forty-seven controlled substance prescriptions. *Supra.* Instead, Respondent's owner/PIC testified that the Government's exhibits, offered as including Respondent's records regarding the forty-seven controlled substance prescriptions, ''match what is on PDMP.'' [4] Tr. 366; *see also id.* at 134. As it is Respondent that submitted these data to E–FORCSE, Florida's PDMP, the fact that Respondent's owner/PIC admits that the data in the Government's exhibits match the data in the PDMP is further evidence of the soundness and legal sufficiency of the Government's seizure of Respondent's files and the lack of credibility of Respondent's claims.

In sum, Respondent is asking the Agency to credit its *post hoc,* concocted sequential claims that: (1) it always copies and files an ID that matches each person presenting a prescription, (2) on forty-seven occasions it was presented with IDs that matched the physical characteristics of the persons presenting the forty-seven prescriptions for Schedule II controlled substances, but those IDs were fake and part of the perpetration of forty-seven incidents of identity theft, (3) Respondent cannot document the forty-seven fake IDs because of unspecified Government errors during the Government's search and seizure of Respondent's files, (4) and Respondent cannot develop the parameters of the unspecified Government errors even though it was given ample opportunity to do so during the hearing. The Agency declines.

After thoroughly reviewing the transmitted record, the Agency concludes that it will afford the testimony of both Government witnesses full credibility, and find that the testimony of Respondent's owner/PIC that conflicts with the Government witnesses' testimonies is not credible or creditable.[5] *Accord* RD, at 4, 5 (Government witnesses); *id.* at 14 (Respondent's witness). Further, when testimony of Respondent's owner/PIC conflicts with the testimony of a Government witness, the Agency will credit the testimony of the Government witness. *Accord* RD, at 14.

Based on the record before it, the Agency finds uncontroverted evidence that Respondent, through Respondent's owner/PIC, filled forty-seven controlled substance prescriptions issued to individuals who, at the time, were deceased.[6] *See, e.g.,* GX 6–GX 8 and GX 12–GX 14; *infra* section III. The Agency further finds uncontroverted record evidence that, due to these fillings, Respondent diverted 1,040 hydromorphone 8 mg tablets and 966 oxycodone HCL 30 mg tablets, or a total of 2006 Schedule II controlled substance tablets.[7] *Id.* The Agency concludes, based on substantial record evidence, that, since the individuals to whom these controlled substance prescriptions were issued were deceased, Respondent could not have ''dispensed'' the prescribed controlled substances to the individuals to whom the prescriptions were issued, and necessarily ''dispensed'' each of these forty-seven controlled substance prescriptions to a ''third party'' instead. GX 12–14; *accord* RD, at 24.

The Agency also finds substantial record evidence that Respondent's owner/PIC did not explain credibly why Respondent's seized files do not contain any of the alleged copies of the deceased customers' identifications that its owner/PIC testified he made when filling the forty-seven Schedule II controlled substance prescriptions. *Supra.*

III. Florida Legal Prohibition on ''Dispensing'' Prescriptions to ''Third Parties''

Among its other statutes and regulatory provisions concerning pharmacy standards of practice, Florida prohibits the ''dispensing'' of controlled

[4] PDMP stands for Prescription Drug Monitoring Program.

[5] The credibility of Respondent's owner/PIC is further eroded by his relentless pursuit of controlled substances sales and his willingness to violate legal requirements. *See, e.g.,* GX 5, at 7 (Respondent's owner/PIC telling the undercover sponsor which days during the following week to bring in ''some more people'' whom the sponsor will be ''taking to the doc''), GX 5, at 3, 4 (showing how Respondent's owner/PIC coached undercover sponsors and undercover officers on what to do to get the controlled substances from him that they want), and *infra* section V (addressing Respondent's owner/PIC's decision to close, permanently, the pharmacy's back door).

[6] Based on all of the above, the Agency does not credit Respondent's submissions to E–FORCSE that the individuals who dropped off the forty-seven prescriptions and picked up the filled controlled substances were the individuals to whom the controlled substance prescriptions were issued. GX 6, at 4, GX 7, at 4, and GX 8, at 4.

Further, a violation of the Florida regulation that this Decision is applying, according to the regulation's text, simply occurs when a pharmacy physically ''dispenses'' a controlled substance to a ''third party,'' not to the individual in whose name the prescription is written. *Cf., e.g., United States* v. *Green Drugs,* 905 F.2d 694, 698 (3d Cir. 1990) (''The defendants further argue that the result we enunciate here would allow the government to hold virtually any pharmacy liable for the most minor infraction even where the greatest care has been exercised and good faith demonstrated. This is a consequence that Congress likely accepted in enacting the [Controlled Substances] Act, and perhaps should be considered together with the broad discretion the district court has in assessing fines.'').

[7] Some prescriptions were written for Dilaudid 8 mg and were filled with hydromorphone HCL 8 mg. *See, e.g.,* GX 10, at 9–10, 13–18, and 25–28; GX 11, at 3–4, 19–20, 23–26, and 31–32.

substances to a ''third party.'' Fla. Admin. Code r. 64B16–27.1001(4) (2010) (''The pharmacist, as an integral aspect of dispensing, shall be directly and immediately available to the patient or the patient's agent for consultation and shall not dispense to a third party. No prescription shall be deemed to be properly dispensed unless the pharmacist is personally available.''). According to the clear text of the regulation, nothing beyond the physical ''dispensing'' to a ''third party'' constitutes a violation. This regulation was in effect for the entire time covered by the OSC's allegations and, therefore, applies to Respondent's actions during that period.

Having thoroughly analyzed all of the record evidence, the Agency finds substantial and undisputed record evidence that Respondent ''dispensed'' controlled substances, pursuant to prescriptions issued to deceased individuals, to ''third parties'' at least forty-seven times. *See, e.g.,* GX 6–GX 8 and GX 12–GX 14.

IV. Discussion

Under Section 304 of the CSA, ''[a] registration . . . to . . . distribute[ ] or dispense a controlled substance . . . may be suspended or revoked by the Attorney General upon a finding that the registrant . . . has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined by such section.'' 21 U.S.C. 824(a)(4). In the case of a ''practitioner,'' which is defined in 21 U.S.C. 802(21) to include a ''pharmacy,'' Congress directed the Attorney General to consider five factors in making the public interest determination. 21 U.S.C. 823(g)(1)(A–E). The five factors are considered in the disjunctive. *Robert A. Leslie, M.D.,* 68 FR 15227, 15230 (2003).

According to Agency decisions, the Agency ''may rely on any one or a combination of factors and may give each factor the weight [it] deems appropriate in determining whether'' to revoke a registration. *Id.; see also Jones Total Health Care Pharmacy, LLC* v. *Drug Enf't Admin.,* 881 F.3d 823, 830 (11th Cir. 2018) (*citing Akhtar-Zaidi* v. *Drug Enf't Admin.,* 841 F.3d 707, 711 (6th Cir. 2016)); *MacKay* v. *Drug Enf't Admin.,* 664 F.3d 808, 816 (10th Cir. 2011); *Volkman* v. *U. S. Drug Enf't Admin.,* 567 F.3d 215, 222 (6th Cir. 2009); *Hoxie* v. *Drug Enf't Admin.,* 419 F.3d 477, 482 (6th Cir. 2005). Moreover, while the Agency is required to consider each of the factors, it ''need not make explicit findings as to each one.'' *MacKay,* 664 F.3d at 816 (*quoting Volkman,* 567 F.3d at 222); *see also Hoxie,* 419 F.3d at 482. ''In short, . . . the Agency is not required to mechanically count up the factors and determine how many favor the Government and how many favor the registrant. Rather, it is an inquiry which focuses on protecting the public interest; what matters is the seriousness of the registrant's misconduct.'' *Jayam Krishna-Iyer, M.D.,* 74 FR 459, 462 (2009). Accordingly, as the Tenth Circuit has recognized, findings under a single factor can support the revocation of a registration. *MacKay,* 664 F.3d at 821.

According to DEA regulations, ''[a]t any hearing for the revocation . . . of a registration, the . . . [Government] shall have the burden of proving that the requirements for such revocation . . . pursuant to . . . 21 U.S.C. 824(a) . . . are satisfied.'' 21 CFR 1301.44(e).

In this matter, while all of the 21 U.S.C. 823(g)(1) factors have been considered, the Government's evidence in support of its *prima facie* case regarding the forty-seven prescriptions is confined to Factors B and D.[8] Government's Proposed Findings of Fact and Conclusions of Law, at 19; *see also* RD, at 16.

Factors B and/or D—Respondent's Experience in Dispensing Controlled Substances and Compliance With Applicable Laws Related to Controlled Substances

Florida regulations explicitly prohibit pharmacies from ''dispensing'' to ''third parties.'' Fla. Admin. Code r. 64B16–27.1001(4) (2010); *supra* sections II and III. The record evidence is uncontroverted that, at least forty-seven times, Respondent filled Schedule II controlled substance prescriptions when the persons to whom the prescriptions were issued were deceased. Due to these fillings, Respondent diverted 1,040 hydromorphone 8 mg tablets and 966 oxycodone HCL 30 mg tablets, or a total of 2006 Schedule II controlled substance tablets to ''third parties.'' *Supra* sections II and III. The Agency finds that, as a result of this ''dispensing'' to ''third parties,'' Respondent repeatedly violated applicable law, supporting the revocation of its registration. 21 U.S.C. 824(a)(4) and Fla. Admin. Code r. 64B16–27.1001(4) (2010).

Accordingly, the Agency finds that Respondent's continued registration is inconsistent with the public interest. 21 U.S.C. 824(a)(4) and 823(g)(1)(B) and (D).

V. Sanction

Where, as here, the Government has met its *prima facie* burden of showing that Respondent's continued registration is inconsistent with the public interest due to its numerous violations pertaining to controlled substances, the burden shifts to the Respondent to show why it can be entrusted with a registration. *Garrett Howard Smith, M.D.,* 83 FR 18882 (2018). The issue of trust is necessarily a fact-dependent determination based on the circumstances presented by the individual respondent. *Jeffrey Stein, M.D.,* 84 FR 46968, 46972 (2019). Moreover, as past performance is the best predictor of future performance, DEA Administrators have required that a registrant who has committed acts inconsistent with the public interest must accept responsibility for those acts and demonstrate that it will not engage in future misconduct. *Id.* A registrant's acceptance of responsibility must be unequivocal. *Id.* In addition, a registrant's candor during the investigation and hearing has been an important factor in determining acceptance of responsibility and the appropriate sanction. *Id.* Furthermore, DEA Administrators have found that the egregiousness and extent of the misconduct are significant factors in determining the appropriate sanction. *Id.* DEA Administrators have also considered the need to deter similar acts by the respondent and by the community of registrants. *Id.*

Regarding these matters, there is no record evidence that Respondent, or its owner/PIC, takes responsibility, let alone unequivocal responsibility, for the founded, egregious violations involving the diversion of 2006 Schedule II controlled substance tablets. *Supra* sections II and IV. Instead, Respondent's case consists of one debunked and failed attempt after another to shift the blame for the unlawful filling of at least forty-seven controlled substance prescriptions away from itself.[9]

The interests of specific and general deterrence weigh in favor of revocation. Respondent has not convinced the Agency that it understands that its controlled substance prescription filling fell short of the applicable legal standards and that this substandard filling has serious negative ramifications for the health, safety, and medical care of individuals who come to it for medicine. *See, e.g., Garrett Howard Smith, M.D.,* 83 FR 18910 (collecting cases). As such, it is not reasonable to

[8] Neither Respondent nor the Government argues that it offered evidence relevant to Factors A, C, or E. Although the Agency considered Factors A, C, and E, it finds that they are not relevant to this adjudication. *Accord* RD, at 16.

[9] The testimony offering these serial attempts reflects poorly on the candor of Respondent's owner/PIC. *Supra* section II.

believe that Respondent's future controlled substance prescription filling will comply with legal requirements.[10] Indeed, Respondent's owner/PIC's own testimony suggests that he has no intention of complying with the CSA in the future because he believes compliance is unduly burdensome.[11]

Further, given the foundational nature and vast number of Respondent's violations, a sanction less than revocation would send a message to the existing and prospective registrant community that compliance with the law is not a condition precedent to maintaining a registration.

The Agency finds that it cannot entrust Respondent with a registration.[12] It finds that Respondent's actions were motivated by profiting while avoiding DEA's detection and lacked any genuine care for the health and welfare of its customers. For example, the record evidence shows that Respondent coached customers regarding what to write on their forms in order to get the desired controlled substances, *see, e.g.,* GX 5, at 3, 4, and shows the complete willingness of Respondent's owner/PIC to continue to fill the controlled substance prescriptions that S/A and undercover officer ''sponsors'' were bringing him. GX 5, at 1, 7.[13]

Respondent's owner/PIC's testimony regarding those matters further erodes the Agency's trust in the truthfulness of Respondent's owner/PIC and in the ability of Respondent to maintain a registration in compliance with the law.

In sum, the record supports the imposition of a sanction because Respondent did not unequivocally accept responsibility for its egregious and extensive violations, and has not convinced the Agency that it can be entrusted with a registration.

Accordingly, the Agency shall order the sanction the Government requested, as contained in the Order below.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a)(4), I hereby revoke DEA registration No. FA5493363 issued to APEXX Pharmacy, LLC. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(g)(1), I hereby deny any pending application of APEXX Pharmacy, LLC, for a DEA Registration in Florida. This Order is effective January 16, 2024.

Signing Authority

This document of the Drug Enforcement Administration was signed on December 7, 2023, by Administrator Anne Milgram. That document with the original signature and date is maintained by DEA. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DEA Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of DEA. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Heather Achbach,

Federal Register Liaison Officer, Drug Enforcement Administration.

[FR Doc. 2023–27524 Filed 12–14–23; 8:45 am]

BILLING CODE 4410–09–P

[10] The Agency notes the record evidence, in GX 5, of two incidents when Respondent's owner/PIC declined to provide the undercover officers with additional controlled substances without a prescription. GX 5, at 6, 8–9. These incidents do not excuse Respondent's owner/PIC's otherwise laser-focused pursuit of controlled substances sales regardless of legal requirements. *Supra* section II.

[11] Respondent's owner/PIC testified that ''filling controls is a lot of headache. You have to record it down, you have to go through a lot of process, and nobody wants to deal with that.'' Tr. 297. Respondent's owner/PIC further testified that when he worked for larger pharmacies in the past, he would tell customers that controlled substances were not in stock because he got paid the same amount whether he filled controlled or non-controlled substances. *Id.* He testified, ''why would pharmacies . . . want to fill a control medication for somebody when it can come back to haunt him when he can say I don't have it, I will fill just the non-controls.'' *Id.*

[12] While only the evidence relating to the found violation, *supra,* was used to determine that the Government made a *prima facie* case, the entire record supports the Agency's determination that Respondent's owner/PIC is not credible and that, therefore, the Agency cannot entrust Respondent with a registration.

[13] GX 5, at 1 (''S/A: 'Can I drop you some more scripts?' . . . . Respondent's owner/PIC: 'How many is there?' ''); GX 5, at 7 (''Undercover Officer: 'I got some more people I'm taking to the doc. you good with me bringing them here again? Um next week.' . . . . Respondent's owner/PIC: 'Next week, yeah, next week that's fine.' '').

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Gary R. Wisner, M.D.; Decision and Order

On March 1, 2023, the Drug Enforcement Administration (DEA or Government) issued an Order to Show Cause (OSC) to Gary R. Wisner, M.D. (Registrant). Request for Final Agency Action (RFAA), Exhibit (RFAAX) 1, at 1, 3. The OSC proposed the revocation of Registrant's Certificates of Registration (COR) Nos. FW8432471 and AW2971073 at the registered addresses of 621 S. Ham Ln., Ste. A, Lodi, California 95242, and 16246 N. Locust Tree Road, Lodi, California 95240, respectively. *Id.* at 1. The OSC alleged that Registrant's registrations should be revoked because Registrant was ''without authority to prescribe, administer, dispense, or otherwise handle controlled substances in the State of California, the state in which [he is] registered with DEA.'' *Id.* at 2 (citing, *inter alia,* 21 U.S.C. 824(a)(3); 21 CFR 1301.37(b)).

The OSC notified Registrant of his right to file with DEA a written request for hearing, and that if he failed to file such a request, he would be deemed to be in default. *Id.* at 2 (citing 21 CFR 1301.43(c)(1)). Here, Registrant did not request a hearing. RFAA, at 1.[1] ''A default, unless excused, shall be deemed to constitute a waiver of the [registrant's] right to a hearing and an admission of the factual allegations of the [OSC].'' 21 CFR 1301.43(e).

Further, ''[i]n the event that a registrant . . . is deemed to be in default . . . DEA may then file a request for final agency action with the Administrator, along with a record to support its request. In such circumstances, the Administrator may enter a default final order pursuant to [21 CFR] 1316.67.'' *Id.* 1301.43(f)(1). Here, the Government has requested final agency action based on Registrant's default pursuant to 21 CFR 1301.43(c), (f), and 1301.46. RFAA, at 1.

Findings of Fact

The Agency finds that, in light of Registrant's default, the factual allegations in the OSC are admitted. According to the OSC, ''[e]ffective January 30, 2023, as part of an agreement with the [Medical Board of California] . . . [Registrant] surrendered [his] license to practice medicine in the State of California.'' RFAAX 1, at 1–2.

According to California's online records, of which the Agency takes official notice, the status of Registrant's physician and surgeon license (type A) is listed as surrendered, and he is not permitted to practice.[2] California

[1] Based on the Government's submissions in its RFAA dated August 3, 2023, the Agency finds that service of the OSC on Registrant was adequate. Specifically, the included declaration by a DEA Diversion Investigator (DI) indicates that on March 13, 2023, the DI personally ''served [Respondent] a copy of the [OSC] by hand delivery.'' RFAAX 2, at 1.

[2] Under the Administrative Procedure Act, an agency ''may take official notice of facts at any stage in a proceeding—even in the final decision.'' United States Department of Justice, Attorney General's Manual on the Administrative Procedure Act 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). Pursuant to 5 U.S.C. 556(e), ''[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a

Department of Consumer Affairs, License Search, *https://search.dca.ca.gov/* (last visited date of signature of this Order). Therefore, the Agency finds that Registrant is not currently authorized to dispense or handle controlled substances in California, the state in which he is registered with DEA.

Discussion

Pursuant to 21 U.S.C. 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued under 21 U.S.C. 823 ''upon a finding that the registrant . . . has had his State license or registration suspended . . . [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances.'' With respect to a practitioner, DEA has also long held that the possession of authority to dispense controlled substances under the laws of the state in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a practitioner's registration. *See, e.g., James L. Hooper, D.O.,* 76 FR 71371, 71372 (2011), *pet. for rev. denied,* 481 F. App'x 826 (4th Cir. 2012); *Frederick Marsh Blanton, D.O.,* 43 FR 27616, 27617 (1978).[3]

According to California statute and relevant to Registrant's COR, ''[n]o person other than a physician . . . shall write or issue a prescription.''[4] Cal. Health & Safety Code 11150. Further, ''physician,'' as defined by California statute, is a person who is ''licensed to practice'' in California. *Id.* 11024.

Here, the evidence in the record is that Registrant currently lacks authority to handle controlled substances in California because his California physician and surgeon license has been surrendered. As already discussed, a person must hold a valid license to dispense a controlled substance in California. Thus, because Registrant lacks authority to handle controlled substances in California, Registrant is not eligible to maintain a DEA registration. Accordingly, the Agency will order that Registrant's DEA registrations be revoked.

Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a), I hereby revoke DEA Certificates of Registration Nos. FW8432471 and AW2971073 issued to Gary R. Wisner, M.D. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(g)(1), I hereby deny any pending applications of Gary R. Wisner, M.D., to renew or modify these registrations, as well as any other pending application of Gary R. Wisner, M.D., for additional registration in California. This Order is effective January 16, 2024.

Signing Authority

This document of the Drug Enforcement Administration was signed on December 7 2023, by Administrator Anne Milgram. That document with the original signature and date is maintained by DEA. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DEA Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of DEA. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Heather Achbach,

Federal Register Liaison Officer, Drug Enforcement Administration.

[FR Doc. 2023–27522 Filed 12–14–23; 8:45 am]

BILLING CODE 4410–09–P

party is entitled, on timely request, to an opportunity to show the contrary.'' Accordingly, Registrant may dispute the Agency's finding by filing a properly supported motion for reconsideration of findings of fact within fifteen calendar days of the date of this Order. Any such motion and response shall be filed and served by email to the other party and to the DEA Office of the Administrator, Drug Enforcement Administration at *dea.addo.attorneys@dea.gov.*

[3] This rule derives from the text of two provisions of the Controlled Substances Act. First, Congress defined the term ''practitioner'' to mean ''a physician . . . or other person licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . ., to distribute, dispense, . . . [or] administer . . . a controlled substance in the course of professional practice.'' 21 U.S.C. 802(21). Second, in setting the requirements for obtaining a practitioner's registration, Congress directed that ''[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.'' 21 U.S.C. 823(g)(1). Because Congress has clearly mandated that a practitioner possess state authority in order to be deemed a practitioner under the CSA, DEA has held repeatedly that revocation of a practitioner's registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the state in which he practices. *See, e.g., James L. Hooper,* 76 FR at 71371–72; *Sheran Arden Yeates, D.O.,* 71 FR 39130, 39131 (2006); *Dominick A. Ricci, D.O.,* 58 FR 51104, 51105 (1993); *Bobby Watts, D.O.,* 53 FR 11919, 11920 (1988); *Frederick Marsh Blanton,* 43 FR 27617.

[4] Although additional specified categories of persons are permitted to write or issue prescriptions, none of those practitioner categories are applicable to Registrant.

DEPARTMENT OF LABOR

Bureau of Labor Statistics

Technical Advisory Committee; Request for Nominations

AGENCY: Bureau of Labor Statistics (BLS), Department of Labor.

ACTION: Request for nominations.

SUMMARY: The BLS is soliciting new members for the Technical Advisory Committee (TAC) to address four member terms expiring on April 13, 2024, and any additional vacancies that may occur on the TAC between the date of publication of this notice and April 13, 2024.

DATES: Nominations for the TAC membership should be transmitted by January 16, 2024.

ADDRESSES: Nominations for the TAC membership should be emailed to *BLSTAC@bls.gov.* Nominations are only being accepted through email as BLS is in maximum telework status pending its relocation to Suitland.

FOR FURTHER INFORMATION CONTACT: Jay Stewart, Senior Research Economist, U.S. Bureau of Labor Statistics. Telephone: 202–691–7376. This is not a toll-free number. Email: *BLSTAC@bls.gov.*

SUPPLEMENTARY INFORMATION: The TAC provides advice to the Bureau of Labor Statistics on technical aspects of data collection and the formulation of economic measures and makes recommendations on areas of research. On some technical issues, there are differing views and receiving feedback at public meetings provides BLS with the opportunity to consider all viewpoints.

The Committee consists of approximately 16 members who serve as Special Government Employees. Members are appointed by the BLS and are approved by the Secretary of Labor. Committee members are experts in economics, statistics, data science, and survey design. Members typically have Ph.D.s in their field and have significant experience. They are prominent experts in their fields and recognized for their professional achievements and objectivity. The economic experts will have research experience with technical issues related to BLS data and will be familiar with employment and unemployment statistics, price index numbers, compensation measures, productivity measures, occupational and health statistics, or other topics relevant to BLS data series. The statistical experts will have experience with sample design, data analysis,

computationally intensive statistical methods, non-sampling errors or other areas which are relevant to BLS work. The data science experts will have experience compiling, modeling, analyzing, and interpreting large sets of structured and unstructured data. The survey design experts will have experience with questionnaire design, usability, or other areas of survey development. Collectively, the members will provide a balance of expertise in all of these areas.

BLS invites persons interested in serving on the TAC to submit their names for consideration for committee membership. Typically, TAC members are appointed to three-year terms, and serve as unpaid Special Government Employees.

The Bureau often faces highly technical issues while developing and maintaining the accuracy and relevancy of its data on employment and unemployment, prices, productivity, and compensation and working conditions. These issues range from how to develop new measures to how to make sure that existing measures account for the ever-changing economy. BLS presents issues and then draws on the specialized expertise of Committee members representing specialized fields within the academic disciplines of economics, statistics and data science, and survey design. Committee members are also invited to bring to the attention of BLS issues that have been identified in the academic literature or in their own research.

The TAC was established to provide advice to the Commissioner of Labor Statistics on technical topics selected by the BLS. Responsibilities include, but are not limited to providing comments on papers and presentations developed by BLS research and program staff, conducting research on issues identified by BLS on which an objective technical opinion or recommendation from outside of BLS would be valuable, recommending BLS conduct internal research projects to address technical problems with BLS statistics that have been identified in the academic literature, participating in discussions of areas where the types or coverage of economic statistics could be expanded or improved and areas where statistics are no longer relevant, and establishing working relationships with professional associations with an interest in BLS statistics, such as the American Statistical Association and the American Economic Association.

Nominations: BLS is looking for committed TAC members who have a strong interest in, and familiarity with, BLS data. The Agency is looking for nominees who use and have a comprehensive understanding of economic statistics. BLS is committed to bringing greater diversity of thought, perspective, and experience to its advisory committees. Nominees from all races, gender, age, and disabilities are encouraged to apply. Interested persons may nominate themselves or may submit the name of another person who they believe to be interested in and qualified to serve on the TAC. Nominations may also be submitted by organizations. Nominations should include the name, address, and telephone number of the candidate. Each nomination should include a summary of the candidate's training or experience relating to BLS data specifically, or economic statistics more generally, and a curriculum vitae. In selecting TAC members, BLS will consider individuals nominated in response to this notice, as well as other qualified individuals. Candidates should not submit information they do not want publicly disclosed. BLS will conduct a basic background check on candidates before their appointment to the TAC. The background check will involve accessing publicly available, internet-based sources. BLS will contact nominees for information on their status as registered lobbyists. Anyone currently subject to federal registration requirements as a lobbyist is not eligible for appointment to the TAC. Nominees should be aware of the time commitment for attending meetings and actively participating in the work of the TAC. Historically, this has meant a commitment of at least two days per year.

Authority: This notice was prepared in accordance with the provisions of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2.

Signed at Washington, DC, on December 11, 2023.

Eric Molina,

Acting Chief, Division of Management Systems.

[FR Doc. 2023–27538 Filed 12–14–23; 8:45 am]

BILLING CODE 4510–24–P

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2023–7]

Notice of Intent To Audit

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Public notice.

SUMMARY: The U.S. Copyright Office is announcing receipt of a notice of intent to conduct an audit pursuant to the section 115 blanket license.

FOR FURTHER INFORMATION CONTACT: Rhea Efthimiadis, Assistant to the General Counsel, by email at *meft@copyright.gov* or telephone at 202–707–8350.

SUPPLEMENTARY INFORMATION: The Orrin G. Hatch-Bob Goodlatte Music Modernization Act (the ''MMA'') substantially modified the compulsory ''mechanical'' license for reproducing and distributing phonorecords of nondramatic musical works under 17 U.S.C. 115.[1] It did so by switching from a song-by-song licensing system to a blanket licensing regime that became available on January 1, 2021 (the ''license availability date''), administered by a mechanical licensing collective (the ''MLC'') designated by the Copyright Office (the ''Office'').[2] Digital music providers (''DMPs'') are able to obtain this new statutory mechanical blanket license (the ''blanket license'') to make digital phonorecord deliveries of nondramatic musical works, including in the form of permanent downloads, limited downloads, or interactive streams (referred to in the statute as ''covered activity'' where such activity qualifies for a blanket license), subject to various requirements, including reporting and payment obligations.[3] The MLC is tasked with collecting royalties from DMPs under the blanket license and distributing them to musical work copyright owners.[4]

In connection with the new blanket license, the MMA also provides for certain audit rights. Under the MMA, the MLC may periodically audit DMPs operating under the blanket license to verify the accuracy of royalty payments made by DMPs to the MLC.[5] Likewise, musical work copyright owners may periodically audit the MLC to verify the accuracy of royalty payments made by the MLC to copyright owners.[6] To commence an audit, a notice of intent to conduct an audit must be filed with the Office and delivered to the party(ies) being audited.[7] The Office must then cause notice to be published in the **Federal Register** within 45 days of receipt.[8]

On November 9, 2023, the Office received a notice of intent to conduct an audit of the MLC from Bridgeport

[1] Public Law 115–264, 132 Stat. 3676 (2018).
[2] 17 U.S.C. 115(d).
[3] *Id.*
[4] *Id.*
[5] *Id.* at 115(d)(4)(D).
[6] *Id.* at 115(d)(3)(L).
[7] *Id.* at 115(d)(3)(L)(i)(IV), (d)(4)(D)(i)(IV).
[8] *Id.* at 115(d)(3)(L)(i)(IV), (d)(4)(D)(i)(IV).

Music, Inc. for the period of January 1, 2021, through December 31, 2023.

Dated: December 11, 2023.

Suzanne V. Wilson,

General Counsel and Associate Register of Copyrights.

[FR Doc. 2023–27554 Filed 12–14–23; 8:45 am]

BILLING CODE 1410–30–P

NATIONAL SCIENCE FOUNDATION

Notice of Open to the Public Meetings of the Networking and Information Technology Research and Development (NITRD) Program

AGENCY: Networking and Information Technology Research and Development (NITRD) National Coordination Office (NCO), National Science Foundation.

ACTION: Notice of public meetings.

SUMMARY: The NITRD Joint Engineering Team (JET) and Middleware And Grid Interagency Coordination (MAGIC) Team hold meetings that are open to the public to attend. The JET and the MAGIC Team provide an opportunity for the public to engage and participate in information sharing with Federal agencies. The JET and MAGIC Team report to the NITRD Large Scale Networking Interagency Working Group.

DATES: January 2024–December 2024.

FOR FURTHER INFORMATION CONTACT: Paul Love for the JET and Mallory Hinks for the MAGIC Team at *nco@nitrd.gov* or (202) 459–9674. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday, except for U.S. Federal Government holidays.

SUPPLEMENTARY INFORMATION: The Joint Engineering Team (JET), established in 1997, provides an opportunity for information sharing among Federal agencies and non-Federal participants who have an interest in high-performance research and engineering or research and education networking (REN) and networking to support science applications.

The MAGIC Team, established in 2002, provides an opportunity for information sharing among Federal agencies and non-Federal participants involved in middleware, grid, and cloud research and infrastructure; implementing or operating grids and clouds; or the use of grids, clouds, and middleware.

The JET and MAGIC Team meetings are hosted by the NITRD NCO with Zoom participation available for each meeting.

Public Meetings Website: The JET and MAGIC Team meetings are scheduled 30 days in advance of the meeting date. Please reference the NITRD Public Meetings web page (*https://www.nitrd.gov/public-meetings/*) for each Team's upcoming meeting dates and times, in addition to the agendas, minutes, and other meeting materials and information.

Public Meetings Mailing Lists: Members of the public may be added to the mailing lists by sending their full name and email address to *jet-signup@nitrd.gov* for JET and *magic-signup@nitrd.gov* for MAGIC, with the subject line: ''Add to JET'' and/or ''Add to MAGIC'', respectively. Meeting notifications and information are shared via the mailing lists.

Public Comments: The government seeks individual input; attendees/participants may provide individual advice only. Members of the public are welcome to submit their comments for JET to *jet-comments@nitrd.gov* and for MAGIC to *magic-comments@nitrd.gov* . Please note that under the provisions of the Federal Advisory Committee Act (FACA), all public comments and/or presentations will be treated as public documents and may be made available to the public via the JET (*https://www.nitrd.gov/coordination-areas/lsn/jet/*) and MAGIC (*https://www.nitrd.gov/coordination-areas/lsn/magic/*) web pages.

Reference Website: NITRD Website at: *https://www.nitrd.gov/*.

Submitted by the National Science Foundation in support of the Networking and Information Technology Research and Development National Coordination Office on December 12, 2023.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2023–27648 Filed 12–14–23; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Committee on Equal Opportunities in Science and Engineering; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces the following meeting:

Name and Committee Code: Committee on Equal Opportunities in Science and Engineering (CEOSE) (#1173).

Date and Time: February 12, 2024: 1:00 p.m.–5:30 p.m.; February 13, 2024: 10:00 a.m.–4:00 p.m.

Place: National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314 (Hybrid).

Meeting Registration: Hybrid attendance information will be forthcoming on the CEOSE website at *http://www.nsf.gov/od/oia/activities/ceose/index.jsp.*

Type of Meeting: Open.

Contact Person: Dr. Bernice Anderson, Senior Advisor and CEOSE Executive Secretary, Office of Integrative Activities (OIA), National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314. Contact Information: Phone: 703–292–8040, Email: *banderso@nsf.gov.*

Minutes: Meeting minutes and other information may be obtained from the CEOSE Executive Secretary at the above address or the website at *http://www.nsf.gov/od/oia/activities/ceose/index.jsp.*

Purpose of Meeting: To study data, programs, policies, and other information pertinent to the National Science Foundation and to provide advice and recommendations concerning broadening participation in science and engineering.

Agenda

Day 1: February 12, 2024

1:00 p.m.–1:30 p.m. Opening, Welcome, Introductions
1:30 p.m.–2:30 p.m. Discussion: 2023 CEOSE Report on Rural STEM
2:30 p.m.–3:00 p.m. Presentation: Report of the CEOSE Executive Liaison
3:00 p.m.–3:15 p.m. *Break*
3:15 p.m.–4:30 p.m. Presentation: NSF Response to the 2022 Envisioning the Future of NSF EPSCoR Report Recommendations and the CHIPS and Science Act Requirements
4:30 p.m.–5:30 p.m. Discussion: Reports of the CEOSE AC Liaisons

Day 2: February 13, 2024

10:00 a.m.–10:15 a.m.—Opening Remarks, CEOSE Chair
10:15 a.m.–11:15 a.m.—Presentation: Bridging IHEs and Underserved Communities
11:15 a.m.–12:00 p.m.—Briefing: Advancing Antiracism, Diversity, Equity, and Inclusion in STEM
12:00 p.m.–1:30 p.m.—Working Lunch: Topics/Advice to Share with NSF Senior Leadership
1:30 p.m.–2:00 p.m.—Discussion with NSF Leadership
2:00 p.m.–2:15 p.m.—*Break*
2:15 p.m.–3:00 p.m.—Panel: NSF Supporting Native Communities: Part 1
3:00 p.m.–3:30 p.m.—Discussion: 2023–2024 CEOSE Report to Congress
3:30 p.m.–4:00 p.m.—Announcements, Closing Remarks, Adjournment

Dated: December 11, 2023.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2023–27542 Filed 12–14–23; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2023–0108]

Information Collection: NRC Form 149, OCFO Invitational Traveler Request Form

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 149, OCFO Invitational Traveler Request Form.''

DATES: Submit comments by February 13, 2024. 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–2023–0108. 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–2023–0108 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–2023–0108. A copy of the collection of information and related instructions may be obtained without charge by accessing Docket ID NRC–2023–0108 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. ML23226A079. The supporting statement and burden estimate are available in ADAMS under Accession Nos. ML23226A064 and ML23226A065.
- *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–2023–0108, 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 149, OCFO Invitational Traveler Request Form.
2. *OMB approval number:* 3150–0247.
3. *Type of submission:* Extension.
4. *The form number, if applicable:* NRC Form 149.
5. *How often the collection is required or requested:* The collection is required when there is an invitational traveler that will be reimbursed by the NRC. This occurs on an as needed basis and does not have a regular schedule for submission.
6. *Who will be required or asked to respond:* The invitational traveler will be asked to respond and NRC staff that are associated with the purpose of the invitational traveler may also be asked to respond on an as needed basis.
7. *The estimated number of annual responses:* 415.
8. *The estimated number of annual respondents:* 415.
9. *The estimated number of hours needed annually to comply with the information collection requirement or request:* 109.
10. *Abstract:* The NRC provides reimbursement for people on invitational travel for the NRC. As such, the NRC would reimburse them through our Financial Accounting and Integrated Management Information System (FAIMIS). Additionally, the travel itself would be processed in our electronic travel systems (ETS2). Both the financial and travel systems must be set up appropriately for the invitational traveler to travel and receive reimbursement from the NRC. The information collected on Form 149 meets the requirements for the invitational traveler to have a profile created in FAIMIS and in ETS2. The information collected is necessary to meet the criteria for both systems.

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: December 11, 2023.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2023–27509 Filed 12–14–23; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2024–103; MC2024–100 and CP2024–104; MC2024–101 and CP2024–105; MC2024–102 and CP2024–106; MC2024–103 and CP2024–107; MC2024–104 and CP2024–108; MC2024–105 and CP2024–109; MC2024–106 and CP2024–110; MC2024–107 and CP2024–111]

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:* December 18, 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:

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I. Introduction

II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* CP2024–103; *Filing Title:* Notice of United States Postal Service of Filing Functionally Equivalent Inbound Competitive Multi-Service Agreement with Foreign Postal Operator—FY24–1; *Filing Acceptance Date:* December 8, 2023; *Filing Authority:* 39 CFR 3035.105; *Public Representative:* Katalin K. Clendenin; *Comments Due:* December 18, 2023.
2. *Docket No(s).:* MC2024–100 and CP2024–104; *Filing Title:* USPS Notice to Add Priority Mail & USPS Ground Advantage Contract 133 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 8, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Arif Hafiz; *Comments Due:* December 18, 2023.
3. *Docket No(s).:* MC2024–101 and CP2024–105; *Filing Title:* USPS Notice to Add Priority Mail & USPS Ground Advantage Contract 134 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 8, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Arif Hafiz; *Comments Due:* December 18, 2023.
4. *Docket No(s).:* MC2024–102 and CP2024–106; *Filing Title:* USPS Notice to Add Priority Mail & USPS Ground Advantage Contract 135 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 8, 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:* December 18, 2023.
5. *Docket No(s).:* MC2024–103 and CP2024–107; *Filing Title:* USPS Request to Add USPS Ground Advantage Contract 9 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 8, 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:* December 18, 2023.
6. *Docket No(s).:* MC2024–104 and CP2024–108; *Filing Title:* USPS Notice to Add Priority Mail & USPS Ground Advantage Contract 136 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 8, 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:* December 18, 2023.
7. *Docket No(s).:* MC2024–105 and CP2024–109; *Filing Title:* USPS Notice to Add Priority Mail & USPS Ground Advantage Contract 137 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 8, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR

[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).

3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Kenneth R. Moeller; *Comments Due:* December 18, 2023.

8. *Docket No(s).:* MC2024–106 and CP2024–110; *Filing Title:* USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 30 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 8, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* December 18, 2023.

9. *Docket No(s).:* MC2024–107 and CP2024–111; *Filing Title:* USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 31 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 8, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* December 18, 2023.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2023–27543 Filed 12–14–23; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket Nos. CP2024–113; MC2024–108 and CP2024–112; MC2024–109 and CP2024–114; MC2024–110 and CP2024–115]

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:* December 19, 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:

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I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* CP2024–113; *Filing Title:* Notice of United States Postal Service of Filing Functionally Equivalent Inbound Competitive Multi-Service Agreement with Foreign Postal Operator—FY24–2; *Filing Acceptance Date:* December 11, 2023; *Filing Authority:* 39 CFR 3035.105; *Public Representative:* Katalin K. Clendenin; *Comments Due:* December 19, 2023.

2. *Docket No(s).:* MC2024–108 and CP2024–112; *Filing Title:* USPS Notice to Add Priority Mail & USPS Ground Advantage Contract 138 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 11, 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:* December 19, 2023.

3. *Docket No(s).:* MC2024–109 and CP2024–114; *Filing Title:* USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 33 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 11, 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:* December 19, 2023.

4. *Docket No(s).:* MC2024–110 and CP2024–115; *Filing Title:* USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 32 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 11, 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:* December 19, 2023.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2023–27623 Filed 12–14–23; 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

[SEC File No. 270–472, OMB Control No. 3235–0531]

Submission for OMB Review; Comment Request; Extension: Rule 0–1

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. 350l *et. seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget a

request for extension of the previous approved collection of information discussed below.

The Investment Company Act of 1940 (the ''Act'')[1] establishes a comprehensive framework for regulating the organization and operation of investment companies (''funds''). A principal objective of the Act is to protect fund investors by addressing the conflicts of interest that exist between funds and their investment advisers and other affiliated persons. The Act places significant responsibility on the fund board of directors in overseeing the operations of the fund and policing the relevant conflicts of interest.[2] Rule 0–1 (17 CFR 270.0–1), as amended, provides definitions for the terms used by the Commission in the rules and regulations it has adopted pursuant to the Act. The rule also contains a number of rules of construction for terms that are defined either in the Act itself or elsewhere in the Commission's rules and regulations. Finally, rule 0–1 defines terms that serve as conditions to the availability of certain of the Commission's exemptive rules. More specifically, the term ''independent legal counsel,'' as defined in rule 0–1, sets out conditions that funds must meet in order to rely on any of ten exemptive rules (''exemptive rules'') under the Act.[3]

If the board's counsel has represented the fund's investment adviser, principal underwriter, administrator (collectively, ''management organizations'') or their ''control persons''[4] during the past two years, rule 0–1 requires that the board's independent directors make a determination about the adequacy of the counsel's independence. A majority of the board's independent directors are required to reasonably determine, in the exercise of their judgment, that the counsel's prior or current representation of the management organizations or their control persons was sufficiently limited to conclude that it is unlikely to adversely affect the counsel's professional judgment and legal representation. Rule 0–1 also requires that a record for the basis of this determination is made in the minutes of the directors' meeting. In addition, the independent directors must have obtained an undertaking from the counsel to provide them with the information necessary to make their determination and to update promptly that information when the person begins to represent a management organization or control person, or when he or she materially increases his or her representation. Generally, the independent directors must re-evaluate their determination no less frequently than annually.

Any fund that relies on one of the exemptive rules must comply with the requirements in the definition of ''independent legal counsel'' under rule 0–1. We assume that approximately 2,909 funds rely on at least one of the exemptive rules annually.[5] We further assume that the independent directors of approximately one-third (970) of those funds would need to make the required determination in order for their counsel to meet the definition of independent legal counsel.[6] We estimate that each of these 970 funds would be required to spend, on average, 0.75 hours annually to comply with the recordkeeping requirement associated with this determination, for a total annual burden of approximately 727.5 hours. Based on this estimate, the total annual cost for all funds' compliance with this rule is approximately $194,485. To calculate this total annual cost, the Commission staff assumed that approximately two-thirds of the total annual hour burden (485 hours) would be incurred by a compliance manager with an average hourly wage rate of $360 per hour,[7] and one-third of the annual hour burden (242.5 hours) would be incurred by compliance clerk with an average hourly wage rate of $82 per hour.[8]

The estimates of average burden hours are made solely for the purposes of the Paperwork Reduction Act. These estimates are not derived from a comprehensive or even a representative survey or study of the costs of Commission rules.

Compliance with the collection of information requirements of the rule is mandatory and is necessary to comply with the requirements of the rule in general. 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 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 January 16, 2024 to (i) *MBX.OMB.OIRA.SEC_desk_officer@omb.eop.gov* 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: December 12, 2023.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–27570 Filed 12–14–23; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 80a.

[2] For example, fund directors must approve investment advisory and distribution contracts. *See* 15 U.S.C. 80a–15(a), (b), and (c).

[3] The relevant exemptive rules are: rule 10f–3 (17 CFR 270.10f–3), rule 12b–1 (17 CFR 270.12b–1), rule 15a–4(b)(2) (17 CFR 270.15a–4(b)(2)), rule 17a–7 (17 CFR 270.17a–7), rule 17a–8 (17 CFR 270.17a–8), rule 17d–1(d)(7) (17 CFR 270.17d–1(d)(7)), rule 17e–1(c) (17 CFR 270.17e–1(c)), rule 17g–1 (17 CFR 270.17g–1), rule 18f–3 (17 CFR 270.18f–3), and rule 23c–3 (17 CFR 270.23c–3).

[4] A ''control person'' is any person—other than a fund—directly or indirectly controlling, controlled by, or under common control, with any of the fund's management organizations; *See* 17 CFR 270.01(a)(6)(iv)(B).

[5] Based on statistics compiled by Commission staff, we estimate that there are approximately 3,232 funds that could rely on one or more of the exemptive rules; of those funds, we assume that approximately 90 percent (2,909) actually rely on at least one exemptive rules annually.

[6] We assume that the independent directors of the remaining two-thirds of those funds will choose not to have counsel, or will rely on counsel who has not recently represented the fund's management organizations or control persons; in both circumstances, it would not be necessary for the fund's independent directors to make a determination about their counsel's independence.

[7] The estimated hourly wages used in this PRA analysis were derived from the Securities Industry and Financial Markets Association Reports on Management and Professional Earnings in the Securities Industry (2013) (modified to account for an 1800-hour work year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead) (adjusted for inflation), and Office Salaries in the Securities Industry (2013) (modified to account for an 1800-hour work year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead) (adjusted for inflation).

[8] (485 × $360/hour) + (242.5 × $82/hour) = $194,485.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99140; File No. SR–PEARL–2023–64]

Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the MIAX Pearl Options Exchange Fee Schedule To Modify Certain Connectivity and Port Fees

December 11, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 27, 2023, MIAX PEARL, LLC (''MIAX Pearl'' or ''Exchange'') filed with the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX Pearl Options Exchange Fee Schedule (the ''Fee Schedule'') to amend certain connectivity and port fees.[3]

The text of the proposed rule change is available on the Exchange's website at *https://www.miaxoptions.com/rule-filings,* at MIAX Pearl's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule as follows: (1) increase the fees for a 10 gigabit (''Gb'') ultra-low latency (''ULL'') fiber connection for Members[4] and non-Members; (2) amend the calculation of fees for MIAX Express Network Full Service (''MEO'')[5] Ports (Bulk and Single); and (3) amend the fees for Full Service MEO Ports (Bulk and Single). The Exchange and its affiliate, Miami International Securities Exchange, LLC (''MIAX'') operated 10Gb ULL connectivity on a single shared network that provided access to both exchanges via a single 10Gb ULL connection. The Exchange last increased fees for 10Gb ULL connections from $9,300 to $10,000 per month on January 1, 2021.[6] At the same time, MIAX also increased its 10Gb ULL connectivity fee from $9,300 to $10,000 per month.[7] The Exchange and MIAX shared a combined cost analysis in those filings due to the single shared 10Gb ULL connectivity network for both exchanges. In those filings, the Exchange and MIAX allocated a combined total of $17.9 million in expenses to providing 10Gb ULL connectivity.[8]

Beginning in late January 2023, the Exchange also recently determined a substantial operational need to no longer operate 10Gb ULL connectivity on a single shared network with MIAX. The Exchange bifurcated 10Gb ULL connectivity due to ever-increasing capacity constraints and to enable it to continue to satisfy the anticipated access needs for Members and other market participants.[9] Since the time of the 2021 increase discussed above,[10] the Exchange experienced ongoing increases in expenses, particularly internal expenses.[11] As discussed more fully below, the Exchange recently calculated increased annual aggregate costs of $11,567,509 for providing 10Gb ULL connectivity on a single unshared network (an overall increase over its prior cost to provide 10Gb ULL connectivity on a shared network with MIAX) and $1,644,132 for providing Full Service MEO Ports.[12]

Much of the cost relates to monitoring and analysis of data and performance of the network via the subscriber's connection with nanosecond granularity, and continuous improvements in network performance with the goal of improving the subscriber's experience. The costs associated with maintaining and enhancing a state-of-the-art network is a significant expense for the Exchange, and thus the Exchange believes that it is reasonable and appropriate to help offset those increased costs by amending fees for connectivity services. Subscribers expect the Exchange to provide this level of support so they continue to receive the performance they expect. This differentiates the Exchange from its competitors.

The Exchange now proposes to amend the Fee Schedule to amend the fees for 10Gb ULL connectivity and Full Service MEO Ports (Bulk and Single) in order to recoup cost related to bifurcating 10Gb connectivity to the Exchange and MIAX as well as the ongoing costs and increase in expenses set forth below in the Exchange's cost analysis.[13] The Exchange proposes to implement the changes to the Fee Schedule pursuant to this proposal immediately. The Exchange initially filed the proposal on December 30, 2022 (SR–PEARL–2022–62) (the ''Initial Proposal'').[14] On February 23, 2023, the Exchange withdrew the Initial Proposal and replaced it with a revised proposal (SR–PEARL–2023–08) (the ''Second Proposal'').[15] On April 20, 2023, the Exchange withdrew the Second Proposal and replaced it with a revised proposal (SR–PEARL–2023–19) (the ''Third Proposal'').[16] On June 16, 2023, the Exchange withdrew the Third Proposal and replaced it with a revised

[3] All references to the ''Exchange'' in this filing mean MIAX Pearl Options. Any references to the equities trading facility of MIAX PEARL, LLC, will specifically be referred to as ''MIAX Pearl Equities.''

[4] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[5] The term ''MEO Interface'' or ''MEO'' means a binary order interface for certain order types as set forth in Rule 516 into the MIAX Pearl System. *See* the Definitions Section of the Fee Schedule and Exchange Rule 100.

[6] *See* Securities Exchange Act Release No. 90981 (January 25, 2021), 86 FR 7582 (January 29, 2021) (SR–PEARL–2021–01).

[7] *See* Securities Exchange Act Release No. 90980 (January 25, 2021), 86 FR 7602 (January 29, 2021) (SR–MIAX–2021–02).

[8] *See id.*

[9] *See MIAX Options and MIAX Pearl Options—Announce planned network changes related to shared 10G ULL extranet,* issued August 12, 2022, *available at https://www.miaxglobal.com/alert/2022/08/12/miax-options-and-miax-pearl-options-announce-planned-network-changes-0.* The Exchange will continue to provide access to both the Exchange and MIAX over a single shared 1Gb connection. *See* Securities Exchange Act Release Nos. 96553 (December 20, 2022), 87 FR 79379 (December 27, 2022) (SR–PEARL–2022–60); 96545 (December 20, 2022) 87 FR 79393 (December 27, 2022) (SR–MIAX–2022–48).

[10] The Exchange notes it last filed to amend the fees for Full Service MEO Ports in 2018 (excluding filings made in July 2021 through early 2022), prior to which the Exchange provided Full Service MEO Ports free of charge since the it launched operations in 2017 and absorbed all costs since that time. *See* Securities Exchange Act Release No. 82867 (March 13, 2018), 83 FR 12044 (March 19, 2018) (SR–PEARL–2018–07).

[11] For example, the New York Stock Exchange, Inc.'s (''NYSE'') Secure Financial Transaction Infrastructure (''SFTI'') network, which contributes to the Exchange's connectivity cost, increased its fees by approximately 9% since 2021. Similarly, since 2021, the Exchange, and its affiliates, experienced an increase in data center costs of approximately 17% and an increase in hardware and software costs of approximately 19%. These percentages are based on the Exchange's actual 2021 and proposed 2023 budgets.

[12] For the avoidance of doubt, all references to costs in this filing, including the cost categories discussed below, refer to costs incurred by MIAX Pearl Options only and not MIAX Pearl Equities, the equities trading facility.

[13] The Exchange notes that MIAX will make a similar filing to increase its 10Gb ULL connectivity fees.

[14] *See* Securities Exchange Act Release No. 96632 (January 10, 2023), 88 FR 2707 (January 17, 2023) (SR–PEARL–2022–62).

[15] *See* Securities Exchange Act Release No. 97082 (March 8, 2023), 88 FR 15825 (March 14, 2023) (SR–PEARL–2023–05).

[16] *See* Securities Exchange Act Release No. 97420 (May 2, 2023), 88 FR 29701 (May 8, 2023) (SR–PEARL–2023–19).

proposal (SR–PEARL–2023–27) (the ''Fourth Proposal'').[17] On August 8, 2023, the Exchange withdrew the Fourth Proposal and replaced it with a revised proposal (SR–PEARL–2023–35) (the ''Fifth Proposal'').[18] Since a U.S. government shutdown was avoided, on October 2, 2023, the Exchange withdrew the Fifth Proposal and replaced it with a further revised proposal (SR–PEARL–2023–55) (the ''Sixth Proposal'').[19] On November 27, 2023, the Exchange withdrew the Sixth Proposal and replaced it with this further revised proposal (SR–PEARL–2023–64) (the ''Seventh Proposal'').

The Exchange previously included a cost analysis in the Initial, Second, Third, Fourth, Fifth, and Sixth Proposals. As described more fully below, the Exchange provides an updated cost analysis that includes, among other things, additional descriptions of how the Exchange allocated costs among it and its affiliated exchanges (separately among MIAX Pearl Options and MIAX Pearl Equities, MIAX and MIAX Emerald[20] (together with MIAX and MIAX Pearl Equities, the ''affiliated markets'')) to ensure no cost was allocated more than once, as well as additional detail supporting its cost allocation processes and explanations as to why a cost allocation in this proposal may differ from the same cost allocation in a similar proposal submitted by one of its affiliated markets. Although the baseline cost analysis used to justify the proposed fees was made in the Initial, Second, Third, Fourth, Fifth, and Sixth Proposals, the fees themselves have not changed since the Initial, Second, Third, Fourth, Fifth, or Sixth Proposals and the Exchange still proposes fees that are intended to cover the Exchange's cost of providing 10Gb ULL connectivity and Full Service MEO Ports with a reasonable mark-up over those costs.

* * * * *

Starting in 2017, following the United States Court of Appeals for the District of Columbia's *Susquehanna Decision*[21] and various other developments, the Commission began to undertake a heightened review of exchange filings, including non-transaction fee filings that was substantially and materially different from it prior review process (hereinafter referred to as the ''Revised Review Process''). In the *Susquehanna Decision,* the D.C. Circuit Court stated that the Commission could not maintain a practice of ''unquestioning reliance'' on claims made by a self-regulatory organization (''SRO'') in the course of filing a rule or fee change with the Commission.[22] Then, on October 16, 2018, the Commission issued an opinion in *Securities Industry and Financial Markets Association* finding that exchanges failed both to establish that the challenged fees were constrained by significant competitive forces and that these fees were consistent with the Act.[23] On that same day, the Commission issued an order remanding to various exchanges and national market system (''NMS'') plans challenges to over 400 rule changes and plan amendments that were asserted in 57 applications for review (the ''Remand Order'').[24] The Remand Order directed the exchanges to ''develop a record,'' and to ''explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review.''[25] The Commission denied requests by various exchanges and plan participants for reconsideration of the Remand Order.[26] However, the Commission did extend the deadlines in the Remand Order ''so that they d[id] not begin to run until the resolution of the appeal of the SIFMA Decision in the D.C. Circuit and the issuance of the court's mandate.''[27] Both the Remand Order and the Order Denying Reconsideration were appealed to the D.C. Circuit.

While the above appeal to the D.C. Circuit was pending, on March 29, 2019, the Commission issued an order disapproving a proposed fee change by BOX Exchange LLC (''BOX'') to establish connectivity fees (the ''BOX Order''), which significantly increased the level of information needed for the Commission to believe that an exchange's filing satisfied its obligations under the Act with respect to changing a fee.[28] Despite approving hundreds of access fee filings in the years prior to the BOX Order (described further below) utilizing a ''market-based'' test, the Commission changed course and disapproved BOX's proposal to begin charging connectivity at one-fourth the rate of competing exchanges' pricing.

Also while the above appeal was pending, on May 21, 2019, the Commission Staff issued guidance ''to assist the national securities exchanges and FINRA . . . in preparing Fee Filings that meet their burden to demonstrate that proposed fees are consistent with the requirements of the Securities Exchange Act.''[29] In the Staff Guidance, the Commission Staff states that, ''[a]s an initial step in assessing the reasonableness of a fee, staff considers whether the fee is constrained by significant competitive forces.''[30] The Staff Guidance also states that, ''. . . even where an SRO cannot demonstrate, or does not assert, that significant

[17] The Exchange met with Commission Staff to discuss the Third Proposal during which the Commission Staff provided feedback and requested additional information, including, most recently, information about total costs related to certain third party vendors. Such vendor cost information is subject to confidentiality restrictions. The Exchange provided this information to Commission Staff under separate cover with a request for confidentiality. While the Exchange will continue to be responsive to Commission Staff's information requests, the Exchange believes that the Commission should, at this point, issue substantially more detailed guidance for exchanges to follow in the process of pursuing a cost-based approach to fee filings, and that, for the purposes of fair competition, detailed disclosures by exchanges, such as those that the Exchange is providing now, should be consistent across all exchanges, including for those that have resisted a cost-based approach to fee filings, in the interests of fair and even disclosure and fair competition. *See* Securities Exchange Act Release No. 97815 (June 27, 2023), 88 FR 42759 (July 3, 2023) (SR–PEARL–2023–27).

[18] *See* Securities Exchange Act Release No. 98180 (August 21, 2023), 88 FR 58404 (August 25, 2023) (SR–PEARL–2023–35). Due to the prospect of a U.S. government shutdown, the Commission suspended the Fifth Proposal on September 29, 2023. *See* Securities Exchange Act Release No. 98658 (September 29, 2023) (SR–PEARL–2023–35).

[19] *See* Securities Exchange Act Release No. 98753 (October 13, 2023), 88 FR 72142 (October 19, 2023) (SR–PEARL–2023).

[20] The term ''MIAX Emerald'' means MIAX Emerald, LLC. *See* Exchange Rule 100.

[21] *See Susquehanna International Group, LLP* v. *Securities & Exchange Commission,* 866 F.3d 442 (D.C. Circuit 2017) (the ''Susquehanna Decision'').

[22] *Id.*

[23] *See Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 84432, 2018 WL 5023228 (October 16, 2018) (the ''SIFMA Decision'').

[24] *See Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 84433, 2018 WL 5023230 (Oct. 16, 2018). *See* 15 U.S.C. 78k–1, 78s; *see also* Rule 608(d) of Regulation NMS, 17 CFR 242.608(d) (asserted as an alternative basis of jurisdiction in some applications).

[25] *Id.* at page 2.

[26] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 85802, 2019 WL 2022819 (May 7, 2019) (the ''Order Denying Reconsideration'').

[27] Order Denying Reconsideration, 2019 WL 2022819, at *13.

[28] *See* Securities Exchange Act Release No. 85459 (March 29, 2019), 84 FR 13363 (April 4, 2019) (SR–BOX–2018–24, SR–BOX–2018–37, and SR–BOX–2019–04) (Order Disapproving Proposed Rule Changes to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network). The Commission noted in the BOX Order that it ''historically applied a 'market-based' test in its assessment of market data fees, which [the Commission] believe[s] present similar issues as the connectivity fees proposed herein.'' *Id.* at page 16. Despite this admission, the Commission disapproved BOX's proposal to begin charging $5,000 per month for 10Gb connections (while allowing legacy exchanges to charge rates equal to 3–4 times that amount utilizing ''market-based'' fee filings from years prior).

[29] See Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019), available at *https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees* (the ''Staff Guidance'').

[30] *Id.*

competitive forces constrain the fee at issue, a cost-based discussion may be an alternative basis upon which to show consistency with the Exchange Act.'' [31]

Following the BOX Order and Staff Guidance, on August 6, 2020, the D.C. Circuit vacated the Commission's SIFMA Decision in *NASDAQ Stock Market, LLC* v. *SEC* [32] and remanded for further proceedings consistent with its opinion.[33] That same day, the D.C. Circuit issued an order remanding the Remand Order to the Commission for reconsideration in light of *NASDAQ*. The court noted that the Remand Order required the exchanges and NMS plan participants to consider the challenges that the Commission had remanded in light of the SIFMA Decision. The D.C. Circuit concluded that because the SIFMA Decision ''has now been vacated, the basis for the [Remand Order] has evaporated.'' [34] Accordingly, on August 7, 2020, the Commission vacated the Remand Order and ordered the parties to file briefs addressing whether the holding in *NASDAQ* v. *SEC* that Exchange Act Section 19(d) does not permit challenges to generally applicable fee rules requiring dismissal of the challenges the Commission previously remanded.[35] The Commission further invited ''the parties to submit briefing stating whether the challenges asserted in the applications for review . . . should be dismissed, and specifically identifying any challenge that they contend should not be dismissed pursuant to the holding of *Nasdaq* v. *SEC*.'' [36] Without resolving the above issues, on October 5, 2020, the Commission issued an order granting SIFMA and Bloomberg's request to withdraw their applications for review and dismissed the proceedings.[37]

As a result of the Commission's loss of the *NASDAQ* vs. *SEC* case noted above, the Commission never followed through with its intention to subject the over 400 fee filings to ''develop a record,'' and to ''explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review.'' [38] As such, all of those fees remained in place and amounted to a baseline set of fees for those exchanges that had the benefit of getting their fees in place before the Commission Staff's fee review process materially changed. The net result of this history and lack of resolution in the D.C. Circuit Court resulted in an uneven competitive landscape where the Commission subjects all new non-transaction fee filings to the new Revised Review Process, while allowing the previously challenged fee filings, mostly submitted by incumbent exchanges prior to 2019, to remain in effect and not subject to the ''record'' or ''review'' earlier intended by the Commission.

While the Exchange appreciates that the Staff Guidance articulates an important policy goal of improving disclosures and requiring exchanges to justify that their market data and access fee proposals are fair and reasonable, the practical effect of the Revised Review Process, Staff Guidance, and the Commission's related practice of continuous suspension of new fee filings, is anti-competitive, discriminatory, and has put in place an un-level playing field, which has negatively impacted smaller, nascent, non-legacy exchanges (''non-legacy exchanges''), while favoring larger, incumbent, entrenched, legacy exchanges (''legacy exchanges'').[39] The legacy exchanges all established a significantly higher baseline for access and market data fees prior to the Revised Review Process. From 2011 until the issuance of the Staff Guidance in 2019, national securities exchanges filed, and the Commission Staff did not abrogate or suspend (allowing such fees to become effective), at least 92 filings [40] to amend exchange connectivity or port fees (or similar access fees). The support for each of those filings was a simple statement by the relevant exchange that the fees were constrained by competitive forces.[41] These fees remain in effect today.

The net result is that the non-legacy exchanges are effectively now blocked by the Commission Staff from adopting or increasing fees to amounts comparable to the legacy exchanges (which were not subject to the Revised Review Process and Staff Guidance), despite providing enhanced disclosures and rationale to support their proposed fee changes that far exceed any such support provided by legacy exchanges. Simply put, legacy exchanges were able to increase their non-transaction fees during an extended period in which the Commission applied a ''market-based'' test that only relied upon the assumed presence of significant competitive forces, while exchanges today are subject to a cost-based test requiring extensive cost and revenue disclosures, a process that is complex, inconsistently applied, and rarely results in a successful outcome, *i.e.,* non-suspension. The Revised Review Process and Staff Guidance changed decades-long Commission Staff standards for review, resulting in unfair discrimination and placing an undue burden on inter-market competition between legacy exchanges and non-legacy exchanges.

Commission Staff now require exchange filings, including from non-legacy exchanges such as MIAX Pearl, to provide detailed cost-based analysis in place of competition-based arguments to support such changes. However, even with the added detailed cost and expense disclosures, the Commission

[31] *Id.*

[32] *NASDAQ Stock Mkt., LLC* v. *SEC,* No 18–1324, --- Fed. App'x ---, 2020 WL 3406123 (D.C. Cir. June 5, 2020). The court's mandate was issued on August 6, 2020.

[33] *Nasdaq* v. *SEC,* 961 F.3d 421, at 424, 431 (D.C. Cir. 2020). The court's mandate issued on August 6, 2020. The D.C. Circuit held that Exchange Act ''Section 19(d) is not available as a means to challenge the reasonableness of generally-applicable fee rules.'' *Id.* The court held that ''for a fee rule to be challengeable under Section 19(d), it must, at a minimum, be targeted at specific individuals or entities.'' *Id.* Thus, the court held that ''Section 19(d) is not an available means to challenge the fees at issue'' in the SIFMA Decision. *Id.*

[34] *Id.* at *2; *see also id.* (''[T]he sole purpose of the challenged remand has disappeared.'').

[35] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 89504, 2020 WL 4569089 (August 7, 2020) (the ''Order Vacating Prior Order and Requesting Additional Briefs'').

[36] *Id.*

[37] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 90087 (October 5, 2020).

[38] *See supra* note 32, at page 2.

[39] Commission Chair Gary Gensler recently reiterated the Commission's mandate to ensure competition in the equities markets. *See* ''Statement on Minimum Price Increments, Access Fee Caps, Round Lots, and Odd-Lots'', by Chair Gary Gensler, dated December 14, 2022 (stating ''[i]n 1975, Congress tasked the Securities and Exchange Commission with responsibility to facilitate the establishment of the national market system and *enhance competition in the securities markets, including the equity markets*'' (*emphasis added*)). In that same statement, Chair Gary Gensler cited the five objectives laid out by Congress in 11A of the Exchange Act (15 U.S.C. 78k-1), including ensuring ''fair competition among brokers and dealers, among exchange markets, and *between exchange markets* and markets other than exchange markets. . .'' (*emphasis added*). *Id.* at note 1. *See also* Securities Acts Amendments of 1975, *available at https://www.govtrack.us/congress/bills/94/s249.*

[40] This timeframe also includes challenges to over 400 rule filings by SIFMA and Bloomberg discussed above. *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 84433, 2018 WL 5023230 (Oct. 16, 2018). Those filings were left to stand, while at the same time, blocking newer exchanges from the ability to establish competitive access and market data fees. *See The Nasdaq Stock Market, LLC* v. *SEC,* Case No. 18–1292 (D.C. Cir. June 5, 2020). The expectation at the time of the litigation was that the 400 rule flings challenged by SIFMA and Bloomberg would need to be justified under revised review standards.

[41] *See, e.g.,* Securities Exchange Act Release Nos. 74417 (March 3, 2015), 80 FR 12534 (March 9, 2015) (SR–ISE–2015–06); 83016 (April 9, 2018), 83 FR 16157 (April 13, 2018) (SR–PHLX–2018–26); 70285 (August 29, 2013), 78 FR 54697 (September 5, 2013) (SR–NYSEMKT–2013–71); 76373 (November 5, 2015), 80 FR 70024 (November 12, 2015) (SR–NYSEMKT–2015–90); 79729 (January 4, 2017), 82 FR 3061 (January 10, 2017) (SR–NYSEARCA–2016–172).

Staff continues to either suspend such filings and institute disapproval proceedings, or put the exchanges in the unenviable position of having to repeatedly withdraw and re-file with additional detail in order to continue to charge those fees.[42] By impeding any path forward for non-legacy exchanges to establish commensurate non-transaction fees, or by failing to provide any alternative means for smaller markets to establish ''fee parity'' with legacy exchanges, the Commission is stifling competition: non-legacy exchanges are, in effect, being deprived of the revenue necessary to compete on a level playing field with legacy exchanges. This is particularly harmful, given that the costs to maintain exchange systems and operations continue to increase. The Commission Staff's change in position impedes the ability of non-legacy exchanges to raise revenue to invest in their systems to compete with the legacy exchanges who already enjoy disproportionate non-transaction fee based revenue. For example, the Cboe Exchange, Inc. (''Cboe'') reported ''access and capacity fee'' revenue of $70,893,000 for 2020[43] and $80,383,000 for 2021.[44] Cboe C2 Exchange, Inc. (''C2'') reported ''access and capacity fee'' revenue of $19,016,000 for 2020[45] and $22,843,000 for 2021.[46] Cboe BZX Exchange, Inc. (''BZX'') reported ''access and capacity fee'' revenue of $38,387,000 for 2020[47] and $44,800,000 for 2021.[48] Cboe EDGX Exchange, Inc. (''EDGX'') reported ''access and capacity fee'' revenue of $26,126,000 for 2020[49] and $30,687,000 for 2021.[50] For 2021, the affiliated Cboe, C2, BZX, and EDGX (the four largest exchanges of the Cboe exchange group) reported $178,712,000 in ''access and capacity fees'' in 2021. NASDAQ Phlx, LLC (''NASDAQ Phlx'') reported ''Trade Management Services'' revenue of $20,817,000 for 2019.[51] The Exchange notes it is unable to compare ''access fee'' revenues with NASDAQ Phlx (or other affiliated NASDAQ exchanges) because after 2019, the ''Trade Management Services'' line item was bundled into a much larger line item in PHLX's Form 1, simply titled ''Market services.''[52]

The much higher non-transaction fees charged by the legacy exchanges provides them with two significant competitive advantages. First, legacy exchanges are able to use their additional non-transaction revenue for investments in infrastructure, vast marketing and advertising on major media outlets,[53] new products and other innovations. Second, higher non-transaction fees provide the legacy exchanges with greater flexibility to lower their transaction fees (or use the revenue from the higher non-transaction fees to subsidize transaction fee rates),[54] which are more immediately impactful in competition for order flow and market share, given the variable nature of this cost on member firms. The prohibition of a reasonable path forward denies the Exchange (and other non-legacy exchanges) this flexibility, eliminates the ability to remain competitive on transaction fees, and hinders the ability to compete for order flow and market share with legacy exchanges. There is little doubt that subjecting one exchange to a materially different standard than that historically applied to legacy exchanges for non-transaction fees leaves that exchange at a disadvantage in its ability to compete with its pricing of transaction fees.

While the Commission has clearly noted that the Staff Guidance is merely guidance and ''is not a rule, regulation or statement of the . . . Commission . . . the Commission has neither approved nor disapproved its content . . .'',[55] this is not the reality experienced by exchanges such as MIAX Pearl. As such, non-legacy exchanges are forced to rely on an opaque cost-based justification standard. However, because the Staff Guidance is devoid of detail on what must be contained in cost-based justification, this standard is nearly impossible to meet despite repeated good-faith efforts by the Exchange to provide substantial amount of cost-related details. For example, the Exchange has attempted to increase fees using a cost-based justification numerous times, having submitted over six filings.[56] However, despite providing 100+ page filings describing in extensive detail its costs associated with providing the services described in the filings, Commission Staff continues to suspend such filings, with the rationale that the Exchange has not provided sufficient detail of its costs and without ever being precise about what additional data points are required. The Commission Staff appears to be interpreting the reasonableness standard set forth in Section 6(b)(4) of the Act[57] in a manner that is not possible to achieve. This essentially nullifies the cost-based approach for

[42] The Exchange has filed, and subsequently withdrew, various forms of this proposed fee change numerous times since August 2021 with each proposal containing hundreds of cost and revenue disclosures never previously disclosed by legacy exchanges in their access and market data fee filings prior to 2019.

[43] According to Cboe's 2021 Form 1 Amendment, access and capacity fees represent fees assessed for the opportunity to trade, including fees for trading-related functionality. *See* Cboe 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000465.pdf.*

[44] *See* Cboe 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001155.pdf.*

[45] *See* C2 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000469.pdf.*

[46] *See* C2 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001156.pdf.*

[47] *See* BZX 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000465.pdf.*

[48] *See* BZX 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001152.pdf.*

[49] *See* EDGX 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000467.pdf.*

[50] *See* EDGX 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001154.pdf.*

[51] According to PHLX, ''Trade Management Services'' includes ''a wide variety of alternatives for connectivity to and accessing [the PHLX] markets for a fee. These participants are charged monthly fees for connectivity and support in accordance with [PHLX's] published fee schedules.'' *See* PHLX 2020 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2001/20012246.pdf.*

[52] *See* PHLX 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000475.pdf.* The Exchange notes that this type of Form 1 accounting appears to be designed to obfuscate the true financials of such exchanges and has the effect of perpetuating fee and revenue advantages of legacy exchanges.

[53] *See, e.g., CNBC Debuts New Set on NYSE Floor, available at https://www.cnbc.com/id/46517876.*

[54] *See, e.g.,* Cboe Fee Schedule, Page 4, Affiliate Volume Plan, *available at https://cdn.cboe.com/resources/membership/Cboe_FeeSchedule.pdf* (providing that if a market maker or its affiliate receives a credit under Cboe's Volume Incentive Program (''VIP''), the market maker will receive an access credit on their BOE Bulk Ports corresponding to the VIP tier reached and the market maker will receive a transaction fee credit on their sliding scale market maker transaction fees) *and* NYSE American Options Fee Schedule, Section III, E, Floor Broker Incentive and Rebate Programs, *available at https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE_American_Options_Fee_Schedule.pdf* (providing floor brokers the opportunity to prepay certain non-transaction fees for the following calendar year by achieving certain amounts of volume executed on NYSE American).

[55] *See supra* note 29, at note 1.

[56] *See* Securities Exchange Act Release Nos. 92798 (August 27, 2021), 86 FR 49360 (September 2, 2021) (SR–PEARL–2021–33); 92644 (August 11, 2021), 86 FR 46055 (August 17, 2021) (SR–PEARL–2021–36); 93162 (September 28, 2021), 86 FR 54739 (October 4, 2021) (SR–PEARL–2021–45); 93556 (November 10, 2021), 86 FR 64235 (November 17, 2021) (SR–PEARL–2021–53); 93774 (December 14, 2021), 86 FR 71952 (December 20, 2021) (SR–PEARL–2021–57); 93894 (January 4, 2022), 87 FR 1203 (January 10, 2022) (SR–PEARL–2021–58); 94258 (February 15, 2022), 87 FR 9659 (February 22, 2022) (SR–PEARL–2022–03); 94286 (February 18, 2022), 87 FR 10860 (February 25, 2022) (SR–PEARL–2022–04); 94721 (April 14, 2022), 87 FR 23573 (April 20, 2022) (SR–PEARL–2022–11); 94722 (April 14, 2022), 87 FR 23660 (April 20, 2022) (SR–PEARL–2022–12); 94888 (May 11, 2022), 87 FR 29892 (May 17, 2022) (SR–PEARL–2022–18).

[57] 15 U.S.C. 78f(b)(4).

exchanges as a legitimate alternative as laid out in the Staff Guidance. By refusing to accept a reasonable cost-based argument to justify non-transaction fees (in addition to refusing to accept a competition-based argument as described above), or by failing to provide the detail required to achieve that standard, the Commission Staff is effectively preventing non-legacy exchanges from making any non-transaction fee changes, which benefits the legacy exchanges and is anticompetitive to the non-legacy exchanges. This does not meet the fairness standard under the Act and is discriminatory.

Because of the un-level playing field created by the Revised Review Process and Staff Guidance, the Exchange believes that the Commission Staff, at this point, should either (a) provide sufficient clarity on how its cost-based standard can be met, including a clear and exhaustive articulation of required data and its views on acceptable margins,[58] to the extent that this is pertinent; (b) establish a framework to provide for commensurate non-transaction based fees among competing exchanges to ensure fee parity; [59] or (c) accept that certain competition-based arguments are applicable given the linkage between non-transaction fees and transaction fees, especially where non-transaction fees among exchanges are based upon disparate standards of review, lack parity, and impede fair competition. Considering the absence of any such framework or clarity, the Exchange believes that the Commission does not have a reasonable basis to deny the Exchange this change in fees, where the proposed change would result in fees meaningfully lower than comparable fees at competing exchanges and where the associated non-transaction revenue is meaningfully lower than competing exchanges.

In light of the above, disapproval of this would not meet the fairness standard under the Act, would be discriminatory and place a substantial burden on competition. The Exchange would be uniquely disadvantaged by not being able to increase its access fees to comparable levels (or lower levels than current market rates) to those of other options exchanges for connectivity. If the Commission Staff were to disapprove this proposal, that action, and not market forces, would substantially affect whether the Exchange can be successful in its competition with other options exchanges. Disapproval of this filing could also be viewed as an arbitrary and capricious decision should the Commission Staff continue to ignore its past treatment of non-transaction fee filings before implementation of the Revised Review Process and Staff Guidance and refuse to allow such filings to be approved despite significantly enhanced arguments and cost disclosures.[60]

* * * * *

10Gb ULL Connectivity Fee Change

MIAX Pearl Options filed a proposal to no longer operate 10Gb connectivity to MIAX Pearl Options on a single shared network with its affiliate, MIAX. This change is an operational necessity due to ever-increasing capacity constraints and to accommodate anticipated access needs for Members and other market participants.[61] This proposal: (i) sets forth the applicable fees for the bifurcated 10Gb ULL network; (ii) removes provisions in the Fee Schedule that provide for a shared 10Gb ULL network; and (iii) specifies that market participants may continue to connect to both MIAX Pearl Options and MIAX via the 1Gb network.

MIAX Pearl Options bifurcated the MIAX Pearl Options and MIAX 10Gb ULL networks in the first quarter of 2023, which change became effective on January 23, 2023. The Exchange issued an alert on August 12, 2022 publicly announcing the planned network change and implementation plan and dates to provide market participants adequate time to prepare.[62] Upon bifurcation of the 10Gb ULL network, subscribers need to purchase separate connections to MIAX Pearl Options and MIAX at the applicable rate. The Exchange's proposed amended rate for 10Gb ULL connectivity is described below. Prior to the bifurcation of the 10Gb ULL networks, subscribers to 10Gb ULL connectivity were able to connect to both MIAX Pearl Options and MIAX at the applicable rate set forth below.

The Exchange, therefore, proposes to amend the Fee Schedule to increase the fees for Members and non-Members to access the Exchange's system networks [63] via a 10Gb ULL fiber connection and to specify that this fee is for a dedicated connection to MIAX Pearl Options and no longer provides access to MIAX. Specifically, MIAX Pearl Options proposes to amend Sections 5)a)–b) of the Fee Schedule to increase the 10Gb ULL connectivity fee for Members and non-Members from $10,000 per month to $13,500 per month (''10Gb ULL Fee'').[64] The Exchange also proposes to amend the Fee Schedule to reflect the bifurcation of the 10Gb ULL network and specify that only the 1Gb network provides access to both MIAX Pearl Options and MIAX.

The Exchange proposes to make the following changes to reflect the bifurcated 10Gb ULL network for the Exchange and MIAX. First, in the Definitions section of the Fee Schedule, the Exchange proposes to amend the last sentence in the definition of ''MENI'' to specify that the MENI can be configured to provide network connectivity to the trading platforms, market data systems, test systems, and disaster recovery facilities of the Exchange's affiliate, MIAX, via a single, shared 1Gb connection. Next, the Exchange proposes to amend the explanatory paragraphs below the network connectivity fee tables in Sections 5)a)–b) of the Fee Schedule to specify that, with the bifurcated 10Gb ULL network,

[58] To the extent that the cost-based standard includes Commission Staff making determinations as to the appropriateness of certain profit margins, the Exchange believes that Staff should be clear as to what they determine is an appropriate profit margin.

[59] In light of the arguments above regarding disparate standards of review for historical legacy non-transaction fees and current non-transaction fees for non-legacy exchanges, a fee parity alternative would be one possible way to avoid the current unfair and discriminatory effect of the Staff Guidance and Revised Review Process. *See, e.g., CSA Staff Consultation Paper 21–401, Real-Time Market Data Fees, available at https://www.bcsc.bc.ca/-/media/PWS/Resources/Securities_Law/Policies/Policy2/21401_Market_Data_Fee_CSA_Staff_Consulation_Paper.pdf.*

[60] The Exchange's costs have clearly increased and continue to increase, particularly regarding capital expenditures, as well as employee benefits provided by third parties (*e.g.,* healthcare and insurance). Yet, practically no fee change proposed by the Exchange to cover its ever increasing costs has been acceptable to the Commission Staff since 2021. The only other fair and reasonable alternative would be to require the numerous fee filings unquestioningly approved before the Staff Guidance and Revised Review Process to ''develop a record,'' and to ''explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review,'' and to ensure a comparable review process with the Exchange's filing.

[61] *See supra* note 9.

[62] *Id.*

[63] The Exchange's system networks consist of the Exchange's extranet, internal network, and external network.

[64] Market participants that purchase additional 10Gb ULL connections as a result of this change will not be subject to the Exchange's Member Network Connectivity Testing and Certification Fee under Section 4)c) of the Exchange's Fee Schedule. *See* Section 4)c) of the Exchange's fee schedule *available at https://www.miaxglobal.com/markets/us-options/pearl-options/fees* (providing that ''Network Connectivity Testing and Certification Fees will not be assessed in situations where the Exchange initiates a mandatory change to the Exchange's system that requires testing and certification. Member Network Connectivity Testing and Certification Fees will not be assessed for testing and certification of connectivity to the Exchange's Disaster Recovery Facility.'').

Members (and non-Members) utilizing the MENI to connect to the trading platforms, market data systems, test systems, and disaster recovery facilities of the Exchange and MIAX via a single, can only do so via a shared 1Gb connection.

The Exchange will continue to assess monthly Member and non-Member network connectivity fees for connectivity to the primary and secondary facilities in any month the Member or non-Member is credentialed to use any of the Exchange APIs or market data feeds in the production environment. The Exchange will continue to pro-rate the fees when a Member or non-Member makes a change to the connectivity (by adding or deleting connections) with such pro-rated fees based on the number of trading days that the Member or non-Member has been credentialed to utilize any of the Exchange APIs or market data feeds in the production environment through such connection, divided by the total number of trading days in such month multiplied by the applicable monthly rate.

Full Service MEO Ports—Bulk and Single

Background

The Exchange also proposes to amend Section 5)d) of the Fee Schedule to amend the calculation and amount of fees for Full Service MEO Ports. The Exchange currently offers different types of MEO Ports depending on the services required by the Member, including a Full Service MEO Port-Bulk,[65] a Full Service MEO Port-Single,[66] and a Limited Service MEO Port.[67] For one monthly price, a Member may be allocated two (2) Full-Service MEO Ports of either type per matching engine[68] and may request Limited Service MEO Ports for which MIAX Pearl will assess Members Limited Service MEO Port fees based on a sliding scale for the number of Limited Service MEO Ports utilized each month. The two (2) Full-Service MEO Ports that may be allocated per matching engine to a Member may consist of: (a) two (2) Full Service MEO Ports—Bulk; (b) two (2) Full Service MEO Ports—Single; or (c) one (1) Full Service MEO Port—Bulk and one (1) Full Service MEO Port—Single.

Currently, the Exchange assesses Members Full Service MEO Port Fees, either for a Full Service MEO Port—Bulk and/or for a Full Service MEO Port—Single, based upon the monthly total volume executed by a Member and its Affiliates[69] on the Exchange, across all origin types, not including Excluded Contracts,[70] as compared to the Total Consolidated Volume (''TCV''),[71] in all MIAX Pearl-listed options. The Exchange adopted a tier-based fee structure based upon the volume-based tiers detailed in the definition of ''Non-Transaction Fees Volume-Based Tiers'' described in the Definitions section of the Fee Schedule. The Exchange assesses these and other monthly Port fees to Members in each month the market participant is credentialed to use a Port in the production environment.

Full Service MEO Port (Bulk) Fee Changes

Current Full Service MEO Port (Bulk) Fees. The Exchange currently assesses all Members (Market Makers[72] and Electronic Exchange Members[73] (''EEMs'')) monthly Full Service MEO Port—Bulk fees as follows:

(i) if its volume falls within the parameters of Tier 1 of the Non-Transaction Fees Volume-Based Tiers, or volume up to 0.30%, $3,000;

(ii) if its volume falls within the parameters of Tier 2 of the Non-Transaction Fees Volume-Based Tiers, or volume above 0.30% up to 0.60%, $4,500; and

(iii) if its volume falls within the parameters of Tier 3 of the Non-Transaction Fees Volume-Based Tiers, or volume above 0.60%, $5,000.

Proposed Full Service MEO Port (Bulk) Fees. The Exchange proposes to amend the calculation and amount of Full Service MEO Port (Bulk) fees for EEMs and Market Makers. In particular, for EEMs, the Exchange proposes to move away from the above-described volume tier-based fee structure and instead charge all EEMs that utilize Full Service MEO Ports (Bulk) a flat monthly fee of $7,500. For this flat monthly fee, EEMs will continue to be entitled to two (2) Full Service MEO Ports (Bulk) for each Matching Engine for the single monthly fee of $7,500. The Exchange now proposes to amend the calculation and amount of Full Service MEO Port (Bulk) fees for Market Makers by moving away from the above-described volume tier-based fee structure to harmonize the Full Service MEO Port (Bulk) fee structure for Market Makers with that of the Exchange's affiliates, MIAX and MIAX Emerald.[74] The Exchange proposes that the amount of the monthly Full Service MEO Port (Bulk) fees for Market Makers would be based on the lesser of either the per class traded or percentage of total national average daily volume (''ADV'') measurement based on classes traded by volume. The amount of monthly Market Maker Full Service MEO Port (Bulk) fee would be based upon the number of classes in which the Market Maker was registered to quote on any given day within the calendar month, or upon the class volume percentages. This change in how Full Service MEO Port (Bulk) fees are calculated is identical to how the Exchange assesses Market Makers Trading Permit fees, which is in line with how numerous exchanges charge similar membership fees.

Specifically, the Exchange proposes to adopt the following Full Service MEO Port (Bulk) fees for Market Makers: (i) $5,000 for Market Maker registrations in up to 10 option classes or up to 20% of option classes by national ADV; (ii) $7,500 for Market Maker registrations in up to 40 option classes or up to 35% of option classes by ADV; (iii) $10,000 for Market Maker registrations in up to 100 option classes or up to 50% of option

[65] ''Full Service MEO Port—Bulk'' means an MEO port that supports all MEO input message types and binary bulk order entry. *See* the Definitions Section of the Fee Schedule.

[66] ''Full Service MEO Port—Single'' means an MEO port that supports all MEO input message types and binary order entry on a single order-by-order basis, but not bulk orders. *See* the Definitions Section of the Fee Schedule.

[67] ''Limited Service MEO Port'' means an MEO port that supports all MEO input message types, but does not support bulk order entry and only supports limited order types, as specified by the Exchange via Regulatory Circular. *See* the Definitions Section of the Fee Schedule.

[68] A ''Matching Engine'' is a part of the Exchange's electronic system that processes options orders and trades on a symbol-by-symbol basis. *See* the Definitions Section of the Fee Schedule.

[69] ''Affiliate'' means (i) an affiliate of a Member of at least 75% common ownership between the firms as reflected on each firm's Form BD, Schedule A, or (ii) the Appointed Market Maker of an Appointed EEM (or, conversely, the Appointed EEM of an Appointed Market Maker). *See* the Definitions Section of the Fee Schedule.

[70] ''Excluded Contracts'' means any contracts routed to an away market for execution. *See* the Definitions Section of the Fee Schedule.

[71] ''TCV'' means total consolidated volume calculated as the total national volume in those classes listed on MIAX Pearl for the month for which the fees apply, excluding consolidated volume executed during the period of time in which the Exchange experiences an Exchange System Disruption (solely in the option classes of the affected Matching Engine). *See* the Definitions Section of the Fee Schedule.

[72] The term ''Market Maker'' means a Member registered with the Exchange for the purpose of making markets in options contracts traded on the Exchange and that is vested with the rights and responsibilities specified in Chapter VI of Exchange Rules. *See* the Definitions Section of the Fee Schedule and Exchange Rule 100.

[73] The term ''Electronic Exchange Member'' or ''EEM'' means the holder of a Trading Permit who is a Member representing as agent Public Customer Orders or Non-Customer Orders on the Exchange and those non-Market Maker Members conducting proprietary trading. Electronic Exchange Members are deemed ''members'' under the Exchange Act. *See* the Definitions Section of the Fee Schedule and Exchange Rule 100.

[74] *See* MIAX Fee Schedule, Section 5)d)ii) and MIAX Emerald Fee Schedule, Section 5)d)ii).

classes by ADV; and (iv) $12,000 for Market Maker registrations in over 100 option classes or over 50% of option classes by ADV up to all option classes listed on MIAX Pearl. For example, if Market Maker 1 elects to quote the top 40 option classes which consist of 58% of the total national average daily volume in the prior calendar quarter, the Exchange would assess $7,500 to Market Maker 1 for the month which is the lesser of 'up to 40 classes' and 'over 50% of classes by volume up to all classes listed on MIAX Pearl'. If Market Maker 2 elects to quote the bottom 1000 option classes which consist of 10% of the total national average daily volume in the prior quarter, the Exchange would assess $5,000 to Market Maker 2 for the month which is the lesser of 'over 100 classes' and 'up to 20% of classes by volume. The Exchange notes that the proposed tiers (ranging from $5,000 to $12,000) are lower than the tiers that the Exchange's affiliates charge for their comparable ports (ranging from $5,000 to $20,500) for similar per class tier thresholds.[75]

With the proposed changes, a Market Maker would be determined to be registered in a class if that Market Maker has been registered in one or more series in that class.[76] The Exchange will assess MIAX Pearl Options Market Makers the monthly Market Maker Full Service MEO Port (Bulk) fee based on the greatest number of classes listed on MIAX Pearl Options that the MIAX Pearl Options Market Maker registered to quote in on any given day within a calendar month. Therefore, with the proposed changes to the calculation of Market Maker Full Service MEO Port (Bulk) fees, the Exchange's Market Makers would be encouraged to quote in more series in each class they are registered in because each additional series in that class would not count against their total classes for purposes of the Full Service MEO Port (Bulk) fee tiers. The class volume percentage is based on the total national ADV in classes listed on MIAX Pearl Options in the prior calendar quarter. Newly listed option classes are excluded from the calculation of the monthly Market Maker Full Service MEO Port (Bulk) fee until the calendar quarter following their listing, at which time the newly listed option classes will be included in both the per class count and the percentage of total national ADV.

The Exchange also proposes to adopt an alternative lower Full Service MEO Port (Bulk) fee for Market Makers who fall within the 2nd, 3rd and 4th levels of the proposed Market Maker Full Service MEO Port (Bulk) fee table: (i) Market Maker registrations in up to 40 option classes or up to 35% of option classes by volume; (ii) Market Maker registrations in up to 100 option classes or up to 50% of option classes by volume; and (iii) Market Maker registrations in over 100 option classes or over 50% of option classes by volume up to all option classes listed on MIAX Pearl Options. In particular, the Exchange proposes to adopt footnote ''**'' following the Market Maker Full Service MEO Port (Bulk) fee table for these Monthly Full Service MEO Port (Bulk) tier levels. New proposed footnote ''**'' will provide that if the Market Maker's total monthly executed volume during the relevant month is less than 0.040% of the total monthly TCV for MIAX Pearl–listed option classes for that month, then the fee will be $6,000 instead of the fee otherwise applicable to such level.

The purpose of the alternative lower fee designated in proposed footnote ''**'' is to provide a lower fixed fee to those Market Makers who are willing to quote the entire Exchange market (or substantial amount of the Exchange market), as objectively measured by either number of classes assigned or national ADV, but who do not otherwise execute a significant amount of volume on the Exchange. The Exchange believes that, by offering lower fixed fees to Market Makers that execute less volume, the Exchange will retain and attract smaller-scale Market Makers, which are an integral component of the option marketplace, but have been decreasing in number in recent years, due to industry consolidation. Since these smaller-scale Market Makers utilize less Exchange capacity due to lower overall volume executed, the Exchange believes it is reasonable and equitable to offer such Market Makers a lower fixed fee. The Exchange notes that the Exchange's affiliates, MIAX and MIAX Emerald, also provide lower MIAX Express Interface (''MEI'') Port fees (the comparable ports on those exchanges) for Market Makers who quote the entire MIAX and MIAX Emerald markets (or substantial amount of those markets), as objectively measured by either number of classes assigned or national ADV, but who do not otherwise execute a significant amount of volume on MIAX or MIAX Emerald.[77] The proposed changes to the Full Service MEO Port (Bulk) fees for Market Makers who fall within the 2nd, 3rd and 4th levels of the fee table are based upon a business determination of current Market Maker assignments and trading volume.

Unlike other options exchanges that provide similar port functionality and charge fees on a per port basis,[78] the Exchange offers Full Service MEO Ports as a package and provides Members with the option to receive up to two Full Service MEO Ports (described above) per matching engine to which that Member connects. The Exchange currently has twelve (12) matching engines, which means Market Makers may receive up to twenty-four (24) Full Service MEO Ports for a single monthly fee, that can vary based on the lesser of either the per class traded or percentage of total national ADV measurement based on classes traded by volume, as described above. For illustrative purposes, the Exchange currently assesses a fee of $5,000 per month for Market Makers that reach the highest Full Service MEO Port (Bulk) tier, regardless of the number of Full Service MEO Ports allocated to the Market Maker. For example, assuming a Market Maker connects to all twelve (12) matching engines during a month, with two Full Service MEO Ports (Bulk) per matching engine, this results in an effective fee of $208.33 per Full Service MEO Port ($5,000 divided by 24) for the

[75] *See id.*

[76] Pursuant to Exchange Rule 602(a), a Member that has qualified as a Market Maker may register to make markets in individual series of options.

[77] *See* MIAX Fee Schedule, Section 5)d)ii), note ''*'' and MIAX Emerald Fee Schedule, Section 5)d)ii), note ''■'' [sic].

[78] *See* NYSE American Options Fee Schedule, Section V.A., Port Fees (each port charged on a per matching engine basis, with NYSE American having 17 match engines). *See* NYSE Technology FAQ and Best Practices: Options, Section 5.1 (How many matching engines are used by each exchange?) (September 2020) (providing a link to an Excel file detailing the number of matching engines per options exchange); NYSE Arca Options Fee Schedule, Port Fees (each port charged on a per matching engine basis, NYSE Arca having 19 match engines); *and* NYSE Technology FAQ and Best Practices: Options, Section 5.1 (How many matching engines are used by each exchange?) (September 2020) (providing a link to an Excel file detailing the number of matching engines per options exchange). *See* NASDAQ Fee Schedule, NASDAQ Options 7 Pricing Schedule, Section 3, Nasdaq Options Market—Ports and Other Services (each port charged on a per matching engine basis, with Nasdaq having multiple matching engines). *See* NASDAQ Specialized Quote Interface (SQF) Specification, Version 6.5b (updated February 13, 2020), Section 2, Architecture, *available at https://www.nasdaq.com/docs/2020/02/18/Specialized-Quote-Interface-SQI-6.5b.pdf* (the ''NASDAQ SQF Interface Specification''). The NASDAQ SQF Interface Specification also provides that NASDAQ's affiliates, NASDAQ Phlx and NASDAQ BX, Inc. (''BX''), have trading infrastructures that may consist of multiple matching engines with each matching engine trading only a range of option classes. Further, the NASDAQ SQF Interface Specification provides that the SQF infrastructure is such that the firms connect to one or more servers residing directly on the matching engine infrastructure. Since there may be multiple matching engines, firms will need to connect to each engine's infrastructure in order to establish the ability to quote the symbols handled by that engine.

month, as compared to other exchanges that charge over $1,000 per port and require multiple ports to connect to all of their matching engines.[79] This fee had been unchanged since the Exchange adopted Full Service MEO Port fees in 2018.[80] The Exchange proposes to increase Full Service MEO Port fees, with the highest monthly fee of $12,000 for the Full Service MEO Ports (Bulk). Market Makers will continue to receive two (2) Full Service MEO Ports to each matching engine to which they connect for the single flat monthly fee. Assuming a Market Maker connects to all twelve (12) matching engines during the month, with two Full Service MEO Ports per matching engine, this would result in an effective fee of $500 per Full Service MEO Port ($12,000 divided by 24).

FULL SERVICE MEO PORTS ()

[Bulk]

	Number of match engines	Total number of ports for market maker to connect to all match engines	Total fee (monthly)	Effective per port fee
Pricing Based on Market Maker Being Charged the Highest Tier (Current)	12	24	$5,000	$208.33
Pricing Based on Market Maker Being Charged the Highest Tier (as proposed)	12	24	12,000	500

Full Service MEO Port (Single) Fee Changes

Current Full Service MEO Port (Single) Fees. The Exchange currently assesses all Members (Market Makers and EEMs) monthly Full Service MEO Port (Single) fees as follows:

(i) if its volume falls within the parameters of Tier 1 of the Non-Transaction Fees Volume-Based Tiers, or volume up to 0.30%, $2,000;

(ii) if its volume falls within the parameters of Tier 2 of the Non-Transaction Fees Volume-Based Tiers, or volume above 0.30% up to 0.60%, $3,375; and

(iii) if its volume falls within the parameters of Tier 3 of the Non-Transaction Fees Volume-Based Tiers, or volume above 0.60%, $3,750.

Proposed Full Service MEO Port (Single) Fees. The Exchange proposes to amend the calculation and amount of Full Service MEO Port (Single) fees for EEMs and Market Makers. In particular, the Exchange proposes to move away from the above-described volume tier-based fee structure and instead charge all Members that utilize Full Service MEO Ports (Single) a flat monthly fee of $4,000. For this flat monthly fee, all Members will continue to be entitled to two (2) Full Service MEO Ports (Single) for each Matching Engine for the single monthly fee of $4,000.

The Exchange offers various types of ports with differing prices because each port accomplishes different tasks, are suited to different types of Members, and consume varying capacity amounts of the network. For instance, MEO ports allow for a higher throughput and can handle much higher quote/order rates than FIX ports. Members that are Market Makers or high frequency trading firms utilize these ports (typically coupled with 10Gb ULL connectivity) because they transact in significantly higher amounts of messages being sent to and from the Exchange, versus FIX port users, who are traditionally customers sending only orders to the Exchange (typically coupled with 1Gb connectivity). The different types of ports cater to the different types of Exchange Memberships and different capabilities of the various Exchange Members. Certain Members need ports and connections that can handle using far more of the network's capacity for message throughput, risk protections, and the amount of information that the System has to assess. Those Members account for the vast majority of network capacity utilization and volume executed on the Exchange, as discussed throughout. For example, three (3) Members account for 64% of all 10Gb ULL connections and Full Service MEO Ports purchased.

The Exchange proposes to increase its monthly Full Service MEO Port fees since it has not done so since the fees were adopted in 2018,[81] which are designed to recover a portion of the costs associated with directly accessing the Exchange. As described above, the Exchange's affiliates, MIAX and MIAX Emerald, also charge fees for their high throughput, low latency ports in a similar fashion as the Exchange proposes to charge for its MEO Ports—generally, the more active user the Member (*i.e.,* the greater number/greater national ADV of classes assigned to quote on MIAX and MIAX Emerald), the higher the MEI Port fee.[82] This concept is, therefore, not new or novel.

Implementation

The proposed fee changes are immediately effective.

2. Statutory Basis

The Exchange believes that the proposed fees are consistent with Section 6(b) of the Act[83] in general, and furthers the objectives of Section 6(b)(4) of the Act[84] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among Members and other persons using any facility or system which the Exchange operates or controls. The Exchange also believes the proposed fees further the objectives of Section 6(b)(5) of the Act[85] in that they are designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general protect investors and the public interest and are not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

The Exchange believes that the information provided to justify the proposed fees meets or exceeds the amount of detail required in respect of proposed fee changes under the Revised Review Process and as set forth in recent Staff Guidance. Based on both the BOX Order[86] and the Staff Guidance[87], the Exchange believes that the proposed fees are consistent with the Act because

[79] *Id. See also infra* table on page 131 and accompanying text.

[80] *See* Securities Exchange Act Release No. 82867 (March 13, 2018), 83 FR 12044 (March 19, 2018) (SR–PEARL–2018–07).

[81] *See id.*

[82] *See* MIAX Fee Schedule, Section 5)d)ii); MIAX Emerald Fee Schedule, Section 5)d)ii).

[83] 15 U.S.C. 78f(b).

[84] 15 U.S.C. 78f(b)(4).

[85] 15 U.S.C. 78f(b)(5).

[86] *See supra* note 28.

[87] *See supra* note 29.

they are: (i) reasonable, equitably allocated, not unfairly discriminatory, and not an undue burden on competition; (ii) comply with the BOX Order and the Staff Guidance; and (iii) supported by evidence (including comprehensive revenue and cost data and analysis) that they are fair and reasonable and will not result in excessive pricing or supra-competitive profit.

The Exchange believes that exchanges, in setting fees of all types, should meet high standards of transparency to demonstrate why each new fee or fee amendment meets the requirements of the Act that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among market participants. The Exchange believes this high standard is especially important when an exchange imposes various fees for market participants to access an exchange's marketplace.

In the Staff Guidance, the Commission Staff states that, ''[a]s an initial step in assessing the reasonableness of a fee, staff considers whether the fee is constrained by significant competitive forces.'' [88] The Staff Guidance further states that, ''. . . even where an SRO cannot demonstrate, or does not assert, that significant competitive forces constrain the fee at issue, a cost-based discussion may be an alternative basis upon which to show consistency with the Exchange Act.'' [89] In the Staff Guidance, the Commission Staff further states that, ''[i]f an SRO seeks to support its claims that a proposed fee is fair and reasonable because it will permit recovery of the SRO's costs, . . . , specific information, including quantitative information, should be provided to support that argument.'' [90]

The proposed fees are reasonable because they promote parity among exchange pricing for access, which promotes competition, including in the Exchanges' ability to competitively price transaction fees, invest in infrastructure, new products and other innovations, all while allowing the Exchange to recover its costs to provide dedicated access via 10Gb ULL connectivity (driven by the bifurcation of the 10Gb ULL network) and Full Service MEO Ports. As discussed above, the Revised Review Process and Staff Guidance have created an uneven playing field between legacy and non-legacy exchanges by severely restricting non-legacy exchanges from being able to increase non-transaction related fees to provide them with additional necessary revenue to better compete with legacy exchanges, which largely set fees prior to the Revised Review Process. The much higher non-transaction fees charged by the legacy exchanges provides them with two significant competitive advantages: (i) additional non-transaction revenue that may be used to fund areas other than the non-transaction service related to the fee, such as investments in infrastructure, advertising, new products and other innovations; and (ii) greater flexibility to lower their transaction fees by using the revenue from the higher non-transaction fees to subsidize transaction fee rates. The latter is more immediately impactful in competition for order flow and market share, given the variable nature of this cost on Member firms. The absence of a reasonable path forward to increase non-transaction fees to comparable (or lower rates) limits the Exchange's flexibility to, among other things, make additional investments in infrastructure and advertising, diminishes the ability to remain competitive on transaction fees, and hinders the ability to compete for order flow and market share. Again, there is little doubt that subjecting one exchange to a materially different standard than that applied to other exchanges for non-transaction fees leaves that exchange at a disadvantage in its ability to compete with its pricing of transaction fees.

The Proposed Fees Ensure Parity Among Exchange Access Fees, Which Promotes Competition

The Exchange commenced operations in February 2017 [91] and adopted its initial fee schedule, with 10Gb ULL connectivity fees set at $8,500 (the Exchange originally had a non-ULL 10Gb connectivity option, which it has since removed) and a fee waiver for all Full Service MEO Port fees.[92] As a new exchange entrant, the Exchange chose to offer Full Service MEO Ports free of charge to encourage market participants to trade on the Exchange and experience, among things, the quality of the Exchange's technology and trading functionality. This practice is not uncommon. New exchanges often do not charge fees or charge lower fees for certain services such as memberships/trading permits to attract order flow to an exchange, and later amend their fees to reflect the true value of those services, absorbing all costs to provide those services in the meantime. Allowing new exchange entrants time to build and sustain market share through various pricing incentives before increasing non-transaction fees encourages market entry and fee parity, which promotes competition among exchanges. It also enables new exchanges to mature their markets and allow market participants to trade on the new exchanges without fees serving as a potential barrier to attracting memberships and order flow.[93]

Later in 2018, as the Exchange's market share increased,[94] the Exchange adopted nominal fees for Full Service MEO Ports.[95] The Exchange last increased the fees for its 10Gb ULL fiber connections from $9,300 to $10,000 per month on January 1, 2021.[96] The Exchange balanced business and competitive concerns with the need to financially compete with the larger incumbent exchanges that charge higher fees for similar connectivity and use that revenue to invest in their technology and other service offerings.

The proposed changes to the Fee Schedule are reasonable in several

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *See* MIAX PEARL Successfully Launches Trading Operations, dated February 6, 2017, *available at https://www.miaxglobal.com/sites/default/files/alert-files/MIAX_Press_Release_02062017.pdf.*

[92] *See* Securities Exchange Act Release No. 80061 (February 17, 2017), 82 FR 11676 (February 24, 2017) (SR–PEARL–2017–10).

[93] *See* Securities Exchange Act Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR–BOX–2022–17) (stating, ''[t]he Exchange established this lower (when compared to other options exchanges in the industry) Participant Fee in order to encourage market participants to become Participants of BOX . . .''). *See also* Securities Exchange Act Release No. 90076 (October 2, 2020), 85 FR 63620 (October 8, 2020) (SR–MEMX–2020–10) (proposing to adopt the initial fee schedule and stating that ''[u]nder the initial proposed Fee Schedule, the Exchange proposes to make clear that it does not charge any fees for membership, market data products, physical connectivity or application sessions.''). MEMX's market share has increased and recently proposed to adopt numerous non-transaction fees, including fees for membership, market data, and connectivity. *See* Securities Exchange Act Release Nos. 93927 (January 7, 2022), 87 FR 2191 (January 13, 2022) (SR–MEMX–2021–19) (proposing to adopt membership fees); 96430 (December 1, 2022), 87 FR 75083 (December 7, 2022) (SR–MEMX–2022–32) *and* 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26) (proposing to adopt fees for connectivity). *See also, e.g.,* Securities Exchange Act Release No. 88211 (February 14, 2020), 85 FR 9847 (February 20, 2020) (SR–NYSENAT–2020–05), *available at https://www.nyse.com/publicdocs/nyse/markets/nyse-national/rule-filings/filings/2020/SR-NYSENat-2020-05.pdf* (initiating market data fees for the NYSE National exchange after initially setting such fees at zero).

[94] The Exchange experienced a monthly average trading volume of 3.94% for the month of March 2018. *See* the ''Market Share'' section of the Exchange's website, *available at www.miaxglobal.com.*

[95] *See* Securities Exchange Act Release No. 82867 (March 13, 2018), 83 FR 12044 (March 19, 2018) (SR–PEARL–2018–07).

[96] *See* Securities Exchange Act Release No. 90981 (January 25, 2021), 86 FR 7582 (January 29, 2021) (SR–PEARL–2021–01).

respects. As a threshold matter, the Exchange is subject to significant competitive forces, which constrains its pricing determinations for transaction fees as well as non-transaction fees. The fact that the market for order flow is competitive has long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* the D.C. Circuit stated, ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .'' [97]

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention to determine prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues, and also recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [98]

Congress directed the Commission to ''rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.' '' [99] As a result, and as evidenced above, the Commission has historically relied on competitive forces to determine whether a fee proposal is equitable, fair, reasonable, and not unreasonably or unfairly discriminatory. ''If competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior.'' [100] Accordingly, ''the existence of significant competition provides a substantial basis for finding that the terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.'' [101] In the Revised Review Process and Staff Guidance, Commission Staff indicated that they would look at factors beyond the competitive environment, such as cost, only if a ''proposal lacks persuasive evidence that the proposed fee is constrained by significant competitive forces.'' [102]

The Exchange believes the competing exchanges' 10Gb connectivity and port fees are useful examples of alternative approaches to providing and charging for access and demonstrating how such fees are competitively set and constrained. To that end, the Exchange believes the proposed fees are competitive and reasonable because the proposed fees are similar to or less than fees charged for similar connectivity and port access provided by other options exchanges with comparable market shares. As such, the Exchange believes that denying its ability to institute fees that allow the Exchange to recoup its costs with a reasonable margin in a manner that is closer to parity with legacy exchanges, in effect, impedes its ability to compete, including in its pricing of transaction fees and ability to invest in competitive infrastructure and other offerings.

The following table shows how the Exchange's proposed fees remain similar to or less than fees charged for similar connectivity and port access provided by other options exchanges with similar market share. Each of the connectivity and port rates in place at competing options exchanges were filed with the Commission for immediate effectiveness and remain in place today.

Exchange	Type of connection or port	Monthly fee (per connection or per port)
MIAX Pearl Options (as proposed) (equity options market share of 6.36% for the month of August 2023) [a].	10Gb ULL connection	$13,500
	Full Service MEO Port (Bulk) for Market Makers.	Lesser of either the per class basis or percentage of total national ADV by the Market Maker, as follows: $5,000—up to 10 classes or up to 20% of classes by volume. $7,500**—up to 40 classes or up to 35% of classes by volume. $10,000**—up to 100 classes or up to 50% of classes by volume. $12,000**—over 100 classes or over 50% of all classes by volume up to all classes (or $500 per port per matching engine).
	**A lower rate of $6,000 will apply to these tiers if the Market Maker's total monthly executed volume is less than 0.040% of total monthly TCV for MIAX Pearl options..	
	Full Service MEO Port (Bulk) for EEMs.	$7,500 (or $312.50 per port per matching engine).
	Full Service MEO Port (Single) for Market Makers and EEMs.	$4,000 (or $166.66 per port per matching engine).
NASDAQ [b] (equity options market share of 5.80% for the month of August 2023) [c].	10Gb Ultra fiber connection.	$15,000 per connection.
	SQF Port [d]	1–5 ports: $1,500 per port. 6–20 ports: $1,000 per port. 21 or more ports: $500 per port.

[97] *See NetCoalition,* 615 F.3d at 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[98] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[99] *See NetCoalition,* 615 F.3d at 534–35; see also H.R. Rep. No. 94–229 at 92 (1975) (''[I]t is the intent of the conferees that the national market system evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed.'').

[100] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74,770 (December 9, 2008) (SR–NYSEArca-2006–21).

[101] *Id.*

[102] *See* Staff Guidance, *supra* note 29.

Exchange	Type of connection or port	Monthly fee (per connection or per port)
NASDAQ ISE LLC (''ISE'')[e] (equity options market share of 5.58% for the month of August 2023)[f].	10Gb Ultra fiber connection. SQF Port	$15,000 per connection. $1,100 per port.
NYSE American LLC (''NYSE American'')[g] ..... (equity options market share of 7.34% for the month of August 2023)[h].	10Gb LX LCN connection. Order/Quote Entry Port.	$22,000 per connection. 1–40 ports: $450 per port 41 or more ports: $150 per port.
NASDAQ GEMX, LLC (''GEMX'')[i] (equity options market share of 3.03% for the month of August 2023)[j].	10Gb Ultra connection SQF Port	$15,000 per connection. $1,250 per port.

a *See* the ''Market Share'' section of the Exchange's website, *available at https://www.miaxglobal.com/.*
b *See* NASDAQ Pricing Schedule, Options 7, Section 3, Ports and Other Services *and* NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.
c *See supra* note a.
d Similar to the MIAX Pearl Options' MEO Ports, SQF ports are primarily utilized by Market Makers.
e *See* ISE Pricing Schedule, Options 7, Section 7, Connectivity Fees *and* ISE Rules, General 8: Connectivity.
f *See supra* note a.
g *See* NYSE American Options Fee Schedule, Section V.A. Port Fees *and* Section V.B. Co-Location Fees.
h *See supra* note a.
i *See* GEMX Pricing Schedule, Options 7, Section 6, Connectivity Fees *and* GEMX Rules, General 8: Connectivity.
j *See supra* note a.

The Exchange acknowledges that, without additional contextual information, the above table may lead someone to believe that the Exchange's proposed fees for Full Service MEO Ports is higher than other exchanges when in fact, that is not true. The Exchange provides each Member or non-Member access to two (2) ports on all twelve (12) matching engines for a single fee and a vast majority choose to connect to all twelve (12) matching engines and utilize both ports for a total of 24 ports. Other exchanges charge on a per port basis and require firms to connect to multiple matching engines, thereby multiplying the cost to access their full market.[103] On the Exchange, this is not the case. The Exchange provides each Member or non-Member access, but does not require they connect to, all twelve (12) matching engines.

There is no requirement, regulatory or otherwise, that any broker-dealer connect to and access any (or all of) the available options exchanges. Market participants may choose to become a member of one or more options exchanges based on the market participant's assessment of the business opportunity relative to the costs of the Exchange. With this, there is elasticity of demand for exchange membership. As an example, one Market Maker terminated their MIAX Pearl Options membership effective January 1, 2023 as a direct result of the proposed connectivity and port fee changes proposed by MIAX Pearl Options.

It is not a requirement for market participants to become members of all options exchanges; in fact, certain market participants conduct an options business as a member of only one options market.[104] A very small number of market participants choose to become a member of all sixteen options exchanges. Most firms that actively trade on options markets are not currently Members of the Exchange and do not purchase connectivity or port services at the Exchange. Connectivity and ports are only available to Members or service bureaus, and only a Member may utilize a port.[105]

One other exchange recently noted in a proposal to amend their own trading permit fees that of the 62 market making firms that are registered as Market Makers across Cboe, MIAX, and BOX, 42 firms access only one of the three exchanges.[106] The Exchange and its affiliated options markets, MIAX and MIAX Emerald, have a total of 46 members. Of those 46 total members, 37 are members of all three affiliated options markets, two are members of only two affiliated options markets, and seven are members of only one affiliated options market. The Exchange also notes that no firm is a Member of the Exchange only. The above data evidences that a broker-dealer need not have direct connectivity to all options exchanges, let alone the Exchange and its two affiliates, and broker-dealers may elect to do so based on their own business decisions and need to directly access each exchange's liquidity pool.

Not only is there not an actual regulatory requirement to connect to every options exchange, the Exchange believes there is also no ''de facto'' or practical requirement as well, as further evidenced by the broker-dealer membership analysis of the options exchanges discussed above. As noted above, this is evidenced by the fact that one MIAX Pearl Options Market Maker terminated their MIAX Pearl Options membership effective January 1, 2023 as a direct result of the proposed connectivity and port fee changes on MIAX Pearl Options. Indeed, broker-dealers choose if and how to access a

[103] *See* Specialized Quote Interface Specification, Nasdaq PHLX, Nasdaq Options Market, Nasdaq BX Options, Version 6.5a, Section 2, Architecture (revised August 16, 2019), *available at http://www.nasdaqtrader.com/content/technicalsupport/specifications/TradingProducts/SQF6.5a-2019-Aug.pdf.* The Exchange notes that it is unclear whether the NASDAQ exchanges include connectivity to each matching engine for the single fee or charge per connection, per matching engine. *See also* NYSE Technology FAQ and Best Practices: Options, Section 5.1 (How many matching engines are used by each exchange?) (September 2020). The Exchange notes that NYSE provides a link to an Excel file detailing the number of matching engines per options exchange, with Arca and Amex having 19 and 17 matching engines, respectively.

[104] BOX recently adopted an electronic market maker trading permit fee. *See* Securities Exchange Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR–BOX–2022–17). In that proposal, BOX stated that, ''. . . it is not aware of any reason why Market Makers could not simply drop their access to an exchange (or not initially access an exchange) if an exchange were to establish prices for its non-transaction fees that, in the determination of such Market Maker, did not make business or economic sense for such Market Maker to access such exchange. [BOX] again notes that no market makers are required by rule, regulation, or competitive forces to be a Market Maker on [BOX].'' Also in 2022, MEMX established a monthly membership fee. *See* Securities Exchange Act Release No. 93927 (January 7, 2022), 87 FR 2191 (January 13, 2022) (SR–MEMX–2021–19). In that proposal, MEMX reasoned that that there is value in becoming a member of the exchange and stated that it believed that the proposed membership fee ''is not unfairly discriminatory because no broker-dealer is required to become a member of the Exchange'' and that ''neither the trade-through requirements under Regulation NMS nor broker-dealers' best execution obligations require a broker-dealer to become a member of every exchange.''

[105] Service Bureaus may obtain ports on behalf of Members.

[106] *See* Securities Exchange Act Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR–BOX–2022–17) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Fee Schedule on the BOX Options Market LLC Facility To Adopt Electronic Market Maker Trading Permit Fees). The Exchange believes that BOX's observation demonstrates that market making firms can, and do, select which exchanges they wish to access, and, accordingly, options exchanges must take competitive considerations into account when setting fees for such access.

particular exchange and because it is a choice, the Exchange must set reasonable pricing, otherwise prospective members would not connect and existing members would disconnect from the Exchange. The decision to become a member of an exchange, particularly for registered market makers, is complex, and not solely based on the non-transactional costs assessed by an exchange. As noted herein, specific factors include, but are not limited to: (i) an exchange's available liquidity in options series; (ii) trading functionality offered on a particular market; (iii) product offerings; (iv) customer service on an exchange; and (v) transactional pricing. Becoming a member of the exchange does not ''lock'' a potential member into a market or diminish the overall competition for exchange services.

In lieu of becoming a member at each options exchange, a market participant may join one exchange and elect to have their orders routed in the event that a better price is available on an away market. Nothing in the Order Protection Rule requires a firm to become a Member at—or establish connectivity to—the Exchange.[107] If the Exchange is not at the national best bid or offer (''NBBO''),[108] the Exchange will route an order to any away market that is at the NBBO to ensure that the order was executed at a superior price and prevent a trade-through.[109]

With respect to the submission of orders, Members may also choose not to purchase any connection from the Exchange, and instead rely on the port of a third party to submit an order. For example, a third-party broker-dealer Member of the Exchange may be utilized by a retail investor to submit orders into an exchange. An institutional investor may utilize a broker-dealer, a service bureau,[110] or request sponsored access [111] through a member of an exchange in order to submit a trade directly to an options exchange.[112] A market participant may either pay the costs associated with becoming a member of an exchange or, in the alternative, a market participant may elect to pay commissions to a broker-dealer, pay fees to a service bureau to submit trades, or pay a member to sponsor the market participant in order to submit trades directly to an exchange.

Non-Member third-parties, such as service bureaus and extranets, resell the Exchange's connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange's connectivity fees), which alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity and other access fees to its market. The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. Unlike other exchanges, the Exchange also does not currently assess fees on third-party resellers on a per customer basis (*i.e.,* fees based on the number of firms that connect to the Exchange indirectly via the third-party).[113] Indeed, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own.[114] Particularly, in the event that a market participant views the Exchange's direct connectivity and access fees as more or less attractive than competing markets, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to the Exchange and connect instead to one or more of the other 15 options markets. Accordingly, the Exchange believes that the proposed fees are fair and reasonable and constrained by competitive forces.

The Exchange is obligated to regulate its Members and secure access to its environment. In order to properly regulate its Members and secure the trading environment, the Exchange takes measures to ensure access is monitored and maintained with various controls. Connectivity and ports are methods utilized by the Exchange to grant Members secure access to communicate with the Exchange and exercise trading rights. When a market participant elects to be a Member, and is approved for membership by the Exchange, the Member is granted trading rights to enter orders and/or quotes into Exchange through secure connections.

Again, there is no legal or regulatory requirement that a market participant become a Member of the Exchange. This is again evidenced by the fact that one MIAX Pearl Options Market Maker terminated their MIAX Pearl Options membership effective January 1, 2023 as a direct result of the proposed connectivity and port fee changes on MIAX Pearl Options. If a market participant chooses to become a Member, they may then choose to purchase connectivity beyond the one connection that is necessary to quote or submit orders on the Exchange. Members may freely choose to rely on one or many connections, depending on their business model.

Bifurcation of 10Gb ULL Connectivity and Related Fees

The Exchange began to operate on a single shared network with MIAX when MIAX Pearl Options commenced operations as a national securities exchange on February 7, 2017.[115] The Exchange and MIAX operated on a single shared network to provide Members with a single convenient set of access points for both exchanges. Both the Exchange and MIAX offer two methods of connectivity, 1Gb and 10Gb ULL connections. The 1Gb connection services are supported by a discrete set of switches providing 1Gb access ports to Members. The 10Gb ULL connection services are supported by a second and mutually exclusive set of switches providing 10Gb ULL access ports to Members. Previously, both the 1Gb and

[107] *See* Options Order Protection and Locked/Crossed Market Plan (August 14, 2009), *available at https://www.theocc.com/getmedia/7fc629d9-4e54-4b99-9f11-c0e4db1a2266/options_order_protection_plan.pdf.*

[108] *See* Exchange Rule 100.

[109] Members may elect to not route their orders by utilizing the Do Not Route order type. *See* Exchange Rule 516(g).

[110] Service Bureaus provide access to market participants to submit and execute orders on an exchange. On the Exchange, a Service Bureau may be a Member. Some Members utilize a Service Bureau for connectivity and that Service Bureau may not be a Member. Some market participants utilize a Service Bureau who is a Member to submit orders.

[111] Sponsored Access is an arrangement whereby a Member permits its customers to enter orders into an exchange's system that bypass the Member's trading system and are routed directly to the Exchange, including routing through a service bureau or other third-party technology provider.

[112] This may include utilizing a floor broker and submitting the trade to one of the five options trading floors.

[113] *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).

[114] The Exchange notes that resellers, such as SFTI, are not required to publicize, let alone justify or file with the Commission their fees, and as such could charge the market participant any fees it deems appropriate (including connectivity fees higher than the Exchange's connectivity fees), even if such fees would otherwise be considered potentially unreasonable or uncompetitive fees.

[115] *See* Securities Exchange Act Release No. 80061 (February 17, 2017), 82 FR 11676 (February 24, 2017) (establishing MIAX Pearl Options Fee Schedule and establishing that the MENI can also be configured to provide network connectivity to the trading platforms, market data systems, test systems, and disaster recovery facility of the MIAX Pearl Options' affiliate, MIAX, via a single, shared connection).

10Gb ULL shared extranet ports allowed Members to use one connection to access both exchanges, namely their trading platforms, market data systems, test systems, and disaster recovery facilities.

The Exchange stresses that bifurcating the 10Gb ULL connectivity between the Exchange and MIAX was not designed with the objective to generate an overall increase in access fee revenue. Rather, the proposed change was necessitated by 10Gb ULL connectivity experiencing a significant decrease in port availability mostly driven by connectivity demands of latency sensitive Members that seek to maintain multiple 10Gb ULL connections on every switch in the network. Operating two separate national securities exchanges on a single shared network provided certain benefits, such as streamlined connectivity to multiple exchanges, and simplified exchange infrastructure. However, doing so was no longer sustainable due to ever-increasing capacity constraints and current system limitations. The network is not an unlimited resource. As described more fully in the proposal to bifurcate the 10Gb ULL network,[116] the connectivity needs of Members and market participants has increased every year since the launch of MIAX Pearl Options and the operations of the Exchange and MIAX on a single shared 10Gb ULL network is no longer feasible. This required constant System expansion to meet Member demand for additional ports and 10Gb ULL connections has resulted in limited available System headroom, which eventually became operationally problematic for both the Exchange and its customers.

As stated above, the shared network is not an unlimited resource and its expansion was constrained by MIAX's and MIAX Pearl Options' ability to provide fair and equitable access to all market participants of both markets. Due to the ever-increasing connectivity demands, the Exchange found it necessary to bifurcate 10Gb ULL connectivity to the Exchange's and MIAX's Systems and networks to be able to continue to meet ongoing and future 10Gb ULL connectivity and access demands.[117]

Unlike the switches that provide 1Gb connectivity, the availability for additional 10Gb ULL connections on each switch had significantly decreased. This was mostly driven by the connectivity demands of latency sensitive Members (*e.g.,* Market Makers and liquidity removers) that sought to maintain connectivity across multiple 10Gb ULL switches. Based on the Exchange's experience, such Members did not typically use a shared 10Gb ULL connection to reach both the Exchange and MIAX due to related latency concerns. Instead, those Members maintain dedicated separate 10Gb ULL connections for the Exchange and separate dedicated 10Gb ULL connections for MIAX. This resulted in a much higher 10Gb ULL usage per switch by those Members on the shared 10Gb ULL network than would otherwise be needed if the Exchange and MIAX had their own dedicated 10Gb ULL networks. Separation of the Exchange and MIAX 10Gb ULL networks naturally lends itself to reduced 10Gb ULL port consumption on each switch and, therefore, increased 10Gb ULL port availability for current Members and new Members.

Prior to bifurcating the 10Gb ULL network, the Exchange and MIAX continued to add switches to meet ongoing demand for 10Gb ULL connectivity. That was no longer sustainable because simply adding additional switches to expand the current shared 10Gb ULL network would not adequately alleviate the issue of limited available port connectivity. While it would have resulted in a gain in overall port availability, the existing switches on the shared 10Gb ULL network in use would have continued to suffer from lack of port headroom given many latency sensitive Members' needs for a presence on each switch to reach both the Exchange and MIAX. This was because those latency sensitive Members sought to have a presence on each switch to maximize the probability of experiencing the best network performance. Those Members routinely decide to rebalance orders and/or messages over their various connections to ensure each connection is operating with maximum efficiency. Simply adding switches to the extranet would not have resolved the port availability needs on the shared 10Gb ULL network since many of the latency sensitive Members were unwilling to relocate their connections to a new switch due to the potential detrimental performance impact. As such, the impact of adding new switches and rebalancing ports would not have been effective or responsive to customer needs. The Exchange has found that ongoing and continued rebalancing once additional switches are added has had, and would have continued to have had, a diminishing return on increasing available 10Gb ULL connectivity.

Based on its experience and expertise, the Exchange found the most practical way to increase connectivity availability on its switches was to bifurcate the existing 10Gb ULL networks for the Exchange and MIAX by migrating the exchanges' connections from the shared network onto their own set of switches. Such changes accordingly necessitated a review of the Exchange's previous 10Gb ULL connectivity fees and related costs. The proposed fees necessary to allow the Exchange to cover ongoing costs related to providing and maintaining such connectivity, described more fully below. The ever increasing connectivity demands that necessitated this change further support that the proposed fees are reasonable because this demand reflects that Members and non-Members believe they are getting value from the 10Gb ULL connections they purchase.

The Exchange announced on August 12, 2022 the planned network change and January 23, 2023 implementation date to provide market participants adequate time to prepare.[118] Since August 12, 2022, the Exchange has worked with current 10Gb ULL subscribers to address their connectivity needs ahead of the January 23, 2023 date. Based on those interactions and subscriber feedback, the Exchange experienced a minimal net increase of six (6) overall 10Gb ULL connectivity subscriptions across MIAX Pearl Options and MIAX. This immaterial increase in overall connections reflects a minimal fee impact for all types of subscribers and reflects that subscribers elected to reallocate existing 10Gb ULL connectivity directly to the Exchange or MIAX, or chose to decrease or cease connectivity as a result of the change.

Should the Commission Staff disapprove such fees, it would effectively dictate how an exchange manages its technology and would hamper the Exchange's ability to continue to invest in and fund access services in a manner that allows it to meet existing and anticipated access demands of market participants. Disapproval could also have the adverse effect of discouraging an exchange from optimizing its operations and deploying innovative technology to the benefit of market participants if it believes the Commission would later prevent that exchange from covering its costs and monetizing its operational enhancements, thus adversely

[116] *See* Securities Exchange Act Release Nos. 96553 (December 20, 2022), 87 FR 79379 (December 27, 2022) (SR–PEARL–2022–60); 96545 (December 20, 2022) 87 FR 79393 (December 27, 2022) (SR–MIAX–2022–48).

[117] Currently, the Exchange maintains sufficient headroom to meet ongoing and future requests for 1Gb connectivity. Therefore, the Exchange did not propose to alter 1Gb connectivity and continues to provide 1Gb connectivity over a shared network.

[118] *See supra* note 9.

impacting competition. Also, as noted above, the economic consequences of not being able to better establish fee parity with other exchanges for non-transaction fees hampers the Exchange's ability to compete on transaction fees.

Cost Analysis

In general, the Exchange believes that exchanges, in setting fees of all types, should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the Exchange Act requirements that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among members and markets. In particular, the Exchange believes that each exchange should take extra care to be able to demonstrate that these fees are based on its costs and reasonable business needs.

In proposing to charge fees for connectivity and port services, the Exchange is especially diligent in assessing those fees in a transparent way against its own aggregate costs of providing the related service, and in carefully and transparently assessing the impact on Members—both generally and in relation to other Members, *i.e.,* to assure the fee will not create a financial burden on any participant and will not have an undue impact in particular on smaller Members and competition among Members in general. The Exchange believes that this level of diligence and transparency is called for by the requirements of Section 19(b)(1) under the Act,[119] and Rule 19b–4 thereunder,[120] with respect to the types of information exchanges should provide when filing fee changes, and Section 6(b) of the Act,[121] which requires, among other things, that exchange fees be reasonable and equitably allocated,[122] not designed to permit unfair discrimination,[123] and that they not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[124] This rule change proposal addresses those requirements, and the analysis and data in each of the sections that follow are designed to clearly and comprehensively show how they are met.[125] The Exchange reiterates that the legacy exchanges with whom the Exchange vigorously competes for order flow and market share, were not subject to any such diligence or transparency in setting their baseline non-transaction fees, most of which were put in place before the Revised Review Process and Staff Guidance.

As detailed below, the Exchange recently calculated its aggregate annual costs for providing physical 10Gb ULL connectivity to the Exchange at $11,567,509 (or approximately $963,959 per month, rounded to the nearest dollar when dividing the annual cost by 12 months) and its aggregate annual costs for providing Full Service MEO Ports at $1,644,132 (or approximately $137,012 per month, rounded to the nearest dollar when dividing the annual cost by 12 months). In order to cover the aggregate costs of providing connectivity to its users (both Members and non-Members [126]) going forward and to make a modest profit, as described below, the Exchange proposes to modify its Fee Schedule to charge a fee of $13,500 per month for each physical 10Gb ULL connection and to remove language providing for a shared 10Gb ULL network between the Exchange and MIAX. The Exchange also proposes to modify its Fee Schedule to charge tiered rates for Full Service MEO Ports (Bulk) depending on the number of classes assigned or the percentage of national ADV, which is in line with how the Exchange's affiliates, MIAX and MIAX Emerald, assess fees for their comparable MEI Ports.

In 2019, the Exchange completed a study of its aggregate costs to produce market data and connectivity (the ''Cost Analysis'').[127] The Cost Analysis required a detailed analysis of the Exchange's aggregate baseline costs, including a determination and allocation of costs for core services provided by the Exchange—transaction execution, market data, membership services, physical connectivity, and port access (which provide order entry, cancellation and modification functionality, risk functionality, the ability to receive drop copies, and other functionality). The Exchange separately divided its costs between those costs necessary to deliver each of these core services, including infrastructure, software, human resources (*i.e.,* personnel), and certain general and administrative expenses (''cost drivers'').

As an initial step, the Exchange determined the total cost for the Exchange and the affiliated markets for each cost driver as part of its 2023 budget review process. The 2023 budget review is a company-wide process that occurs over the course of many months, includes meetings among senior management, department heads, and the Finance Team. Each department head is required to send a ''bottom up'' budget to the Finance Team allocating costs at the profit and loss account and vendor levels for the Exchange and its affiliated markets based on a number of factors, including server counts, additional hardware and software utilization, current or anticipated functional or non-functional development projects, capacity needs, end-of-life or end-of-service intervals, number of members, market model (*e.g.,* price time or pro-rata, simple only or simple and complex markets, auction functionality, etc.), which may impact message traffic, individual system architectures that impact platform size,[128] storage needs, dedicated infrastructure versus shared infrastructure allocated per platform based on the resources required to support each platform, number of available connections, and employees allocated time. All of these factors result in different allocation percentages among the Exchange and its affiliated markets, *i.e.,* the different percentages of the overall cost driver allocated to the Exchange and its affiliated markets will cause the dollar amount of the overall cost allocated among the Exchange and its affiliated markets to also differ. Because the Exchange's parent company currently owns and operates four separate and distinct marketplaces, the Exchange must determine the costs associated with each actual market—as opposed to the Exchange's parent company simply concluding that all costs drivers are the same at each individual marketplace and dividing total cost by four (4) (evenly for each marketplace). Rather, the Exchange's parent company determines an accurate cost for each marketplace, which results in different allocations and amounts across exchanges for the same cost drivers, due to the unique factors of each marketplace as described above. This allocation methodology also

[119] 15 U.S.C. 78s(b)(1).

[120] 17 CFR 240.19b–4.

[121] 15 U.S.C. 78f(b).

[122] 15 U.S.C. 78f(b)(4).

[123] 15 U.S.C. 78f(b)(5).

[124] 15 U.S.C. 78f(b)(8).

[125] *See* Staff Guidance, *supra* note 29.

[126] Types of market participants that obtain connectivity services from the Exchange but are not Members include service bureaus and extranets. Service bureaus offer technology-based services to other companies for a fee, including order entry services, and thus, may access application sessions on behalf of one or more Members. Extranets offer physical connectivity services to Members and non-Members.

[127] The Exchange frequently updates it Cost Analysis as strategic initiatives change, costs increase or decrease, and market participant needs and trading activity changes. The Exchange's most recent Cost Analysis was conducted ahead of this filing.

[128] For example, MIAX Pearl Options maintains 12 matching engines, MIAX Pearl Equities maintains 24 matching engines, MIAX maintains 24 matching engines and MIAX Emerald maintains 12 matching engines.

ensures that no cost would be allocated twice or double-counted between the Exchange and its affiliated markets. The Finance Team then consolidates the budget and sends it to senior management, including the Chief Financial Officer and Chief Executive Officer, for review and approval. Next, the budget is presented to the Board of Directors and the Finance and Audit Committees for each exchange for their approval. The above steps encompass the first step of the cost allocation process.

The next step involves determining what portion of the cost allocated to the Exchange pursuant to the above methodology is to be allocated to each core service, *e.g.,* connectivity and ports, market data, and transaction services. The Exchange and its affiliated markets adopted an allocation methodology with thoughtful and consistently applied principles to guide how much of a particular cost amount allocated to the Exchange should be allocated within the Exchange to each core service. This is the final step in the cost allocation process and is applied to each of the cost drivers set forth below. For instance, fixed costs that are not driven by client activity (*e.g.,* message rates), such as data center costs, were allocated more heavily to the provision of physical connectivity (60.6% of total expense amount allocated to 10Gb ULL connectivity), with smaller allocations to Full Service MEO Ports (3.4%), and the remainder to the provision of other connectivity, other ports, transaction execution, membership services and market data services (36%). This next level of the allocation methodology at the individual exchange level also took into account factors similar to those set forth under the first step of the allocation methodology process described above, to determine the appropriate allocation to connectivity or market data versus allocations for other services. This allocation methodology was developed through an assessment of costs with senior management intimately familiar with each area of the Exchange's operations. After adopting this allocation methodology, the Exchange then applied an allocation of each cost driver to each core service, resulting in the cost allocations described below. Each of the below cost allocations is unique to the Exchange and represents a percentage of overall cost that was allocated to the Exchange pursuant to the initial allocation described above.

By allocating segmented costs to each core service, the Exchange was able to estimate by core service the potential margin it might earn based on different fee models. The Exchange notes that as a non-listing venue it has five primary sources of revenue that it can potentially use to fund its operations: transaction fees, fees for connectivity and port services, membership fees, regulatory fees, and market data fees. Accordingly, the Exchange must cover its expenses from these five primary sources of revenue. The Exchange also notes that as a general matter each of these sources of revenue is based on services that are interdependent. For instance, the Exchange's system for executing transactions is dependent on physical hardware and connectivity; only Members and parties that they sponsor to participate directly on the Exchange may submit orders to the Exchange; many Members (but not all) consume market data from the Exchange in order to trade on the Exchange; and the Exchange consumes market data from external sources in order to comply with regulatory obligations. Accordingly, given this interdependence, the allocation of costs to each service or revenue source required judgment of the Exchange and was weighted based on estimates of the Exchange that the Exchange believes are reasonable, as set forth below. While there is no standardized and generally accepted methodology for the allocation of an exchange's costs, the Exchange's methodology is the result of an extensive review and analysis and will be consistently applied going forward for any other potential fee proposals. In the absence of the Commission attempting to specify a methodology for the allocation of exchanges' interdependent costs, the Exchange will continue to be left with its best efforts to attempt to conduct such an allocation in a thoughtful and reasonable manner.

Through the Exchange's extensive updated Cost Analysis, which was again recently further refined, the Exchange analyzed every expense item in the Exchange's general expense ledger to determine whether each such expense relates to the provision of connectivity and port services, and, if such expense did so relate, what portion (or percentage) of such expense actually supports the provision of connectivity and port services, and thus bears a relationship that is, ''in nature and closeness,'' directly related to network connectivity and port services. In turn, the Exchange allocated certain costs more to physical connectivity and others to ports, while certain costs were only allocated to such services at a very low percentage or not at all, using consistent allocation methodologies as described above. Based on this analysis, the Exchange estimates that the aggregate monthly cost to provide 10Gb ULL connectivity and Full Service MEO Port services, is $1,106,971 (utilizing the rounded numbers when dividing the annual cost for 10Gb ULL connectivity and annual cost for Full Service MEO Ports by 12 months, then adding both numbers together), as further detailed below.

Lastly, the Exchange notes that, based on: (i) the total expense amounts contained in this filing (which are 2023 projected expenses), and (ii) the total expense amounts contained in the related MIAX Pearl Equities filing (also 2023 projected expenses), MIAX PEARL, LLC's total costs have increased at a greater rate over the last three years than the total costs of MIAX PEARL, LLC's affiliated exchanges, MIAX and MIAX Emerald. This is also reflected in the total costs reported in MIAX PEARL, LLC's Form 1 filings over the last three years, when comparing MIAX PEARL, LLC to MIAX PEARL, LLC's affiliated exchanges, MIAX and MIAX Emerald. This is primarily because that MIAX PEARL, LLC operates two markets, one for options and one for equities, while MIAX and MIAX Emerald each operate only one market. This is also due to higher current expense for MIAX PEARL, LLC for 2022 and 2023, due to a hardware refresh (*i.e.,* replacing old hardware with new equipment) for MIAX Pearl Options, as well as higher costs associated with MIAX Pearl Equities due to greater development efforts to grow that newer marketplace.[129] The Exchange confirms

[129] *See, e.g.,* Securities Exchange Act Release Nos. 94301 (February 23, 2022), 87 FR 11739 (March 2, 2022) (SR–PEARL–2022–06) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Rule 2617(b) To Adopt Two New Routing Options, and To Make Related Changes and Clarifications to Rules 2614(a)(2)(B) and 2617(b)(2)); 94851 (May 4, 2022), 87 FR 28077 (May 10, 2022) (SR–PEARL–2022–15) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Adopt Exchange Rule 532, Order Price Protection Mechanisms and Risk Controls); 95298 (July 15, 2022), 87 FR 43579 (July 21, 2022) (SR–PEARL–2022–29) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by MIAX PEARL, LLC To Amend the Route to Primary Auction Routing Option Under Exchange Rule 2617(b)(5)(B)); 95679 (September 6, 2022), 87 FR 55866 (September 12, 2022) (SR–PEARL–2022–34) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 2614, Orders and Order Instructions, To Adopt the Primary Peg Order Type); 96205 (November 1, 2022), 87 FR 67080 (November 7, 2022) (SR–PEARL–2022–43) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Rule 2614, Orders and Order Instructions and Rule 2618, Risk Settings and Trading Risk Metrics To Enhance Existing Risk Controls); 96905 (February 13, 2023), 88 FR 10391 (February 17, 2023) (SR–PEARL–2023–03) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 2618 To Add Optional Risk Control

that there is no double counting of expenses between the options and equities platform of MIAX Pearl; the greater expense amounts of the MIAX PEARL, LLC (relative to its affiliated exchanges, MIAX and MIAX Emerald) is solely attributed to the unique factors of MIAX Pearl discussed above.

Costs Related to Offering Physical 10Gb ULL Connectivity

The following chart details the individual line-item costs considered by the Exchange to be related to offering physical dedicated 10Gb ULL connectivity via an unshared network as well as the percentage of the Exchange's overall costs that such costs represent for each cost driver (*e.g.,* as set forth below, the Exchange allocated approximately 26.9% of its overall Human Resources cost to offering physical connectivity).

Cost drivers	Allocated annual cost [k]	Allocated monthly cost [l]	% of all
Human Resources	$3,675,098	$306,258	26.3
Connectivity (external fees, cabling, switches, etc.)	70,163	5,847	60.6
Internet Services and External Market Data	322,388	26,866	73.3
Data Center	739,983	61,665	60.6
Hardware and Software Maintenance and Licenses	959,157	79,930	58.6
Depreciation	1,885,969	157,164	58.2
Allocated Shared Expenses	3,914,751	326,229	49.2
Total	11,567,509	963,959	40.5

[k] The Annual Cost includes figures rounded to the nearest dollar.
[l] The Monthly Cost was determined by dividing the Annual Cost for each line item by twelve (12) months and rounding up or down to the nearest dollar.

Below are additional details regarding each of the line-item costs considered by the Exchange to be related to offering physical 10Gb ULL connectivity. While some costs were attempted to be allocated as equally as possible among the Exchange and its affiliated markets, the Exchange notes that some of its cost allocation percentages for certain cost drivers differ when compared to the same cost drivers for the Exchange's affiliated markets in their similar proposed fee changes for connectivity and ports. This is because MIAX Pearl Options' cost allocation methodology utilizes the actual projected costs of MIAX Pearl Options (which are specific to MIAX Pearl Options, and are independent of the costs projected and utilized by MIAX Pearl Options' affiliated markets) to determine its actual costs, which may vary across the Exchange and its affiliated markets based on factors that are unique to each marketplace. MIAX Pearl Options provides additional explanation below (including the reason for the deviation) for the significant differences.

Human Resources

The Exchange notes that it and its affiliated markets have 184 employees (excluding employees at non-options/equities exchange subsidiaries of Miami International Holdings, Inc. (''MIH''), the holding company of the Exchange and its affiliated markets), and each department leader has direct knowledge of the time spent by each employee with respect to the various tasks necessary to operate the Exchange. Specifically, twice a year, and as needed with additional new hires and new project initiatives, in consultation with employees as needed, managers and department heads assign a percentage of time to every employee and then allocate that time amongst the Exchange and its affiliated markets to determine each market's individual Human Resources expense. Then, managers and department heads assign a percentage of each employee's time allocated to the Exchange into buckets including network connectivity, ports, market data, and other exchange services. This process ensures that every employee is 100% allocated, ensuring there is no double counting between the Exchange and its affiliated markets.

For personnel costs (Human Resources), the Exchange calculated an allocation of employee time for employees whose functions include providing and maintaining physical connectivity and performance thereof (primarily the Exchange's network infrastructure team, which spends most of their time performing functions necessary to provide physical connectivity). As described more fully above, the Exchange's parent company allocates costs to the Exchange and its affiliated markets and then a portion of the Human Resources costs allocated to the Exchange is then allocated to connectivity. From that portion allocated to the Exchange that applied to connectivity, the Exchange then allocated a weighted average of 42.9% of each employee's time from the above group. The Exchange also allocated Human Resources costs to provide physical connectivity to a limited subset of personnel with ancillary functions related to establishing and maintaining such connectivity (such as information security, sales, membership, and finance personnel). The Exchange allocated cost on an employee-by-employee basis (*i.e.,* only including those personnel who support functions related to providing physical connectivity) and then applied a smaller allocation to such employees' time to 10Gb ULL connectivity (less than 17%). This other group of personnel with a smaller allocation of Human Resources costs also have a direct nexus to 10Gb ULL connectivity, whether it is a sales person selling a connection, finance personnel billing for connectivity or providing budget analysis, or information security ensuring that such connectivity is secure and adequately defended from an outside intrusion.

The estimates of Human Resources cost were therefore determined by consulting with such department leaders, determining which employees are involved in tasks related to providing physical connectivity, and confirming that the proposed allocations were reasonable based on an understanding of the percentage of time such employees devote to those tasks. This includes personnel from the Exchange departments that are predominately involved in providing 1Gb and 10Gb ULL connectivity: Business Systems Development, Trading Systems Development, Systems Operations and Network Monitoring,

Settings); 97236 (March 31, 2023), 88 FR 20597 (April 6, 2023) (SR–PEARL–2023–15) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rules 2617 and 2626 Regarding Retail Orders Routed Pursuant to the Route to Primary Auction Routing Option).

Network and Data Center Operations, Listings, Trading Operations, and Project Management. Again, the Exchange allocated 42.9% of each of their employee's time assigned to the Exchange for 10Gb ULL connectivity, as stated above. Employees from these departments perform numerous functions to support 10Gb ULL connectivity, such as the installation, re-location, configuration, and maintenance of 10Gb ULL connections and the hardware they access. This hardware includes servers, routers, switches, firewalls, and monitoring devices. These employees also perform software upgrades, vulnerability assessments, remediation and patch installs, equipment configuration and hardening, as well as performance and capacity management. These employees also engage in research and development analysis for equipment and software supporting 10Gb ULL connectivity and design, and support the development and on-going maintenance of internally-developed applications as well as data capture and analysis, and Member and internal Exchange reports related to network and system performance. The above list of employee functions is not exhaustive of all the functions performed by Exchange employees to support 10Gb ULL connectivity, but illustrates the breath of functions those employees perform in support of the above cost and time allocations.

Lastly, the Exchange notes that senior level executives' time was only allocated to the 10Gb ULL connectivity related Human Resources costs to the extent that they are involved in overseeing tasks related to providing physical connectivity. The Human Resources cost was calculated using a blended rate of compensation reflecting salary, equity and bonus compensation, benefits, payroll taxes, and 401(k) matching contributions.

Connectivity (External Fees, Cabling, Switches, etc.)

The Connectivity cost driver includes external fees paid to connect to other exchanges and third parties, cabling and switches required to operate the Exchange. The Connectivity cost driver is more narrowly focused on technology used to complete connections to the Exchange and to connect to external markets. The Exchange notes that its connectivity to external markets is required in order to receive market data to run the Exchange's matching engine and basic operations compliant with existing regulations, primarily Regulation NMS.

The Exchange relies on various connectivity providers for connectivity to the entire U.S. options industry, and infrastructure services for critical components of the network that are necessary to provide and maintain its System Networks and access to its System Networks via 10Gb ULL connectivity. Specifically, the Exchange utilizes connectivity providers to connect to other national securities exchanges and the Options Price Reporting Authority (''OPRA''). The Exchange understands that these service providers provide services to most, if not all, of the other U.S. exchanges and other market participants. Connectivity provided by these service providers is critical to the Exchanges daily operations and performance of its System Networks to which market participants connect to via 10Gb ULL connectivity. Without these services providers, the Exchange would not be able to connect to other national securities exchanges, market data providers or OPRA and, therefore, would not be able to operate and support its System Networks. The Exchange does not employ a separate fee to cover its connectivity expense and recoups that expense, in part, by charging for 10Gb ULL connectivity.

Internet Services and External Market Data

The next cost driver consists of internet Services and external market data. Internet services includes third-party service providers that provide the internet, fiber and bandwidth connections between the Exchange's networks, primary and secondary data centers, and office locations in Princeton and Miami.

External market data includes fees paid to third parties, including other exchanges, to receive market data. The Exchange includes external market data fee costs towards the provision of 10Gb ULL connectivity because such market data is necessary for certain services related to connectivity, including pre-trade risk checks and checks for other conditions (*e.g.,* re-pricing of orders to avoid locked or crossed markets and trading collars). Since external market data from other exchanges is consumed at the Exchange's matching engine level, (to which 10Gb ULL connectivity provides access) in order to validate orders before additional orders enter the matching engine or are executed, the Exchange believes it is reasonable to allocate an amount of such costs to 10Gb ULL connectivity.

The Exchange relies on content service providers for data feeds for the entire U.S. options industry, as well as content for critical components of the network that are necessary to provide and maintain its System Networks and access to its System Networks via 10Gb ULL connectivity. Specifically, the Exchange utilizes content service providers to receive market data from OPRA, other exchanges and market data providers. The Exchange understands that these service providers provide services to most, if not all, of the other U.S. exchanges and other market participants. Market data provided these service providers is critical to the Exchanges daily operations and performance of its System Networks to which market participants connect to via 10Gb ULL connectivity. Without these services providers, the Exchange would not be able to receive market data and, therefore, would not be able to operate and support its System Networks. The Exchange does not employ a separate fee to cover its content service provider expense and recoups that expense, in part, by charging for 10Gb ULL connectivity.

Lastly, the Exchange notes that the actual dollar amounts allocated as part of the second step of the 2023 budget process differ among the Exchange and its affiliated markets for the internet Services and External Market Data cost driver, even though, but for MIAX Emerald, the allocation percentages are generally consistent across markets (*e.g.,* MIAX Emerald, MIAX, MIAX Pearl Options and MIAX Pearl Equities allocated 84.8%, 73.3%, 73.3% and 72.5%, respectively, to the same cost driver). This is because: (i) a different percentage of the overall internet Services and External Market Data cost driver was allocated to MIAX Emerald and its affiliated markets due to the factors set forth under the first step of the 2023 budget review process described above (unique technical architecture, market structure, and business requirements of each marketplace); and (ii) MIAX Emerald itself allocated a larger portion of this cost driver to 10Gb ULL connectivity because of recent initiatives to improve the latency and determinism of its systems. The Exchange notes while the percentage MIAX Emerald allocated to the internet Services and External Market Data cost driver is greater than the Exchange and its other affiliated markets, the overall dollar amount allocated to the Exchange under the initial step of the 2023 budget process is lower than its affiliated markets. However, the Exchange believes that this is not, in dollar amounts, a significant difference. This is because the total dollar amount of expense

covered by this cost driver is relatively small compared to other cost drivers and is due to nuances in exchange architecture that require different initial allocation amount under the first step of the 2023 budget process described above. Thus, non-significant differences in percentage allocation amounts in a smaller cost driver create the appearance of a significant difference, even though the actual difference in dollar amounts is small.

Data Center

Data Center costs includes an allocation of the costs the Exchange incurs to provide physical connectivity in the third-party data centers where it maintains its equipment (such as dedicated space, security services, cooling and power). The Exchange notes that it does not own the Primary Data Center or the Secondary Data Center, but instead, leases space in data centers operated by third parties. The Exchange has allocated a high percentage of the Data Center cost (60.6%) to physical 10Gb ULL connectivity because the third-party data centers and the Exchange's physical equipment contained therein is the most direct cost in providing physical access to the Exchange. In other words, for the Exchange to operate in a dedicated space with connectivity by market participants to a physical trading platform, the data centers are a very tangible cost, and in turn, if the Exchange did not maintain such a presence then physical connectivity would be of no value to market participants.

Hardware and Software Maintenance and Licenses

Hardware and Software Licenses includes hardware and software licenses used to operate and monitor physical assets necessary to offer physical connectivity to the Exchange.[130] The Exchange notes that this allocation is greater than MIAX and MIAX Emerald options exchanges by a significant amount as MIAX Pearl Options allocated 58.6% of its Hardware and Software Maintenance and License expense towards 10Gb ULL connectivity, while MIAX and MIAX Emerald allocated 49.8% and 50.9%, respectively, to the same category of expense. This is because MIAX Pearl Options is in the process of replacing and upgrading various hardware and software used to operate its options trading platform in order to maintain premium network performance. At the time of this filing, the Exchange is undergoing a major hardware refresh, replacing older hardware with new hardware. This hardware includes servers, network switches, cables, optics, protocol data units, and cabinets, to maintain a state-of-the-art technology platform. Because of the timing of the hardware refresh with the timing of this filing, the Exchange has materially higher expense than its affiliates. Also, MIAX Pearl Equities allocated a higher percentage of the same category of expense (58%) towards its Hardware and Software Maintenance and License expense for 10Gb ULL connectivity, which MIAX Pearl Equities explains in its own proposal to amend its 10Gb ULL connectivity fees.

Depreciation

All physical assets, software and hardware used to provide 10Gb ULL connectivity, which also includes assets used for testing and monitoring of Exchange infrastructure, were valued at cost, and depreciated or leased over periods ranging from three to five years. Thus, the depreciation cost primarily relates to servers necessary to operate the Exchange, some of which are owned by the Exchange and some of which are leased by the Exchange in order to allow efficient periodic technology refreshes. The Exchange also included in the Depreciation cost driver certain budgeted improvements that the Exchange intends to capitalize and depreciate with respect to 10Gb ULL connectivity in the near-term. As with the other allocated costs in the Exchange's updated Cost Analysis, the Depreciation cost was therefore narrowly tailored to depreciation related to 10Gb ULL connectivity. As noted above, the Exchange allocated 58.2% of its allocated depreciation costs to providing physical 10Gb ULL connectivity.

The Exchange also notes that this allocation differs from its affiliated markets due to a number of factors, such as the age of physical assets and software (*e.g.,* older physical assets and software were previously depreciated and removed from the allocation), or certain system enhancements that required new physical assets and software, thus providing a higher contribution to the depreciated cost. For example, the percentages the Exchange and its affiliate, MIAX, allocated to the depreciation of hardware and software used to provide 10Gb ULL connectivity are nearly identical. However, the Exchange's dollar amount is less than that of MIAX by approximately $35,000 per month due to two factors: first, MIAX has undergone a technology refresh since the time MIAX Pearl Options launched in 2017, leading to it having more hardware that software that is subject to depreciation. Second, MIAX maintains 24 matching engines while MIAX Pearl Options maintains only 12 matching engines. This also results in more of MIAX's hardware and software being subject to depreciation than MIAX Pearl Options' hardware and software due to the greater amount of equipment and software necessary to support the greater number of matching engines on MIAX.

Allocated Shared Expenses

Finally, as with other exchange products and services, a portion of general shared expenses was allocated to overall physical connectivity costs. These general shared costs are integral to exchange operations, including its ability to provide physical connectivity. Costs included in general shared expenses include office space and office expenses (*e.g.,* occupancy and overhead expenses), utilities, recruiting and training, marketing and advertising costs, professional fees for legal, tax and accounting services (including external and internal audit expenses), and telecommunications. Similarly, the cost of paying directors to serve on the Exchange's Board of Directors is also included in the Exchange's general shared expense cost driver.[131] These general shared expenses are incurred by the Exchange's parent company, MIH, as a direct result of operating the Exchange and its affiliated markets.

The Exchange employed a process to determine a reasonable percentage to allocate general shared expenses to 10Gb ULL connectivity pursuant to its multi-layered allocation process. First, general expenses were allocated among the Exchange and affiliated markets as

[130] This expense may be greater than the Exchange's affiliated markets, specifically MIAX and MIAX Emerald, because, unlike the MIAX and MIAX Emerald, MIAX Pearl (the options and equities markets) maintains an additional gateway to accommodate its Members' and Equity Members' access and connectivity needs. This added gateway contributes to the difference in allocations between MIAX Pearl, MIAX and MIAX Emerald. This expense also differs in dollar amount among the MIAX Pearl (options and equities markets), MIAX, and MIAX Emerald because each market may maintain and utilize a different amount of hardware and software based on its market model and infrastructure needs. The Exchange allocated a percentage of the overall cost based on actual amounts of hardware and software utilized by that market, which resulted in different cost allocations and dollar amounts.

[131] The Exchange notes that MEMX allocated a precise amount of 10% of the overall cost for directors to providing physical connectivity. *See* Securities Exchange Act Release No. 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26). The Exchange does not calculate is expenses at that granular a level. Instead, director costs are included as part of the overall general allocation.

described above. Then, the general shared expense assigned to the Exchange was allocated across core services of the Exchange, including connectivity. Then, these costs were further allocated to sub-categories within the final categories, *i.e.,* 10Gb ULL connectivity as a sub-category of connectivity. In determining the percentage of general shared expenses allocated to connectivity that ultimately apply to 10Gb ULL connectivity, the Exchange looked at the percentage allocations of each of the cost drivers and determined a reasonable allocation percentage. The Exchange also held meetings with senior management, department heads, and the Finance Team to determine the proper amount of the shared general expense to allocate to 10Gb ULL connectivity. The Exchange, therefore, believes it is reasonable to assign an allocation, in the range of allocations for other cost drivers, while continuing to ensure that this expense is only allocated once. Again, the general shared expenses are incurred by the Exchange's parent company as a result of operating the Exchange and its affiliated markets and it is therefore reasonable to allocate a percentage of those expenses to the Exchange and ultimately to specific product offerings such as 10Gb ULL connectivity.

Again, a portion of all shared expenses were allocated to the Exchange (and its affiliated markets) which, in turn, allocated a portion of that overall allocation to all physical connectivity on the Exchange. The Exchange then allocated 49.2% of the portion allocated to physical connectivity to 10Gb ULL connectivity. The Exchange believes this allocation percentage is reasonable because, while the overall dollar amount may be higher than other cost drivers, the 49.2% is based on and in line with the percentage allocations of each of the Exchange's other cost drivers. The percentage allocated to 10Gb ULL connectivity also reflects its importance to the Exchange's strategy and necessity towards the nature of the Exchange's overall operations, which is to provide a resilient, highly deterministic trading system that relies on faster 10Gb ULL connectivity than the Exchange's competitors to maintain premium performance. This allocation reflects the Exchange's focus on providing and maintaining high performance network connectivity, of which 10Gb ULL connectivity is a main contributor. The Exchange differentiates itself by offering a ''premium-product'' network experience, as an operator of a high performance, ultra-low latency network with unparalleled system throughput, which system networks can support access to three distinct options markets and multiple competing market-makers having affirmative obligations to continuously quote over 1,100,000 distinct trading products (per exchange), and the capacity to handle approximately 38 million quote messages per second. The ''premium-product'' network experience enables users of 10Gb ULL connections to receive the network monitoring and reporting services for those approximately 1,100,000 distinct trading products. These value add services are part of the Exchange's strategy for offering a high performance trading system, which utilizes 10Gb ULL connectivity.

The Exchange notes that the 49.2% allocation of general shared expenses for physical 10Gb ULL connectivity is higher than that allocated to general shared expenses for Full Service MEO Ports. This is based on its allocation methodology that weighted costs attributable to each core service. While physical connectivity has several areas where certain tangible costs are heavily weighted towards providing such service (*e.g.,* Data Center, as described above), Full Service MEO Ports do not require as many broad or indirect resources as other core services.

* * * * *

Approximate Cost per 10Gb Connection per Month

After determining the approximate allocated monthly cost related to 10Gb connectivity, the total monthly cost for 10Gb ULL connectivity of $963,959 was divided by the number of physical 10Gb ULL connections the Exchange maintained at the time that proposed pricing was determined (108), to arrive at a cost of approximately $8,925 per month, per physical 10Gb ULL connection. Due to the nature of this particular cost, this allocation methodology results in an allocation among the Exchange and its affiliated markets based on set quantifiable criteria, *i.e.,* actual number of 10Gb ULL connections.

* * * * *

Costs Related to Offering Full Service MEO Ports

The following chart details the individual line-item costs considered by the Exchange to be related to offering Full Service MEO Ports as well as the percentage of the Exchange's overall costs such costs represent for such area (*e.g.,* as set forth below, the Exchange allocated approximately 8.3% of its overall Human Resources cost to offering Full Service MEO Ports).

Cost drivers	Allocated annual cost [m]	Allocated monthly cost [n]	% of all
Human Resources	$1,159,831	$96,653	8.3
Connectivity (external fees, cabling, switches, etc.)	1,589	132	1.4
Internet Services and External Market Data	6,033	503	1.4
Data Center	41,881	3,490	3.4
Hardware and Software Maintenance and Licenses	22,438	1,870	1.4
Depreciation	127,986	10,666	3.9
Allocated Shared Expenses	284,374	23,698	3.6
Total	1,644,132	137,012	5.8

m. *See supra* note k (describing rounding of Annual Costs).
n. *See supra* note l (describing rounding of Monthly Costs based on Annual Costs).

Below are additional details regarding each of the line-item costs considered by the Exchange to be related to offering Full Service MEO Ports. While some costs were attempted to be allocated as equally as possible among the Exchange and its affiliated markets, the Exchange notes that some of its cost allocation percentages for certain cost drivers differ when compared to the same cost drivers for the Exchange's affiliated markets in their similar proposed fee changes for connectivity and ports. This is because the Exchange's cost allocation methodology utilizes the actual projected costs of the Exchange (which are specific to the Exchange, and are independent of the costs projected

and utilized by the Exchange's affiliated markets) to determine its actual costs, which may vary across the Exchange and its affiliated markets based on factors that are unique to each marketplace. The Exchange provides additional explanation below (including the reason for the deviation) for the significant differences.

Human Resources

With respect to Full Service MEO Ports, the Exchange calculated Human Resources cost by taking an allocation of employee time for employees whose functions include providing Full Service MEO Ports and maintaining performance thereof (including a broader range of employees such as technical operations personnel, market operations personnel, and software engineering personnel) as well as a limited subset of personnel with ancillary functions related to maintaining such connectivity (such as sales, membership, and finance personnel). Just as described above for 10Gb ULL connectivity, the estimates of Human Resources cost were again determined by consulting with department leaders, determining which employees are involved in tasks related to providing Full Service MEO Ports and maintaining performance thereof, and confirming that the proposed allocations were reasonable based on an understanding of the percentage of their time such employees devote to tasks related to providing Full Service MEO Ports and maintaining performance thereof. This includes personnel from the following Exchange departments that are predominately involved in providing Full Service MEO Ports: Business Systems Development, Trading Systems Development, Systems Operations and Network Monitoring, Network and Data Center Operations, Listings, Trading Operations, and Project Management. The Exchange notes that senior level executives were allocated Human Resources costs to the extent they are involved in overseeing tasks specifically related to providing Full Service MEO Ports. Senior level executives were only allocated Human Resources costs to the extent that they are involved in managing personnel responsible for tasks integral to providing Full Service MEO Ports. The Human Resources cost was again calculated using a blended rate of compensation reflecting salary, equity and bonus compensation, benefits, payroll taxes, and 401(k) matching contributions.

Connectivity (External Fees, Cabling, Switches, etc.)

The Connectivity cost includes external fees paid to connect to other exchanges and cabling and switches, as described above.

Internet Services and External Market Data

The next cost driver consists of internet services and external market data. Internet services includes third-party service providers that provide the internet, fiber and bandwidth connections between the Exchange's networks, primary and secondary data centers, and office locations in Princeton and Miami. For purposes of Full Service MEO Ports, the Exchange also includes a portion of its costs related to external market data. External market data includes fees paid to third parties, including other exchanges, to receive and consume market data from other markets. The Exchange includes external market data costs towards the provision of Full Service MEO Ports because such market data is necessary (in addition to physical connectivity) to offer certain services related to such ports, such as validating orders on entry against the NBBO and checking for other conditions (*e.g.,* halted securities).[132] Thus, since market data from other exchanges is consumed at the Exchange's Full Service MEO Port level in order to validate orders, before additional processing occurs with respect to such orders, the Exchange believes it is reasonable to allocate a small amount of such costs to Full Service MEO Ports.

The Exchange notes that the allocation for the internet Services and External Market Data cost driver is lower than that of its affiliate, MIAX, as MIAX allocated 7.2% of its internet Services and External Market Data expense towards Limited Service MEI Ports, while MIAX Pearl Options allocated 1.4% to its Full Service MEO Ports for the same cost driver. The allocation percentages set forth above differ because they directly correspond with the number of applicable ports utilized on each exchange. For August 2023, MIAX Market Makers utilized 1,781 Limited Service MEI ports and MIAX Emerald Market Makers utilized 1,030 Limited Service MEI Ports. When compared to Full Service Port (Bulk and Single) usage, for August 2023, MIAX Pearl Options Members utilized only 384 Full Service MEO Ports (Bulk and Single), far fewer than number of Limited Service MEI Ports utilized by Market Makers on MIAX and MIAX Emerald, thus resulting in a smaller cost allocation. There is increased cost associated with supporting a higher number of ports (requiring more hardware and other technical infrastructure and internet Service), thus the Exchange allocates a higher percentage of expense than MIAX Pearl Options, which has a lower port count.

Data Center

Data Center costs includes an allocation of the costs the Exchange incurs to provide Full Service MEO Ports in the third-party data centers where it maintains its equipment as well as related costs for market data to then enter the Exchange's system via Full Service MEO Ports (the Exchange does not own the Primary Data Center or the Secondary Data Center, but instead, leases space in data centers operated by third parties).

Hardware and Software Maintenance and Licenses

Hardware and Software Licenses includes hardware and software licenses used to monitor the health of the order entry services provided by the Exchange, as described above.

The Exchange notes that this allocation is less than its affiliate, MIAX, as MIAX allocated 7.2% of its Hardware and Software Maintenance and License expense towards Limited Service MEI Ports, while MIAX Pearl Options allocated 1.4% to its Full Service MEO Ports (Bulk and Single) for the same category of expense. The allocation percentages set forth above differ because they correspond with the number of applicable ports utilized on each exchange. For August 2023, MIAX Market Makers utilized 1,781 Limited Service MEI ports and MIAX Emerald Market Makers utilized 1,030 Limited Service MEI Ports. When compared to Full Service Port (Bulk and Single) usage, for August 2023, MIAX Pearl Options Members utilized only 384 Full Service MEO Ports (Bulk and Single), far fewer than number of Limited Service MEI Ports utilized by Market Makers on MIAX and MIAX Emerald, thus resulting in a smaller cost allocation. There is increased cost associated with supporting a higher number of ports (requiring more hardware and other technical infrastructure), thus the Exchange allocates a higher percentage of expense than MIAX Pearl Options, which has a lower port count.

[132] The Exchange notes that MEMX separately allocated 7.5% of its external market data costs to providing physical connectivity. *See* Securities Exchange Act Release No. 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26).

Depreciation

The vast majority of the software the Exchange uses to provide Full Service MEO Ports has been developed in-house and the cost of such development, which takes place over an extended period of time and includes not just development work, but also quality assurance and testing to ensure the software works as intended, is depreciated over time once the software is activated in the production environment. Hardware used to provide Full Service MEO Ports includes equipment used for testing and monitoring of order entry infrastructure and other physical equipment the Exchange purchased and is also depreciated over time.

All hardware and software, which also includes assets used for testing and monitoring of order entry infrastructure, were valued at cost, depreciated or leased over periods ranging from three to five years. Thus, the depreciation cost primarily relates to servers necessary to operate the Exchange, some of which is owned by the Exchange and some of which is leased by the Exchange in order to allow efficient periodic technology refreshes. The Exchange allocated 3.9% of all depreciation costs to providing Full Service MEO Ports. The Exchange allocated depreciation costs for depreciated software necessary to operate the Exchange to Full Service MEO Ports because such software is related to the provision of Full Service MEO Ports. As with the other allocated costs in the Exchange's updated Cost Analysis, the Depreciation cost driver was therefore narrowly tailored to depreciation related to Full Service MEO Ports.

The Exchange notes that this allocation differs from its affiliated markets due to a number of factors, such as the age of physical assets and software (*e.g.,* older physical assets and software were previously depreciated and removed from the allocation), or certain system enhancements that required new physical assets and software, thus providing a higher contribution to the depreciated cost.

For example, the Exchange notes that the percentage it allocated to the depreciation cost driver for Full Service MEO Ports and the percentage its affiliate, MIAX, allocated to the depreciation cost driver for MIAX's Limited Service MEI Ports, differ by only 2.4%. However, MIAX's approximate dollar amount is greater than that of MIAX Pearl Options by approximately $9,000 per month. This is due to two primary factors. First, MIAX has under gone a technology refresh since the time MIAX Pearl Options launched in 2017, leading to it having more hardware that software that is subject to depreciation. Second, MIAX maintains 24 matching engines while MIAX Pearl Options maintains only 12 matching engines. This also results in more of MIAX's hardware and software being subject to depreciation than MIAX Pearl Options' hardware and software due to the greater amount of equipment and software necessary to support the greater number of matching engines on MIAX.

Allocated Shared Expenses

Finally, a portion of general shared expenses was allocated to overall Full Service MEO Ports costs as without these general shared costs the Exchange would not be able to operate in the manner that it does and provide application sessions. The costs included in general shared expenses include general expenses of the Exchange, including office space and office expenses (*e.g.,* occupancy and overhead expenses), utilities, recruiting and training, marketing and advertising costs, professional fees for legal, tax and accounting services (including external and internal audit expenses), and telecommunications costs. The Exchange again notes that the cost of paying directors to serve on its Board of Directors is included in the calculation of Allocated Shared Expenses, and thus a portion of such overall cost amounting to less than 4.0% of the overall cost for directors was allocated to providing Full Service MEO Ports. The Exchange notes that the 3.6% allocation of general shared expenses for Full Service MEO Ports is lower than that allocated to general shared expenses for physical connectivity based on its allocation methodology that weighted costs attributable to each Core Service based on an understanding of each area. While Full Service MEO Ports have several areas where certain tangible costs are heavily weighted towards providing such service (*e.g.,* Data Centers, as described above), 10Gb ULL connectivity requires a broader level of support from Exchange personnel in different areas, which in turn leads to a broader general level of cost to the Exchange.

Lastly, the Exchange notes that this allocation is less than its affiliate, MIAX, as MIAX allocated 9.8% of its Allocated Shared Expense towards Limited Service MEI Ports, while MIAX Pearl Options allocated 3.6% to its Full Service MEO Ports (Bulk and Single) for the same category of expense. The allocation percentages set forth above differ because they correspond with the number of applicable ports utilized on each exchange. For August 2023, MIAX Market Makers utilized 1,781 Limited Service MEI Ports and MIAX Emerald Market Makers utilized 1,030 Limited Service MEI ports. When compared to Full Service Port (Bulk and Single) usage, for August 2023, MIAX Pearl Options Members utilized only 384 Full Service MEO Ports (Bulk and Single), far fewer than number of Limited Service MEI Ports utilized by Market Makers on MIAX, thus resulting in a smaller cost allocation. There is increased cost associated with supporting a higher number of ports (requiring more hardware and other technical infrastructure), thus the Exchange allocates a higher percentage of expense than MIAX Pearl Options which has a lower port count.

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Approximate Cost per Full Service MEO Port per Month

Based on May 2023 data, the total monthly cost allocated to Full Service MEO Ports of $137,012 was divided by the number of chargeable Full Service MEO Ports the Exchange maintained at the time that proposed pricing was determined (25 total; 25 Full Service MEO Port, Bulk, and 0 Full Service MEO Port, Single), to arrive at a cost of approximately $5,480 per month, per charged Full Service MEO Port.

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Cost Analysis—Additional Discussion

In conducting its Cost Analysis, the Exchange did not allocate any of its expenses in full to any core services (including physical connectivity or Full Service MEO Ports) and did not double-count any expenses. Instead, as described above, the Exchange allocated applicable cost drivers across its core services and used the same Cost Analysis to form the basis of this proposal and the filings the Exchange submitted proposing fees for proprietary data feeds offered by the Exchange. For instance, in calculating the Human Resources expenses to be allocated to physical connections based upon the above described methodology, the Exchange has a team of employees dedicated to network infrastructure and with respect to such employees the Exchange allocated network infrastructure personnel with a high percentage of the cost of such personnel (42.9%) given their focus on functions necessary to provide physical connections. The salaries of those same personnel were allocated only 12.3% to Full Service MEO Ports and the remaining 44.8% was allocated to 1Gb

connectivity, other port services, transaction services, membership services and market data. The Exchange did not allocate any other Human Resources expense for providing physical connections to any other employee group, outside of a smaller allocation of 16.9% for 10Gb ULL connectivity or 17.3% for the entire network, of the cost associated with certain specified personnel who work closely with and support network infrastructure personnel. In contrast, the Exchange allocated much smaller percentages of costs (6.0% or less) across a wider range of personnel groups in order to allocate Human Resources costs to providing Full Service MEO Ports. This is because a much wider range of personnel are involved in functions necessary to offer, monitor and maintain Full Service MEO Ports but the tasks necessary to do so are not a primary or full-time function.

In total, the Exchange allocated 26.9% of its personnel costs to providing 10Gb ULL and 1Gb ULL connectivity and 8.3% of its personnel costs to providing Full Service MEO Ports, for a total allocation of 35.2% Human Resources expense to provide these specific connectivity and port services. In turn, the Exchange allocated the remaining 64.8% of its Human Resources expense to membership services, transaction services, other port services and market data. Thus, again, the Exchange's allocations of cost across core services were based on real costs of operating the Exchange and were not double-counted across the core services or their associated revenue streams.

As another example, the Exchange allocated depreciation expense to all core services, including physical connections and Full Service MEO Ports, but in different amounts. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense includes the actual cost of the computer equipment, such as dedicated servers, computers, laptops, monitors, information security appliances and storage, and network switching infrastructure equipment, including switches and taps that were purchased to operate and support the network. Without this equipment, the Exchange would not be able to operate the network and provide connectivity services to its Members and non-Members and their customers. However, the Exchange did not allocate all of the depreciation and amortization expense toward the cost of providing connectivity services, but instead allocated approximately 62.1% of the Exchange's overall depreciation and amortization expense to connectivity services (58.2% attributed to 10Gb ULL physical connections and 3.9% to Full Service MEO Ports). The Exchange allocated the remaining depreciation and amortization expense (approximately 37.9%) toward the cost of providing transaction services, membership services, other port services and market data.

The Exchange notes that its revenue estimates are based on projections across all potential revenue streams and will only be realized to the extent such revenue streams actually produce the revenue estimated. The Exchange does not yet know whether such expectations will be realized. For instance, in order to generate the revenue expected from connectivity, the Exchange will have to be successful in retaining existing clients that wish to maintain physical connectivity and/or Full Service MEO Ports or in obtaining new clients that will purchase such services. Similarly, the Exchange will have to be successful in retaining a positive net capture on transaction fees in order to realize the anticipated revenue from transaction pricing.

The Exchange notes that the Cost Analysis is based on the Exchange's 2023 fiscal year of operations and projections. It is possible, however, that actual costs may be higher or lower. To the extent the Exchange sees growth in use of connectivity services it will receive additional revenue to offset future cost increases.

However, if use of connectivity services is static or decreases, the Exchange might not realize the revenue that it anticipates or needs in order to cover applicable costs. Accordingly, the Exchange is committing to conduct a one-year review after implementation of these fees. The Exchange expects that it may propose to adjust fees at that time, to increase fees in the event that revenues fail to cover costs and a reasonable mark-up of such costs. Similarly, the Exchange may propose to decrease fees in the event that revenue materially exceeds our current projections. In addition, the Exchange will periodically conduct a review to inform its decision making on whether a fee change is appropriate (*e.g.,* to monitor for costs increasing/decreasing or subscribers increasing/decreasing, etc. in ways that suggest the then-current fees are becoming dislocated from the prior cost-based analysis) and would propose to increase fees in the event that revenues fail to cover its costs and a reasonable mark-up, or decrease fees in the event that revenue or the mark-up materially exceeds our current projections. In the event that the Exchange determines to propose a fee change, the results of a timely review, including an updated cost estimate, will be included in the rule filing proposing the fee change. More generally, we believe that it is appropriate for an exchange to refresh and update information about its relevant costs and revenues in seeking any future changes to fees, and the Exchange commits to do so.

Projected Revenue [133]

The proposed fees will allow the Exchange to cover certain costs incurred by the Exchange associated with providing and maintaining necessary hardware and other network infrastructure as well as network monitoring and support services; without such hardware, infrastructure, monitoring and support the Exchange would be unable to provide the connectivity and port services. Much of the cost relates to monitoring and analysis of data and performance of the network via the subscriber's connection(s). The above cost, namely those associated with hardware, software, and human capital, enable the Exchange to measure network performance with nanosecond granularity. These same costs are also associated with time and money spent seeking to continuously improve the network performance, improving the subscriber's experience, based on monitoring and analysis activity. The Exchange routinely works to improve the performance of the network's hardware and software. The costs associated with maintaining and enhancing a state-of-the-art exchange network is a significant expense for the Exchange, and thus the Exchange believes that it is reasonable and appropriate to help offset those costs by amending fees for connectivity services. Subscribers, particularly those of 10Gb ULL connectivity, expect the Exchange to provide this level of support to connectivity so they continue to receive the performance they expect. This differentiates the Exchange from its competitors. As detailed above, the Exchange has five primary sources of revenue that it can potentially use to fund its operations: transaction fees, fees for connectivity services, membership and regulatory fees, and market data fees. Accordingly, the Exchange must cover its expenses from these five primary sources of revenue.

[133] For purposes of calculating revenue for 10Gb ULL connectivity, the Exchange used revenues for February 2023, the first full month for which it provided dedicated 10Gb ULL connectivity to MIAX Pearl Options and ceased operating a shared 10Gb ULL network with MIAX.

The Exchange's Cost Analysis estimates the annual cost to provide 10Gb ULL connectivity services will equal $11,567,509. Based on current 10Gb ULL connectivity services usage, the Exchange would generate annual revenue of approximately $17,496,000. The Exchange believes this represents a modest profit of 34% when compared to the cost of providing 10Gb ULL connectivity services, which could decrease over time.[134]

The Exchange's Cost Analysis estimates the annual cost to provide Full Service MEO Port services will equal $1,644,132. Based on current Full Service MEO Port services usage, the Exchange would generate annual revenue of approximately $1,644,000. The Exchange believes this would result in a small negative margin after calculating the cost of providing Full Service MEO Port services, which could decrease further over time.[135]

Based on the above discussion, even if the Exchange earns the above revenue or incrementally more or less, the proposed fees are fair and reasonable because they will not result in excessive pricing that deviates from that of other exchanges or a supra-competitive profit, when comparing the total expense of the Exchange associated with providing 10Gb ULL connectivity and Full Service MEO Port services versus the total projected revenue of the Exchange associated with network 10Gb ULL connectivity and Full Service MEO Port services.

The Exchange also notes that this the resultant profit margin differs slightly from the profit margins set forth in similar fee filings by its affiliated markets. This is not atypical among exchanges and is due to a number of factors that differ between these four markets, including: different market models, market structures, and product offerings (equities, options, price-time, pro-rata, simple, and complex); different pricing models; different number of market participants and connectivity subscribers; different maintenance and operations costs, as described in the cost allocation methodology above; different technical architecture (*e.g.,* the number of matching engines per exchange, *i.e.,* the Exchange maintains 12 matching engines while MIAX maintains 24 matching engines); and different maturity phase of the Exchange and its affiliated markets (*i.e.,* start-up versus growth versus more mature). All of these factors contribute to a unique and differing level of profit margin per exchange.

Further, the Exchange proposes to charge rates that are comparable to, or lower than, similar fees for similar products charged by competing exchanges. For example, for 10Gb ULL connectivity, the Exchange proposes a lower fee than the fee charged by Nasdaq for its comparable 10Gb Ultra fiber connection ($13,500 per month for the Exchange vs. $15,000 per month for Nasdaq).[136] NYSE American charges even higher fees for its comparable 10GB LX LCN connection than the Exchange's proposed fees ($13,500 for the Exchange vs. $22,000 per month for NYSE American).[137] Accordingly, the Exchange believes that comparable and competitive pricing are key factors in determining whether a proposed fee meets the requirements of the Act, regardless of whether that same fee across the Exchange's affiliated markets leads to slightly different profit margins due to factors outside of the Exchange's control (*i.e.,* more subscribers to 10Gb ULL connectivity on the Exchange than its affiliated markets or vice versa).

* * * * *

The Exchange has operated at a cumulative net annual loss since it launched operations in 2017.[138] This is due to a number of factors, one of which is choosing to forgo revenue by offering certain products, such as low latency connectivity, at lower rates than other options exchanges to attract order flow and encourage market participants to experience the high determinism, low latency, and resiliency of the Exchange's trading systems. The Exchange does not believe it should now be penalized for seeking to raise its fees as it now needs to upgrade its technology and absorb increased costs. Therefore, the Exchange believes the proposed fees are reasonable because they are based on both relative costs to the Exchange to provide dedicated 10Gb ULL connectivity and Full Service MEO Ports, the extent to which the product drives the Exchange's overall costs and the relative value of the product, as well as the Exchange's objective to make access to its Systems broadly available to market participants. The Exchange also believes the proposed fees are reasonable because they are designed to generate annual revenue to recoup the Exchange's costs of providing dedicated 10Gb ULL connectivity and Full Service MEO Ports.

The Exchange notes that its revenue estimate is based on projections and will only be realized to the extent customer activity produces the revenue estimated. As a competitor in the hyper-competitive exchange environment, and an exchange focused on driving competition, the Exchange does not yet know whether such projections will be realized. For instance, in order to generate the revenue expected from 10Gb ULL connectivity and Full Service MEO Ports, the Exchange will have to be successful in retaining existing clients that wish to utilize 10Gb ULL connectivity and Full Service MEO Ports and/or obtaining new clients that will purchase such access. To the extent the Exchange is successful in encouraging new clients to utilize 10Gb ULL connectivity and Full Service MEO Ports, the Exchange does not believe it should be penalized for such success. To the extent the Exchange has mispriced and experiences a net loss in connectivity clients or in transaction activity, the Exchange could experience a net reduction in revenue. While the Exchange is supportive of transparency around costs and potential margins (applied across all exchanges), as well as periodic review of revenues and applicable costs (as discussed below), the Exchange does not believe that these estimates should form the sole basis of whether or not a proposed fee is reasonable or can be adopted. Instead, the Exchange believes that the information should be used solely to confirm that an Exchange is not earning—or seeking to earn—supra-competitive profits. The Exchange believes the Cost Analysis and related projections in this filing demonstrate this fact.

The Exchange is owned by a holding company that is the parent company of four exchange markets and, therefore, the Exchange and its affiliated markets must allocate shared costs across all of those markets accordingly, pursuant to the above-described allocation methodology. In contrast, the Investors Exchange LLC (''IEX'') and MEMX, which are currently each operating only one exchange, in their recent non-transaction fee filings allocate the entire

[134] Assuming the U.S. inflation rate continues at its current rate, the Exchange believes that the projected profit margins in this proposal will decrease; however, the Exchange cannot predict with any certainty whether the U.S. inflation rate will continue at its current rate or its impact on the Exchange's future profits or losses. *See, e.g., https://www.usinflationcalculator.com/inflation/current-inflation-rates/* (last visited September 22, 2023).

[135] *Id.*

[136] *See* NASDAQ Pricing Schedule, Options 7, Section 3, Ports and Other Services *and* NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.

[137] *See* NYSE American Options Fee Schedule, Section V.A. Port Fees *and* Section V.B. Co-Location Fees.

[138] The Exchange has incurred a cumulative loss of $83 million since its inception in 2017 through full year 2022. *See* Exchange's Form 1/A, Application for Registration or Exemption from Registration as a National Securities Exchange, filed June 26, 2023, *available at https://www.sec.gov/Archives/edgar/vprr/2300/23007743.pdf.*

amount of that same cost to a single exchange. This can result in lower profit margins for the non-transaction fees proposed by IEX and MEMX because the single allocated cost does not experience the efficiencies and synergies that result from sharing costs across multiple platforms. The Exchange and its affiliated markets often share a single cost, which results in cost efficiencies that can cause a broader gap between the allocated cost amount and projected revenue, even though the fee levels being proposed are lower or competitive with competing markets (as described above). To the extent that the application of a cost-based standard results in Commission Staff making determinations as to the appropriateness of certain profit margins, the Exchange believes that Commission Staff should also consider whether the proposed fee level is comparable to, or competitive with, the same fee charged by competing exchanges and how different cost allocation methodologies (such as across multiple markets) may result in different profit margins for comparable fee levels. Further, if Commission Staff is making determinations as to appropriate profit margins in their approval of exchange fees, the Exchange believes that the Commission should be clear to all market participants as to what they have determined is an appropriate profit margin and should apply such determinations consistently and, in the case of certain legacy exchanges, retroactively, if such standards are to avoid having a discriminatory effect.

Further, as is reflected in the proposal, the Exchange continuously and aggressively works to control its costs as a matter of good business practice. A potential profit margin should not be evaluated solely on its size; that assessment should also consider cost management and whether the ultimate fee reflects the value of the services provided. For example, a profit margin on one exchange should not be deemed excessive where that exchange has been successful in controlling its costs, but not excessive on another exchange where that exchange is charging comparable fees but has a lower profit margin due to higher costs. Doing so could have the perverse effect of not incentivizing cost control where higher costs alone could be used to justify fees increases.

The Proposed Pricing Is Not Unfairly Discriminatory and Provides for the Equitable Allocation of Fees, Dues, and Other Charges

The Exchange believes that the proposed fees are reasonable, fair, equitable, and not unfairly discriminatory because they are designed to align fees with services provided and will apply equally to all subscribers.

10Gb ULL Connectivity

The Exchange believes that the proposed fees are equitably allocated among users of the network connectivity and port alternatives, as the users of 10Gb ULL connections consume substantially more bandwidth and network resources than users of 1Gb ULL connection. Specifically, the Exchange notes that 10Gb ULL connection users account for more than 99% of message traffic over the network, driving other costs that are linked to capacity utilization, as described above, while the users of the 1Gb ULL connections account for less than 1% of message traffic over the network. In the Exchange's experience, users of the 1Gb connections do not have the same business needs for the high-performance network as 10Gb ULL users.

The Exchange's high-performance network and supporting infrastructure (including employee support), provides unparalleled system throughput with the network ability to support access to several distinct options markets. To achieve a consistent, premium network performance, the Exchange must build out and maintain a network that has the capacity to handle the message rate requirements of its most heavy network consumers. These billions of messages per day consume the Exchange's resources and significantly contribute to the overall network connectivity expense for storage and network transport capabilities. The Exchange must also purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages to satisfy its record keeping requirements under the Exchange Act.[139] Thus, as the number of messages an entity increases, certain other costs incurred by the Exchange that are correlated to, though not directly affected by, connection costs (*e.g.,* storage costs, surveillance costs, service expenses) also increase. Given this difference in network utilization rate, the Exchange believes that it is reasonable, equitable, and not unfairly discriminatory that the 10Gb ULL users pay for the vast majority of the shared network resources from which all market participants' benefit.

Full Service MEO Ports

The tiered pricing structure for Full Service MEO Ports has been in effect since 2018.[140] The Exchange now proposes a pricing structure that is used by the Exchange's affiliates, MIAX and MIAX Emerald, except with lower pricing for each tier for Full Service MEO Ports (Bulk) and a flat fee for Full Service MEO Ports (Single). Members that are frequently in the highest tier for Full Service MEO Ports consume the most bandwidth and resources of the network. Specifically, as noted above for 10Gb ULL connectivity, Market Makers who reach the highest tier for Full Service MEO Ports (Bulk) account for greater than 84% of ADV on the Exchange, while Market Makers that are typically in the lowest Tier for Full Service MEO Ports, account for less than 14% of ADV on the Exchange. The remaining 1% is accounted for by Market Makers who are frequently in the middle Tier for Full Service MEO Ports (Bulk).

To achieve a consistent, premium network performance, the Exchange must build out and maintain a network that has the capacity to handle the message rate requirements of its most heavy network consumers during anticipated peak market conditions. The need to support billions of messages per day consume the Exchange's resources and significantly contribute to the overall network connectivity expense for storage and network transport capabilities. The Exchange must also purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages as part of it surveillance program and to satisfy its record keeping requirements under the Exchange Act.[141] Thus, as the number of connections a Market Maker has increases, the related pull on Exchange resources also increases. The Exchange sought to design the proposed tiered-pricing structure to set the amount of the fees to relate to the number of connections a firm purchases. The more connections purchased by a Market Maker likely results in greater expenditure of Exchange resources and increased cost to the Exchange.

The Exchange further believes that the proposed fees are reasonable, equitably allocated and not unfairly discriminatory because, for the flat fee,

[139] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

[140] *See* Securities Exchange Act Release No. 82867 (March 13, 2018), 83 FR 12044 (March 19, 2018) (SR–PEARL–2018–07).

[141] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

the Exchange provides each Member two (2) Full Service MEO Ports for each matching engine to which that Member is connected. Unlike other options exchanges that provide similar port functionality and charge fees on a per port basis,[142] the Exchange offers Full Service MEO Ports as a package and provides Members with the option to receive up to two Full Service MEO Ports per matching engine to which it connects. The Exchange currently has twelve (12) matching engines, which means Members may receive up to twenty-four (24) Full Service MEO Ports for a single monthly fee, that can vary based on certain volume percentages. The Exchange currently assesses Members a fee of $5,000 per month in the highest Full Service MEO Port—Bulk Tier, regardless of the number of Full Service MEO Ports allocated to the Member. Assuming a Member connects to all twelve (12) matching engines during a month, with two Full Service MEO Ports per matching engine, this results in a cost of $208.33 per Full Service MEO Port—Bulk ($5,000 divided by 24) for the month. This fee has been unchanged since the Exchange adopted Full Service MEO Port fees in 2018.[143] Members will continue to receive two (2) Full Service MEO Ports to each matching engine to which they are connected for the single flat monthly fee. Assuming a Member connects to all twelve (12) matching engines during the month, and achieves the highest Tier for that month, with two Full Service MEO Ports (Bulk) per matching engine, this would result in a cost of $500 per Full Service MEO Port ($12,000 divided by 24).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intra-Market Competition

The Exchange believes the proposed fees will not result in any burden on intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed fees will allow the Exchange to recoup some of its costs in providing 10Gb ULL connectivity and Full Service MEO Ports at below market rates to market participants since the Exchange launched operations. As described above, the Exchange has operated at a cumulative net annual loss since it launched operations in 2017 [144] due to providing a low-cost alternative to attract order flow and encourage market participants to experience the high determinism and resiliency of the Exchange's trading Systems. To do so, the Exchange chose to waive the fees for some non-transaction related services and Exchange products or provide them at a very lower fee, which was not profitable to the Exchange. This resulted in the Exchange forgoing revenue it could have generated from assessing any fees or higher fees. The Exchange could have sought to charge higher fees at the outset, but that could have served to discourage participation on the Exchange. Instead, the Exchange chose to provide a low-cost exchange alternative to the options industry, which resulted in lower initial revenues. Examples of this are 10Gb ULL connectivity and Full Service MEO Ports, for which the Exchange only now seeks to adopt fees at a level similar to or lower than those of other options exchanges.

Further, the Exchange does not believe that the proposed fee increase for the 10Gb ULL connection change would place certain market participants at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete. As is the case with the current proposed flat fee, the proposed fee would apply uniformly to all market participants regardless of the number of connections they choose to purchase. The proposed fee does not favor certain categories of market participants in a manner that would impose an undue burden on competition.

The Exchange does not believe that the proposed rule change would place certain market participants at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete. In particular, Exchange personnel has been informally discussing potential fees for connectivity services with a diverse group of market participants that are connected to the Exchange (including large and small firms, firms with large connectivity service footprints and small connectivity service footprints, as well as extranets and service bureaus) for several months leading up to that time. The Exchange does not believe the proposed fees for connectivity services would negatively impact the ability of Members, non-Members (extranets or service bureaus), third-parties that purchase the Exchange's connectivity and resell it, and customers of those resellers to compete with other market participants or that they are placed at a disadvantage.

The Exchange does anticipate, however, that some market participants may reduce or discontinue use of connectivity services provided directly by the Exchange in response to the proposed fees. In fact, as mentioned above, one MIAX Pearl Options Market Maker terminated their membership on January 1, 2023 as a direct result of the proposed fee changes.[145] The Exchange does not believe that the proposed fees for connectivity services place certain market participants at a relative disadvantage to other market participants because the proposed connectivity pricing is associated with relative usage of the Exchange by each market participant and does not impose a barrier to entry to smaller participants. The Exchange believes its proposed pricing is reasonable and, when coupled with the availability of third-party providers that also offer connectivity solutions, that participation on the Exchange is affordable for all market participants, including smaller trading firms. As described above, the connectivity services purchased by market participants typically increase based on their additional message traffic and/or the complexity of their operations. The market participants that utilize more connectivity services typically utilize the most bandwidth, and those are the participants that consume the most resources from the network. Accordingly, the proposed fees for connectivity services do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation of the proposed connectivity fees reflects the network resources consumed by the various size of market participants and the costs to the Exchange of providing such connectivity services.

[142] *See supra* table on page 122 and accompanying text.

[143] *See* Securities Exchange Act Release No. 82867 (March 13, 2018), 83 FR 12044 (March 19, 2018) (SR–PEARL–2018–07).

[144] *See supra* note 138.

[145] The Exchange acknowledges that IEX included in its proposal to adopt market data fees after offering market data for free an analysis of what its projected revenue would be if all of its existing customers continued to subscribe versus what its projected revenue would be if a limited number of customers subscribed due to the new fees. *See* Securities Exchange Act Release No. 94630 (April 7, 2022), 87 FR 21945 (April 13, 2022) (SR–IEX–2022–02). MEMX did not include a similar analysis in either of its recent non-transaction fee proposals. *See, e.g., supra* note 135. The Exchange does not believe a similar analysis would be useful here because it is amending existing fees, not proposing to charge a new fee where existing subscribers may terminate connections because they are no longer enjoying the service at no cost.

Inter-Market Competition

The Exchange also does not believe that the proposed rule change and price increase will result in any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act. As this is a fee increase, arguably if set too high, this fee would make it easier for other exchanges to compete with the Exchange. Only if this were a substantial fee decrease could this be considered a form of predatory pricing. In contrast, the Exchange believes that, without this fee increase, we are potentially at a competitive disadvantage to certain other exchanges that have in place higher fees for similar services. As we have noted, the Exchange believes that connectivity fees can be used to foster more competitive transaction pricing and additional infrastructure investment and there are other options markets of which market participants may connect to trade options at higher rates than the Exchange's. Accordingly, the Exchange does not believe its proposed fee changes impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange also believes that the proposed fees for 10Gb connectivity are appropriate and warranted and would not impose any burden on competition. This is a technology driven change designed to meet customer needs. The proposed fees would assist the Exchange in recovering costs related to providing dedicated 10Gb connectivity to the Exchange while enabling it to continue to meet current and anticipated demands for connectivity by its Members and other market participants. Separating its 10Gb network from MIAX enables the Exchange to better compete with other exchanges by ensuring it can continue to provide adequate connectivity to existing and new Members, which may increase in ability to compete for order flow and deepen its liquidity pool, improving the overall quality of its market. The proposed rates for 10Gb ULL connectivity are structured to enable the Exchange to bifurcate its 10Gb ULL network shared with MIAX so that it can continue to meet current and anticipated connectivity demands of all market participants.

Similarly, and also in connection with a technology change, Cboe Exchange, Inc. (''Cboe'') amended its access and connectivity fees, including port fees.[146] Specifically, Cboe adopted certain logical ports to allow for the delivery and/or receipt of trading messages—*i.e.,* orders, accepts, cancels, transactions, etc. Cboe established tiered pricing for BOE and FIX logical ports,[147] tiered pricing for BOE Bulk ports, and flat prices for DROP, Purge Ports, GRP Ports and Multicast PITCH/Top Spin Server Ports. Cboe argued in its fee proposal that the proposed pricing more closely aligned its access fees to those of its affiliated exchanges as the affiliated exchanges offer substantially similar connectivity and functionality and are on the same platform that Cboe migrated to.[148] Cboe justified its proposal by stating that, ''. . . the Exchange believes substitutable products and services are in fact available to market participants, including, among other things, other options exchanges a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity and/or trading of any options product, including proprietary products, in the Over- the-Counter (OTC) markets.'' [149] The Exchange concurs with the following statement by Cboe,

> The rule structure for options exchanges are also fundamentally different from those of equities exchanges. In particular, options market participants are not forced to connect to (and purchase market data from) all options exchanges. For example, there are many order types that are available in the equities markets that are not utilized in the options markets, which relate to mid-point pricing and pegged pricing which require connection to the SIPs and each of the equities exchanges in order to properly execute those orders in compliance with best execution obligations. Additionally, in the options markets, the linkage routing and trade through protection are handled by the exchanges, not by the individual members. Thus not connecting to an options exchange or disconnecting from an options exchange does not potentially subject a broker-dealer to violate order protection requirements. Gone are the days when the retail brokerage firms (such as Fidelity, Schwab, and eTrade) were members of the options exchanges—they are not members of the Exchange or its affiliates, they do not purchase connectivity to the Exchange, and they do not purchase market data from the Exchange. Accordingly, not only is there not an actual regulatory requirement to connect to every options exchange, the Exchange believes there is also no ''de facto'' or practical requirement as well, as further evidenced by the recent significant reduction in the number of broker-dealers that are members of all options exchanges.[150]

The Cboe proposal also referenced the National Market System Plan Governing the Consolidated Audit Trail (''CAT NMS Plan''),[151] wherein the Commission discussed the existence of competition in the marketplace generally, and particularly for exchanges with unique business models. The Commission acknowledged that, even if an exchange were to exit the marketplace due to its proposed fee-related change, it would not significantly impact competition in the market for exchange trading services because these markets are served by multiple competitors.[152] Further, the Commission explicitly stated that ''[c]onsequently, demand for these services in the event of the exit of a competitor is likely to be swiftly met by existing competitors.'' [153] Finally, the Commission recognized that while some exchanges may have a unique business model that is not currently offered by competitors, a competitor could create similar business models if demand were adequate, and if a competitor did not do so, the Commission believes it would be likely that new entrants would do so if the exchange with that unique business model was otherwise profitable.[154]

Cboe also filed to establish a monthly fee for Certification Logical Ports of $250 per Certification Logical Port.[155] Cboe reasoned that purchasing additional Certification Logical Ports, beyond the one Certification Logical Port per logical port type offered in the production environment free of charge, is voluntary and not required in order to participate in the production

[146] *See* Securities Exchange Act Release No. 90333 (November 4, 2020), 85 FR 71666 (November 10, 2020) (SR–CBOE–2020–105). The Exchange notes that Cboe submitted this filing *after* the Staff Guidance and contained no cost based justification.

[147] *See* Cboe Fee Schedule, Page 12, Logical Connectivity Fees, *available at https://cdn.cboe.com/resources/membership/Cboe_FeeSchedule.pdf* (BOE/FIX logical monthly port fees of $750 per port for ports 1–5 and $800 per port for port 6 or more; and BOE Bulk logical monthly port fees of $1,500 per port for ports 1–5, $2,500 per port for ports 6–30, and $3,000 for port 31 or more).

[148] *See supra* note 146 at 71676.

[149] *Id.*

[150] *Id.* at 71676.

[151] *See* Securities Exchange Act Release No. 86901 (September 9, 2019), 84 FR 48458 (September 13, 2019) (File No. S7–13–19).

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *See* Securities Exchange Act Release No. 94512 (March 24, 2002), 87 FR 18425 (March 30, 2022) (SR-Cboe-2022–011). Cboe offers BOE and FIX Logical Ports, BOE Bulk Logical Ports, DROP Logical Ports, Purge Ports, GRP Ports and Multicast PITCH/Top Spin Server Ports. For each type of the aforementioned logical ports that are used in the production environment, the Exchange also offers corresponding ports which provide Trading Permit Holders and non-TPHs access to the Exchange's certification environment to test proprietary systems and applications (*i.e.,* ''Certification Logical Ports'').

environment, including live production trading on the Exchange.[156]

In its statutory basis, Cboe justified the new port fee by stating that it believed the Certification Logical Port fee were reasonable because while such ports were no longer completely free, TPHs and non-TPHs would continue to be entitled to receive free of charge one Certification Logical Port for each type of logical port that is currently offered in the production environment.[157] Cboe noted that other exchanges assess similar fees and cited to NASDAQ LLC and MIAX.[158] Cboe also noted that the decision to purchase additional ports is optional and no market participant is required or under any regulatory obligation to purchase excess Certification Logical Ports in order to access the Exchange's certification environment.[159] Finally, similar proposals to adopt a Certification Logical Port monthly fee were filed by Cboe BYX Exchange, Inc.,[160] BZX,[161] and Cboe EDGA Exchange, Inc.[162]

The Cboe fee proposals described herein were filed subsequent to the D.C. Circuit decision in *Susquehanna Int'l Grp., LLC* v. *SEC,* 866 F.3d 442 (D.C. Cir. 2017), meaning that such fee filings were subject to the same (and current) standard for SEC review and approval as this proposal. In summary, the Exchange requests the Commission apply the same standard of review to this proposal which was applied to the various Cboe and Cboe affiliated markets' filings with respect to non-transaction fees. If the Commission were to apply a different standard of review to this proposal than it applied to other exchange fee filings it would create a burden on competition such that it would impair the Exchange's ability to make necessary technology driven changes, such as bifurcating its 10Gb ULL network, because it would be unable to monetize or recoup costs related to that change and compete with larger, non-legacy exchanges.

* * * * *

In conclusion, as discussed thoroughly above, the Exchange regrettably believes that the application of the Revised Review Process and Staff Guidance has adversely affected inter-market competition among legacy and non-legacy exchanges by impeding the ability of non-legacy exchanges to adopt or increase fees for their market data and access services (including connectivity and port products and services) that are on parity or commensurate with fee levels previously established by legacy exchanges. Since the adoption of the Revised Review Process and Staff Guidance, and even more so recently, it has become extraordinarily difficult to adopt or increase fees to generate revenue necessary to invest in systems, provide innovative trading products and solutions, and improve competitive standing to the benefit of non-legacy exchanges' market participants. Although the Staff Guidance served an important policy goal of improving disclosures and requiring exchanges to justify that their market data and access fee proposals are fair and reasonable, it has also negatively impacted non-legacy exchanges in particular in their efforts to adopt or increase fees that would enable them to more fairly compete with legacy exchanges, despite providing enhanced disclosures and rationale under both competitive and cost basis approaches provided for by the Revised Review Process and Staff Guidance to support their proposed fee changes.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange received one comment letter on the Initial Proposal, one comment letter on the Second Proposal, one comment letter on the Third Proposal, one comment letter on the Fourth Proposal, one comment letter on the Fifth Proposal, and one comment letter on the Sixth Proposal, all from the same commenter.[163] In their letters, the sole commenter seeks to incorporate comments submitted on previous Exchange proposals to which the Exchange has previously responded. The Exchange also received one comment letter from a separate commenter on the Sixth Proposal.[164] The Exchange believes issues raised by each commenters are not germane to this proposal in particular, but rather raise larger issues with the current environment surrounding exchange non-transaction fee proposals that should be addressed by the Commission through rule making, or Congress, more holistically and not through an individual exchange fee filings. Among other things, the commenters are requesting additional data and information that is both opaque and a moving target and would constitute a level of disclosure materially over and above that provided by any competitor exchanges.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[165] and Rule 19b–4(f)(2) [166] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–PEARL–2023–64 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–PEARL–2023–64. 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

[156] *See* Securities Exchange Act Release No. 94512 (March 24, 2002), 87 FR 18425 (March 30, 2022) (SR–Cboe–2022–011).

[157] *Id.* at 18426.

[158] *Id.*

[159] *Id.*

[160] *See* Securities Exchange Act Release No. 94507 (March 24, 2002), 87 FR 18439 (March 30, 2022) (SR–CboeBYX–2022–004).

[161] *See* Securities Exchange Act Release No. 94511 (March 24, 2002), 87 FR 18411 (March 30, 2022) (SR–CboeBZX–2022–021).

[162] *See* Securities Exchange Act Release No. 94517 (March 25, 2002), 87 FR 18848 (March 31, 2022) (SR–CboeEDGA–2022–004).

[163] *See* letter from Brian Sopinsky, General Counsel, Susquehanna International Group, LLP (''SIG''), to Vanessa Countryman, Secretary, Commission, dated February 7, 2023, *and* letters from Gerald D. O'Connell, SIG, to Vanessa Countryman, Secretary, Commission, dated March 21, 2023, May 24, 2023, July 24, 2023 and September 18, 2023.

[164] *See* letter from Thomas M. Merritt, Deputy General Counsel, Virtu Financial, Inc. (''Virtu''), to Vanessa Countryman, Secretary, Commission, dated November 8, 2023.

[165] 15 U.S.C. 78s(b)(3)(A)(ii).

[166] 17 CFR 240.19b–4(f)(2).

only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–PEARL–2023–64 and should be submitted on or before January 5, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[167]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–27531 Filed 12–14–23; 8:45 am]

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[167] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–316, OMB Control No. 3235–0359]

Submission for OMB Review; Comment Request; Extension: Form N–17f–1

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 (the ''Commission'') has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Form N–17f–1 (17 CFR 274.219) is entitled ''Certificate of Accounting of Securities and Similar Investments of a Management Investment Company in the Custody of Members of National Securities Exchanges.'' The form serves as a cover sheet to the accountant's certificate that is required to be filed periodically with the Commission pursuant to rule 17f–1 (17 CFR 270.17f–1) under the Act, entitled ''Custody of Securities with Members of National Securities Exchanges,'' which sets forth the conditions under which a fund may place its assets in the custody of a member of a national securities exchange. Rule 17f–1 requires, among other things, that an independent public accountant verify the fund's assets at the end of every annual and semi-annual fiscal period, and at least one other time during the fiscal year as chosen by the independent accountant. Requiring an independent accountant to examine the fund's assets in the custody of a member of a national securities exchange assists Commission staff in its inspection program and helps to ensure that the fund assets are subject to proper auditing procedures. The accountant's certificate stating that it has made an examination, and describing the nature and the extent of the examination, must be attached to Form N–17f–1 and filed with the Commission promptly after each examination. The form facilitates the filing of the accountant's certificates, and increases the accessibility of the certificates to both Commission staff and interested investors.

Commission staff estimates that it takes: (i) 1 hour of clerical time to prepare and file Form N–17f–1; and (ii) 0.5 hour for the fund's chief compliance officer to review Form N–17f–1 prior to filing with the Commission, for a total of 1.5 hours. Each fund is required to make 3 filings annually, for a total annual burden per fund of approximately 4.5 hours.[1] Commission staff estimates that an average of 21 funds currently file Form N–17f–1 with the Commission 3 times each year, for a total of 64 responses annually.[2] The total annual hour burden for Form N–17f-1 is therefore estimated to be approximately 95 hours.[3]

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules. Compliance with the collections of information required by Form N–17f–1 is mandatory for funds that place their assets in the custody of a national securities exchange member. Responses will not be kept confidential. 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 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 January 16, 2024 to (i) *MBX.OMB.OIRA.SEC_desk_officer@omb.eop.gov* 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: December 12, 2023.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–27571 Filed 12–14–23; 8:45 am]

BILLING CODE 8011–01–P

[1] This estimate is based on the following calculation: (1.5 hours × 3 responses annually = 4.5 hours).

[2] This estimate is based on a review of Form N–17f–1 filings made with the Commission over the last three years.

[3] This estimate is based on the following calculations: (4.5 hours × 21 funds = 94.5 total hours).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99131; File No. SR–ISE–2023–33]

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its GPS Antenna Fees at General 8, Section 1

December 11, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 29, 2023, Nasdaq ISE, LLC (''ISE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's GPS antenna fees at General 8, Section 1, as described further below. The text of the proposed rule change is available on the Exchange's Website at *https://listingcenter.nasdaq.com/rulebook/ise/rules,* 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 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 [3]

The Exchange offers a GPS antenna, which allows co-location customers [4] to synchronize their time recording systems to the U.S. Government's Global Positioning System (''GPS'') network time (the ''Service''). The Exchange proposes to modify its monthly fees for the Service at General 8, Section 1(d).

GPS network time is the atomic time scale implemented by the atomic clocks in the GPS ground control stations and GPS satellites. Each GPS satellite contains multiple atomic clocks that contribute precise time data to the GPS signals. GPS receivers decode these signals, synchronizing the receivers to the atomic clocks. A GPS antenna serves as a time signal receiver and feeds a primary clock device the GPS network time using precise time data. Firms can use the precise time data provided by the GPS antenna to time-stamp transactional information.

Time synchronization services are well established in the U.S. and utilized in many areas of the U.S. economy and infrastructure. The Service is not novel to the securities markets, or to the Exchange.

The Exchange offers connectivity to a GPS antenna via two options, over shared infrastructure or a dedicated antenna. If a firm wishes to connect via a dedicated connection, it must supply the antenna hardware.

The Exchange currently charges a monthly fee of $200 for the Service, which applies to both the shared infrastructure option and the dedicated antenna option. The Exchange proposes to increase the monthly fee to $600 for the Service, which would apply to both the shared infrastructure option and the dedicated antenna option. As such, the Exchange proposes to amend its fee schedule at General 8, Section 1(d) to reflect the increased monthly fee for the GPS antenna. The Exchange has not raised such price since the monthly fee of $200 was adopted.[5] In addition, the Exchange charges a higher monthly fee of $350 for cross-connections to approved telecommunication carriers in the data center and for inter-cabinet connections to other co-location customers in the data center, despite the fact that the Service not only provides connectivity (like the cross-connections), but also provides data (*i.e.,* the network time) to co-location customers.

In addition, the Exchange's fee schedule at General 8, Section 1(d) currently states that the installation fee for the GPS antenna is installation specific. The Exchange proposes to add specific installation amounts for the Service within the fee schedule, providing greater transparency to market participants. Specifically, the Exchange proposes to charge an installation fee of $900 for connectivity to a GPS antenna over shared infrastructure and $1,500 for connectivity to a GPS antenna over a dedicated antenna.[6] The difference in installation costs reflects the differing levels of complexity. For the dedicated antenna option, installation involves installing an antenna on the roof whereas the shared option involves extending a cable from a device located inside the data center.

The Service is an optional product available to any firm that chooses to subscribe. Firms may cancel their subscription at any time. The Service simply provides time synchronization that may be utilized by firms to adjust their own time systems and time-stamp transactional information. The GPS antenna is offered on a completely voluntary basis. No customer is required to purchase the GPS antenna. Potential subscribers may subscribe to the Service only if they voluntarily choose to do so. It is a business decision of each firm whether to subscribe to the Service or not. Furthermore, firms have an array of options for time synchronization. Firms may purchase the Service (or enhanced time synchronization services) from other vendors.[7] Customers do not receive an advantage by purchasing the Service from the Exchange rather than another provider. The Exchange is merely providing access to GPS signals, which can also be accessed via other providers.

In addition to cost, a firm's decision regarding which, if any, time synchronization option to purchase may depend, among other factors, on whether it wants to build or buy a time feed as well as the design of a firm's systems. A firm may prefer to build out its own time feed using GPS network time (as provided by the Exchange or a third-party vendor) or purchase a time synchronization service that handles the time feed for them. Examples of enhanced time synchronization include Precision Time Protocol (''PTP''), Pulse Per Second Time Synchronization Protocol (''PPS''), and Network Time Protocol (''NTP''), each of which are feeds that a client can consume rather than creating a feed itself. Such a choice may depend on a firm's desire for control of the feed, time sensitivity, and trade strategy, including whether a firm uses such time information to trigger trading decisions, as well as other considerations such as cost and convenience. In addition, with respect to the design of a firm's systems, a firm may choose to have its time synchronization equipment centralized or in multiple locations. Third-party vendors may be situated in Carteret or other New York metro financial data centers. Clients and vendors alike can produce a time feed in Carteret or any of the other locations.[8]

[3] The Exchange initially filed the proposed pricing changes on September 29, 2023 with an effective date of October 1, 2023 (SR–ISE–2023–21). On November 15, 2023, the Exchange withdrew SR–ISE–2023–21 and replaced with SR–ISE–2023–29. The instant filing replaces SR–ISE–2023–29, which was withdrawn on November 29, 2023.

[4] The Exchange offers customers the opportunity to co-locate their servers and equipment within the Exchange's primary data center, located in Carteret, New Jersey.

[5] *See* Securities Exchange Act Release No. 81903 (October 19, 2017), 82 FR 49450 (October 25, 2017) (SR–ISE–2017–91).

[6] NYSE provides a similar service for a $3,000 initial charge plus a $400 monthly charge. *See https://www.nyse.com/publicdocs/Wireless_Connectivity_Fees_and_Charges.pdf.*

[7] For example, Pico, Guava Tech, and SFTI provide time synchronization services.

[8] As needed, firms and vendors use latency between the data centers to adjust their time synchronization.

Approximately 59% of the Exchange's co-location customers subscribe to the Service, most of which opt for the shared option. The fact that approximately 41% of the Exchange's co-location customers do not subscribe to the Service demonstrate that there are alternative options available.

If the Exchange is incorrect in its determination that the proposed fees reflect the value of the GPS antenna, customers will not purchase the product or will seek other options at their disposal, such as purchasing time synchronization services from third-party vendors.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[10] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The proposed change to the pricing schedule is reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for order flow, which constrains its pricing determinations. The fact that the market for order flow is competitive has long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* the D.C. Circuit stated, ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .''[11]

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention to determine prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues, and also recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.''[12]

Congress directed the Commission to ''rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.'''[13] As a result, the Commission has historically relied on competitive forces to determine whether a fee proposal is equitable, fair, reasonable, and not unreasonably or unfairly discriminatory. ''If competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior.''[14] Accordingly, ''the existence of significant competition provides a substantial basis for finding that the terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.''[15] In its 2019 guidance on fee proposals, Commission staff indicated that they would look at factors beyond the competitive environment, such as cost, only if a ''proposal lacks persuasive evidence that the proposed fee is constrained by significant competitive forces.''[16]

The proposed fees are reasonable and unlikely to burden the market because the purchase of the Service is optional for all categories of co-location customers. No firms are required to purchase the Service. Though many firms use GPS network time to synchronize their internal primary clock devices, firms can purchase time sync services from third-party vendors. Firms are also free to utilize other services that may assist them in enhanced time synchronization of their systems by consuming time feeds, such as PTP, PPS, and NTP. As noted above, approximately 59% of the Exchange's co-location customers subscribe to the Service, most of which opt for the shared option. The fact that approximately 41% of the Exchange's co-location customers do not subscribe to the Service demonstrate that there are alternative options available. Firms may choose to purchase multiple time synchronization services for resiliency or otherwise.[17] For example, a decision to purchase multiple synchronization services could be based on client strategy, as some strategies require more precise time than others. As described above, in addition to cost, a firm's decision regarding which, if any, time synchronization option to purchase may depend, among other factors, on whether a firm wishes to build or buy a time feed, the design of a firm's systems, including whether a firm chooses to have its time synchronization equipment centralized or in multiple locations, a firm's time sensitivity, a firm's trading strategy, including whether it uses such time information to trigger trading decisions, and a firm's desire for control of the time feed.

The Exchange offers the Service as a convenience to firms to provide them with the ability to synchronize their own primary clock devices to the GPS network time and time-stamp transactional information.[18] Customers do not receive an advantage by purchasing the Service from the Exchange rather than another provider. The Exchange is merely providing access to GPS signals, which can also be accessed via other providers. Firms that choose to subscribe to the Service may discontinue the use of the Service at any time if they determine that the time synchronization services provided via the GPS antenna are no longer useful. In sum, co-location customers can discontinue the use of the Service at any time, decide not to subscribe, or use a third-party vendor for time synchronization services, for any reason, including the fees.

The optional Service is available to all co-location customers that choose to subscribe. The proposed fees would apply to all co-location customers on a non-discriminatory basis, and therefore are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange also believes that the proposed changes to include specific installation fees promote just and equitable principles of trade and remove

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4) and (5).

[11] *See NetCoalition,* 615 F.3d at 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[12] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[13] *See NetCoalition,* 615 F.3d at 534–35; *see also* H.R. Rep. No. 94–229 at 92 (1975) (''[I]t is the intent of the conferees that the national market system evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed.'').

[14] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR–NYSEArca–2006–21).

[15] *Id.*

[16] *See* U.S. Securities and Exchange Commission, ''Staff Guidance on SRO Rule filings Relating to Fees'' (May 21, 2019), available at *https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees.*

[17] Of the Exchange's co-location customers that subscribe to the Service, approximately 9% of such co-location customers purchase both the dedicated and the shared options of the Service.

[18] In offering the Service as a convenience to firms, the Exchange incurs certain costs, including costs related to the data center facility, hardware and equipment, and personnel.

impediments to and perfect the mechanism of a free and open market and a national market system because the proposed rule changes will provide greater clarity to Members and the public regarding the Exchange's fees. It is in the public interest for rules to be accurate and transparent so as to eliminate the potential for confusion.

If the Exchange is incorrect in its determination that the proposed fees reflect the value of the GPS antenna, customers will not purchase the product or will seek other options at their disposal, such as purchasing time synchronization services from third-party vendors.

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 not necessary or appropriate in furtherance of the purposes of the Act.

In terms of inter-market competition (the competition among self-regulatory organizations), the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. Approval of the proposal does not impose any burden on the ability of other exchanges to compete. As noted above, time synchronization services are offered by other vendors and any exchange has the ability to offer such services if it so chooses.

Nothing in the proposal burdens intra-market competition (the competition among consumers of exchange data) because the GPS antenna is available to any co-location customer under the same fees as any other co-location customer, and any co-location customer that wishes to purchase a GPS antenna can do so on a non-discriminatory basis.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[19] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–ISE–2023–33 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–ISE–2023–33. 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–ISE–2023–33 and should be submitted on or before January 5, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–27527 Filed 12–14–23; 8:45 am]

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[19] 15 U.S.C. 78s(b)(3)(A)(ii).

[20] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–177, OMB Control No. 3235–0177]

Submission for OMB Review; Comment Request; Extension: Rule 6e–2 and Form N–6EI–1

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 a request for extension of the previously approved collection of information discussed below.

Rule 6e–2 (17 CFR 270.6e–2) under the Investment Company Act of 1940 (''Act'')

(15 U.S.C. 80a) is an exemptive rule that provides separate accounts formed by life insurance companies to fund certain variable life insurance products, exemptions from certain provisions of the Act, subject to conditions set forth in the rule.

Rule 6e–2 provides a separate account with an exemption from the registration provisions of section 8(a) of the Act if the account files with the Commission

Form N–6EI–1 (17 CFR 274.301), a notification of claim of exemption.

The rule also exempts a separate account from a number of other sections

of the Act, provided that the separate account makes certain disclosure in its registration statements (in the case of those separate accounts that elect to register), reports to contract holders, proxy solicitations, and submissions to state regulatory authorities, as prescribed by the rule.

Since 2008, there have been no filings of Form N–6EI–1 by separate accounts. Therefore, there has been no cost or burden to the industry since that time. The Commission requests authorization to maintain an inventory of one burden hour for administrative purposes.

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 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 January 16, 2024 to (i) *MBX.OMB.OIRA.SEC_desk_officer@omb.eop.gov* 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: December 12, 2023.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–27569 Filed 12–14–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99137; File No. SR–MIAX–2023–48]

Self-Regulatory Organizations; Miami International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Modify Certain Connectivity and Port Fees

December 11, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 27, 2023, Miami International Securities Exchange, LLC (''MIAX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the MIAX Options Exchange Fee Schedule (the ''Fee Schedule'') to amend certain connectivity and port fees.

The text of the proposed rule change is available on the Exchange's website at *https://www.miaxglobal.com/markets/us-options/miax-options/rule-filings,* at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule as follows: (1) increase the fees for a 10 gigabit (''Gb'') ultra-low latency (''ULL'') fiber connection for Members[3] and non-Members; and (2) amend the monthly port fee for additional Limited Service MIAX Express Interface (''MEI'') Ports[4] available to Market Makers.[5] The Exchange and its affiliate, MIAX PEARL, LLC (''MIAX Pearl'') operated 10Gb ULL connectivity (for MIAX Pearl's options market) on a single shared network that provided access to both exchanges via a single 10Gb ULL connection. The Exchange last increased fees for 10Gb ULL connections from $9,300 to $10,000 per month on January 1, 2021.[6] At the same time, MIAX Pearl also increased its 10Gb ULL connectivity fee from $9,300 to $10,000 per month.[7] The Exchange and MIAX Pearl shared a combined cost analysis in those filings due to the single shared 10Gb ULL connectivity network for both exchanges. In those filings, the Exchange and MIAX Pearl allocated a combined total of $17.9 million in expenses to providing 10Gb ULL connectivity.[8]

Beginning in late January 2023, the Exchange also recently determined a substantial operational need to no longer operate 10Gb ULL connectivity on a single shared network with MIAX Pearl. The Exchange bifurcated 10Gb ULL connectivity due to ever-increasing capacity constraints and to enable it to continue to satisfy the anticipated access needs for Members and other market participants.[9] Since the time of the 2021 increase discussed above, the Exchange experienced ongoing increases in expenses, particularly internal expenses.[10] As discussed more fully below, the Exchange recently calculated increased annual aggregate costs of $12,034,554 for providing 10Gb ULL connectivity on a single unshared

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[4] The MIAX Express Interface (''MEI'') is a connection to MIAX systems that enables Market Makers to submit simple and complex electronic quotes to MIAX. *See* Fee Schedule, note 26.

[5] The term ''Market Makers'' refers to Lead Market Makers (''LMMs''), Primary Lead Market Makers (''PLMMs''), and Registered Market Makers (''RMMs'') collectively. *See* Exchange Rule 100. For purposes of Limit Service MEI Ports, Market Makers also include firms that engage in other types of liquidity activity, such as seeking to remove resting liquidity from the Exchange's Book.

[6] *See* Securities Exchange Act Release No. 90980 (January 25, 2021), 86 FR 7602 (January 29, 2021) (SR–MIAX–2021–02).

[7] *See* Securities Exchange Act Release No. 90981 (January 25, 2021), 86 FR 7582 (January 29, 2021) (SR–PEARL–2021–01).

[8] *See id.*

[9] *See MIAX Options and MIAX Pearl Options—Announce planned network changes related to shared 10G ULL extranet,* issued August 12, 2022, *available at https://www.miaxglobal.com/alert/2022/08/12/miax-options-and-miax-pearl-options-announce-planned-network-changes-0.* The Exchange will continue to provide access to both the Exchange and MIAX Pearl over a single shared 1Gb connection. *See* Securities Exchange Act Release Nos. 96553 (December 20, 2022), 87 FR 79379 (December 27, 2022) (SR–PEARL–2022–60); 96545 (December 20, 2022) 87 FR 79393 (December 27, 2022) (SR–MIAX–2022–48).

[10] For example, the New York Stock Exchange, Inc.'s (''NYSE'') Secure Financial Transaction Infrastructure (''SFTI'') network, which contributes to the Exchange's connectivity cost, increased its fees by approximately 9% since 2021. Similarly, since 2021, the Exchange, and its affiliates, experienced an increase in data center costs of approximately 17% and an increase in hardware and software costs of approximately 19%. These percentages are based on the Exchange's actual 2021 and proposed 2023 budgets.

network (an overall increase over its prior cost to provide 10Gb ULL connectivity on a shared network with MIAX Pearl) and $2,157,178 for providing Limited Service MEI Ports.

Much of the cost relates to monitoring and analysis of data and performance of the network via the subscriber's connection with nanosecond granularity, and continuous improvements in network performance with the goal of improving the subscriber's experience. The costs associated with maintaining and enhancing a state-of-the-art network is a significant expense for the Exchange, and thus the Exchange believes that it is reasonable and appropriate to help offset those increased costs by amending fees for connectivity services. Subscribers expect the Exchange to provide this level of support so they continue to receive the performance they expect. This differentiates the Exchange from its competitors.

The Exchange now proposes to amend the Fee Schedule to amend the fees for 10Gb ULL connectivity and Limited Service MEI Ports in order to recoup cost related to bifurcating 10Gb connectivity to the Exchange and MIAX Pearl as well as the ongoing costs and increase in expenses set forth below in the Exchange's cost analysis.[11] The Exchange proposes to implement the changes to the Fee Schedule pursuant to this proposal immediately. The Exchange initially filed the proposal on December 30, 2022 (SR–MIAX–2022–50) (the ''Initial Proposal'').[12] On February 23, 2023, the Exchange withdrew the Initial Proposal and replaced it with a revised proposal (SR–MIAX–2023–08) (the ''Second Proposal'').[13] On April 20, 2023, the Exchange withdrew the Second Proposal and replaced it with a revised proposal (SR–MIAX–2023–18) (the ''Third Proposal'').[14] On June 16, 2023, the Exchange withdrew the Third Proposal and replaced it with a revised proposal (SR–MIAX–2023–25) (the ''Fourth Proposal'').[15] On August 8, 2023, the Exchange withdrew the Fourth Proposal and replaced it with a revised proposal (SR–MIAX–2023–30) (the ''Fifth Proposal'').[16] Since a U.S. government shutdown was avoided, on October 2, 2023, the Exchange withdrew the Fifth Proposal and replaced it with a revised proposal (SR–MIAX–2023–39) (the ''Sixth Proposal'').[17] On November 27, the Exchange withdrew the Sixth Proposal and replaced it with this further revised proposal (SR–MIAX–2023–48) (the ''Seventh Proposal'').

The Exchange previously included a cost analysis in the Initial, Second, Third, Fourth, Fifth, and Sixth Proposals. As described more fully below, the Exchange provides an updated cost analysis that includes, among other things, additional descriptions of how the Exchange allocated costs among it and its affiliated exchanges (MIAX Pearl (separately among MIAX Pearl Options and MIAX Pearl Equities) and MIAX Emerald[18] (together with MIAX Pearl Options and MIAX Pearl Equities, the ''affiliated markets'')) to ensure no cost was allocated more than once, as well as additional detail supporting its cost allocation processes and explanations as to why a cost allocation in this proposal may differ from the same cost allocation in a similar proposal submitted by one of its affiliated markets. The Exchange continues to propose fees that are intended to cover the Exchange's cost of providing 10Gb ULL connectivity and Limited Service MEI Ports with a reasonable mark-up over those costs.

* * * * *

Starting in 2017, following the United States Court of Appeals for the District of Columbia's *Susquehanna Decision*[19] and various other developments, the Commission began to undertake a heightened review of exchange filings, including non-transaction fee filings that was substantially and materially different from it prior review process (hereinafter referred to as the ''Revised Review Process''). In the *Susquehanna Decision,* the D.C. Circuit Court stated that the Commission could not maintain a practice of ''unquestioning reliance'' on claims made by a self-regulatory organization (''SRO'') in the course of filing a rule or fee change with the Commission.[20] Then, on October 16, 2018, the Commission issued an opinion in *Securities Industry and Financial Markets Association* finding that exchanges failed both to establish that the challenged fees were constrained by significant competitive forces and that these fees were consistent with the Act.[21] On that same day, the Commission issued an order remanding to various exchanges and national market system (''NMS'') plans challenges to over 400 rule changes and plan amendments that were asserted in 57 applications for review (the ''Remand Order'').[22] The Remand Order directed the exchanges to ''develop a record,'' and to ''explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review.''[23] The Commission denied requests by various exchanges and plan participants for reconsideration of the Remand Order.[24] However, the Commission did extend the deadlines in the Remand Order ''so that they d[id] not begin to run until the resolution of the appeal of the SIFMA Decision in the D.C. Circuit and the issuance of the court's mandate.''[25] Both the Remand Order and the Order Denying Reconsideration were appealed to the D.C. Circuit.

While the above appeal to the D.C. Circuit was pending, on March 29, 2019, the Commission issued an order

[11] The Exchange notes that MIAX Pearl Options will make a similar filing to increase its 10Gb ULL connectivity fees.

[12] *See* Securities Exchange Act Release No. 96629 (January 10, 2023), 88 FR 2729 (January 17, 2023) (SR–MIAX–2022–50).

[13] *See* Securities Exchange Act Release No. 97081 (March 8, 2023), 88 FR 15782 (March 14, 2023) (SR–MIAX–2023–08).

[14] *See* Securities Exchange Act Release No. 97419 (May 2, 2023), 88 FR 29777 (May 8, 2023) (SR–MIAX–2023–18).

[15] The Exchange met with Commission Staff to discuss the Third Proposal during which the Commission Staff provided feedback and requested additional information, including, most recently, information about total costs related to certain third party vendors. Such vendor cost information is subject to confidentiality restrictions. The Exchange provided this information to Commission Staff under separate cover with a request for confidentiality. While the Exchange will continue to be responsive to Commission Staff's information requests, the Exchange believes that the Commission should, at this point, issue substantially more detailed guidance for exchanges to follow in the process of pursuing a cost-based approach to fee filings, and that, for the purposes of fair competition, detailed disclosures by exchanges, such as those that the Exchange is providing now, should be consistent across all exchanges, including for those that have resisted a cost-based approach to fee filings, in the interests of fair and even disclosure and fair competition. *See* Securities Exchange Act Release No. 97814 (June 27, 2023), 88 FR 42844 (July 3, 2023) (SR–MIAX–2023–25).

[16] *See* Securities Exchange Act Release No. 98173 (August 21, 2023), 88 FR 58378 (August 25, 2023) (SR–MIAX–2023–30). Due to the prospect of a U.S. government shutdown, the Commission suspended the Fifth Proposal on September 29, 2023. *See* Securities Exchange Act Release No. 98657 (September 29, 2023) (SR–MIAX–2023–30).

[17] *See* Securities Exchange Act Release No. 98752 (October 13, 2023), 88 FR 72117 (October 19, 2023) (SR–MIAX–2023–39).

[18] The term ''MIAX Emerald'' means MIAX Emerald, LLC. *See* Exchange Rule 100.

[19] *See Susquehanna International Group, LLP* v. *Securities & Exchange Commission,* 866 F.3d 442 (D.C. Circuit 2017) (the ''Susquehanna Decision'').

[20] *Id.*

[21] *See Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 84432, 2018 WL 5023228 (October 16, 2018) (the ''SIFMA Decision'').

[22] *See Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 84433, 2018 WL 5023230 (Oct. 16, 2018). *See* 15 U.S.C. 78k–1, 78s; *see also* Rule 608(d) of Regulation NMS, 17 CFR 242.608(d) (asserted as an alternative basis of jurisdiction in some applications).

[23] *Id.* at page 2.

[24] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 85802, 2019 WL 2022819 (May 7, 2019) (the ''Order Denying Reconsideration'').

[25] Order Denying Reconsideration, 2019 WL 2022819, at *13.

disapproving a proposed fee change by BOX Exchange LLC (''BOX'') to establish connectivity fees (the ''BOX Order''), which significantly increased the level of information needed for the Commission to believe that an exchange's filing satisfied its obligations under the Act with respect to changing a fee.[26] Despite approving hundreds of access fee filings in the years prior to the BOX Order (described further below) utilizing a ''market-based'' test, the Commission changed course and disapproved BOX's proposal to begin charging connectivity at one-fourth the rate of competing exchanges' pricing.

Also while the above appeal was pending, on May 21, 2019, the Commission Staff issued guidance ''to assist the national securities exchanges and FINRA . . . in preparing Fee Filings that meet their burden to demonstrate that proposed fees are consistent with the requirements of the Securities Exchange Act.'' [27] In the Staff Guidance, the Commission Staff states that, ''[a]s an initial step in assessing the reasonableness of a fee, staff considers whether the fee is constrained by significant competitive forces.'' [28] The Staff Guidance also states that, ''. . . even where an SRO cannot demonstrate, or does not assert, that significant competitive forces constrain the fee at issue, a cost-based discussion may be an alternative basis upon which to show consistency with the Exchange Act.'' [29]

Following the BOX Order and Staff Guidance, on August 6, 2020, the D.C. Circuit vacated the Commission's SIFMA Decision in *NASDAQ Stock Market, LLC* v. *SEC* [30] and remanded for further proceedings consistent with its opinion.[31] That same day, the D.C. Circuit issued an order remanding the Remand Order to the Commission for reconsideration in light of *NASDAQ.* The court noted that the Remand Order required the exchanges and NMS plan participants to consider the challenges that the Commission had remanded in light of the SIFMA Decision. The D.C. Circuit concluded that because the SIFMA Decision ''has now been vacated, the basis for the [Remand Order] has evaporated.'' [32] Accordingly, on August 7, 2020, the Commission vacated the Remand Order and ordered the parties to file briefs addressing whether the holding in *NASDAQ* v. *SEC* that Exchange Act Section 19(d) does not permit challenges to generally applicable fee rules requiring dismissal of the challenges the Commission previously remanded.[33] The Commission further invited ''the parties to submit briefing stating whether the challenges asserted in the applications for review . . . should be dismissed, and specifically identifying any challenge that they contend should not be dismissed pursuant to the holding of *Nasdaq* v. *SEC.*'' [34] Without resolving the above issues, on October 5, 2020, the Commission issued an order granting SIFMA and Bloomberg's request to withdraw their applications for review and dismissed the proceedings.[35]

As a result of the Commission's loss of the *NASDAQ vs. SEC* case noted above, the Commission never followed through with its intention to subject the over 400 fee filings to ''develop a record,'' and to ''explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review.'' [36] As such, all of those fees remained in place and amounted to a baseline set of fees for those exchanges that had the benefit of getting their fees in place before the Commission Staff's fee review process materially changed. The net result of this history and lack of resolution in the D.C. Circuit Court resulted in an uneven competitive landscape where the Commission subjects all new non-transaction fee filings to the new Revised Review Process, while allowing the previously challenged fee filings, mostly submitted by incumbent exchanges prior to 2019, to remain in effect and not subject to the ''record'' or ''review'' earlier intended by the Commission.

While the Exchange appreciates that the Staff Guidance articulates an important policy goal of improving disclosures and requiring exchanges to justify that their market data and access fee proposals are fair and reasonable, the practical effect of the Revised Review Process, Staff Guidance, and the Commission's related practice of continuous suspension of new fee filings, is anti-competitive, discriminatory, and has put in place an un-level playing field, which has negatively impacted smaller, nascent, non-legacy exchanges (''non-legacy exchanges''), while favoring larger, incumbent, entrenched, legacy exchanges (''legacy exchanges'').[37] The legacy exchanges all established a significantly higher baseline for access and market data fees prior to the Revised Review Process. From 2011 until the issuance of the Staff Guidance in 2019, national securities exchanges filed, and the Commission Staff did not abrogate or suspend (allowing such fees to become effective), at least 92 filings [38]

[26] *See* Securities Exchange Act Release No. 85459 (March 29, 2019), 84 FR 13363 (April 4, 2019) (SR–BOX–2018–24, SR–BOX–2018–37, and SR–BOX–2019–04) (Order Disapproving Proposed Rule Changes to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network). The Commission noted in the BOX Order that it ''historically applied a 'market-based' test in its assessment of market data fees, which [the Commission] believe[s] present similar issues as the connectivity fees proposed herein.'' *Id.* at page 16. Despite this admission, the Commission disapproved BOX's proposal to begin charging $5,000 per month for 10Gb connections (while allowing legacy exchanges to charge rates equal to 3–4 times that amount utilizing ''market-based'' fee filings from years prior).

[27] *See* Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019), *available at https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees (the ''Staff Guidance'').*

[28] *Id.*

[29] *Id.*

[30] *NASDAQ Stock Mkt., LLC* v. *SEC,* No 18–1324, --- Fed. App'x ----, 2020 WL 3406123 (D.C. Cir. June 5, 2020). The court's mandate was issued on August 6, 2020.

[31] *Nasdaq* v. *SEC,* 961 F.3d 421, at 424, 431 (D.C. Cir. 2020). The court's mandate issued on August 6, 2020. The D.C. Circuit held that Exchange Act ''Section 19(d) is not available as a means to challenge the reasonableness of generally-applicable fee rules.'' *Id.* The court held that ''for a fee rule to be challengeable under Section 19(d), it must, at a minimum, be targeted at specific individuals or entities.'' *Id.* Thus, the court held that ''Section 19(d) is not an available means to challenge the fees at issue'' in the SIFMA Decision. *Id.*

[32] *Id.* at *2; *see also id.* (''[T]he sole purpose of the challenged remand has disappeared.'').

[33] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 89504, 2020 WL 4569089 (August 7, 2020) (the ''Order Vacating Prior Order and Requesting Additional Briefs'').

[34] *Id.*

[35] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 90087 (October 5, 2020).

[36] *See supra* note 31, at page 2.

[37] Commission Chair Gary Gensler recently reiterated the Commission's mandate to ensure competition in the equities markets. *See* ''Statement on Minimum Price Increments, Access Fee Caps, Round Lots, and Odd-Lots'', by Chair Gary Gensler, dated December 14, 2022 (stating ''[i]n 1975, Congress tasked the Securities and Exchange Commission with responsibility to facilitate the establishment of the national market system and *enhance competition in the securities markets, including the equity markets*'' (*emphasis added*)). In that same statement, Chair Gary Gensler cited the five objectives laid out by Congress in 11A of the Exchange Act (15 U.S.C. 78k-1), including ensuring ''fair competition among brokers and dealers, among exchange markets, and *between exchange markets* and markets other than exchange markets . . .'' (*emphasis added*). *Id.* at note 1. *See also* Securities Acts Amendments of 1975, *available at https://www.govtrack.us/congress/bills/94/s249.*

[38] This timeframe also includes challenges to over 400 rule filings by SIFMA and Bloomberg discussed above. *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 84433, 2018 WL 5023230 (Oct. 16, 2018). Those filings were left to stand, while at the same time, blocking newer exchanges from the ability to establish competitive access and market data fees. *See The Nasdaq Stock Market, LLC* v. *SEC,* Case No. 18–1292 (D.C. Cir. June 5, 2020). The expectation at the time of the litigation was that the 400 rule flings challenged by SIFMA and Bloomberg would need to be justified under revised review standards.

to amend exchange connectivity or port fees (or similar access fees). The support for each of those filings was a simple statement by the relevant exchange that the fees were constrained by competitive forces.[39] These fees remain in effect today.

The net result is that the non-legacy exchanges are effectively now blocked by the Commission Staff from adopting or increasing fees to amounts comparable to the legacy exchanges (which were not subject to the Revised Review Process and Staff Guidance), despite providing enhanced disclosures and rationale to support their proposed fee changes that far exceed any such support provided by legacy exchanges. Simply put, legacy exchanges were able to increase their non-transaction fees during an extended period in which the Commission applied a ''market-based'' test that only relied upon the assumed presence of significant competitive forces, while exchanges today are subject to a cost-based test requiring extensive cost and revenue disclosures, a process that is complex, inconsistently applied, and rarely results in a successful outcome, *i.e.,* non-suspension. The Revised Review Process and Staff Guidance changed decades-long Commission Staff standards for review, resulting in unfair discrimination and placing an undue burden on inter-market competition between legacy exchanges and non-legacy exchanges.

Commission Staff now require exchange filings, including from non-legacy exchanges such as the Exchange, to provide detailed cost-based analysis in place of competition-based arguments to support such changes. However, even with the added detailed cost and expense disclosures, the Commission Staff continues to either suspend such filings and institute disapproval proceedings, or put the exchanges in the unenviable position of having to repeatedly withdraw and re-file with additional detail in order to continue to charge those fees.[40] By impeding any path forward for non-legacy exchanges to establish commensurate non-transaction fees, or by failing to provide any alternative means for smaller markets to establish ''fee parity'' with legacy exchanges, the Commission is stifling competition: non-legacy exchanges are, in effect, being deprived of the revenue necessary to compete on a level playing field with legacy exchanges. This is particularly harmful, given that the costs to maintain exchange systems and operations continue to increase. The Commission Staff's change in position impedes the ability of non-legacy exchanges to raise revenue to invest in their systems to compete with the legacy exchanges who already enjoy disproportionate non-transaction fee based revenue. For example, the Cboe Exchange, Inc. (''Cboe'') reported ''access and capacity fee'' revenue of $70,893,000 for 2020[41] and $80,383,000 for 2021.[42] Cboe C2 Exchange, Inc. (''C2'') reported ''access and capacity fee'' revenue of $19,016,000 for 2020[43] and $22,843,000 for 2021.[44] Cboe BZX Exchange, Inc. (''BZX'') reported ''access and capacity fee'' revenue of $38,387,000 for 2020[45] and $44,800,000 for 2021.[46] Cboe EDGX Exchange, Inc. (''EDGX'') reported ''access and capacity fee'' revenue of $26,126,000 for 2020[47] and $30,687,000 for 2021.[48] For 2021, the affiliated Cboe, C2, BZX, and EDGX (the four largest exchanges of the Cboe exchange group) reported $178,712,000 in ''access and capacity fees'' in 2021. NASDAQ Phlx, LLC (''NASDAQ Phlx'') reported ''Trade Management Services'' revenue of $20,817,000 for 2019.[49] The Exchange notes it is unable to compare ''access fee'' revenues with NASDAQ Phlx (or other affiliated NASDAQ exchanges) because after 2019, the ''Trade Management Services'' line item was bundled into a much larger line item in PHLX's Form 1, simply titled ''Market services.''[50]

The much higher non-transaction fees charged by the legacy exchanges provides them with two significant competitive advantages. First, legacy exchanges are able to use their additional non-transaction revenue for investments in infrastructure, vast marketing and advertising on major media outlets,[51] new products and other innovations. Second, higher non-transaction fees provide the legacy exchanges with greater flexibility to lower their transaction fees (or use the revenue from the higher non-transaction fees to subsidize transaction fee rates),[52] which are more immediately impactful in competition for order flow and market share, given the variable nature of this cost on member firms. The prohibition of a reasonable path forward denies the Exchange (and other non-legacy exchanges) this flexibility, eliminates the ability to remain competitive on transaction fees, and hinders the ability to compete for order flow and market share with legacy exchanges. There is little doubt that subjecting one exchange to a materially different standard than that historically applied to legacy exchanges for non-transaction fees leaves that exchange at a disadvantage in its ability to compete with its pricing of transaction fees.

While the Commission has clearly noted that the Staff Guidance is merely

[39] *See, e.g.,* Securities Exchange Act Release Nos. 74417 (March 3, 2015), 80 FR 12534 (March 9, 2015) (SR–ISE–2015–06); 83016 (April 9, 2018), 83 FR 16157 (April 13, 2018) (SR–PHLX–2018–26); 70285 (August 29, 2013), 78 FR 54697 (September 5, 2013) (SR–NYSEMKT–2013–71); 76373 (November 5, 2015), 80 FR 70024 (November 12, 2015) (SR–NYSEMKT–2015–90); 79729 (January 4, 2017), 82 FR 3061 (January 10, 2017) (SR–NYSEARCA–2016–172).

[40] The Exchange has filed, and subsequently withdrawn, various forms of this proposed fee change numerous times since August 2021 with each proposal containing hundreds of cost and revenue disclosures never previously disclosed by legacy exchanges in their access and market data fee filings prior to 2019.

[41] According to Cboe's 2021 Form 1 Amendment, access and capacity fees represent fees assessed for the opportunity to trade, including fees for trading-related functionality. *See* Cboe 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000465.pdf.*

[42] *See* Cboe 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001155.pdf.*

[43] *See* C2 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000469.pdf.*

[44] *See* C2 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001156.pdf.*

[45] *See* BZX 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000465.pdf.*

[46] *See* BZX 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001152.pdf.*

[47] *See* EDGX 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000467.pdf.*

[48] *See* EDGX 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001154.pdf.*

[49] According to PHLX, ''Trade Management Services'' includes ''a wide variety of alternatives for connectivity to and accessing [the PHLX] markets for a fee. These participants are charged monthly fees for connectivity and support in accordance with [PHLX's] published fee schedules.'' *See* PHLX 2020 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2001/20012246.pdf.*

[50] *See* PHLX 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000475.pdf.* The Exchange notes that this type of Form 1 accounting appears to be designed to obfuscate the true financials of such exchanges and has the effect of perpetuating fee and revenue advantages of legacy exchanges.

[51] *See, e.g., CNBC Debuts New Set on NYSE Floor, available at https://www.cnbc.com/id/46517876.*

[52] *See, e.g.,* Cboe Fee Schedule, Page 4, Affiliate Volume Plan, *available at https://cdn.cboe.com/resources/membership/Cboe_FeeSchedule.pdf* (providing that if a market maker or its affiliate receives a credit under Cboe's Volume Incentive Program (''VIP''), the market maker will receive an access credit on their BOE Bulk Ports corresponding to the VIP tier reached and the market maker will receive a transaction fee credit on their sliding scale market maker transaction fees) *and* NYSE American Options Fee Schedule, Section III, E, Floor Broker Incentive and Rebate Programs, *available at https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE_American_Options_Fee_Schedule.pdf* (providing floor brokers the opportunity to prepay certain non-transaction fees for the following calendar year by achieving certain amounts of volume executed on NYSE American).

guidance and ''is not a rule, regulation or statement of the . . . Commission. . .the Commission has neither approved nor disapproved its content . . .'',[53] this is not the reality experienced by exchanges such as MIAX. As such, non-legacy exchanges are forced to rely on an opaque cost-based justification standard. However, because the Staff Guidance is devoid of detail on what must be contained in cost-based justification, this standard is nearly impossible to meet despite repeated good-faith efforts by the Exchange to provide substantial amount of cost-related details. For example, the Exchange has attempted to increase fees using a cost-based justification numerous times, having submitted over six filings.[54] However, despite providing 100+ page filings describing in extensive detail its costs associated with providing the services described in the filings, Commission Staff continues to suspend such filings, with the rationale that the Exchange has not provided sufficient detail of its costs and without ever being precise about what additional data points are required. The Commission Staff appears to be interpreting the reasonableness standard set forth in Section 6(b)(4) of the Act[55] in a manner that is not possible to achieve. This essentially nullifies the cost-based approach for exchanges as a legitimate alternative as laid out in the Staff Guidance. By refusing to accept a reasonable cost-based argument to justify non-transaction fees (in addition to refusing to accept a competition-based argument as described above), or by failing to provide the detail required to achieve that standard, the Commission Staff is effectively preventing non-legacy exchanges from making any non-transaction fee changes, which benefits the legacy exchanges and is anticompetitive to the non-legacy exchanges. This does not meet the fairness standard under the Act and is discriminatory.

Because of the un-level playing field created by the Revised Review Process and Staff Guidance, the Exchange believes that the Commission Staff, at this point, should either (a) provide sufficient clarity on how its cost-based standard can be met, including a clear and exhaustive articulation of required data and its views on acceptable margins,[56] to the extent that this is pertinent; (b) establish a framework to provide for commensurate non-transaction based fees among competing exchanges to ensure fee parity;[57] or (c) accept that certain competition-based arguments are applicable given the linkage between non-transaction fees and transaction fees, especially where non-transaction fees among exchanges are based upon disparate standards of review, lack parity, and impede fair competition. Considering the absence of any such framework or clarity, the Exchange believes that the Commission does not have a reasonable basis to deny the Exchange this change in fees, where the proposed change would result in fees meaningfully lower than comparable fees at competing exchanges and where the associated non-transaction revenue is meaningfully lower than competing exchanges.

In light of the above, disapproval of this would not meet the fairness standard under the Act, would be discriminatory and places a substantial burden on competition. The Exchange would be uniquely disadvantaged by not being able to increase its access fees to comparable levels (or lower levels than current market rates) to those of other options exchanges for connectivity. If the Commission Staff were to disapprove this proposal, that action, and not market forces, would substantially affect whether the Exchange can be successful in its competition with other options exchanges. Disapproval of this filing could also be viewed as an arbitrary and capricious decision should the Commission Staff continue to ignore its past treatment of non-transaction fee filings before implementation of the Revised Review Process and Staff Guidance and refuse to allow such filings to be approved despite significantly enhanced arguments and cost disclosures.[58]

* * * * *

10Gb ULL Connectivity Fee Change

The Exchange filed a proposal to no longer operate 10Gb connectivity to the Exchange on a single shared network with its affiliate, MIAX Pearl Options. This change is an operational necessity due to ever-increasing capacity constraints and to accommodate anticipated access needs for Members and other market participants.[59] This proposal: (i) sets forth the applicable fees for the bifurcated 10Gb ULL network; (ii) removes provisions in the Fee Schedule that provide for a shared 10Gb ULL network; and (iii) specifies that market participants may continue to connect to both the Exchange and MIAX Pearl Options via the 1Gb network.

The Exchange bifurcated the Exchange and MIAX Pearl Options 10Gb ULL networks on January 23, 2023. The Exchange issued an alert on August 12, 2022 publicly announcing the planned network change and implementation plan and dates to provide market participants adequate time to prepare.[60] Upon bifurcation of the 10Gb ULL network, subscribers need to purchase separate connections to the Exchange and MIAX Pearl Options at the applicable rate. The Exchange's proposed amended rate for 10Gb ULL connectivity is described below. Prior to the bifurcation of the 10Gb ULL networks, subscribers to 10Gb ULL connectivity would be able to connect to both the Exchange and MIAX Pearl Options at the applicable rate set forth below.

The Exchange, therefore, proposes to amend the Fee Schedule to increase the fees for Members and non-Members to

[53] *See supra* note 27, at note 1.

[54] *See* Securities Exchange Act Release Nos. 94890 (May 11, 2022), 87 FR 29945 (May 17, 2022) (SR–MIAX–2022–20); 94720 (April 14, 2022), 87 FR 23586 (April 20, 2022) (SR–MIAX–2022–16); 94719 (April 14, 2022), 87 FR 23600 (April 20, 2022) (SR–MIAX–2022–14); 94259 (February 15, 2022), 87 FR 9747 (February 22, 2022) (SR–MIAX–2022–08); 94256 (February 15, 2022), 87 FR9711 (February 22, 2022) (SR–MIAX–2022–07); 93771 (December 14, 2021), 86 FR 71940 (December 20, 2021) (SR–MIAX–2021–60); 93775 (December 14, 2021), 86 FR 71996 (December 20, 2021) (SR–MIAX–2021–59); 93185 (September 29, 2021), 86 FR 55093 (October 5, 2021) (SR–MIAX–2021–43); 93165 (September 28, 2021), 86 FR 54750 (October 4, 2021) (SR–MIAX–2021–41); 92661 (August 13, 2021), 86 FR 46737 (August 19, 2021) (SR–MIAX–2021–37); 92643 (August 11, 2021), 86 FR 46034 (August 17, 2021) (SR–MIAX–2021–35).

[55] 15 U.S.C. 78f(b)(4).

[56] To the extent that the cost-based standard includes Commission Staff making determinations as to the appropriateness of certain profit margins, the Exchange believes that Staff should be clear as to what they determine is an appropriate profit margin.

[57] In light of the arguments above regarding disparate standards of review for historical legacy non-transaction fees and current non-transaction fees for non-legacy exchanges, a fee parity alternative would be one possible way to avoid the current unfair and discriminatory effect of the Staff Guidance and Revised Review Process. *See, e.g., CSA Staff Consultation Paper 21–401, Real-Time Market Data Fees, available at https://www.bcsc.bc.ca/-/media/PWS/Resources/Securities_Law/Policies/Policy2/21401_Market_Data_Fee_CSA_Staff_Consulation_Paper.pdf.*

[58] The Exchange's costs have clearly increased and continue to increase, particularly regarding capital expenditures, as well as employee benefits provided by third parties (*e.g.,* healthcare and insurance). Yet, practically no fee change proposed by the Exchange to cover its ever-increasing costs has been acceptable to the Commission Staff since 2021. The only other fair and reasonable alternative would be to require the numerous fee filings unquestioningly approved before the Staff Guidance and Revised Review Process to ''develop a record,'' and to ''explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review,'' and to ensure a comparable review process with the Exchange's filing.

[59] *See supra* note 9.

[60] *Id.*

access the Exchange's system networks[61] via a 10Gb ULL fiber connection and to specify that this fee is for a dedicated connection to the Exchange and no longer provides access to MIAX Pearl Options. Specifically, the Exchange proposes to amend Sections 5)a)-b) of the Fee Schedule to increase the 10Gb ULL connectivity fee for Members and non-Members from $10,000 per month to $13,500 per month (''10Gb ULL Fee'').[62] The Exchange also proposes to amend the Fee Schedule to reflect the bifurcation of the 10Gb ULL network and specify that only the 1Gb network provides access to both the Exchange and MIAX Pearl Options.

The Exchange proposes to make the following changes to reflect the bifurcated 10Gb ULL network for the Exchange and MIAX Pearl Options. The Exchange proposes to amend the explanatory paragraphs below the network connectivity fee tables in Sections 5)a)-b) of the Fee Schedule to specify that, with the bifurcated 10Gb ULL network, Members (and non-Members) utilizing the MENI to connect to the trading platforms, market data systems, test systems, and disaster recovery facilities of the Exchange and MIAX Pearl Options via a single, can only do so via a shared 1Gb connection.

The Exchange will continue to assess monthly Member and non-Member network connectivity fees for connectivity to the primary and secondary facilities in any month the Member or non-Member is credentialed to use any of the Exchange APIs or market data feeds in the production environment. The Exchange will continue to pro-rate the fees when a Member or non-Member makes a change to the connectivity (by adding or deleting connections) with such pro-rated fees based on the number of trading days that the Member or non-Member has been credentialed to utilize any of the Exchange APIs or market data feeds in the production environment through such connection, divided by the total number of trading days in such month multiplied by the applicable monthly rate.

Limited Service MEI Ports

Background

The Exchange also proposes to amend Section 5)d) of the Fee Schedule to amend the monthly port fee for Limited Service MEI Ports available to Market Makers.[63] The Exchange currently allocates two (2) Full Service MEI Ports[64] and two (2) Limited Service MEI Ports[65] per matching engine[66] to which each Market Maker connects. Market Makers may also request additional Limited Service MEI Ports for each matching engine to which they connect. The Full Service MEI Ports and Limited Service MEI Ports all include access to the Exchange's primary and secondary data centers and its disaster recovery center. Market Makers may request additional Limited Service MEI Ports. Prior to the Exchange's proposals to adopt a tiered fee structure for Limited Service MEI Ports, Market Makers were assessed a $100 monthly fee for each Limited Service MEI Port for each matching engine above the first two Limited Service MEI Ports that are included for free. This fee was unchanged since 2016 (before the proposals to adopt a tiered fee structure).[67]

Limited Service MEI Port Fee Changes

The Exchange now proposes to amend the monthly fee per Limited Service MEI Port and increase the number of free Limited Service MEI Ports per matching engine from two (2) to four (4). Specifically, the Exchange will now provide the first, second, third, and fourth Limited Service MEI Ports for each matching engine free of charge. For additional Limited Service MEI Ports after the first four ports per matching engine that are provided for free (*i.e.,* beginning with the fifth Limited Service MEI Port), the Exchange proposes to increase the monthly fee from $100 to $275 per Limited Service MEI Port per matching engine.

Market Makers that elect to purchase more than the number of Limited Service Ports that are provide for free do so due to the nature of their business and their perceived need for numerous ports to access the Exchange. Meanwhile, Market Makers who utilize the free Limited Service MEI Ports do so based on their business needs.

The Exchange notes that it last proposed to increase its monthly Limited Service MEI Port fees in 2016 (other than the prior proposals to adopt a tiered fee structure for Limited Service MEI Ports),[68] and such increase proposed herein is designed to recover a portion of the ever increasing costs associated with directly accessing the Exchange.

Implementation

The proposed fee changes are immediately effective.

2. Statutory Basis

The Exchange believes that the proposed fees are consistent with Section 6(b) of the Act[69] in general, and furthers the objectives of Section 6(b)(4) of the Act[70] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among Members and other persons using any facility or system which the Exchange operates or controls. The Exchange also believes the proposed fees further the objectives of Section 6(b)(5) of the Act[71] in that they are designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general protect investors and the public

[61] The Exchange's system networks consist of the Exchange's extranet, internal network, and external network.

[62] Market participants that purchase additional 10Gb ULL connections as a result of this change will not be subject to the Exchange's Member Network Connectivity Testing and Certification Fee under Section 4)c) of the Exchange's fee schedule. *See* Section 4)c) of the Exchange's Fee Schedule *available at https://www.miaxglobal.com/markets/us-options/miax-options/fees* (providing that ''Network Connectivity Testing and Certification Fees will not be assessed in situations where the Exchange initiates a mandatory change to the Exchange's system that requires testing and certification. Member Network Connectivity Testing and Certification Fees will not be assessed for testing and certification of connectivity to the Exchange's Disaster Recovery Facility.'').

[63] The Exchange notes that in its prior filings (the Initial, Second, Third, Fourth and Fifth Proposals), the Exchange proposed to adopt a tiered-pricing structure for Limited Service MEI Ports.

[64] Full Service MEI Ports provide Market Makers with the ability to send Market Maker quotes, eQuotes, and quote purge messages to the MIAX System. Full Service MEI Ports are also capable of receiving administrative information. Market Makers are limited to two Full Service MEI Ports per matching engine. *See* Fee Schedule, Section 5)d)ii), note 27.

[65] Limited Service MEI Ports provide Market Makers with the ability to send eQuotes and quote purge messages only, but not Market Maker Quotes, to the MIAX System. Limited Service MEI Ports are also capable of receiving administrative information. Market Makers initially receive two Limited Service MEI Ports per matching engine. *See* Fee Schedule, Section 5)d)ii), note 28.

[66] A ''matching engine'' is a part of the MIAX electronic system that processes options quotes and trades on a symbol-by-symbol basis. Some matching engines will process option classes with multiple root symbols, and other matching engines will be dedicated to one single option root symbol (for example, options on SPY will be processed by one single matching engine that is dedicated only to SPY). A particular root symbol may only be assigned to a single designated matching engine. A particular root symbol may not be assigned to multiple matching engines. *See* Fee Schedule, Section 5)d)ii), note 29.

[67] *See* Securities Exchange Act Release No. 79666 (December 22, 2016), 81 FR 96133 (December 29, 2016) (SR–MIAX–2016–47).

[68] *See* Securities Exchange Act Release No. 79666 (December 22, 2016), 81 FR 96133 (December 29, 2016) (SR–MIAX–2016–47).

[69] 15 U.S.C. 78f(b).

[70] 15 U.S.C. 78f(b)(4).

[71] 15 U.S.C. 78f(b)(5).

interest and are not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

The Exchange believes that the information provided to justify the proposed fees meets or exceeds the amount of detail required in respect of proposed fee changes under the Revised Review Process and as set forth in recent Staff Guidance. Based on both the BOX Order [72] and the Staff Guidance,[73] the Exchange believes that the proposed fees are consistent with the Act because they are: (i) reasonable, equitably allocated, not unfairly discriminatory, and not an undue burden on competition; (ii) comply with the BOX Order and the Staff Guidance; and (iii) supported by evidence (including comprehensive revenue and cost data and analysis) that they are fair and reasonable and will not result in excessive pricing or supra-competitive profit.

The Exchange believes that exchanges, in setting fees of all types, should meet high standards of transparency to demonstrate why each new fee or fee amendment meets the requirements of the Act that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among market participants. The Exchange believes this high standard is especially important when an exchange imposes various fees for market participants to access an exchange's marketplace.

In the Staff Guidance, the Commission Staff states that, ''[a]s an initial step in assessing the reasonableness of a fee, staff considers whether the fee is constrained by significant competitive forces.'' [74] The Staff Guidance further states that, ''. . . even where an SRO cannot demonstrate, or does not assert, that significant competitive forces constrain the fee at issue, a cost-based discussion may be an alternative basis upon which to show consistency with the Exchange Act.'' [75] In the Staff Guidance, the Commission Staff further states that, ''[i]f an SRO seeks to support its claims that a proposed fee is fair and reasonable because it will permit recovery of the SRO's costs, . . . , specific information, including quantitative information, should be provided to support that argument.'' [76]

The proposed fees are reasonable because they promote parity among exchange pricing for access, which promotes competition, including in the Exchanges' ability to competitively price transaction fees, invest in infrastructure, new products and other innovations, all while allowing the Exchange to recover its costs to provide dedicated access via 10Gb ULL connectivity (driven by the bifurcation of the 10Gb ULL network) and Limited Service MEI Ports. As discussed above, the Revised Review Process and Staff Guidance have created an uneven playing field between legacy and non-legacy exchanges by severely restricting non-legacy exchanges from being able to increase non-transaction related fees to provide them with additional necessary revenue to better compete with legacy exchanges, which largely set fees prior to the Revised Review Process. The much higher non-transaction fees charged by the legacy exchanges provides them with two significant competitive advantages: (i) additional non-transaction revenue that may be used to fund areas other than the non-transaction service related to the fee, such as investments in infrastructure, advertising, new products and other innovations; and (ii) greater flexibility to lower their transaction fees by using the revenue from the higher non-transaction fees to subsidize transaction fee rates. The latter is more immediately impactful in competition for order flow and market share, given the variable nature of this cost on Member firms. The absence of a reasonable path forward to increase non-transaction fees to comparable (or lower rates) limits the Exchange's flexibility to, among other things, make additional investments in infrastructure and advertising, diminishes the ability to remain competitive on transaction fees, and hinders the ability to compete for order flow and market share. Again, there is little doubt that subjecting one exchange to a materially different standard than that applied to other exchanges for non-transaction fees leaves that exchange at a disadvantage in its ability to compete with its pricing of transaction fees.

The Proposed Fees Ensure Parity Among Exchange Access Fees, Which Promotes Competition

The Exchange commenced operations in 2012 and adopted its initial fee schedule, with all connectivity and port fees set at $0.00 (the Exchange originally had a non-ULL 10Gb connectivity option, which it has since removed).[77] As a new exchange entrant, the Exchange chose to offer connectivity and ports free of charge to encourage market participants to trade on the Exchange and experience, among things, the quality of the Exchange's technology and trading functionality. This practice is not uncommon. New exchanges often do not charge fees or charge lower fees for certain services such as memberships/trading permits to attract order flow to an exchange, and later amend their fees to reflect the true value of those services, absorbing all costs to provide those services in the meantime. Allowing new exchange entrants time to build and sustain market share through various pricing incentives before increasing non-transaction fees encourages market entry and fee parity, which promotes competition among exchanges. It also enables new exchanges to mature their markets and allow market participants to trade on the new exchanges without fees serving as a potential barrier to attracting memberships and order flow.[78]

Later in 2013, as the Exchange's market share increased,[79] the Exchange adopted a nominal $10 fee for each additional Limited Service MEI Port.[80] The Exchange last increased the fees for its 10Gb ULL fiber connections from $9,300 to $10,000 per month on January

[72] *See supra* note 26.

[73] *See supra* note 27.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *See* Securities Exchange Act Release No. 68415 (December 12, 2012), 77 FR 74905 (December 18, 2012) (SR–MIAX–2012–01).

[78] *See* Securities Exchange Act Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR–BOX–2022–17) (stating, ''[t]he Exchange established this lower (when compared to other options exchanges in the industry) Participant Fee in order to encourage market participants to become Participants of BOX . . .''). *See also* Securities Exchange Act Release No. 90076 (October 2, 2020), 85 FR 63620 (October 8, 2020) (SR–MEMX–2020–10) (proposing to adopt the initial fee schedule and stating that ''[u]nder the initial proposed Fee Schedule, the Exchange proposes to make clear that it does not charge any fees for membership, market data products, physical connectivity or application sessions.''). MEMX's market share has increased and recently proposed to adopt numerous non-transaction fees, including fees for membership, market data, and connectivity. *See* Securities Exchange Act Release Nos. 93927 (January 7, 2022), 87 FR 2191 (January 13, 2022) (SR–MEMX–2021–19) (proposing to adopt membership fees); 96430 (December 1, 2022), 87 FR 75083 (December 7, 2022) (SR–MEMX–2022–32) *and* 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26) (proposing to adopt fees for connectivity). *See also, e.g.,* Securities Exchange Act Release No. 88211 (February 14, 2020), 85 FR 9847 (February 20, 2020) (SR–NYSENAT–2020–05), *available at https://www.nyse.com/publicdocs/nyse/markets/nyse-national/rule-filings/filings/2020/SR-NYSENat-2020-05.pdf* (initiating market data fees for the NYSE National exchange after initially setting such fees at zero).

[79] The Exchange experienced a monthly average equity options trading volume of 1.87% for the month of November 2013. *See* the ''Market Share'' section of the Exchange's website, *available at https://www.miaxglobal.com/.*

[80] *See* Securities Exchange Act Release No. 70903 (November 20, 2013), 78 FR 70615 (November 26, 2013) (SR–MIAX–2013–52).

1, 2021.[81] The Exchange balanced business and competitive concerns with the need to financially compete with the larger incumbent exchanges that charge higher fees for similar connectivity and use that revenue to invest in their technology and other service offerings.

The proposed changes to the Fee Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces, which constrains its pricing determinations for transaction fees as well as non-transaction fees. The fact that the market for order flow is competitive has long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* the D.C. Circuit stated, ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers' . . . .'' [82]

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention to determine prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues, and also recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [83]

Congress directed the Commission to ''rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.' '' [84] As a result, and as evidenced above, the Commission has historically relied on competitive forces to determine whether a fee proposal is equitable, fair, reasonable, and not unreasonably or unfairly discriminatory. ''If competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior.'' [85] Accordingly, ''the existence of significant competition provides a substantial basis for finding that the terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.'' [86] In the Revised Review Process and Staff Guidance, Commission Staff indicated that they would look at factors beyond the competitive environment, such as cost, only if a ''proposal lacks persuasive evidence that the proposed fee is constrained by significant competitive forces.'' [87]

The Exchange believes the competing exchanges' 10Gb connectivity and port fees are useful examples of alternative approaches to providing and charging for access and demonstrating how such fees are competitively set and constrained. To that end, the Exchange believes the proposed fees are competitive and reasonable because the proposed fees are similar to or less than fees charged for similar connectivity and port access provided by other options exchanges with comparable market shares. As such, the Exchange believes that denying its ability to institute fees that allow the Exchange to recoup its costs with a reasonable margin in a manner that is closer to parity with legacy exchanges, in effect, impedes its ability to compete, including in its pricing of transaction fees and ability to invest in competitive infrastructure and other offerings.

The following table shows how the Exchange's proposed fees remain similar to or less than fees charged for similar connectivity and port access provided by other options exchanges with similar market share. Each of the connectivity or port rates in place at competing options exchanges were filed with the Commission for immediate effectiveness and remain in place today.

Exchange	Type of connection or port	Monthly fee (per connection or per port)
MIAX (as proposed) (equity options market share of 6.20% for the month of August 2023) [a].	10Gb ULL connection	$13,500.
	Limited Service MEI Ports	1–4 ports: FREE. 5 or more ports: $275 each.
NASDAQ [b] (equity options market share of 5.80% for the month of August 2023) [c].	10Gb Ultra fiber connection	$15,000 per connection.
	SQF Port [d]	1–5 ports: $1,500 per port. 6–20 ports: $1,000 per port. 21 or more ports: $500 per port.
NASDAQ ISE LLC (''ISE'') [e] (equity options market share of 5.58% for the month of August 2023) [f].	10Gb Ultra fiber connection	$15,000 per connection.
	SQF Port	$1,100 per port.
NYSE American LLC (''NYSE American'') [g] (equity options market share of 7.34% for the month of August 2023) [h].	10Gb LX LCN connection	$22,000 per connection.
	Order/Quote Entry Port	1–40 ports: $450 per port. 41 or more ports: $150 per port.
NASDAQ GEMX, LLC (''GEMX'') [i] (equity options market share of 3.03% for the month of August 2023) [j].	10Gb Ultra connection	$15,000 per connection.
	SQF Port	$1,250 per port.

[a] *See* the ''Market Share'' section of the Exchange's website, *available at https://www.miaxglobal.com/.*
[b] *See* NASDAQ Pricing Schedule, Options 7, Section 3, Ports and Other Services *and* NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.
[c] *See supra* note a.
[d] Similar to the Exchange's MEI Ports, SQF ports are primarily utilized by Market Makers.
[e] *See* ISE Pricing Schedule, Options 7, Section 7, Connectivity Fees *and* ISE Rules, General 8: Connectivity.
[f] *See supra* note a.
[g] *See* NYSE American Options Fee Schedule, Section V.A. Port Fees *and* Section V.B. Co-Location Fees.
[h] *See supra* note a.

[81] *See* Securities Exchange Act Release No. 90980 (January 25, 2021), 86 FR 7602 (January 29, 2021) (SR–MIAX–2021–02).

[82] *See NetCoalition,* 615 F.3d at 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[83] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[84] *See NetCoalition,* 615 F.3d at 534–35; see also H.R. Rep. No. 94–229 at 92 (1975) (''[I]t is the intent of the conferees that the national market system evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed.'').

[85] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74,770 (December 9, 2008) (SR–NYSEArca–2006–21).

[86] *Id.*

[87] *See supra* note 27.

[i] *See* GEMX Pricing Schedule, Options 7, Section 6, Connectivity Fees *and* GEMX Rules, General 8: Connectivity.
[i] *See supra* note a.

There is no requirement, regulatory or otherwise, that any broker-dealer connect to and access any (or all of) the available options exchanges. Market participants may choose to become a member of one or more options exchanges based on the market participant's assessment of the business opportunity relative to the costs of the Exchange. With this, there is elasticity of demand for exchange membership. As an example, the Exchange's affiliate, MIAX Pearl Options, experienced a decrease in membership as the result of similar fees proposed herein. One MIAX Pearl Options Market Maker terminated their MIAX Pearl Options membership effective January 1, 2023, as a direct result of the proposed connectivity and port fee changes proposed by MIAX Pearl Options.

It is not a requirement for market participants to become members of all options exchanges; in fact, certain market participants conduct an options business as a member of only one options market.[88] A very small number of market participants choose to become a member of all sixteen options exchanges. Most firms that actively trade on options markets are not currently Members of the Exchange and do not purchase connectivity or port services at the Exchange. Connectivity and ports are only available to Members or service bureaus, and only a Member may utilize a port.[89]

One other exchange recently noted in a proposal to amend their own trading permit fees that of the 62 market making firms that are registered as Market Makers across Cboe, MIAX, and BOX, 42 firms access only one of the three exchanges.[90] The Exchange and its affiliated options markets, MIAX Pearl Options and MIAX Emerald, have a total of 46 members. Of those 46 total members, 37 are members of all three affiliated options markets, two are members of only two affiliated options markets, and seven are members of only one affiliated options market. The Exchange also notes that no firm is a Member of the Exchange only. The above data evidences that a broker-dealer need not have direct connectivity to all options exchanges, let alone the Exchange and its two affiliates, and broker-dealers may elect to do so based on their own business decisions and need to directly access each exchange's liquidity pool.

Not only is there not an actual regulatory requirement to connect to every options exchange, the Exchange believes there is also no ''de facto'' or practical requirement as well, as further evidenced by the broker-dealer membership analysis of the options exchanges discussed above. As noted above, this is evidenced by the fact that one MIAX Pearl Options Market Maker terminated their MIAX Pearl Options membership effective January 1, 2023 as a direct result of the proposed connectivity and port fee changes on MIAX Pearl Options (which are similar to the changes proposed herein). Indeed, broker-dealers choose if and how to access a particular exchange and because it is a choice, the Exchange must set reasonable pricing, otherwise prospective members would not connect and existing members would disconnect from the Exchange. The decision to become a member of an exchange, particularly for registered market makers, is complex, and not solely based on the non-transactional costs assessed by an exchange. As noted herein, specific factors include, but are not limited to: (i) an exchange's available liquidity in options series; (ii) trading functionality offered on a particular market; (iii) product offerings; (iv) customer service on an exchange; and (v) transactional pricing. Becoming a member of the exchange does not ''lock'' a potential member into a market or diminish the overall competition for exchange services.

In lieu of becoming a member at each options exchange, a market participant may join one exchange and elect to have their orders routed in the event that a better price is available on an away market. Nothing in the Order Protection Rule requires a firm to become a Member at—or establish connectivity to—the Exchange.[91] If the Exchange is not at the national best bid or offer (''NBBO''),[92] the Exchange will route an order to any away market that is at the NBBO to ensure that the order was executed at a superior price and prevent a trade-through.[93]

With respect to the submission of orders, Members may also choose not to purchase any connection from the Exchange, and instead rely on the port of a third party to submit an order. For example, a third-party broker-dealer Member of the Exchange may be utilized by a retail investor to submit orders into an exchange. An institutional investor may utilize a broker-dealer, a service bureau,[94] or request sponsored access [95] through a member of an exchange in order to submit a trade directly to an options exchange.[96] A market participant may either pay the costs associated with becoming a member of an exchange or, in the alternative, a market participant may elect to pay commissions to a broker-dealer, pay fees to a service bureau to submit trades, or pay a

[88] BOX recently adopted an electronic market maker trading permit fee. *See* Securities Exchange Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR–BOX–2022–17). In that proposal, BOX stated that, ''. . . it is not aware of any reason why Market Makers could not simply drop their access to an exchange (or not initially access an exchange) if an exchange were to establish prices for its non-transaction fees that, in the determination of such Market Maker, did not make business or economic sense for such Market Maker to access such exchange. [BOX] again notes that no market makers are required by rule, regulation, or competitive forces to be a Market Maker on [BOX].'' Also in 2022, MEMX established a monthly membership fee. *See* Securities Exchange Act Release No. 93927 (January 7, 2022), 87 FR 2191 (January 13, 2022) (SR–MEMX–2021–19). In that proposal, MEMX reasoned that that there is value in becoming a member of the exchange and stated that it believed that the proposed membership fee ''is not unfairly discriminatory because no broker-dealer is required to become a member of the Exchange'' and that ''neither the trade-through requirements under Regulation NMS nor broker-dealers' best execution obligations require a broker-dealer to become a member of every exchange.''

[89] Service Bureaus may obtain ports on behalf of Members.

[90] *See* Securities Exchange Act Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR–BOX–2022–17) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Fee Schedule on the BOX Options Market LLC Facility To Adopt Electronic Market Maker Trading Permit Fees). The Exchange believes that BOX's observation demonstrates that market making firms can, and do, select which exchanges they wish to access, and, accordingly, options exchanges must take competitive considerations into account when setting fees for such access.

[91] *See* Options Order Protection and Locked/Crossed Market Plan (August 14, 2009), *available at https://www.theocc.com/getmedia/7fc629d9-4e54-4b99-9f11-c0e4db1a2266/options_order_protection_plan.pdf.*

[92] *See* Exchange Rule 100.

[93] Members may elect to not route their orders by utilizing the Do Not Route order type. *See* Exchange Rule 516(g).

[94] Service Bureaus provide access to market participants to submit and execute orders on an exchange. On the Exchange, a Service Bureau may be a Member. Some Members utilize a Service Bureau for connectivity and that Service Bureau may not be a Member. Some market participants utilize a Service Bureau who is a Member to submit orders.

[95] Sponsored Access is an arrangement whereby a Member permits its customers to enter orders into an exchange's system that bypass the Member's trading system and are routed directly to the Exchange, including routing through a service bureau or other third-party technology provider.

[96] This may include utilizing a floor broker and submitting the trade to one of the five options trading floors.

member to sponsor the market participant in order to submit trades directly to an exchange.

Non-Member third-parties, such as service bureaus and extranets, resell the Exchange's connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange's connectivity fees), which alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity and other access fees to its market. The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. Unlike other exchanges, the Exchange also does not currently assess fees on third-party resellers on a per customer basis (*i.e.,* fees based on the number of firms that connect to the Exchange indirectly via the third-party).[97] Indeed, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own.[98] Particularly, in the event that a market participant views the Exchange's direct connectivity and access fees as more or less attractive than competing markets, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to the Exchange and connect instead to one or more of the other 15 options markets. Accordingly, the Exchange believes that the proposed fees are fair and reasonable and constrained by competitive forces.

The Exchange is obligated to regulate its Members and secure access to its environment. In order to properly regulate its Members and secure the trading environment, the Exchange takes measures to ensure access is monitored and maintained with various controls. Connectivity and ports are methods utilized by the Exchange to grant Members secure access to communicate with the Exchange and exercise trading rights. When a market participant elects to be a Member, and is approved for membership by the Exchange, the Member is granted trading rights to enter orders and/or quotes into Exchange through secure connections.

Again, there is no legal or regulatory requirement that a market participant become a Member of the Exchange. This is again evidenced by the fact that one MIAX Pearl Options Market Maker terminated their MIAX Pearl Options membership effective January 1, 2023 as a direct result of the proposed connectivity and port fee changes on MIAX Pearl Options. If a market participant chooses to become a Member, they may then choose to purchase connectivity beyond the one connection that is necessary to quote or submit orders on the Exchange. Members may freely choose to rely on one or many connections, depending on their business model.

Bifurcation of 10Gb ULL Connectivity and Related Fees

The Exchange began to operate on a single shared network with MIAX Pearl Options when MIAX Pearl commenced operations as a national securities exchange on February 7, 2017.[99] The Exchange and MIAX Pearl Options operated on a single shared network to provide Members with a single convenient set of access points for both exchanges. Both the Exchange and MIAX Pearl Options offer two methods of connectivity, 1Gb and 10Gb ULL connections. The 1Gb connection services are supported by a discrete set of switches providing 1Gb access ports to Members. The 10Gb ULL connection services are supported by a second and mutually exclusive set of switches providing 10Gb ULL access ports to Members. Previously, both the 1Gb and 10Gb ULL shared extranet ports allowed Members to use one connection to access both exchanges, namely their trading platforms, market data systems, test systems, and disaster recovery facilities.

The Exchange stresses that bifurcating the 10Gb ULL connectivity between the Exchange and MIAX Pearl Options was not designed with the objective to generate an overall increase in access fee revenue. Rather, the proposed change was necessitated by 10Gb ULL connectivity experiencing a significant decrease in port availability mostly driven by connectivity demands of latency sensitive Members that seek to maintain multiple 10Gb ULL connections on every switch in the network. Operating two separate national securities exchanges on a single shared network provided certain benefits, such as streamlined connectivity to multiple exchanges, and simplified exchange infrastructure. However, doing so was no longer sustainable due to ever-increasing capacity constraints and current system limitations. The network is not an unlimited resource. As described more fully in the proposal to bifurcate the 10Gb ULL network,[100] the connectivity needs of Members and market participants has increased every year since the launch of MIAX Pearl Options and the operations of the Exchange and MIAX Pearl Options on a single shared 10Gb ULL network is no longer feasible. This required constant System [101] expansion to meet Member demand for additional ports and 10Gb ULL connections has resulted in limited available System headroom, which eventually became operationally problematic for both the Exchange and its customers.

As stated above, the shared network is not an unlimited resource and its expansion was constrained by MIAX's and MIAX Pearl Options' ability to provide fair and equitable access to all market participants of both markets. Due to the ever-increasing connectivity demands, the Exchange found it necessary to bifurcate 10Gb ULL connectivity to the Exchange's and MIAX Pearl Options' Systems and networks to be able to continue to meet ongoing and future 10Gb ULL connectivity and access demands.[102]

Unlike the switches that provide 1Gb connectivity, the availability for additional 10Gb ULL connections on each switch had significantly decreased. This was mostly driven by the connectivity demands of latency sensitive Members (*e.g.,* Market Makers and liquidity removers) that sought to maintain connectivity across multiple

[97] *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).

[98] The Exchange notes that resellers, such as SFTI, are not required to publicize, let alone justify or file with the Commission their fees, and as such could charge the market participant any fees it deems appropriate (including connectivity fees higher than the Exchange's connectivity fees), even if such fees would otherwise be considered potentially unreasonable or uncompetitive fees.

[99] *See* Securities Exchange Act Release No. 80061 (February 17, 2017), 82 FR 11676 (February 24, 2017) (establishing MIAX Pearl Fee Schedule and establishing that the MENI can also be configured to provide network connectivity to the trading platforms, market data systems, test systems, and disaster recovery facility of the MIAX Pearl's affiliate, MIAX, via a single, shared connection).

[100] *See* Securities Exchange Act Release Nos. 96553 (December 20, 2022), 87 FR 79379 (December 27, 2022) (SR–PEARL–2022–60); 96545 (December 20, 2022) 87 FR 79393 (December 27, 2022) (SR–MIAX–2022–48).

[101] The term ''System'' means the automated trading system used by the Exchange for the trading of securities. *See* Exchange Rule 100.

[102] Currently, the Exchange maintains sufficient headroom to meet ongoing and future requests for 1Gb connectivity. Therefore, the Exchange did not propose to alter 1Gb connectivity and continues to provide 1Gb connectivity over a shared network.

10Gb ULL switches. Based on the Exchange's experience, such Members did not typically use a shared 10Gb ULL connection to reach both the Exchange and MIAX Pearl Options due to related latency concerns. Instead, those Members maintain dedicated separate 10Gb ULL connections for the Exchange and separate dedicated 10Gb ULL connections for MIAX Pearl Options. This resulted in a much higher 10Gb ULL usage per switch by those Members on the shared 10Gb ULL network than would otherwise be needed if the Exchange and MIAX Pearl Options had their own dedicated 10Gb ULL networks. Separation of the Exchange and MIAX Pearl Options 10Gb ULL networks naturally lends itself to reduced 10Gb ULL port consumption on each switch and, therefore, increased 10Gb ULL port availability for current Members and new Members.

Prior to bifurcating the 10Gb ULL network, the Exchange and MIAX Pearl Options continued to add switches to meet ongoing demand for 10Gb ULL connectivity. That was no longer sustainable because simply adding additional switches to expand the current shared 10Gb ULL network would not adequately alleviate the issue of limited available port connectivity. While it would have resulted in a gain in overall port availability, the existing switches on the shared 10Gb ULL network in use would have continued to suffer from lack of port headroom given many latency sensitive Members' needs for a presence on each switch to reach both the Exchange and MIAX Pearl Options. This was because those latency sensitive Members sought to have a presence on each switch to maximize the probability of experiencing the best network performance. Those Members routinely decide to rebalance orders and/or messages over their various connections to ensure each connection is operating with maximum efficiency. Simply adding switches to the extranet would not have resolved the port availability needs on the shared 10Gb ULL network since many of the latency sensitive Members were unwilling to relocate their connections to a new switch due to the potential detrimental performance impact. As such, the impact of adding new switches and rebalancing ports would not have been effective or responsive to customer needs. The Exchange has found that ongoing and continued rebalancing once additional switches are added has had, and would have continued to have had, a diminishing return on increasing available 10Gb ULL connectivity.

Based on its experience and expertise, the Exchange found the most practical way to increase connectivity availability on its switches was to bifurcate the existing 10Gb ULL networks for the Exchange and MIAX Pearl Options by migrating the exchanges' connections from the shared network onto their own set of switches. Such changes accordingly necessitated a review of the Exchange's previous 10Gb ULL connectivity fees and related costs. The proposed fees are necessary to allow the Exchange to cover ongoing costs related to providing and maintaining such connectivity, described more fully below. The ever increasing connectivity demands that necessitated this change further support that the proposed fees are reasonable because this demand reflects that Members and non-Members believe they are getting value from the 10Gb ULL connections they purchase.

The Exchange announced on August 12, 2022 the planned network change and the January 23, 2023 implementation date to provide market participants adequate time to prepare.[103] Since August 12, 2022, the Exchange has worked with current 10Gb ULL subscribers to address their connectivity needs ahead of the January 23, 2023 date. Based on those interactions and subscriber feedback, the Exchange experienced a minimal net increase of six (6) overall 10Gb ULL connectivity subscriptions across the Exchange and MIAX Pearl Options. This immaterial increase in overall connections reflects a minimal fee impact for all types of subscribers and reflects that subscribers elected to reallocate existing 10Gb ULL connectivity directly to the Exchange or MIAX Pearl Options, or choose to decrease or cease connectivity as a result of the change.

Should the Commission Staff disapprove such fees, it would effectively dictate how an exchange manages its technology and would hamper the Exchange's ability to continue to invest in and fund access services in a manner that allows it to meet existing and anticipated access demands of market participants. Disapproval could also have the adverse effect of discouraging an exchange from optimizing its operations and deploying innovative technology to the benefit of market participants if it believes the Commission would later prevent that exchange from covering its costs and monetizing operational enhancements, thus adversely impacting competition. Also, as noted above, the economic consequences of not being able to better establish fee parity with other exchanges for non-transaction fees hampers the Exchange's ability to compete on transaction fees.

Cost Analysis

In general, the Exchange believes that exchanges, in setting fees of all types, should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the Exchange Act requirements that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among members and markets. In particular, the Exchange believes that each exchange should take extra care to be able to demonstrate that these fees are based on its costs and reasonable business needs.

In proposing to charge fees for connectivity and port services, the Exchange is especially diligent in assessing those fees in a transparent way against its own aggregate costs of providing the related service, and in carefully and transparently assessing the impact on Members—both generally and in relation to other Members, *i.e.,* to assure the fee will not create a financial burden on any participant and will not have an undue impact in particular on smaller Members and competition among Members in general. The Exchange believes that this level of diligence and transparency is called for by the requirements of Section 19(b)(1) under the Act,[104] and Rule 19b–4 thereunder,[105] with respect to the types of information exchanges should provide when filing fee changes, and Section 6(b) of the Act,[106] which requires, among other things, that exchange fees be reasonable and equitably allocated,[107] not designed to permit unfair discrimination,[108] and that they not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[109] This rule change proposal addresses those requirements, and the analysis and data in each of the sections that follow are designed to clearly and comprehensively show how they are met.[110] The Exchange reiterates that the legacy exchanges with whom the Exchange vigorously competes for order flow and market share, were not subject to any such diligence or transparency in setting their baseline non-transaction fees, most of which were put in place before the Revised Review Process and Staff Guidance.

[103] *See supra* note 9.

[104] 15 U.S.C. 78s(b)(1).

[105] 17 CFR 240.19b–4.

[106] 15 U.S.C. 78f(b).

[107] 15 U.S.C. 78f(b)(4).

[108] 15 U.S.C. 78f(b)(5).

[109] 15 U.S.C. 78f(b)(8).

[110] *See supra* note 27.

As detailed below, the Exchange recently calculated its aggregate annual costs for providing physical 10Gb ULL connectivity to the Exchange at $12,034,554 (or approximately $1,002,880 per month, rounded up to the nearest dollar when dividing the annual cost by 12 months) and its aggregate annual costs for providing Limited Service MEI Ports at $2,157,178 (or approximately $179,765 per month, rounded down to the nearest dollar when dividing the annual cost by 12 months). In order to cover the aggregate costs of providing connectivity to its users (both Members and non-Members [111]) going forward and to make a modest profit, as described below, the Exchange proposes to modify its Fee Schedule to charge a fee of $13,500 per month for each physical 10Gb ULL connection and to remove language providing for a shared 10Gb ULL network between the Exchange and MIAX Pearl Options. The Exchange also proposes to modify its Fee Schedule to amend the monthly fee for additional Limited Service MEI Ports and provide two additional ports free of charge for a total of four free Limited Service MEI Ports per matching engine to which each Member connects.

In 2019, the Exchange completed a study of its aggregate costs to produce market data and connectivity (the ''Cost Analysis'').[112] The Cost Analysis required a detailed analysis of the Exchange's aggregate baseline costs, including a determination and allocation of costs for core services provided by the Exchange—transaction execution, market data, membership services, physical connectivity, and port access (which provide order entry, cancellation and modification functionality, risk functionality, the ability to receive drop copies, and other functionality). The Exchange separately divided its costs between those costs necessary to deliver each of these core services, including infrastructure, software, human resources (*i.e.,* personnel), and certain general and administrative expenses (''cost drivers'').

As an initial step, the Exchange determined the total cost for the Exchange and the affiliated markets for each cost driver as part of its 2023 budget review process. The 2023 budget review is a company-wide process that occurs over the course of many months, includes meetings among senior management, department heads, and the Finance Team. Each department head is required to send a ''bottom up'' budget to the Finance Team allocating costs at the profit and loss account and vendor levels for the Exchange and its affiliated markets based on a number of factors, including server counts, additional hardware and software utilization, current or anticipated functional or non-functional development projects, capacity needs, end-of-life or end-of-service intervals, number of members, market model (*e.g.,* price time or pro-rata, simple only or simple and complex markets, auction functionality, etc.), which may impact message traffic, individual system architectures that impact platform size,[113] storage needs, dedicated infrastructure versus shared infrastructure allocated per platform based on the resources required to support each platform, number of available connections, and employees allocated time. All of these factors result in different allocation percentages among the Exchange and its affiliated markets, *i.e.,* the different percentages of the overall cost driver allocated to the Exchange and its affiliated markets will cause the dollar amount of the overall cost allocated among the Exchange and its affiliated markets to also differ. Because the Exchange's parent company currently owns and operates four separate and distinct marketplaces, the Exchange must determine the costs associated with each actual market—as opposed to the Exchange's parent company simply concluding that all costs drivers are the same at each individual marketplace and dividing total cost by four (4) (evenly for each marketplace). Rather, the Exchange's parent company determines an accurate cost for each marketplace, which results in different allocations and amounts across exchanges for the same cost drivers, due to the unique factors of each marketplace as described above. This allocation methodology also ensures that no cost would be allocated twice or double-counted between the Exchange and its affiliated markets. The Finance Team then consolidates the budget and sends it to senior management, including the Chief Financial Officer and Chief Executive Officer, for review and approval. Next, the budget is presented to the Board of Directors and the Finance and Audit Committees for each exchange for their approval. The above steps encompass the first step of the cost allocation process.

The next step involves determining what portion of the cost allocated to the Exchange pursuant to the above methodology is to be allocated to each core service, *e.g.,* connectivity and ports, market data, and transaction services. The Exchange and its affiliated markets adopted an allocation methodology with thoughtful and consistently applied principles to guide how much of a particular cost amount allocated to the Exchange should be allocated within the Exchange to each core service. This is the final step in the cost allocation process and is applied to each of the cost drivers set forth below. For instance, fixed costs that are not driven by client activity (*e.g.,* message rates), such as data center costs, were allocated more heavily to the provision of physical connectivity (60.6% of total expense amount allocated to 10Gb ULL connectivity), with smaller allocations to additional Limited Service MEI Ports (7.2%), and the remainder to the provision of other connectivity, other ports, transaction execution, membership services and market data services (32.3%). This next level of the allocation methodology at the individual exchange level also took into account factors similar to those set forth under the first step of the allocation methodology process described above, to determine the appropriate allocation to connectivity or market data versus allocations for other services. This allocation methodology was developed through an assessment of costs with senior management intimately familiar with each area of the Exchange's operations. After adopting this allocation methodology, the Exchange then applied an allocation of each cost driver to each core service, resulting in the cost allocations described below. Each of the below cost allocations is unique to the Exchange and represents a percentage of overall cost that was allocated to the Exchange pursuant to the initial allocation described above.

By allocating segmented costs to each core service, the Exchange was able to estimate by core service the potential margin it might earn based on different fee models. The Exchange notes that as a non-listing venue it has five primary sources of revenue that it can potentially use to fund its operations:

[111] Types of market participants that obtain connectivity services from the Exchange but are not Members include service bureaus and extranets. Service bureaus offer technology-based services to other companies for a fee, including order entry services, and thus, may access Limited Service MEI Ports on behalf of one or more Members. Extranets offer physical connectivity services to Members and non-Members.

[112] The Exchange frequently updates it Cost Analysis as strategic initiatives change, costs increase or decrease, and market participant needs and trading activity changes. The Exchange's most recent Cost Analysis was conducted ahead of this filing.

[113] For example, the Exchange maintains 24 matching engines, MIAX Pearl Options maintains 12 matching engines, MIAX Pearl Equities maintains 24 matching engines, and MIAX Emerald maintains 12 matching engines.

transaction fees, fees for connectivity and port services, membership fees, regulatory fees, and market data fees. Accordingly, the Exchange must cover its expenses from these five primary sources of revenue. The Exchange also notes that as a general matter each of these sources of revenue is based on services that are interdependent. For instance, the Exchange's system for executing transactions is dependent on physical hardware and connectivity; only Members and parties that they sponsor to participate directly on the Exchange may submit orders to the Exchange; many Members (but not all) consume market data from the Exchange in order to trade on the Exchange; and, the Exchange consumes market data from external sources in order to comply with regulatory obligations. Accordingly, given this interdependence, the allocation of costs to each service or revenue source required judgment of the Exchange and was weighted based on estimates of the Exchange that the Exchange believes are reasonable, as set forth below. While there is no standardized and generally accepted methodology for the allocation of an exchange's costs, the Exchange's methodology is the result of an extensive review and analysis and will be consistently applied going forward for any other potential fee proposals. In the absence of the Commission attempting to specify a methodology for the allocation of exchanges' interdependent costs, the Exchange will continue to be left with its best efforts to attempt to conduct such an allocation in a thoughtful and reasonable manner.

Through the Exchange's extensive updated Cost Analysis, which was again recently further refined, the Exchange analyzed every expense item in the Exchange's general expense ledger to determine whether each such expense relates to the provision of connectivity and port services, and, if such expense did so relate, what portion (or percentage) of such expense actually supports the provision of connectivity and port services, and thus bears a relationship that is, ''in nature and closeness,'' directly related to network connectivity and port services. In turn, the Exchange allocated certain costs more to physical connectivity and others to ports, while certain costs were only allocated to such services at a very low percentage or not at all, using consistent allocation methodologies as described above. Based on this analysis, the Exchange estimates that the aggregate monthly cost to provide 10Gb ULL connectivity and Limited Service MEI Port services, including both physical 10Gb connections and Limited Service MEI Ports, is $1,182,645 (utilizing the rounded numbers when dividing the annual cost for 10Gb ULL connectivity and annual cost for Limited Service MEI Ports by 12 months, then adding both numbers together), as further detailed below.

Costs Related to Offering Physical 10Gb ULL Connectivity

The following chart details the individual line-item costs considered by the Exchange to be related to offering physical dedicated 10Gb ULL connectivity via an unshared network as well as the percentage of the Exchange's overall costs that such costs represent for each cost driver (*e.g.,* as set forth below, the Exchange allocated approximately 25.6% of its overall Human Resources cost to offering physical connectivity).

Cost drivers	Allocated annual cost [k]	Allocated monthly cost [l]	Percent of all
Human Resources	$3,867,297	$322,275	25
Connectivity (external fees, cabling, switches, etc.)	70,163	5,847	60.6
Internet Services and External Market Data	424,584	35,382	73.3
Data Center	718,950	59,912	60.6
Hardware and Software Maintenance and Licenses	727,734	60,645	49.8
Depreciation	2,310,898	192,575	61.6
Allocated Shared Expenses	3,914,928	326,244	49.1
Total	12,034,554	1,002,880	39.4

k. The Annual Cost includes figures rounded to the nearest dollar.
l. The Monthly Cost was determined by dividing the Annual Cost for each line item by twelve (12) months and rounding up or down to the nearest dollar.

Below are additional details regarding each of the line-item costs considered by the Exchange to be related to offering physical 10Gb ULL connectivity. While some costs were attempted to be allocated as equally as possible among the Exchange and its affiliated markets, the Exchange notes that some of its cost allocation percentages for certain cost drivers differ when compared to the same cost drivers for the Exchange's affiliated markets in their similar proposed fee changes for connectivity and ports. This is because the Exchange's cost allocation methodology utilizes the actual projected costs of the Exchange (which are specific to the Exchange and are independent of the costs projected and utilized by the Exchange's affiliated markets) to determine its actual costs, which may vary across the Exchange and its affiliated markets based on factors that are unique to each marketplace. The Exchange provides additional explanation below (including the reason for the deviation) for the significant differences.

Human Resources

The Exchange notes that it and its affiliated markets have 184 employees (excluding employees at non-options/equities exchange subsidiaries of Miami International Holdings, Inc. (''MIH''), the holding company of the Exchange and its affiliated markets), and each department leader has direct knowledge of the time spent by each employee with respect to the various tasks necessary to operate the Exchange. Specifically, twice a year, and as needed with additional new hires and new project initiatives, in consultation with employees as needed, managers and department heads assign a percentage of time to every employee and then allocate that time amongst the Exchange and its affiliated markets to determine each market's individual Human Resources expense. Then, managers and department heads assign a percentage of each employee's time allocated to the Exchange into buckets including network connectivity, ports, market data, and other exchange services. This process ensures that every employee is 100% allocated, ensuring there is no double counting between the Exchange and its affiliated markets.

For personnel costs (Human Resources), the Exchange calculated an allocation of employee time for

employees whose functions include providing and maintaining physical connectivity and performance thereof (primarily the Exchange's network infrastructure team, which spends most of their time performing functions necessary to provide physical connectivity). As described more fully above, the Exchange's parent company allocates costs to the Exchange and its affiliated markets and then a portion of the Human Resources costs allocated to the Exchange is then allocated to connectivity. From that portion allocated to the Exchange that applied to connectivity, the Exchange then allocated a weighted average of 42% of each employee's time from the above group.

The Exchange also allocated Human Resources costs to provide physical connectivity to a limited subset of personnel with ancillary functions related to establishing and maintaining such connectivity (such as information security, sales, membership, and finance personnel). The Exchange allocated cost on an employee-by-employee basis (*i.e.,* only including those personnel who support functions related to providing physical connectivity) and then applied a smaller allocation to such employees' time to 10Gb ULL connectivity (less than 18%). This other group of personnel with a smaller allocation of Human Resources costs also have a direct nexus to 10Gb ULL connectivity, whether it is a sales person selling a connection, finance personnel billing for connectivity or providing budget analysis, or information security ensuring that such connectivity is secure and adequately defended from an outside intrusion.

The estimates of Human Resources cost were therefore determined by consulting with such department leaders, determining which employees are involved in tasks related to providing physical connectivity, and confirming that the proposed allocations were reasonable based on an understanding of the percentage of time such employees devote to those tasks. This includes personnel from the Exchange departments that are predominately involved in providing 1Gb and 10Gb ULL connectivity: Business Systems Development, Trading Systems Development, Systems Operations and Network Monitoring, Network and Data Center Operations, Listings, Trading Operations, and Project Management. Again, the Exchange allocated 42% of each of their employee's time assigned to the Exchange for 10Gb ULL connectivity, as stated above. Employees from these departments perform numerous functions to support 10Gb ULL connectivity, such as the installation, re-location, configuration, and maintenance of 10Gb ULL connections and the hardware they access. This hardware includes servers, routers, switches, firewalls, and monitoring devices. These employees also perform software upgrades, vulnerability assessments, remediation and patch installs, equipment configuration and hardening, as well as performance and capacity management. These employees also engage in research and development analysis for equipment and software supporting 10Gb ULL connectivity and design, and support the development and on-going maintenance of internally-developed applications as well as data capture and analysis, and Member and internal Exchange reports related to network and system performance. The above list of employee functions is not exhaustive of all the functions performed by Exchange employees to support 10Gb ULL connectivity, but illustrates the breath of functions those employees perform in support of the above cost and time allocations.

Lastly, the Exchange notes that senior level executives' time was only allocated to the 10Gb ULL connectivity related Human Resources costs to the extent that they are involved in overseeing tasks related to providing physical connectivity. The Human Resources cost was calculated using a blended rate of compensation reflecting salary, equity and bonus compensation, benefits, payroll taxes, and 401(k) matching contributions.

Connectivity (External Fees, Cabling, Switches, etc.)

The Connectivity cost driver includes external fees paid to connect to other exchanges and third parties, cabling and switches required to operate the Exchange. The Connectivity cost driver is more narrowly focused on technology used to complete connections to the Exchange and to connect to external markets. The Exchange notes that its connectivity to external markets is required in order to receive market data to run the Exchange's matching engine and basic operations compliant with existing regulations, primarily Regulation NMS.

The Exchange relies on various connectivity providers for connectivity to the entire U.S. options industry, and infrastructure services for critical components of the network that are necessary to provide and maintain its System Networks and access to its System Networks via 10Gb ULL connectivity. Specifically, the Exchange utilizes connectivity providers to connect to other national securities exchanges and the Options Price Reporting Authority (''OPRA''). The Exchange understands that these service providers provide services to most, if not all, of the other U.S. exchanges and other market participants. Connectivity provided by these service providers is critical to the Exchanges daily operations and performance of its System Networks to which market participants connect to via 10Gb ULL connectivity. Without these services providers, the Exchange would not be able to connect to other national securities exchanges, market data providers or OPRA and, therefore, would not be able to operate and support its System Networks. The Exchange does not employ a separate fee to cover its connectivity provider expense and recoups that expense, in part, by charging for 10Gb ULL connectivity.

Internet Services and External Market Data

The next cost driver consists of internet Services and external market data. Internet services includes third-party service providers that provide the internet, fiber and bandwidth connections between the Exchange's networks, primary and secondary data centers, and office locations in Princeton and Miami.

External market data includes fees paid to third parties, including other exchanges, to receive market data. The Exchange includes external market data fee costs towards the provision of 10Gb ULL connectivity because such market data is necessary for certain services related to connectivity, including pre-trade risk checks and checks for other conditions (*e.g.,* re-pricing of orders to avoid locked or crossed markets and trading collars). Since external market data from other exchanges is consumed at the Exchange's matching engine level, (to which 10Gb ULL connectivity provides access) in order to validate orders before additional orders enter the matching engine or are executed, the Exchange believes it is reasonable to allocate an amount of such costs to 10Gb ULL connectivity.

The Exchange relies on various content service providers for data feeds for the entire U.S. options industry, as well as content for critical components of the network that are necessary to provide and maintain its System Networks and access to its System Networks via 10Gb ULL connectivity. Specifically, the Exchange utilizes content service providers to receive market data from OPRA, other

exchanges and market data providers. The Exchange understands that these service providers provide services to most, if not all, of the other U.S. exchanges and other market participants. Market data provided these service providers is critical to the Exchanges daily operations and performance of its System Networks to which market participants connect to via 10Gb ULL connectivity. Without these services providers, the Exchange would not be able to receive market data and, therefore, would not be able to operate and support its System Networks. The Exchange does not employ a separate fee to cover its content service provider expense and recoups that expense, in part, by charging for 10Gb ULL connectivity.

Lastly, the Exchange notes that the actual dollar amounts allocated as part of the second step of the 2023 budget process differ among the Exchange and its affiliated markets for the internet Services and External Market Data cost driver, even though but for MIAX Emerald, the allocation percentages are generally consistent across markets (*e.g.,* MIAX Emerald, MIAX, MIAX Pearl Options and MIAX Pearl Equities allocated 84.8%, 73.3%, 73.3% and 72.5%, respectively, to the same cost driver). This is because: (i) a different percentage of the overall internet Services and External Market Data cost driver was allocated to MIAX Emerald and its affiliated markets due to the factors set forth under the first step of the 2023 budget review process described above (unique technical architecture, market structure, and business requirements of each marketplace); and (ii) MIAX Emerald itself allocated a larger portion of this cost driver to 10Gb ULL connectivity because of recent initiatives to improve the latency and determinism of its systems. The Exchange notes while the percentage MIAX Emerald allocated to the internet Services and External Market Data cost driver is greater than the Exchange and its other affiliated markets, the overall dollar amount allocated to the Exchange under the initial step of the 2023 budget process is lower than its affiliated markets. However, the Exchange believes that this is not, in dollar amounts, a significant difference. This is because the total dollar amount of expense covered by this cost driver is relatively small compared to other cost drivers and is due to nuances in exchange architecture that require different initial allocation amount under the first step of the 2023 budget process described above. Thus, non-significant differences in percentage allocation amounts in a smaller cost driver create the appearance of a significant difference, even though the actual difference in dollar amounts is small. For instance, despite the difference in cost allocation percentages for the internet Services and External Market Data cost driver across the Exchange and MIAX Emerald, the actual dollar amount difference is approximately only $4,000 per month, a non-significant amount.

Data Center

Data Center costs includes an allocation of the costs the Exchange incurs to provide physical connectivity in the third-party data centers where it maintains its equipment (such as dedicated space, security services, cooling and power). The Exchange notes that it does not own the Primary Data Center or the Secondary Data Center, but instead, leases space in data centers operated by third parties. The Exchange has allocated a high percentage of the Data Center cost (60.6%) to physical 10Gb ULL connectivity because the third-party data centers and the Exchange's physical equipment contained therein is the most direct cost in providing physical access to the Exchange. In other words, for the Exchange to operate in a dedicated space with connectivity by market participants to a physical trading platform, the data centers are a very tangible cost, and in turn, if the Exchange did not maintain such a presence then physical connectivity would be of no value to market participants.

Hardware and Software Maintenance and Licenses

Hardware and Software Licenses includes hardware and software licenses used to operate and monitor physical assets necessary to offer physical connectivity to the Exchange.[114] The Exchange notes that this allocation is less than MIAX Pearl Options by a significant amount, and slightly less than MIAX Emerald, as MIAX Pearl Options allocated 58.6% of its Hardware and Software Maintenance and License expense towards 10Gb ULL connectivity, while MIAX and MIAX Emerald allocated 49.8% and 50.9%, respectively, to the same category of expense. This is because MIAX Pearl Options is in the process of replacing and upgrading various hardware and software used to operate its options trading platform in order to maintain premium network performance. At the time of this filing, MIAX Pearl Options is undergoing a major hardware refresh, replacing older hardware with new hardware. This hardware includes servers, network switches, cables, optics, protocol data units, and cabinets, to maintain a state-of-the-art technology platform. Because of the timing of the hardware refresh with the timing of this filing, the Exchange has materially higher expense than its affiliates. Also, MIAX Pearl Equities allocated a higher percentage of the same category of expense (58%) towards its Hardware and Software Maintenance and License expense for 10Gb ULL connectivity, which MIAX Pearl Equities explains in its own proposal to amend its 10Gb ULL connectivity fees.

Depreciation

All physical assets, software, and hardware used to provide 10Gb ULL connectivity, which also includes assets used for testing and monitoring of Exchange infrastructure, were valued at cost, and depreciated or leased over periods ranging from three to five years. Thus, the depreciation cost primarily relates to servers necessary to operate the Exchange, some of which are owned by the Exchange and some of which are leased by the Exchange in order to allow efficient periodic technology refreshes. The Exchange also included in the Depreciation cost driver certain budgeted improvements that the Exchange intends to capitalize and depreciate with respect to 10Gb ULL connectivity in the near-term. As with the other allocated costs in the Exchange's updated Cost Analysis, the Depreciation cost was therefore narrowly tailored to depreciation related to 10Gb ULL connectivity. As noted above, the Exchange allocated 61.6% of its allocated depreciation costs to providing physical 10Gb ULL connectivity.

The Exchange also notes that this allocation differs from its affiliated markets due to a number of factors, such as the age of physical assets and software (*e.g.,* older physical assets and software were previously depreciated and removed from the allocation), or

[114] This expense may be less than the Exchange's affiliated markets, specifically MIAX Pearl (the options and equities markets), because, unlike the Exchange, MIAX Pearl (the options and equities markets) maintains an additional gateway to accommodate its member's access and connectivity needs. This added gateway contributes to the difference in allocations between the Exchange and MIAX Pearl. This expense also differs in dollar amount among the Exchange, MIAX Pearl (options and equities), and MIAX Emerald because each market may maintain and utilize a different amount of hardware and software based on its market model and infrastructure needs. The Exchange allocated a percentage of the overall cost based on actual amounts of hardware and software utilized by that market, which resulted in different cost allocations and dollar amounts.

certain system enhancements that required new physical assets and software, thus providing a higher contribution to the depreciated cost. For example, the percentages the Exchange and its affiliate, MIAX Emerald, allocated to the depreciation of hardware and software used to provide 10Gb ULL connectivity are nearly identical. However, the Exchange's dollar amount is greater than that of MIAX Emerald by approximately $32,000 per month due to two factors: first, the Exchange has undergone a technology refresh since the time MIAX Emerald launched in February 2019, leading to it having more hardware that software that is subject to depreciation. Second, the Exchange maintains 24 matching engines while MIAX Emerald maintains only 12 matching engines. This also results in more of the Exchange's hardware and software being subject to depreciation than MIAX Emerald's hardware and software due to the greater amount of equipment and software necessary to support the greater number of matching engines on the Exchange.

Allocated Shared Expenses

Finally, as with other exchange products and services, a portion of general shared expenses was allocated to overall physical connectivity costs. These general shared costs are integral to exchange operations, including its ability to provide physical connectivity. Costs included in general shared expenses include office space and office expenses (*e.g.,* occupancy and overhead expenses), utilities, recruiting and training, marketing and advertising costs, professional fees for legal, tax and accounting services (including external and internal audit expenses), and telecommunications. Similarly, the cost of paying directors to serve on the Exchange's Board of Directors is also included in the Exchange's general shared expense cost driver.[115] These general shared expenses are incurred by the Exchange's parent company, MIH, as a direct result of operating the Exchange and its affiliated markets.

The Exchange employed a process to determine a reasonable percentage to allocate general shared expenses to 10Gb ULL connectivity pursuant to its multi-layered allocation process. First, general expenses were allocated among the Exchange and affiliated markets as described above. Then, the general shared expense assigned to the Exchange was allocated across core services of the Exchange, including connectivity. Then, these costs were further allocated to sub-categories within the final categories, *i.e.,* 10Gb ULL connectivity as a sub-category of connectivity. In determining the percentage of general shared expenses allocated to connectivity that ultimately apply to 10Gb ULL connectivity, the Exchange looked at the percentage allocations of each of the cost drivers and determined a reasonable allocation percentage. The Exchange also held meetings with senior management, department heads, and the Finance Team to determine the proper amount of the shared general expense to allocate to 10Gb ULL connectivity. The Exchange, therefore, believes it is reasonable to assign an allocation, in the range of allocations for other cost drivers, while continuing to ensure that this expense is only allocated once. Again, the general shared expenses are incurred by the Exchange's parent company as a result of operating the Exchange and its affiliated markets and it is therefore reasonable to allocate a percentage of those expenses to the Exchange and ultimately to specific product offerings such as 10Gb ULL connectivity.

Again, a portion of all shared expenses were allocated to the Exchange (and its affiliated markets) which, in turn, allocated a portion of that overall allocation to all physical connectivity on the Exchange. The Exchange then allocated 49.1% of the portion allocated to physical connectivity to 10Gb ULL connectivity. The Exchange believes this allocation percentage is reasonable because, while the overall dollar amount may be higher than other cost drivers, the 49.1% is based on and in line with the percentage allocations of each of the Exchange's other cost drivers. The percentage allocated to 10Gb ULL connectivity also reflects its importance to the Exchange's strategy and necessity towards the nature of the Exchange's overall operations, which is to provide a resilient, highly deterministic trading system that relies on faster 10Gb ULL connectivity than the Exchange's competitors to maintiain premium performance. This allocation reflects the Exchange's focus on providing and maintaining high performance network connectivity, of which 10Gb ULL connectivity is a main contributor. The Exchange differentiates itself by offering a ''premium-product'' network experience, as an operator of a high performance, ultra-low latency network with unparalleled system throughput, which system networks can support access to three distinct options markets and multiple competing market-makers having affirmative obligations to continuously quote over 1,100,000 distinct trading products (per exchange), and the capacity to handle approximately 18 million quote messages per second. The ''premium-product'' network experience enables users of 10Gb ULL connections to receive the network monitoring and reporting services for those approximately 1,100,000 distinct trading products. These value add services are part of the Exchange's strategy for offering a high performance trading system, which utilizes 10Gb ULL connectivity.

The Exchange notes that the 49.1% allocation of general shared expenses for physical 10Gb ULL connectivity is higher than that allocated to general shared expenses for Limited Service MEI Ports. This is based on its allocation methodology that weighted costs attributable to each core service. While physical connectivity has several areas where certain tangible costs are heavily weighted towards providing such service (*e.g.,* Data Center, as described above), Limited Service MEI Ports do not require as many broad or indirect resources as other core services.

* * * * *

Approximate Cost Per 10Gb ULL Connection Per Month

After determining the approximate allocated monthly cost related to 10Gb connectivity, the total monthly cost for 10Gb ULL connectivity of $1,002,880 was divided by the number of physical 10Gb ULL connections the Exchange maintained at the time that proposed pricing was determined (93), to arrive at a cost of approximately $10,784 per month, per physical 10Gb ULL connection. Due to the nature of this particular cost, this allocation methodology results in an allocation among the Exchange and its affiliated markets based on set quantifiable criteria, *i.e.,* actual number of 10Gb ULL connections.

* * * * *

Costs Related to Offering Limited Service MEI Ports

The following chart details the individual line-item costs considered by the Exchange to be related to offering Limited Service MEI Ports as well as the percentage of the Exchange's overall costs such costs represent for such area (*e.g.,* as set forth below, the Exchange

[115] The Exchange notes that MEMX allocated a precise amount of 10% of the overall cost for directors to providing physical connectivity. *See* Securities Exchange Act Release No. 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26). The Exchange does not calculate is expenses at that granular a level. Instead, director costs are included as part of the overall general allocation.

allocated approximately 5.8% of its overall Human Resources cost to offering Limited Service MEI Ports).

Cost drivers	Allocated annual cost [m]	Allocated monthly cost [n]	% of all
Human Resources	$898,480	$74,873	5.8%
Connectivity (external fees, cabling, switches, etc.)	4,435	370	3.8
Internet Services and External Market Data	41,601	3,467	7.2
Data Center	85,214	7,101	7.2
Hardware and Software Maintenance and Licenses	104,859	8,738	7.2
Depreciation	237,335	19,778	6.3
Allocated Shared Expenses	785,254	65,438	9.8
Total	2,157,178	179,765	7.1

m. *See supra* note k (describing rounding of Annual Costs).
n. *See supra* note l (describing rounding of Monthly Costs based on Annual Costs).

Below are additional details regarding each of the line-item costs considered by the Exchange to be related to offering Limited Service MEI Ports. While some costs were attempted to be allocated as equally as possible among the Exchange and its affiliated markets, the Exchange notes that some of its cost allocation percentages for certain cost drivers differ when compared to the same cost drivers for the Exchange's affiliated markets in their similar proposed fee changes for connectivity and ports. This is because the Exchange's cost allocation methodology utilizes the actual projected costs of the Exchange (which are specific to the Exchange, and are independent of the costs projected and utilized by the Exchange's affiliated markets) to determine its actual costs, which may vary across the Exchange and its affiliated markets based on factors that are unique to each marketplace. The Exchange provides additional explanation below (including the reason for the deviation) for the significant differences.

Human Resources

With respect to Limited Service MEI Ports, the Exchange calculated Human Resources cost by taking an allocation of employee time for employees whose functions include providing Limited Service MEI Ports and maintaining performance thereof (including a broader range of employees such as technical operations personnel, market operations personnel, and software engineering personnel) as well as a limited subset of personnel with ancillary functions related to maintaining such connectivity (such as sales, membership, and finance personnel). Just as described above for 10Gb ULL connectivity, the estimates of Human Resources cost were again determined by consulting with department leaders, determining which employees are involved in tasks related to providing Limited Service MEI Ports and maintaining performance thereof, and confirming that the proposed allocations were reasonable based on an understanding of the percentage of their time such employees devote to tasks related to providing Limited Service MEI Ports and maintaining performance thereof. This includes personnel from the following Exchange departments that are predominately involved in providing Limited Service MEI Ports: Business Systems Development, Trading Systems Development, Systems Operations and Network Monitoring, Network and Data Center Operations, Listings, Trading Operations, and Project Management. The Exchange notes that senior level executives were allocated Human Resources costs to the extent they are involved in overseeing tasks specifically related to providing Limited Service MEI Ports. Senior level executives were only allocated Human Resources costs to the extent that they are involved in managing personnel responsible for tasks integral to providing and maintaining Limited Service MEI Ports. The Human Resources cost was again calculated using a blended rate of compensation reflecting salary, equity and bonus compensation, benefits, payroll taxes, and 401(k) matching contributions.

Connectivity (External Fees, Cabling, Switches, etc.)

The Connectivity cost includes external fees paid to connect to other exchanges and cabling and switches, as described above.

Internet Services and External Market Data

The next cost driver consists of internet services and external market data. Internet services includes third-party service providers that provide the internet, fiber and bandwidth connections between the Exchange's networks, primary and secondary data centers, and office locations in Princeton and Miami. For purposes of Limited Service MEI Ports, the Exchange also includes a portion of its costs related to external market data. External market data includes fees paid to third parties, including other exchanges, to receive and consume market data from other markets. The Exchange includes external market data costs towards the provision of Limited Service MEI Ports because such market data is necessary (in addition to physical connectivity) to offer certain services related to such ports, such as validating orders on entry against the NBBO and checking for other conditions (*e.g.,* halted securities).[116] Thus, since market data from other exchanges is consumed at the Exchange's Limited Service MEI Port level in order to validate orders, before additional processing occurs with respect to such orders, the Exchange believes it is reasonable to allocate a small amount of such costs to Limited Service MEI Ports.

The Exchange notes that the allocation for the internet Services and External Market Data cost driver is greater than that of its affiliate, MIAX Pearl Options, as MIAX allocated 7.2% of its internet Services and External Market Data expense towards Limited Service MEI Ports, while MIAX Pearl Options allocated 1.4% to its Full Service MEO Ports for the same cost driver. The allocation percentages set forth above differ because they directly correspond with the number of applicable ports utilized on each exchange. For August 2023, MIAX Market Makers utilized 1,781 Limited Service MEI ports and MIAX Emerald Market Makers utilized 1,030 Limited Service MEI ports. When compared to Full Service Port (Bulk and Single)

[116] The Exchange notes that MEMX separately allocated 7.5% of its external market data costs to providing physical connectivity. *See* Securities Exchange Act Release No. 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26).

usage, for August 2023, MIAX Pearl Options Members utilized only 384 Full Service MEO Ports (Bulk and Single), far fewer than number of Limited Service MEI Ports utilized by Market Makers on MIAX and MIAX Emerald, thus resulting in a smaller cost allocation. There is increased cost associated with supporting a higher number of ports (requiring more hardware and other technical infrastructure and internet Service), thus the Exchange allocates a higher percentage of expense than MIAX Pearl Options, which has a lower port count.

Data Center

Data Center costs includes an allocation of the costs the Exchange incurs to provide Limited Service MEI Ports in the third-party data centers where it maintains its equipment as well as related costs for market data to then enter the Exchange's system via Limited Service MEI Ports (the Exchange does not own the Primary Data Center or the Secondary Data Center, but instead, leases space in data centers operated by third parties).

Hardware and Software Maintenance and Licenses

Hardware and Software Licenses includes hardware and software licenses used to monitor the health of the order entry services provided by the Exchange, as described above.

The Exchange notes that this allocation is greater than its affiliate, MIAX Pearl Options, as MIAX allocated 7.2% of its Hardware and Software Maintenance and License expense towards Limited Service MEI Ports, while MIAX Pearl Options allocated 1.4% to its Full Service MEO Ports (Bulk and Single) for the same category of expense. The allocation percentages set forth above differ because they correspond with the number of applicable ports utilized on each exchange. For August 2023, MIAX Market Makers utilized 1,781 Limited Service MEI ports and MIAX Emerald Market Makers utilized 1,030 Limited Service MEI Ports. When compared to Full Service Port (Bulk and Single) usage, for August 2023, MIAX Pearl Options Members utilized only 384 Full Service MEO Ports (Bulk and Single), far fewer than number of Limited Service MEI Ports utilized by Market Makers on MIAX and MIAX Emerald, thus resulting in a smaller cost allocation. There is increased cost associated with supporting a higher number of ports (requiring more hardware and other technical infrastructure), thus the Exchange allocates a higher percentage of expense than MIAX Pearl Options, which has a lower port count.

Depreciation

The vast majority of the software the Exchange uses to provide Limited Service MEI Ports has been developed in-house and the cost of such development, which takes place over an extended period of time and includes not just development work, but also quality assurance and testing to ensure the software works as intended, is depreciated over time once the software is activated in the production environment. Hardware used to provide Limited Service MEI Ports includes equipment used for testing and monitoring of order entry infrastructure and other physical equipment the Exchange purchased and is also depreciated over time.

All hardware and software, which also includes assets used for testing and monitoring of order entry infrastructure, were valued at cost, depreciated or leased over periods ranging from three to five years. Thus, the depreciation cost primarily relates to servers necessary to operate the Exchange, some of which is owned by the Exchange and some of which is leased by the Exchange in order to allow efficient periodic technology refreshes. The Exchange allocated 6.3% of all depreciation costs to providing Limited Service MEI Ports. The Exchange allocated depreciation costs for depreciated software necessary to operate the Exchange because such software is related to the provision of Limited Service MEI Ports. As with the other allocated costs in the Exchange's updated Cost Analysis, the Depreciation cost driver was therefore narrowly tailored to depreciation related to Limited Service MEI Ports.

The Exchange notes that this allocation differs from its affiliated markets due to a number of factors, such as the age of physical assets and software (*e.g.,* older physical assets and software were previously depreciated and removed from the allocation), or certain system enhancements that required new physical assets and software, thus providing a higher contribution to the depreciated cost. For example, the Exchange notes that the percentages it and its affiliate, MIAX Emerald, allocated to the depreciation cost driver for Limited Service MEI Ports differ by only 2.6%. However, the Exchange's approximate dollar amount is greater than that of MIAX Emerald by approximately $10,000 per month. This is due to two primary factors. First, the Exchange has under gone a technology refresh since the time MIAX Emerald launched in February 2019, leading to it having more hardware that software that is subject to depreciation. Second, the Exchange maintains 24 matching engines while MIAX Emerald maintains only 12 matching engines. This also results in more of the Exchange's hardware and software being subject to depreciation than MIAX Emerald's hardware and software due to the greater amount of equipment and software necessary to support the greater number of matching engines on the Exchange.

Allocated Shared Expenses

Finally, a portion of general shared expenses was allocated to overall Limited Service MEI Ports costs as without these general shared costs the Exchange would not be able to operate in the manner that it does and provide Limited Service MEI Ports. The costs included in general shared expenses include general expenses of the Exchange, including office space and office expenses (*e.g.,* occupancy and overhead expenses), utilities, recruiting and training, marketing and advertising costs, professional fees for legal, tax and accounting services (including external and internal audit expenses), and telecommunications costs. The Exchange again notes that the cost of paying directors to serve on its Board of Directors is included in the calculation of Allocated Shared Expenses, and thus a portion of such overall cost amounting to less than 10% of the overall cost for directors was allocated to providing Limited Service MEI Ports. The Exchange notes that the 9.8% allocation of general shared expenses for Limited Service MEI Ports is lower than that allocated to general shared expenses for physical connectivity based on its allocation methodology that weighted costs attributable to each Core Service based on an understanding of each area. While Limited Service MEI Ports have several areas where certain tangible costs are heavily weighted towards providing such service (*e.g.,* Data Center, as described above), 10Gb ULL connectivity requires a broader level of support from Exchange personnel in different areas, which in turn leads to a broader general level of cost to the Exchange.

Lastly, the Exchange notes that this allocation is greater than its affiliate, MIAX Pearl Options, as MIAX allocated 9.8% of its Allocated Shared Expense towards Limited Service MEI Ports, while MIAX Pearl Options allocated 3.6% to its Full Service MEO Ports (Bulk and Single) for the same category of expense. The allocation percentages set forth above differ because they correspond with the number of

applicable ports utilized on each exchange. For August 2023, MIAX Market Makers utilized 1,781 Limited Service MEI Ports and MIAX Emerald Market Makers utilized 1,030 Limited Service MEI ports. When compared to Full Service Port (Bulk and Single) usage, for August 2023, MIAX Pearl Options Members utilized only 384 Full Service MEO Ports (Bulk and Single), far fewer than number of Limited Service MEI Ports utilized by Market Makers on MIAX, thus resulting in a smaller cost allocation. There is increased cost associated with supporting a higher number of ports (requiring more hardware and other technical infrastructure), thus the Exchange allocates a higher percentage of expense than MIAX Pearl Options which has a lower port count.[117]

* * * * *

Approximate Cost per Limited Service MEI Port per Month

Based on August 2023 data, the total monthly cost allocated to Limited Service MEI Ports of $179,765 was divided by the total number of Limited Service MEI Ports utilized by Members in August, which was 1,781 (and includes free and charged ports), resulting in an approximate cost of $101 per port per month (when rounding to the nearest dollar). The Exchange used the total number of Limited Service MEI Ports it maintained in August for all Members and included free and charged ports. However, in prior filings, the Exchange did not include the expense of maintaining the two free Limited Service MEI Ports per matching engine that each Member receives when the Exchange discussed the approximate cost per port per month, but did include the two free Limited Service MEI Ports in the total expense amounts. As described herein, the Exchange changed its proposed fee structure since past filings to now offer four free Limited Service MEI Ports per matching engine to which each Member connects. After the first four free Limited Service MEI Ports, the Exchange proposes to charge $275 per Limited Service MEI Port per matching engine, up to a total of twelve (12) Limited Service MEI Ports per matching engine.

For the sake of clarity, if a Member wanted to connect to all 24 of the Exchange's matching engines and utilize the maximum number of Limited Service MEI Ports on each matching engine (*i.e.,* 12), that Member would have a total of 288 Limited Service MEI Ports (24 matching engines multiplied by 12 Limited Service MEI Ports per matching engine). With the proposed increase to now provide four Limited Service MEI Ports for free on each matching engine, that particular Member would receive 96 free Limited Service MEI Ports (4 free Limited Service MEI Ports multiplied by 24 matching engines), and be charged for the remaining 192 Limited Service MEI Ports (288 total Limited Service MEI Ports across all matching engines minus 96 free Limited Service MEI Ports across all matching engines).

As mentioned above, Members utilized a total of 1,781 Limited Service MEI Ports in the month of August 2023 (free and charged ports combined). Using August 2023 data to extrapolate out after the proposed changes herein go into effect, the total number of Limited Service MEI Ports that the Exchange would not charge for as a result of this increase in free ports is 940 (meaning the Exchange would charge for only 841 ports) and amounts to a total expense of $98,980 per month to the Exchange ($101 per port multiplied by 980 free Limited Service MEI Ports).

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Cost Analysis—Additional Discussion

In conducting its Cost Analysis, the Exchange did not allocate any of its expenses in full to any core services (including physical connectivity or Limited Service MEI Ports) and did not double-count any expenses. Instead, as described above, the Exchange allocated applicable cost drivers across its core services and used the same Cost Analysis to form the basis of this proposal and the filings the Exchange submitted proposing fees for proprietary data feeds offered by the Exchange. For instance, in calculating the Human Resources expenses to be allocated to physical connections based upon the above described methodology, the Exchange has a team of employees dedicated to network infrastructure and with respect to such employees the Exchange allocated network infrastructure personnel with a high percentage of the cost of such personnel (42%) given their focus on functions necessary to provide physical connections. The salaries of those same personnel were allocated only 8.4% to Limited Service MEI Ports and the remaining 49.6% was allocated to 1Gb connectivity, other port services, transaction services, membership services and market data. The Exchange did not allocate any other Human Resources expense for providing physical connections to any other employee group, outside of a smaller allocation of 17.8% for 10Gb ULL connectivity or 18.2% for the entire network, of the cost associated with certain specified personnel who work closely with and support network infrastructure personnel. In contrast, the Exchange allocated much smaller percentages of costs (5% or less) across a wider range of personnel groups in order to allocate Human Resources costs to providing Limited Service MEI Ports. This is because a much wider range of personnel are involved in functions necessary to offer, monitor and maintain Limited Service MEI Ports but the tasks necessary to do so are not a primary or full-time function.

In total, the Exchange allocated 25.6% of its personnel costs to providing 10Gb ULL and 1Gb ULL connectivity and 5.8% of its personnel costs to providing Limited Service MEI Ports, for a total allocation of 31.4% Human Resources expense to provide these specific connectivity and port services. In turn, the Exchange allocated the remaining 68.6% of its Human Resources expense to membership services, transaction services, other port services and market data. Thus, again, the Exchange's allocations of cost across core services were based on real costs of operating the Exchange and were not double-counted across the core services or their associated revenue streams.

As another example, the Exchange allocated depreciation expense to all core services, including physical connections and Limited Service MEI Ports, but in different amounts. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense includes the actual cost of the computer equipment, such as dedicated servers, computers, laptops, monitors, information security appliances and storage, and network switching infrastructure equipment, including switches and taps that were purchased to operate and support the network. Without this equipment, the Exchange would not be able to operate the network and provide connectivity services to its Members and non-Members and their customers. However, the Exchange did not allocate all of the depreciation and amortization expense toward the cost of providing connectivity services, but instead allocated approximately 67.9% of the

[117] The Exchange allocated a slightly lower amount (9.8%) of this cost as compared to MIAX Emerald (10.3%). This is not a significant difference. However, both allocations resulted in an identical cost amount of $0.8 million, despite the Exchange having a higher number of Limited Service MEI Ports. MIAX Emerald was allocated a higher cost per Limited Service MEI Port due to the additional resources and expenditures associated with maintaining its recently enhanced low latency network.

Exchange's overall depreciation and amortization expense to connectivity services (61.6% attributed to 10Gb ULL physical connections and 6.3% to Limited Service MEI Ports). The Exchange allocated the remaining depreciation and amortization expense (approximately 32.1%) toward the cost of providing transaction services, membership services, other port services and market data.

The Exchange notes that its revenue estimates are based on projections across all potential revenue streams and will only be realized to the extent such revenue streams actually produce the revenue estimated. The Exchange does not yet know whether such expectations will be realized. For instance, in order to generate the revenue expected from connectivity, the Exchange will have to be successful in retaining existing clients that wish to maintain physical connectivity and/or Limited Service MEI Ports or in obtaining new clients that will purchase such services. Similarly, the Exchange will have to be successful in retaining a positive net capture on transaction fees in order to realize the anticipated revenue from transaction pricing.

The Exchange notes that the Cost Analysis is based on the Exchange's 2023 fiscal year of operations and projections. It is possible, however, that actual costs may be higher or lower. To the extent the Exchange sees growth in use of connectivity services it will receive additional revenue to offset future cost increases. However, if use of connectivity services is static or decreases, the Exchange might not realize the revenue that it anticipates or needs in order to cover applicable costs. Accordingly, the Exchange is committing to conduct a one-year review after implementation of these fees. The Exchange expects that it may propose to adjust fees at that time, to increase fees in the event that revenues fail to cover costs and a reasonable mark-up of such costs. Similarly, the Exchange may propose to decrease fees in the event that revenue materially exceeds our current projections. In addition, the Exchange will periodically conduct a review to inform its decision making on whether a fee change is appropriate (*e.g.,* to monitor for costs increasing/decreasing or subscribers increasing/decreasing, etc. in ways that suggest the then-current fees are becoming dislocated from the prior cost-based analysis) and would propose to increase fees in the event that revenues fail to cover its costs and a reasonable mark-up, or decrease fees in the event that revenue or the mark-up materially exceeds our current projections. In the event that the Exchange determines to propose a fee change, the results of a timely review, including an updated cost estimate, will be included in the rule filing proposing the fee change. More generally, the Exchange believes that it is appropriate for an exchange to refresh and update information about its relevant costs and revenues in seeking any future changes to fees, and the Exchange commits to do so.

Projected Revenue [118]

The proposed fees will allow the Exchange to cover certain costs incurred by the Exchange associated with providing and maintaining necessary hardware and other network infrastructure as well as network monitoring and support services; without such hardware, infrastructure, monitoring and support the Exchange would be unable to provide the connectivity and port services. Much of the cost relates to monitoring and analysis of data and performance of the network via the subscriber's connection(s). The above cost, namely those associated with hardware, software, and human capital, enable the Exchange to measure network performance with nanosecond granularity. These same costs are also associated with time and money spent seeking to continuously improve the network performance, improving the subscriber's experience, based on monitoring and analysis activity. The Exchange routinely works to improve the performance of the network's hardware and software. The costs associated with maintaining and enhancing a state-of-the-art exchange network is a significant expense for the Exchange, and thus the Exchange believes that it is reasonable and appropriate to help offset those costs by amending fees for connectivity services. Subscribers, particularly those of 10Gb ULL connectivity, expect the Exchange to provide this level of support to connectivity so they continue to receive the performance they expect. This differentiates the Exchange from its competitors. As detailed above, the Exchange has five primary sources of revenue that it can potentially use to fund its operations: transaction fees, fees for connectivity services, membership and regulatory fees, and market data fees. Accordingly, the Exchange must cover its expenses from these five primary sources of revenue.

The Exchange's Cost Analysis estimates the annual cost to provide 10Gb ULL connectivity services will equal $12,034,554. Based on current 10Gb ULL connectivity services usage, the Exchange would generate annual revenue of approximately $15,066,000. The Exchange believes this represents a modest profit of 20% when compared to the cost of providing 10Gb ULL connectivity services, which could decrease over time.[119]

The Exchange's Cost Analysis estimates the annual cost to provide Limited Service MEI Port services will equal $2,157,178. Based on August 2023 data for Limited Service MEI Port usage and counting for the proposed increase in free Limited Service MEI Ports and proposed increase in the monthly fee from $100 to $275 per port, the Exchange would generate annual revenue of approximately $2,775,300. The Exchange believes this would result in an estimated profit margin of 22% after calculating the cost of providing Limited Service MEI Port services, which profit margin could decrease over time.[120] The Exchange notes that the cost to provide Limited Service MEI Ports is higher than the cost for the Exchange's affiliate, MIAX Pearl Options, to provide Full Service MEO Ports due to the substantially higher number of Limited Service MEI Ports used by Exchange Members. For example, utilizing August 2023 data, MIAX Market Makers utilized 1,781 Limited Service MEI Ports compared to only 384 Full Service MEO Ports (Bulk and Single combined) allocated to MIAX Pearl Options members.

Based on the above discussion, the Exchange believes that even if the Exchange earns the above revenue or incrementally more or less, the proposed fees are fair and reasonable because they will not result in pricing that deviates from that of other exchanges or a supra-competitive profit, when comparing the total expense of the Exchange associated with providing 10Gb ULL connectivity and Limited Service MEI Port services versus the total projected revenue of the Exchange associated with network 10Gb ULL connectivity and Limited Service MEI Port services.

The Exchange also notes that this the resultant profit margin differs slightly

[118] For purposes of calculating revenue for 10Gb ULL connectivity, the Exchange used revenues for February 2023, the first full month for which it provided dedicated 10Gb ULL connectivity to the Exchange and ceased operating a shared 10Gb ULL network with MIAX Pearl Options.

[119] Assuming the U.S. inflation rate continues at its current rate, the Exchange believes that the projected profit margins in this proposal will decrease; however, the Exchange cannot predict with any certainty whether the U.S. inflation rate will continue at its current rate or its impact on the Exchange's future profits or losses. *See, e.g., https://www.usinflationcalculator.com/inflation/current-inflation-rates/* (last visited September 22, 2023).

[120] *Id.*

from the profit margins set forth in similar fee filings by its affiliated markets. This is not atypical among exchanges and is due to a number of factors that differ between these four markets, including: different market models, market structures, and product offerings (equities, options, price-time, pro-rata, simple, and complex); different pricing models; different number of market participants and connectivity subscribers; different maintenance and operations costs, as described in the cost allocation methodology above; different technical architecture (*e.g.,* the number of matching engines per exchange, *i.e.,* the Exchange maintains 24 matching engines while MIAX Emerald maintains only 12 matching engines); and different maturity phase of the Exchange and its affiliated markets (*i.e.,* start-up versus growth versus more mature). All of these factors contribute to a unique and differing level of profit margin per exchange.

Further, the Exchange proposes to charge rates that are comparable to, or lower than, similar fees for similar products charged by competing exchanges. For example, for 10Gb ULL connectivity, the Exchange proposes a lower fee than the fee charged by Nasdaq for its comparable 10Gb Ultra fiber connection ($13,500 per month for the Exchange vs. $15,000 per month for Nasdaq).[121] NYSE American charges even higher fees for its comparable 10GB LX LCN connection than the Exchange's proposed fees ($13,500 for the Exchange vs. $22,000 per month for NYSE American).[122] Accordingly, the Exchange believes that comparable and competitive pricing are key factors in determining whether a proposed fee meets the requirements of the Act, regardless of whether that same fee across the Exchange's affiliated markets leads to slightly different profit margins due to factors outside of the Exchange's control (*i.e.,* more subscribers to 10Gb ULL connectivity on the Exchange than its affiliated markets or vice versa).

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The Exchange has operated at a cumulative net annual loss since it launched operations in 2012.[123] This is due to a number of factors, one of which is choosing to forgo revenue by offering certain products, such as low latency connectivity, at lower rates than other options exchanges to attract order flow and encourage market participants to experience the high determinism, low latency, and resiliency of the Exchange's trading systems. The Exchange does not believe that it should now be penalized for seeking to raise its fees as it now needs to upgrade its technology and absorb increased costs. Therefore, the Exchange believes the proposed fees are reasonable because they are based on both relative costs to the Exchange to provide dedicated 10Gb ULL connectivity and Limited Service MEI Ports, the extent to which the product drives the Exchange's overall costs and the relative value of the product, as well as the Exchange's objective to make access to its Systems broadly available to market participants. The Exchange also believes the proposed fees are reasonable because they are designed to generate annual revenue to recoup the Exchange's costs of providing dedicated 10Gb ULL connectivity and Limited Service MEI Ports.

The Exchange notes that its revenue estimate is based on projections and will only be realized to the extent customer activity produces the revenue estimated. As a competitor in the hyper-competitive exchange environment, and an exchange focused on driving competition, the Exchange does not yet know whether such projections will be realized. For instance, in order to generate the revenue expected from 10Gb ULL connectivity and Limited Service MEI Ports, the Exchange will have to be successful in retaining existing clients that wish to utilize 10Gb ULL connectivity and Limited Service MEI Ports and/or obtaining new clients that will purchase such access. To the extent the Exchange is successful in encouraging new clients to utilize 10Gb ULL connectivity and Limited Service MEI Ports, the Exchange does not believe it should be penalized for such success. To the extent the Exchange has mispriced and experiences a net loss in connectivity clients or in transaction activity, the Exchange could experience a net reduction in revenue. While the Exchange is supportive of transparency around costs and potential margins (applied across all exchanges), as well as periodic review of revenues and applicable costs (as discussed below), the Exchange does not believe that these estimates should form the sole basis of whether or not a proposed fee is reasonable or can be adopted. Instead, the Exchange believes that the information should be used solely to confirm that an Exchange is not earning—or seeking to earn—supra-competitive profits. The Exchange believes the Cost Analysis and related projections in this filing demonstrate this fact.

The Exchange is owned by a holding company that is the parent company of four exchange markets and, therefore, the Exchange and its affiliated markets must allocate shared costs across all of those markets accordingly, pursuant to the above-described allocation methodology. In contrast, the Investors Exchange LLC (''IEX'') and MEMX, which are currently each operating only one exchange, in their recent non-transaction fee filings allocate the entire amount of that same cost to a single exchange. This can result in lower profit margins for the non-transaction fees proposed by IEX and MEMX because the single allocated cost does not experience the efficiencies and synergies that result from sharing costs across multiple platforms. The Exchange and its affiliated markets often share a single cost, which results in cost efficiencies that can cause a broader gap between the allocated cost amount and projected revenue, even though the fee levels being proposed are lower or competitive with competing markets (as described above). To the extent that the application of a cost-based standard results in Commission Staff making determinations as to the appropriateness of certain profit margins, the Exchange believes that Commission Staff should also consider whether the proposed fee level is comparable to, or competitive with, the same fee charged by competing exchanges and how different cost allocation methodologies (such as across multiple markets) may result in different profit margins for comparable fee levels. Further, if Commission Staff is making determinations as to appropriate profit margins in their approval of exchange fees, the Exchange believes that the Commission should be clear to all market participants as to what they have determined is an appropriate profit margin and should apply such determinations consistently and, in the case of certain legacy exchanges, retroactively, if such standards are to avoid having a discriminatory effect.

Further, as is reflected in the proposal, the Exchange continuously and aggressively works to control its costs as a matter of good business practice. A potential profit margin should not be evaluated solely on its size; that assessment should also consider cost management and whether the ultimate fee reflects the value of the

[121] *See* NASDAQ Pricing Schedule, Options 7, Section 3, Ports and Other Services *and* NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.

[122] *See* NYSE American Options Fee Schedule, Section V.A. Port Fees *and* Section V.B. Co-Location Fees.

[123] The Exchange has incurred a cumulative loss of $71 million since its inception in 2012 through full year 2022. *See* Exchange's Form 1/A, Application for Registration or Exemption from Registration as a National Securities Exchange, filed June 26, 2023, *available at https://www.sec.gov/Archives/edgar/vprr/2300/23007741.pdf.*

services provided. For example, a profit margin on one exchange should not be deemed excessive where that exchange has been successful in controlling its costs, but not excessive on another exchange where that exchange is charging comparable fees but has a lower profit margin due to higher costs. Doing so could have the perverse effect of not incentivizing cost control where higher costs alone could be used to justify fees increases.

The Proposed Pricing Is Not Unfairly Discriminatory and Provides for the Equitable Allocation of Fees, Dues, and Other Charges

The Exchange believes that the proposed fees are reasonable, fair, equitable, and not unfairly discriminatory because they are designed to align fees with services provided and will apply equally to all subscribers.

10Gb ULL Connectivity

The Exchange believes that the proposed fees are equitably allocated among users of the network connectivity and port alternatives, as the users of 10Gb ULL connections consume substantially more bandwidth and network resources than users of 1Gb ULL connection. Specifically, the Exchange notes that 10Gb ULL connection users account for more than 99% of message traffic over the network, driving other costs that are linked to capacity utilization, as described above, while the users of the 1Gb ULL connections account for less than 1% of message traffic over the network. In the Exchange's experience, users of the 1Gb connections do not have the same business needs for the high-performance network as 10Gb ULL users.

The Exchange's high-performance network and supporting infrastructure (including employee support), provides unparalleled system throughput with the network ability to support access to several distinct options markets. To achieve a consistent, premium network performance, the Exchange must build out and maintain a network that has the capacity to handle the message rate requirements of its most heavy network consumers. These billions of messages per day consume the Exchange's resources and significantly contribute to the overall network connectivity expense for storage and network transport capabilities. The Exchange must also purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages to satisfy its record keeping requirements under the Exchange Act.[124] Thus, as the number of messages an entity increases, certain other costs incurred by the Exchange that are correlated to, though not directly affected by, connection costs (*e.g.,* storage costs, surveillance costs, service expenses) also increase. Given this difference in network utilization rate, the Exchange believes that it is reasonable, equitable, and not unfairly discriminatory that the 10Gb ULL users pay for the vast majority of the shared network resources from which all market participants' benefit.

Limited Service MEI Ports

The proposed changes to the monthly fee for Limited Service MEI Ports is not unfairly discriminatory because it would apply to all Market Makers equally. All Market Makers would now be eligible to receive four (4) free Limited Service MEI Ports and those that elect to purchase more would be subject to the same monthly rate regardless of the number of additional Limited Service MEI Ports they purchase. Certain market participants choose to purchase additional Limited Service MEI Ports based on their own particular trading/quoting strategies and feel they need a certain number of connections to the Exchange to execute on those strategies. Other market participants may continue to choose to only utilize the free Limited Service MEI Ports to accommodate their own trading or quoting strategies, or other business models. All market participants elect to receive or purchase the amount of Limited Service MEI Ports they require based on their own business decisions and all market participants would be subject to the same fee structure and flat fee. Every market participant may receive up to four (4) free Limited Service MEI Ports and those that choose to purchase additional Limited Service MEI Ports may elect to do so based on their own business decisions and would continue to be subject to the same flat fee. The Exchange notes that it filed to amend this fee in 2016 and that filing contained the same fee structure, *i.e.,* a certain number of free Limited Service MEI Ports coupled with a flat fee for additional Limited Service MEI Ports.[125] At that time, the Commission did not find the structure to be unfairly discriminatory by virtue of that proposal surviving the 60-day suspension period. Therefore, the proposed changes to the fees for Limited Service MEI Ports is not unfairly discriminatory because it would continue to apply to all market participants equally and provides a fee structure that includes four free Limited Service MEI Ports for one monthly rate that was previously in place and filed with the Commission.

The Exchange believes that its proposed fee for Limited Service MEI Ports is reasonable, fair and equitable, and not unfairly discriminatory because it is designed to align fees with services provided, will apply equally to all Members that are assigned Limited Service MEI Ports (either directly or through a Service Bureau), and will minimize barriers to entry by now providing all Members with four, instead of the prior two, free Limited Service MEI Ports.[126] In fact, the proposed fee structure produces less overall monthly revenue for the Exchange compared to the prior tiered structure, while providing more additional free ports to all Members. Additionally, based on October 2023 billings, no Member experienced an increase in monthly cost from the proposed fee structure. As a result of the proposed fee structure, a significant majority of Members will not be subject to any fee, and only six Members will potentially be subject to a fee for Limited Service MEI Ports in excess of four per month, based on current usage. In contrast, as described above, other exchange generally charge in excess of $450 per port without providing any free ports.[127] Even for Members that choose to maintain more than four Limited Service MEI Ports, the Exchange believes that the cost-based fee proposed herein is low enough that it will not operate to restrain any Member's ability to maintain the number of Limited Service MEI Ports that it determines are consistent with its business objectives. The small number of Members projected to be subject to the highest fees will still pay considerably less than competing exchanges charge.[128] Further, the

[124] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

[125] *See* Securities Exchange Act Release No. 79666 (December 22, 2016), 81 FR 96133 (December 29, 2016) (SR–MIAX–2016–47).

[126] The following rationale to support providing a certain number of Limited Service MEI Ports for free prior to applying a fee is similar to that used by the Investors Exchange LLC (''IEX'') in 2020 proposal to do the same as proposed herein. *See* Securities Exchange Act Release No. 86626 (August 9, 2019), 84 FR 41793 (August 15, 2019) (SR–IEX–2019–07).

[127] *See supra* notes a—j above.

[128] Assuming a Member selects five Limited Service MEI Ports based on their business needs, that Member on MIAX would be charged only for the fifth Limited Service MEI Port and pay only the $275 monthly fee, as the first four Limited Service Ports would be free. Meanwhile, a Member that purchases five ports on NYSE Arca Options would pay $450 per port per month, resulting in a total

number of assigned Limited Service MEI Ports will continue to be based on decisions by each Member, including the ability to reduce fees by discontinuing unused Limited Service MEI Ports.

The Exchange believes that providing four free Limited Service MEI Ports is fair and equitable, and not unfairly discriminatory because it will enable all Members (and more Members than when the Exchange previously provided two free Limited Service MEI Ports) to access the Exchange free of charge, thereby encouraging order flow and liquidity from a diverse set of market participants, facilitating price discovery and the interaction of orders. The Exchange believes that four Limited Service MEI Ports is an appropriate number to provide for free because it aligns with the number of such ports currently maintained by a substantial majority of Members. Based on a review of Limited Service MEI Port usage, 39 of 45 connected Members are not projected to be subject to any Limited Service MEI Port fees under the proposed fee.

The Exchange assessed whether the fee may impact different types or sizes of Members differently. As a threshold matter, the fee does not by design apply differently to different types or sizes of Members. Nonetheless, the Exchange assessed whether there would be any differences in the amount of the projected fee that correlate to the type and/or size of different Members. This assessment revealed that the number of assigned Limited Service MEI Ports, and thus projected fees, correlates closely to a Member's inbound message volume to the Exchange. Specifically, as inbound message volume increases per Member, the number of requested and assigned Limited Service MEI Ports increases. The following table presents data from October 2023 evidencing the correlation between a Member's inbound message volume and the number of Limited Service MEI Port assigned to the Member as of October 31, 2023.

Number of ports	Average daily message traffic	Total message traffic	Overall percentage of all message traffic for month
1–4	3,406,080,631	74,933,773,891	25.94
5 or more	9,726,608,139	213,985,379,062	74.06

Members with relatively higher inbound message volume are projected to pay higher fees because they have requested more Limited Service MEI Ports. For example, the six Members that subscribe to five or more Limited Service MEI Ports and are subject to the proposed monthly fee on average account for 74.06%% of October 2023 inbound messages over Limited Service MEI Ports. Of those six Members, five experienced a monthly fee decrease for October 2023 under the proposed fee structure compared to the prior fee structure that provided two Limited Service MEI Ports for free and charged a tiered structure for any additional Limited Service MEI Ports. In contrast, the 39 Members that, based on their October 2023 Limited Service MEI Port usage are not projected to be subject to any Limited Service MEI Port fees, on average account for only 25.94% of October 2023 inbound messages over Limited Service MEI Port. This includes one Member that previously paid a fee that was not charged in October 2023 under the proposed fee structure.

The Exchange believes that the variance between projected fees and Limited Service MEI Ports usage is not unfairly discriminatory because it is based on objective differences in Limited Service MEI Port usage among different Members. The Exchange notes that the distribution of total inbound message volume is concentrated in relatively few Members, which consume a much larger proportionate share of the Exchange's resources (compared to the majority of Members that send substantially fewer inbound order messages). This distribution of inbound message volume requires the Exchange to maintain sufficient Limited Service MEI Port capacity to accommodate the higher existing and anticipated message volume of higher volume Members. Thus, the Exchange's incremental aggregate costs for all Limited Service MEI Ports are disproportionately related to volume from the highest inbound message volume Members. For these reasons, the Exchange believes it is not unfairly discriminatory for the Members with the highest inbound message volume to pay a higher share of the total Limited Service MEI Ports fees.

While Limited Service MEI Port usage is concentrated in a few relatively larger Members, the number of such ports requested is not based on the size or type of Member but rather correlates to a Member's inbound message volume to the Exchange. Further, Members with relatively higher inbound message volume also request (and are assigned) more Limited Service MEI Ports than other Members, which in turn means they account for a disproportionate share of the Exchange's aggregate costs for providing Limited Service MEI Ports.[129] Therefore, the Exchange believes it is not unfairly discriminatory for the Members with higher inbound message volume to pay a modestly higher proportionate share of the Limited Service MEI Port fees.

To achieve consistent, premium network performance, the Exchange must build and maintain a network that has the capacity to handle the message rate requirements of its heaviest network consumers during anticipated peak market conditions. The resultant need to support billions of messages per day consume the Exchange's resources and significantly contribute to the overall network connectivity expense for storage and network transport capabilities. This need also requires the Exchange to purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages as part of it surveillance program and to satisfy its record keeping requirements under the Exchange Act.[130] Thus, as the number of connections per Market Maker increases, other costs incurred by the Exchange also increase, *e.g.,* storage

charge of $2,250 per month. On Cboe BZX Options, that same member would pay $750 per port per month, resulting in a total charge of $3,750 per months for five ports. *See* NYSE Arca Options Fees and Charges, dated November 2023, available at *https://www.nyse.com/publicdocs/nyse/markets/arca-options/NYSE_Arca_Options_Fee_Schedule.pdf* and Cboe BZX Options Fee Schedule *available at https://www.cboe.com/us/options/membership/fee_schedule/.*

[129] *See* Securities Exchange Act Release No. 86626 (August 9, 2019), 84 FR 41793 (August 15, 2019) (SR–IEX–2019–07) (justifying providing 5 ports for free and charging a fee for every port purchased in excess of 5 ports based on the higher message traffic of subscribers with increased number of ports).

[130] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

costs, surveillance costs, service expenses.

Accordingly, the Exchange believes that the fee will be applied consistently with its specific purpose—to partially recover the Exchange's aggregate costs, encourage the efficient use of Limited Service MEI Ports, and align fees with Members' Limited Service MEI Port and system usage.

The Exchange further believes that the proposed fees are reasonable, fair and equitable, and non-discriminatory because they will apply to all Members in the same manner and are not targeted at a specific type or category of market participant engaged in any particular trading strategy. All Members will receive four free Limited Service MEI Ports and pay the same proposed fee per Limited Service MEI Ports for each additional Limited Service MEI Port. Each Limited Service MEI Port is identical, providing connectivity to the Exchange on identical terms. While the proposed fee will result in a different effective ''per unit'' rate for different Members after factoring in the four free Limited Service MEI Ports, the Exchange does not believe that this difference is material given the overall low proposed fee per Limited Service MEI Port. Because the first four Limited Service MEI Ports are free of charge, each entity will have a ''per unit'' rate of less than the proposed fee. Further, the fee is not connected to volume based tiers. All Members will be subject to the same fee schedule, regardless of the volume sent to or executed on the Exchange. The fee also does not depend on any distinctions between Members, customers, broker-dealers, or any other entity. The fee will be assessed solely based on the number of Limited Service MEI Ports an entity selects and not on any other distinction applied by the Exchange. While entities that send relatively more inbound messages to the Exchange may select more Limited Service MEI Ports, thereby resulting in higher fees, that distinction is based on decisions made by each Member and the extent and nature of the Member's business on the Exchange rather than application of the fee by the Exchange. Members can determine how many Limited Service MEI Ports they need to implement their trading strategies effectively. The Exchange proposes to offer additional Limited Service MEI Ports at a low fee to enable all Members to purchase as many Limited Service MEI Ports as their business needs dictate in order to optimize throughput and manage latency across the Exchange.

Notwithstanding that Members with the highest number of Limited Service MEI Ports will pay a greater percentage of the total projected fees than is represented by their Limited Service MEI Port usage, the Exchange does not believe that the proposed fee is unfairly discriminatory. It is not possible to fully synchronize the Exchange's objective to provide four free Limited Service MEI Ports to all Members, thereby minimizing barriers to entry and incentivizing liquidity on the Exchange, with an approach that exactly aligns the projected per Member fee with each Member's number of requested Limited Service MEI Ports. As proposed, the Exchange is providing a reasonable increased number of Limited Service MEI Ports to each Member without charge. In fact, the Exchange proposes to provide more Limited Service MEI Ports for free by increasing the number of available Limited Service MEI Ports that are provided for free from two to four. Any variance between projected fees and Limited Service MEI Port usage is attributable to objective differences among Members in terms of the number of Limited Service MEI Ports they determine are appropriate based on their trading on the Exchange. Further, the Exchange believes that the low amount of the proposed fee (which in the aggregate is projected to only partially recover the Exchange's directly-related costs as described herein) mitigates any disparate impact.

Further, the fee will help to encourage Limited Service MEI Port usage in a way that aligns with the Exchange's regulatory obligations. As a national securities exchange, the Exchange is subject to Regulation Systems Compliance and Integrity (''Reg SCI'').[131] Reg SCI Rule 1001(a) requires that the Exchange establish, maintain, and enforce written policies and procedures reasonably designed to ensure (among other things) that its Reg SCI systems have levels of capacity adequate to maintain the Exchange's operational capability and promote the maintenance of fair and orderly markets.[132] By encouraging Members to be efficient with their Limited Service MEI Ports usage, the proposed fee will support the Exchange's Reg SCI obligations in this regard by ensuring that unused Limited Service MEI Ports are available to be allocated based on individual Members needs and as the Exchange's overall order and trade volumes increase. Additionally, because the Exchange will continue not to charge connectivity testing and certification fees to its Disaster Recovery Facility or where the Exchange requires testing and certification, the proposed fee structure will further support the Exchange's Reg SCI compliance by reducing the potential impact of a disruption should the Exchange be required to switch to its Disaster Recovery Facility and encouraging Members to engage in any necessary system testing without incurring any port fee costs.[133]

Finally, the Exchange believes that the proposed fee is consistent with Section 11A of the Exchange Act in that it is designed to facilitate the economically efficient execution of securities transactions, fair competition among brokers and dealers, exchange markets and markets other than exchange markets, and the practicability of brokers executing investors' orders in the best market. Specifically, the proposed low, cost-based fee will enable a broad range of the Exchange Members to continue to connect to the Exchange, thereby facilitating the economically efficient execution of securities transactions on the Exchange, fair competition between and among such Members, and the practicability of Members that are brokers executing investors' orders on the Exchange when it is the best market.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intra-Market Competition

The Exchange believes the proposed fees will not result in any burden on intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed fees will allow the Exchange to recoup some of its costs in providing 10Gb ULL connectivity and Limited Service MEI Ports at below market rates to market participants since the Exchange launched operations. As described above, the Exchange has operated at a cumulative net annual loss since it launched operations in 2012 [134] due to providing a low-cost alternative to attract order flow and encourage market participants to experience the high determinism and resiliency of the Exchange's trading Systems. To do so, the Exchange chose to waive the fees for

[131] 17 CFR 242.1000–1007.

[132] 17 CFR 242.1001(a).

[133] By comparison, some other exchanges charge less to connect to their disaster recovery facilities, but still charge an amount that could both recoup costs and potentially be a source of profits. See, *e.g.,* Nasdaq Stock Market LLC Equity 7, Section 115 (Ports and other Services).

[134] *See supra* note 123.

some non-transaction related services and Exchange products or provide them at a very lower fee, which was not profitable to the Exchange. This resulted in the Exchange forgoing revenue it could have generated from assessing any fees or higher fees. The Exchange could have sought to charge higher fees at the outset, but that could have served to discourage participation on the Exchange. Instead, the Exchange chose to provide a low-cost exchange alternative to the options industry, which resulted in lower initial revenues. Examples of this are 10Gb ULL connectivity and Limited Service MEI Ports, for which the Exchange only now seeks to adopt fees at a level similar to or lower than those of other options exchanges.

Further, the Exchange does not believe that the proposed fee increase for the 10Gb ULL connection change would place certain market participants at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete. As is the case with the current proposed flat fee, the proposed fee would apply uniformly to all market participants regardless of the number of connections they choose to purchase. The proposed fee does not favor certain categories of market participants in a manner that would impose an undue burden on competition.

The Exchange does not believe that the proposed rule change would place certain market participants at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete. In particular, Exchange personnel has been informally discussing potential fees for connectivity services with a diverse group of market participants that are connected to the Exchange (including large and small firms, firms with large connectivity service footprints and small connectivity service footprints, as well as extranets and service bureaus) for several months leading up to that time. The Exchange does not believe the proposed fees for connectivity services would negatively impact the ability of Members, non-Members (extranets or service bureaus), third-parties that purchase the Exchange's connectivity and resell it, and customers of those resellers to compete with other market participants or that they are placed at a disadvantage.

The Exchange does anticipate, however, that some market participants may reduce or discontinue use of connectivity services provided directly by the Exchange in response to the proposed fees. In fact, as mentioned above, one MIAX Pearl Options Market Maker terminated their MIAX Pearl Options membership on January 1, 2023 as a direct result of the similar proposed fee changes by MIAX Pearl Options.[135] The Exchange does not believe that the proposed fees for connectivity services place certain market participants at a relative disadvantage to other market participants because the proposed connectivity pricing is associated with relative usage of the Exchange by each market participant and does not impose a barrier to entry to smaller participants. The Exchange believes its proposed pricing is reasonable and, when coupled with the availability of third-party providers that also offer connectivity solutions, that participation on the Exchange is affordable for all market participants, including smaller trading firms. As described above, the connectivity services purchased by market participants typically increase based on their additional message traffic and/or the complexity of their operations. The market participants that utilize more connectivity services typically utilize the most bandwidth, and those are the participants that consume the most resources from the network. Accordingly, the proposed fees for connectivity services do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation of the proposed connectivity fees reflects the network resources consumed by the various size of market participants and the costs to the Exchange of providing such connectivity services.

Lastly, the Exchange does not believe its proposed changes to the monthly rate for Limited Service MEI Ports will place certain market participants at a relative disadvantage to other market participants. All market participants would be eligible to receive four (4) free Limited Service MEI Ports and those that elect to purchase more would be subject to the same flat fee regardless of the number of additional Limited Service MEI Ports they purchase. All firms purchase the amount of Limited Service MEI Ports they require based on their own business decisions and similarly situated firms are subject to the same fees.

Inter-Market Competition

The Exchange also does not believe that the proposed rule change and price increase will result in any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act. As this is a fee increase, arguably if set too high, this fee would make it easier for other exchanges to compete with the Exchange. Only if this were a substantial fee decrease could this be considered a form of predatory pricing. In contrast, the Exchange believes that, without this fee increase, we are potentially at a competitive disadvantage to certain other exchanges that have in place higher fees for similar services. As we have noted, the Exchange believes that connectivity fees can be used to foster more competitive transaction pricing and additional infrastructure investment and there are other options markets of which market participants may connect to trade options at higher rates than the Exchange's. Accordingly, the Exchange does not believe its proposed fee changes impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange also believes that the proposed fees for 10Gb connectivity are appropriate and warranted and would not impose any burden on competition. This is a technology driven change designed to meet customer needs. The proposed fees would assist the Exchange in recovering costs related to providing dedicated 10Gb connectivity to the Exchange while enabling it to continue to meet current and anticipated demands for connectivity by its Members and other market participants. Separating its 10Gb network from MIAX Pearl Options enables the Exchange to better compete with other exchanges by ensuring it can continue to provide adequate connectivity to existing and new Members, which may increase in ability to compete for order flow and deepen its liquidity pool, improving the overall quality of its market. The proposed rates for 10Gb ULL connectivity are structured to enable the Exchange to bifurcate its 10Gb ULL network shared with MIAX Pearl Options so that it can continue to meet current and anticipated connectivity demands of all market participants.

[135] The Exchange acknowledges that IEX included in its proposal to adopt market data fees after offering market data for free an analysis of what its projected revenue would be if all of its existing customers continued to subscribe versus what its projected revenue would be if a limited number of customers subscribed due to the new fees. *See* Securities Exchange Act Release No. 94630 (April 7, 2022), 87 FR 21945 (April 13, 2022) (SR–IEX–2022–02). MEMX did not include a similar analysis in either of its recent non-transaction fee proposals. *See supra* note 77. The Exchange does not believe a similar analysis would be useful here because it is amending existing fees, not proposing to charge a new fee where existing subscribers may terminate connections because they are no longer enjoying the service at no cost.

Similarly, and also in connection with a technology change, Cboe amended its access and connectivity fees, including port fees.[136] Specifically, Cboe adopted certain logical ports to allow for the delivery and/or receipt of trading messages—*i.e.,* orders, accepts, cancels, transactions, etc. Cboe established tiered pricing for BOE and FIX logical ports,[137] tiered pricing for BOE Bulk ports, and flat prices for DROP, Purge Ports, GRP Ports and Multicast PITCH/Top Spin Server Ports. Cboe argued in its fee proposal that the proposed pricing more closely aligned its access fees to those of its affiliated exchanges as the affiliated exchanges offer substantially similar connectivity and functionality and are on the same platform that Cboe migrated to.[138] Cboe justified its proposal by stating that, ''. . .the Exchange believes substitutable products and services are in fact available to market participants, including, among other things, other options exchanges a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity and/or trading of any options product, including proprietary products, in the Over- the-Counter (OTC) markets.'' [139] The Exchange concurs with the following statement by CBOE,

> The rule structure for options exchanges are also fundamentally different from those of equities exchanges. In particular, options market participants are not forced to connect to (and purchase market data from) all options exchanges. For example, there are many order types that are available in the equities markets that are not utilized in the options markets, which relate to mid-point pricing and pegged pricing which require connection to the SIPs and each of the equities exchanges in order to properly execute those orders in compliance with best execution obligations. Additionally, in the options markets, the linkage routing and trade through protection are handled by the exchanges, not by the individual members. Thus not connecting to an options exchange or disconnecting from an options exchange does not potentially subject a broker-dealer to violate order protection requirements. Gone are the days when the retail brokerage firms (such as Fidelity, Schwab, and eTrade) were members of the options exchanges—they are not members of the Exchange or its affiliates, they do not purchase connectivity to the Exchange, and they do not purchase market data from the Exchange. Accordingly, not only is there not an actual regulatory requirement to connect to every options exchange, the Exchange believes there is also no ''de facto'' or practical requirement as well, as further evidenced by the recent significant reduction in the number of broker-dealers that are members of all options exchanges.[140]

The Cboe proposal also referenced the National Market System Plan Governing the Consolidated Audit Trail (''CAT NMS Plan''),[141] wherein the Commission discussed the existence of competition in the marketplace generally, and particularly for exchanges with unique business models. The Commission acknowledged that, even if an exchange were to exit the marketplace due to its proposed fee-related change, it would not significantly impact competition in the market for exchange trading services because these markets are served by multiple competitors.[142] Further, the Commission explicitly stated that ''[c]onsequently, demand for these services in the event of the exit of a competitor is likely to be swiftly met by existing competitors.'' [143] Finally, the Commission recognized that while some exchanges may have a unique business model that is not currently offered by competitors, a competitor could create similar business models if demand were adequate, and if a competitor did not do so, the Commission believes it would be likely that new entrants would do so if the exchange with that unique business model was otherwise profitable.[144]

Cboe also filed to establish a monthly fee for Certification Logical Ports of $250 per Certification Logical Port.[145] Cboe reasoned that purchasing additional Certification Logical Ports, beyond the one Certification Logical Port per logical port type offered in the production environment free of charge, is voluntary and not required in order to participate in the production environment, including live production trading on the Exchange.[146]

In its statutory basis, Cboe justified the new port fee by stating that it believed the Certification Logical Port fee were reasonable because while such ports were no longer completely free, TPHs and non-TPHs would continue to be entitled to receive free of charge one Certification Logical Port for each type of logical port that is currently offered in the production environment.[147] Cboe noted that other exchanges assess similar fees and cited to NASDAQ LLC and MIAX.[148] Cboe also noted that the decision to purchase additional ports is optional and no market participant is required or under any regulatory obligation to purchase excess Certification Logical Ports in order to access the Exchange's certification environment.[149] Finally, similar proposals to adopt a Certification Logical Port monthly fee were filed by Cboe BYX Exchange, Inc.,[150] BZX,[151] and Cboe EDGA Exchange, Inc.[152]

The Cboe fee proposals described herein were filed subsequent to the D.C. Circuit decision in *Susquehanna Int'l Grp., LLC* v. *SEC,* 866 F.3d 442 (D.C. Cir. 2017), meaning that such fee filings were subject to the same (and current) standard for SEC review and approval as this proposal. In summary, the Exchange requests the Commission apply the same standard of review to this proposal which was applied to the various Cboe and Cboe affiliated markets' filings with respect to non-transaction fees. If the Commission were to apply a different standard of review to this proposal than it applied to other exchange fee filings it would create a burden on competition such that it would impair the Exchange's ability to make necessary technology driven changes, such as bifurcating its 10Gb ULL network, because it would be unable to monetize or recoup costs related to that change and compete with larger, non-legacy exchanges.

* * * * *

[136] *See* Securities Exchange Act Release No. 90333 (November 4, 2020), 85 FR 71666 (November 10, 2020) (SR–CBOE–2020–105). The Exchange notes that Cboe submitted this filing *after* the Staff Guidance and contained no cost based justification.

[137] *See* Cboe Fee Schedule, Page 12, Logical Connectivity Fees, *available at https://cdn.cboe.com/resources/membership/Cboe_FeeSchedule.pdf* (BOE/FIX logical monthly port fees of $750 per port for ports 1–5 and $800 per port for port 6 or more; and BOE Bulk logical monthly port fees of $1,500 per port for ports 1–5, $2,500 per port for ports 6–30, and $3,000 for port 31 or more).

[138] *Id.* at 71676.

[139] *Id.*

[140] *Id.* at 71676.

[141] *See* Securities Exchange Act Release No. 86901 (September 9, 2019), 84 FR 48458 (September 13, 2019) (File No. S7–13–19).

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *See* Securities Exchange Act Release No. 94512 (March 24, 2002), 87 FR 18425 (March 30, 2022) (SR–Cboe-2022–011). Cboe offers BOE and FIX Logical Ports, BOE Bulk Logical Ports, DROP Logical Ports, Purge Ports, GRP Ports and Multicast PITCH/Top Spin Server Ports. For each type of the aforementioned logical ports that are used in the production environment, the Exchange also offers corresponding ports which provide Trading Permit Holders and non-TPHs access to the Exchange's certification environment to test proprietary systems and applications (*i.e.,* ''Certification Logical Ports'').

[146] *See* Securities Exchange Act Release No. 94512 (March 24, 2002), 87 FR 18425 (March 30, 2022) (SR–Cboe-2022–011).

[147] *Id.* at 18426.

[148] *Id.*

[149] *Id.*

[150] *See* Securities Exchange Act Release No. 94507 (March 24, 2002), 87 FR 18439 (March 30, 2022) (SR–CboeBYX–2022–004).

[151] *See* Securities Exchange Act Release No. 94511 (March 24, 2002), 87 FR 18411 (March 30, 2022) (SR–CboeBZX–2022–021).

[152] *See* Securities Exchange Act Release No. 94517 (March 25, 2002), 87 FR 18848 (March 31, 2022) (SR–CboeEDGA–2022–004).

In conclusion, as discussed thoroughly above, the Exchange regrettably believes that the application of the Revised Review Process and Staff Guidance has adversely affected inter-market competition among legacy and non-legacy exchanges by impeding the ability of non-legacy exchanges to adopt or increase fees for their market data and access services (including connectivity and port products and services) that are on parity or commensurate with fee levels previously established by legacy exchanges. Since the adoption of the Revised Review Process and Staff Guidance, and even more so recently, it has become extraordinarily difficult to adopt or increase fees to generate revenue necessary to invest in systems, provide innovative trading products and solutions, and improve competitive standing to the benefit of non-legacy exchanges' market participants. Although the Staff Guidance served an important policy goal of improving disclosures and requiring exchanges to justify that their market data and access fee proposals are fair and reasonable, it has also negatively impacted non-legacy exchanges in particular in their efforts to adopt or increase fees that would enable them to more fairly compete with legacy exchanges, despite providing enhanced disclosures and rationale under both competitive and cost basis approaches provided for by the Revised Review Process and Staff Guidance to support their proposed fee changes.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange received one comment letter on the Initial Proposal, one comment letter on the Second Proposal, one comment letter on the Third Proposal, one comment letter on the Fourth Proposal, one comment letter on the Fifth Proposal, and one comment letter on the Sixth Proposal, all from the same commenter.[153] In their letters, the sole commenter seeks to incorporate comments submitted on previous Exchange proposals to which the Exchange has previously responded. The Exchange also received one comment letter from a separate commenter on the Sixth Proposal.[154] The Exchange believes issues raised by each commenters are not germane to this proposal in particular, but rather raise larger issues with the current environment surrounding exchange non-transaction fee proposals that should be addressed by the Commission through rule making, or Congress, more holistically and not through an individual exchange fee filings. Among other things, the commenters are requesting additional data and information that is both opaque and a moving target and would constitute a level of disclosure materially over and above that provided by any competitor exchanges.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[155] and Rule 19b–4(f)(2) [156] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–MIAX–2023–48 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–MIAX–2023–48. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–MIAX–2023–48 and should be submitted on or before January 5, 2024

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[157]

Sherry R. Haywood,

Assistant Secretary.

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[153] *See* letter from Brian Sopinsky, General Counsel, Susquehanna International Group, LLP (''SIG''), to Vanessa Countryman, Secretary, Commission, dated February 7, 2023, *and* letters from Gerald D. O'Connell, SIG, to Vanessa Countryman, Secretary, Commission, dated March 21, 2023, May 24, 2023, July 24, 2023 and September 18, 2023.

[154] *See* letter from Thomas M. Merritt, Deputy General Counsel, Virtu Financial, Inc. (''Virtu''), to Vanessa Countryman, Secretary, Commission, dated November 8, 2023.

[155] 15 U.S.C. 78s(b)(3)(A)(ii).

[156] 17 CFR 240.19b–4(f)(2).

[157] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99130; File No. SR–MRX–2023–24]

Self-Regulatory Organizations; Nasdaq MRX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its GPS Antenna Fees at General 8, Section 1

December 11, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

notice is hereby given that on November 29, 2023, Nasdaq MRX, LLC (''MRX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''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

The Exchange proposes to amend the Exchange's GPS antenna fees at General 8, Section 1, as described further below. The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/mrx/rules,* 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 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 [3]

The Exchange offers a GPS antenna, which allows co-location customers [4] to synchronize their time recording systems to the U.S. Government's Global Positioning System (''GPS'') network time (the ''Service''). The Exchange proposes to modify its monthly fees for the Service at General 8, Section 1(d).

GPS network time is the atomic time scale implemented by the atomic clocks in the GPS ground control stations and GPS satellites. Each GPS satellite contains multiple atomic clocks that contribute precise time data to the GPS signals. GPS receivers decode these signals, synchronizing the receivers to the atomic clocks. A GPS antenna serves as a time signal receiver and feeds a primary clock device the GPS network time using precise time data. Firms can use the precise time data provided by the GPS antenna to time-stamp transactional information.

Time synchronization services are well established in the U.S. and utilized in many areas of the U.S. economy and infrastructure. The Service is not novel to the securities markets, or to the Exchange.

The Exchange offers connectivity to a GPS antenna via two options, over shared infrastructure or a dedicated antenna. If a firm wishes to connect via a dedicated connection, it must supply the antenna hardware.

The Exchange currently charges a monthly fee of $200 for the Service, which applies to both the shared infrastructure option and the dedicated antenna option. The Exchange proposes to increase the monthly fee to $600 for the Service, which would apply to both the shared infrastructure option and the dedicated antenna option. As such, the Exchange proposes to amend its fee schedule at General 8, Section 1(d) to reflect the increased monthly fee for the GPS antenna. The Exchange has not raised such price since the monthly fee of $200 was adopted.[5] In addition, the Exchange charges a higher monthly fee of $350 for cross-connections to approved telecommunication carriers in the data center and for inter-cabinet connections to other co-location customers in the data center, despite the fact that the Service not only provides connectivity (like the cross-connections), but also provides data (*i.e.,* the network time) to co-location customers.

In addition, the Exchange's fee schedule at General 8, Section 1(d) currently states that the installation fee for the GPS antenna is installation specific. The Exchange proposes to add specific installation amounts for the Service within the fee schedule, providing greater transparency to market participants. Specifically, the Exchange proposes to charge an installation fee of $900 for connectivity to a GPS antenna over shared infrastructure and $1,500 for connectivity to a GPS antenna over a dedicated antenna.[6] The difference in installation costs reflects the differing levels of complexity. For the dedicated antenna option, installation involves installing an antenna on the roof whereas the shared option involves extending a cable from a device located inside the data center.

The Service is an optional product available to any firm that chooses to subscribe. Firms may cancel their subscription at any time. The Service simply provides time synchronization that may be utilized by firms to adjust their own time systems and time-stamp transactional information. The GPS antenna is offered on a completely voluntary basis. No customer is required to purchase the GPS antenna. Potential subscribers may subscribe to the Service only if they voluntarily choose to do so. It is a business decision of each firm whether to subscribe to the Service or not. Furthermore, firms have an array of options for time synchronization. Firms may purchase the Service (or enhanced time synchronization services) from other vendors.[7] Customers do not receive an advantage by purchasing the Service from the Exchange rather than another provider. The Exchange is merely providing access to GPS signals, which can also be accessed via other providers.

In addition to cost, a firm's decision regarding which, if any, time synchronization option to purchase may depend, among other factors, on whether it wants to build or buy a time feed as well as the design of a firm's systems. A firm may prefer to build out its own time feed using GPS network time (as provided by the Exchange or a third-party vendor) or purchase a time synchronization service that handles the time feed for them. Examples of enhanced time synchronization include Precision Time Protocol (''PTP''), Pulse Per Second Time Synchronization Protocol (''PPS''), and Network Time Protocol (''NTP''), each of which are feeds that a client can consume rather than creating a feed itself. Such a choice may depend on a firm's desire for control of the feed, time sensitivity, and trade strategy, including whether a firm uses such time information to trigger trading decisions, as well as other considerations such as cost and convenience. In addition, with respect to the design of a firm's systems, a firm may choose to have its time synchronization equipment centralized

[3] The Exchange initially filed the proposed pricing changes on September 29, 2023 with an effective date of October 1, 2023 (SR–MRX–2023–19). On November 15, 2023, the Exchange withdrew SR–MRX–2023–19 and replaced with SR–MRX–2023–21. The instant filing replaces SR–MRX–2023–21, which was withdrawn on November 29, 2023.

[4] The Exchange offers customers the opportunity to co-locate their servers and equipment within the Exchange's primary data center, located in Carteret, New Jersey.

[5] *See* Securities Exchange Act Release No. 81907 (October 19, 2017), 82 FR 49447 (October 25, 2017) (SR–MRX–2017–21).

[6] NYSE provides a similar service for a $3,000 initial charge plus a $400 monthly charge. *See https://www.nyse.com/publicdocs/Wireless_Connectivity_Fees_and_Charges.pdf.*

[7] For example, Pico, Guava Tech, and SFTI provide time synchronization services.

or in multiple locations. Third-party vendors may be situated in Carteret or other New York metro financial data centers. Clients and vendors alike can produce a time feed in Carteret or any of the other locations.[8]

Approximately 59% of the Exchange's co-location customers subscribe to the Service, most of which opt for the shared option. The fact that approximately 41% of the Exchange's co-location customers do not subscribe to the Service demonstrate that there are alternative options available.

If the Exchange is incorrect in its determination that the proposed fees reflect the value of the GPS antenna, customers will not purchase the product or will seek other options at their disposal, such as purchasing time synchronization services from third-party vendors.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[10] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The proposed change to the pricing schedule is reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for order flow, which constrains its pricing determinations. The fact that the market for order flow is competitive has long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* the D.C. Circuit stated, ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .''[11]

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention to determine prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues, and also recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.''[12]

Congress directed the Commission to ''rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.' ''[13] As a result, the Commission has historically relied on competitive forces to determine whether a fee proposal is equitable, fair, reasonable, and not unreasonably or unfairly discriminatory. ''If competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior.''[14] Accordingly, ''the existence of significant competition provides a substantial basis for finding that the terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.''[15] In its 2019 guidance on fee proposals, Commission staff indicated that they would look at factors beyond the competitive environment, such as cost, only if a ''proposal lacks persuasive evidence that the proposed fee is constrained by significant competitive forces.''[16]

The proposed fees are reasonable and unlikely to burden the market because the purchase of the Service is optional for all categories of co-location customers. No firms are required to purchase the Service. Though many firms use GPS network time to synchronize their internal primary clock devices, firms can purchase time sync services from third-party vendors. Firms are also free to utilize other services that may assist them in enhanced time synchronization of their systems by consuming time feeds, such as PTP, PPS, and NTP. As noted above, approximately 59% of the Exchange's co-location customers subscribe to the Service, most of which opt for the shared option. The fact that approximately 41% of the Exchange's co-location customers do not subscribe to the Service demonstrate that there are alternative options available. Firms may choose to purchase multiple time synchronization services for resiliency or otherwise.[17] For example, a decision to purchase multiple synchronization services could be based on client strategy, as some strategies require more precise time than others. As described above, in addition to cost, a firm's decision regarding which, if any, time synchronization option to purchase may depend, among other factors, on whether a firm wishes to build or buy a time feed, the design of a firm's systems, including whether a firm chooses to have its time synchronization equipment centralized or in multiple locations, a firm's time sensitivity, a firm's trading strategy, including whether it uses such time information to trigger trading decisions, and a firm's desire for control of the time feed.

The Exchange offers the Service as a convenience to firms to provide them with the ability to synchronize their own primary clock devices to the GPS network time and time-stamp transactional information.[18] Customers do not receive an advantage by purchasing the Service from the Exchange rather than another provider. The Exchange is merely providing access to GPS signals, which can also be accessed via other providers. Firms that choose to subscribe to the Service may discontinue the use of the Service at any time if they determine that the time synchronization services provided via the GPS antenna are no longer useful. In sum, co-location customers can discontinue the use of the Service at any time, decide not to subscribe, or use a third-party vendor for time synchronization services, for any reason, including the fees.

The optional Service is available to all co-location customers that choose to

[8] As needed, firms and vendors use latency between the data centers to adjust their time synchronization.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4) and (5).

[11] *See NetCoalition,* 615 F.3d at 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[12] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[13] *See NetCoalition,* 615 F.3d at 534–35; *see also* H.R. Rep. No. 94–229 at 92 (1975) (''[I]t is the intent of the conferees that the national market system evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed.'').

[14] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR–NYSEArca–2006–21).

[15] *Id.*

[16] *See* U.S. Securities and Exchange Commission, ''Staff Guidance on SRO Rule filings Relating to Fees'' (May 21, 2019), available at *https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees.*

[17] Of the Exchange's co-location customers that subscribe to the Service, approximately 9% of such co-location customers purchase both the dedicated and the shared options of the Service.

[18] In offering the Service as a convenience to firms, the Exchange incurs certain costs, including costs related to the data center facility, hardware and equipment, and personnel.

subscribe. The proposed fees would apply to all co-location customers on a non-discriminatory basis, and therefore are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange also believes that the proposed changes to include specific installation fees promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed rule changes will provide greater clarity to Members and the public regarding the Exchange's fees. It is in the public interest for rules to be accurate and transparent so as to eliminate the potential for confusion.

If the Exchange is incorrect in its determination that the proposed fees reflect the value of the GPS antenna, customers will not purchase the product or will seek other options at their disposal, such as purchasing time synchronization services from third-party vendors.

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 not necessary or appropriate in furtherance of the purposes of the Act.

In terms of inter-market competition (the competition among self-regulatory organizations), the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. Approval of the proposal does not impose any burden on the ability of other exchanges to compete. As noted above, time synchronization services are offered by other vendors and any exchange has the ability to offer such services if it so chooses.

Nothing in the proposal burdens intra-market competition (the competition among consumers of exchange data) because the GPS antenna is available to any co-location customer under the same fees as any other co-location customer, and any co-location customer that wishes to purchase a GPS antenna can do so on a non-discriminatory basis.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[19] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or • Send an email to *rule-comments@sec.gov.* Please include file number SR–MRX–2023–24 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–MRX–2023–24. 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–MRX–2023–24 and should be submitted on or before January 5, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Sherry R. Haywood,

Assistant Secretary.

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[19] 15 U.S.C. 78s(b)(3)(A)(ii).

[20] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99132; File No. SR–CboeEDGX–2023–078]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule

December 11, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 8, 2023, Cboe EDGX Exchange, Inc. (''Exchange'' or ''EDGX'') 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 EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') proposes to amend its Fee Schedule. The text of the proposed rule change is provided in Exhibit 5. 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 applicable to its equities trading platform (''EDGX Equities'') as follows: (1) by introducing Add Volume Tier 7; (2) by modifying the Market Quality Tier; (3) by introducing a new Non-Displayed Add Volume Tier; (4) by modifying Remove Volume Tier 3; and (5) by introducing a new Retail Volume Tier. The Exchange proposes to implement these changes effective December 1, 2023.[3]

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 registered equities exchanges, as well as a number of alternative trading systems and other off-exchange venues that do not have similar self-regulatory responsibilities under the Securities Exchange Act of 1934 (the ''Act''), to which market participants may direct their order flow. Based on publicly available information,[4] no single registered equities exchange has more than 14% of the market share. Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow. The Exchange in particular operates a ''Maker-Taker'' model whereby it pays rebates to members that add liquidity and assesses fees to those that remove liquidity. The Exchange's Fee Schedule sets forth the standard rebates and rates applied per share for orders that provide and remove liquidity, respectively. Currently, for orders in securities priced at or above $1.00, the Exchange provides a standard rebate of $0.00160 per share for orders that add liquidity and assesses a fee of $0.0030 per share for orders that remove liquidity.[5] For orders in securities priced below $1.00, the Exchange provides a standard rebate of $0.00009 per share for orders that add liquidity and assesses a fee of 0.30% of the total dollar value for orders that remove liquidity.[6] Additionally, in response to the competitive environment, the Exchange also offers tiered pricing which provides Members opportunities to qualify for higher rebates or reduced fees where certain volume criteria and thresholds are met. Tiered pricing provides an incremental incentive for Members to strive for higher tier levels, which provides increasingly higher benefits or discounts for satisfying increasingly more stringent criteria.

Add Volume & Market Quality Tiers

Under footnote 1 of the Fee Schedule, the Exchange currently offers various Add/Remove Volume Tiers. In particular, the Exchange offers six Add Volume Tiers that each provide an enhanced rebate for Members' qualifying orders yielding fee codes B,[7] V,[8] Y,[9] 3,[10] and 4,[11] where a Member reaches certain add volume-based criteria.[12] First, the Exchange is proposing to introduce a new Add Volume Tier 7 to provide Members an additional manner in which they could receive an enhanced rebate if certain criteria is met. The proposed criteria for proposed Add Volume Tier 7 is as follows:

- Add Volume Tier 7 provides a rebate of $0.0034 per share for securities priced at or above $1.00 to qualifying orders (*i.e.,* orders yielding fee B, V, Y, 3, or 4) where: (1) Member has a total remove ADV [13] ≥0.40% of the TCV [14] or Member has a total remove ADV ≥40,000,000; and (2) Member has a Hidden, Primary Peg ADV [15] ≥1,000,000; and (3) Member has a Hidden Midpoint ADV (*i.e.,* yielding fee codes DM [16] or MM [17]) ≥5,000,000.

Second, the Exchange proposes to modify the criteria of the existing Market Quality Tier. Currently, the criteria for the Market Quality Tier is as follows:

- The Market Quality Tier provides a rebate of $0.0028 per share for securities priced at or above $1.00 to qualifying orders (*i.e.,* orders yielding fee B, V, Y, 3, or 4) where: (1) Member adds an ADV ≥0.25% of the TCV; and (2) Member adds an ADV ≥0.10% of the TCV as

[3] The Exchange initially filed the proposed fee change on December 1, 2023 (SR–CboeEDGX–2023–074). On December 8, 2023, the Exchange withdrew that filing and submitted SR–CboeEDGX–2023–077. On December 8, 2023, the Exchange withdrew that filing and submitted this proposal.

[4] *See* Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (November 28, 2023), available at *https://www.cboe.com/us/equities/market_statistics/*.

[5] *See* EDGX Equities Fee Schedule, Standard Rates.

[6] *Id.*

[7] Fee code B is appended to orders adding liquidity to EDGX in Tape B securities.

[8] Fee code V is appended to orders adding liquidity to EDGX in Tape A securities.

[9] Fee code Y is appended to orders adding liquidity to EDGX in Tape C securities.

[10] Fee code 3 is appended to orders adding liquidity to EDGX in the pre and post market in Tapes A or C securities.

[11] Fee code 4 is appended to orders adding liquidity to EDGX in the pre and post market in Tape B securities.

[12] The Exchange notes that unless otherwise noted on the fee schedule, enhanced rebates or reduced fees offered under footnote 1 are only available to securities priced at or above $1.00.

[13] ''ADV'' means average daily volume calculated as the number of shares added to, removed from, or routed by, the Exchange, or any combination or subset thereof, per day. ADV is calculated on a monthly basis.

[14] ''TCV'' means total consolidated volume calculated as the volume reported by all exchanges and trade reporting facilities to a consolidated transaction reporting plan for the month for which the fees apply.

[15] The Exchange notes that it also proposes to add a definition for Hidden, Primary Peg ADV to the Definitions section of the fee schedule, ''Hidden, Primary Peg ADV'' means ADV in non-displayed orders that include a Primary Peg instruction as defined in EDGX Equities Rule 11.6(j)(2).

[16] Fee code DM is appended to orders adding liquidity to EDGX using MidPoint Discretionary order within discretionary range.

[17] Fee code MM is appended to non-displayed orders adding liquidity to EDGX using Mid-Point Peg.

Non-Displayed orders that yield fee codes DM, HA,[18] HI,[19] MM or RP.[20]

Now, the Exchange proposes to amend the second prong of criteria in the Market Quality Tier. The proposed criteria is as follows:

• The Market Quality Tier provides a rebate of $0.0028 per share for securities priced at or above $1.00 to qualifying orders (*i.e.,* orders yielding fee B, V, Y, 3, or 4) where: (1) Member adds an ADV ≥0.25% of the TCV; and (2) Members adds an ADV ≥0.12% of the TCV as Non-Displayed orders that yield fee codes DM, HA, HI, MM or RP.

Non-Displayed Add Volume Tiers

In addition to the Add/Remove Volume Tiers offered under footnote 1, the Exchange also offers three Non-Displayed Add Volume Tiers that each provide an enhanced rebate for Members' qualifying orders yielding fee codes DM, HA, MM, and RP, where a Member reaches certain volume-based criteria offered in each tier. The Exchange now proposes to introduce Non-Displayed Add Volume Tier 4. The proposed criteria for Non-Displayed Add Volume Tier 4 is as follows:

• Non-Displayed Add Volume Tier 4 provides a rebate of $0.0025 per share for securities priced at or above $1.00 to qualifying orders (*i.e.,* orders yielding fee DM, HA, MM, or RP) where: (1) Member has a total remove ADV ≥0.40% of the TCV or Member has a total remove ADV ≥40,000,000; and (2) Member has a Hidden, Primary Peg ADV ≥1,000,000; and (3) Member has a Hidden Midpoint ADV (*i.e.,* yielding fee codes DM or MM) ≥5,000,000.

The Exchange also proposes to make minor grammatical changes to the introductory text associated with the Non-Displayed Add Volume Tiers. These changes are non-substantive in nature.

Remove Volume Tiers

In addition to the Add/Remove Volume Tiers and Non-Displayed Add Volume Tiers offered under footnote 1, the Exchange also offers three Remove Volume Tiers that each assess a reduced fee for Members' qualifying orders yielding fee codes BB,[21] N,[22] and W[23] where a Member reaches certain add volume-based criteria. The Exchange now proposes to amend Remove Volume Tier 3. Currently, the criteria for Remove Volume Tier 3 is as follows:

• Remove Volume Tier 3 provides a reduced fee of $0.00275 per share for securities priced at or above $1.00 to qualifying orders (*i.e.,* orders yielding fee codes BB, N, or W) and a reduced fee of 0.28% of total dollar value for securities priced below $1.00 where: (1) Member has an ADAV ≥0.30% of the TCV; and (2) Member has a total remove ADV ≥0.40% of the TCV; and (3) Member adds Retail Pre Market Order ADV (*i.e.,* yielding fee code ZO) ≥3,000,000.

Now, the Exchange proposes to amend the second prong of criteria in Remove Volume Tier 3. The proposed criteria is as follows:

• Proposed Remove Volume Tier 3 provides a reduced fee of $0.00275 per share for securities priced at or above $1.00 to qualifying orders (*i.e.,* orders yielding fee codes BB, N, or W) and a reduced fee of 0.28% of total dollar value for securities priced below $1.00 where: (1) Member has an ADAV ≥0.30% of the TCV; and (2) Member has a total remove ADV ≥0.40% of the TCV or Member has a total remove ADV ≥40,000,000; and (3) Member adds Retail Pre Market Order ADV (*i.e.,* yielding fee code ZO) ≥3,000,000.

Retail Volume Tiers

Pursuant to footnote 2 of the Fee Schedule, the Exchange offers Retail Volume Tiers which provide Retail Member Organizations (''RMOs'')[24] an opportunity to receive an enhanced rebate from the standard rebate for Retail Orders[25] that add liquidity (*i.e.,* yielding fee code ZA or ZO). Currently, the Retail Volume Tiers offer two Retail Volume Tiers where a Member is eligible for an enhanced rebate for qualifying orders (*i.e.,* yielding fee code ZA or ZO) meeting certain add volume-based criteria. The Exchange now proposes to introduce Retail Volume Tier 3. The proposed criteria for Retail Volume Tier 3 is as follows:

• Proposed Retail Volume Tier 3 provides an enhanced rebate of $0.0037 per share for securities priced above $1.00 to qualifying orders (*i.e.,* orders yielding fee ZA or ZO) where: (1) Member has a total remove ADV ≥0.40% of the TCV or Member has a total remove ADV ≥40,000,000; and (2) Member has a Hidden, Primary Peg ADV ≥1,000,000; and (3) Member has a Hidden Midpoint ADV (*i.e.,* yielding fee codes DM or MM) ≥5,000,000.

Together, the proposed addition of Retail Volume Tier 3, proposed addition of Add Volume Tier 7, proposed amendment to the Market Quality Tier, proposed addition of Non-Displayed Add Volume Tier 4, and proposed amendment to Remove Volume Tier 3 are each intended to provide Members an alternative opportunity to earn an enhanced rebate or a reduced fee by increasing their order flow to the Exchange, which further contributes to a deeper, more liquid market and provides even more execution opportunities for active market participants. Incentivizing an increase in liquidity adding or removing volume, through enhanced rebate or reduced fee opportunities, encourages liquidity adding Members on the Exchange to contribute to a deeper, more liquid market, and liquidity executing Members on the Exchange to increase transactions and take execution opportunities provided by such increased liquidity, together providing for overall enhanced price discovery and price improvement opportunities on the Exchange. As such, increased overall order flow benefits all Members by contributing towards a robust and well-balanced market ecosystem.

The Exchange also proposes to make minor grammatical changes to the introductory text associated with the Retail Volume Tiers. These changes are non-substantive in nature.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[26] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[27] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and

[18] Fee code HA is appended to non-displayed orders adding liquidity to EDGX.

[19] Fee code HI is appended to non-displayed orders adding liquidity to EDGX that receive price improvement.

[20] Fee code RP is appended to non-displayed orders adding liquidity to EDGX using Supplemental Peg.

[21] Fee code BB is appended to orders that remove liquidity from EDGX in Tape B securities.

[22] Fee code N is appended to orders that remove liquidity from EDGX in Tape C securities.

[23] Fee code W is appended to orders that remove liquidity from EDGX in Tape A securities.

[24] *See* EDGX Rule 11.21(a)(1). A ''Retail Member Organization'' or ''RMO'' is a Member (or a division thereof) that has been approved by the Exchange under this Rule to submit Retail Orders.

[25] *See* EDGX Rule 11.21(a)(2). A ''Retail Order'' is an agency or riskless principal order that meets the criteria of FINRA Rule 5320.03 that originates from a natural person and is submitted to the Exchange by a Retail Member Organization, provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology.

[26] 15 U.S.C. 78f(b).

[27] 15 U.S.C. 78f(b)(5).

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) [28] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers as well as Section 6(b)(4) [29] as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities.

As described above, the Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. The Exchange believes that its proposal to: (1) introduce new Add Volume Tier 7; (2) modify the Market Quality Tier; (3) introduce new Non-Displayed Add Volume Tier 4; (4) modify Remove Volume Tier 3; and (5) introduce new Retail Volume Tier 3 reflects a competitive pricing structure designed to incentivize market participants to direct their order flow to the Exchange, which the Exchange believes would enhance market quality to the benefit of all Members. Specifically, the Exchange's proposal to introduce slightly more difficult criteria to its Market Quality Tier and Remove Volume Tier is not a significant departure from existing criteria, is reasonably correlated to the enhanced rebate or reduced fee offered by the Exchange and other competing exchanges,[30] and will continue to incentivize Members to submit order flow to the Exchange. Additionally, the Exchange notes that relative volume-based incentives and discounts have been widely adopted by exchanges,[31] including the Exchange,[32] and are reasonable, equitable and non-discriminatory because they are open to all Members on an equal basis and provide additional benefits or discounts that are reasonably related to (i) the value to an exchange's market quality and (ii) associated higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns. Competing equity exchanges offer similar tiered pricing structures, including schedules of rebates and fees that apply based upon members achieving certain volume and/or growth thresholds, as well as assess similar fees or rebates for similar types of orders, to that of the Exchange. Further, the Exchange believes that its proposal to incentivize Hidden, Primary Peg ADV [33] and Hidden Midpoint ADV [34] will encourage Members to submit additional non-displayed orders to the Exchange using pegged order types. The Exchange believes that non-displayed, Primary Peg [35] orders will reduce the number of cancel/replace messages submitted by Members to the Exchange and non-displayed MidPoint Peg [36] orders will encourage greater liquidity with the potential for price improvement on the Exchange.

In particular, the Exchange believes its proposal to: (1) introduce new Add Volume Tier 7; (2) modify the Market Quality Tier; (3) introduce new Non-Displayed Add Volume Tier 4; (4) modify Remove Volume Tier 3; and (5) introduce new Retail Volume Tier 3 is reasonable because the revised tiers will be available to all Members and provide all Members with an additional opportunity to receive an enhanced rebate or a reduced fee. The Exchange further believes the proposed modifications to its Add Volume Tier, Non-Displayed Add Volume Tier, and Retail Volume Tier will provide a reasonable means to encourage liquidity adding displayed orders and liquidity adding non-displayed orders, respectively, in Members' order flow to the Exchange and to incentivize Members to continue to provide liquidity adding volume to the Exchange by offering them an additional opportunity to receive an enhanced rebate or reduced fee on qualifying orders. Further, the Exchange wishes to encourage the use of the Primary Peg and MidPoint Peg order types by introducing criteria specific to Hidden, Primary Peg ADV and Hidden Midpoint ADV. While the proposed criteria in the Market Quality Tier and Remove Volume Tier 3 are slightly more difficult than the current criteria found in those tiers, the proposed criteria is not a significant departure from existing criteria, is reasonably correlated to the enhanced rebate or reduced fee offered by the Exchange, and will continue to incentivize Members to submit order flow to the Exchange. An overall increase in activity would deepen the Exchange's liquidity pool, offers additional cost savings, support the quality of price discovery, promote market transparency and improve market quality, for all investors.

The Exchange believes that the proposed changes to its Add/Remove Volume Tiers, Market Quality Tier, Non-Displayed Add Volume Tier, and Retail Volume Tier are reasonable as they do not represent a significant departure from the criteria currently offered in the Fee Schedule. The Exchange also believes that the proposal represents an equitable allocation of fees and rebates and is not unfairly discriminatory because all Members will be eligible for the proposed new tiers and have the opportunity to meet the tiers' criteria and receive the corresponding enhanced rebate if such criteria is met. Without having a view of activity on other markets and off-exchange venues, the Exchange has no way of knowing whether this proposed rule change would definitely result in any Members qualifying the new proposed tiers. While the Exchange has no way of predicting with certainty how the proposed changes will impact Member activity, based on the prior months volume, the Exchange anticipates that at least one Member will be able to satisfy proposed Add Volume Tier 7, at least two Members will be able to satisfy the proposed Market Quality Tier, at least one Member will be able to satisfy proposed Non-Displayed Add Volume Tier 4, at least one Member will be able to satisfy proposed Remove Volume Tier 3, and at least 1 Member will be able to satisfy proposed Retail Volume Tier 3. The Exchange also notes that proposed changes will not adversely impact any Member's ability to qualify for enhanced rebates offered under other tiers. Should a Member not meet the proposed new criteria, the

[28] *Id.*

[29] 15 U.S.C. 78f(b)(4).

[30] *See* MIAX Pearl Equities Exchange Fee Schedule, Remove Volume Tier, available at *https://www.miaxglobal.com/sites/default/files/fee_schedule-files/MIAX_Pearl_Equities_Fee_Schedule_12012023.pdf See also* MEMX Equities Fee Schedule, Liquidity Removal Tier, available at *https://info.memxtrading.com/equities-trading-resources/us-equities-fee-schedule/.*

[31] *See e.g.,* BZX Equities Fee Schedule, Footnote 1, Add/Remove Volume Tiers.

[32] *See e.g.,* EDGX Equities Fee Schedule, Footnote 1, Add/Remove Volume Tiers.

[33] *Supra* note 15.

[34] *Supra* notes 16–17.

[35] *See* EDGX Equities Rule 11.6(j)(2). A ''Primary Peg'' order is an order with instructions to peg to the NBB, for a buy order, or the NBO, for a sell order.

[36] *See* EDGX Equities Rule 11.8(d). A MidPoint Peg Order is a non-displayed Market Order or Limit Order with an instruction to execute at the midpoint of the NBBO, or, alternatively, pegged to the less aggressive of the midpoint of the NBBO or one minimum price variation inside the same side of the NBBO as the order.

Member will merely not receive that corresponding enhanced rebate.

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. Rather, as discussed above, the Exchange believes that the proposed changes would encourage the submission of additional order flow to a public exchange, thereby promoting market depth, execution incentives and enhanced execution opportunities, as well as price discovery and transparency for all Members. As a result, the Exchange believes that the proposed changes further the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.''

The Exchange believes the proposed rule changes do not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Particularly, the proposed changes to the Exchange's Add/Remove Volume Tiers, Market Quality Tier, Non-Displayed Add Volume Tier, and Retail Volume Tier will apply to all Members equally in that all Members are eligible for each of the Tiers, have a reasonable opportunity to meet the Tiers' criteria and will receive the enhanced rebate on their qualifying orders if such criteria is met. The Exchange does not believe the proposed changes burden competition, but rather, enhances competition as it is intended to increase the competitiveness of EDGX by amending an existing pricing incentive and adopting pricing incentives in order to attract order flow and incentivize participants to increase their participation on the Exchange, providing for additional execution opportunities for market participants and improved price transparency. Greater overall order flow, trading opportunities, and pricing transparency benefits all market participants on the Exchange by enhancing market quality and continuing to encourage Members to send orders, thereby contributing towards a robust and well-balanced market ecosystem.

Next, the Exchange believes the proposed rule changes does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, the Exchange operates in a highly competitive market. Members have numerous alternative venues that they may participate on and direct their order flow, including other equities exchanges, off-exchange venues, and alternative trading systems. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single equities exchange has more than 14% of the market share.[37] Therefore, no exchange possesses significant pricing power in the execution of order flow. Indeed, participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [38] The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* the D.C. Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers' . . . .''.[39] Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

[37] *Supra* note 3.

[38] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[39] *NetCoalition* v. *SEC,* 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

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 [40] and paragraph (f) of Rule 19b–4 [41] 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–2023–078 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–2023–078. 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

[40] 15 U.S.C. 78s(b)(3)(A).

[41] 17 CFR 240.19b–4(f).

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–2023–078 and should be submitted on or before January 5, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[42]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–27528 Filed 12–14–23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99129; File No. SR–GEMX–2023–17]

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its GPS Antenna Fees at General 8, Section 1

December 11, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 29, 2023, Nasdaq GEMX, LLC (''GEMX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''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

The Exchange proposes to amend the Exchange's GPS antenna fees at General 8, Section 1, as described further below. The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/gemx/rules,* 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 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 [3]

The Exchange offers a GPS antenna, which allows co-location customers [4] to synchronize their time recording systems to the U.S. Government's Global Positioning System (''GPS'') network time (the ''Service''). The Exchange proposes to modify its monthly fees for the Service at General 8, Section 1(d).

GPS network time is the atomic time scale implemented by the atomic clocks in the GPS ground control stations and GPS satellites. Each GPS satellite contains multiple atomic clocks that contribute precise time data to the GPS signals. GPS receivers decode these signals, synchronizing the receivers to the atomic clocks. A GPS antenna serves as a time signal receiver and feeds a primary clock device the GPS network time using precise time data. Firms can use the precise time data provided by the GPS antenna to time-stamp transactional information.

Time synchronization services are well established in the U.S. and utilized in many areas of the U.S. economy and infrastructure. The Service is not novel to the securities markets, or to the Exchange.

The Exchange offers connectivity to a GPS antenna via two options, over shared infrastructure or a dedicated antenna. If a firm wishes to connect via a dedicated connection, it must supply the antenna hardware.

The Exchange currently charges a monthly fee of $200 for the Service, which applies to both the shared infrastructure option and the dedicated antenna option. The Exchange proposes to increase the monthly fee to $600 for the Service, which would apply to both the shared infrastructure option and the dedicated antenna option. As such, the Exchange proposes to amend its fee schedule at General 8, Section 1(d) to reflect the increased monthly fee for the GPS antenna. The Exchange has not raised such price since the monthly fee of $200 was adopted.[5] In addition, the Exchange charges a higher monthly fee of $350 for cross-connections to approved telecommunication carriers in the data center and for inter-cabinet connections to other co-location customers in the data center, despite the fact that the Service not only provides connectivity (like the cross-connections), but also provides data (*i.e.,* the network time) to co-location customers.

In addition, the Exchange's fee schedule at General 8, Section 1(d) currently states that the installation fee for the GPS antenna is installation specific. The Exchange proposes to add specific installation amounts for the Service within the fee schedule, providing greater transparency to market participants. Specifically, the Exchange proposes to charge an installation fee of $900 for connectivity to a GPS antenna over shared infrastructure and $1,500 for connectivity to a GPS antenna over a dedicated antenna.[6] The difference in installation costs reflects the differing levels of complexity. For the dedicated antenna option, installation involves installing an antenna on the roof whereas the shared option involves

[42] 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 pricing changes on September 29, 2023 with an effective date of October 1, 2023 (SR–GEMX–2023–12). On November 15, 2023, the Exchange withdrew SR–GEMX–2023–12 and replaced with SR–GEMX–2023–15. The instant filing replaces SR–GEMX–2023–15, which was withdrawn on November 29, 2023.

[4] The Exchange offers customers the opportunity to co-locate their servers and equipment within the Exchange's primary data center, located in Carteret, New Jersey.

[5] *See* Securities Exchange Act Release No. 81902 (October 19, 2017), 82 FR 49453 (October 25, 2017) (SR–GEMX–2017–48).

[6] NYSE provides a similar service for a $3,000 initial charge plus a $400 monthly charge. *See https://www.nyse.com/publicdocs/Wireless_Connectivity_Fees_and_Charges.pdf.*

extending a cable from a device located inside the data center.

The Service is an optional product available to any firm that chooses to subscribe. Firms may cancel their subscription at any time. The Service simply provides time synchronization that may be utilized by firms to adjust their own time systems and time-stamp transactional information. The GPS antenna is offered on a completely voluntary basis. No customer is required to purchase the GPS antenna. Potential subscribers may subscribe to the Service only if they voluntarily choose to do so. It is a business decision of each firm whether to subscribe to the Service or not. Furthermore, firms have an array of options for time synchronization. Firms may purchase the Service (or enhanced time synchronization services) from other vendors.[7] Customers do not receive an advantage by purchasing the Service from the Exchange rather than another provider. The Exchange is merely providing access to GPS signals, which can also be accessed via other providers.

In addition to cost, a firm's decision regarding which, if any, time synchronization option to purchase may depend, among other factors, on whether it wants to build or buy a time feed as well as the design of a firm's systems. A firm may prefer to build out its own time feed using GPS network time (as provided by the Exchange or a third-party vendor) or purchase a time synchronization service that handles the time feed for them. Examples of enhanced time synchronization include Precision Time Protocol (''PTP''), Pulse Per Second Time Synchronization Protocol (''PPS''), and Network Time Protocol (''NTP''), each of which are feeds that a client can consume rather than creating a feed itself. Such a choice may depend on a firm's desire for control of the feed, time sensitivity, and trade strategy, including whether a firm uses such time information to trigger trading decisions, as well as other considerations such as cost and convenience. In addition, with respect to the design of a firm's systems, a firm may choose to have its time synchronization equipment centralized or in multiple locations. Third-party vendors may be situated in Carteret or other New York metro financial data centers. Clients and vendors alike can produce a time feed in Carteret or any of the other locations.[8]

Approximately 59% of the Exchange's co-location customers subscribe to the Service, most of which opt for the shared option. The fact that approximately 41% of the Exchange's co-location customers do not subscribe to the Service demonstrate that there are alternative options available.

If the Exchange is incorrect in its determination that the proposed fees reflect the value of the GPS antenna, customers will not purchase the product or will seek other options at their disposal, such as purchasing time synchronization services from third-party vendors.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[10] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The proposed change to the pricing schedule is reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for order flow, which constrains its pricing determinations. The fact that the market for order flow is competitive has long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* the D.C. Circuit stated, ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .''[11]

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention to determine prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues, and also recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.''[12]

Congress directed the Commission to ''rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.' ''[13] As a result, the Commission has historically relied on competitive forces to determine whether a fee proposal is equitable, fair, reasonable, and not unreasonably or unfairly discriminatory. ''If competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior.''[14] Accordingly, ''the existence of significant competition provides a substantial basis for finding that the terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.''[15] In its 2019 guidance on fee proposals, Commission staff indicated that they would look at factors beyond the competitive environment, such as cost, only if a ''proposal lacks persuasive evidence that the proposed fee is constrained by significant competitive forces.''[16]

The proposed fees are reasonable and unlikely to burden the market because the purchase of the Service is optional for all categories of co-location customers. No firms are required to purchase the Service. Though many firms use GPS network time to synchronize their internal primary clock devices, firms can purchase time sync services from third-party vendors. Firms are also free to utilize other services that may assist them in enhanced time synchronization of their systems by consuming time feeds, such as PTP, PPS, and NTP. As noted above, approximately 59% of the Exchange's co-location customers subscribe to the Service, most of which opt for the

[7] For example, Pico, Guava Tech, and SFTI provide time synchronization services.

[8] As needed, firms and vendors use latency between the data centers to adjust their time synchronization.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4) and (5).

[11] *See NetCoalition,* 615 F.3d at 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[12] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[13] *See NetCoalition,* 615 F.3d at 534–35; *see also* H.R. Rep. No. 94–229 at 92 (1975) (''[I]t is the intent of the conferees that the national market system evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed.'').

[14] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR–NYSEArca–2006–21).

[15] *Id.*

[16] *See* U.S. Securities and Exchange Commission, ''Staff Guidance on SRO Rule filings Relating to Fees'' (May 21, 2019), available at *https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees.*

shared option. The fact that approximately 41% of the Exchange's co-location customers do not subscribe to the Service demonstrate that there are alternative options available. Firms may choose to purchase multiple time synchronization services for resiliency or otherwise.[17] For example, a decision to purchase multiple synchronization services could be based on client strategy, as some strategies require more precise time than others. As described above, in addition to cost, a firm's decision regarding which, if any, time synchronization option to purchase may depend, among other factors, on whether a firm wishes to build or buy a time feed, the design of a firm's systems, including whether a firm chooses to have its time synchronization equipment centralized or in multiple locations, a firm's time sensitivity, a firm's trading strategy, including whether it uses such time information to trigger trading decisions, and a firm's desire for control of the time feed.

The Exchange offers the Service as a convenience to firms to provide them with the ability to synchronize their own primary clock devices to the GPS network time and time-stamp transactional information.[18] Customers do not receive an advantage by purchasing the Service from the Exchange rather than another provider. The Exchange is merely providing access to GPS signals, which can also be accessed via other providers. Firms that choose to subscribe to the Service may discontinue the use of the Service at any time if they determine that the time synchronization services provided via the GPS antenna are no longer useful. In sum, co-location customers can discontinue the use of the Service at any time, decide not to subscribe, or use a third-party vendor for time synchronization services, for any reason, including the fees.

The optional Service is available to all co-location customers that choose to subscribe. The proposed fees would apply to all co-location customers on a non-discriminatory basis, and therefore are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange also believes that the proposed changes to include specific installation fees promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed rule changes will provide greater clarity to Members and the public regarding the Exchange's fees. It is in the public interest for rules to be accurate and transparent so as to eliminate the potential for confusion.

If the Exchange is incorrect in its determination that the proposed fees reflect the value of the GPS antenna, customers will not purchase the product or will seek other options at their disposal, such as purchasing time synchronization services from third-party vendors.

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 not necessary or appropriate in furtherance of the purposes of the Act.

In terms of inter-market competition (the competition among self-regulatory organizations), the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. Approval of the proposal does not impose any burden on the ability of other exchanges to compete. As noted above, time synchronization services are offered by other vendors and any exchange has the ability to offer such services if it so chooses.

Nothing in the proposal burdens intra-market competition (the competition among consumers of exchange data) because the GPS antenna is available to any co-location customer under the same fees as any other co-location customer, and any co-location customer that wishes to purchase a GPS antenna can do so on a non-discriminatory basis.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[19] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include file number SR–GEMX–2023–17 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–GEMX–2023–17. 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,

[17] Of the Exchange's co-location customers that subscribe to the Service, approximately 9% of such co-location customers purchase both the dedicated and the shared options of the Service.

[18] In offering the Service as a convenience to firms, the Exchange incurs certain costs, including costs related to the data center facility, hardware and equipment, and personnel.

[19] 15 U.S.C. 78s(b)(3)(A)(ii).

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–GEMX–2023–17 and should be submitted on or before January 5, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–27525 Filed 12–14–23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99138; File No. SR–EMERALD–2023–30]

Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Modify Certain Connectivity and Port Fees

December 11, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 27, 2023, MIAX Emerald, LLC (''MIAX Emerald'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the MIAX Emerald Options Exchange Fee Schedule (the ''Fee Schedule'') to amend certain connectivity and port fees.

The text of the proposed rule change is available on the Exchange's website at *https://www.miaxglobal.com/markets/us-options/emerald-options/rule-filings,* at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule as follows: (1) increase the fees for a 10 gigabit (''Gb'') ultra-low latency (''ULL'') fiber connection for Members[3] and non-Members; and (2) amend the monthly port fee for additional Limited Service MIAX Emerald Express Interface (''MEI'') Ports[4] available to Market Makers.[5] The Exchange last increased the fees for both 10Gb ULL fiber connections and Limited Service MEI Ports beginning with a series of filings on October 1, 2020 (with the final filing made on March 24, 2021).[6] Prior to that fee change, the Exchange provided Limited Service MEI Ports for $50 per port, after the first two Limited Service MEI Ports that are provided free of charge, and the Exchange incurred all the costs associated to provide those first two Limited Service MEI Ports since it commenced operations in March 2019. The Exchange then increased the fee by $50 to a modest $100 fee per Limited Service MEI Port and increased the fee for 10Gb ULL fiber connections from $6,000 to $10,000 per month.

Also, in that fee change, the Exchange adopted fees for providing five different types of ports for the first time. These ports were FIX Ports, MEI Ports, Clearing Trade Drop Ports, FIX Drop Copy Ports, and Purge Ports.[7] Again, the Exchange absorbed all costs associated with providing these ports since its launch in March 2019. As explained in that filing, expenditures, as well as research and development (''R&D'') in numerous areas resulted in a material increase in expense to the Exchange and were the primary drivers for that proposed fee change. In that filing, the Exchange allocated a total of $9.3 million in expenses to providing 10Gb ULL fiber connectivity, additional Limited Service MEI Ports, FIX Ports, MEI Ports, Clearing Trade Drop Ports, FIX Drop Copy Ports, and Purge Ports.[8]

Since the time of the 2021 increase discussed above, the Exchange experienced ongoing increases in expenses, particularly internal expenses.[9] As discussed more fully below, the Exchange recently calculated increased annual aggregate costs of $11,361,586 for providing 10Gb ULL connectivity and $1,779,066 for providing Limited Service MEI Ports.

Much of the cost relates to monitoring and analysis of data and performance of the network via the subscriber's connection with nanosecond granularity, and continuous improvements in network performance with the goal of improving the subscriber's experience. The costs associated with maintaining and enhancing a state-of-the-art network is a significant expense for the Exchange, and thus the Exchange believes that it is reasonable and appropriate to help offset those increased costs by amending fees for connectivity services. Subscribers expect the Exchange to provide this level of support so they

[20] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[4] The MIAX Emerald Express Interface (''MEI'') is a connection to the MIAX Emerald System that enables Market Makers to submit simple and complex electronic quotes to MIAX Emerald. *See* the Definitions Section of the Fee Schedule.

[5] The term ''Market Makers'' refers to Lead Market Makers (''LMMs''), Primary Lead Market Makers (''PLMMs''), and Registered Market Makers (''RMMs'') collectively. *See* the Definitions Section of the Fee Schedule and Exchange Rule 100. For purposes of Limit Service MEI Ports, Market Makers also include firms that engage in other types of liquidity activity, such as seeking to remove resting liquidity from the Exchange's Book.

[6] *See* Securities Exchange Act Release Nos. 91460 (April 1, 2021), 86 FR 18349 (April 8, 2021) (SR–EMERALD–2021–11); 90184 (October 14, 2020), 85 FR 66636 (October 20, 2020) (SR–EMERALD–2020–12); 90600 (December 8, 2020), 85 FR 80831 (December 14, 2020) (SR–EMERALD–2020–17); 91032 (February 1, 2021), 86 FR 8428 (February 5, 2021) (SR–EMERALD–2021–02); *and* 91200 (February 24, 2021), 86 FR 12221 (March 2, 2021) (SR–EMERALD–2021–07).

[7] *See id.* for a description of each of these ports.

[8] *Id.*

[9] For example, the New York Stock Exchange, Inc.'s (''NYSE'') Secure Financial Transaction Infrastructure (''SFTI'') network, which contributes to the Exchange's connectivity cost, increased its fees by approximately 9% since 2021. Similarly, since 2021, the Exchange, and its affiliates, experienced an increase in data center costs of approximately 17% and an increase in hardware and software costs of approximately 19%. These percentages are based on the Exchange's actual 2021 and proposed 2023 budgets.

continue to receive the performance they expect. This differentiates the Exchange from its competitors.

The Exchange now proposes to amend the Fee Schedule to amend the fees for 10Gb ULL connectivity and Limited Service MEI Ports in order to recoup ongoing costs and increase in expenses set forth below in the Exchange's cost analysis. The Exchange initially filed this proposal on December 30, 2022 as SR–EMERALD–2022–38. On January 9, 2023, the Exchange withdrew SR–EMERALD–2022–38 and resubmitted this proposal as SR–EMERALD–2023–01 (the ''Initial Proposal'').[10] On, February 23, 2023, the Exchange withdrew the Initial Proposal and replaced it with a revised proposal (SR–EMERALD–2023–05) (the ''Second Proposal'').[11] On April 20, 2023, the Exchange withdrew the Second Proposal and replaced it with a revised proposal (SR–EMERALD–2023–12) (the ''Third Proposal'').[12] On June 16, 2023, the Exchange withdrew the Third Proposal and replaced it with a revised proposal (SR–EMERALD–2023–14) (the ''Fourth Proposal'').[13] On August 8, 2023, the Exchange withdrew the Fourth Proposal and replaced it with a revised proposal (SR–EMERALD–2023–19) (the ''Fifth Proposal'').[14] Since a U.S. government shutdown was avoided, on October 2, 2023, the Exchange withdrew the Fifth Proposal and replaced it with a further revised proposal (SR–EMERALD–2023–27) (the ''Sixth Proposal'').[15] On November 27, 2023, the Exchange withdrew the Sixth Proposal and replaced it with this further revised proposal (SR–EMERALD–2023–30) (the ''Seventh Proposal'').

The Exchange previously included a cost analysis in the Initial, Second, Third, Fourth, Fifth, and Sixth Proposals. As described more fully below, the Exchange provides an updated cost analysis that includes, among other things, additional descriptions of how the Exchange allocated costs among it and its affiliated exchanges (MIAX PEARL, LLC (''MIAX Pearl'') (separately among MIAX Pearl Options and MIAX Pearl Equities) and MIAX [16] (together with MIAX Pearl Options and MIAX Pearl Equities, the ''affiliated markets'')) to ensure no cost was allocated more than once, as well as additional detail supporting its cost allocation processes and explanations as to why a cost allocation in this proposal may differ from the same cost allocation in a similar proposal submitted by one of its affiliated markets. The Exchange continues to propose fees that are intended to cover the Exchange's cost of providing 10Gb ULL connectivity and Limited Service MEI Ports with a reasonable mark-up over those costs.

* * * * *

Starting in 2017, following the United States Court of Appeals for the District of Columbia's *Susquehanna Decision* [17] and various other developments, the Commission began to undertake a heightened review of exchange filings, including non-transaction fee filings that was substantially and materially different from it prior review process (hereinafter referred to as the ''Revised Review Process''). In the *Susquehanna Decision,* the D.C. Circuit Court stated that the Commission could not maintain a practice of ''unquestioning reliance'' on claims made by a self-regulatory organization (''SRO'') in the course of filing a rule or fee change with the Commission.[18] Then, on October 16, 2018, the Commission issued an opinion in *Securities Industry and Financial Markets Association* finding that exchanges failed both to establish that the challenged fees were constrained by significant competitive forces and that these fees were consistent with the Act.[19] On that same day, the Commission issued an order remanding to various exchanges and national market system (''NMS'') plans challenges to over 400 rule changes and plan amendments that were asserted in 57 applications for review (the ''Remand Order'').[20] The Remand Order directed the exchanges to ''develop a record,'' and to ''explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review.'' [21] The Commission denied requests by various exchanges and plan participants for reconsideration of the Remand Order.[22] However, the Commission did extend the deadlines in the Remand Order ''so that they d[id] not begin to run until the resolution of the appeal of the SIFMA Decision in the D.C. Circuit and the issuance of the court's mandate.'' [23] Both the Remand Order and the Order Denying Reconsideration were appealed to the D.C. Circuit.

While the above appeal to the D.C. Circuit was pending, on March 29, 2019, the Commission issued an order disapproving a proposed fee change by BOX Exchange LLC (''BOX'') to establish connectivity fees (the ''BOX Order''), which significantly increased the level of information needed for the Commission to believe that an exchange's filing satisfied its obligations under the Act with respect to changing a fee.[24] Despite approving hundreds of

[10] *See* Securities Exchange Act Release No. 96628 (January 10, 2023), 88 FR 2651 (January 17, 2023) (SR–EMERALD–2023–01).

[11] *See* Securities Exchange Act Release No. 97079 (March 8, 2023), 88 FR 15764 (March 14, 2023) (SR–EMERALD–2023–05).

[12] *See* Securities Exchange Act Release No. 97422 (May 2, 2023), 88 FR 29750 (May 8, 2023) (SR–EMERALD–2023–12).

[13] The Exchange met with Commission Staff to discuss the Third Proposal during which the Commission Staff provided feedback and requested additional information, including, most recently, information about total costs related to certain third party vendors. Such vendor cost information is subject to confidentiality restrictions. The Exchange provided this information to Commission Staff under separate cover with a request for confidentiality. While the Exchange will continue to be responsive to Commission Staff's information requests, the Exchange believes that the Commission should, at this point, issue substantially more detailed guidance for exchanges to follow in the process of pursuing a cost-based approach to fee filings, and that, for the purposes of fair competition, detailed disclosures by exchanges, such as those that the Exchange is providing now, should be consistent across all exchanges, including for those that have resisted a cost-based approach to fee filings, in the interests of fair and even disclosure and fair competition. *See* Securities Exchange Act Release No. 97813 (June 27, 2023), 88 FR 42785 (July 3, 2023) (SR–EMERALD–2023–14).

[14] *See* Securities Exchange Act Release No. 98176 (August 21, 2023), 88 FR 58341 (August 25, 2023) (SR–EMERALD–2023–19). Due to the prospect of a U.S. government shutdown, the Commission suspended the Fifth Proposal on September 29, 2023. *See* Securities Exchange Act Release No. 98656 (September 29, 2023) (SR–EMERALD–2023–19).

[15] *See* Securities Exchange Act Release No. 98751 (October 13, 2023), 88 FR 72174 (October 19, 2023) (SR–EMERALD–2023–27).

[16] The term ''MIAX'' means Miami International Securities Exchange, LLC. *See* Exchange Rule 100.

[17] *See Susquehanna International Group, LLP* v. *Securities & Exchange Commission,* 866 F.3d 442 (D.C. Circuit 2017) (the ''Susquehanna Decision'').

[18] *Id.*

[19] *See Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 84432, 2018 WL 5023228 (October 16, 2018) (the ''SIFMA Decision'').

[20] *See Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 84433, 2018 WL 5023230 (Oct. 16, 2018). *See* 15 U.S.C. 78k-1, 78s; *see also* Rule 608(d) of Regulation NMS, 17 CFR 242.608(d) (asserted as an alternative basis of jurisdiction in some applications).

[21] *Id.* at page 2.

[22] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 85802, 2019 WL 2022819 (May 7, 2019) (the ''Order Denying Reconsideration'').

[23] Order Denying Reconsideration, 2019 WL 2022819, at *13.

[24] *See* Securities Exchange Act Release No. 85459 (March 29, 2019), 84 FR 13363 (April 4, 2019) (SR–BOX–2018–24, SR–BOX–2018–37, and SR–BOX–2019–04) (Order Disapproving Proposed Rule Changes to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network). The Commission noted in the BOX Order that it ''historically applied a 'market-based' test in its assessment of market data fees, which [the Commission] believe[s] present similar issues as the connectivity fees proposed herein.'' *Id.* at page 16. Despite this admission, the Commission disapproved BOX's proposal to begin charging

Continued

access fee filings in the years prior to the BOX Order (described further below) utilizing a ''market-based'' test, the Commission changed course and disapproved BOX's proposal to begin charging connectivity at one-fourth the rate of competing exchanges' pricing.

Also while the above appeal was pending, on May 21, 2019, the Commission Staff issued guidance ''to assist the national securities exchanges and FINRA . . . in preparing Fee Filings that meet their burden to demonstrate that proposed fees are consistent with the requirements of the Securities Exchange Act.'' [25] In the Staff Guidance, the Commission Staff states that, ''[a]s an initial step in assessing the reasonableness of a fee, staff considers whether the fee is constrained by significant competitive forces.'' [26] The Staff Guidance also states that, ''. . . even where an SRO cannot demonstrate, or does not assert, that significant competitive forces constrain the fee at issue, a cost-based discussion may be an alternative basis upon which to show consistency with the Exchange Act.'' [27]

Following the BOX Order and Staff Guidance, on August 6, 2020, the D.C. Circuit vacated the Commission's SIFMA Decision in *NASDAQ Stock Market, LLC* v. *SEC* [28] and remanded for further proceedings consistent with its opinion.[29] That same day, the D.C. Circuit issued an order remanding the Remand Order to the Commission for reconsideration in light of *NASDAQ.* The court noted that the Remand Order required the exchanges and NMS plan participants to consider the challenges that the Commission had remanded in light of the SIFMA Decision. The D.C. Circuit concluded that because the SIFMA Decision ''has now been vacated, the basis for the [Remand Order] has evaporated.'' [30] Accordingly, on August 7, 2020, the Commission vacated the Remand Order and ordered the parties to file briefs addressing whether the holding in *NASDAQ* v. *SEC* that Exchange Act Section 19(d) does not permit challenges to generally applicable fee rules requiring dismissal of the challenges the Commission previously remanded.[31] The Commission further invited ''the parties to submit briefing stating whether the challenges asserted in the applications for review . . . should be dismissed, and specifically identifying any challenge that they contend should not be dismissed pursuant to the holding of *Nasdaq* v. *SEC.*'' [32] Without resolving the above issues, on October 5, 2020, the Commission issued an order granting SIFMA and Bloomberg's request to withdraw their applications for review and dismissed the proceedings.[33]

As a result of the Commission's loss of the *NASDAQ vs. SEC* case noted above, the Commission never followed through with its intention to subject the over 400 fee filings to ''develop a record,'' and to ''explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review.'' [34] As such, all of those fees remained in place and amounted to a baseline set of fees for those exchanges that had the benefit of getting their fees in place before the Commission Staff's fee review process materially changed. The net result of this history and lack of resolution in the D.C. Circuit Court resulted in an uneven competitive landscape where the Commission subjects all new non-transaction fee filings to the new Revised Review Process, while allowing the previously challenged fee filings, mostly submitted by incumbent exchanges prior to 2019, to remain in effect and not subject to the ''record'' or ''review'' earlier intended by the Commission.

While the Exchange appreciates that the Staff Guidance articulates an important policy goal of improving disclosures and requiring exchanges to justify that their market data and access fee proposals are fair and reasonable, the practical effect of the Revised Review Process, Staff Guidance, and the Commission's related practice of continuous suspension of new fee filings, is anti-competitive, discriminatory, and has put in place an un-level playing field, which has negatively impacted smaller, nascent, non-legacy exchanges (''non-legacy exchanges''), while favoring larger, incumbent, entrenched, legacy exchanges (''legacy exchanges'').[35] The legacy exchanges all established a significantly higher baseline for access and market data fees prior to the Revised Review Process. From 2011 until the issuance of the Staff Guidance in 2019, national securities exchanges filed, and the Commission Staff did not abrogate or suspend (allowing such fees to become effective), at least 92 filings [36] to amend exchange connectivity or port fees (or similar access fees). The support for each of those filings was a simple statement by the relevant exchange that the fees were constrained by competitive forces.[37] These fees remain in effect today.

The net result is that the non-legacy exchanges are effectively now blocked by the Commission Staff from adopting or increasing fees to amounts comparable to the legacy exchanges (which were not subject to the Revised Review Process and Staff Guidance), despite providing enhanced disclosures

$5,000 per month for 10Gb connections (while allowing legacy exchanges to charge rates equal to 3–4 times that amount utilizing ''market-based'' fee filings from years prior).

[25] See Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019), available at *h*ttps://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees (the ''Staff Guidance'').

[26] *Id.*

[27] *Id.*

[28] *NASDAQ Stock Mkt., LLC* v. *SEC,* No. 18–1324,----Fed. App'x----, 2020 WL 3406123 (D.C. Cir. June 5, 2020). The court's mandate was issued on August 6, 2020.

[29] *Nasdaq* v. *SEC,* 961 F.3d 421, at 424, 431 (D.C. Cir. 2020). The court's mandate issued on August 6, 2020. The D.C. Circuit held that Exchange Act ''Section 19(d) is not available as a means to challenge the reasonableness of generally-applicable fee rules.'' *Id.* The court held that ''for a fee rule to be challengeable under Section 19(d), it must, at a minimum, be targeted at specific individuals or entities.'' *Id.* Thus, the court held that ''Section 19(d) is not an available means to challenge the fees at issue'' in the SIFMA Decision. *Id.*

[30] *Id.* at *2; *see also id.* (''[T]he sole purpose of the challenged remand has disappeared.'').

[31] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 89504, 2020 WL 4569089 (August 7, 2020) (the ''Order Vacating Prior Order and Requesting Additional Briefs'').

[32] *Id.*

[33] *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 90087 (October 5, 2020).

[34] *See supra* note 29, at page 2.

[35] Commission Chair Gary Gensler recently reiterated the Commission's mandate to ensure competition in the equities markets. *See* ''Statement on Minimum Price Increments, Access Fee Caps, Round Lots, and Odd-Lots'', by Chair Gary Gensler, dated December 14, 2022 (stating ''[i]n 1975, Congress tasked the Securities and Exchange Commission with responsibility to facilitate the establishment of the national market system and *enhance competition in the securities markets, including the equity markets*'' (*emphasis added*)). In that same statement, Chair Gary Gensler cited the five objectives laid out by Congress in 11A of the Exchange Act (15 U.S.C. 78k–1), including ensuring ''fair competition among brokers and dealers, among exchange markets, and *between exchange markets* and markets other than exchange markets. . .'' (*emphasis added*). *Id.* at note 1. *See also* Securities Acts Amendments of 1975, *available at https://www.govtrack.us/congress/bills/94/s249.*

[36] This timeframe also includes challenges to over 400 rule filings by SIFMA and Bloomberg discussed above. *Sec. Indus. & Fin. Mkts. Ass'n,* Securities Exchange Act Release No. 84433, 2018 WL 5023230 (Oct. 16, 2018). Those filings were left to stand, while at the same time, blocking newer exchanges from the ability to establish competitive access and market data fees. *See The Nasdaq Stock Market, LLC* v. *SEC,* Case No. 18–1292 (D.C. Cir. June 5, 2020). The expectation at the time of the litigation was that the 400 rule flings challenged by SIFMA and Bloomberg would need to be justified under revised review standards.

[37] *See, e.g.,* Securities Exchange Act Release Nos. 74417 (March 3, 2015), 80 FR 12534 (March 9, 2015) (SR–ISE–2015–06); 83016 (April 9, 2018), 83 FR 16157 (April 13, 2018) (SR–PHLX–2018–26); 70285 (August 29, 2013), 78 FR 54697 (September 5, 2013) (SR–NYSEMKT–2013–71); 76373 (November 5, 2015), 80 FR 70024 (November 12, 2015) (SR–NYSEMKT–2015–90); 79729 (January 4, 2017), 82 FR 3061 (January 10, 2017) (SR–NYSEARCA–2016–172).

and rationale to support their proposed fee changes that far exceed any such support provided by legacy exchanges. Simply put, legacy exchanges were able to increase their non-transaction fees during an extended period in which the Commission applied a ''market-based'' test that only relied upon the assumed presence of significant competitive forces, while exchanges today are subject to a cost-based test requiring extensive cost and revenue disclosures, a process that is complex, inconsistently applied, and rarely results in a successful outcome, *i.e.,* non-suspension. The Revised Review Process and Staff Guidance changed decades-long Commission Staff standards for review, resulting in unfair discrimination and placing an undue burden on inter-market competition between legacy exchanges and non-legacy exchanges.

Commission Staff now require exchange filings, including from non-legacy exchanges such as the Exchange, to provide detailed cost-based analysis in place of competition-based arguments to support such changes. However, even with the added detailed cost and expense disclosures, the Commission Staff continues to either suspend such filings and institute disapproval proceedings, or put the exchanges in the unenviable position of having to repeatedly withdraw and re-file with additional detail in order to continue to charge those fees.[38] By impeding any path forward for non-legacy exchanges to establish commensurate non-transaction fees, or by failing to provide any alternative means for smaller markets to establish ''fee parity'' with legacy exchanges, the Commission is stifling competition: non-legacy exchanges are, in effect, being deprived of the revenue necessary to compete on a level playing field with legacy exchanges. This is particularly harmful, given that the costs to maintain exchange systems and operations continue to increase. The Commission Staff's change in position impedes the ability of non-legacy exchanges to raise revenue to invest in their systems to compete with the legacy exchanges who already enjoy disproportionate non-transaction fee based revenue. For example, the Cboe Exchange, Inc. (''Cboe'') reported ''access and capacity fee'' revenue of $70,893,000 for 2020[39] and $80,383,000 for 2021.[40] Cboe C2 Exchange, Inc. (''C2'') reported ''access and capacity fee'' revenue of $19,016,000 for 2020[41] and $22,843,000 for 2021.[42] Cboe BZX Exchange, Inc. (''BZX'') reported ''access and capacity fee'' revenue of $38,387,000 for 2020[43] and $44,800,000 for 2021.[44] Cboe EDGX Exchange, Inc. (''EDGX'') reported ''access and capacity fee'' revenue of $26,126,000 for 2020[45] and $30,687,000 for 2021.[46] For 2021, the affiliated Cboe, C2, BZX, and EDGX (the four largest exchanges of the Cboe exchange group) reported $178,712,000 in ''access and capacity fees'' in 2021. NASDAQ Phlx, LLC (''NASDAQ Phlx'') reported ''Trade Management Services'' revenue of $20,817,000 for 2019.[47] The Exchange notes it is unable to compare ''access fee'' revenues with NASDAQ Phlx (or other affiliated NASDAQ exchanges) because after 2019, the ''Trade Management Services'' line item was bundled into a much larger line item in PHLX's Form 1, simply titled ''Market services.''[48]

The much higher non-transaction fees charged by the legacy exchanges provides them with two significant competitive advantages. First, legacy exchanges are able to use their additional non-transaction revenue for investments in infrastructure, vast marketing and advertising on major media outlets,[49] new products and other innovations. Second, higher non-transaction fees provide the legacy exchanges with greater flexibility to lower their transaction fees (or use the revenue from the higher non-transaction fees to subsidize transaction fee rates),[50] which are more immediately impactful in competition for order flow and market share, given the variable nature of this cost on member firms. The prohibition of a reasonable path forward denies the Exchange (and other non-legacy exchanges) this flexibility, eliminates the ability to remain competitive on transaction fees, and hinders the ability to compete for order flow and market share with legacy exchanges. There is little doubt that subjecting one exchange to a materially different standard than that historically applied to legacy exchanges for non-transaction fees leaves that exchange at a disadvantage in its ability to compete with its pricing of transaction fees.

While the Commission has clearly noted that the Staff Guidance is merely guidance and ''is not a rule, regulation or statement of the . . . Commission . . . the Commission has neither approved nor disapproved its content . . .'',[51] this is not the reality experienced by exchanges such as MIAX Emerald. As such, non-legacy exchanges are forced to rely on an opaque cost-based justification standard. However, because the Staff Guidance is devoid of detail on what must be contained in cost-based justification, this standard is nearly impossible to meet despite repeated good-faith efforts by the Exchange to provide substantial amount of cost-related details. For example, the Exchange has attempted to increase fees using a cost-based justification numerous times, having submitted over

[38] The Exchange has filed, and subsequently withdrawn, various forms of this proposed fee numerous times since August 2021 with each proposal containing hundreds of cost and revenue disclosures never previously disclosed by legacy exchanges in their access and market data fee filings prior to 2019.

[39] According to Cboe's 2021 Form 1 Amendment, access and capacity fees represent fees assessed for the opportunity to trade, including fees for trading-related functionality. *See* Cboe 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000465.pdf.*

[40] *See* Cboe 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001155.pdf.*

[41] *See* C2 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000469.pdf.*

[42] *See* C2 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001156.pdf.*

[43] *See* BZX 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000465.pdf.*

[44] *See* BZX 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001152.pdf.*

[45] *See* EDGX 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000467.pdf.*

[46] *See* EDGX 2022 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001154.pdf.*

[47] According to PHLX, ''Trade Management Services'' includes ''a wide variety of alternatives for connectivity to and accessing [the PHLX] markets for a fee. These participants are charged monthly fees for connectivity and support in accordance with [PHLX's] published fee schedules.'' *See* PHLX 2020 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2001/20012246.pdf.*

[48] *See* PHLX 2021 Form 1 Amendment, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000475.pdf.* The Exchange notes that this type of Form 1 accounting appears to be designed to obfuscate the true financials of such exchanges and has the effect of perpetuating fee and revenue advantages of legacy exchanges.

[49] *See, e.g., CNBC Debuts New Set on NYSE Floor, available at https://www.cnbc.com/id/46517876.*

[50] *See, e.g.,* Cboe Fee Schedule, Page 4, Affiliate Volume Plan, *available at https://cdn.cboe.com/resources/membership/Cboe_FeeSchedule.pdf* (providing that if a market maker or its affiliate receives a credit under Cboe's Volume Incentive Program (''VIP''), the market maker will receive an access credit on their BOE Bulk Ports corresponding to the VIP tier reached and the market maker will receive a transaction fee credit on their sliding scale market maker transaction fees) *and* NYSE American Options Fee Schedule, Section III, E, Floor Broker Incentive and Rebate Programs, *available at https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE_American_Options_Fee_Schedule.pdf* (providing floor brokers the opportunity to prepay certain non-transaction fees for the following calendar year by achieving certain amounts of volume executed on NYSE American).

[51] *See supra* note 25, at note 1.

six filings.[52] However, despite providing 100+ page filings describing in extensive detail its costs associated with providing the services described in the filings, Commission Staff continues to suspend such filings, with the rationale that the Exchange has not provided sufficient detail of its costs and without ever being precise about what additional data points are required. The Commission Staff appears to be interpreting the reasonableness standard set forth in Section 6(b)(4) of the Act[53] in a manner that is not possible to achieve. This essentially nullifies the cost-based approach for exchanges as a legitimate alternative as laid out in the Staff Guidance. By refusing to accept a reasonable cost-based argument to justify non-transaction fees (in addition to refusing to accept a competition-based argument as described above), or by failing to provide the detail required to achieve that standard, the Commission Staff is effectively preventing non-legacy exchanges from making any non-transaction fee changes, which benefits the legacy exchanges and is anticompetitive to the non-legacy exchanges. This does not meet the fairness standard under the Act and is discriminatory.

Because of the un-level playing field created by the Revised Review Process and Staff Guidance, the Exchange believes that the Commission Staff, at this point, should either (a) provide sufficient clarity on how its cost-based standard can be met, including a clear and exhaustive articulation of required data and its views on acceptable margins,[54] to the extent that this is pertinent; (b) establish a framework to provide for commensurate non-transaction based fees among competing exchanges to ensure fee parity;[55] or (c) accept that certain competition-based arguments are applicable given the linkage between non-transaction fees and transaction fees, especially where non-transaction fees among exchanges are based upon disparate standards of review, lack parity, and impede fair competition. Considering the absence of any such framework or clarity, the Exchange believes that the Commission does not have a reasonable basis to deny the Exchange this change in fees, where the proposed change would result in fees meaningfully lower than comparable fees at competing exchanges and where the associated non-transaction revenue is meaningfully lower than competing exchanges.

In light of the above, disapproval of this would not meet the fairness standard under the Act, would be discriminatory and places a substantial burden on competition. The Exchange would be uniquely disadvantaged by not being able to increase its access fees to comparable levels (or lower levels than current market rates) to those of other options exchanges for connectivity. If the Commission Staff were to disapprove this proposal, that action, and not market forces, would substantially affect whether the Exchange can be successful in its competition with other options exchanges. Disapproval of this filing could also be viewed as an arbitrary and capricious decision should the Commission Staff continue to ignore its past treatment of non-transaction fee filings before implementation of the Revised Review Process and Staff Guidance and refuse to allow such filings to be approved despite significantly enhanced arguments and cost disclosures.[56]

* * * * *

10Gb ULL Connectivity Fee Change

The Exchange proposes to amend the Fee Schedule to increase the fees for Members and non-Members to access the Exchange's system networks[57] via a 10Gb ULL fiber connection. Specifically, the Exchange proposes to amend Sections 5)a)–b) of the Fee Schedule to increase the 10Gb ULL connectivity fee for Members and non-Members from $10,000 per month to $13,500 per month (''10Gb ULL Fee'').[58]

The Exchange will continue to assess monthly Member and non-Member network connectivity fees for connectivity to the primary and secondary facilities in any month the Member or non-Member is credentialed to use any of the Exchange APIs or market data feeds in the production environment. The Exchange will continue to pro-rate the fees when a Member or non-Member makes a change to the connectivity (by adding or deleting connections) with such pro-rated fees based on the number of trading days that the Member or non-Member has been credentialed to utilize any of the Exchange APIs or market data feeds in the production environment through such connection, divided by the total number of trading days in such month multiplied by the applicable monthly rate.

Limited Service MEI Ports

Background

The Exchange also proposes to amend Section 5)d) of the Fee Schedule to amend the monthly port fee for Limited Service MEI Ports available to Market Makers.[59] The Exchange currently allocates two (2) Full Service MEI

[52] *See* Securities Exchange Act Release Nos. 94889 (May 11, 2022), 87 FR 29928 (May 17, 2022) (SR–EMERALD–2022–19); 94718 (April 14, 2022), 87 FR 23633 (April 20, 2022) (SR–EMERALD–2022–15); 94717 (April 14, 2022), 87 FR 23648 (April 20, 2022) (SR–EMERALD–2022–13); 94260 (February 15, 2022), 87 FR 9695 (February 22, 2022) (SR–EMERALD–2022–05); 94257 (February 15, 2022), 87 FR 9678 (February 22, 2022) (SR–EMERALD–2022–04); 93772 (December 14, 2021), 86 FR 71965 (December 20, 2021) (SR–EMERALD–2021–43); 93776 (December 14, 2021), 86 FR 71983 (December 20, 2021) (SR–EMERALD–2021–42); 93188 (September 29, 2021), 86 FR 55052 (October 5, 2021) (SR–EMERALD–2021–31); (SR–EMERALD–2021–30) (withdrawn without being noticed by the Commission); 93166 (September 28, 2021), 86 FR 54760 (October 4, 2021) (SR–EMERALD–2021–29); 92662 (August 13, 2021), 86 FR 46726 (August 19, 2021) (SR–EMERALD–2021–25); 92645 (August 11, 2021), 86 FR 46048 (August 17, 2021) (SR–EMERALD–2021–23).

[53] 15 U.S.C. 78f(b)(4).

[54] To the extent that the cost-based standard includes Commission Staff making determinations as to the appropriateness of certain profit margins, the Exchange believes that Staff should be clear as to what they determine is an appropriate profit margin.

[55] In light of the arguments above regarding disparate standards of review for historical legacy non-transaction fees and current non-transaction fees for non-legacy exchanges, a fee parity alternative would be one possible way to avoid the current unfair and discriminatory effect of the Staff Guidance and Revised Review Process. *See, e.g., CSA Staff Consultation Paper 21–401, Real-Time Market Data Fees, available at https://www.bcsc.bc.ca/-/media/PWS/Resources/Securities_Law/Policies/Policy2/21401_Market_Data_Fee_CSA_Staff_Consulation_Paper.pdf.*

[56] The Exchange's costs have clearly increased and continue to increase, particularly regarding capital expenditures, as well as employee benefits provided by third parties (*e.g.,* healthcare and insurance). Yet, practically no fee change proposed by the Exchange to cover its ever-increasing costs has been acceptable to the Commission Staff since 2021. The only other fair and reasonable alternative would be to require the numerous fee filings unquestioningly approved before the Staff Guidance and Revised Review Process to ''develop a record,'' and to ''explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review,'' and to ensure a comparable review process with the Exchange's filing.

[57] The Exchange's system networks consist of the Exchange's extranet, internal network, and external network.

[58] Market participants that purchase additional 10Gb ULL connections as a result of this change will not be subject to the Exchange's Member Network Connectivity Testing and Certification Fee under Section 4)c) of the Exchange's Fee Schedule. *See* Section 4)c) of the Exchange's fee schedule *available at https://www.miaxglobal.com/markets/us-options/miax-options/fees* (providing that ''Network Connectivity Testing and Certification Fees will not be assessed in situations where the Exchange initiates a mandatory change to the Exchange's system that requires testing and certification. Member Network Connectivity Testing and Certification Fees will not be assessed for testing and certification of connectivity to the Exchange's Disaster Recovery Facility.'').

[59] The Exchange notes that in its prior filings (the Initial, Second, Third, Fourth and Fifth Proposals), the Exchange proposed to adopt a tiered-pricing structure for Limited Service MEI Ports.

Ports[60] and two (2) Limited Service MEI Ports[61] per matching engine[62] to which each Market Maker connects. Market Makers may also request additional Limited Service MEI Ports for each matching engine to which they connect. The Full Service MEI Ports and Limited Service MEI Ports all include access to the Exchange's primary and secondary data centers and its disaster recovery center. Market Makers may request additional Limited Service MEI Ports. Prior to the Exchange's proposals to adopt a tiered fee structure for Limited Service MEI Ports, Market Makers were assessed a $100 monthly fee for each Limited Service MEI Port for each matching engine above the first two Limited Service MEI Ports that are included for free (before the proposals to adopt a tiered fee structure).

Limited Service MEI Port Fee Changes

The Exchange now proposes to amend the monthly fee per Limited Service MEI Port and increase the number of free Limited Service MEI Ports per matching engine from two (2) to four (4). Specifically, the Exchange will now provide the first, second, third and fourth Limited Service MEI Ports for each matching engine free of charge. For additional Limited Service MEI Ports after the first four ports per matching engine that are provided for free (*i.e.,* beginning with the fifth Limited Service MEI Port), the Exchange proposes to increase the monthly fee from $100 to $420 per Limited Service MEI Port per matching engine.[63]

Market Makers that elect to purchase more than the number of Limited Service Ports that are provide for free do so due to the nature of their business and their perceived need for numerous ports to access the Exchange. Meanwhile, Market Makers who utilize the free Limited Service MEI Ports do so based on their business needs.

The Exchange notes that it last proposed to increase its monthly Limited Service MEI Port fees in 2020 (other than the prior proposals to adopt a tiered fee structure for Limited Service MEI Ports),[64] and such increase proposed herein is designed to recover a portion of the ever increasing costs associated with directly accessing the Exchange.

The Exchange also proposes to make corresponding changes to the Definitions section of the Fee Schedule and the paragraph describing the cap on the number of Limited Service MEI Ports each Market Maker may receive in Section 5)d)ii) of the Fee Schedule to account for the proposed change to now provide the first four (4) Limited Service MEI Ports for free per matching engine. Accordingly, the Exchange proposes to amend the last sentence of the paragraph describing the fees for Limited Service MEI Ports in Section 5)d)ii) of the Fee Schedule to now state that Market Makers are limited to ten additional Limited Service MEI Ports per matching engine, for a total of fourteen Limited Service MEI Ports per matching engine.

Implementation

The proposed fee changes are immediately effective.

2. Statutory Basis

The Exchange believes that the proposed fees are consistent with Section 6(b) of the Act[65] in general, and furthers the objectives of Section 6(b)(4) of the Act[66] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among Members and other persons using any facility or system which the Exchange operates or controls. The Exchange also believes the proposed fees further the objectives of Section 6(b)(5) of the Act[67] in that they are designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general protect investors and the public interest and are not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

The Exchange believes that the information provided to justify the proposed fees meets or exceeds the amount of detail required in respect of proposed fee changes under the Revised Review Process and as set forth in recent Staff Guidance. Based on both the BOX Order[68] and the Staff Guidance,[69] the Exchange believes that the proposed fees are consistent with the Act because they are: (i) reasonable, equitably allocated, not unfairly discriminatory, and not an undue burden on competition; (ii) comply with the BOX Order and the Staff Guidance; and (iii) supported by evidence (including comprehensive revenue and cost data and analysis) that they are fair and reasonable and will not result in excessive pricing or supra-competitive profit.

The Exchange believes that exchanges, in setting fees of all types, should meet high standards of transparency to demonstrate why each new fee or fee amendment meets the requirements of the Act that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among market participants. The Exchange believes this high standard is especially important when an exchange imposes various fees for market participants to access an exchange's marketplace.

In the Staff Guidance, the Commission Staff states that, ''[a]s an initial step in assessing the reasonableness of a fee, staff considers whether the fee is constrained by significant competitive forces.''[70] The Staff Guidance further states that, ''. . . even where an SRO cannot demonstrate, or does not assert, that significant competitive forces constrain the fee at issue, a cost-based discussion may be an alternative basis upon which to show consistency with the Exchange Act.''[71] In the Staff Guidance, the Commission Staff further states that, ''[i]f an SRO seeks to support its claims that a proposed fee is fair and reasonable because it will permit recovery of the SRO's costs, . . . , specific information, including quantitative information,

[60] The term ''Full Service MEI Ports'' means a port which provides Market Makers with the ability to send Market Maker simple and complex quotes, eQuotes, and quote purge messages to the MIAX Emerald System. Full Service MEI Ports are also capable of receiving administrative information. Market Makers are limited to two Full Service MEI Ports per Matching Engine. *See* the Definitions Section of the Fee Schedule.

[61] The term ''Limited Service MEI Ports'' means a port which provides Market Makers with the ability to send simple and complex eQuotes and quote purge messages only, but not Market Maker Quotes, to the MIAX Emerald System. Limited Service MEI Ports are also capable of receiving administrative information. Market Makers initially receive two Limited Service MEI Ports per Matching Engine. *See* the Definitions Section of the Fee Schedule.

[62] The term ''Matching Engine'' means a part of the MIAX Emerald electronic system that processes options orders and trades on a symbol-by-symbol basis. Some Matching Engines will process option classes with multiple root symbols, and other Matching Engines may be dedicated to one single option root symbol (for example, options on SPY may be processed by one single Matching Engine that is dedicated only to SPY). A particular root symbol may only be assigned to a single designated Matching Engine. A particular root symbol may not be assigned to multiple Matching Engines. *See* the Definitions Section of the Fee Schedule.

[63] As noted in the Fee Schedule, Market Makers will continue to be limited to fourteen Limited Service MEI Ports per Matching Engine. The Exchange also proposes to make a ministerial clarifying change to remove the defined term ''Additional Limited Service MEI Ports''. The Exchange proposes to make a related change to add the term ''Limited Service MEI Ports'' after the word ''fourteen'' in the Fee Schedule.

[64] *See supra* note 6.

[65] 15 U.S.C. 78f(b).

[66] 15 U.S.C. 78f(b)(4).

[67] 15 U.S.C. 78f(b)(5).

[68] *See supra* note 24.

[69] *See supra* note 25.

[70] *Id.*

[71] *Id.*

should be provided to support that argument.'' [72]

The proposed fees are reasonable because they promote parity among exchange pricing for access, which promotes competition, including in the Exchanges' ability to competitively price transaction fees, invest in infrastructure, new products and other innovations, all while allowing the Exchange to recover its costs to provide dedicated access via 10Gb ULL connectivity and Limited Service MEI Ports. As discussed above, the Revised Review Process and Staff Guidance have created an uneven playing field between legacy and non-legacy exchanges by severely restricting non-legacy exchanges from being able to increase non-transaction related fees to provide them with additional necessary revenue to better compete with legacy exchanges, which largely set fees prior to the Revised Review Process. The much higher non-transaction fees charged by the legacy exchanges provides them with two significant competitive advantages: (i) additional non-transaction revenue that may be used to fund areas other than the non-transaction service related to the fee, such as investments in infrastructure, advertising, new products and other innovations; and (ii) greater flexibility to lower their transaction fees by using the revenue from the higher non-transaction fees to subsidize transaction fee rates. The latter is more immediately impactful in competition for order flow and market share, given the variable nature of this cost on Member firms. The absence of a reasonable path forward to increase non-transaction fees to comparable (or lower rates) limits the Exchange's flexibility to, among other things, make additional investments in infrastructure and advertising, diminishes the ability to remain competitive on transaction fees, and hinders the ability to compete for order flow and market share. Again, there is little doubt that subjecting one exchange to a materially different standard than that applied to other exchanges for non-transaction fees leaves that exchange at a disadvantage in its ability to compete with its pricing of transaction fees.

The Proposed Fees Ensure Parity Among Exchange Access Fees, Which Promotes Competition

The Exchange initially adopted a fee of $50 per port, after the first two Limited Service MEI Ports that are provided free of charge, and the Exchange incurred all the costs associated to provide those first two Limited Service MEI Ports since it commenced operations in March 2019. At that same time, the Exchange only charged $6,000 per month for each 10Gb ULL connection. As a new exchange entrant, the Exchange chose to offer connectivity and ports at very low fees to encourage market participants to trade on the Exchange and experience, among things, the quality of the Exchange's technology and trading functionality. This practice is not uncommon. New exchanges often do not charge fees or charge lower fees for certain services such as memberships/trading permits to attract order flow to an exchange, and later amend their fees to reflect the true value of those services, absorbing all costs to provide those services in the meantime. Allowing new exchange entrants time to build and sustain market share through various pricing incentives before increasing non-transaction fees encourages market entry and fee parity, which promotes competition among exchanges. It also enables new exchanges to mature their markets and allow market participants to trade on the new exchanges without fees serving as a potential barrier to attracting memberships and order flow.[73]

Later in 2020, as the Exchange's market share increased,[74] the Exchange then increased the fee by $50 to a modest $100 fee per Limited Service MEI Port and increased the fee for 10Gb ULL fiber connections from $6,000 to $10,000 per month.[75] The Exchange balanced business and competitive concerns with the need to financially compete with the larger incumbent exchanges that charge higher fees for similar connectivity and use that revenue to invest in their technology and other service offerings.

The proposed changes to the Fee Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces, which constrains its pricing determinations for transaction fees as well as non-transaction fees. The fact that the market for order flow is competitive has long been recognized by the courts. In *NetCoalition* v. *Securities and Exchange Commission,* the D.C. Circuit stated, ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers' . . . .'' [76]

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention to determine prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues, and also recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [77]

Congress directed the Commission to ''rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs

[72] *Id.*

[73] *See* Securities Exchange Act Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR–BOX–2022–17) (stating, ''[t]he Exchange established this lower (when compared to other options exchanges in the industry) Participant Fee in order to encourage market participants to become Participants of BOX. . .''). *See also* Securities Exchange Act Release No. 90076 (October 2, 2020), 85 FR 63620 (October 8, 2020) (SR–MEMX–2020–10) (proposing to adopt the initial fee schedule and stating that ''[u]nder the initial proposed Fee Schedule, the Exchange proposes to make clear that it does not charge any fees for membership, market data products, physical connectivity or application sessions.''). MEMX's market share has increased and recently proposed to adopt numerous non-transaction fees, including fees for membership, market data, and connectivity. *See* Securities Exchange Act Release Nos. 93927 (January 7, 2022), 87 FR 2191 (January 13, 2022) (SR–MEMX–2021–19) (proposing to adopt membership fees); 96430 (December 1, 2022), 87 FR 75083 (December 7, 2022) (SR–MEMX–2022–32) *and* 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26) (proposing to adopt fees for connectivity). *See also, e.g.,* Securities Exchange Act Release No. 88211 (February 14, 2020), 85 FR 9847 (February 20, 2020) (SR–NYSENAT–2020–05), *available at https://www.nyse.com/publicdocs/nyse/markets/nyse-national/rule-filings/filings/2020/SR-NYSENat-2020-05.pdf* (initiating market data fees for the NYSE National exchange after initially setting such fees at zero).

[74] The Exchange experienced a monthly average trading volume of 3.43% for the month of October 2020. *See* the ''Market Share'' section of the Exchange's website, *available at https://www.miaxglobal.com/.*

[75] *See* Securities Exchange Act Release Nos. 91460 (April 1, 2021), 86 FR 18349 (April 8, 2021) (SR–EMERALD–2021–11); 90184 (October 14, 2020), 85 FR 66636 (October 20, 2020) (SR–EMERALD–2020–12); 90600 (December 8, 2020), 85 FR 80831 (December 14, 2020) (SR–EMERALD–2020–17); 91032 (February 1, 2021), 86 FR 8428 (February 5, 2021) (SR–EMERALD–2021–02); *and* 91200 (February 24, 2021), 86 FR 12221 (March 2, 2021) (SR–EMERALD–2021–07).

[76] *See NetCoalition,* 615 F.3d at 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

[77] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

and the national market system.'''[78] As a result, and as evidenced above, the Commission has historically relied on competitive forces to determine whether a fee proposal is equitable, fair, reasonable, and not unreasonably or unfairly discriminatory. ''If competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior.''[79] Accordingly, ''the existence of significant competition provides a substantial basis for finding that the terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.''[80] In the Revised Review Process and Staff Guidance, Commission Staff indicated that they would look at factors beyond the competitive environment, such as cost, only if a ''proposal lacks persuasive evidence that the proposed fee is constrained by significant competitive forces.''[81]

The Exchange believes the competing exchanges' 10Gb connectivity and port fees are useful examples of alternative approaches to providing and charging for access and demonstrating how such fees are competitively set and constrained. To that end, the Exchange believes the proposed fees are competitive and reasonable because the proposed fees are similar to or less than fees charged for similar connectivity and port access provided by other options exchanges with comparable market shares. As such, the Exchange believes that denying its ability to institute fees that allow the Exchange to recoup its costs with a reasonable margin in a manner that is closer to parity with legacy exchanges, in effect, impedes its ability to compete, including in its pricing of transaction fees and ability to invest in competitive infrastructure and other offerings.

The following table shows how the Exchange's proposed fees remain similar to or less than fees charged for similar connectivity and port access provided by other options exchanges with similar market share. Each of the connectivity or port rates in place at competing options exchanges were filed with the Commission for immediate effectiveness and remain in place today.

Exchange	Type of connection or port	Monthly fee (per connection or per port)
MIAX Emerald (as proposed) (equity options market share of 2.69% for the month of August 2023)[a].	10Gb ULL connection	$13,500.
	Limited Service MEI Ports	1–4 ports: FREE. 5 or more ports: $420 each.
NASDAQ[b] (equity options market share of 5.80% for the month of August 2023)[c].	10Gb Ultra fiber connection	$15,000 per connection.
	SQF Port	1–5 ports: $1,500 per port. 6–20 ports: $1,000 per port. 21 or more ports: $500 per port.
NASDAQ ISE LLC (''ISE'')[d] (equity options market share of 5.58% for the month of August 2023)[e].	10Gb Ultra fiber connection	$15,000 per connection.
	SQF Port[f]	$1,100 per port.
NYSE American LLC (''NYSE American'')[g] (equity options market share of 7.34% for the month of August 2023)[h].	10Gb LX LCN connection	$22,000 per connection.
	Order/Quote Entry Port	1–40 Ports: $450 per port. 41 or more Ports: $150 per port.
NASDAQ GEMX, LLC (''GEMX'')[i] (equity options market share of 3.03% for the month of August 2023)[j].	10Gb Ultra connection	$15,000 per connection.
	SQF Port	$1,250 per port.

[a] *See* the ''Market Share'' section of the Exchange's website, *available at https://www.miaxglobal.com/.*
[b] *See* NASDAQ Pricing Schedule, Options 7, Section 3, Ports and Other Services *and* NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.
[c] *See supra* note a.
[d] *See* ISE Pricing Schedule, Options 7, Section 7, Connectivity Fees *and* ISE Rules, General 8: Connectivity.
[e] *See supra* note a.
[f] Similar to the Exchange's MEI Ports, SQF ports are primarily utilized by Market Makers.
[g] *See* NYSE American Options Fee Schedule, Section V.A. Port Fees *and* Section V.B. Co-Location Fees.
[h] *See supra* note a.
[i] *See* GEMX Pricing Schedule, Options 7, Section 6, Connectivity Fees *and* GEMX Rules, General 8: Connectivity.
[J] *See supra* note a.

There is no requirement, regulatory or otherwise, that any broker-dealer connect to and access any (or all of) the available options exchanges. Market participants may choose to become a member of one or more options exchanges based on the market participant's assessment of the business opportunity relative to the costs of the Exchange. With this, there is elasticity of demand for exchange membership. As an example, the Exchange's affiliate, MIAX Pearl Options, experienced a decrease in membership as the result of similar fees proposed herein. One MIAX Pearl Options Market Maker terminated their MIAX Pearl Options membership effective January 1, 2023, as a direct result of the proposed connectivity and port fee changes proposed by MIAX Pearl Options.

It is not a requirement for market participants to become members of all options exchanges; in fact, certain market participants conduct an options business as a member of only one options market.[82] A very small number

[78] *See NetCoalition,* 615 F.3d at 534–35; see also H.R. Rep. No. 94–229 at 92 (1975) (''[I]t is the intent of the conferees that the national market system evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed.'').

[79] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74,770 (December 9, 2008) (SR–NYSEArca–2006–21).

[80] *Id.*

[81] *See* Staff Guidance, *supra* note 25.

[82] BOX recently adopted an electronic market maker trading permit fee. *See* Securities Exchange Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR–BOX–2022–17). In that proposal, BOX stated that, ''. . . it is not aware of any reason why Market Makers could not simply drop their access to an exchange (or not initially access an exchange) if an exchange were to establish prices for its non-transaction fees that, in the determination of such Market Maker, did not make business or economic sense for such Market Maker to access such exchange. [BOX] again notes that no market makers are required by rule, regulation, or competitive forces to be a Market Maker on [BOX].'' Also in 2022, MEMX established a monthly membership fee. *See* Securities Exchange Act Release No. 93927 (January 7, 2022), 87 FR 2191 (January 13, 2022) (SR–MEMX–2021–19). In that proposal, MEMX reasoned that that there is value in becoming a member of the exchange and stated that it believed that the proposed membership fee ''is not unfairly discriminatory because no broker-dealer is required to become a member of the Exchange'' and that ''neither the trade-through requirements under Regulation NMS nor broker-dealers' best execution obligations require a broker-dealer to become a member of every exchange.''

of market participants choose to become a member of all sixteen options exchanges. Most firms that actively trade on options markets are not currently Members of the Exchange and do not purchase connectivity or port services at the Exchange. Connectivity and ports are only available to Members or service bureaus, and only a Member may utilize a port.[83]

One other exchange recently noted in a proposal to amend their own trading permit fees that of the 62 market making firms that are registered as Market Makers across Cboe, MIAX, and BOX, 42 firms access only one of the three exchanges.[84] The Exchange and its affiliated options markets, MIAX Pearl Options and MIAX, have a total of 46 members. Of those 46 total members, 37 are members of all three affiliated options markets, two are members of only two affiliated options markets, and seven are members of only one affiliated options market. The Exchange also notes that no firm is a Member of the Exchange only. The above data evidences that a broker-dealer need not have direct connectivity to all options exchanges, let alone the Exchange and its two affiliates, and broker-dealers may elect to do so based on their own business decisions and need to directly access each exchange's liquidity pool.

Not only is there not an actual regulatory requirement to connect to every options exchange, the Exchange believes there is also no ''de facto'' or practical requirement as well, as further evidenced by the broker-dealer membership analysis of the options exchanges discussed above. As noted above, this is evidenced by the fact that one MIAX Pearl Options Market Maker terminated their MIAX Pearl Options membership effective January 1, 2023 as a direct result of the proposed connectivity and port fee changes on MIAX Pearl Options (which are similar to the changes proposed herein). Indeed, broker-dealers choose if and how to access a particular exchange and because it is a choice, the Exchange must set reasonable pricing, otherwise prospective members would not connect and existing members would disconnect from the Exchange. The decision to become a member of an exchange, particularly for registered market makers, is complex, and not solely based on the non-transactional costs assessed by an exchange. As noted herein, specific factors include, but are not limited to: (i) an exchange's available liquidity in options series; (ii) trading functionality offered on a particular market; (iii) product offerings; (iv) customer service on an exchange; and (v) transactional pricing. Becoming a member of the exchange does not ''lock'' a potential member into a market or diminish the overall competition for exchange services.

In lieu of becoming a member at each options exchange, a market participant may join one exchange and elect to have their orders routed in the event that a better price is available on an away market. Nothing in the Order Protection Rule requires a firm to become a Member at—or establish connectivity to—the Exchange.[85] If the Exchange is not at the national best bid or offer (''NBBO''),[86] the Exchange will route an order to any away market that is at the NBBO to ensure that the order was executed at a superior price and prevent a trade-through.[87]

With respect to the submission of orders, Members may also choose not to purchase any connection from the Exchange, and instead rely on the port of a third party to submit an order. For example, a third-party broker-dealer Member of the Exchange may be utilized by a retail investor to submit orders into an exchange. An institutional investor may utilize a broker-dealer, a service bureau,[88] or request sponsored access[89] through a member of an exchange in order to submit a trade directly to an options exchange.[90] A market participant may either pay the costs associated with becoming a member of an exchange or, in the alternative, a market participant may elect to pay commissions to a broker-dealer, pay fees to a service bureau to submit trades, or pay a member to sponsor the market participant in order to submit trades directly to an exchange.

Non-Member third-parties, such as service bureaus and extranets, resell the Exchange's connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange's connectivity fees), which alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity and other access fees to its market. The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. Unlike other exchanges, the Exchange also does not currently assess fees on third-party resellers on a per customer basis (*i.e.,* fees based on the number of firms that connect to the Exchange indirectly via the third-party).[91] Indeed, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own.[92] Particularly, in the event that a market participant views the Exchange's direct connectivity and access fees as more or less attractive than competing markets, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to the Exchange and connect instead to one or more of the other 15 options markets. Accordingly, the Exchange believes that the proposed fees are fair and

[83] Service Bureaus may obtain ports on behalf of Members.

[84] *See* Securities Exchange Act Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR–BOX–2022–17) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Fee Schedule on the BOX Options Market LLC Facility To Adopt Electronic Market Maker Trading Permit Fees). The Exchange believes that BOX's observation demonstrates that market making firms can, and do, select which exchanges they wish to access, and, accordingly, options exchanges must take competitive considerations into account when setting fees for such access.

[85] *See* Options Order Protection and Locked/Crossed Market Plan (August 14, 2009), *available at https://www.theocc.com/getmedia/7fc629d9-4e54-4b99-9f11-c0e4db1a2266/options_order_protection_plan.pdf.*

[86] *See* Exchange Rule 100.

[87] Members may elect to not route their orders by utilizing the Do Not Route order type. *See* Exchange Rule 516(g).

[88] Service Bureaus provide access to market participants to submit and execute orders on an exchange. On the Exchange, a Service Bureau may be a Member. Some Members utilize a Service Bureau for connectivity and that Service Bureau may not be a Member. Some market participants utilize a Service Bureau who is a Member to submit orders.

[89] Sponsored Access is an arrangement whereby a Member permits its customers to enter orders into an exchange's system that bypass the Member's trading system and are routed directly to the Exchange, including routing through a service bureau or other third-party technology provider.

[90] This may include utilizing a floor broker and submitting the trade to one of the five options trading floors.

[91] *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).

[92] The Exchange notes that resellers, such as SFTI, are not required to publicize, let alone justify or file with the Commission their fees, and as such could charge the market participant any fees it deems appropriate (including connectivity fees higher than the Exchange's connectivity fees), even if such fees would otherwise be considered potentially unreasonable or uncompetitive fees.

reasonable and constrained by competitive forces.

The Exchange is obligated to regulate its Members and secure access to its environment. In order to properly regulate its Members and secure the trading environment, the Exchange takes measures to ensure access is monitored and maintained with various controls. Connectivity and ports are methods utilized by the Exchange to grant Members secure access to communicate with the Exchange and exercise trading rights. When a market participant elects to be a Member, and is approved for membership by the Exchange, the Member is granted trading rights to enter orders and/or quotes into Exchange through secure connections.

Again, there is no legal or regulatory requirement that a market participant become a Member of the Exchange. This is again evidenced by the fact that one MIAX Pearl Options Market Maker terminated their MIAX Pearl Options membership effective January 1, 2023 as a direct result of the proposed connectivity and port fee changes on MIAX Pearl Options. If a market participant chooses to become a Member, they may then choose to purchase connectivity beyond the one connection that is necessary to quote or submit orders on the Exchange. Members may freely choose to rely on one or many connections, depending on their business model.

Cost Analysis

In general, the Exchange believes that exchanges, in setting fees of all types, should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the Exchange Act requirements that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among members and markets. In particular, the Exchange believes that each exchange should take extra care to be able to demonstrate that these fees are based on its costs and reasonable business needs.

In proposing to charge fees for connectivity and port services, the Exchange is especially diligent in assessing those fees in a transparent way against its own aggregate costs of providing the related service, and in carefully and transparently assessing the impact on Members—both generally and in relation to other Members, *i.e.,* to assure the fee will not create a financial burden on any participant and will not have an undue impact in particular on smaller Members and competition among Members in general. The Exchange believes that this level of diligence and transparency is called for by the requirements of Section 19(b)(1) under the Act,[93] and Rule 19b–4 thereunder,[94] with respect to the types of information exchanges should provide when filing fee changes, and Section 6(b) of the Act,[95] which requires, among other things, that exchange fees be reasonable and equitably allocated,[96] not designed to permit unfair discrimination,[97] and that they not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[98] This rule change proposal addresses those requirements, and the analysis and data in each of the sections that follow are designed to clearly and comprehensively show how they are met.[99] The Exchange reiterates that the legacy exchanges with whom the Exchange vigorously competes for order flow and market share, were not subject to any such diligence or transparency in setting their baseline non-transaction fees, most of which were put in place before the Revised Review Process and Staff Guidance.

As detailed below, the Exchange recently calculated its aggregate annual costs for providing physical 10Gb ULL connectivity to the Exchange at $11,361,586 (or approximately $946,799 per month, rounded to the nearest dollar when dividing the annual cost by 12 months) and its aggregate annual costs for providing Limited Service MEI Ports at $1,799,066 (or approximately $148,255 per month, rounded to the nearest dollar when dividing the annual cost by 12 months). In order to cover the aggregate costs of providing connectivity to its users (both Members and non-Members [100]) going forward and to make a modest profit, as described below, the Exchange proposes to modify its Fee Schedule to charge a fee of $13,500 per month for each physical 10Gb ULL connection. The Exchange also proposes to modify its Fee Schedule to amend the monthly fee for additional Limited Service MEI Ports and provide two additional ports free of charge for a total of four free Limited Service MEI Ports per matching engine to which each Member connects.

In 2020, the Exchange completed a study of its aggregate costs to produce market data and connectivity (the ''Cost Analysis'').[101] The Cost Analysis required a detailed analysis of the Exchange's aggregate baseline costs, including a determination and allocation of costs for core services provided by the Exchange—transaction execution, market data, membership services, physical connectivity, and port access (which provide order entry, cancellation and modification functionality, risk functionality, the ability to receive drop copies, and other functionality). The Exchange separately divided its costs between those costs necessary to deliver each of these core services, including infrastructure, software, human resources (*i.e.,* personnel), and certain general and administrative expenses (''cost drivers'').

As an initial step, the Exchange determined the total cost for the Exchange and the affiliated markets for each cost driver as part of its 2023 budget review process. The 2023 budget review is a company-wide process that occurs over the course of many months, includes meetings among senior management, department heads, and the Finance Team. Each department head is required to send a ''bottom up'' budget to the Finance Team allocating costs at the profit and loss account and vendor levels for the Exchange and its affiliated markets based on a number of factors, including server counts, additional hardware and software utilization, current or anticipated functional or non-functional development projects, capacity needs, end-of-life or end-of-service intervals, number of members, market model (*e.g.,* price time or pro-rata, simple only or simple and complex markets, auction functionality, etc.), which may impact message traffic, individual system architectures that impact platform size,[102] storage needs, dedicated infrastructure versus shared infrastructure allocated per platform based on the resources required to support each platform, number of available connections, and employees allocated time.

[93] 15 U.S.C. 78s(b)(1).

[94] 17 CFR 240.19b–4.

[95] 15 U.S.C. 78f(b).

[96] 15 U.S.C. 78f(b)(4).

[97] 15 U.S.C. 78f(b)(5).

[98] 15 U.S.C. 78f(b)(8).

[99] *See* Staff Guidance, *supra* note 25.

[100] Types of market participants that obtain connectivity services from the Exchange but are not Members include service bureaus and extranets. Service bureaus offer technology-based services to other companies for a fee, including order entry services, and thus, may access Limited Service MEI Ports on behalf of one or more Members. Extranets offer physical connectivity services to Members and non-Members.

[101] The Exchange frequently updates it Cost Analysis as strategic initiatives change, costs increase or decrease, and market participant needs and trading activity changes. The Exchange's most recent Cost Analysis was conducted ahead of this filing.

[102] For example, the Exchange maintains 12 matching engines, MIAX Pearl Options maintains 12 matching engines, MIAX Pearl Equities maintains 24 matching engines, and MIAX maintains 24 matching engines.

All of these factors result in different allocation percentages among the Exchange and its affiliated markets, *i.e.,* the different percentages of the overall cost driver allocated to the Exchange and its affiliated markets will cause the dollar amount of the overall cost allocated among the Exchange and its affiliated markets to also differ. Because the Exchange's parent company currently owns and operates four separate and distinct marketplaces, the Exchange must determine the costs associated with each actual market—as opposed to the Exchange's parent company simply concluding that all costs drivers are the same at each individual marketplace and dividing total cost by four (4) (evenly for each marketplace). Rather, the Exchange's parent company determines an accurate cost for each marketplace, which results in different allocations and amounts across exchanges for the same cost drivers, due to the unique factors of each marketplace as described above. This allocation methodology also ensures that no cost would be allocated twice or double-counted between the Exchange and its affiliated markets. The Finance Team then consolidates the budget and sends it to senior management, including the Chief Financial Officer and Chief Executive Officer, for review and approval. Next, the budget is presented to the Board of Directors and the Finance and Audit Committees for each exchange for their approval. The above steps encompass the first step of the cost allocation process.

The next step involves determining what portion of the cost allocated to the Exchange pursuant to the above methodology is to be allocated to each core service, *e.g.,* connectivity and ports, market data, and transaction services. The Exchange and its affiliated markets adopted an allocation methodology with thoughtful and consistently applied principles to guide how much of a particular cost amount allocated to the Exchange should be allocated within the Exchange to each core service. This is the final step in the cost allocation process and is applied to each of the cost drivers set forth below. For instance, fixed costs that are not driven by client activity (*e.g.,* message rates), such as data center costs, were allocated more heavily to the provision of physical connectivity (61.9% of total expense amount allocated to 10Gb ULL connectivity), with smaller allocations to additional Limited Service MEI Ports (4.6%), and the remainder to the provision of other connectivity, other ports, transaction execution, membership services and market data services (33.5%). This next level of the allocation methodology at the individual exchange level also took into account factors similar to those set forth under the first step of the allocation methodology process described above, to determine the appropriate allocation to connectivity or market data versus allocations for other services. This allocation methodology was developed through an assessment of costs with senior management intimately familiar with each area of the Exchange's operations. After adopting this allocation methodology, the Exchange then applied an allocation of each cost driver to each core service, resulting in the cost allocations described below. Each of the below cost allocations is unique to the Exchange and represents a percentage of overall cost that was allocated to the Exchange pursuant to the initial allocation described above.

By allocating segmented costs to each core service, the Exchange was able to estimate by core service the potential margin it might earn based on different fee models. The Exchange notes that as a non-listing venue it has five primary sources of revenue that it can potentially use to fund its operations: transaction fees, fees for connectivity and port services, membership fees, regulatory fees, and market data fees. Accordingly, the Exchange must cover its expenses from these five primary sources of revenue. The Exchange also notes that as a general matter each of these sources of revenue is based on services that are interdependent. For instance, the Exchange's system for executing transactions is dependent on physical hardware and connectivity; only Members and parties that they sponsor to participate directly on the Exchange may submit orders to the Exchange; many Members (but not all) consume market data from the Exchange in order to trade on the Exchange; and the Exchange consumes market data from external sources in order to comply with regulatory obligations. Accordingly, given this interdependence, the allocation of costs to each service or revenue source required judgment of the Exchange and was weighted based on estimates of the Exchange that the Exchange believes are reasonable, as set forth below. While there is no standardized and generally accepted methodology for the allocation of an exchange's costs, the Exchange's methodology is the result of an extensive review and analysis and will be consistently applied going forward for any other potential fee proposals. In the absence of the Commission attempting to specify a methodology for the allocation of exchanges' interdependent costs, the Exchange will continue to be left with its best efforts to attempt to conduct such an allocation in a thoughtful and reasonable manner.

Through the Exchange's extensive updated Cost Analysis, which was again recently further refined, the Exchange analyzed every expense item in the Exchange's general expense ledger to determine whether each such expense relates to the provision of connectivity and port services, and, if such expense did so relate, what portion (or percentage) of such expense actually supports the provision of connectivity and port services, and thus bears a relationship that is, ''in nature and closeness,'' directly related to network connectivity and port services. In turn, the Exchange allocated certain costs more to physical connectivity and others to ports, while certain costs were only allocated to such services at a very low percentage or not at all, using consistent allocation methodologies as described above. Based on this analysis, the Exchange estimates that the aggregate monthly cost to provide 10Gb ULL connectivity and Limited Service MEI Port services, including both physical 10Gb connections and Limited Service MEI Ports, is $1,095,054 (utilizing the rounded numbers when dividing the annual cost for 10Gb ULL connectivity and annual cost for Limited Service MEI Ports by 12 months, then adding both numbers together), as further detailed below.

Costs Related to Offering Physical 10Gb ULL Connectivity

The following chart details the individual line-item costs considered by the Exchange to be related to offering physical dedicated 10Gb ULL connectivity via an unshared network as well as the percentage of the Exchange's overall costs that such costs represent for each cost driver (*e.g.,* as set forth below, the Exchange allocated approximately 28.1% of its overall Human Resources cost to offering physical connectivity).

Cost drivers	Allocated annual cost [k]	Allocated monthly cost [l]	% of all
Human Resources	$3,520,856	$293,405	28

Cost drivers	Allocated annual cost[k]	Allocated monthly cost[l]	% of all
Connectivity (external fees, cabling, switches, etc.)	71,675	5,973	61.9
Internet Services and External Market Data	373,249	31,104	84.8
Data Center	752,545	62,712	61.9
Hardware and Software Maintenance and Licenses	666,208	55,517	50.9
Depreciation *	1,929,118	160,760	63.8
Allocated Shared Expenses	4,047,935	337,328	51.3
Total	11,361,586	946,799	42.8

k. The Annual Cost includes figures rounded to the nearest dollar.
l. The Monthly Cost was determined by dividing the Annual Cost for each line item by twelve (12) months and rounding up or down to the nearest dollar.

Below are additional details regarding each of the line-item costs considered by the Exchange to be related to offering physical 10Gb ULL connectivity. While some costs were attempted to be allocated as equally as possible among the Exchange and its affiliated markets, the Exchange notes that some of its cost allocation percentages for certain cost drivers differ when compared to the same cost drivers for the Exchange's affiliated markets in their similar proposed fee changes for connectivity and ports. This is because the Exchange's cost allocation methodology utilizes the actual projected costs of the Exchange (which are specific to the Exchange, and are independent of the costs projected and utilized by the Exchange's affiliated markets) to determine its actual costs, which may vary across the Exchange and its affiliated markets based on factors that are unique to each marketplace. The Exchange provides additional explanation below (including the reason for the deviation) for the significant differences.

Human Resources

The Exchange notes that it and its affiliated markets have 184 employees (excluding employees at non-options/equities exchange subsidiaries of Miami International Holdings, Inc. (''MIH''), the holding company of the Exchange and its affiliated markets), and each department leader has direct knowledge of the time spent by each employee with respect to the various tasks necessary to operate the Exchange. Specifically, twice a year, and as needed with additional new hires and new project initiatives, in consultation with employees as needed, managers and department heads assign a percentage of time to every employee and then allocate that time amongst the Exchange and its affiliated markets to determine each market's individual Human Resources expense. Then, managers and department heads assign a percentage of each employee's time allocated to the Exchange into buckets including network connectivity, ports, market data, and other exchange services. This process ensures that every employee is 100% allocated, ensuring there is no double counting between the Exchange and its affiliated markets.

For personnel costs (Human Resources), the Exchange calculated an allocation of employee time for employees whose functions include providing and maintaining physical connectivity and performance thereof (primarily the Exchange's network infrastructure team, which spends most of their time performing functions necessary to provide physical connectivity). As described more fully above, the Exchange's parent company allocates costs to the Exchange and its affiliated markets and then a portion of the Human Resources costs allocated to the Exchange is then allocated to connectivity. From that portion allocated to the Exchange that applied to connectivity, the Exchange then allocated a weighted average of 42.4% of each employee's time from the above group.

The Exchange also allocated Human Resources costs to provide physical connectivity to a limited subset of personnel with ancillary functions related to establishing and maintaining such connectivity (such as information security, sales, membership, and finance personnel). The Exchange allocated cost on an employee-by-employee basis (*i.e.,* only including those personnel who support functions related to providing physical connectivity) and then applied a smaller allocation to such employees' time to 10Gb ULL connectivity (less than 20%). This other group of personnel with a smaller allocation of Human Resources costs also have a direct nexus to 10Gb ULL connectivity, whether it is a sales person selling a connection, finance personnel billing for connectivity or providing budget analysis, or information security ensuring that such connectivity is secure and adequately defended from an outside intrusion.

The estimates of Human Resources cost were therefore determined by consulting with such department leaders, determining which employees are involved in tasks related to providing physical connectivity, and confirming that the proposed allocations were reasonable based on an understanding of the percentage of time such employees devote to those tasks. This includes personnel from the Exchange departments that are predominately involved in providing 1Gb and 10Gb ULL connectivity: Business Systems Development, Trading Systems Development, Systems Operations and Network Monitoring, Network and Data Center Operations, Listings, Trading Operations, and Project Management. Again, the Exchange allocated 42.4% of each of their employee's time assigned to the Exchange for 10Gb ULL connectivity, as stated above. Employees from these departments perform numerous functions to support 10Gb ULL connectivity, such as the installation, re-location, configuration, and maintenance of 10Gb ULL connections and the hardware they access. This hardware includes servers, routers, switches, firewalls, and monitoring devices. These employees also perform software upgrades, vulnerability assessments, remediation and patch installs, equipment configuration and hardening, as well as performance and capacity management. These employees also engage in research and development analysis for equipment and software supporting 10Gb ULL connectivity and design, and support the development and on-going maintenance of internally-developed applications as well as data capture and analysis, and Member and internal Exchange reports related to network and system performance. The above list of employee functions is not exhaustive of all the functions performed by Exchange employees to support 10Gb ULL connectivity, but illustrates the breath of functions those employees perform in

support of the above cost and time allocations.

Lastly, the Exchange notes that senior level executives' time was only allocated to the 10Gb ULL connectivity related Human Resources costs to the extent that they are involved in overseeing tasks related to providing physical connectivity. The Human Resources cost was calculated using a blended rate of compensation reflecting salary, equity and bonus compensation, benefits, payroll taxes, and 401(k) matching contributions.

Connectivity (External Fees, Cabling, Switches, Etc.)

The Connectivity cost driver includes external fees paid to connect to other exchanges and third parties, cabling and switches required to operate the Exchange. The Connectivity cost driver is more narrowly focused on technology used to complete connections to the Exchange and to connect to external markets. The Exchange notes that its connectivity to external markets is required in order to receive market data to run the Exchange's matching engine and basic operations compliant with existing regulations, primarily Regulation NMS.

The Exchange relies on various connectivity providers for connectivity to the entire U.S. options industry, and infrastructure services for critical components of the network that are necessary to provide and maintain its System Networks and access to its System Networks via 10Gb ULL connectivity. Specifically, the Exchange utilizes connectivity providers to connect to other national securities exchanges and the Options Price Reporting Authority (''OPRA''). The Exchange understands that these service providers provide services to most, if not all, of the other U.S. exchanges and other market participants. Connectivity provided by these service providers is critical to the Exchanges daily operations and performance of its System Networks to which market participants connect to via 10Gb ULL connectivity. Without these services providers, the Exchange would not be able to connect to other national securities exchanges, market data providers or OPRA and, therefore, would not be able to operate and support its System Networks. The Exchange does not employ a separate fee to cover its connectivity provider expense and recoups that expense, in part, by charging for 10Gb ULL connectivity.

Internet Services and External Market Data

The next cost driver consists of internet Services and external market data. The internet services cost driver includes third-party service providers that provide the internet, fiber and bandwidth connections between the Exchange's networks, primary and secondary data centers, and office locations in Princeton and Miami.

External market data includes fees paid to third parties, including other exchanges, to receive market data. The Exchange includes external market data fee costs towards the provision of 10Gb ULL connectivity because such market data is necessary for certain services related to connectivity, including pre-trade risk checks and checks for other conditions (*e.g.,* re-pricing of orders to avoid locked or crossed markets and trading collars). Since external market data from other exchanges is consumed at the Exchange's matching engine level, (to which 10Gb ULL connectivity provides access) in order to validate orders before additional orders enter the matching engine or are executed, the Exchange believes it is reasonable to allocate an amount of such costs to 10Gb ULL connectivity.

The Exchange relies on various content service providers for data feeds for the entire U.S. options industry, as well as content for critical components of the network that are necessary to provide and maintain its System Networks and access to its System Networks via 10Gb ULL connectivity. Specifically, the Exchange utilizes content service providers to receive market data from OPRA, other exchanges and market data providers. The Exchange understands that these service providers provide services to most, if not all, of the other U.S. exchanges and other market participants. Market data provided these service providers is critical to the Exchanges daily operations and performance of its System Networks to which market participants connect to via 10Gb ULL connectivity. Without these services providers, the Exchange would not be able to receive market data and, therefore, would not be able to operate and support its System Networks. The Exchange does not employ a separate fee to cover its content service provider expense and recoups that expense, in part, by charging for 10Gb ULL connectivity.

Lastly, the Exchange notes that the actual dollar amounts allocated as part of the second step of the 2023 budget process differ among the Exchange and its affiliated markets for the internet Services and External Market Data cost driver, even though, but for the Exchange, the allocation percentages are generally consistent across markets (*e.g.,* MIAX Emerald, MIAX, MIAX Pearl Options and MIAX Pearl Equities allocated 84.8%, 73.3%, 73.3% and 72.5%, respectively, to the same cost driver). This is because: (i) a different percentage of the overall internet Services and External Market Data cost driver was allocated to the Exchange and its affiliated markets due to the factors set forth under the first step of the 2023 budget review process described above (unique technical architecture, market structure, and business requirements of each marketplace); and (ii) the Exchange itself allocated a larger portion of this cost driver to 10Gb ULL connectivity because of recent initiatives to improve the latency and determinism of its systems. The Exchange notes while the percentage it allocated to the internet Services and External Market Data cost driver is greater than its affiliated markets, the overall dollar amount allocated to the Exchange under the initial step of the 2023 budget process is lower than its affiliated markets. However, the Exchange believes that this is not, in dollar amounts, a significant difference. This is because the total dollar amount of expense covered by this cost driver is relatively small compared to other cost drivers and is due to nuances in exchange architecture that require different initial allocation amount under the first step of the 2023 budget process described above. Thus, non-significant differences in percentage allocation amounts in a smaller cost driver create the appearance of a significant difference, even though the actual difference in dollar amounts is small. For instance, despite the difference in cost allocation percentages for the internet Services and External Market Data cost driver across the Exchange and MIAX, the actual dollar amount difference is approximately only $4,000 per month, a non-significant amount.

Data Center

Data Center costs includes an allocation of the costs the Exchange incurs to provide physical connectivity in the third-party data centers where it maintains its equipment (such as dedicated space, security services, cooling and power). The Exchange notes that it does not own the Primary Data Center or the Secondary Data Center, but instead, leases space in data centers operated by third parties. The Exchange has allocated a high percentage of the Data Center cost (61.9%) to physical

10Gb ULL connectivity because the third-party data centers and the Exchange's physical equipment contained therein is the most direct cost in providing physical access to the Exchange. In other words, for the Exchange to operate in a dedicated space with connectivity by market participants to a physical trading platform, the data centers are a very tangible cost, and in turn, if the Exchange did not maintain such a presence then physical connectivity would be of no value to market participants.

Hardware and Software Maintenance and Licenses

Hardware and Software Licenses includes hardware and software licenses used to operate and monitor physical assets necessary to offer physical connectivity to the Exchange.[103] The Exchange notes that this allocation is less than MIAX Pearl Options by a significant amount, but slightly more than MIAX, as MIAX Pearl Options allocated 58.6% of its Hardware and Software Maintenance and License expense towards 10Gb ULL connectivity, while MIAX and MIAX Emerald allocated 49.8% and 50.9%, respectively, to the same category of expense. This is because MIAX Pearl Options is in the process of replacing and upgrading various hardware and software used to operate its options trading platform in order to maintain premium network performance. At the time of this filing, MIAX Pearl Options is undergoing a major hardware refresh, replacing older hardware with new hardware. This hardware includes servers, network switches, cables, optics, protocol data units, and cabinets, to maintain a state-of-the-art technology platform. Because of the timing of the hardware refresh with the timing of this filing, the Exchange has materially higher expense than its affiliates. Also, MIAX Pearl Equities allocated a higher percentage of the same category of expense (58%) towards its Hardware and Software Maintenance and License expense for 10Gb ULL connectivity, which MIAX Pearl Equities explains in its own proposal to amend its 10Gb ULL connectivity fees.

Depreciation

All physical assets, software, and hardware used to provide 10Gb ULL connectivity, which also includes assets used for testing and monitoring of Exchange infrastructure, were valued at cost, and depreciated or leased over periods ranging from three to five years. Thus, the depreciation cost primarily relates to servers necessary to operate the Exchange, some of which are owned by the Exchange and some of which are leased by the Exchange in order to allow efficient periodic technology refreshes. The Exchange also included in the Depreciation cost driver certain budgeted improvements that the Exchange intends to capitalize and depreciate with respect to 10Gb ULL connectivity in the near-term. As with the other allocated costs in the Exchange's updated Cost Analysis, the Depreciation cost was therefore narrowly tailored to depreciation related to 10Gb ULL connectivity. As noted above, the Exchange allocated 63.8% of its allocated depreciation costs to providing physical 10Gb ULL connectivity.

The Exchange also notes that this allocation differs from its affiliated markets due to a number of factors, such as the age of physical assets and software (*e.g.,* older physical assets and software were previously depreciated and removed from the allocation), or certain system enhancements that required new physical assets and software, thus providing a higher contribution to the depreciated cost. For example, the percentages the Exchange and its affiliate, MIAX, allocated to the depreciation of hardware and software used to provide 10Gb ULL connectivity are nearly identical. However, the Exchange's dollar amount is lower than that of MIAX by approximately $32,000 per month due to two factors: first, MIAX has undergone a technology refresh since the time MIAX Emerald launched in February 2019, leading MIAX to have more hardware that software that is subject to depreciation. Second, MIAX maintains 24 matching engines while MIAX Emerald maintains only 12 matching engines. This also results in more of MIAX's hardware and software being subject to depreciation than MIAX Emerald's hardware and software due to the greater amount of equipment and software necessary to support the greater number of matching engines on MIAX.

Allocated Shared Expenses

Finally, as with other exchange products and services, a portion of general shared expenses was allocated to overall physical connectivity costs. These general shared costs are integral to exchange operations, including its ability to provide physical connectivity. Costs included in general shared expenses include office space and office expenses (*e.g.,* occupancy and overhead expenses), utilities, recruiting and training, marketing and advertising costs, professional fees for legal, tax and accounting services (including external and internal audit expenses), and telecommunications. Similarly, the cost of paying directors to serve on the Exchange's Board of Directors is also included in the Exchange's general shared expense cost driver.[104] These general shared expenses are incurred by the Exchange's parent company, MIH, as a direct result of operating the Exchange and its affiliated markets.

The Exchange employed a process to determine a reasonable percentage to allocate general shared expenses to 10Gb ULL connectivity pursuant to its multi-layered allocation process. First, general expenses were allocated among the Exchange and affiliated markets as described above. Then, the general shared expense assigned to the Exchange was allocated across core services of the Exchange, including connectivity. Then, these costs were further allocated to sub-categories within the final categories, *i.e.,* 10Gb ULL connectivity as a sub-category of connectivity. In determining the percentage of general shared expenses allocated to connectivity that ultimately apply to 10Gb ULL connectivity, the Exchange looked at the percentage allocations of each of the cost drivers and determined a reasonable allocation percentage. The Exchange also held meetings with senior management, department heads, and the Finance Team to determine the proper amount of the shared general expense to allocate to 10GBb ULL connectivity. The Exchange, therefore, believes it is reasonable to assign an allocation, in the range of allocations for other cost drivers, while continuing to ensure that this expense is only allocated once. Again, the general shared expenses are incurred by the Exchange's parent company as a result

[103] This expense may be less than the Exchange's affiliated markets, specifically MIAX Pearl (the options and equities markets), because, unlike the Exchange, MIAX Pearl (the options and equities markets) maintains an additional gateway to accommodate its member's access and connectivity needs. This added gateway contributes to the difference in allocations between the Exchange and MIAX Pearl. This expense also differs in dollar amount among the Exchange, MIAX Pearl (options and equities), and MIAX because each market may maintain and utilize a different amount of hardware and software based on its market model and infrastructure needs. The Exchange allocated a percentage of the overall cost based on actual amounts of hardware and software utilized by that market, which resulted in different cost allocations and dollar amounts.

[104] The Exchange notes that MEMX allocated a precise amount of 10% of the overall cost for directors to providing physical connectivity. *See* Securities Exchange Act Release No. 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26). The Exchange does not calculate is expenses at that granular a level. Instead, director costs are included as part of the overall general allocation.

of operating the Exchange and its affiliated markets and it is therefore reasonable to allocate a percentage of those expenses to the Exchange and ultimately to specific product offerings such as 10Gb ULL connectivity.

Again, a portion of all shared expenses were allocated to the Exchange (and its affiliated markets) which, in turn, allocated a portion of that overall allocation to all physical connectivity on the Exchange. The Exchange then allocated 51.3% of the portion allocated to physical connectivity to 10Gb ULL connectivity. The Exchange believes this allocation percentage is reasonable because, while the overall dollar amount may be higher than other cost drivers, the 51.3% is based on and in line with the percentage allocations of each of the Exchange's other cost drivers. The percentage allocated to 10Gb ULL connectivity also reflects its importance to the Exchange's strategy and necessity towards the nature of the Exchange's overall operations, which is to provide a resilient, highly deterministic trading system that relies on faster 10Gb ULL connectivity than the Exchange's competitors to maintiain premium performance. This allocation reflects the Exchange's focus on providing and maintaining high performance network connectivity, of which 10Gb ULL connectivity is a main contributor. The Exchange differentiates itself by offering a ''premium-product'' network experience, as an operator of a high performance, ultra-low latency network with unparalleled system throughput, which system networks can support access to three distinct options markets and multiple competing market-makers having affirmative obligations to continuously quote over 1,100,000 distinct trading products (per exchange), and the capacity to handle approximately 18 million quote messages per second. The ''premium-product'' network experience enables users of 10Gb ULL connections to receive the network monitoring and reporting services for those approximately 1,100,000 distinct trading products. These value add services are part of the Exchange's strategy for offering a high performance trading system, which utilizes 10Gb ULL connectivity.

The Exchange notes that the 51.3% allocation of general shared expenses for physical 10Gb ULL connectivity is higher than that allocated to general shared expenses for Limited Service MEI Ports. This is based on its allocation methodology that weighted costs attributable to each core service. While physical connectivity has several areas where certain tangible costs are heavily weighted towards providing such service (*e.g.,* Data Center, as described above), Limited Service MEI Ports do not require as many broad or indirect resources as other core services.

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Approximate Cost per 10Gb ULL Connection per Month

After determining the approximate allocated monthly cost related to 10Gb connectivity, the total monthly cost for 10Gb ULL connectivity of $946,799 was divided by the number of physical 10Gb ULL connections the Exchange maintained at the time that proposed pricing was determined (102), to arrive at a cost of approximately $9,282 per month, per physical 10Gb ULL connection. Due to the nature of this particular cost, this allocation methodology results in an allocation among the Exchange and its affiliated markets based on set quantifiable criteria, *i.e.,* actual number of 10Gb ULL connections.

* * * * *

Costs Related to Offering Limited Service MEI Ports

The following chart details the individual line-item costs considered by the Exchange to be related to offering Limited Service MEI Ports as well as the percentage of the Exchange's overall costs such costs represent for such area (*e.g.,* as set forth below, the Exchange allocated approximately 5.9% of its overall Human Resources cost to offering Limited Service MEI Ports).

Cost drivers	Allocated annual cost [m]	Allocated monthly cost [n]	% of all
Human Resources	$737,784	$61,482	5.9
Connectivity (external fees, cabling, switches, etc.)	3,713	309	3.2
Internet Services and External Market Data	14,102	1,175	3.2
Data Center	55,686	4,641	4.6
Hardware and Software Maintenance and Licenses	41,951	3,496	3.2
Depreciation	112,694	9,391	3.7
Allocated Shared Expenses	813,136	67,761	10.3
Total	1,779,066	148,255	6.7

m. *See supra* note k (describing rounding of Annual Costs).
n. *See supra* note l (describing rounding of Monthly Costs based on Annual Costs).

Below are additional details regarding each of the line-item costs considered by the Exchange to be related to offering Limited Service MEI Ports. While some costs were attempted to be allocated as equally as possible among the Exchange and its affiliated markets, the Exchange notes that some of its cost allocation percentages for certain cost drivers differ when compared to the same cost drivers described by the Exchange's affiliated markets in their similar proposed fee changes for connectivity and ports. This is because the Exchange's cost allocation methodology utilizes the actual projected costs of the Exchange (which are specific to the Exchange, and are independent of the costs projected and utilized by the Exchange's affiliated markets) to determine its actual costs, which may vary across the Exchange and its affiliated markets based on factors that are unique to each marketplace. The Exchange provides additional explanation below (including the reason for the deviation) for the significant differences.

Human Resources

With respect to Limited Service MEI Ports, the Exchange calculated Human Resources cost by taking an allocation of employee time for employees whose functions include providing Limited Service MEI Ports and maintaining performance thereof (including a broader range of employees such as technical operations personnel, market operations personnel, and software engineering personnel) as well as a limited subset of personnel with ancillary functions related to maintaining such connectivity (such as

sales, membership, and finance personnel). Just as described above for 10Gb ULL connectivity, the estimates of Human Resources cost were again determined by consulting with department leaders, determining which employees are involved in tasks related to providing Limited Service MEI Ports and maintaining performance thereof, and confirming that the proposed allocations were reasonable based on an understanding of the percentage of their time such employees devote to tasks related to providing Limited Service MEI Ports and maintaining performance thereof. This includes personnel from the following Exchange departments that are predominately involved in providing Limited Service MEI Ports: Business Systems Development, Trading Systems Development, Systems Operations and Network Monitoring, Network and Data Center Operations, Listings, Trading Operations, and Project Management. The Exchange notes that senior level executives were allocated Human Resources costs to the extent they are involved in overseeing tasks specifically related to providing Limited Service MEI Ports. Senior level executives were only allocated Human Resources costs to the extent that they are involved in managing personnel responsible for tasks integral to providing and maintaining Limited Service MEI Ports. The Human Resources cost was again calculated using a blended rate of compensation reflecting salary, equity and bonus compensation, benefits, payroll taxes, and 401(k) matching contributions.

Connectivity (External Fees, Cabling, Switches, etc.)

The Connectivity cost includes external fees paid to connect to other exchanges and cabling and switches, as described above.

Internet Services and External Market Data

The next cost driver consists of internet services and external market data. Internet services includes third-party service providers that provide the internet, fiber and bandwidth connections between the Exchange's networks, primary and secondary data centers, and office locations in Princeton and Miami. For purposes of Limited Service MEI Ports, the Exchange also includes a portion of its costs related to external market data. External market data includes fees paid to third parties, including other exchanges, to receive and consume market data from other markets. The Exchange includes external market data costs towards the provision of Limited Service MEI Ports because such market data is necessary (in addition to physical connectivity) to offer certain services related to such ports, such as validating orders on entry against the NBBO and checking for other conditions (*e.g.,* halted securities).[105] Thus, since market data from other exchanges is consumed at the Exchange's Limited Service MEI Port level in order to validate orders, before additional processing occurs with respect to such orders, the Exchange believes it is reasonable to allocate a small amount of such costs to Limited Service MEI Ports.

The Exchange notes that the allocation for the internet Services and External Market Data cost driver is greater than that of its affiliate, MIAX Pearl Options, as MIAX Emerald allocated 3.2% of its internet Services and External Market Data expense towards Limited Service MEI Ports, while MIAX Pearl Options allocated 1.4% to its Full Service MEO Ports for the same cost driver. The allocation percentages set forth above differ because they directly correspond with the number of applicable ports utilized on each exchange. For August 2023, MIAX Emerald Market Makers utilized 1,030 Limited Service MEI ports and MIAX Market Makers utilized 1,781 Limited Service MEI ports. When compared to Full Service Port (Bulk and Single) usage, for August 2023, MIAX Pearl Options Members utilized only 384 Full Service MEO Ports (Bulk and Single), far fewer than number of Limited Service MEI Ports utilized by Market Makers on MIAX and MIAX Emerald, thus resulting in a smaller cost allocation. There is increased cost associated with supporting a higher number of ports (requiring more hardware and other technical infrastructure and internet Service), thus the Exchange allocates a higher percentage of expense than MIAX Pearl Options, which has a lower port count.

Data Center

Data Center costs includes an allocation of the costs the Exchange incurs to provide Limited Service MEI Ports in the third-party data centers where it maintains its equipment as well as related costs for market data to then enter the Exchange's system via Limited Service MEI Ports (the Exchange does not own the Primary Data Center or the Secondary Data Center, but instead, leases space in data centers operated by third parties).

Hardware and Software Maintenance and Licenses

Hardware and Software Licenses includes hardware and software licenses used to monitor the health of the order entry services provided by the Exchange, as described above.

The Exchange notes that this allocation is greater than its affiliate, MIAX Pearl Options, as MIAX Emerald allocated 3.2% of its Hardware and Software Maintenance and License expense towards Limited Service MEI Ports, while MIAX Pearl Options allocated 1.4% to its Full Service MEO Ports (Bulk and Single) for the same category of expense. The allocation percentages set forth above differ because they correspond with the number of applicable ports utilized on each exchange. For August 2023, MIAX Market Makers utilized 1,781 Limited Service MEI ports and MIAX Emerald Market Makers utilized 1,030 Limited Service MEI Ports. When compared to Full Service Port (Bulk and Single) usage, for August 2023, MIAX Pearl Options Members utilized only 384 Full Service MEO Ports (Bulk and Single), far fewer than number of Limited Service MEI Ports utilized by Market Makers on MIAX and MIAX Emerald, thus resulting in a smaller cost allocation. There is increased cost associated with supporting a higher number of ports (requiring more hardware and other technical infrastructure), thus the Exchange allocates a higher percentage of expense than MIAX Pearl Options, which has a lower port count.

Depreciation

The vast majority of the software the Exchange uses to provide Limited Service MEI Ports has been developed in-house and the cost of such development, which takes place over an extended period of time and includes not just development work, but also quality assurance and testing to ensure the software works as intended, is depreciated over time once the software is activated in the production environment. Hardware used to provide Limited Service MEI Ports includes equipment used for testing and monitoring of order entry infrastructure and other physical equipment the Exchange purchased and is also depreciated over time.

All hardware and software, which also includes assets used for testing and monitoring of order entry infrastructure, were valued at cost, depreciated or leased over periods ranging from three to five years. Thus, the depreciation cost

[105] The Exchange notes that MEMX separately allocated 7.5% of its external market data costs to providing physical connectivity. *See* Securities Exchange Act Release No. 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–26).

primarily relates to servers necessary to operate the Exchange, some of which is owned by the Exchange and some of which is leased by the Exchange in order to allow efficient periodic technology refreshes. The Exchange allocated 3.7% of all depreciation costs to providing Limited Service MEI Ports. The Exchange allocated depreciation costs for depreciated software necessary to operate the Exchange because such software is related to the provision of Limited Service MEI Ports. As with the other allocated costs in the Exchange's updated Cost Analysis, the Depreciation cost driver was therefore narrowly tailored to depreciation related to Limited Service MEI Ports.

The Exchange notes that this allocation differs from its affiliated markets due to a number of factors, such as the age of physical assets and software (*e.g.,* older physical assets and software were previously depreciated and removed from the allocation), or certain system enhancements that required new physical assets and software, thus providing a higher contribution to the depreciated cost. For example, the Exchange notes that the percentages it and its affiliate, MIAX, allocated to the depreciation cost driver for Limited Service MEI Ports differ by only 2.6%. However, MIAX's approximate dollar amount is greater than that of MIAX Emerald by approximately $10,000 per month. This is due to two primary factors. First, MIAX has under gone a technology refresh since the time MIAX Emerald launched in February 2019, leading to it having more hardware that software that is subject to depreciation. Second, MIAX maintains 24 matching engines while MIAX Emerald maintains only 12 matching engines. This also results in more of MIAX's hardware and software being subject to depreciation than MIAX Emerald's hardware and software due to the greater amount of equipment and software necessary to support the greater number of matching engines on the Exchange.

Allocated Shared Expenses

Finally, a portion of general shared expenses was allocated to overall Limited Service MEI Ports costs as without these general shared costs the Exchange would not be able to operate in the manner that it does and provide Limited Service MEI Ports. The costs included in general shared expenses include general expenses of the Exchange, including office space and office expenses (*e.g.,* occupancy and overhead expenses), utilities, recruiting and training, marketing and advertising costs, professional fees for legal, tax and accounting services (including external and internal audit expenses), and telecommunications costs. The Exchange again notes that the cost of paying directors to serve on its Board of Directors is included in the calculation of Allocated Shared Expenses, and thus a portion of such overall cost amounting to less than 11% of the overall cost for directors was allocated to providing Limited Service MEI Ports. The Exchange notes that the 10.3% allocation of general shared expenses for Limited Service MEI Ports is lower than that allocated to general shared expenses for physical connectivity based on its allocation methodology that weighted costs attributable to each Core Service based on an understanding of each area. While Limited Service MEI Ports have several areas where certain tangible costs are heavily weighted towards providing such service (*e.g.,* Data Center, as described above), 10Gb ULL connectivity requires a broader level of support from Exchange personnel in different areas, which in turn leads to a broader general level of cost to the Exchange.

Lastly, the Exchange notes that this allocation is greater than its affiliate, MIAX Pearl Options, as MIAX Emerald allocated 10.3% of its Allocated Shared Expense towards Limited Service MEI Ports, while MIAX Pearl Options allocated 3.6% to its Full Service MEO Ports (Bulk and Single) for the same category of expense. The allocation percentages set forth above differ because they correspond with the number of applicable ports utilized on each exchange. For August 2023, MIAX Market Makers utilized 1,781 Limited Service MEI ports and MIAX Emerald Market Makers utilized 1,030 Limited Service MEI Ports. When compared to Full Service Port (Bulk and Single) usage, for August 2023, MIAX Pearl Options Members utilized only 384 Full Service MEO Ports (Bulk and Single), far fewer than number of Limited Service MEI Ports utilized by Market Makers on MIAX Emerald, thus resulting in a smaller cost allocation. There is increased cost associated with supporting a higher number of ports (requiring more hardware and other technical infrastructure), thus the Exchange allocates a higher percentage of expense than MIAX Pearl Options which has a lower port count.[106]

* * * * *

Approximate Cost per Limited Service MEI Port per Month

Based on August 2023 data, the total monthly cost allocated to Limited Service MEI Ports of $148,255 was divided by the total number of Limited Service MEI Ports utilized by Members in August, which was 1,030 (and includes free and charged ports), resulting in an approximate cost of $144 per port per month (when rounding to the nearest dollar). The Exchange used the total number of Limited Service MEI Ports it maintained in August for all Members and included free and charged ports. However, in prior filings, the Exchange did not include the expense of maintaining the two free Limited Service MEI Ports per matching engine that each Member receives when the Exchange discussed the approximate cost per port per month, but did include the two free Limited Service MEI Ports in the total expense amounts. As described herein, the Exchange changed its proposed fee structure since past filings to now offer four free Limited Service MEI Ports per matching engine to which each Member connects. After the first four free Limited Service MEI Ports, the Exchange proposes to charge $420 per Limited Service MEI Port per matching engine, up to a total of fourteen (14) Limited Service MEI Ports per matching engine.

For the sake of clarity, if a Member wanted to connect to all 12 of the Exchange's matching engines and utilize the maximum number of Limited Service MEI Ports on each matching engine (*i.e.,* 14), that Member would have a total of 168 Limited Service MEI Ports (12 matching engines multiplied by 14 Limited Service MEI Ports per matching engine). With the proposed increase to now provide four Limited Service MEI Ports for free on each matching engine, that particular Member would receive 48 free Limited Service MEI Ports (4 free Limited Service MEI Ports multiplied by 12 matching engines), and be charged for the remaining 120 Limited Service MEI Ports (168 total Limited Service MEI Ports across all matching engines minus 48 free Limited Service MEI Ports across all matching engines).

As mentioned above, Members utilized a total of 1,030 Limited Service MEI Ports in the month of August 2023 (free and charged ports combined). Using August 2023 data to extrapolate out after the proposed changes herein go into effect, the total number of Limited

[106] MIAX allocated a slightly lower amount (9.8%) of this cost as compared to MIAX Emerald (10.3%). This is not a significant difference. However, both allocations resulted in an identical cost amount of $0.8 million, despite MIAX having a higher number of Limited Service MEI Ports. MIAX Emerald was allocated a higher cost per Limited Service MEI Port due to the additional resources and expenditures associated with maintaining its recently enhanced low latency network.

Service MEI Ports that the Exchange would not charge for as a result of this increase in free ports is 468 (meaning the Exchange would charge for only 562 ports) and amounts to a total expense of $67,392 per month to the Exchange ($144 per port multiplied by 468 free Limited Service MEI Ports).

* * * * *

Cost Analysis—Additional Discussion

In conducting its Cost Analysis, the Exchange did not allocate any of its expenses in full to any core services (including physical connectivity or Limited Service MEI Ports) and did not double-count any expenses. Instead, as described above, the Exchange allocated applicable cost drivers across its core services and used the same Cost Analysis to form the basis of this proposal and the filings the Exchange submitted proposing fees for proprietary data feeds offered by the Exchange. For instance, in calculating the Human Resources expenses to be allocated to physical connections based upon the above described methodology, the Exchange has a team of employees dedicated to network infrastructure and with respect to such employees the Exchange allocated network infrastructure personnel with a high percentage of the cost of such personnel (42.4%) given their focus on functions necessary to provide physical connections. The salaries of those same personnel were allocated only 8.0% to Limited Service MEI Ports and the remaining 49.6% was allocated to 1Gb connectivity, other port services, transaction services, membership services and market data. The Exchange did not allocate any other Human Resources expense for providing physical connections to any other employee group, outside of a smaller allocation of 19.8% for 10Gb ULL connectivity or 19.9% for the entire network, of the cost associated with certain specified personnel who work closely with and support network infrastructure personnel. In contrast, the Exchange allocated much smaller percentages of costs (5% or less) across a wider range of personnel groups in order to allocate Human Resources costs to providing Limited Service MEI Ports. This is because a much wider range of personnel are involved in functions necessary to offer, monitor and maintain Limited Service MEI Ports but the tasks necessary to do so are not a primary or full-time function.

In total, the Exchange allocated 28.1% of its personnel costs to providing 10Gb ULL and 1Gb connectivity and 5.9% of its personnel costs to providing Limited Service MEI Ports, for a total allocation of 34% Human Resources expense to provide these specific connectivity and port services. In turn, the Exchange allocated the remaining 66% of its Human Resources expense to membership services, transaction services, other port services and market data. Thus, again, the Exchange's allocations of cost across core services were based on real costs of operating the Exchange and were not double-counted across the core services or their associated revenue streams.

As another example, the Exchange allocated depreciation expense to all core services, including physical connections and Limited Service MEI Ports, but in different amounts. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense includes the actual cost of the computer equipment, such as dedicated servers, computers, laptops, monitors, information security appliances and storage, and network switching infrastructure equipment, including switches and taps that were purchased to operate and support the network. Without this equipment, the Exchange would not be able to operate the network and provide connectivity services to its Members and non-Members and their customers. However, the Exchange did not allocate all of the depreciation and amortization expense toward the cost of providing connectivity services, but instead allocated approximately 67.5% of the Exchange's overall depreciation and amortization expense to connectivity services (63.8% attributed to 10Gb ULL physical connections and 3.7% to Limited Service MEI Ports). The Exchange allocated the remaining depreciation and amortization expense (approximately 32.5%) toward the cost of providing transaction services, membership services, other port services and market data.

The Exchange notes that its revenue estimates are based on projections across all potential revenue streams and will only be realized to the extent such revenue streams actually produce the revenue estimated. The Exchange does not yet know whether such expectations will be realized. For instance, in order to generate the revenue expected from connectivity, the Exchange will have to be successful in retaining existing clients that wish to maintain physical connectivity and/or Limited Service MEI Ports or in obtaining new clients that will purchase such services. Similarly, the Exchange will have to be successful in retaining a positive net capture on transaction fees in order to realize the anticipated revenue from transaction pricing.

The Exchange notes that the Cost Analysis is based on the Exchange's 2023 fiscal year of operations and projections. It is possible, however, that actual costs may be higher or lower. To the extent the Exchange sees growth in use of connectivity services it will receive additional revenue to offset future cost increases.

However, if use of connectivity services is static or decreases, the Exchange might not realize the revenue that it anticipates or needs in order to cover applicable costs. Accordingly, the Exchange is committing to conduct a one-year review after implementation of these fees. The Exchange expects that it may propose to adjust fees at that time, to increase fees in the event that revenues fail to cover costs and a reasonable mark-up of such costs. Similarly, the Exchange may propose to decrease fees in the event that revenue materially exceeds our current projections. In addition, the Exchange will periodically conduct a review to inform its decision making on whether a fee change is appropriate (*e.g.,* to monitor for costs increasing/decreasing or subscribers increasing/decreasing, etc. in ways that suggest the then-current fees are becoming dislocated from the prior cost-based analysis) and would propose to increase fees in the event that revenues fail to cover its costs and a reasonable mark-up, or decrease fees in the event that revenue or the mark-up materially exceeds our current projections. In the event that the Exchange determines to propose a fee change, the results of a timely review, including an updated cost estimate, will be included in the rule filing proposing the fee change. More generally, the Exchange believes that it is appropriate for an exchange to refresh and update information about its relevant costs and revenues in seeking any future changes to fees, and the Exchange commits to do so.

Projected Revenue

The proposed fees will allow the Exchange to cover certain costs incurred by the Exchange associated with providing and maintaining necessary hardware and other network infrastructure as well as network monitoring and support services; without such hardware, infrastructure, monitoring and support the Exchange would be unable to provide the connectivity and port services. Much of the cost relates to monitoring and analysis of data and performance of the network via the subscriber's connection(s). The above cost, namely

those associated with hardware, software, and human capital, enable the Exchange to measure network performance with nanosecond granularity. These same costs are also associated with time and money spent seeking to continuously improve the network performance, improving the subscriber's experience, based on monitoring and analysis activity. The Exchange routinely works to improve the performance of the network's hardware and software. The costs associated with maintaining and enhancing a state-of-the-art exchange network is a significant expense for the Exchange, and thus the Exchange believes that it is reasonable and appropriate to help offset those costs by amending fees for connectivity services. Subscribers, particularly those of 10Gb ULL connectivity, expect the Exchange to provide this level of support to connectivity so they continue to receive the performance they expect. This differentiates the Exchange from its competitors. As detailed above, the Exchange has five primary sources of revenue that it can potentially use to fund its operations: transaction fees, fees for connectivity services, membership and regulatory fees, and market data fees. Accordingly, the Exchange must cover its expenses from these five primary sources of revenue.

The Exchange's Cost Analysis estimates the annual cost to provide 10Gb ULL connectivity services will equal $11,361,586. Based on current 10Gb ULL connectivity services usage, the Exchange would generate annual revenue of approximately $16,524,000. The Exchange believes this represents a modest profit of 31% when compared to the cost of providing 10Gb ULL connectivity services which could decrease over time.[107]

The Exchange's Cost Analysis estimates the annual cost to provide Limited Service MEI Port services will equal $1,779,066. Based on August 2023 data for Limited Service MEI Port usage and counting for the proposed increase in free Limited Service MEI Ports and proposed increase in the monthly fee from $100 to $420 per port, the Exchange would generate annual revenue of approximately $2,832,480. The Exchange believes this would result in an estimated profit margin of 37% after calculating the cost of providing Limited Service MEI Port services, which profit margin could decrease over time.[108] The Exchange notes that the cost to provide Limited Service MEI Ports is higher than the cost for the Exchange's affiliate, MIAX Pearl Options, to provide Full Service MEO Ports due to the substantially higher number of Limited Service MEI Ports used by Exchange Members. For example, utilizing August 2023 data, MIAX Emerald Market Makers utilized 1,030 Limited Service MEI Ports compared to only 384 Full Service MEO Ports (Bulk and Single combined) allocated to MIAX Pearl Options members.

Based on the above discussion, the Exchange believes that even if the Exchange earns the above revenue or incrementally more or less, the proposed fees are fair and reasonable because they will not result in pricing that deviates from that of other exchanges or a supra-competitive profit, when comparing the total expense of the Exchange associated with providing 10Gb ULL connectivity and Limited Service MEI Port services versus the total projected revenue of the Exchange associated with network 10Gb ULL connectivity and Limited Service MEI Port services.

The Exchange also notes that this the resultant profit margin differs slightly from the profit margins set forth in similar fee filings by its affiliated markets. This is not atypical among exchanges and is due to a number of factors that differ between these four markets, including: different market models, market structures, and product offerings (equities, options, price-time, pro-rata, simple, and complex); different pricing models; different number of market participants and connectivity subscribers; different maintenance and operations costs, as described in the cost allocation methodology above; different technical architecture (*e.g.,* the number of matching engines per exchange, *i.e.,* the Exchange maintains only 12 matching engines while MIAX maintains 24 matching engines); and different maturity phase of the Exchange and its affiliated markets (*i.e.,* start-up versus growth versus more mature). All of these factors contribute to a unique and differing level of profit margin per exchange.

Further, the Exchange proposes to charge rates that are comparable to, or lower than, similar fees for similar products charged by competing exchanges. For example, for 10Gb ULL connectivity, the Exchange proposes a lower fee than the fee charged by Nasdaq for its comparable 10Gb Ultra fiber connection ($13,500 per month for the Exchange vs. $15,000 per month for Nasdaq).[109] NYSE American charges even higher fees for its comparable 10GB LX LCN connection than the Exchange's proposed fees ($13,500 per month for the Exchange vs. $22,000 per month for NYSE American).[110] Accordingly, the Exchange believes that comparable and competitive pricing are key factors in determining whether a proposed fee meets the requirements of the Act, regardless of whether that same fee across the Exchange's affiliated markets leads to slightly different profit margins due to factors outside of the Exchange's control (*i.e.,* more subscribers to 10Gb ULL connectivity on the Exchange than its affiliated markets or vice versa).

* * * * *

The Exchange operated at a cumulative net annual loss from the time it launched operations in 2019 through fiscal year 2021.[111] This was due to a number of factors, one of which was choosing to forgo revenue by offering certain products, such as low latency connectivity, at lower rates than other options exchanges to attract order flow and encourage market participants to experience the high determinism, low latency, and resiliency of the Exchange's trading systems. The Exchange does not believe that it should now be penalized for seeking to raise its fees as it now needs to upgrade its technology and absorb increased costs. Therefore, the Exchange believes the proposed fees are reasonable because they are based on both relative costs to the Exchange to provide dedicated 10Gb ULL connectivity and Limited Service MEI Ports, the extent to which the product drives the Exchange's overall costs and the relative value of the product, as well as the Exchange's objective to make access to its Systems broadly available to market participants. The Exchange also believes the proposed fees are reasonable because they are designed to generate annual revenue to recoup the Exchange's costs of providing dedicated

[107] Assuming the U.S. inflation rate continues at its current rate, the Exchange believes that the projected profit margins in this proposal will decrease; however, the Exchange cannot predict with any certainty whether the U.S. inflation rate will continue at its current rate or its impact on the Exchange's future profits or losses. *See, e.g., https://www.usinflationcalculator.com/inflation/current-inflation-rates/* (last visited September 22, 2023).

[108] *Id.*

[109] *See* NASDAQ Pricing Schedule, Options 7, Section 3, Ports and Other Services *and* NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.

[110] *See* NYSE American Options Fee Schedule, Section V.A. Port Fees *and* Section V.B. Co-Location Fees.

[111] Beginning with fiscal year 2022, the Exchange incurred a net gain of approximately $14 million. *See* Exchange's Form 1/A, Application for Registration or Exemption from Registration as a National Securities Exchange, filed June 26, 2023, *available at https://www.sec.gov/Archives/edgar/vprr/2300/23007742.pdf.*

10Gb ULL connectivity and Limited Service MEI Ports.

The Exchange notes that its revenue estimate is based on projections and will only be realized to the extent customer activity produces the revenue estimated. As a competitor in the hyper-competitive exchange environment, and an exchange focused on driving competition, the Exchange does not yet know whether such projections will be realized. For instance, in order to generate the revenue expected from 10Gb ULL connectivity and Limited Service MEI Ports, the Exchange will have to be successful in retaining existing clients that wish to utilize 10Gb ULL connectivity and Limited Service MEI Ports and/or obtaining new clients that will purchase such access. To the extent the Exchange is successful in encouraging new clients to utilize 10Gb ULL connectivity and Limited Service MEI Ports, the Exchange does not believe it should be penalized for such success. To the extent the Exchange has mispriced and experiences a net loss in connectivity clients or in transaction activity, the Exchange could experience a net reduction in revenue. While the Exchange is supportive of transparency around costs and potential margins (applied across all exchanges), as well as periodic review of revenues and applicable costs (as discussed below), the Exchange does not believe that these estimates should form the sole basis of whether or not a proposed fee is reasonable or can be adopted. Instead, the Exchange believes that the information should be used solely to confirm that an Exchange is not earning—or seeking to earn—supra-competitive profits. The Exchange believes the Cost Analysis and related projections in this filing demonstrate this fact.

The Exchange is owned by a holding company that is the parent company of four exchange markets and, therefore, the Exchange and its affiliated markets must allocate shared costs across all of those markets accordingly, pursuant to the above-described allocation methodology. In contrast, the Investors Exchange LLC (''IEX'') and MEMX, which are currently each operating only one exchange, in their recent non-transaction fee filings allocate the entire amount of that same cost to a single exchange. This can result in lower profit margins for the non-transaction fees proposed by IEX and MEMX because the single allocated cost does not experience the efficiencies and synergies that result from sharing costs across multiple platforms. The Exchange and its affiliated markets often share a single cost, which results in cost efficiencies that can cause a broader gap between the allocated cost amount and projected revenue, even though the fee levels being proposed are lower or competitive with competing markets (as described above). To the extent that the application of a cost-based standard results in Commission Staff making determinations as to the appropriateness of certain profit margins, the Exchange believes that Commission Staff should also consider whether the proposed fee level is comparable to, or competitive with, the same fee charged by competing exchanges and how different cost allocation methodologies (such as across multiple markets) may result in different profit margins for comparable fee levels. Further, if Commission Staff is making determinations as to appropriate profit margins in their approval of exchange fees, the Exchange believes that the Commission should be clear to all market participants as to what they have determined is an appropriate profit margin and should apply such determinations consistently and, in the case of certain legacy exchanges, retroactively, if such standards are to avoid having a discriminatory effect.

Further, as is reflected in the proposal, the Exchange continuously and aggressively works to control its costs as a matter of good business practice. A potential profit margin should not be evaluated solely on its size; that assessment should also consider cost management and whether the ultimate fee reflects the value of the services provided. For example, a profit margin on one exchange should not be deemed excessive where that exchange has been successful in controlling its costs, but not excessive on another exchange where that exchange is charging comparable fees but has a lower profit margin due to higher costs. Doing so could have the perverse effect of not incentivizing cost control where higher costs alone could be used to justify fees increases.

The Proposed Pricing Is Not Unfairly Discriminatory and Provides for the Equitable Allocation of Fees, Dues, and Other Charges

The Exchange believes that the proposed fees are reasonable, fair, equitable, and not unfairly discriminatory because they are designed to align fees with services provided and will apply equally to all subscribers.

10Gb ULL Connectivity

The Exchange believes that the proposed fees are equitably allocated among users of the network connectivity and port alternatives, as the users of 10Gb ULL connections consume substantially more bandwidth and network resources than users of 1Gb ULL connection. Specifically, the Exchange notes that 10Gb ULL connection users account for more than 99% of message traffic over the network, driving other costs that are linked to capacity utilization, as described above, while the users of the 1Gb ULL connections account for less than 1% of message traffic over the network. In the Exchange's experience, users of the 1Gb connections do not have the same business needs for the high-performance network as 10Gb ULL users.

The Exchange's high-performance network and supporting infrastructure (including employee support), provides unparalleled system throughput with the network ability to support access to several distinct options markets. To achieve a consistent, premium network performance, the Exchange must build out and maintain a network that has the capacity to handle the message rate requirements of its most heavy network consumers. These billions of messages per day consume the Exchange's resources and significantly contribute to the overall network connectivity expense for storage and network transport capabilities. The Exchange must also purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages to satisfy its record keeping requirements under the Exchange Act.[112] Thus, as the number of messages an entity increases, certain other costs incurred by the Exchange that are correlated to, though not directly affected by, connection costs (*e.g.,* storage costs, surveillance costs, service expenses) also increase. Given this difference in network utilization rate, the Exchange believes that it is reasonable, equitable, and not unfairly discriminatory that the 10Gb ULL users pay for the vast majority of the shared network resources from which all market participants' benefit.

Limited Service MEI Ports

The proposed changes to the monthly fee for Limited Service MEI Ports is not unfairly discriminatory because it would apply to all Market Makers equally. All Market Makers would now be eligible to receive four (4) free Limited Service MEI Ports and those that elect to purchase more would be subject to the same monthly rate

[112] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

regardless of the number of additional Limited Service MEI Ports they purchase. Certain market participants choose to purchase additional Limited Service MEI Ports based on their own particular trading/quoting strategies and feel they need a certain number of connections to the Exchange to execute on those strategies. Other market participants may continue to choose to only utilize the free Limited Service MEI Ports to accommodate their own trading or quoting strategies, or other business models. All market participants elect to receive or purchase the amount of Limited Service MEI Ports they require based on their own business decisions and all market participants would be subject to the same fee structure and flat fee. Every market participant may receive up to four (4) free Limited Service MEI Ports and those that choose to purchase additional Limited Service MEI Ports may elect to do so based on their own business decisions and would continue to be subject to the same flat fee. The Exchange notes that it filed to amend this fee in 2020 and that filing contained the same fee structure, *i.e.,* a certain number of free Limited Service MEI Ports coupled with a flat fee for additional Limited Service MEI Ports.[113] At that time, the Commission did not find the structure to be unfairly discriminatory by virtue of that proposal surviving the 60-day suspension period. Therefore, the proposed changes to the fees for Limited Service MEI Ports is not unfairly discriminatory because it would continue to apply to all market participants equally and provides a fee structure that includes four free Limited Service MEI Ports for one monthly rate that was previously in place and filed with the Commission.

The Exchange believes that its proposed fee for Limited Service MEI Ports is reasonable, fair and equitable, and not unfairly discriminatory because it is designed to align fees with services provided, will apply equally to all Members that are assigned Limited Service MEI Ports (either directly or through a Service Bureau), and will minimize barriers to entry by now providing all Members with four, instead of the prior two, free Limited Service MEI Ports.[114] In fact, the proposed fee structure produces less overall monthly revenue for the Exchange compared to the prior tiered structure, while providing more additional free ports to all Members. Additionally, based on October 2023 billings, no Member experienced an increase in monthly cost from the proposed fee structure. As a result of the proposed fee structure, a significant majority of Members will not be subject to any fee, and only seven Members will potentially be subject to a fee for Limited Service MEI Ports in excess of four per month, based on current usage. In contrast, as described above, other exchange generally charge in excess of $450 per port without providing any free ports.[115] Even for Members that choose to maintain more than four Limited Service MEI Ports, the Exchange believes that the cost-based fee proposed herein is low enough that it will not operate to restrain any Member's ability to maintain the number of Limited Service MEI Ports that it determines are consistent with its business objectives. The small number of Members projected to be subject to the highest fees will still pay considerably less than competing exchanges charge.[116] Further, the number of assigned Limited Service MEI Ports will continue to be based on decisions by each Member, including the ability to reduce fees by discontinuing unused Limited Service MEI Ports.

The Exchange believes that providing four free Limited Service MEI Ports is fair and equitable, and not unfairly discriminatory because it will enable all Members (and more Members than when the Exchange previously provided two free Limited Service MEI Ports) to access the Exchange free of charge, thereby encouraging order flow and liquidity from a diverse set of market participants, facilitating price discovery and the interaction of orders. The Exchange believes that four Limited Service MEI Ports is an appropriate number to provide for free because it aligns with the number of such ports currently maintained by a substantial majority of Members. Based on a review of Limited Service MEI Port usage, 28 of 35 connected Members are not projected to be subject to any Limited Service MEI Port fees under the proposed fee.

The Exchange assessed whether the fee may impact different types or sizes of Members differently. As a threshold matter, the fee does not by design apply differently to different types or sizes of Members. Nonetheless, the Exchange assessed whether there would be any differences in the amount of the projected fee that correlate to the type and/or size of different Members. This assessment revealed that the number of assigned Limited Service MEI Ports, and thus projected fees, correlates closely to a Member's inbound message volume to the Exchange. Specifically, as inbound message volume increases per Member, the number of requested and assigned Limited Service MEI Ports increases. The following table presents data from October 2023 evidencing the correlation between a Member's inbound message volume and the number of Limited Service MEI Port assigned to the Member as of October 31, 2023.

Number of ports	Average daily message traffic	Total message traffic	Overall percentage of all message traffic for month
1–4	2,171,903,372	47,781,874,178	22.03
5 or more	7,658,332,916	169,077,324,161	77.97

Members with relatively higher inbound message volume are projected to pay higher fees because they have requested more Limited Service MEI Ports. For example, the seven Members that subscribe to five or more Limited

[113] *See supra* note 6.

[114] The following rationale to support providing a certain number of Limited Service MEI Ports for free prior to applying a fee is similar to that used by the Investors Exchange LLC (''IEX'') in 2020 proposal to do the same as proposed herein. *See* Securities Exchange Act Release No. 86626 (August 9, 2019), 84 FR 41793 (August 15, 2019) (SR–IEX–2019–07).

[115] *See supra* notes a–j above.

[116] Assuming a Member selects five Limited Service MEI Ports based on their business needs, that Member on Emerald would be charged only for the fifth Limited Service MEI Port and pay only the $420 monthly fee, as the first four Limited Service Ports would be free. Meanwhile, a Member that purchases five ports on NYSE Arca Options would pay $450 per port per month, resulting in a total charge of $2,250 per month. On Cboe BZX Options, that same member would pay $750 per port per month, resulting in a total charge of $3,750 per months for five ports. *See* NYSE Arca Options Fees and Charges, dated November 2023, available at *https://www.nyse.com/publicdocs/nyse/markets/arca-options/NYSE_Arca_Options_Fee_Schedule.pdf* and Cboe BZX Options Fee Schedule *available at https://www.cboe.com/us/options/membership/fee_schedule/.*

Service MEI Ports and are subject to the proposed monthly fee on average account for 77.97%% of October 2023 inbound messages over Limited Service MEI Ports. Of those seven Members, three experienced a monthly fee decrease for October 2023 under the proposed fee structure compared to the prior fee structure that provided two Limited Service MEI Ports for free and charged a tiered structure for any additional Limited Service MEI Ports. In contrast, the 28 Members that, based on their October 2023 Limited Service MEI Port usage are not projected to be subject to any Limited Service MEI Port fees, on average account for only 22.03% of October 2023 inbound messages over Limited Service MEI Port. This includes two Members that previously paid a fee that were not charged in October 2023 under the proposed fee structure.

The Exchange believes that the variance between projected fees and Limited Service MEI Ports usage is not unfairly discriminatory because it is based on objective differences in Limited Service MEI Port usage among different Members. The Exchange notes that the distribution of total inbound message volume is concentrated in relatively few Members, which consume a much larger proportionate share of the Exchange's resources (compared to the majority of Members that send substantially fewer inbound order messages). This distribution of inbound message volume requires the Exchange to maintain sufficient Limited Service MEI Port capacity to accommodate the higher existing and anticipated message volume of higher volume Members. Thus, the Exchange's incremental aggregate costs for all Limited Service MEI Ports are disproportionately related to volume from the highest inbound message volume Members. For these reasons, the Exchange believes it is not unfairly discriminatory for the Members with the highest inbound message volume to pay a higher share of the total Limited Service MEI Ports fees.

While Limited Service MEI Port usage is concentrated in a few relatively larger Members, the number of such ports requested is not based on the size or type of Member but rather correlates to a Member's inbound message volume to the Exchange. Further, Members with relatively higher inbound message volume also request (and are assigned) more Limited Service MEI Ports than other Members, which in turn means they account for a disproportionate share of the Exchange's aggregate costs for providing Limited Service MEI Ports.[117] Therefore, the Exchange believes it is not unfairly discriminatory for the Members with higher inbound message volume to pay a modestly higher proportionate share of the Limited Service MEI Port fees.

To achieve consistent, premium network performance, the Exchange must build and maintain a network that has the capacity to handle the message rate requirements of its heaviest network consumers during anticipated peak market conditions. The resultant need to support billions of messages per day consume the Exchange's resources and significantly contribute to the overall network connectivity expense for storage and network transport capabilities. This need also requires the Exchange to purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages as part of it surveillance program and to satisfy its record keeping requirements under the Exchange Act.[118] Thus, as the number of connections per Market Maker increases, other costs incurred by the Exchange also increase, *e.g.,* storage costs, surveillance costs, service expenses.

Accordingly, the Exchange believes that the fee will be applied consistently with its specific purpose—to partially recover the Exchange's aggregate costs, encourage the efficient use of Limited Service MEI Ports, and align fees with Members' Limited Service MEI Port and system usage.

The Exchange further believes that the proposed fees are reasonable, fair and equitable, and non-discriminatory because they will apply to all Members in the same manner and are not targeted at a specific type or category of market participant engaged in any particular trading strategy. All Members will receive four free Limited Service MEI Ports and pay the same proposed fee per Limited Service MEI Ports for each additional Limited Service MEI Port. Each Limited Service MEI Port is identical, providing connectivity to the Exchange on identical terms. While the proposed fee will result in a different effective ''per unit'' rate for different Members after factoring in the four free Limited Service MEI Ports, the Exchange does not believe that this difference is material given the overall low proposed fee per Limited Service MEI Port. Because the first four Limited Service MEI Ports are free of charge, each entity will have a ''per unit'' rate of less than the proposed fee. Further, the fee is not connected to volume based tiers. All Members will be subject to the same fee schedule, regardless of the volume sent to or executed on the Exchange. The fee also does not depend on any distinctions between Members, customers, broker-dealers, or any other entity. The fee will be assessed solely based on the number of Limited Service MEI Ports an entity selects and not on any other distinction applied by the Exchange. While entities that send relatively more inbound messages to the Exchange may select more Limited Service MEI Ports, thereby resulting in higher fees, that distinction is based on decisions made by each Member and the extent and nature of the Member's business on the Exchange rather than application of the fee by the Exchange. Members can determine how many Limited Service MEI Ports they need to implement their trading strategies effectively. The Exchange proposes to offer additional Limited Service MEI Ports at a low fee to enable all Members to purchase as many Limited Service MEI Ports as their business needs dictate in order to optimize throughput and manage latency across the Exchange.

Notwithstanding that Members with the highest number of Limited Service MEI Ports will pay a greater percentage of the total projected fees than is represented by their Limited Service MEI Port usage, the Exchange does not believe that the proposed fee is unfairly discriminatory. It is not possible to fully synchronize the Exchange's objective to provide four free Limited Service MEI Ports to all Members, thereby minimizing barriers to entry and incentivizing liquidity on the Exchange, with an approach that exactly aligns the projected per Member fee with each Member's number of requested Limited Service MEI Ports. As proposed, the Exchange is providing a reasonable increased number of Limited Service MEI Ports to each Member without charge. In fact, the Exchange proposes to provide more Limited Service MEI Ports for free by increasing the number of available Limited Service MEI Ports that are provided for free from two to four. Any variance between projected fees and Limited Service MEI Port usage is attributable to objective differences among Members in terms of the number of Limited Service MEI Ports they determine are appropriate based on

[117] *See* Securities Exchange Act Release No. 86626 (August 9, 2019), 84 FR 41793 (August 15, 2019) (SR–IEX–2019–07) (justifying providing 5 ports for free and charging a fee for every port purchased in excess of 5 ports based on the higher message traffic of subscribers with increased number of ports).

[118] 17 CFR 240.17a-1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

their trading on the Exchange. Further, the Exchange believes that the low amount of the proposed fee (which in the aggregate is projected to only partially recover the Exchange's directly-related costs as described herein) mitigates any disparate impact.

Further, the fee will help to encourage Limited Service MEI Port usage in a way that aligns with the Exchange's regulatory obligations. As a national securities exchange, the Exchange is subject to Regulation Systems Compliance and Integrity (''Reg SCI'').[119] Reg SCI Rule 1001(a) requires that the Exchange establish, maintain, and enforce written policies and procedures reasonably designed to ensure (among other things) that its Reg SCI systems have levels of capacity adequate to maintain the Exchange's operational capability and promote the maintenance of fair and orderly markets.[120] By encouraging Members to be efficient with their Limited Service MEI Ports usage, the proposed fee will support the Exchange's Reg SCI obligations in this regard by ensuring that unused Limited Service MEI Ports are available to be allocated based on individual Members needs and as the Exchange's overall order and trade volumes increase. Additionally, because the Exchange will continue not to charge connectivity testing and certification fees to its Disaster Recovery Facility or where the Exchange requires testing and certification, the proposed fee structure will further support the Exchange's Reg SCI compliance by reducing the potential impact of a disruption should the Exchange be required to switch to its Disaster Recovery Facility and encouraging Members to engage in any necessary system testing without incurring any port fee costs.[121]

Finally, the Exchange believes that the proposed fee is consistent with Section 11A of the Exchange Act in that it is designed to facilitate the economically efficient execution of securities transactions, fair competition among brokers and dealers, exchange markets and markets other than exchange markets, and the practicability of brokers executing investors' orders in the best market. Specifically, the proposed low, cost-based fee will enable a broad range of the Exchange Members to continue to connect to the Exchange, thereby facilitating the economically efficient execution of securities transactions on the Exchange, fair competition between and among such Members, and the practicability of Members that are brokers executing investors' orders on the Exchange when it is the best market.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intra-Market Competition

The Exchange believes the proposed fees will not result in any burden on intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed fees will allow the Exchange to recoup some of its costs in providing 10Gb ULL connectivity and Limited Service MEI Ports at below market rates to market participants since the Exchange launched operations. As described above, the Exchange operated at a cumulative net annual loss since its launch in 2019 through 2021 [122] due to providing a low-cost alternative to attract order flow and encourage market participants to experience the high determinism and resiliency of the Exchange's trading Systems. To do so, the Exchange chose to waive the fees for some non-transaction related services and Exchange products or provide them at a very lower fee, which was not profitable to the Exchange. This resulted in the Exchange forgoing revenue it could have generated from assessing any fees or higher fees. The Exchange could have sought to charge higher fees at the outset, but that could have served to discourage participation on the Exchange. Instead, the Exchange chose to provide a low-cost exchange alternative to the options industry, which resulted in lower initial revenues. Examples of this are 10Gb ULL connectivity and Limited Service MEI Ports, for which the Exchange only now seeks to adopt fees at a level similar to or lower than those of other options exchanges.

Further, the Exchange does not believe that the proposed fee increase for the 10Gb ULL connection change would place certain market participants at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete. As is the case with the current proposed flat fee, the proposed fee would apply uniformly to all market participants regardless of the number of connections they choose to purchase. The proposed fee does not favor certain categories of market participants in a manner that would impose an undue burden on competition.

The Exchange does not believe that the proposed rule change would place certain market participants at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete. In particular, Exchange personnel has been informally discussing potential fees for connectivity services with a diverse group of market participants that are connected to the Exchange (including large and small firms, firms with large connectivity service footprints and small connectivity service footprints, as well as extranets and service bureaus) for several months leading up to that time. The Exchange does not believe the proposed fees for connectivity services would negatively impact the ability of Members, non-Members (extranets or service bureaus), third-parties that purchase the Exchange's connectivity and resell it, and customers of those resellers to compete with other market participants or that they are placed at a disadvantage.

The Exchange does anticipate, however, that some market participants may reduce or discontinue use of connectivity services provided directly by the Exchange in response to the proposed fees. In fact, as mentioned above, one MIAX Pearl Options Market Maker terminated their MIAX Pearl Options membership on January 1, 2023 as a direct result of the similar proposed fee changes by MIAX Pearl Options.[123] The Exchange does not believe that the proposed fees for connectivity services place certain market participants at a

[119] 17 CFR 242.1000–1007.

[120] 17 CFR 242.1001(a).

[121] By comparison, some other exchanges charge less to connect to their disaster recovery facilities, but still charge an amount that could both recoup costs and potentially be a source of profits. See, *e.g.,* Nasdaq Stock Market LLC Equity 7, Section 115 (Ports and other Services).

[122] The Exchange has incurred a cumulative loss of $9 million since its inception in 2019 through 2021. *See* Exchange's Form 1/A, Application for Registration or Exemption from Registration as a National Securities Exchange, filed June 29, 2022, *available at https://www.sec.gov/Archives/edgar/vprr/2200/22001164.pdf*

[123] The Exchange acknowledges that IEX included in its proposal to adopt market data fees after offering market data for free an analysis of what its projected revenue would be if all of its existing customers continued to subscribe versus what its projected revenue would be if a limited number of customers subscribed due to the new fees. *See* Securities Exchange Act Release No. 94630 (April 7, 2022), 87 FR 21945 (April 13, 2022) (SR–IEX–2022–02). MEMX did not include a similar analysis in either of its recent non-transaction fee proposals. *See, e.g., supra* note 71. The Exchange does not believe a similar analysis would be useful here because it is amending existing fees, not proposing to charge a new fee where existing subscribers may terminate connections because they are no longer enjoying the service at no cost.

relative disadvantage to other market participants because the proposed connectivity pricing is associated with relative usage of the Exchange by each market participant and does not impose a barrier to entry to smaller participants. The Exchange believes its proposed pricing is reasonable and, when coupled with the availability of third-party providers that also offer connectivity solutions, that participation on the Exchange is affordable for all market participants, including smaller trading firms. As described above, the connectivity services purchased by market participants typically increase based on their additional message traffic and/or the complexity of their operations. The market participants that utilize more connectivity services typically utilize the most bandwidth, and those are the participants that consume the most resources from the network. Accordingly, the proposed fees for connectivity services do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation of the proposed connectivity fees reflects the network resources consumed by the various size of market participants and the costs to the Exchange of providing such connectivity services.

Lastly, the Exchange does not believe its proposed changes to the monthly rate for Limited Service MEI Ports will place certain market participants at a relative disadvantage to other market participants. All market participants would be eligible to receive four (4) free Limited Service MEI Ports and those that elect to purchase more would be subject to the same flat fee regardless of the number of additional Limited Service MEI Ports they purchase. All firms purchase the amount of Limited Service MEI Ports they require based on their own business decisions and similarly situated firms are subject to the same fees.

Inter-Market Competition

The Exchange also does not believe that the proposed rule change and price increase will result in any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act. As this is a fee increase, arguably if set too high, this fee would make it easier for other exchanges to compete with the Exchange. Only if this were a substantial fee decrease could this be considered a form of predatory pricing. In contrast, the Exchange believes that, without this fee increase, we are potentially at a competitive disadvantage to certain other exchanges that have in place higher fees for similar services. As we have noted, the Exchange believes that connectivity fees can be used to foster more competitive transaction pricing and additional infrastructure investment and there are other options markets of which market participants may connect to trade options at higher rates than the Exchange's. Accordingly, the Exchange does not believe its proposed fee changes impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

* * * * *

In conclusion, as discussed thoroughly above, the Exchange regrettably believes that the application of the Revised Review Process and Staff Guidance has adversely affected inter-market competition among legacy and non-legacy exchanges by impeding the ability of non-legacy exchanges to adopt or increase fees for their market data and access services (including connectivity and port products and services) that are on parity or commensurate with fee levels previously established by legacy exchanges. Since the adoption of the Revised Review Process and Staff Guidance, and even more so recently, it has become extraordinarily difficult to adopt or increase fees to generate revenue necessary to invest in systems, provide innovative trading products and solutions, and improve competitive standing to the benefit of non-legacy exchanges' market participants. Although the Staff Guidance served an important policy goal of improving disclosures and requiring exchanges to justify that their market data and access fee proposals are fair and reasonable, it has also negatively impacted non-legacy exchanges in particular in their efforts to adopt or increase fees that would enable them to more fairly compete with legacy exchanges, despite providing enhanced disclosures and rationale under both competitive and cost basis approaches provided for by the Revised Review Process and Staff Guidance to support their proposed fee changes.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange received one comment letter on the Initial Proposal, one comment letter on the Second Proposal, one comment letter on the Third Proposal, one comment letter on the Fourth Proposal, one comment letter on the Fifth Proposal, and one comment letter on the Sixth Proposal, all from the same commenter.[124] In their letters, the sole commenter seeks to incorporate comments submitted on previous Exchange proposals to which the Exchange has previously responded. The Exchange also received one comment letter from a separate commenter on the Sixth Proposal.[125] The Exchange believes issues raised by each commenters are not germane to this proposal in particular, but rather raise larger issues with the current environment surrounding exchange non-transaction fee proposals that should be addressed by the Commission through rule making, or Congress, more holistically and not through an individual exchange fee filings. Among other things, the commenters are requesting additional data and information that is both opaque and a moving target and would constitute a level of disclosure materially over and above that provided by any competitor exchanges.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[126] and Rule 19b–4(f)(2) [127] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

[124] *See* letter from Brian Sopinsky, General Counsel, Susquehanna International Group, LLP (''SIG''), to Vanessa Countryman, Secretary, Commission, dated February 7, 2023, *and* letters from Gerald D. O'Connell, SIG, to Vanessa Countryman, Secretary, Commission, dated March 21, 2023, May 24, 2023, July 24, 2023 and September 18, 2023.

[125] *See* letter from Thomas M. Merritt, Deputy General Counsel, Virtu Financial, Inc. (''Virtu''), to Vanessa Countryman, Secretary, Commission, dated November 8, 2023.

[126] 15 U.S.C. 78s(b)(3)(A)(ii).

[127] 17 CFR 240.19b–4(f)(2).

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–EMERALD–2023–30 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–EMERALD–2023–30. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–EMERALD–2023–30 and should be submitted on or before January 5, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[128]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–27530 Filed 12–14–23; 8:45 am]

BILLING CODE 8011–01–P

[128] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments

ACTION: 60-Day notice and request for comments.

SUMMARY: The Small Business Administration (SBA) intends to request approval, from the Office of Management and Budget (OMB) for the collection of information described below. The Paperwork Reduction Act (PRA) requires federal agencies to publish a notice in the **Federal Register** concerning each proposed collection of information before submission to OMB, and to allow 60 days for public comment in response to the notice. This notice complies with that requirement.

DATES: Submit comments on or before February 13, 2024.

ADDRESSES: Send all comments to, Paul Kirwin, Chief, SBA Supervised Lender Oversight Division, Office of Credit Risk Management, Small Business Administration, Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Paul Kirwin, Chief, SBA Supervised Lender Oversight Division, Office of Credit Risk Management 202–205–7261, *paul.kirwin@sba.gov* Curtis B. Rich, Agency Clearance Officer, 202–205–7030, *curtis.rich@sba.gov*.

SUPPLEMENTARY INFORMATION:

Small Business Lending Companies (SBLCs), Community Advantage Small Business Lending Companies (CA SBLCs) and Non-federally regulated lenders (NFRLs) are non-depository lending institutions authorized by SBA primarily to make loans under section 7(a) of the Small Business Act. As sole regulator of these institutions, SBA requires them to submit audited financial statements annually as well as interim, quarterly financial statements and other reports to facilitate the Agency's oversight of these lenders.

Solicitation of Public Comments

SBA is requesting comments on (a) Whether the collection of information is necessary for the agency to properly perform its functions; (b) whether the burden estimates are accurate; (c) whether there are ways to minimize the burden, including through the use of automated techniques or other forms of information technology; and (d) whether there are ways to enhance the quality, utility, and clarity of the information.

Summary of Information Collection

Collection: 3245–0077.

Title of Collection: Reports to SBA Provisions of 13 CFR 120.464.

Description of Respondents: Small Business Lending Companies (SBLCs) and Non-federally regulated lenders (NFRLs).

Total Estimated Annual Responses: 594.

Total Estimated Annual Hour Burden: 7,110.

Curtis Rich,

Agency Clearance Officer.

[FR Doc. 2023–27638 Filed 12–14–23; 8:45 am]

BILLING CODE 8026–09–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36742]

Lakeshore Terminal Railroad LLC—Acquisition and Operation Exemption—Track in Lake County, Ind.

Lakeshore Terminal Railroad LLC (Lakeshore Terminal), a noncarrier, has filed a verified notice of exemption pursuant to 49 CFR 1150.31 to acquire and operate approximately 0.5 miles (2,854 feet) of what is currently private industry track in East Chicago, Lake County, Ind., extending from a point of connection with Indiana Harbor Belt Railroad Company to the end of track (the Line).

This transaction is related to a verified notice of exemption concurrently filed in *Patriot Rail Company—Continuance in Control Exemption—Lakeshore Terminal Railroad,* Docket No. FD 36743, in which Patriot Rail Company LLC and a number of other related applicants seek to continue in control of Lakeshore Terminal upon Lakeshore Terminal's becoming a Class III rail carrier.

According to Lakeshore Terminal, its noncarrier corporate affiliate, Lakeshore Railcar & Tanker Services LLC (Lakeshore Services), currently owns the Line and uses it for non-common carrier activity (primarily, freight car repair and cleaning). The verified notice states that Lakeshore Terminal and Lakeshore Services have an agreement under which Lakeshore Services will convey the Line to Lakeshore Terminal for the initiation of railroad common carrier service. Lakeshore Terminal states that it will operate and provide all rail common carrier service to customers on the Line and connecting ancillary trackage once the exemption becomes effective.

Lakeshore Terminal certifies that it will not be subject to any limitations on its ability to interchange with a third-party connecting carrier. Lakeshore Terminal also certifies that its projected annual revenues are not expected to exceed $5 million and that the proposed

transaction will not result in Lakeshore Terminal's becoming a Class I or Class II rail carrier.

The earliest this transaction may be consummated is December 31, 2023, the effective date of the exemption (30 days after the verified notice was filed).

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 December 22, 2023 (at least seven days before the exemption becomes effective).

All pleadings, referring to Docket No. FD 36742, must be filed with the Surface Transportation Board either 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 Lakeshore Terminal's representative, Robert A. Wimbish, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 800, Chicago, IL 60606–3208.

According to Lakeshore Terminal, 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: December 12, 2023.

By the Board, Mai Dinh, Director, Office of Proceedings.

Tammy Lowery,

Clearance Clerk.

[FR Doc. 2023–27636 Filed 12–14–23; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 35508 (Sub-No. 1)]

Iowa Northern Railway Company—Lease Renewal Exemption—Rail Line of North Central Iowa Rail Corridor, LLC

Iowa Northern Railway Company (IANR) has filed a verified notice of exemption under 49 CFR 1180.2(d)(4) to renew its lease of the railroad property of North Central Iowa Rail Corridor, LLC (NCIRC), between milepost 48.12 at Belmond, Iowa, and milepost 75.95 at Forest City, Iowa, and 600 feet of connecting track at Garner, Iowa (the Line).[1]

According to the verified notice, in 2011, IANR leased the Line from NCIRC, for an initial term of ten years, pursuant to a lease and purchase agreement. *See Iowa N. Ry.—Operation Exemption—N. Cent. Rail Corridor, LLC,* FD 35508 (STB served May 26, 2011). IANR states that, in 2021, it and NCIRC agreed to renew the lease for an additional three years, from September 30, 2021, until September 30, 2024. IANR states that it did not file a notice of exemption before consummating the lease renewal because it was not aware that the renewal required an exemption or Board approval. IANR now seeks after-the-fact Board authorization for the transaction.[2] IANR states that the agreement does not include any provision that would limit the future interchange of traffic with a third-party connecting carrier.

IANR represents that the transaction involves a renewal of a lease that the Board previously authorized, and only an extension in time is involved. Therefore, the transaction is exempt from the prior approval requirements of 49 U.S.C. 11323. *See* 49 CFR 1180.2(d)(4).

This transaction may be consummated on or after December 30, 2023, the effective date of the exemption (30 days after the verified notice was filed).

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. However, 49 U.S.C. 11326(c) does not provide for labor protection for transactions under 49 U.S.C. 11324 and 11325 that involve only Class III rail carriers. Because this transaction involves Class III rail carriers only, the Board, under the statute, may not impose labor protective conditions for this transaction.

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 December 22, 2023.

All pleadings, referring to Docket No. FD 35508 (Sub-No. 1), must be filed with the Surface Transportation Board either via e-filing on the Board's website or in writing addressed to 395 E Street SW, Washington, DC 20423–0001. In addition, one copy of each pleading must be served on IANR's representative, Kevin M. Sheys, Hogan Lovells US LLP, Columbia Square 555, Thirteenth Street NW, Washington, DC 20004.

According to IANR, this action is categorically excluded from environmental review under 49 CFR 1105.6(c) and from historic reporting requirements under 49 CFR 1105.8(b).

Board decisions and notices are available at *www.stb.gov.*

Decided: December 12, 2023.

By the Board, Mai T. Dinh, Director, Office of Proceedings.

Kenyatta Clay,

Clearance Clerk.

[FR Doc. 2023–27634 Filed 12–14–23; 8:45 am]

BILLING CODE 4915–01–P

[1] IANR filed a correction to its verified notice of exemption on December 5, 2023.

[2] IANR does not seek retroactive effectiveness for the exemption.

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36743]

Patriot Rail Company LLC, SteelRiver Transport Ventures LLC, Global Diversified Infrastructure Fund (North America) LP, First State Infrastructure Managers (International) Limited, and Mitsubishi UFJ Financial Group, Inc.—Continuance in Control Exemption—Lakeshore Terminal Railroad LLC

Patriot Rail Company LLC, SteelRiver Transport Ventures LLC, Global Diversified Infrastructure Fund (North America) LP, First State Infrastructure Managers (International) Limited, and Mitsubishi UFJ Financial Group, Inc. (collectively, Applicants), all noncarriers, have filed a verified notice of exemption under 49 CFR 1180.2(d)(2) to continue in control of Lakeshore Terminal Railroad LLC (Lakeshore Terminal) upon Lakeshore Terminal's becoming a Class III rail carrier.

This transaction is related to a verified notice of exemption filed concurrently in *Lakeshore Terminal Railroad—Acquisition & Operation Exemption—Track in Lake County, Ind.,* Docket No. FD 36742, in which Lakeshore Terminal seeks to acquire and commence common carrier operations over approximately 0.5 miles of track located in East Chicago, Lake County, Ind.

According to the verified notice, Applicants currently control Lakeshore Terminal in addition to 31 existing Class III rail carriers in 21 states.[1]

[1] The verified notice lists the railroads and the location of their operations as follows: (1) Alabama & Florida Railway Co., Inc. d/b/a Ripley & New Albany Railroad Co.—Alabama and Mississippi; (2) Columbia & Cowlitz Railway, LLC—Washington; (3) Decatur Junction Railway Co. LLC—Illinois; (4) Delta Southern Railroad, Inc.—Louisiana; (5) DeQueen and Eastern Railroad, LLC—Arkansas; (6) Elkhart & Western Railroad Co. LLC—Indiana; (7)

Continued

Applicants state that they neither contemplate nor require an agreement to continue in control of Lakeshore Terminal once it becomes a rail carrier.

The verified notice indicates that: (1) the Line does not connect with any of the Patriot Short Lines; (2) the acquisition of control is not part of a series of anticipated transactions that would connect the Line or any of the Patriot Short Lines with each other; and (3) the proposed transaction does not involve a Class I rail carrier. Therefore, the transaction is exempt from the prior approval requirements of 49 U.S.C. 11323. *See* 49 CFR 1180.2(d)(2).

The transaction may be consummated on or after December 31, 2023, the effective date of the exemption (30 days after the verified notice was filed).

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. However, 49 U.S.C. 11326(c) does not provide for labor protection for transactions under 49 U.S.C. 11324 and 11325 that involve only Class III rail carriers. Accordingly, the Board may not impose labor protective conditions here because all of the carriers involved are Class III rail carriers.

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 to stay must be filed no later than December 22, 2023.

All pleadings, referring to Docket No. FD 36743, must be filed with the Surface Transportation Board either 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 Applicants' representative, Robert A. Wimbish, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 800, Chicago, IL 60606–3208.

According to the verified notice, 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: December 12, 2023.

By the Board, Mai T. Dinh, Director, Office of Proceedings.

Tammy Lowery,

Clearance Clerk.

[FR Doc. 2023–27637 Filed 12–14–23; 8:45 am]

BILLING CODE 4915–01–P

Fort Smith Railroad Co. LLC—Arkansas; (8) The Garden City Western Railway LLC—Kansas; (9) Georgia Northeastern Railroad Company LLC—Georgia; (10) Georgia Southern Railway Co. LLC—Georgia; (11) Gettysburg & Northern Railroad Co. LLC—Pennsylvania; (12) Golden Triangle Railroad, LLC—Mississippi; (13) Indiana Southwestern Railway Co. LLC—Indiana; (14) Kendallville Terminal Railway Co. LLC—Indiana; (15) Keokuk Junction Railway Co. LLC—Iowa and Illinois; (16) Keokuk Union Depot Company LLC (KUD)—Iowa; (17) Kingman Terminal Railroad, LLC—Arizona; (18) Louisiana and North West Railroad Company, LLC—Arkansas and Louisiana; (19) Merced County Central Valley Railroad LLC—California; (20) Michigan Southern Railroad Company (in Indiana and Ohio, d/b/a Napoleon Defiance and Western Railway)—Indiana, Michigan, and Ohio; (21) Mississippi Central Railroad Co. LLC—Mississippi, Tennessee, and Alabama; (22) Pioneer Industrial Railway Co. LLC—Illinois; (23) Rarus Railway, LLC d/b/a Butte, Anaconda & Pacific Railway Co.—Montana; (24) Sacramento Valley Railroad, LLC—California; (25) Salt Lake, Garfield and Western Railway Company—Utah; (26) Temple & Central Texas Railway, LLC—Texas; (27) Tennessee Southern Railroad Company, LLC—Tennessee and Alabama; (28) Texas Oklahoma & Eastern Railroad, LLC—Oklahoma; (29) Utah Central Railway Company, LLC—Utah; (30) Vandalia Railroad Company—Illinois; (31) West Belt Railway LLC—Missouri (collectively, Patriot Short Lines). Applicants state that they have included KUD in this list out of an abundance of caution, as it is unclear whether KUD is a rail common carrier subject to the Board's jurisdiction.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2023–25488]

Random Drug and Alcohol Testing Percentage Rates of Covered Aviation Employees for the Period January 1, 2024 to December 31, 2024; Correction

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

ACTION: Random drug and alcohol testing percentage rates of covered aviation employees for the period January 1, 2024 to December 31, 2024; correction.

SUMMARY: On November 17, 2023, the Federal Aviation Administration (FAA) published the Random Drug and Alcohol Testing Percentage Rates of Covered Aviation Employees for the Period January 1, 2024 to December 31, 2024. In that document, the FAA inadvertently provided incorrect years in the supplementary information section. This document corrects that error.

DATES: This correction is effective December 15, 2023.

FOR FURTHER INFORMATION CONTACT: Ms. Vicky Dunne, Federal Aviation Administration, Office of Aerospace Medicine, Drug Abatement Division, Program Policy Branch; Email *drugabatement@faa.gov;* Telephone (202) 267–8442.

SUPPLEMENTARY INFORMATION: On November 17, 2023, the Federal Aviation Administration (FAA) published the Random Drug and Alcohol Testing Percentage Rates of Covered Aviation Employees for the Period January 1, 2024 to December 31, 2024; Corrections. In the second column, third paragraph under the supplementary section of the document, the year appeared as 2023 instead of 2024. In the third column, first paragraph under the supplementary section of the document, the year appeared as 2022 instead of 2024. This document corrects that error.

Corrections

In the **Federal Register** of November 17, 2023, in FR Doc. 2023–25488, on page 80376, in the second column, the year 2023 in the thirty-first line in the **SUPPLEMENTARY INFORMATION** section should be 2024.

In the **Federal Register** of November 17, 2023, in FR Doc. 2023–25488, on page 80376, in the third column, the year 2022 in the third line in the **SUPPLEMENTARY INFORMATION** section should be 2024.

Docket No. FAA–2023–25488

Issued in Washington, DC.

Virginia Lozada,

Acting Director, Drug Abatement Division.

[FR Doc. 2023–27501 Filed 12–14–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Public Notice of Final Action To Release Surplus Airport Property at Kearney Municipal Airport, Kearney, Nebraska

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of final action to release airport property.

SUMMARY: In accordance with section 125 of The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century(AIR–21) the Federal Aviation Administration (FAA) provides notice that the FAA is approving a surplus property land release of Federal obligations for a 5.25 acre parcel at the Kearney Muncipal Airport, Kearney, Nebraska.

FOR FURTHER INFORMATION CONTACT: Amy J. Walter, Airports Land Specialist, Federal Aviation Administration, Central Region Airports Division, ACE–

620, 901 Locust, Kansas City, MO 64106, (816)329–2603.

SUPPLEMENTARY INFORMATION: The Sponsor self reported the sale of a parcel of surplus property airport land prior to receiving required authorization and release by the Federal Aviation Administration (FAA). FAA authorization is a requirement found in the Federal surplus property transfer deeds, 14 CFR part 155, the Federal obligations found in the grant assurances and the guidelines outlined in FAAO 5190.6 Airport Compliance Manual. The 5.25 acre parcel was sold to the previous tenant who had improved the parcel with a building and fuel storage. Upon FAA request, the airport has submitted acceptable corrective actions that include the required documentation of payment of Fair Market Value in the amount of $183,500.00. The FAA has confirmed that the disposition of proceeds from the sale of the airport property are in accordance with 49 U.S.C. 47107(c)(2)(B) and FAA's Policy and Procedures Concerning the Use of Airport Revenue, published in the **Federal Register** on February 16, 1999 (64 FR 7696). In addition, the relevant airport records, to include the ALP and the Exhibit A, have been updated to reflect the release of this property. The FAA has formalized this release with the sponsor in accordance with the applicable authorities. As a result, the FAA considers this matter closed.

Issued in Kansas City, Missouri, on December 11, 2023.

James A. Johnson,

Director, Airports Division.

[FR Doc. 2023–27541 Filed 12–14–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2023–1427]

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: National Flight Data Center Web Portal

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on June 26, 2023. The collection involves aeronautical information detailing the physical description and operational status of all components of the National Airspace System (NAS). The information to be collected will be used to update government, military, and private aeronautical databases, charts, publications, flight management systems, and in-flight tracking products.

DATES: Written comments should be submitted by January 16, 2024.

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: John Graybill by email at: *John.Graybill@faa.gov;* phone: 202–267–3742.

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information.

OMB Control Number: 2120–0754.

Title: National Flight Data Center Web Portal.

Form Numbers: AD1–ADCP, AD3–ACC.

Type of Review: Renewal of an information collection.

Background: The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on June 26, 2023 (88 FR 41464). 49 U.S.C 40103, ''Sovereignty and Use of Airspace,'' authorizes and directs the FAA to develop plans and policy for the use of the navigable airspace. The National Flight Data Center (NFDC) is the authoritative government source for collecting, validating, storing, maintaining, and disseminating aeronautical data concerning the United States and its territories to support real-time aviation activities. The information collected ensures the safe and efficient navigation of the national airspace. The information collected includes, but is not limited to, data regarding airport associated city, CTAF, UNICOM, facility use, runway lighting, airport sketches and diagrams, proposed aircraft call signs, and general remarks. NFDC collects this information and maintains it in the National Airspace System resources (NASR) database. NASR serves as the official repository for NAS data and is provided to government, military, and private producers of aeronautical databases, chants, publications, flight management systems, and in-flight tracking products at no charge. Information will be collected via digital forms. Failure to collect this information would result in obsolete and inaccurate data being reflected on aviation products.

Respondents: Approximately 5,211 representatives of U.S. public airports; airlines; and aircraft operators. Average of 6,495 responses annually.

Frequency: Information to be collected on occasion.

Estimated Average Burden per Response: 20 minutes for AD1–ADCP, 20 minutes for AD3–ACC, 24 minutes for Call Signs.

Estimated Total Annual Burden: 2,170 hours.

Issued in Washington, DC, on December 12, 2023.

John L. Graybill,

Aeronautical Information Specialist, Data Systems Team, Aeronautical Information Services, AJV–A35.

[FR Doc. 2023–27595 Filed 12–14–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Highway Projects in Texas

AGENCY: Texas Department of Transportation (TxDOT), Federal Highway Administration (FHWA), U.S. Department of Transportation.

ACTION: Notice of limitation on claims for judicial review of actions by TxDOT and Federal agencies.

SUMMARY: This notice announces actions taken by TxDOT and Federal agencies that are final. The environmental review, consultation, and other actions required by applicable Federal environmental laws for these projects are being, or have been, carried out by TxDOT pursuant to an assignment agreement executed by FHWA and TxDOT. The actions relate to various proposed highway projects in the State of Texas. These actions grant licenses, permits, and approvals for the projects.

DATES: By this notice, TxDOT is advising the public of final agency actions subject to 23 U.S.C. 139(l)(1). A claim seeking judicial review of TxDOT and Federal agency actions on the highway projects will be barred unless the claim is filed on or before the deadline. For the projects listed below, the deadline is May 13, 2024. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such a claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: Patrick Lee, Environmental Affairs Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701; telephone: (512) 416–2358; email: *Patrick.Lee@txdot.gov.* TxDOT's normal business hours are 8 a.m.–5 p.m. (central time), Monday through Friday.

SUPPLEMENTARY INFORMATION: The environmental review, consultation, and other actions required by applicable Federal environmental laws for these projects are being, or have been, carried out by TxDOT pursuant to 23 U.S.C. 327 and a Memorandum of Understanding dated December 9, 2019, and executed by FHWA and TxDOT.

Notice is hereby given that TxDOT and Federal agencies have taken final agency actions by issuing licenses, permits, and approvals for the highway projects in the State of Texas that are listed below.

The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion (CE), Environmental Assessment (EA), or Environmental Impact Statement (EIS) issued in connection with the projects and in other key project documents. The CE, EA, or EIS and other key documents for the listed projects are available by contacting the local TxDOT office at the address or telephone number provided for each project below.

This notice applies to all TxDOT and Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. *General:* National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351]; Federal-Aid Highway Act [23 U.S.C. 109].

2. *Air:* Clean Air Act [42 U.S.C. 7401–7671(q)].

3. *Land:* Section 4(f) of the Department of Transportation Act of 1966 [49 U.S.C. 303]; Landscaping and Scenic Enhancement (Wildflowers) [23 U.S.C. 319].

4. *Wildlife:* Endangered Species Act [16 U.S.C. 1531–1544 and section 1536], Marine Mammal Protection Act [16 U.S.C. 1361], Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)], Migratory Bird Treaty Act [16 U.S.C. 703–712].

5. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [54 U.S.C. 300101 *et seq.*]; Archeological Resources Protection Act of 1977 [16 U.S.C. 470(aa)–11]; Archeological and Historic Preservation Act [54 U.S.C. 312501 *et seq.*]; Native American Grave Protection and Repatriation Act (NAGPRA) [25 U.S.C. 3001–3013].

6. *Social and Economic:* Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)]; American Indian Religious Freedom Act [42 U.S.C. 1996]; Farmland Protection Policy Act (FPPA) [7 U.S.C. 4201–4209].

7. *Wetlands and Water Resources:* Clean Water Act [33 U.S.C. 1251–1377] (section 404, section 401, section 319); Land and Water Conservation Fund (LWCF) [16 U.S.C. 4601–4604]; Safe Drinking Water Act (SDWA) [42 U.S.C. 300(f)–300(j)(6)]; Rivers and Harbors Act of 1899 [33 U.S.C. 401–406]; Wild and Scenic Rivers Act [16 U.S.C. 1271–1287]; Emergency Wetlands Resources Act [16 U.S.C. 3921, 3931]; TEA–21 Wetlands Mitigation [23 U.S.C. 103(b)(6)(m), 133(b)(11)]; Flood Disaster Protection Act [42 U.S.C. 4001–4128].

8. *Executive Orders:* E.O. 11990 Protection of Wetlands; E.O. 11988 Floodplain Management; E.O. 12898 Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13007 Indian Sacred Sites; E.O. 13287 Preserve America; E.O. 13175 Consultation and Coordination with Indian Tribal Governments; E.O. 11514 Protection and Enhancement of Environmental Quality; E.O. 13112 Invasive Species. (Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction.)

The projects subject to this notice are:

1. US 79 at Little Brazos River, Robertson County, Texas. The project will replace and widen the existing US 79 bridge and approaches over the Little Brazos River. Additional roadway improvements include reconstruction of the base and roadway ditch grading, structure widening, and drainage restoration and improvements. The project is 1.441 miles long on US 79 southwest of Hearne, TX. Starting at the northeast limits of the project, an existing culvert will be reconstructed, and an existing concrete-lined drainage channel will be reconstructed. This work will extend an additional 0.48 mile and will include driveway construction over the proposed ditch. Additional work on FM 50 where it intersects with US 79 will be 0.12 mile long. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on September 5, 2023, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Bryan District Office at 2591 North Earl Rudder Freeway, Bryan, Texas 77803; telephone: (979) 778–2165.

2. SH 178 from the Texas/New Mexico state line to the SH 178/I–10 interchange, El Paso County, Texas. The project will include four direct connectors at the interchange of I–10 and SH 178. Between I–10 and SH 20 (Doniphan Drive) improvements include access control measures, reconstruction, and extension of existing frontage roads in both directions. The project will also include grade-separated interchanges along SH 178 at Upper Valley Road and Westside Drive, with four elevated lanes constructed over these intersections, and entrance and exit ramps connecting with two-lane access roads. The total project length is approximately three miles. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on October 3, 2023, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT El Paso District Office at 13301 Gateway West, El Paso, TX 79928; telephone: (915) 790–4341.

3. SH 6 at the BNSF railroad, Brazoria County, Texas. The project will reconstruct the pump station and install a new stormwater detention on SH 6 at the BNSF railroad near Avenue C/Perry Lane. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on October 5, 2023, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Houston District Office at 7600 Washington Avenue, Houston, TX 77007; telephone: (713) 802–5000.

4. US 183 from RM 1431 to Avery Ranch Boulevard, Williamson County, Texas. The improvements include the

construction of two to four continuous northbound and southbound general purpose lanes adjacent to the 183A tollway, as well as a shared-use path on the northbound side of the roadway. Exit and entrance ramps would also be reconstructed to connect the existing 183A toll facility to the general purpose lanes. No improvements are proposed on the adjacent 183A tollway. The project is approximately 2.83 miles in length. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on October 9, 2023, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Austin District Office at 7901 North I–35, Austin, TX 78753; telephone: (512) 832–7000.

5. Wheatland Road From Dallas/Lancaster County Line to University Hills Boulevard, Dallas County, Texas. The proposed roadway will be a new location undivided roadway realigning Wheatland Road. The project will accommodate four 12-foot-wide travel lanes (two in each direction), with dedicated 5-foot-wide bike lanes and 5-foot-wide sidewalks along both sides of the roadway within an 80-foot-wide right-of-way to match the previous improved section of Wheatland Rd east of the proposed project. The realigned Killough Blvd. would include one 12-foot lane in either direction and a dedicated right-turn lane toward Wheatland Road. The project is approximately 0.579 mile in length. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on October 23, 2023, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Dallas District Office at 4777 E Highway 80, Mesquite, TX 75150; telephone: (214) 320–4480.

6. State Loop (SL) 335 realignment at SH 136 intersection in Potter County, Texas. The project will extend along SL 335 from approximately 0.58 mile south of the SH 136 intersection to approximately 0.365 mile north of the intersection, for a total project length of approximately 0.94 mile. Entrance and exit ramps on SL 335 north of SH 136 will be reconfigured to eliminate the jug handles so that the frontage roads tie straight into SH 136. Eastbound SH 136 west of the intersection will add a 12-foot-wide right turn lane for traffic turning south onto southbound SL 335. New frontage roads for SL 335 northbound and southbound traffic south of SH 136 will be constructed adjacent to the SL 335 main lanes. The areas north of SH 136 where jug handles will be removed will be shaped and reseeded. Lakeside Drive north of SH 136 will no longer be connected to the SL 335 roadway. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Categorical Exclusion Determination issued on October 27, 2023, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Amarillo District Office at 5715 Canyon Drive, Amarillo, TX 79110; telephone: (806) 356–3200.

7. FM 428 from Dallas Parkway to SH 289/Preston Road, Collin County, Texas. The project will include the realignment and widening of the roadway within the project limits. Improvements will consist of four 12-foot-wide lanes (ultimate six) with an 18-foot-wide raised median, and 10-foot-wide sidewalks along both sides of the road. The project will include a bridge over Doe Branch and an overpass over the BNSF tracks. The project is approximately 1.8 miles in length. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in, the Categorical Exclusion Determination issued on November 10, 2023, and other documents in the TxDOT project file. The Categorical Exclusion Determination and other documents in the TxDOT project file are available by contacting the TxDOT Dallas District Office at 4777 E Highway 80, Mesquite, TX 75150; telephone: (214) 320–4480.

8. Hachar-Reuthinger Road, from FM 1472 to I–35 Southbound Frontage Road, Webb County, Texas. The proposed Hachar-Reuthinger Road will provide a new roadway on new location for approximately 8.4 miles from FM 1472 (aka Mines Road) northbound lane east to the southbound (western) frontage road of I–35 approximately two miles north of the I–35/Beltway Parkway/Uniroyal Drive overpass. The proposed roadway will consist of a four-lane divided facility with two lanes of travel in each direction. The proposed roads will consist of two 12-foot-wide travel lanes with four-foot-wide inside shoulders and 10-foot-wide outside shoulders. Intersections with turnarounds will be constructed at the intersection of the future Beltway Parkway and at two additional locations based upon the City of Laredo Thoroughfare Plan. These two currently unidentified intersections will be located approximately 2.4 miles east of Mines Road/FM 1472 intersection, and approximately 1.5 mile northeast of the Hachar Road/Beltway Parkway. A westbound turnaround will be constructed approximately 0.16 mile east of the FM 1472/Hachar-Reuthinger Road intersection. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Final Environmental Assessment (EA), the Finding of No Significant Impact (FONSI) issued on September 20, 2023, and other documents in the TxDOT project file. The EA, FONSI, and other documents in the TxDOT project file are available by contacting the TxDOT Laredo District Office at 1817 Bob Bullock Loop, Laredo, TX 78043; telephone: (956) 712–7402.

9. FM 517 from SH 35 to I–45 in Brazoria and Galveston Counties, Texas. The project will make improvements along 9.8 miles of FM 517. Between SH 35 and FM 646 the improvements will include widening the existing facility to four lanes with two 12-foot-wide travel lanes in each direction. Between FM 646 and I–45, the improvements will add an 18-foot-wide raised median with turn lanes. The facility will also have 14-foot-wide shoulders and 10-foot-wide shared use paths on both sides of the roadway. No sidewalks are proposed between FM 646 and I–45. The roadway will be converted to curb and gutter system with open vegetated ditches. There are no detention ponds proposed. The actions by TxDOT and Federal agencies and the laws under which such actions were taken are described in the Final Environmental Assessment (EA), the Finding of No Significant Impact (FONSI) issued on October 30, 2023, and other documents in the TxDOT project file. The EA, FONSI and, other documents in the TxDOT project file are available by contacting the TxDOT Houston District Office at 7600 Washington Avenue, Houston, TX 77007; telephone: (713) 802–5000.

Authority: 23 U.S.C. 139(l)(1).

Michael T. Leary,

Director, Planning and Program Development, Federal Highway Administration.

[FR Doc. 2023–27546 Filed 12–14–23; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF THE TREASURY

Community Development Financial Institutions Fund

Notice of Funds Availability

Funding Opportunity Title: Change to Notice of Funds Availability (NOFA) inviting Applications for Financial Assistance (FA) or Technical Assistance (TA) awards under the Native American CDFI Assistance (NACA Program) fiscal year (FY) 2024 Funding Round.

Action: Technical correction to the deadlines within Table 12 in the NOFA.

Funding Opportunity Number: CDFI–2024–NACA.

Catalog of Federal Domestic Assistance (CFDA) Number: 21.012.

Executive Summary: On December 11, 2023, the Community Development Financial Institutions Fund (CDFI Fund) published a Notice of Funds Availability (NOFA) inviting Applications for Financial Assistance (FA) or Technical Assistance (TA) awards under the Native American CDFI Assistance (NACA Program) fiscal year (FY) 2024 Funding Round. The CDFI Fund is issuing this notice to correct the deadlines contained within Table 12 of the NOFA. The corrected deadlines are listed in Table A below.

In the **Federal Register**/Vol. 88, No. 236/Monday, December 11, 2023/Notices. On page 86006, Table 12—FY 2024 NACA Program Funding Round Critical Deadlines for Applicants, is replaced with the table that follows (Table A.)

TABLE A—CORRECTED FY 2024 NACA PROGRAM FUNDING ROUND CRITICAL DEADLINES FOR APPLICANTS

Description	Table 12 deadline	Corrected deadline	Time (eastern time—ET)	Submission method
Last day to create an Awards Management Information Systems (AMIS) Account (all Applicants).	January 5, 2024	January 16, 2024	11:59 p.m. ET	AMIS.
Last day to enter EIN and UEI in AMIS (all Applicants).	January 5, 2024	January 16, 2024	11:59 p.m. ET	AMIS.
Last day to submit SF–424 (Application for Federal Assistance).	January 5, 2024	January 16, 2024	11:59 p.m. ET	Electronically via *Grants.gov.*
Last day to contact NACA Program staff.	February 2, 2024	February 13, 2024	5:00 p.m. ET	Service Request via AMIS, Or CDFI Fund Helpdesk: 202–653–0421.
Last day to contact AMIS–IT Help Desk (regarding AMIS technical problems only).	February 6, 2024	February 15, 2024	5:00 p.m. ET	Service Request via AMIS, Or 202–653–0422, Or *AMIS@cdfi.treas.gov.*
Last day to submit Title VI Compliance Worksheet (all Applicants)*.	February 6, 2024	February 15, 2024	11:59 p.m. ET	AMIS.
Last day to submit NACA Program Application for Financial Assistance (FA) or Technical Assistance (TA).	February 6, 2024	February 15, 2024	11:59 p.m. ET	AMIS.
Last day to contact Certification, Compliance Monitoring and Evaluation (CCME) Help Desk regarding CDFI Certification Applications for uncertified FA Applicants.	February 2, 2024	March 1, 2024	11:59 p.m. ET	Service Request via AMIS.
Last day to submit CDFI Certification Applications for uncertified FA Applicants.	February 6, 2024	March 5, 2024	11:59 p.m. ET	AMIS.

* This requirement also applies to Applicants' prospective sub-recipients that are not direct beneficiaries of Federal financial assistance (*e.g.,* Depository Institution Holding Companies and their Subsidiary CDFI Insured Depository Institutions).

All other deadlines shall remain in accordance with the NOFA published on December 11, 2023.

I. Agency Contacts

A. General Information and CDFI Fund Support.

The CDFI Fund will respond to questions concerning the NOFA and the Application between the hours of 9:00 a.m. and 5:00 p.m. Eastern Time, starting on the date that the NOFA was published through the dates listed in this notice. The CDFI Fund strongly recommends Applicants submit questions to the CDFI Fund via an AMIS service request to the NACA Program, Office of Certification Policy and Evaluation, the Office of Compliance Monitoring and Evaluation, or IT Help Desk. Other information regarding the CDFI Fund and its programs may be obtained from the CDFI Fund's website at *http://www.cdfifund.gov.*

B. The CDFI Fund's Contact Information is as follows:

TABLE B—CONTACT INFORMATION

Type of question	Preferred method	Telephone number (not toll free)	Email addresses
NACA Program Questions	Service Request via AMIS	202–653–0421, Option 1	*cdfihelp@cdfi.treas.gov.*
CDFI Certification	Service Request via AMIS	202–653–0423	*ccme@cdfi.treas.gov.*
Compliance Monitoring and Evaluation.	Service Request via AMIS	202–653–0423	*ccme@cdfi.treas.gov.*
AMIS—IT Help Desk	Service Request via AMIS	202–653–0422	*AMIS@cdfi.treas.gov.*

C. Communication With the CDFI Fund

The CDFI Fund will use the contact information in AMIS to communicate with Applicants and Recipients. It is imperative therefore, that Applicants, Recipients, Subsidiaries, Affiliates, and signatories maintain accurate contact information in their accounts. This includes information such as contact names (especially for the Authorized Representative), email addresses, fax and phone numbers, and office locations. For more information about AMIS, please see the AMIS Landing Page at *https://amis.cdfifund.gov.*

Authority: 12 U.S.C. 4701, et seq; 12 CFR parts 1805 and 1815; 2 CFR part 200.

Dated: December 11, 2023.

Marcia Sigal,

Acting Director, Community Development Financial Institutions Fund.

[FR Doc. 2023–27598 Filed 12–14–23; 8:45 am]

BILLING CODE 4810–05–P

DEPARTMENT OF THE TREASURY

Community Development Financial Institutions Fund

Notice of Funds Availability

Funding Opportunity Title: Change to Notice of Funds Availability (NOFA) inviting Applications for Financial Assistance (FA) or Technical Assistance (TA) awards under the Community Development Financial Institutions Program (CDFI Program) fiscal year (FY) 2024 Funding Round.

Action: Technical correction to the deadlines within Table 12 in the NOFA.

Funding Opportunity Number: CDFI–2024–FATA

Catalog of Federal Domestic Assistance (CFDA) Number: 21.020

Executive Summary: On December 11, 2023, the Community Development Financial Institutions Fund (CDFI Fund) published a Notice of Funds Availability (NOFA) inviting Applications for Financial Assistance (FA) or Technical Assistance (TA) awards under the Community Development Financial Institutions Program (CDFI Program) fiscal year (FY) 2024 Funding Round. The CDFI Fund is issuing this notice to correct the deadlines contained within Table 12 of the NOFA. The corrected deadlines are listed in Table A below.

In the **Federal Register**/Vol. 88, No. 236/Monday, December 11, 2023/Notices. On page 85986, Table 12—FY 2024 CDFI Program Funding Round Critical Deadlines For Applicants, is replaced with the table that follows (Table A.)

TABLE A—CORRECTED FY 2024 CDFI PROGRAM FUNDING ROUND CRITICAL DEADLINES FOR APPLICANTS

Description	Table 12 deadline	Corrected deadline	Time (Eastern Time—ET)	Submission method
Last day to create an Awards Management Information Systems (AMIS) Account (all Applicants).	January 5, 2024	January 16, 2024	11:59 p.m. ET	AMIS.
Last day to enter EIN and UEI in AMIS (all Applicants).	January 5, 2024	January 16, 2024	11:59 p.m. ET	AMIS.
Last day to submit SF–424 (Application for Federal Assistance).	January 5, 2024	January 16, 2024	11:59 p.m. ET	Electronically via *Grants.gov.*
Last day to contact CDFI Program staff.	February 2, 2024	February 13, 2024	5:00 p.m. ET	Service Request via AMIS, Or, CDFI Fund Helpdesk: 202–653–0421.
Last day to contact AMIS–IT Help Desk (regarding AMIS technical problems only).	February 6, 2024	February 15, 2024	5:00 p.m. ET	Service Request via AMIS, Or, 202–653–0422, Or, *AMIS@cdfi.treas.gov.*
Last day to submit Title VI Compliance Worksheet (all Applicants)*.	February 6, 2024	February 15, 2024	11:59 p.m. ET	AMIS.
Last day to submit CDFI Program Application for Financial Assistance (FA) or Technical Assistance (TA).	February 6, 2024	February 15, 2024	11:59 p.m. ET	AMIS.
Last day to contact Certification, Compliance Monitoring and Evaluation (CCME) Help Desk regarding CDFI Certification Applications for uncertified FA Applicants.	February 2, 2024	March 1, 2024	11:59 p.m. ET	Service Request via AMIS.
Last day to submit CDFI Certification Applications for uncertified FA Applicants.	February 6, 2024	March 5, 2024	11:59 p.m. ET	AMIS.

* This requirement also applies to Applicants' prospective sub-recipients that are not direct beneficiaries of Federal financial assistance (*e.g.,* Depository Institution Holding Companies and their Subsidiary CDFI Insured Depository Institutions).

All other deadlines shall remain in accordance with the NOFA published on December 11, 2023.

I. Agency Contacts

A. General Information and CDFI Fund Support

The CDFI Fund will respond to questions concerning the NOFA and the Application between the hours of 9:00 a.m. and 5:00 p.m. Eastern Time, starting on the date that the NOFA was published through the dates listed in this notice. The CDFI Fund strongly recommends Applicants submit questions to the CDFI Fund via an AMIS service request to the CDFI Program, Office of Certification Policy and Evaluation, the Office of Compliance Monitoring and Evaluation, or IT Help Desk. Other information regarding the CDFI Fund and its programs may be obtained from the CDFI Fund's website at *http://www.cdfifund.gov.*

B. The CDFI Fund's Contact Information Is as Follows

TABLE B—CONTACT INFORMATION

Type of question	Preferred method	Telephone number (not toll free)	Email addresses
CDFI Program Questions	Service Request via AMIS	202–653–0421, Option 1	*cdfihelp@cdfi.treas.gov.*
CDFI Certification	Service Request via AMIS	202–653–0423	*ccme@cdfi.treas.gov.*
Compliance Monitoring and Evaluation.	Service Request via AMIS	202–653–0423	*ccme@cdfi.treas.gov.*
AMIS—IT Help Desk	Service Request via AMIS	202–653–0422	*AMIS@cdfi.treas.gov.*

C. Communication With the CDFI Fund

The CDFI Fund will use the contact information in AMIS to communicate with Applicants and Recipients. It is imperative therefore, that Applicants, Recipients, Subsidiaries, Affiliates, and signatories maintain accurate contact information in their accounts. This includes information such as contact names (especially for the Authorized Representative), email addresses, fax and phone numbers, and office locations. For more information about AMIS, please see the AMIS Landing Page at *https://amis.cdfifund.gov.*

Authority: 12 U.S.C. 4701, et seq; 12 CFR parts 1805 and 1815; 2 CFR part 200.

Dated: December 11, 2023.

Marcia Sigal,

Acting Director, Community Development Financial Institutions Fund.

[FR Doc. 2023–27597 Filed 12–14–23; 8:45 am]

BILLING CODE 4810–05–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Revision of an Approved Information Collection; Comment Request; Fair Housing Home Loan Data System Regulation

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995 (PRA). In accordance with the requirements of the PRA, the OCC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OCC is soliciting comment concerning a revision to its information collection titled, ''Fair Housing Home Loan Data System Regulation.''

DATES: Comments must be received by February 13, 2024.

ADDRESSES: Commenters are encouraged to submit comments by email, if possible. You may submit comments by any of the following methods:

- *Email: prainfo@occ.treas.gov.*
- *Mail:* Chief Counsel's Office, Attention: Comment Processing, Office of the Comptroller of the Currency, Attention: 1557–0159, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Fax:* (571) 293–4835.

Instructions: You must include ''OCC'' as the agency name and ''1557–0159'' in your comment. In general, the OCC will publish comments on *www.reginfo.gov* 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.

Following the close of this notice's 60-day comment period, the OCC will publish a second notice with a 30-day comment period. You may review comments and other related materials that pertain to this information collection beginning on the date of publication of the second notice for this collection by the method set forth in the next bullet.

- *Viewing Comments Electronically:* Go to *www.reginfo.gov.* Hover over the ''Information Collection Review'' drop-down menu. Click on ''Information Collection Review.'' From the ''Currently under Review'' drop-down menu, select ''Department of Treasury'' and then click ''submit.'' This information collection can be located by searching OMB control number ''1557–0159'' or ''Fair Housing Home Loan Data System Regulation.'' Upon finding the appropriate information collection, click on the related ''ICR Reference Number.'' On the next screen, select ''View Supporting Statement and Other Documents'' and then click on the link to any comment listed at the bottom of the screen.
- For assistance in navigating *www.reginfo.gov,* please contact the Regulatory Information Service Center at (202) 482–7340.

FOR FURTHER INFORMATION CONTACT: Shaquita Merritt, Clearance Officer, (202) 649–5490, Chief Counsel's Office, 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.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501 *et seq.*), Federal agencies must obtain approval from the OMB for each collection of information that they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include 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 title 44 generally requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, the OCC is publishing notice of the revision to the collection of information set forth in this document. The OCC asks OMB to approve this revised collection.

Title: Fair Housing Home Loan Data System Regulation.

OMB Control No.: 1557–0159.

Type of Review: Regular.

Description: Part 27 requires certain national banks to record certain information, and all national banks to retain certain information.[1] Specifically,

[1] The OCC issued part 27 as part of a settlement agreement in a case in which the plaintiffs alleged that Federal agencies, including the OCC, were obligated to exercise supervisory and regulatory powers to prevent discrimination in home mortgage lending under Title VIII of the Civil Rights Act of 1968 (Fair Housing Act). *See National Urban League, et al.* v. *Office of the Comptroller of the*

national banks must record certain home loan data if they: (1) are otherwise required to maintain and report data pursuant to Regulation C,[2] which implements the Home Mortgage Disclosure Act (HMDA),[3] in which case they are HMDA reporters, or (2) receive more than 50 home loan applications annually. Specifically, national banks that are HMDA reporters meet the part 27 requirement by recording HMDA data along with the reasons for denying any loan application on the HMDA Loan Application/Register (LAR).[4] A national bank that is not a HMDA reporter but that receives more than 50 home loan applications annually must comply with part 27 by either: (1) recording and reporting HMDA data and denial reasons on the LAR as if they were a HMDA reporter,[5] or (2) recording and maintaining part 27-specified activity data relating to aggregate numbers of certain types of loans by geography and action taken.[6] Part 27 also requires that all national banks, including those not subject to the recording requirements, maintain certain application and loan information in loan files. Part 27 further provides that the OCC may require national banks to maintain and submit additional information if there is reason to believe that the bank engaged in discrimination.

The requirements in part 27 are as follows:

Section 27.3(a)(1) requires provision of the data that national banks are required to collect on home loans pursuant to Regulation C.[7]

Sections 27.3(a)(2) and (3) require national banks that receive more than 50 applications but are not HMDA reporters to collect certain information quarterly.

Section 27.3(a) also lists exceptions to the HMDA–LAR recordkeeping requirements.

Section 27.3(b) lists the information national banks must attempt to obtain from an applicant as part of a home loan application and sets forth the information that banks must disclose to an applicant.

Section 27.3(c) sets forth additional information national banks must maintain in each of their home loan files.

Section 27.4 states that the OCC may require a national bank to maintain a Fair Housing Inquiry/Application Log found in Appendix III to part 27 including if: (1) there is reason to believe that the bank is prescreening, or otherwise engaging in discriminatory practices on a prohibited basis, (2) complaints filed with the Comptroller or letters in the Community Reinvestment Act file are found to be substantive in nature, indicating that the bank's home lending practices are, or may be, discriminatory, or (3) analysis of the data compiled by the bank under HMDA and Regulation C indicates a pattern of significant variation in the number of home loans between census tracts with similar incomes and home ownership levels differentiated only by race or national origin.

Section 27.5 requires a national bank to maintain the information required by § 27.3 for 25 months after the bank notifies the applicant of action taken on an application or after withdrawal of an application.

Section 27.7 requires a national bank to submit to the OCC, upon request prior to a scheduled examination, the information required by §§ 27.3(a) and 27.4. Non-HMDA reporters with more than 50 applications are required to submit this data using the Monthly Home Loan Activity Format form in Appendix I to part 27 and the Home Loan Data Submission Form in Appendix IV to part 27, except that there is an additional exclusion for national banks with fewer than 75 applications. Specifically, § 27.7(c)(3) states that a bank with fewer than 75 home loan applications in the preceding year is not required to submit such forms unless the home loan activity is concentrated in the few months preceding the request for data, indicating the likelihood of increased activity over the subsequent year, or there is cause to believe that a bank is not in compliance with the fair housing laws based on prior examinations and/or complaints, among other factors.

Section 27.7(d) provides that if there is cause to believe that a national bank is in noncompliance with fair housing laws, the Comptroller may require submission of additional Home Loan Data Submission Forms. The Comptroller may also require submission of the information maintained under § 27.3(a) and Home Loan Data Submission Forms at more frequent intervals than specified.

Burden Estimates

Estimated Number of Respondents: 702.

Estimated Total Annual Burden: 12,632 hours.

Estimated Frequency of Response: On occasion.

Affected Public: Businesses or other for-profit.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information has practical utility;

(b) The accuracy of the OCC's estimate of the burden of the collection of information;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Theodore J. Dowd,

Deputy Chief Counsel, Office of the Comptroller of the Currency.

[FR Doc. 2023–27517 Filed 12–14–23; 8:45 am]

BILLING CODE 4810–33–P

Currency, et al., 78 FRD. 543, 544 (D.D.C. May 3, 1978). *See also* 44 FR 63084, November 2, 1979.

[2] 12 CFR part 1003.

[3] 12 U.S.C. 2801 *et seq.*

[4] 12 CFR 27.3(a)(1)(i).

[5] 12 CFR 27.3(a)(5).

[6] 12 CFR 27.3(a)(2).

[7] The quarterly recordkeeping requirements under 12 CFR 27.3(a) do not add any burden because they are duplicative of the recordkeeping requirements under 12 CFR 1003.4(f). *See* OMB control number 1557–0345.

DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

Bank Secrecy Act Advisory Group; Solicitation of Application for Membership

AGENCY: Financial Crimes Enforcement Network (''FinCEN''), Treasury.

ACTION: Notice and request for nominations.

SUMMARY: FinCEN is inviting the public to nominate financial institutions, trade groups, and non-federal regulators or law enforcement agencies for membership in the Bank Secrecy Act Advisory Group. New members will be selected for three-year membership terms.

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

ADDRESSES: Nominations must be emailed to *BSAAG@fincen.gov.*

FOR FURTHER INFORMATION CONTACT: FinCEN Regulatory Support Section at *frc@fincen.gov.*

SUPPLEMENTARY INFORMATION: Section 1564 of the Annunzio-Wylie Anti-

Money Laundering (AML) Act of 1992 required the Secretary of the Treasury to establish a Bank Secrecy Act Advisory Group (BSAAG) consisting of representatives from federal agencies, and other interested persons and financial institutions subject to the regulatory requirements of the Bank Secrecy Act, found at 31 CFR chapter X. The BSAAG is the means by which the Treasury receives advice on the reporting requirements of the Bank Secrecy Act, and informs private sector representatives on how the information they provide is used. As chair of the BSAAG, the Director of FinCEN is responsible for ensuring that relevant issues are placed before the BSAAG for review, analysis, and discussion.

BSAAG membership is open to financial institutions, trade groups, and Federal and non-Federal regulators and law enforcement agencies that are located within the United States. In September of 2022, FinCEN published a final rule [1] establishing a beneficial ownership information reporting requirement, pursuant to the Corporate Transparency Act. The rule will require most corporations, limited liability companies, and other entities created or registered to do business in the United States to report information about their beneficial owners, the persons who ultimately own or control the company, to FinCEN. We invite firms, trade groups, and Federal and State governmental entities within the United States that are affected by and connected to compliance with the new rule to express interest in BSAAG membership, with a clear explanation on how their perspectives can enhance the broader BSAAG discussions. We also continue to welcome nominations from other eligible entities that can actively share their perspectives on a variety of Bank Secrecy Act requirements.

Each member selected will serve a three-year term and must designate one individual to represent that member at plenary meetings. While BSAAG membership is granted to organizations, not to individuals, the designated representative for each selected organization should be knowledgeable about Bank Secrecy Act requirements and be willing and able to devote the necessary time and effort on behalf of the representative's organization. Members are expected to actively share anecdotal perspectives, quantifiable insights on BSA requirements, and industry trends in BSAAG discussions. The organization's representative must be able to attend biannual plenary meetings, generally held in Washington, DC, over one or two days, generally in May and October. Additional BSAAG meetings may be held by phone, videoconference, or in person, and the organization's representative is expected to actively engage in the BSAAG's work through participation in meetings of various BSAAG Subcommittees and/or working groups, including Subcommittees established pursuant to the Anti-Money Laundering Act of 2020 (AML Act).[2] Members will not be paid for their time, services, or travel.

Nominations for individuals who are not representing an organization will not be considered, but organizations may nominate themselves. Please provide complete answers to the following items, as nominations will be evaluated based on the information provided in response to this notice and request for nominations. There is no required format; interested organizations may submit their nominations via email or email attachment. Nominations should consist of:

- Name of the organization requesting membership
- Point of contact, title, address, email address, and phone number
- Description of the financial institution or trade group and its involvement with the Bank Secrecy Act and/or Corporate Transparency Act.
- Reasons why the organization's participation on the BSAAG will bring value to the group
- Trade groups must submit a full list of their members along with their nomination. Trade groups must also confirm that, if selected, they will only share BSAAG information with their members that are located within the United States.

In making the selections, FinCEN will seek to complement current BSAAG members and obtain comprehensive representation in terms of affiliation, industry, and geographic representation. The Director of FinCEN retains full discretion on all membership decisions. The Director may consider prior years' applications when making selections and will not limit consideration to institutions nominated by the public when making selections.

Andrea M. Gacki,

Director, Financial Crimes Enforcement Network.

[FR Doc. 2023–27620 Filed 12–14–23; 8:45 am]

BILLING CODE 4810–02–P

[1] "FinCEN Issues Final Rule for Beneficial Ownership Reporting to Support Law Enforcement Efforts, Counter Illicit Finance, and Increase Transparency". 87 FR 59498, September 30, 2022.

[2] The AML Act was enacted as Division F, sections 6001–6511, of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Public Law 116–283 (2021). The AML Act, among other provisions, mandated the creation of a BSAAG Subcommittee on Innovation and Technology (Section 6207) and a BSAG Subcommittee on Information Security and Confidentiality (Section 6302).

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See Supplementary Information section for effective date(s).

FOR FURTHER INFORMATION CONTACT: OFAC: Bradley T. Smith, Director, tel.: 202–622–2490; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or the Assistant Director for Compliance, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

Notice of OFAC Actions

On December 6, 2023, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authority listed below.

Individuals

1. ALEMAN MEZA, Oscar, Mexico; DOB 17 Apr 1962; POB Sinaloa, Mexico; nationality Mexico; Gender Male; C.U.R.P. AEMO620417HSLLZS07 (Mexico) (individual) [ILLICIT–DRUGS–EO14059].

Designated pursuant to section 1(a)(i) of E.O. 14059 for having engaged in, or

attempted to engage in, activities or transactions that have materially contributed to, or pose a significant risk of materially contributing to, the international proliferation of illicit drugs or their means of production.

2. BASTIDAS ERENAS, Juan Pablo (a.k.a. ''PAYO''), Mexico; DOB 11 Mar 1980; POB Sinaloa, Mexico; nationality Mexico; Gender Male; C.U.R.P. BAEJ800311HSLSRN16 (Mexico) (individual) [ILLICIT–DRUGS–EO14059].

Designated pursuant to section 1(a)(i) of E.O. 14059 for having engaged in, or attempted to engage in, activities or transactions that have materially contributed to, or pose a significant risk of materially contributing to, the international proliferation of illicit drugs or their means of production.

3. BELTRAN ARAUJO, Amberto, Mexico; DOB 12 Dec 1988; POB Sinaloa, Mexico; nationality Mexico; Gender Male; C.U.R.P. BEAA881212HSLLRM08 (Mexico) (individual) [ILLICIT–DRUGS–EO14059].

Designated pursuant to section 1(a)(i) of E.O. 14059 for having engaged in, or attempted to engage in, activities or transactions that have materially contributed to, or pose a significant risk of materially contributing to, the international proliferation of illicit drugs or their means of production.

4. BELTRAN ARAUJO, Mario German (a.k.a. ''EL NINON''), Mexico; DOB 14 May 1992; POB Sonora, Mexico; nationality Mexico; Gender Male; C.U.R.P. BEAM920514HSRLRR03 (Mexico) (individual) [ILLICIT–DRUGS–EO14059].

Designated pursuant to section 1(a)(i) of E.O. 14059 for having engaged in, or attempted to engage in, activities or transactions that have materially contributed to, or pose a significant risk of materially contributing to, the international proliferation of illicit drugs or their means of production.

5. CARO MONGE, Jesus Jose Gil (a.k.a. ''KIKIL''), Mexico; DOB 20 Jun 1991; POB Jalisco, Mexico; nationality Mexico; Gender Male; C.U.R.P. CAMJ910620HJCRNS02 (Mexico) (individual) [ILLICIT–DRUGS–EO14059].

Designated pursuant to section 1(a)(i) of E.O. 14059 for having engaged in, or attempted to engage in, activities or transactions that have materially contributed to, or pose a significant risk of materially contributing to, the international proliferation of illicit drugs or their means of production.

6. CARO QUINTERO, Jose Gil, Mexico; DOB 07 Feb 1968; POB Sinaloa, Mexico; nationality Mexico; Gender Male; C.U.R.P. CAQG680207HSLRNL09 (Mexico) (individual) [ILLICIT–DRUGS–EO14059].

Designated pursuant to section 1(a)(i) of E.O. 14059 for having engaged in, or attempted to engage in, activities or transactions that have materially contributed to, or pose a significant risk of materially contributing to, the international proliferation of illicit drugs or their means of production.

7. ESTEVEZ COLMENARES, Ricardo (a.k.a. SOTO RODRIGUEZ, Bogar; a.k.a. ''LOCO''; a.k.a. ''TIO''), Mexico; DOB 14 Sep 1974; POB Guerrero, Mexico; nationality Mexico; Gender Male; C.U.R.P. EECR740914HGRSLC02 (Mexico) (individual) [ILLICIT–DRUGS–EO14059].

Designated pursuant to section 1(a)(i) of E.O. 14059 for having engaged in, or attempted to engage in, activities or transactions that have materially contributed to, or pose a significant risk of materially contributing to, the international proliferation of illicit drugs or their means of production.

8. ESTRADA GUTIERREZ, Jose de Jesus (a.k.a. ESTRADA GUTIERREZ, Josue de Jesus), Mexico; DOB 17 Nov 1968; POB Jalisco, Mexico; nationality Mexico; Gender Male; C.U.R.P. EAGJ681117HJCSTS00 (Mexico) (individual) [ILLICIT–DRUGS–EO14059].

Designated pursuant to section 1(a)(i) of E.O. 14059 for having engaged in, or attempted to engage in, activities or transactions that have materially contributed to, or pose a significant risk of materially contributing to, the international proliferation of illicit drugs or their means of production.

9. FLORES ORTIZ, Francisco Abraham (a.k.a. ''PANCHITO''), Mexico; DOB 13 Aug 1977; POB Sinaloa, Mexico; nationality Mexico; Gender Male; C.U.R.P. FOOF770813HSLLRR00 (Mexico) (individual) [ILLICIT–DRUGS–EO14059].

Designated pursuant to section 1(a)(i) of E.O. 14059 for having engaged in, or attempted to engage in, activities or transactions that have materially contributed to, or pose a significant risk of materially contributing to, the international proliferation of illicit drugs or their means of production.

10. FRANCO FIGUEROA, Ulises (a.k.a. ''CHARCO''), Mexico; DOB 17 Jun 1987; POB Oaxaca, Mexico; nationality Mexico; Gender Male; C.U.R.P. FAFU870617HOCRGL03 (Mexico) (individual) [ILLICIT–DRUGS–EO14059].

Designated pursuant to section 1(a)(i) of E.O. 14059 for having engaged in, or attempted to engage in, activities or transactions that have materially contributed to, or pose a significant risk of materially contributing to, the international proliferation of illicit drugs or their means of production.

11. GASTELUM IRIBE, Oscar Manuel (a.k.a. ''EL MUSICO''; a.k.a. ''SALGADO''), Monte Rosa #657, Colonia Montebello, Culiacan, Sinaloa 80227, Mexico; Rio de la Plata #3041, Colonia Lomas del Boulevard, Culiacan, Sinaloa 80110, Mexico; Antonio Palafox #1856 Int 42, Colonia Paseos del Sol, Zapopan, Jalisco, Mexico; DOB 05 Oct 1974; POB Jalisco, Mexico; nationality Mexico; RFC GAI0741005TQ3 (Mexico) (individual) [ILLICIT–DRUGS–EO14059].

Designated pursuant to section 1(a)(i) of E.O. 14059 for having engaged in, or attempted to engage in, activities or transactions that have materially contributed to, or pose a significant risk of materially contributing to, the international proliferation of illicit drugs or their means of production.

12. INZUNZA NORIEGA, Pedro, Mexico; DOB 24 Nov 1962; POB Sinaloa, Mexico; nationality Mexico; Gender Male; C.U.R.P. IUNP621124HSLNRD01 (Mexico) (individual) [ILLICIT–DRUGS–EO14059].

Designated pursuant to section 1(a)(i) of E.O. 14059 for having engaged in, or attempted to engage in, activities or transactions that have materially contributed to, or pose a significant risk of materially contributing to, the international proliferation of illicit drugs or their means of production.

13. LEON RODRIGUEZ, Juvenal (a.k.a. ''GALLO''), Mexico; DOB 01 Sep 1976; POB Guanajuato, Mexico; nationality Mexico; Gender Male; C.U.R.P. LERJ760901HGTNDV06 (Mexico) (individual) [ILLICIT–DRUGS–EO14059].

Designated pursuant to section 1(a)(i) of E.O. 14059 for having engaged in, or attempted to engage in, activities or transactions that have materially contributed to, or pose a significant risk of materially contributing to, the international proliferation of illicit drugs or their means of production.

14. LOPEZ LOPEZ, Servando (a.k.a. ''EL HUEVO''), Mexico; DOB 17 Sep 1974; POB Sinaloa, Mexico; nationality Mexico; Gender Male; C.U.R.P. LOLS740917HSLPPR01 (Mexico) (individual) [ILLICIT–DRUGS–EO14059].

Designated pursuant to section 1(a)(i) of E.O. 14059 for having engaged in, or attempted to engage in, activities or transactions that have materially contributed to, or pose a significant risk of materially contributing to, the international proliferation of illicit drugs or their means of production.

15. PULIDO DIAZ, Oscar, Mexico; DOB 14 Apr 1976; POB Guerrero, Mexico; nationality Mexico; Gender Male; C.U.R.P. PUDO760414HGRLZS04 (Mexico) (individual) [ILLICIT–DRUGS–EO14059].

Designated pursuant to section 1(a)(i) of E.O. 14059 for having engaged in, or attempted to engage in, activities or transactions that have materially contributed to, or pose a significant risk of materially contributing to, the international proliferation of illicit drugs or their means of production.

Entities

1. DIFACULSA, S.A. DE C.V., Villa Dorada 3996, Fracc. Los Portales, Culiacan, Sinaloa, Mexico; Organization Established Date 25 Feb 2006; Organization Type: Retail sale of pharmaceutical and medical goods, cosmetic and toilet articles in specialized stores; Folio Mercantil No. 75487 (Mexico) [ILLICIT–DRUGS–EO14059].

Designated pursuant to section 1(b)(iii) of E.O. 14059 for being owned, controlled, or directed by, or having acted or purported to act for or on behalf of, directly or indirectly, a person sanctioned pursuant to E.O. 14059.

2. EDITORIAL MERCADO ECUESTRE, S.A. DE C.V., Guadalajara, Jalisco, Mexico; Organization Established Date 11 Jan 2005; Organization Type: Publishing of newspapers, journals and periodicals; Folio Mercantil No. 28481 (Mexico) [ILLICIT–DRUGS–EO14059].

Designated pursuant to section 1(b)(iii) of E.O. 14059 for being owned, controlled, or directed by, or having acted or purported to act for or on behalf of, directly or indirectly, a person sanctioned pursuant to E.O. 14059.

Dated: December 6, 2023.

Bradley T. Smith,

Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2023–27646 Filed 12–14–23; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Proposed Collection; Comment Request; State Small Business Credit Initiative

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other federal agencies to comment on the proposed information collections listed below, in accordance with the Paperwork Reduction Act of 1995.

DATES: Written comments must be received on or before February 13, 2024.

ADDRESSES: Send comments regarding the burden estimate, or any other aspect of the information collection, including suggestions for reducing the burden, by the following method:

• *Federal E-rulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Refer to Docket Number TREAS–DO–2022–0009 and the specific Office of Management and Budget (OMB) control number 1505–0227.

FOR FURTHER INFORMATION CONTACT: Jeffrey Stout, State Small Business Credit Initiative (SSBCI), at (866) 220–9050 or *ssbci_information@treasury.gov.* Further information may be obtained from the SSBCI website, *https://home.treasury.gov/policy-issues/small-business-programs/state-small-business-credit-initiative-ssbci,* or by contacting *ssbci_information@treasury.gov.*

SUPPLEMENTARY INFORMATION:

Title: State Small Business Credit Initiative Information Collection Activities.

OMB Control Number: 1505–0227.

Type of Review: Revision of currently approved information collection activities.

Description: This information collection captures information related to the State Small Business Credit Initiative (SSBCI). The American Rescue Plan Act of 2021 (ARPA) reauthorized and amended the Small Business Jobs Act of 2010 (SSBCI statute) to fund SSBCI as a response to the economic effects of the COVID–19 pandemic.[1] SSBCI is a federal program administered by the U.S. Department of the Treasury (Treasury) that was created to strengthen the programs of states, the District of Columbia, territories, and Tribal Governments (collectively, jurisdictions) that support private financing for small businesses. SSBCI includes the Capital Program, through which Treasury provides funding to jurisdictions to expand access to capital for small businesses, and the Technical Assistance (TA) Program, through which jurisdictions provide legal, accounting, and financial advisory services (TA services) to very small and underserved businesses (eligible beneficiaries) that are applying for SSBCI Capital Program funding and other governmental programs that support small businesses. The TA Program includes the allocation formula-based TA Grant Program. In addition, as part of the TA Program, Treasury has published the SSBCI Investing in America Small Business Opportunity Program (SBOP) Notice of Funding Opportunity (NOFO), which is a competitive grant program.[2]

• *SSBCI Investing in America SBOP Application.* Any jurisdiction that has been approved as a participating jurisdiction in the SSBCI Capital Program can apply for the program. Jurisdictions that are not yet approved as participating jurisdictions in the SSBCI Capital Program, but that have submitted complete and timely SSBCI Capital Program applications (or are part of a joint Tribal government application), are also eligible to apply; however, to receive an SSBCI Investing in America SBOP award, a jurisdiction must be approved as a participating jurisdiction in the SSBCI Capital Program. Only certain applicants will be selected for funding under this competitive program in accordance with the SSBCI Investing in America SBOP NOFO.

To determine whether an application should be selected for funding, Treasury must collect certain types of information in an application. This information is detailed in the publicly-posted NOFO on Treasury's website, and includes: designation letter from the jurisdiction's governing official designating the eligible applicant to take specific actions with respect to the program; information about the applicant's proposed program, including a description of the project service area and potential to connect eligible beneficiaries to business opportunities, the applicant's proposed solution and how it aligns with the needs of eligible beneficiaries and overcomes any limitations or gaps in coverage in providing TA services, a description of the applicant's key partners and project support, information about the applicant's organizational capacity and experience, and the applicant's performance goals and measures; details on the applicant's budget using the line items of Form SF–424A ''Budget Information—Non-Construction Programs'' and a budget narrative that details the use of funds in each line item, as applicable to the proposed programs; certain required assurances and certifications; and supporting

[1] ARPA, Public Law 117–2, sec. 3301, codified at 12 U.S.C. 5701 *et seq.* SSBCI was originally established in Title III of the Small Business Jobs Act of 2010.

[2] The SSBCI Investing in America SBOP NOFO is available on Treasury's website at *https://home.treasury.gov/system/files/136/Competitive-TA-NOFO-FINAL-Oct-25-2023.pdf.*

documentation to substantiate elements of an application, which may include letters of commitment for proposed matching funds and letters from other jurisdictions demonstrating a plan to coordinate on a regional approach, as applicable. Treasury will collect application information from eligible jurisdictions through an online portal.

• *SSBCI Investing in America SBOP Reports.* Treasury must collect financial and performance reports consistent with 2 CFR 200.328 and 329 in order for Treasury to determine compliance with the SSBCI statute, regulations, and guidance and to evaluate program outcomes. The financial and performance reports must include information about the applicant's progress in implementing its project and details on its use of program funds. Treasury anticipates publishing reporting guidance for the SSBCI Investing in America SBOP that is anticipated to be generally consistent with the reporting guidance for the formula-based TA Grant Program, which may be found on Treasury's website at *https://home.treasury.gov/system/files/136/SSBCI-Technical-Assistance-Reporting-Guidance.pdf,* with potential new or modified data elements specific to this program. Treasury will clearly specify all reporting requirements specific to the SSBCI Investing in America SBOP. All reports must be submitted in electronic format as specified in the terms and conditions of the award.

Treasury is updating the burden estimate for OMB Control Number 1505–0227 to account for applications and reports under the SSBCI Investing in America SBOP.

Form: SSBCI Investing in America SBOP Application and reporting forms, through an online Treasury portal annual report forms.

Affected Public: States, the District of Columbia, territories, and Tribal governments, small businesses.

Estimated Number of Respondents: For application submission: 100; for reporting: 15.

Frequency of Response: For application submission: one time; for grant award modifications: one time; for reporting: annually and semiannually.

Estimated Total Number of Annual Responses: The current estimate for OMB Control Number 1505–0227 is 112,376. Treasury estimates the SSBCI Investing in America SBOP will increase this estimate by 6,115 to 118,491.

Estimated Time per Response: For the SSBCI Investing in America SBOP, depending on the type of collection Treasury estimates that responses will take 9 minutes up to 6 hours.

Estimated Total Annual Burden Hours: The current estimate for OMB Control Number 1505–0227 is 24,877. Treasury estimates the SSBCI Investing in America SBOP will increase this estimate by 1,530 hours to 26,407.

Request for Comments: Comments submitted in response to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services required to provide information.

Authority: 44 U.S.C. 3501 *et seq.*

Jeffrey Stout,

Director, SSBCI.

[FR Doc. 2023–27535 Filed 12–14–23; 8:45 am]

BILLING CODE 4810–AK–P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; U.S. Income Tax Return for Individual Taxpayers

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice of Information Collection; request for comment.

SUMMARY: The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. Currently, the IRS is soliciting comments concerning the burden associated with the U.S. Income Tax Return Forms for Individual Taxpayers.

DATES: Comments should be received on or before January 16, 2024 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 Melody Braswell by emailing *PRA@treasury.gov,* calling (202) 622–1035, or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Internal Revenue Service (IRS)

Title: U.S. Income Tax Return for Individual Taxpayers.

OMB Number: 1545–0074.

Form Number: Form 1040 and affiliated return forms.

Abstract: IRC sections 6011 & 6012 of the Internal Revenue Code require individuals to prepare and file income tax returns annually. These forms and related schedules are used by individuals to report their income subject to tax and compute their correct tax liability. This information collection request (ICR) covers the actual reporting burden associated with preparing and submitting the prescribed return forms, by individuals required to file Form 1040 and any of its affiliated forms as explained in the attached table.

Current Actions: There have also been changes in regulatory guidance related to various forms approved under this approval package during the past year. There have been additions and removals of forms included in this approval package. In filing season 2024, the Internal Revenue Service (IRS) will launch a pilot program for a free direct e-file tax return system (Direct File). This limited-scale pilot will allow the IRS to evaluate the costs, benefits, and operational challenges associated with providing such an optional service to taxpayers.

This approval package is being submitted for renewal purposes only.

Type of Review: Revision of a currently approved collection.

Affected Public: Individuals or Households, Farms.

Estimated Number of Respondents: 171,800,000.

Estimated Time per Respondent (Hours): 13.

Estimated Total Annual Time (Hours): 2,249,000,000.

Estimated Total Annual Monetized Time ($): 46,342,000,000.

Estimated Total Out-of-Pockets Costs ($): 45,365,000,000.

Estimated Total Monetized Burden ($): 91,707,000,000.

Note: Total Monetized Burden = Total Out-of-Pocket Costs + Total Annual Monetized Time.

ESTIMATED AVERAGE TAXPAYER BURDEN FOR INDIVIDUALS FILING A 1040 BY ACTIVITY

Primary form filed or type of taxpayer		Time burden					Money burden	
	Percentage of returns (%)	Average time burden (hours) *					Average cost (dollars)	Total monetized burden (dollars)
		Total time	Record keeping	Tax planning	Form completion and submission	All other		
All Taxpayers	100%	13	6	2	4	1	$270	$540
Type of Taxpayer								
Nonbusiness **	72%	9	3	1	3	1	150	310
Business ***	28	24	12	4	6	2	560	1,120

Note: Detail may not add to total due to rounding. Dollars rounded to the nearest $10.
*A ''business'' filer files one or more of the following with Form 1040: Schedule C, C–EZ, E, F, Form 2106, or 2106–EZ. A ''nonbusiness'' filer does not file any of these schedules or forms with Form 1040.
Source: RAAS:KDA (11–2–2023)

TAXPAYER BURDEN STATISTICS BY TOTAL POSITIVE INCOME QUINTILE

	Average time (hours)	Average out-of-pocket costs	Average total monetized burden
All Filers			
Total positive income quintiles			
0 to 20	7.8	80	$146
20 to 40	10.9	128	242
40 to 60	11.6	165	327
60 to 80	13.1	232	480
80 to 100	22.7	726	1,497
Wage and Investment Filers			
Total Income Quintiles:			
0 to 20	6.9	71	129
20 to 40	9.3	112	212
40 to 60	9.0	139	277
60 to 80	9.1	185	384
80 to 100	10.8	322	737
Self Employed Filers			
Total Income Quintiles			
0 to 20	11.9	125	225
20 to 40	18.5	204	379
40 to 60	21.0	258	507
60 to 80	22.0	338	697
80 to 100	33.1	1,077	2,155

Source: RAAS:KDA (12–1–2023)

(Authority: *44 U.S.C. 3501 et seq.*)

Melody Braswell,

Treasury PRA Clearance Officer.

[FR Doc. 2023–27645 Filed 12–14–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Coronavirus Capital Projects Fund

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 January 16, 2024 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:

Title: Coronavirus Capital Projects Fund.

OMB Control Number: 1505–0277.

Type of Review: Revision of a currently approved collection.

Description: Section 604 of the Social Security Act (the ''Act''), as added by section 9901 of the American Rescue Plan Act of 2021, Public Law 117–2 (Mar. 11, 2021) authorized the Coronavirus Capital Projects Fund (''CPF''). The CPF provides $10 billion in funding for the Department of the Treasury (''Treasury'') to provide grant payments to States (defined to include the District of Columbia and Puerto Rico), seven territories and freely associated states (including the United States Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau), and Tribal governments to carry out critical capital projects directly enabling work, education, and health monitoring, including remote options, in response to the public health emergency with respect to the Coronavirus Disease (''COVID–19'').

Section 604(b) of the Act prescribes that the $10 billion be allocated to eligible grant recipients according to a formula provided in the statute. Treasury has used this formula to calculate the CPF grant fund allocations for each eligible recipient and has posted these allocations on its website. In general, each State (including the District of Columbia and Puerto Rico) will receive between approximately $107 million and $500 million, each of the seven named territories and freely associated states will receive approximately $14 million, and each Tribal government will receive approximately $167,000.

Treasury has separately received approval under OMB #1505–0274 for information collections related to applying for CPF grant awards (''Applications'') and for specifying the use of funds (''Grant Plans'').

For non-Tribal entities, the current information collection is used to solicit information related to quarterly project and expenditure reports and annual performance reports. Both information collections are described generally in the Compliance and Reporting Guidance for States, Territories, and Freely Associated Sates, which provides these recipients information needed to fulfill their reporting requirements and compliance obligations.

For Tribal entities, the current information collection will be used to solicit information for annual reports. The information collection is described generally in the Compliance and Reporting Guidance for Tribal Entities, which provides Tribal entities with information needed to fulfill their reporting requirements and compliance obligations.

Form: None.

Affected Public: State, Territorial, Tribal and Freely Associated States Governments.

Estimated Number of Respondents: 609.

Frequency of Response: Quarterly, Annually.

Estimated Total Number of Annual Responses: 845.

Estimated Time per Response: Varies from 20 to 80 hours per year depending on type of respondent and report.

Estimated Total Annual Burden Hours: 30,352.

(Authority: *44 U.S.C. 3501 et seq.*)

Spencer W. Clark,

Treasury PRA Clearance Officer.

[FR Doc. 2023–27639 Filed 12–14–23; 8:45 am]

BILLING CODE 4810–AK–P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; U.S. Tax-Exempt Organization Return

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice of information collection; request for comment.

SUMMARY: The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning forms used by tax-exempt organizations.

DATES: Comments should be received on or before January 16, 2024 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 Melody Braswell by emailing *PRA@treasury.gov,* calling (202) 622–1035, or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Internal Revenue Service (IRS)

These are forms used by tax-exempt organizations. These include Forms 990, 990–EZ, 990–N, 990–PF, 990–T, and related forms and schedules tax-exempt organizations attach to their returns. In addition, there are numerous Treasury Decisions and guidance documents that are covered by the burden estimate provided in this notice.

Taxpayer Compliance Burden

Tax compliance burden is defined as the time and money taxpayers spend to comply with their tax filing responsibilities. Time-related activities include recordkeeping, tax planning, gathering tax materials, learning about the law and what you need to do, and completing and submitting the return. Out-of-pocket costs include expenses such as purchasing tax software, paying a third-party preparer, and printing and postage. Tax compliance burden does not include a taxpayer's tax liability, economic inefficiencies caused by sub-optimal choices related to tax deductions or credits, or psychological costs.

Proposed PRA Submission to OMB

Title: U.S. Tax-Exempt Organization Return.

OMB Number: 1545–0047.

Form Numbers: Forms 990, 990–EZ, 990–N, 990–PF, 990–T, 1023, 1023–EZ, 1024, 1024–A, 1028, 1120–POL, 4720, 5578, 5884–C, 5884–D, 6069, 6497, 7203, 8038, 8038–B, 8038–CP, 8038–G, 8038–GC, 8038–R, 8038–T, 8038–TC, 8282, 8328, 8330, 8453–TE., 8453–X, 8718, 8868, 8870, 8871, 8872, 8879–TE, 8886–T, 8899 and all other related forms, schedules, and attachments.

Abstract: These forms and schedules are used to determine that tax-exempt organizations fulfill the operating conditions within the limitations of their tax exemption. The data is also used for general statistical purposes.

Current Actions: There have been changes in IRS guidance documents and regulations related to various forms approved under this approval package during the past year. There have been additions of forms included in this approval package. This approval package is being submitted for renewal purposes.

Type of Review: Revision of a currently approved collection.

Affected Public: Tax-exempt organizations.

Estimated Number of Responses: 1,698,500.

Estimated Average Time per Respondent (Hours): 55.2.

Estimated Total Time (Hours): 75,500,000.

Estimated Total Monetized Time ($): $3,903,700,000.

Estimated Total Out-of-Pocket Costs ($): $1,978,400,000.

Estimated Total Monetized Burden ($): $5,882,100,000.

Total Monetized Burden = Total Out-of-Pocket Costs + Total Monetized Time.

FISCAL YEAR 2024 FORM 990 SERIES TAXPAYER COMPLIANCE COST ESTIMATES

+	Type of return				
	Form 990	990–EZ	990–PF	990–T	990–N
Projections of the Number of Returns to be Filed with IRS	351,100	251,000	130,100	233,200	733,100
Estimated Average Total Time (Hours)	107	69	53	42	5
Estimated Average Total Out-of-Pocket Costs	$2,900	$600	$2,200	$2,200	$20
Estimated Average Total Monetized Burden	$9,900	$1,700	$4,600	$5,700	$100

Source: IRS:RAAS:KDA:TBL (Dec 2023)
NOTE: Detail may not add due to rounding

FY2024 TAXPAYER BURDEN FORM 990/990EZ/990PF BY TOTAL POSITIVE INCOME

Total positive income	Average time (hrs)	Average out-of-pocket costs	Average monetized burden
1. < $10k	44	$359	$792
2. $10k to $50k	72	$634	$1,493
3. $50k to $100k	80	$726	$1,901
4. $100k to $1mil	89	$1,473	$4,148
5. > $1mil	109	$3,885	$13,318

Source: IRS:RAAS:KDA:TBL (Dec 2023)

Authority: 44 U.S.C. 3501 *et seq.*

Melody Braswell,

Treasury PRA Clearance Officer.

[FR Doc. 2023–27644 Filed 12–14–23; 8:45 am]

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FEDERAL REGISTER

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Part II

Department of Energy

10 CFR Parts 429 and 431

Energy Conservation Program: Energy Conservation Standards for Expanded Scope Electric Motors; Proposed Rule

DEPARTMENT OF ENERGY

10 CFR Parts 429 and 431

[EERE–2020–BT–STD–0007]

RIN 1904–AF55

Energy Conservation Program: Energy Conservation Standards for Expanded Scope Electric Motors

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of proposed rulemaking and announcement of public meeting.

SUMMARY: The Energy Policy and Conservation Act, as amended (''EPCA''), prescribes energy conservation standards for various consumer products and certain commercial and industrial equipment, including electric motors. In this notice of proposed rulemaking (''NOPR''), DOE proposes new energy conservation standards for a subset of electric motors, expanded scope electric motors, expressed in terms of average full-load efficiency, and also announces a public meeting to receive comment on these proposed standards and associated analyses and results.

DATES:

Comments: DOE will accept comments, data, and information regarding this NOPR no later than February 13, 2024.

Meeting: DOE will hold a public meeting on Wednesday, January 17, 2024, from 10 a.m. to 4 p.m., in Washington, DC. This meeting will also be broadcast as a webinar.

Comments regarding the likely competitive impact of the proposed standard should be sent to the Department of Justice contact listed in the **ADDRESSES** section on or before January 16, 2024.

ADDRESSES: The public meeting will be held at the U.S. Department of Energy, Forrestal Building, Room 1E–245, 1000 Independence Avenue SW, Washington, DC 20585. See section VII of this document, ''Public Participation,'' for further details, including procedures for attending the in-person meeting, webinar registration information, participant instructions, and information about the capabilities available to webinar participants.

Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at *www.regulations.gov* under docket number EERE–2020–BT–STD–0007. Follow the instructions for submitting comments. Alternatively, interested persons may submit comments, identified by docket number EERE–2020–BT–STD–0007, by any of the following methods:

Email: ElecMotors2020STD0007@ee.doe.gov. Include the docket number EERE–2020–BT–STD–0007 in the subject line of the message.

Postal Mail: Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, Mailstop EE–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 287–1445. If possible, please submit all items on a compact disc (''CD''), in which case it is not necessary to include printed copies.

Hand Delivery/Courier: Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, 950 L'Enfant Plaza SW, 6th Floor, Washington, DC 20024. Telephone: (202) 287–1445. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

No telefacsimiles (''faxes'') will be accepted. For detailed instructions on submitting comments and additional information on this process, see section VII of this document.

Docket: The docket for this activity, which includes **Federal Register** notices, comments, and other supporting documents/materials, is available for review at *www.regulations.gov.* All documents in the docket are listed in the *www.regulations.gov* index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

The docket web page can be found at *www.regulations.gov/docket/EERE-2020-BT-STD-0007.* The docket web page contains instructions on how to access all documents, including public comments, in the docket. See section VII of this document for information on how to submit comments through *www.regulations.gov.*

EPCA requires the Attorney General to provide DOE a written determination of whether the proposed standard is likely to lessen competition. The U.S. Department of Justice Antitrust Division invites input from market participants and other interested persons with views on the likely competitive impact of the proposed standard. Interested persons may contact the Antitrust Division at *energy.standards@usdoj.gov* on or before the date specified in the **DATES** section. Please indicate in the ''Subject'' line of your email the title and Docket Number of this proposed rulemaking.

FOR FURTHER INFORMATION CONTACT:

Mr. Jeremy Dommu, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Email: *ApplianceStandardsQuestions@ee.doe.gov.*

Ms. Kristin Koernig, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 586–3593. Email: *kristin.koernig@hq.doe.gov.*

For further information on how to submit a comment, review other public comments and the docket, or participate in the public meeting, contact the Appliance and Equipment Standards Program staff at (202) 287–1445 or by email: *ApplianceStandardsQuestions@ee.doe.gov.*

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I. Synopsis of the Proposed Rule

The Energy Policy and Conservation Act, Public Law 94–163, as amended (''EPCA''),[1] authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. (42 U.S.C. 6291–6317) Title III, Part C[2] of EPCA established the Energy Conservation Program for Certain Industrial Equipment. (42 U.S.C. 6311–6317) Such equipment includes electric motors. Expanded scope electric motors (''ESEMs''), a subcategory of electric motors, are the subject of this rulemaking. This proposed rulemaking does not address small electric motors that are covered under title 10 of the Code of Federal Regulations (''CFR'') part 431 subpart X.

Pursuant to EPCA, any new or amended energy conservation standard must be designed to achieve the maximum improvement in energy efficiency that DOE determines is technologically feasible and economically justified. (42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(2)(A)) Furthermore, the new or amended standard must result in significant conservation of energy. (42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(3)(B))

In accordance with these and other statutory provisions discussed in this document, DOE analyzed the benefits and burdens of four trial standard levels (''TSLs'') for ESEMs. The TSLs and their associated benefits and burdens are discussed in detail in sections V.A through V.C of this document. As discussed in section V.C of this document, DOE has tentatively determined that TSL 2 represents the maximum improvement in energy efficiency that is technologically feasible and economically justified. The proposed standards, which are expressed in average full-load efficiency, are shown in Table I–1 through Table I–3 and are equivalent to those recommended in a joint recommendation for energy conservation standards for ESEMs[3] (''December 2022 Joint Recommendation'') from the Electric Motors Working Group, representing the motors industry, energy efficiency organizations and utilities.[4] [5]

Upon receipt of the December 2022 Joint Recommendation, DOE considered whether the statutory requirements of

[1] All references to EPCA in this document refer to the statute as amended through the Energy Act of 2020, Public Law 116–260 (Dec. 27, 2020), which reflect the last statutory amendments that impact Parts A and A–1 of EPCA.

[2] For editorial reasons, upon codification in the U.S. Code, Part C was re-designated Part A–1.

[3] In the letter, this category is referred to as ''SNEM.'' See discussion on the change in terminology in sections III.A and III.B of this document.

[4] Full recommendation available at: *www.regulations.gov/comment/EERE-2020-BT-STD-0007-0038*.

[5] The members of the Electric Motors Working Group included American Council for an Energy-Efficient Economy, Appliance Standards Awareness Project, National Electrical Manufacturers Association, Natural Resources Defense Council, Northwest Energy Efficiency Alliance, Pacific Gas & Electric Company, San Diego Gas & Electric, and Southern California Edison.

42 U.S.C. 6295(p)(4) would be satisfied and thus warrant the issuance of a direct final rule by DOE. In particular, EPCA requires DOE to determine whether the recommended standard contained in a statement submitted jointly by interested parties is in accordance with 42 U.S.C. 6295(o); *i.e.,* whether the recommended standard would achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. (42 U.S.C. 6295(p)(4)(A)(i)) If the Secretary determines the recommended standard is in accordance with 42 U.S.C. 6295(o), the Secretary may issue a final rule that establishes the recommended energy conservation standard. (*Id.*) If the Secretary determines that a direct final rule cannot be issued based on the statement, the Secretary must publish a notice of the determination, together with an explanation of the reasons for such determination. (42 U.S.C. 6295(p)(4)(A)(ii)) EPCA defines seven factors by which DOE must determine whether a proposed standard is economically justified. (42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII)) Having considered the December 2022 Joint Recommendation, DOE has tentatively determined that the recommended standard is in accordance with 42 U.S.C. 6295(o). However, because EPCA does not require DOE to issue a direct final rule under 42 U.S.C. 6295(p), DOE is interested in seeking public comment on the proposed, and recommended, standards level through this proposed rule to better understand the impacts of those standards.

These proposed standards, if adopted, would apply to all ESEMs listed in Table I–1 through Table I–3 manufactured in, or imported into, the United States starting on January 1, 2029.

TABLE I–1—PROPOSED ENERGY CONSERVATION STANDARDS FOR HIGH AND MEDIUM-TORQUE ESEMS

[Compliance Starting on January 1, 2029] [Recommended TSL 2]

hp	Average full load efficiency							
	Open				Enclosed			
	2-pole	4-pole	6-pole	8-pole	2-pole	4-pole	6-pole	8-pole
0.25	59.5	59.5	57.5	.....	59.5	59.5	57.5	.....
0.33	64.0	64.0	62.0	50.5	64.0	64.0	62.0	50.5
0.5	68.0	69.2	68.0	52.5	68.0	67.4	68.0	52.5
0.75	76.2	81.8	80.2	72.0	75.5	75.5	75.5	72.0
1	80.4	82.6	81.1	74.0	77.0	80.0	77.0	74.0
1.5	81.5	83.8	.....	.....	81.5	81.5	80.0	.....
2	82.9	84.5	.....	.....	82.5	82.5	.....	.....
3	84.1	.....	.....	.....	84.0	.....	.....	.....

TABLE I–2—PROPOSED ENERGY CONSERVATION STANDARDS FOR LOW-TORQUE ESEMS

[Compliance Starting on January 1, 2029] [Recommended TSL 2]

hp	Average full load efficiency							
	Open				Enclosed			
	2-pole	4-pole	6-pole	8-pole	2-pole	4-pole	6-pole	8-pole
0.25	63.9	66.1	60.2	52.5	60.9	64.1	59.2	52.5
0.33	66.9	69.7	65.0	56.6	63.9	67.7	64.0	56.6
0.5	68.8	70.1	66.8	57.1	65.8	68.1	65.8	57.1
0.75	70.5	74.8	73.1	62.8	67.5	72.8	72.1	62.8
1	74.3	77.1	77.3	65.7	71.3	75.1	76.3	65.7
1.5	79.9	82.1	80.5	72.2	76.9	80.1	79.5	72.2
2	81.0	82.9	81.4	73.3	78.0	80.9	80.4	73.3
3	82.4	84.0	82.5	74.9	79.4	82.0	81.5	74.9

TABLE I–3—PROPOSED ENERGY CONSERVATION STANDARDS FOR POLYPHASE ESEMS

[Compliance Starting on January 1, 2029] [Recommended TSL 2]

hp	Average full load efficiency							
	Open				Enclosed			
	2-pole	4-pole	6-pole	8-pole	2-pole	4-pole	6-pole	8-pole
0.25	65.6	69.5	67.5	62.0	66.0	68.0	66.0	62.0
0.33	69.5	73.4	71.4	64.0	70.0	72.0	70.0	64.0
0.5	73.4	78.2	75.3	66.0	72.0	75.5	72.0	66.0
0.75	76.8	81.1	81.7	70.0	75.5	77.0	74.0	70.0
1	77.0	83.5	82.5	75.5	75.5	77.0	74.0	75.5
1.5	84.0	86.5	83.8	77.0	84.0	82.5	87.5	78.5
2	85.5	86.5	.....	86.5	85.5	85.5	88.5	84.0
3	85.5	86.9	.....	87.5	86.5	86.5	89.5	85.5

A. Benefits and Costs to Consumers

Table I–4 presents DOE's evaluation of the economic impacts of the proposed standards on consumers of ESEMs, as measured by the average life-cycle cost (''LCC'') savings and the simple payback period (''PBP'').[6] The average LCC savings are positive for all representative units, and the PBP is less than the average lifetime of ESEMs, which is estimated to be 7.1 years (see section IV.F of this document).

TABLE I–4—IMPACTS OF PROPOSED ENERGY CONSERVATION STANDARDS ON CONSUMERS OF ESEMS

Representative unit	Average LCC savings (2022$)	Simple payback period (years)
ESEM High/Med Torque, 4 poles, enclosed, 0.25 hp	51	1.1
ESEM High/Med Torque, 4 poles, enclosed, 1 hp	138	0.9
ESEM High/Med Torque, 4 poles, enclosed, 5 hp	147	0.7
ESEM Low Torque, 6 poles, enclosed, 0.25 hp	100	1.5
ESEM Low Torque, 6 poles, enclosed, 0.5 hp	26	2.0
ESEM Polyphase, 4 poles, enclosed, 0.25 hp	83	0.8
AO–ESEM High/Med Torque, 4 poles, enclosed, 0.25 hp	160	0.8
AO–ESEM High/Med Torque, 4 poles, enclosed, 1 hp	121	0.7
AO–ESEM High/Med Torque, 4 poles, enclosed, 5 hp	88	1.3
AO–ESEM Low Torque, 6 poles, enclosed, 0.25 hp	40	1.8
AO–ESEM Low Torque, 6 poles, enclosed, 0.5 hp	51	1.2
AO–ESEM Polyphase, 4 poles, enclosed, 0.25 hp	138	1.1

DOE's analysis of the impacts of the proposed standards on consumers is described in section IV.F of this document.

B. Impact on Manufacturers

The industry net present value (''INPV'') is the sum of the discounted cash flows to the industry from the base year through the end of the analysis period (2024–2058). Using a real discount rate of 9.1 percent, DOE estimates that the INPV for manufacturers of ESEMs in the case without new standards is $2,019 million in 2022$. Under the proposed standards, DOE estimates the change in INPV to range from −13.1 percent to −6.5 percent, which is approximately −$264 million to −$131 million. In order to bring equipment into compliance with new standards, it is estimated that industry will incur total conversion costs of $339 million.

DOE's analysis of the impacts of the proposed standards on manufacturers is described in section IV.J of this document. The analytic results of the manufacturer impact analysis (''MIA'') are presented in section V.B.2 of this document.

C. National Benefits and Costs[7]

DOE's analyses indicate that the proposed energy conservation standards for ESEMs would save a significant amount of energy. Relative to the case without new standards, the lifetime energy savings for ESEMs purchased in the 30-year period that begins in the anticipated year of compliance with the new standards (2029–2058) amount to 8.9 quadrillion British thermal units (''Btu''), or quads.[8] This represents a savings of 9 percent relative to the energy use of these products in the case without new standards (referred to as the ''no-new-standards case'').

The cumulative net present value (''NPV'') of total consumer benefits of the proposed standards for ESEMs ranges from $38.3 billion (at a 7-percent discount rate) to $72.8 billion (at a 3-percent discount rate). This NPV expresses the estimated total value of future operating-cost savings minus the estimated increased equipment and installation costs for ESEMs purchased in 2029–2058.

In addition, the proposed standards for ESEMs are projected to yield significant environmental benefits. DOE estimates that the proposed standards would result in cumulative emission reductions (over the same period as for energy savings) of 160.5 million metric tons (''Mt'')[9] of carbon dioxide (''CO_2''), 43.8 thousand tons of sulfur dioxide (''SO_2''), 299.8 thousand tons of nitrogen oxides (''NO_X''), 1,362.2 thousand tons of methane (''CH_4''), 1.4 thousand tons of nitrous oxide (''N_2O''), and 0.3 tons of mercury (''Hg'').[10]

DOE estimates the value of climate benefits from a reduction in greenhouse gases (''GHG'') using four different estimates of the social cost of CO_2 (''SC–CO_2''), the social cost of methane (''SC–CH_4''), and the social cost of nitrous oxide (''SC–N_2O''). Together these represent the social cost of GHG (''SC–GHG''). DOE used interim SC–GHG values (in terms of benefit per ton of GHG avoided) developed by an Interagency Working Group on the Social Cost of Greenhouse Gases (''IWG'').[11] The derivation of these values is discussed in section IV.L of this document. For presentational purposes, the climate benefits associated with the average SC–GHG at a 3-percent discount rate are estimated to be $9.4 billion. DOE does not have a single central SC–GHG point estimate and it emphasizes the importance and value of considering the benefits

[6] The average LCC savings refer to consumers that are affected by a standard and are measured relative to the efficiency distribution in the no-new-standards case, which depicts the market in the compliance year in the absence of new standards (see section IV.F.9 of this document). The simple PBP, which is designed to compare specific efficiency levels, is measured relative to the baseline product (see section IV.C of this document).

[7] All monetary values in this document are expressed in 2022 dollars.

[8] The quantity refers to full-fuel-cycle (''FFC'') energy savings. FFC energy savings includes the energy consumed in extracting, processing, and transporting primary fuels (*i.e.,* coal, natural gas, petroleum fuels), and, thus, presents a more complete picture of the impacts of energy efficiency standards. For more information on the FFC metric, see section IV.H.1 of this document.

[9] A metric ton is equivalent to 1.1 short tons. Results for emissions other than CO_2 are presented in short tons.

[10] DOE calculated emissions reductions relative to the no-new-standards case, which reflects key assumptions in the *Annual Energy Outlook 2023* (''*AEO2023*''). *AEO2023* reflects, to the extent possible, laws and regulations adopted through mid-November 2022, including the Inflation Reduction Act. See section IV.K of this document for further discussion of *AEO2023* assumptions that effect air pollutant emissions.

[11] To monetize the benefits of reducing GHG emissions this analysis uses the interim estimates presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990* published in February 2021 by the IWG. (''February 2021 SC–GHG TSD''). *www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf.*

calculated using all four sets of SC–GHG estimates.

DOE estimated the monetary health benefits of SO_2 and NO_X emissions reductions using benefit per ton estimates from the Environmental Protection Agency (''EPA''),[12] as discussed in section IV.L of this document. DOE estimated the present value of the health benefits would be $7.9 billion using a 7-percent discount rate, and $18.3 billion using a 3-percent discount rate.[13] DOE is currently only monetizing health benefits from changes in ambient fine particulate matter (''$PM_{2.5}$'') concentrations from two precursors (SO_2 and NO_X), and from changes in ambient ozone from one precursor (for NO_X), but will continue to assess the ability to monetize other effects such as health benefits from reductions in direct $PM_{2.5}$ emissions.

Table I–5 summarizes the monetized benefits and costs expected to result from the proposed standards for ESEMs. There are other important unquantified effects, including certain unquantified climate benefits, unquantified public health benefits from the reduction of toxic air pollutants and other emissions, unquantified energy security benefits, and distributional effects, among others.

TABLE I–5—SUMMARY OF MONETIZED BENEFITS AND COSTS OF PROPOSED ENERGY CONSERVATION STANDARDS FOR ESEMS

[TSL 2]

	Billion $2022
3% discount rate	
Consumer Operating Cost Savings	54.7
Climate Benefits *	9.4
Health Benefits **	18.3
Total Benefits †	82.4
Consumer Incremental Equipment Costs ‡	9.7
Net Benefits	72.8
Change in Producer Cashflow (INPV ††)	(0.3)–(0.1)
7% discount rate	
Consumer Operating Cost Savings	26.1
Climate Benefits * (3% discount rate)	9.4
Health Benefits **	7.9
Total Benefits †	43.5
Consumer Incremental Equipment Costs ‡	5.1
Net Benefits	38.3
Change in Producer Cashflow (INPV ††)	(0.3)–(0.1)

Note: This table presents the costs and benefits associated with ESEMs shipped in 2029–2058. These results include consumer, climate, and health benefits which accrue after 2029 from the equipment shipped in 2029–2058.

* Climate benefits are calculated using four different estimates of the social cost of carbon (SC–CO_2), methane (SC–CH_4), and nitrous oxide (SC–N_2O) (model average at 2.5 percent, 3 percent, and 5 percent discount rates; 95th percentile at 3 percent discount rate) (see section IV.L of this document). Together these represent the global SC–GHG. For presentational purposes of this table, the climate benefits associated with the average SC–GHG at a 3 percent discount rate are shown; however, DOE emphasizes the importance and value of considering the benefits calculated using all four sets of SC–GHG estimates. To monetize the benefits of reducing GHG emissions, this analysis uses the interim estimates presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990* published in February 2021 by the IWG

** Health benefits are calculated using benefit-per-ton values for NO_X and SO_2. DOE is currently only monetizing (for SO_2 and NO_X) $PM_{2.5}$ precursor health benefits and (for NO_X) ozone precursor health benefits, but will continue to assess the ability to monetize other effects such as health benefits from reductions in direct $PM_{2.5}$ emissions. See section IV.L of this document for more details.

† Total and net benefits include those consumer, climate, and health benefits that can be quantified and monetized. For presentation purposes, total and net benefits for both the 3-percent and 7-percent cases are presented using the average SC–GHG with 3-percent discount rate.

‡ Costs include incremental equipment costs.

†† Operating Cost Savings are calculated based on the life cycle costs analysis and national impact analysis as discussed in detail below. See sections IV.F and IV.H of this document. DOE's national impacts analysis includes all impacts (both costs and benefits) along the distribution chain beginning with the increased costs to the manufacturer to manufacture the equipment and ending with the increase in price experienced by the consumer. DOE also separately conducts a detailed analysis on the impacts on manufacturers (the MIA). See section IV.J of this document. In the detailed MIA, DOE models manufacturers' pricing decisions based on assumptions regarding investments, conversion costs, cashflow, and margins. The MIA produces a range of impacts, which is the rule's expected impact on the INPV. The change in INPV is the present value of all changes in industry cash flow, including changes in production costs, capital expenditures, and manufacturer profit margins. Change in INPV is calculated using the industry weighted average cost of capital value of 9.1 percent that is estimated in the MIA (see chapter 12 of the NOPR TSD for a complete description of the industry weighted average cost of capital). For ESEMs, those values are −$264 million and −$131 million. DOE accounts for that range of likely impacts in analyzing whether a TSL is economically justified. See section IV.J of this document. DOE is presenting the range of impacts to the INPV under two markup scenarios: the Preservation of Gross Margin scenario, which is the manufacturer markup scenario used in the calculation of Consumer Operating Cost Savings in this table, and the Preservation of Operating Profit scenario, where DOE assumed manufacturers would not be able to increase per-unit operating profit in proportion to increases in manufacturer production costs. DOE includes the range of estimated INPV in the above table, drawing on the MIA explained further in section IV.J of this document, to provide additional context for assessing the estimated impacts of this rule to society, including potential changes in production and consumption, which is consistent with OMB's Circular A–4 and E.O. 12866. If DOE were to include the INPV into the net benefit calculation for this proposed rule, the net benefits would range from $72.5 billion to $72.7 billion at 3-percent discount rate and would range from $38.0 billion to $38.2 billion at 7-percent discount rate. Numbers in parentheses are negative numbers. DOE seeks comment on this approach.

[12] U.S. EPA. Estimating the Benefit per Ton of Reducing Directly Emitted $PM_{2.5}$, $PM_{2.5}$ Precursors and Ozone Precursors from 21 Sectors. Available at *www.epa.gov/benmap/estimating-benefit-ton-reducing-pm25-precursors-21-sectors.*

[13] DOE estimates the economic value of these emissions reductions resulting from the considered TSLs for the purpose of complying with the requirements of Executive Order 12866.

The benefits and costs of the proposed standards can also be expressed in terms of annualized values. The monetary values for the total annualized net benefits are (1) the reduced consumer operating costs, minus (2) the increase in product purchase prices and installation costs, plus (3) the value of climate and health benefits of emission reductions, all annualized.[14]

The national operating cost savings are domestic private U.S. consumer monetary savings that occur as a result of purchasing the covered products and are measured for the lifetime of ESEMs shipped in 2029–2058. The benefits associated with reduced emissions achieved as a result of the proposed standards are also calculated based on the lifetime of ESEMs shipped in 2029–2058. Total benefits for both the 3-percent and 7-percent cases are presented using the average GHG social costs with 3-percent discount rate. Estimates of SC–GHG values are presented for all four discount rates in section V.B of this document.

Table I–6 presents the total estimated monetized benefits and costs associated with the proposed standard, expressed in terms of annualized values. The results under the primary estimate are as follows.

Using a 7-percent discount rate for consumer benefits and costs and health benefits from reduced NO_X and SO_2 emissions, and the 3-percent discount rate case for climate benefits from reduced GHG emissions, the estimated cost of the standards proposed in this rule is $543 million per year in increased equipment costs, while the estimated annual benefits are $2,757 million in reduced equipment operating costs, $542 million in climate benefits, and $836 million in health benefits. In this case. The net benefit would amount to $3,592 million per year.

Using a 3-percent discount rate for all benefits and costs, the estimated cost of the proposed standards is $556 million per year in increased equipment costs, while the estimated annual benefits are $3,140 million in reduced operating costs, $542 million in climate benefits, and $1,052 million in health benefits. In this case, the net benefit would amount to $4,179 million per year.

TABLE I–6—ANNUALIZED BENEFITS AND COSTS OF PROPOSED ENERGY CONSERVATION STANDARDS FOR ESEMS

[TSL 2]

	Million 2022$/year		
	Primary estimate	Low-net-benefits estimate	High-net-benefits estimate
3% discount rate			
Consumer Operating Cost Savings	3,140	2,962	3,341
Climate Benefits *	542	526	562
Health Benefits **	1,052	1,021	1,089
Total Benefits †	4,734	4,509	4,992
Consumer Incremental Equipment Costs ‡	556	598	529
Net Benefits	4,179	3,911	4,464
Change in Producer Cashflow (INPV ††)	(25)–(13)	(25)–(13)	(25)–(13)
7% discount rate			
Consumer Operating Cost Savings	2,757	2,615	2,921
Climate Benefits * (3% discount rate)	542	526	562
Health Benefits **	836	814	863
Total Benefits †	4,135	3,955	4,346
Consumer Incremental Equipment Costs ‡	543	578	520
Net Benefits	3,592	3,377	3,826
Change in Producer Cashflow (INPV ††)	(25)–(13)	(25)–(13)	(25)–(13)

Note: This table presents the costs and benefits associated with ESEMs shipped in 2029–2058. These results include consumer, climate, and health benefits which accrue after 2058 from the equipment shipped in 2029–2058. The Primary, Low Net Benefits, and High Net Benefits Estimates utilize projections of energy prices from the *AEO2023* Reference case, Low Economic Growth case, and High Economic Growth case, respectively. In addition, incremental equipment costs reflect a constant rate in the Primary Estimate, an increasing rate in the Low Net Benefits Estimate, and a declining rate in the High Net Benefits Estimate. The methods used to derive projected price trends are explained in sections IV.F and IV.4 of this document. Note that the Benefits and Costs may not sum to the Net Benefits due to rounding.

* Climate benefits are calculated using four different estimates of the global SC–GHG (see section IV.L of this document). For presentational purposes of this table, the climate benefits associated with the average SC–GHG at a 3 percent discount rate are shown; however, DOE emphasizes the importance and value of considering the benefits calculated using all four sets of SC–GHG estimates. To monetize the benefits of reducing GHG emissions, this analysis uses the interim estimates presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990* published in February 2021 by the IWG.

** Health benefits are calculated using benefit-per-ton values for NO_X and SO_2. DOE is currently only monetizing (for SO_2 and NO_X) $PM_{2.5}$ precursor health benefits and (for NO_X) ozone precursor health benefits but will continue to assess the ability to monetize other effects such as health benefits from reductions in direct $PM_{2.5}$ emissions. See section IV.L of this document for more details.

† Total benefits for both the 3-percent and 7-percent cases are presented using the average SC–GHG with 3-percent discount rate.

‡ Costs include incremental equipment costs.

[14] To convert the time-series of costs and benefits into annualized values, DOE calculated a present value in 2022, the year used for discounting the NPV of total consumer costs and savings. For the benefits, DOE calculated a present value associated with each year's shipments in the year in which the shipments occur (*e.g.,* 2030), and then discounted the present value from each year to 2022. Using the present value, DOE then calculated the fixed annual payment over a 30-year period, starting in the compliance year, that yields the same present value.

†† Operating Cost Savings are calculated based on the life cycle costs analysis and national impact analysis as discussed in detail below. See sections IV.F and IV.H of this document. DOE's national impacts analysis includes all impacts (both costs and benefits) along the distribution chain beginning with the increased costs to the manufacturer to manufacture the equipment and ending with the increase in price experienced by the consumer. DOE also separately conducts a detailed analysis on the impacts on manufacturers (the MIA). See section IV.J. of this document. In the detailed MIA, DOE models manufacturers' pricing decisions based on assumptions regarding investments, conversion costs, cashflow, and margins. The MIA produces a range of impacts, which is the rule's expected impact on the INPV. The change in INPV is the present value of all changes in industry cash flow, including changes in production costs, capital expenditures, and manufacturer profit margins. The annualized change in INPV is calculated using the industry weighted average cost of capital value of 9.1 percent that is estimated in the MIA (see chapter 12 of the NOPR TSD for a complete description of the industry weighted average cost of capital). For ESEMs, those values are −$25 million and −$13 million. DOE accounts for that range of likely impacts in analyzing whether a TSL is economically justified. See section IV.J of this NOPR. DOE is presenting the range of impacts to the INPV under two markup scenarios: the Preservation of Gross Margin scenario, which is the manufacturer markup scenario used in the calculation of Consumer Operating Cost Savings in this table, and the Preservation of Operating Profit Markup scenario, where DOE assumed manufacturers would not be able to increase per-unit operating profit in proportion to increases in manufacturer production costs. DOE includes the range of estimated annualized change in INPV in the above table, drawing on the MIA explained further in section IV.J of this document to provide additional context for assessing the estimated impacts of this rule to society, including potential changes in production and consumption, which is consistent with OMB's Circular A–4 and E.O. 12866. If DOE were to include the INPV into the annualized net benefit calculation for this proposed rule, the annualized net benefits would range from $4,154 million to $4,166 million at 3-percent discount rate and would range from $3,567 million to $3,579 million at 7-percent discount rate. Numbers in parentheses are negative numbers. DOE seeks comment on this approach.

DOE's analysis of the national impacts of the proposed standards is described in sections IV.G, IV.K, and IV.L of this document.

D. Conclusion

DOE has tentatively concluded that the proposed standards represent the maximum improvement in energy efficiency that is technologically feasible and economically justified, and would result in the significant conservation of energy. Specifically, with regards to technological feasibility, equipment achieving these standard levels are already commercially available for all equipment classes covered by this proposal. As for economic justification, DOE's analysis shows that the benefits of the proposed standard exceed, to a great extent, the burdens of the proposed standards.

Using a 7-percent discount rate for consumer benefits and costs and NO_X and SO_2 reduction benefits, and a 3-percent discount rate case for GHG social costs, the estimated cost of the proposed standards for ESEMs is $543 million per year in increased equipment costs, while the estimated annual benefits are $2,757 million in reduced equipment operating costs, $542 million in climate benefits and $836 million in health benefits. The net benefit amounts to $3,592 million per year.

The significance of energy savings offered by a new or amended energy conservation standard cannot be determined without knowledge of the specific circumstances surrounding a given rulemaking.[15] For example, some covered products and equipment have substantial energy consumption occur during periods of peak energy demand. The impacts of these products on the energy infrastructure can be more pronounced than products with relatively constant demand. Accordingly, DOE evaluates the significance of energy savings on a case-by-case basis.

As previously mentioned, the standards are projected to result in estimated national energy savings of 8.9 quad FFC, the equivalent of the primary annual energy use of 95.7 million homes. In addition, they are projected to reduce CO_2 emissions by 160.5 Mt. Based on these findings, DOE has initially determined the energy savings from the proposed standard levels are ''significant'' within the meaning of 42 U.S.C. 6295(o)(3)(B). A more detailed discussion of the basis for these tentative conclusions is contained in the remainder of this document and the accompanying technical support document (''TSD'').

DOE also considered more-stringent energy efficiency levels as potential standards, and is still considering them in this proposed rulemaking. However, DOE has tentatively concluded that the potential burdens of the more-stringent energy efficiency levels would outweigh the projected benefits.

Based on consideration of the public comments DOE receives in response to this document and related information collected and analyzed during the course of this proposed rulemaking effort, DOE may adopt energy efficiency levels presented in this document that are either higher or lower than the proposed standards, or some combination of level(s) that incorporate the proposed standards in part.

II. Introduction

The following section briefly discusses the statutory authority underlying this proposed rule, as well as some of the relevant historical background related to the establishment of standards for ESEMs.

A. Authority

EPCA authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. Title III, Part C of EPCA, added by Public Law 95–619, Title IV, section 441(a), established the Energy Conservation Program for Certain Industrial Equipment, which sets forth a variety of provisions designed to improve the energy efficiency of certain types of industrial equipment, including electric motors. (42 U.S.C. 6311(1)(A)) ESEMs, the subject of this document, are a category of electric motors.

The Energy Policy Act of 1992 (''EPACT 1992'') (Pub. L. 102–486 (Oct. 24, 1992)) further amended EPCA by establishing energy conservation standards and test procedures for certain commercial and industrial electric motors that are manufactured alone or as a component of another piece of equipment. In December 2007, Congress enacted the Energy Independence and Security Act of 2007 (''EISA 2007'') (Pub. L. 110–140 (Dec. 19, 2007). Section 313(b)(1) of EISA 2007 updated the energy conservation standards for those electric motors already covered by EPCA and established energy conservation standards for a larger scope of motors not previously covered by standards. (42 U.S.C. 6313(b)(2)) EISA 2007 also revised certain statutory definitions related to electric motors. See EISA 2007, sec. 313 (amending statutory definitions related to electric motors at 42 U.S.C. 6311(13)).

The energy conservation program under EPCA, consists essentially of four parts: (1) testing, (2) labeling, (3) the establishment of Federal energy conservation standards, and (4) certification and enforcement procedures. Relevant provisions of EPCA include definitions (42 U.S.C. 6311), test procedures (42 U.S.C. 6314), labeling provisions (42 U.S.C. 6315), energy conservation standards (42 U.S.C. 6313), and the authority to require information and reports from

[15] Procedures, Interpretations, and Policies for Consideration in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment, 86 FR 70892, 70901 (Dec. 13, 2021).

manufacturers (42 U.S.C. 6316; U.S.C. 6296).

Federal energy efficiency requirements for covered equipment established under EPCA generally supersede state laws and regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6316(a) and 42 U.S.C. 6316(b); 42 U.S.C. 6297) DOE may, however, grant waivers of Federal preemption in limited instances for particular state laws or regulations, in accordance with the procedures and other provisions set forth under EPCA. (*See* 42 U.S.C. 6316(a) (applying the preemption waiver provisions of 42 U.S.C. 6297))

Subject to certain criteria and conditions, DOE is required to develop test procedures to measure the energy efficiency, energy use, or estimated annual operating cost of each covered equipment. (*See* 42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(3)(A) and (r)) Manufacturers of covered equipment must use the Federal test procedures as the basis for: (1) certifying to DOE that their equipment complies with the applicable energy conservation standards adopted pursuant to EPCA (42 U.S.C. 6316(a); 42 U.S.C. 6295(s)), and (2) making representations about the efficiency of that equipment (42 U.S.C. 6314(d)). Similarly, DOE must use these test procedures to determine whether the equipment complies with relevant standards promulgated under EPCA. (42 U.S.C. 6316(a); 42 U.S.C. 6295(s)) The DOE test procedure for ESEMs appear at 10 CFR part 431, subpart B, appendix B (''appendix B'').

DOE must follow specific statutory criteria for prescribing new or amended standards for covered equipment, including ESEMs. Any new or amended standard for a covered product must be designed to achieve the maximum improvement in energy efficiency that the Secretary of Energy determines is technologically feasible and economically justified. (42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(2)(A)) Furthermore, DOE may not adopt any standard that would not result in the significant conservation of energy. (42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(3))

Moreover, DOE may not prescribe a standard (1) for certain equipment, including ESEMs, if no test procedure has been established for the equipment, or (2) if DOE determines by rule that the standard is not technologically feasible or economically justified. (42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(3)(A)–(B)) In deciding whether a proposed standard is economically justified, DOE must determine whether the benefits of the standard exceed its burdens. (42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(3)(A)–(B)) DOE must make this determination after receiving comments on the proposed standard, and by considering, to the greatest extent practicable, the following seven statutory factors:

(1) The economic impact of the standard on manufacturers and consumers of the products subject to the standard;

(2) The savings in operating costs throughout the estimated average life of the covered products in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered products that are likely to result from the standard;

(3) The total projected amount of energy (or as applicable, water) savings likely to result directly from the standard;

(4) Any lessening of the utility or the performance of the covered products likely to result from the standard;

(5) The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the standard;

(6) The need for national energy and water conservation; and

(7) Other factors the Secretary of Energy (''Secretary'') considers relevant. (42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII))

Further, EPCA establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the energy savings during the first year that the consumer will receive as a result of the standard, as calculated under the applicable test procedure. (42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(2)(B)(iii))

EPCA also contains what is known as an ''anti-backsliding'' provision, which prevents the Secretary from prescribing any amended standard that either increases the maximum allowable energy use or decreases the minimum required energy efficiency of a covered product. (42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(1)) Also, the Secretary may not prescribe an amended or new standard if interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States. (42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(4))

Additionally, EPCA specifies requirements when promulgating an energy conservation standard for a covered product or equipment that has two or more subcategories. DOE must specify a different standard level for a type or class of product that has the same function or intended use, if DOE determines that products within such group: (A) consume a different kind of energy from that consumed by other covered products within such type (or class); or (B) have a capacity or other performance-related feature which other products within such type (or class) do not have and such feature justifies a higher or lower standard. (42 U.S.C. 6316(a); 42 U.S.C. 6295(q)(1)) In determining whether a performance-related feature justifies a different standard for a group of equipment, DOE must consider such factors as the utility to the consumer of such a feature and other factors DOE deems appropriate. (*Id.*) Any rule prescribing such a standard must include an explanation of the basis on which such higher or lower level was established. (42 U.S.C. 6316(a); 42 U.S.C. 6295(q)(2))

B. Background

1. Current Standards

DOE does not currently have energy conservation standards for ESEMs even though DOE has the authority to regulate electric motors broadly. DOE has adopted energy conservation standards for medium electric motors (''MEMs'') at 10 CFR 431.25 (see section III.A of this document for further description), as well as small electric motors (''SEMs'') at 10 CFR 431.446, which are separately regulated categories.

2. History of Standards Rulemaking for ESEMs

On May 21, 2020, DOE issued an early assessment request for information (''RFI'') (''May 2020 Early Assessment Review RFI'') in which DOE stated that it was initiating an early assessment review to determine whether any new or amended standards would satisfy the relevant requirements of EPCA for a new or amended energy conservation standard for electric motors and sought information related to that effort. Specifically, DOE sought data and information that could enable the agency to determine whether DOE should propose a ''no new standard'' determination because a more stringent standard: (1) would not result in a significant savings of energy; (2) is not technologically feasible; (3) is not economically justified; or (4) any combination of the foregoing. 85 FR 30878, 30879.

On March 2, 2022, DOE published a Preliminary Analysis for electric motors (''March 2022 Preliminary Analysis''). 87 FR 11650. In conjunction with the March 2022 Preliminary Analysis, DOE published the March 2022 Preliminary TSD, which presented the results of the in-depth technical analyses in the following areas: (1) engineering; (2) markups to determine equipment price; (3) energy use; (4) LCC and PBP; and (5) national impacts. The results presented included the current scope of electric motors regulated at 10 CFR 431.25, in addition to an expanded scope of motors, including electric motors above 500 horsepower, air-over electric motors, and ESEMs.[16] *See* chapter 2 of the March 2022 Preliminary TSD. DOE requested comment on a number of topics regarding the analysis presented. However, DOE is only responding to comments pertaining to ESEMs and air-over expanded scope electric motors (''AO–ESEMs'') in this NOPR, as DOE responded to the rest of the comments pertaining to medium electric motors and their air-over equivalents in the Electric Motors Direct Final Rule published on June 1, 2023 (''June 2023 DFR'') that amended energy conservation standards for medium electric motors and their air-over equivalents. 88 FR 36066.

On April 5, 2022, DOE held a public webinar in which it presented the methods and analysis in the March 2022 Preliminary Analysis and solicited public comment. (''April 5, 2022, Public Meeting'').

TABLE II–1—MARCH 2022 PRELIMINARY ANALYSIS WRITTEN COMMENTERS

Commenter(s)	Reference in this NOPR	Docket No.	Commenter type
American Council for an Energy-Efficient Economy, Appliance Standards Awareness Project, National Electrical Manufacturers Association, Natural Resources Defense Council, Northwest Energy Efficiency Alliance, Pacific Gas & Electric Company, San Diego Gas & Electric, Southern California Edison.	Electric Motors Working Group.	38	Working Group.
Appliance Standards Awareness Project, American Council for an Energy-Efficient Economy, Natural Resources Defense Council, New York State Energy Research and Development Authority.	Joint Advocates	27	Efficiency Advocacy Organizations.
Association of Home Appliance Manufacturers; Air-Conditioning, Heating, and Refrigeration Institute.	AHAM and AHRI	25	Trade Association.
Air-Conditioning, Heating, and Refrigeration Institute	AHRI	26	Trade Association.
Pacific Gas and Electric Company, San Diego Gas and Electric, and Southern California Edison; collectively, the California Investor-Owned Utilities.	CA IOUs	30	Utilities.
Electrical Apparatus Service Association, Inc	EASA	21	Trade Association.
Hydraulics Institute	HI	31	Trade Association.
Lennox International	Lennox	29	Manufacturer.
Northwest Energy Efficiency Alliance	NEEA	33	Efficiency Advocacy Organization.
National Electrical Manufacturers Association, Association of Home Appliance Manufacturers, the Air-Conditioning, Heating, and Refrigeration Institute, the Medical Imaging Technology Alliance, the Outdoor Power Equipment Institute, Home Ventilating Institute, and the Power Tool Institute.	Joint Industry Stakeholders.	23	Trade Associations.
National Electrical Manufacturers Association	NEMA	22	Trade Association.

A parenthetical reference at the end of a comment quotation or paraphrase provides the location of the item in the public record.[17] To the extent that interested parties have provided written comments that are substantively consistent with any oral comments provided during the April 5, 2022, public meeting, DOE cites the written comments throughout this document.

By letter dated December 22, 2022, DOE received the December 2022 Joint Recommendation from the Electric Motors Working Group. The December 2022 Joint Recommendation addressed energy conservation standards for high-torque, medium-torque, low-torque, and polyphase ESEMs that are 0.25–3 hp, and AO–ESEMs. The December 2022 Joint Recommendation recommended a compliance date for updated energy conservation standards for AO–ESEMs as well. (Electric Motors Working Group, No. 38 at p. 5)

3. Electric Motors Working Group Recommended Standard Levels

This section summarizes the standard levels recommended in the December 2022 Joint Recommendation and the subsequent procedural steps taken by DOE. Further discussion on scope is provided in section III.A of this document. The Electric Motors Working Group stated that the recommended levels would minimize potential market disruptions by allowing smaller designs to remain on the market. Specifically the Electric Motors Working Group stated that the recommended levels for high and medium torque ESEM could allow smaller capacitor start induction run (''CSIR'') motors and currently unregulated split-phase motors, which are common in certain space-constrained products; for low torque ESEMs, the Electric Motors Working Group stated that manufacturers believe efficiency levels above the recommended levels could result in significant increases in the physical size, unavailability of product, and, in some cases, may be extremely difficult to achieve with current permanent split capacitor (''PSC'') technology; and for AO–ESEMs, the Electric Motors Working Group stated that the recommended levels represented the highest feasible efficiencies given the potential design constraints associated with their use in covered equipment. (*Id.* at pp. 3–5)

Recommendation A: For high-torque and medium-torque ESEMs (*i.e.,* CSIR, capacitor start capacitor run (''CSCR''), and split-phase motors), the Electric Motors Working Group recommended the following standard levels, expressed in average full-load efficiency:

(1) Values for open and enclosed motors rated at 0.25, 0.33, and 0.5 hp (all pole configurations) that are largely based on the levels in NEMA MG 1, Table 12–19, ''Premium Efficiency Levels for Capacitor-Start/Induction-

[16] In the March 2022 Preliminary Analysis, DOE used the term small, non-small electric motor, electric motors (''SNEMs'') to designate ESEMs.

[17] The parenthetical reference provides a reference for information located in the docket of DOE's rulemaking to develop energy conservation standards for electric motors. (Docket No. EERE–2020–BT–STD–0007, which is maintained at *www.regulations.gov*). The references are arranged as follows: (commenter name, comment docket ID number, page of that document).

Run Single-Phase Small Motors.'' The exceptions are the open and enclosed 0.5 hp 4-pole values, which have lower efficiency standards described in Table II–2. For cases where Table 12–19 lists two frame sizes (*e.g.,* 48 and 56 frame) for a given hp rating, the recommended efficiency level reflects the smaller frame size (*i.e.,* lower efficiency).

(2) Values for open motors (2-, 4-, 6-pole) above 0.5 hp that are consistent with the current small electric motor standards for CSCR and CSIR motors found in 10 CFR part 431, subpart X (§ 431.446).

(3) Values for 8-pole open motors above 0.5 hp and all enclosed motors above 0.5 hp that are based on the levels in NEMA MG 1, Table 12–20, ''Premium Efficiency Levels for Capacitor-Start/Capacitor-Run Single-Phase Small Motors.'' For cases where Table 12–20 lists two frame sizes (*e.g.,* 48 and 56 frame) for a given hp rating, the recommended efficiency level reflects the smaller frame size (*i.e.,* lower efficiency).

TABLE II–2—RECOMMENDED ENERGY CONSERVATION STANDARDS FOR HIGH-TORQUE AND MEDIUM-TORQUE ESEMS

[*i.e.,* CSIR, CSCR, and split-phase motors]

hp	Average full load efficiency							
	Open				Enclosed			
	2-pole	4-pole	6-pole	8-pole	2-pole	4-pole	6-pole	8-pole
0.25	59.5	59.5	57.5	.....	59.5	59.5	57.5	.....
0.33	64.0	64.0	62.0	50.5	64.0	64.0	62.0	50.5
0.5	68.0	69.2	68.0	52.5	68.0	67.4	68.0	52.5
0.75	76.2	81.8	80.2	72.0	75.5	75.5	75.5	72.0
1	80.4	82.6	81.1	74.0	77.0	80.0	77.0	74.0
1.5	81.5	83.8	.....	.....	81.5	81.5	80.0	.....
2	82.9	84.5	.....	.....	82.5	82.5	.....	.....
3	84.1	.....	.....	.....	84.0	.....	.....	.....

(*Id.* at pp. 3, 6).

Recommendation B: For low-torque ESEMs (*i.e.,* shaded pole and PSC motors), the Electric motors Working Group recommended the following standard levels, expressed in terms of average full-load efficiency:

(1) Values for open motors rated at 0.25 hp, 0.33 hp, and 1.5 hp and above that are based on DOE's new efficiency level (EL 3).[18]

(2) Values for open motors rated at 0.5, 0.75, and 1.0 hp that are based on DOE's new EL 2, with two exceptions:[19]

(a) The 6-pole, 1.0 hp value is the mid-point between EL 2 (75.3%) and EL 3 (79.2%)

(b) The 2-pole, 0.5 hp value is the mid-point between EL 2 (66.4%) and EL 3 (71.1%)

(3) Values for enclosed motors that are based on the equivalent open motor efficiency but are adjusted to account for the lack of additional cooling, which is a function of motor rpm (*i.e.,* number of poles). The adjustment is 3% for 2-pole motors, 2% for 4-pole motors, 1% for 6-pole motors, and 0% for 8-pole motors.

TABLE II–3—RECOMMENDED ENERGY CONSERVATION STANDARDS FOR LOW-TORQUE ESEMS

[*i.e.,* shaded pole and PSC motors]

hp	Average full load efficiency							
	Open				Enclosed			
	2-pole	4-pole	6-pole	8-pole	2-pole	4-pole	6-pole	8-pole
0.25	63.9	66.1	60.2	52.5	60.9	64.1	59.2	52.5
0.33	66.9	69.7	65.0	56.6	63.9	67.7	64.0	56.6
0.5	68.8	70.1	66.8	57.1	65.8	68.1	65.8	57.1
0.75	70.5	74.8	73.1	62.8	67.5	72.8	72.1	62.8
1	74.3	77.1	77.3	65.7	71.3	75.1	76.3	65.7
1.5	79.9	82.1	80.5	72.2	76.9	80.1	79.5	72.2
2	81.0	82.9	81.4	73.3	78.0	80.9	80.4	73.3
3	82.4	84.0	82.5	74.9	79.4	82.0	81.5	74.9

(*Id.* at pp. 4, 6)

Recommendation C: For polyphase ESEMs (*i.e.,* three-phase ESEMs), the Electric Motors Working Group recommended the following standard levels, expressed in terms of average full-load efficiency:

(1) Values for 2-pole, 4-pole, and 6-pole open motors that are consistent with the current small electric motor standards for polyphase motors found in 10 CFR part 431, subpart X (§ 431.446).

(2) Values for 8-pole open and all enclosed motors from NEMA MG 1, Table 12–21, ''Premium Efficiency Levels for Three-Phase Induction Small Motors.'' For cases where Table 12–21 lists two frame sizes (*e.g.,* 48 and 56 frame) for a given hp rating, the recommended efficiency level reflects the smaller frame size (*i.e.,* lower efficiency).

[18] ''DOE's new efficiency level'' refers to preliminary efficiency levels that were developed during the private negotiations of the Electric Motors Working Group. See Table II–3 for the final values chosen from those preliminary efficiency levels.

[19] See footnote 18.

TABLE II–4—RECOMMENDED ENERGY CONSERVATION STANDARDS FOR POLYPHASE ESEMS

[*i.e.,* Three-Phase ESEMs]

hp	Average full load efficiency							
	Open				Enclosed			
	2-pole	4-pole	6-pole	8-pole	2-pole	4-pole	6-pole	8-pole
0.25	65.6	69.5	67.5	62.0	66.0	68.0	66.0	62.0
0.33	69.5	73.4	71.4	64.0	70.0	72.0	70.0	64.0
0.5	73.4	78.2	75.3	66.0	72.0	75.5	72.0	66.0
0.75	76.8	81.1	81.7	70.0	75.5	77.0	74.0	70.0
1	77.0	83.5	82.5	75.5	75.5	77.0	74.0	75.5
1.5	84.0	86.5	83.8	77.0	84.0	82.5	87.5	78.5
2	85.5	86.5	.....	86.5	85.5	85.5	88.5	84.0
3	85.5	86.9	.....	87.5	86.5	86.5	89.5	85.5

(*Id.*)

Recommendation D: The Electric Motors Working Group recommended that if standards are warranted for AO–ESEMs, DOE set the standards at the same levels as those for comparable ESEMs used in non-air-over applications. (*Id.* at p. 5)

Recommendation E: The Electric Motors Working Group recommended that DOE align the compliance date for AO–ESEMs with the compliance date for updated energy conservation standards for Commercial Unitary Air Conditioners/Heat Pumps (''CUAC/HPs'') currently under negotiation in DOE's Appliance Standards and Rulemaking Federal Advisory Committee (''ASRAC'') Working Group on CUAC/HPs. The Electric Motors Working Group stated this recommended compliance date would appropriately balance energy savings and the time needed for manufacturers of equipment with AO–ESEMs to re-design products. (*Id.*)

DOE notes that the scope and standards proposed in this document are equivalent to those recommended by the Electric Motors Working Group. Regarding the compliance year for energy conservation standards for ESEMs, the Electric Motors Working Group recommended that DOE align the compliance date for AO–ESEMs with the compliance date for updated energy conservation standards for CUAC/HP, which were under negotiation in DOE's ASRAC Working Group on CUAC/HPs at the time. Since then, the CUAC/HP negotiations have concluded and include a recommended compliance year of 2029 (*i.e.,* January 1, 2029).[20] ESEMs are a type of electric motor, but not among the types of electric motor for which Congress established standards and a rulemaking schedule in 42 U.S.C. 6313(b). As such, they are exempt from the requirements of 42 U.S.C. 6313(b), including the compliance deadlines provided in that section. Because section 42 U.S.C. 6316(a) applies certain requirements of 42 U.S.C. 6295(l)–(s) of EPCA to certain equipment, including electric motors, DOE considered whether the compliance deadlines of 42 U.S.C. 6295(m)(4) applies to ESEMs. 42 U.S.C. 6295(m)(4)(A) defines compliance deadlines for specific products; however, electric motors and ESEMs are not listed, nor does 42 U.S.C. 6316 apply a cross reference on how to apply these paragraphs to electric motors or ESEMs. Accordingly, DOE has determined that these compliance deadlines do not apply to ESEMs. Additionally, DOE reviewed section 6295(m)(4)(B), which states that a manufacturer shall not be required to apply new standards to a product with respect to which other new standards have been required in the prior 6-year period. As no standards for ESEMs have not yet been established, this paragraph also does not apply to ESEMs. As such, DOE has determined that it has discretion to establish compliance deadlines for ESEMs. Therefore, DOE proposes a January 1, 2029, compliance date in accordance with the recommendation from the Electric Motors Working Group. DOE has tentatively determined that this compliance date would provide sufficient lead time to motor manufacturers based on the recommendation from the Electric Motors Working Group, which includes NEMA.

C. Deviation From Process Rule

In accordance with section 3(a) of 10 CFR part 430, subpart C, appendix A (''Process Rule''), DOE notes that it is deviating from the provision in the Process Rule regarding the pre-NOPR and NOPR stages for an energy conservation standards rulemaking.

1. Public Comment Period

Section 6(f)(2) of the Process Rule specifies that the length of the public comment period for a NOPR will be not less than 75 calendar days. For this NOPR, DOE has opted instead to provide a 60-day comment period, consistent with EPCA requirements. (42 U.S.C. 6316(a); 42 U.S.C. 6295(p). DOE is opting to deviate from the 75-day comment period because stakeholders have already been afforded multiple opportunities to provide comments on this proposed rulemaking. As noted previously, DOE requested comment on various issues pertaining to this standards rulemaking in the May 2020 Early Assessment Review RFI and provided stakeholders with a 30-day comment period. 85 FR 30878. Additionally, DOE provided a 60-day comment period for stakeholders to provide input on the analyses presented in the March 2022 Preliminary Analysis. 87 FR 11650. The analytical assumptions and approaches used for the analyses conducted for this NOPR are similar to those used for the preliminary analysis. Furthermore, as discussed previously in this document, the standards proposed in this document are equivalent to those recommended by the Electric Motors Working Group for the electric motor types subject to this proposal. Therefore, DOE believes a 60-day comment period is appropriate and will provide interested parties with a meaningful opportunity to comment on the proposed rule.

2. Framework Document

Section 6(a)(2) of the Process Rule states that if DOE determines it is appropriate to proceed with a rulemaking, the preliminary stages of a rulemaking to issue or amend an energy conservation standard that DOE will undertake will be a framework document and preliminary analysis, or

[20] *See* CUAC/HP ASRAC Working group term sheet at: *www.regulations.gov/document/EERE-2022-BT-STD-0015-0087.*

an advance notice of proposed rulemaking. While DOE published a preliminary analysis for this rulemaking (*see* 87 FR 11650), DOE did not publish a framework document in conjunction with the preliminary analysis. DOE notes, however, that chapter 2 of the March 2022 Preliminary TSD that accompanied the March 2022 Preliminary Analysis—entitled *Analytical Framework, Comments from Interested Parties, and DOE Responses*—describes the general analytical framework that DOE uses in evaluating and developing potential new energy conservation standards.[21] As such, publication of a separate framework document would be largely redundant of chapter 2 of the March 2022 Preliminary TSD.

III. General Discussion

DOE developed this proposal after considering oral and written comments, data, and information from interested parties that represent a variety of interests, including the December 2022 Joint Recommendation. The following discussion addresses issues raised by these commenters.

A. Scope of Coverage and Equipment Classes

1. General Scope of Coverage and Equipment Classes

This document covers certain equipment meeting the definition of electric motors as defined in 10 CFR 431.12. Specifically, the definition for ''electric motor'' is ''a machine that converts electrical power into rotational mechanical power.'' 10 CFR 431.12. This NOPR addresses ESEMs, which are covered under 10 CFR part 431 subpart B. This NOPR does not address small electric motors, which are covered under 10 CFR part 431 subpart X.[22]

Currently, DOE regulates MEMs falling into the NEMA Design A, NEMA Design B, NEMA Design C, and fire pump motor categories and those electric motors that meet the criteria specified at 10 CFR 431.25(g). 10 CFR 431.25(h)–(j). Section 431.25(g) specifies that the relevant standards apply only to electric motors, including partial electric motors, that satisfy the following criteria:

(1) Are single-speed, induction motors;

(2) Are rated for continuous duty (MG 1) operation or for duty type S1 (IEC);

(3) Contain a squirrel-cage (MG 1) or cage (IEC) rotor;

(4) Operate on polyphase alternating current 60-hertz sinusoidal line power;

(5) Are rated 600 volts or less;

(6) Have a 2-, 4-, 6-, or 8-pole configuration;

(7) Are built in a three-digit or four-digit NEMA frame size (or IEC metric equivalent), including those designs between two consecutive NEMA frame sizes (or IEC metric equivalent), or an enclosed 56 NEMA frame size (or IEC metric equivalent);

(8) Produce at least one horsepower (0.746 kW) but not greater than 500 horsepower (373 kW), and

(9) Meet all of the performance requirements of one of the following motor types: A NEMA Design A, B, or C motor or an IEC Design N, NE, NEY, NY or H, HE, HEY, HYmotor.[23]

10 CFR 431.25(g).

The definitions for ''NEMA Design A motors,'' ''NEMA Design B motors,'' ''NEMA Design C motors,'' ''fire pump electric motors,'' ''IEC Design N motor,'' and ''IEC Design H motor,'' as well as ''E'' and ''Y'' designated IEC Design motors, are codified in 10 CFR 431.12. DOE has also currently exempted certain categories of motors from standards. The exemptions are as follows:

(1) Air-over electric motors;

(2) Component sets of an electric motor;

(3) Liquid-cooled electric motors;

(4) Submersible electric motors; and

(5) Inverter-only electric motors.

10 CFR 431.25(l).

On October 19, 2022, DOE published the electric motors test procedure final rule (''October 2022 Final Rule''). 87 FR 63588. As part of the October 2022 Final Rule, DOE expanded the test procedure scope to additional categories of electric motors that currently do not have energy conservation standards. 87 FR 63588, 63593–63606. The expanded test procedure scope included the following:

(1) Electric motors having a rated horsepower above 500 and up to 750 hp that meets the criteria listed at § 431.25(g), with the exception of criteria § 431.25(g)(8) to air-over electric motors (''AO–MEMs''), and inverter-only electric motors;

(2) Expanded Scope Electric Motors (''ESEM'', formally known as ''small, non-small electric motor, electric motors'' or ''SNEMs''), that are not air-over electric motors, which:

(a) Are not a small electric motor, as defined at § 431.442 and is not a dedicated pool pump motors as defined at § 431.483;

(b) Are rated for continuous duty (MG 1) operation or for duty type S1 (IEC);

(c) Operate on polyphase or single-phase alternating current 60-hertz (Hz) sinusoidal line power; or is used with an inverter that operates on polyphase or single-phase alternating current 60-hertz (Hz) sinusoidal line power;

(d) Are rated for 600 volts or less;

(e) Are a single-speed induction motor capable of operating without an inverter or is an inverter-only electric motor;

(f) Produce a rated motor horsepower greater than or equal to 0.25 horsepower (0.18 kW); and

(g) Are built in the following frame sizes: any two-, or three-digit NEMA frame size (or IEC equivalent) if the motor operates on single-phase power; any two-, or three-digit NEMA frame size (or IEC equivalent) if the motor operates on polyphase power, and has a rated motor horsepower less than 1 horsepower (0.75 kW); or a two-digit NEMA frame size (or IEC metric equivalent), if the motor operates on polyphase power, has a rated motor horsepower equal to or greater than 1 horsepower (0.75 kW), and is not an enclosed 56 NEMA frame size (or IEC metric equivalent).

(3) ESEMs that are air-over electric motors (''AO–ESEMs'') and inverter-only electric motors;

(4) A synchronous electric motor, which:

(a) Is not a dedicated pool pump motor as defined at § 431.483 or is not an air-over electric motor;

(b) Is a synchronous electric motor;

(c) Is rated for continuous duty (MG 1) operation or for duty type S1 (IEC);

(d) Operates on polyphase or single-phase alternating current 60-hertz (Hz) sinusoidal line power; or is used with an inverter that operates on polyphase or single-phase alternating current 60-hertz (Hz) sinusoidal line power;

(e) Is rated 600 volts or less; and

(f) Produces at least 0.25 hp (0.18 kW) but not greater than 750 hp (559 kW).

(5) Synchronous electric motors that are inverter-only electric motors.

See section 1.2, appendix B.

In the October 2022 Final Rule, DOE noted that, for these motors newly included within the scope of the test procedure for which there was no established energy conservation standards, such as ESEMs and AO–

[21] The March 2022 Preliminary TSD is available at *www.regulations.gov/document/EERE-2020-BT-STD-0007-0010.*

[22] DOE uses the term ''expanded scope electric motor'' or ''ESEM'' (formally known as ''small, non-small electric motor, electric motors'' or ''SNEMs''), to describe those small electric motors that are not included in the definition ''small electric motor'' under EPCA, but otherwise fall within the definition of ''electric motor'' under EPCA. The term ''small electric motor'' means a NEMA general purpose alternating current single-speed induction motor, built in a two-digit frame number series in accordance with NEMA Standards Publication MG1–1987. (42 U.S.C. 6311(13)(G)).

[23] DOE added the ''E'' and ''Y'' designations for IEC Design motors into 10 CFR 431.25(g) in the electric motors test procedure final rule. 87 FR 63588, 63596–636597, 63606 (Oct. 19, 2022).

ESEMs, manufacturers would not be required to use the test procedure to certify these motors to DOE until such time as a standard is established. 87 FR 63588, 63591.[24] Further, the October 2022 Final Rule continued to exclude the following categories of electric motors:

(1) Inverter-only electric motors that are air-over electric motors;

(2) Component sets of an electric motor;

(3) Liquid-cooled electric motors; and

(4) Submersible electric motors.

Due to the number of electric motor characteristics (*e.g.,* horsepower rating, pole configuration, and enclosure), in the March 2022 Preliminary Analysis, DOE used two constructs to help develop appropriate energy conservation standards for electric motors: ''equipment class'' and ''equipment class groups.'' An equipment class represents a unique combination of motor characteristics for which DOE is establishing a specific energy conservation standard. This includes permutations of electric motor design topologies (*i.e.,* CSIR/CSCR, split phase, shaded pole, PSC, or polyphase), standard horsepower ratings (*i.e.,* standard ratings from 0.25 to 3 horsepower varying based on torque level and pole count), pole configurations (*i.e.,* 2-, 4-, 6-, or 8-pole), and enclosure types (*i.e.,* open or enclosed). An ECG is a collection of electric motors that share a common design trait. Equipment class groups include motors over a range of horsepower ratings, enclosure types, and pole configurations. Essentially, each equipment class group is a collection of a large number of equipment classes with the same design trait. As such, in the March 2022 Preliminary Analysis, DOE presented equipment class groups based on electric motor topology, horsepower rating, pole configuration. and enclosure type. *See* sections 2.3.1 and 3.2.2 of the March 2022 Preliminary TSD.

In the March 2022 Preliminary Analysis, DOE analyzed the additional motors now included within the scope of the test procedure after the October 2022 Final Rule. *See* sections 2.2.1 and 2.2.3.2 of the March 2022 Preliminary TSD. This analysis included MEMs from 1–500hp, AO–MEMs, and ESEMs (including AO–ESEMs). This NOPR proposes new standards for only a portion of the scope analyzed in the March 2022 Preliminary Analysis and included within the scope of the test procedure after the October 2022 Final Rule. Specifically, in this NOPR, DOE is only proposing standards for ESEMs, including AO–ESEMs. As further described in section IV.A.3 of this document, DOE used multiple performance characteristics to establish the equipment classes used in this NOPR. Among these performance characteristics are locked-rotor torque and number of phases of the input power of a motor, used to create the following groups: high and medium torque single-phase ESEMs (*i.e.,* CSIR/CSCR and split phase), low torque single phase ESEMs (*i.e.,* shaded pole, PSC) and polyphase ESEMs that meet the criteria a) through g) as listed previously (*See* section 1.2, 10 CFR part 431, appendix B). These are typically used in residential as well as commercial and industrial applications.

Further discussion on equipment classes and the basis used to establish them is provided in section IV.A.3 of this document.

2. Structure of the Regulatory Text

In addition to proposing new requirements for ESEMs, in this NOPR, DOE proposes to move portions of the existing electric motor regulations that pertain to the energy conservation standards and their compliance dates (at 10 CFR 431.25) to improve clarity. In this NOPR, DOE proposes to revise 10 CFR 431.25 by retaining the existing electric motor energy conservation standards and their compliance dates, adding provisions pertaining to ESEMs, and reorganizing all provisions currently in 10 CFR 431.25 by compliance date (*i.e.,* each section has a different compliance date) to improve clarity. See Table III–1 for details.

TABLE III–1—REVISIONS TO 10 CFR 431.25

Current location	Content high-level description	Proposed revised location	Impact
§ 431.25(a)–(f)	Describes standards for certain electric motors manufactured on or after December 19, 2010, but before June 1, 2016.	None	None—Removed as these requirements are no longer current.
§ 431.25(k), § 431.25(q)	Describes how to establish the horsepower for purposes of determining the required minimum nominal full-load efficiency of an electric motor.	§ 431.25(a)	Avoids repeating identical provisions in each subsection.
§ 431.25(g)	Describes the criteria for inclusion for certain electric motors manufactured on or after June 1, 2016, but before June 1, 2027 subject to energy conservation standards.	§ 431.25(b)(1)(i)	Moves the ''inclusion'' criteria, so that the proper scope is presented fully upfront in each section.
§ 431.25(h)	Describes standards for certain NEMA Design A and B electric motors (and IEC equivalent) manufactured on or after June 1, 2016, but before June 1, 2027.	§ 431.25(b)(2)(i)	Makes each section ''comprehensive'' by carrying over the existing standards for all electric motors categories in each section.
§ 431.25(i)	Describes standards for certain NEMA Design C electric motors (and IEC equivalent) manufactured on or after June 1, 2016.	§ 431.25(b)(2)(ii), § 431.25(c)(2)(iv), § 431.25(d)(3)(iv).	Makes each section ''comprehensive'' by carrying over the existing standards for all electric motors categories in each section.

[24] However, manufacturers making voluntary representations respecting the energy consumption or cost of energy consumed by such motors are required to use the DOE test procedure for making such representations beginning 180 days following publication of the October 2022 Final Rule. *Id.* at 87 FR 63591.

TABLE III–1—REVISIONS TO 10 CFR 431.25—Continued

Current location	Content high-level description	Proposed revised location	Impact
§ 431.25(j)	Describes standards for certain fire pump electric motors (and IEC equivalent) manufactured on or after June 1, 2016.	§ 431.25(b)(2)(iii), § 431.25(c)(2)(v), § 431.25(d)(3)(v).	Makes each section ''comprehensive'' by carrying over the existing standards for all electric motors categories in each section.
§ 431.25(l)	Describes the criteria for exclusion for certain electric motors manufactured on or after June 1, 2016, but before June 1, 2027 subject to energy conservation standards.	§ 431.25(b)(1)(ii)	Moves the ''exemptions'' to directly after the ''inclusion'' criteria, so that the proper scope is presented fully upfront in each section, prior to presenting the sub-group criteria and standards.
§ 431.25(m)	Describes the criteria for inclusion for certain electric motors manufactured on or after June 1, 2027 subject to energy conservation standards.	§ 431.25(c)(1)(i)	Moves the ''inclusion'' criteria, so that the proper scope is presented fully upfront in each section.
§ 431.25(n)	Describes standards for certain NEMA Design A and B electric motors (and IEC equivalent),but excluding fire pump electric motors and air-over electric motors manufactured on or after June 1, 2027.	§ 431.25(c)(2)(i), § 431.25(d)(3)(i)	Makes each section ''comprehensive'' by carrying over the existing standards for all electric motors categories in each section.
§ 431.25(o)	Describes standards for certain air-over NEMA Design A and B electric motors (and IEC equivalent), built in standard frame size manufactured on or after June 1, 2027.	§ 431.25(c)(2)(ii), § 431.25(d)(3)(ii)	Makes each section ''comprehensive'' by carrying over the existing standards for all electric motors categories in each section.
§ 431.25(p)	Describes standards for certain air-over NEMA Design A and B electric motors (and IEC equivalent), built in specialized frame size manufactured on or after June 1, 2027.	§ 431.25(c)(2)(iii), § 431.25(d)(3)(iii)	Makes each section ''comprehensive'' by carrying over the existing standards for all electric motors categories in each section.
§ 431.25(r)	Describes the criteria for exclusion for certain electric motors manufactured on or after June 1, 2027, subject to energy conservation standards.	§ 431.25(c)(1)(ii)	Moves the ''exemptions'' to directly after the ''inclusion'' criteria, so that the proper scope is presented fully upfront in each section, prior to presenting the sub-group criteria and standards.
New section	Describes the criteria for inclusion as ESEM.	§ 431.25(d)(2)(i)	New section—Adds the ESEM provisions proposed in this NOPR.
New section	Describes the criteria for exclusion for certain ESEM electric motors manufactured on or after January 1, 2029.	§ 431.25(d)(2)(ii)	New section—Adds the ESEM provisions proposed in this NOPR.
New section	Describes standards for certain high and medium torque ESEM manufactured on or after January 1, 2029.	§ 431.25(d)(3)(vi)	New section—Adds the ESEM provisions proposed in this NOPR.
New section	Describes standards for certain low torque ESEMs manufactured on or after January 1, 2029.	§ 431.25(d)(3)(vii)	New section—Adds the ESEM provisions proposed in this NOPR.
New section	Describes standards for certain polyphase ESEMs manufactured on or after January 1, 2029.	§ 431.25(d)(3)(viii)	New section—Adds the ESEM provisions proposed in this NOPR.

3. Air-Over Medium Electric Motors and Air-Over ESEMs

The June 2023 DFR amended the existing energy conservation standards for electric motors by establishing higher standards for certain horsepower electric motors and expanding the scope of the energy conservation standards to include certain air-over electric motors and electric motors with horsepower greater than 500. DOE adopted standards that were consistent with a joint recommendation that was submitted to DOE on November 15, 2022 (the ''November 2022 Joint Recommendation''), after determining that the new and amended energy conservation standards for these products would result in significant conservation of energy and are technologically feasible and economically justified. 88 FR 36066, 36067–36069.

In the June 2023 DFR, DOE described that DOE currently regulates MEMs falling into the NEMA Design A, NEMA Design B, NEMA Design C, and fire pump motor categories and those electric motors that meet the criteria specified at 10 CFR 431.25(g). *See id.* at 88 FR 36079–36080; 10 CFR 431.25(h)–(j). Specifically, DOE noted the nine criteria used to describe currently regulated MEMs, including the criteria at 10 CFR 431.25(g)(7), which specifies MEMs: ''Are built in a three-digit or four-digit NEMA frame size (or IEC metric equivalent), including those designs between two consecutive NEMA

frame sizes (or IEC metric equivalent), or an enclosed 56 NEMA frame size (or IEC metric equivalent)''. 88 FR 36066, 36080.

In the June 2023 DFR, to support the new energy conservations standards for air-over electric motors, DOE created new equipment classes: one for standard frame size air-over motors (''AO–MEM (Standard frame size)'')) and one for specialized frame size air-over electric motors (''AO-Polyphase (Specialized frame size)''). *Id.* at 88 FR 36088. DOE also established a definition for ''specialized frame size,'' based on a table that specified the maximum NEMA frame diameter (or size) for a given motor horsepower, pole configuration, and enclosure combination. *Id.* This table was part of the November 2022 Joint Recommendation. *Id.* In this table, the maximum frame diameter specified ranges from a 48 NEMA frame motor diameter up to a 210 NEMA frame diameter, therefore including intermediate sizes such as 56 NEMA frame size in enclosed and open enclosure configurations. *Id.*

To clarify that AO-Polyphase (Specialized frame size) are not included in the scope of electric motors included as ESEMs, DOE proposes to add ''and do not have an air-over enclosure and a specialized frame size if the motor operates on polyphase power'' to the ESEM scope criteria in the proposed paragraph (d)(2)(i)(1) of 10 CFR 431.25 in this NOPR. DOE notes that AO–MEM (Standard frame size) do not meet the frame criteria for ESEMs and are not included in the scope of ESEMs.

In the June 2023 DFR, DOE further noted that the specialized frame size air-over electric motors equipment class included frame sizes beyond those described at 10 CFR 431.25(g)(7). *Id.* To better characterize this distinction in frame sizes, DOE stated that it was renaming ''Specialized Frame Size AO–MEMs'' (from the November 2022 Joint Recommendation) to ''AO–Polyphase (Specialized frame size).'' *Id.* DOE added that only the naming convention was changed compared to the November 2022 Joint Recommendation; and the scope of motors being represented in that equipment class continued to stay the same as in the November 2022 Joint Recommendation. *Id.*

The general scope description in 10 CFR 431.25(m) of the regulatory text published in the June 2023 DFR presents the nine criteria that determine what electric motors the standards in 10 CFR 431.25 apply to. Specifically, the criteria at 10 CFR 431.25(m)(7) specifies that the standards apply to electric motors that: ''Are built in a three-digit or four-digit NEMA frame size (or IEC metric equivalent), including those designs between two consecutive NEMA frame sizes (or IEC metric equivalent), or an enclosed 56 NEMA frame size (or IEC metric equivalent).''

When describing the energy conversation standards adopted for specialized frame sizes air-over electric motors, DOE specified that the standards are applicable to ''air-over electric motor meeting the criteria in paragraph (m) of this section and [. . .] built in a specialized frame size'' in section 10 CFR 431.25(p) of the regulatory text published in the June 2023 DFR. 88 FR 36066, 36150.

As published, the general scope description in 10 CFR 431.25(m)(7) of the regulatory text in the June 2023 DFR, and the scope description in section 10 CFR 431.25(p) may be interpreted as inconsistent with the scope of electric motors included in the AO–Polyphase (Specialized frame size) equipment class analyzed in the June 2023 DFR, and for which DOE intended to establish new standards in 10 CFR 431.25(p). Specifically, DOE identified that the criteria at 10 CFR 431.25 (m)(7), which is identical to the criteria currently at 10 CFR 431.25(g)(7), excludes specialized frame air-over motors built in two-digit NEMA frame sizes (other than enclosed 56 frame size motors). Therefore, while in the preamble, DOE explicitly stated that the specialized frame size air-over electric motors equipment class included frame sizes beyond those described at 10 CFR 431.25(g)(7), the regulatory text as written may be interpreted as limiting the covered frame sizes to those specifically described at 10 CFR 431.25(g)(7).

Therefore, to clarify the intent of the preamble of the June 2023 DFR when establishing standards for the AO-polyphase (Specialized frame size) equipment class, which was to include frame sizes beyond those described at 10 CFR 431.25(g)(7), DOE proposes to make the following clarification by adding ''or have an air-over enclosure and a specialized frame size'' to the criteria originally included under 10 CFR 431.25 (m)(7) in the June 2023 DFR, to read as follows: ''Are built in a three-digit or four-digit NEMA frame size (or IEC metric equivalent), including those designs between two consecutive NEMA frame sizes (or IEC metric equivalent), or an enclosed 56 NEMA frame size (or IEC metric equivalent), or have an air-over enclosure and a specialized frame size''. As previously discussed, DOE proposes to re-organize the regulatory text at 10 CFR 431.25 and therefore is adding this proposed clarification in the new paragraphs (c)(1)(i)(7) and (d)(1)(i)(7).

B. Test Procedure

EPCA sets forth generally applicable criteria and procedures for DOE's adoption and amendment of test procedures. (42 U.S.C. 6314(a)) Manufacturers of covered equipment must use these test procedures to certify to DOE that their equipment complies with energy conservation standards and to quantify the efficiency of their equipment. On October 19, 2022, DOE published the October 2022 Final Rule. 87 FR 63588. As described previously in this document, the October 2022 Final Rule expanded the types of motors included within the scope of the test procedure, including the new class of ESEMs for which DOE is establishing energy conservation standards in this NOPR. DOE's test procedures for electric motors are currently prescribed at appendix B as ''small, non-small-electric-motor electric motor'' and measure the full-load efficiency of an electric motor. To harmonize terminology, in this NOPR, DOE is replacing any reference to small, non-small-electric-motor electric motor (''SNEM'') in appendix B with the term ''expanded scope electric motor,'' or ''ESEM.''

C. Represented Values

DOE's energy conservation standards for electric motors are currently prescribed at 10 CFR 431.25. DOE's current energy conservation standards for electric motors are expressed in terms of nominal full-load efficiency and manufacturers must certify the represented value of nominal full-load efficiency of each basic model. 10 CFR 429.64. The provisions establishing how to determine the average full-load efficiency and the nominal full-load efficiency of a basic model are provided at 10 CFR 429.64.

As discussed in section II.B.3 of this document, the ESEM standard levels recommended by the Electric Motors Working Group are expressed in average full-load efficiency and not in terms of nominal full-load efficiency. To align with the Electric Motors Working Group recommendations, DOE proposes to revise the provisions related to the determination of the represented values for ESEMs at 10 CFR 429.64 such that manufacturers of ESEMs would certify a represented value of average full-load efficiency instead of a represented value of nominal full-load efficiency. DOE also proposes edits to 10 CFR 429.70(j) to reflect the use of a represented value of average full-load efficiency instead of

a represented value of nominal full-load efficiency for ESEMs.

DOE requests comments on the proposal to use a represented value of average full-load efficiency for ESEMs and proposed revisions to 10 CFR 429.64 and 429.70(j).

D. Technological Feasibility

1. General

In each energy conservation standards rulemaking, DOE conducts a screening analysis based on information gathered on all current technology options and prototype designs that could improve the efficiency of the products or equipment that are the subject of this proposed rulemaking. As the first step in such an analysis, DOE develops a list of technology options for consideration in consultation with manufacturers, design engineers, and other interested parties. DOE then determines which of those means for improving efficiency are technologically feasible. DOE considers technologies incorporated in commercially-available products or in working prototypes to be technologically feasible. 10 CFR 431.4; sections 6(c)(3)(i) and 7(b)(1), Process Rule.

After DOE has determined that particular technology options are technologically feasible, it further evaluates each technology option in light of the following additional screening criteria: (1) practicability to manufacture, install, and service; (2) adverse impacts on product utility or availability; (3) adverse impacts on health or safety, and (4) unique-pathway proprietary technologies. 10 CFR 431.4; sections 6(b)(3)(ii)–(v) and 7(b)(2)–(5), Process Rule. Section IV.B of this document discusses the results of the screening analysis for ESEMs, particularly the designs DOE considered, those it screened out, and those that are the basis for the standards considered in this rulemaking. For further details on the screening analysis for this proposed rulemaking, see chapter 4 of the NOPR TSD.

2. Maximum Technologically Feasible Levels

When DOE proposes to adopt a new or amended standard for a type or class of covered product, it must determine the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible for such product. (42 U.S.C. 6316(a); 42 U.S.C. 6295(p)(1)) Accordingly, in the engineering analysis, DOE determined the maximum technologically feasible (''max-tech'') improvements in energy efficiency for ESEMs, using the design parameters for the most efficient products available on the market or in working prototypes. The max-tech levels that DOE determined for this proposed rulemaking are described in section IV.C of this proposed rule and in chapter 5 of the NOPR TSD.

E. Energy Savings

1. Determination of Savings

For each TSL, DOE projected energy savings from application of the TSL to ESEMs purchased in the 30-year period that begins in the year of compliance with the proposed standards (2029–2058).[25] The savings are measured over the entire lifetime of ESEMs purchased in the previous 30-year period. DOE quantified the energy savings attributable to each TSL as the difference in energy consumption between each standards case and the no-new-standards case. The no-new-standards case represents a projection of energy consumption that reflects how the market for a product would likely evolve in the absence of new energy conservation standards.

DOE used its national impact analysis (''NIA'') spreadsheet model to estimate national energy savings (''NES'') from potential new standards for ESEMs. The NIA spreadsheet model (described in section IV.H of this document) calculates energy savings in terms of site energy, which is the energy directly consumed by products at the locations where they are used. For electricity, DOE reports national energy savings in terms of primary energy savings, which is the savings in the energy that is used to generate and transmit the site electricity. DOE also calculates NES in terms of FFC energy savings. The FFC metric includes the energy consumed in extracting, processing, and transporting primary fuels (*i.e.,* coal, natural gas, petroleum fuels), and thus presents a more complete picture of the impacts of energy conservation standards.[26] DOE's approach is based on the calculation of an FFC multiplier for each of the energy types used by covered products or equipment. For more information on FFC energy savings, see section IV.H of this document.

2. Significance of Savings

To adopt any new or amended standards for a covered product, DOE must determine that such action would result in significant energy savings. (42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(3)(B))

The significance of energy savings offered by a new or amended energy conservation standard cannot be determined without knowledge of the specific circumstances surrounding a given proposed rulemaking.[27] For example, some covered products and equipment have most of their energy consumption occur during periods of peak energy demand. The impacts of these products on the energy infrastructure can be more pronounced than products with relatively constant demand. Accordingly, DOE evaluates the significance of energy savings on a case-by-case basis, taking into account the significance of cumulative FFC national energy savings, the cumulative FFC emissions reductions, and the need to confront the global climate crisis, among other factors.

As stated, the standard levels proposed in this NOPR are projected to result in national energy savings of 8.9 quad FFC, the equivalent of the primary annual energy use of 95.7 million homes. Based on the amount of FFC savings, the corresponding reduction in emissions, and need to confront the global climate crisis, DOE has tentatively determined the energy savings from the standard levels proposed in this NOPR are ''significant'' within the meaning of 42 U.S.C. 6316(a) and 42 U.S.C. 6295(o)(3)(B).

F. Economic Justification

1. Specific Criteria

As noted previously, EPCA provides seven factors to be evaluated in determining whether a potential energy conservation standard is economically justified. (42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII)) The following sections discuss how DOE has addressed each of those seven factors in this proposed rulemaking.

a. Economic Impact on Manufacturers and Consumers

In determining the impacts of a potential new or amended standard on manufacturers, DOE conducts an MIA, as discussed in section IV.J of this document. DOE first uses an annual cash-flow approach to determine the quantitative impacts. This step includes

[25] Each TSL is composed of specific efficiency levels for each product class. The TSLs considered for this NOPR are described in section V.A of this document. DOE conducted a sensitivity analysis that considers impacts for products shipped in a 9-year period.

[26] The FFC metric is discussed in DOE's statement of policy and notice of policy amendment. 76 FR 51282 (Aug. 18, 2011), as amended at 77 FR 49701 (Aug. 17, 2012).

[27] The numeric threshold for determining the significance of energy savings established in a final rule published on February 14, 2020 (85 FR 8626, 8670) was subsequently eliminated in a final rule published on December 13, 2021 (86 FR 70892).

both a short-term assessment—based on the cost and capital requirements during the period between when a regulation is issued and when entities must comply with the regulation—and a long-term assessment over a 30-year period. The industry-wide impacts analyzed include (1) INPV, which values the industry on the basis of expected future cash flows, (2) cash flows by year, (3) changes in revenue and income, and (4) other measures of impact, as appropriate. Second, DOE analyzes and reports the impacts on different types of manufacturers, including impacts on small manufacturers. Third, DOE considers the impact of standards on domestic manufacturer employment and manufacturing capacity, as well as the potential for standards to result in plant closures and loss of capital investment. Finally, DOE takes into account cumulative impacts of various DOE regulations and other regulatory requirements on manufacturers.

For individual consumers, measures of economic impact include the changes in LCC and PBP associated with new or amended standards. These measures are discussed further in the following section. For consumers in the aggregate, DOE also calculates the national net present value of the consumer costs and benefits expected to result from particular standards. DOE also evaluates the impacts of potential standards on identifiable subgroups of consumers that may be affected disproportionately by a standard.

b. Savings in Operating Costs Compared to Increase in Price (LCC and PBP)

EPCA requires DOE to consider the savings in operating costs throughout the estimated average life of the covered product in the type (or class) compared to any increase in the price of, or in the initial charges for, or maintenance expenses of, the covered product that are likely to result from a standard. (42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(2)(B)(i)(II)) DOE conducts this comparison in its LCC and PBP analysis.

The LCC is the sum of the purchase price of equipment (including its installation) and the operating expense (including energy, maintenance, and repair expenditures) discounted over the lifetime of the equipment. The LCC analysis requires a variety of inputs, such as equipment prices, equipment energy consumption, energy prices, maintenance and repair costs, equipment lifetime, and discount rates appropriate for consumers. To account for uncertainty and variability in specific inputs, such as equipment lifetime and discount rate, DOE uses a distribution of values, with probabilities attached to each value.

The PBP is the estimated amount of time (in years) it takes consumers to recover the increased purchase cost (including installation) of a more-efficient equipment through lower operating costs. DOE calculates the PBP by dividing the change in purchase cost due to a more-stringent standard by the change in annual operating cost for the year that standards are assumed to take effect.

For its LCC and PBP analysis, DOE assumes that consumers will purchase the covered equipment in the first year of compliance with new standards. The LCC savings for the considered efficiency levels are calculated relative to the case that reflects projected market trends in the absence of new standards. DOE's LCC and PBP analysis is discussed in further detail in section IV.F of this document.

c. Energy Savings

Although significant conservation of energy is a separate statutory requirement for adopting an energy conservation standard, EPCA requires DOE, in determining the economic justification of a standard, to consider the total projected energy savings that are expected to result directly from the standard. (42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(2)(B)(i)(III)) As discussed in section IV.H of this document, DOE uses the NIA spreadsheet models to project national energy savings.

d. Lessening of Utility or Performance of Products

In establishing product classes and in evaluating design options and the impact of potential standard levels, DOE evaluates potential standards that would not lessen the utility or performance of the considered products. (42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(2)(B)(i)(IV)) Based on data available to DOE, the standards proposed in this document would not reduce the utility or performance of the equipment under consideration in this proposed rulemaking.

e. Impact of Any Lessening of Competition

EPCA directs DOE to consider the impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from a proposed standard. (42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(2)(B)(i)(V)) It also directs the Attorney General to determine the impact, if any, of any lessening of competition likely to result from a proposed standard and to transmit such determination to the Secretary within 60 days of the publication of a proposed rule, together with an analysis of the nature and extent of the impact. (42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(2)(B)(ii)) DOE will transmit a copy of this proposed rule to the Attorney General with a request that the Department of Justice (''DOJ'') provide its determination on this issue. DOE will publish and respond to the Attorney General's determination in the final rule. DOE invites comment from the public regarding the competitive impacts that are likely to result from this proposed rule. In addition, stakeholders may also provide comments separately to DOJ regarding these potential impacts. See the **ADDRESSES** section for information to send comments to DOJ.

f. Need for National Energy Conservation

DOE also considers the need for national energy and water conservation in determining whether a new or amended standard is economically justified. (42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(2)(B)(i)(VI)) The energy savings from the proposed standards are likely to provide improvements to the security and reliability of the Nation's energy system. Reductions in the demand for electricity also may result in reduced costs for maintaining the reliability of the Nation's electricity system. DOE conducts a utility impact analysis to estimate how standards may affect the Nation's needed power generation capacity, as discussed in section IV.M of this document.

DOE maintains that environmental and public health benefits associated with the more efficient use of energy are important to take into account when considering the need for national energy conservation. The proposed standards are likely to result in environmental benefits in the form of reduced emissions of air pollutants and greenhouse gases (''GHGs'') associated with energy production and use. DOE conducts an emissions analysis to estimate how potential standards may affect these emissions, as discussed in section IV.K of this document; the estimated emissions impacts are reported in section V.B.6 of this document. DOE also estimates the economic value of emissions reductions resulting from the considered TSLs, as discussed in section IV.L of this document.

g. Other Factors

In determining whether an energy conservation standard is economically justified, DOE may consider any other factors that the Secretary deems to be

relevant. (42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(2)(B)(i)(VII)) To the extent DOE identifies any relevant information regarding economic justification that does not fit into the other categories described previously, DOE could consider such information under ''other factors.''

2. Rebuttable Presumption

EPCA creates a rebuttable presumption that an energy conservation standard is economically justified if the additional cost to the consumer of the equipment that meets the standard is less than three times the value of the first year's energy savings resulting from the standard, as calculated under the applicable DOE test procedure. (42 U.S.C. 6313(a); 42 U.S.C. 6295(o)(2)(B)(iii) DOE's LCC and PBP analyses generate values used to calculate the effects that new energy conservation standards would have on the PBP for consumers. These analyses include, but are not limited to, the 3-year PBP contemplated under the rebuttable-presumption test.

In addition, DOE routinely conducts an economic analysis that considers the full range of impacts to consumers, manufacturers, the Nation, and the environment, as required under 42 U.S.C. 6313(a) and 42 U.S.C. 6295(o)(2)(B). The results of this analysis serve as the basis for DOE's evaluation of the economic justification for a potential standard level (thereby supporting or rebutting the results of any preliminary determination of economic justification). The rebuttable presumption payback calculation is discussed in section V.B.1.c of this document.

IV. Methodology and Discussion of Related Comments

This section addresses the analyses DOE has performed for this proposed rulemaking with regard to ESEMs. Separate subsections address each component of DOE's analyses. In this NOPR, DOE is only addressing comments and analysis specific to the scope of motors provided in the December 2022 Joint Recommendation (*i.e.,* ESEMs and AO–ESEMs). As such, any analysis and comments related to MEMs and AO–MEMs were addressed in the separate June 2023 DFR published on June 1, 2023. 88 FR 36066.

DOE used several analytical tools to estimate the impact of the standards proposed in this document. The first tool is a spreadsheet that presents the calculations of the LCC savings and PBP of potential new energy conservation standards. The national impacts analysis uses a second spreadsheet set that provides shipments projections and calculates national energy savings and net present value of total consumer costs and savings expected to result from potential energy conservation standards. DOE uses the third spreadsheet tool, the Government Regulatory Impact Model (''GRIM''), to assess manufacturer impacts of potential standards. These three spreadsheet tools are available on the DOE website for this rulemaking: *www.regulations.gov/docket/EERE-2020-BT-STD-0007.* Additionally, DOE used output from the latest version of the Energy Information Administration's (''EIA's'') *Annual Energy Outlook* (''*AEO*''), a widely known energy projection for the United States, for the emissions and utility impact analyses.

A. Market and Technology Assessment

DOE develops information in the market and technology assessment that provides an overall picture of the market for the products concerned, including the purpose of the products, the industry structure, manufacturers, market characteristics, and technologies used in the products. This activity includes both quantitative and qualitative assessments, based primarily on publicly-available information. The subjects addressed in the market and technology assessment for this proposed rulemaking include (1) a determination of the scope of the proposed rulemaking and equipment classes, (2) manufacturers and industry structure, (3) existing efficiency programs, (4) shipments information, (5) market and industry trends; and (6) technologies or design options that could improve the energy efficiency of ESEMs. The key findings of DOE's market assessment are summarized in the following sections. See chapter 3 of the NOPR TSD for further discussion of the market and technology assessment.

1. Scope of Coverage

This document covers ESEMs, a category of electric motors. The term ''electric motor'' is defined at 10 CFR 431.12. Specifically, the definition for ''electric motor'' is ''a machine that converts electrical power into rotational mechanical power.'' 10 CFR 431.12.

In the March 2022 Preliminary Analysis, DOE presented analysis for the current scope of electric motors regulated at 10 CFR 431.25, in addition to certain expanded scope, including air-over electric motors, and ESEMs and AO–ESEMs. See chapter 2 of the March 2022 Preliminary TSD. Since then, DOE has published the October 2022 Final Rule, which established test procedures for expanded scope, as discussed in detail in section III.B of this NOPR. Additionally, DOE has also published the June 2023 DFR, which established energy conservations standards for MEMs and AO–MEMs.

In response to the scope presented in the March 2022 Preliminary Analysis, DOE received a number of comments, which are discussed in the subsections below. In this NOPR, DOE is only addressing comments and analysis specific to the scope of motors proposed in this NOPR, which includes ESEMs and AO–ESEMs.

NEEA supported the inclusion of ESEMs in the scope of the standards. NEEA noted that including ESEMs will allow comparison of performance and informed purchase decisions. (NEEA, No. 33 at p. 2)

AHAM and AHRI strongly opposed DOE's plan to expand the existing scope of coverage of electric motors to include motors destined for particular applications in finished goods, and instead recommended that DOE should apply a finished-product approach to energy efficiency regulations. (AHAM and AHRI, No. 25 at pp. 7–9) Lennox added that it strongly objects to any expansion of coverage (including development of test procedures, energy conservation requirements, and/or certification requirements) for electric motors that would circumvent the statutory exemption that Congress provided for small electric motors that are components of EPCA-covered products/equipment. (Lennox, No. 29 at p. 3) AHAM and AHRI commented that they interpret the EPCA exemption for SEMs that are components of covered product and equipment as to also mean that small special and definite purpose motors, whether they are classified as small electric motors or as an ESEM, should not be subject to energy conservation standards. AHAM and AHRI stated that such motors are, by definition, destined for particular products, and when that product is a covered product/piece of equipment, that motor is destined for a product already subject to energy conservation standards and has defining features to identify it as such. (AHAM and AHRI, No. 25 at pp. 1,6)

AHRI and AHAM further commented that regulating ESEMs could affect the following product categories: clothes washers (top and front load), clothes dryers, food waste disposers, refrigerators, room air conditioners, and stick vacuums. Apart from stick vacuums and food waste disposers, AHAM and AHRI noted that the products listed are already subject to energy conservation standards. AHAM and AHRI also commented that

regulating ESEM and AO motors could impact the following products: small, large, very large commercial package air conditioning and heating equipment, residential air conditioners and heat pumps, single package vertical air conditioners and heat pumps, commercial and residential furnaces, commercial and residential boilers, commercial and residential water heaters, air cooled condensing unit, central station air handling units, geothermal heat pumps, unit coolers, unit ventilators, and water source heat pumps. (AHAM and AHRI, No. 25 at pp. 1–2)

HI recommended that dedicated-purpose ESEMs should be regulated as part of their final product instead of as motors specifically. (HI, No. 31 at p. 1)

The Joint Industry Stakeholders commented that they strongly object to any expansion of coverage (including development of test procedures, energy conservation requirements, and/or certification requirements) for electric motors that would circumvent the statutory exemption that Congress provided for small electric motors that are components of EPCA-covered products/equipment. They stated that embedded motor testing, and ultimately energy conservation standards, would save minimal energy and would create needless testing, paperwork, and record-keeping requirements that would raise costs for consumers. (Joint Industry Stakeholders, No. 23 at pp. 3–4) The Joint Industry Stakeholders and AHAM and AHRI agreed with the previous determination in which DOE recognized that Congress intentionally excluded these motors from coverage by DOE regulation when such motors are used as components of products and equipment that are already subject to DOE regulation, and they noted that these are the motors that DOE now seeks to regulate as ESEMs and by expanding the scope of the test procedure to ¼ hp. The Joint Industry Stakeholders and AHAM and AHRI added that, despite the similarity between ESEMs and SEMs, DOE is proposing to subject ESEMs used as components in EPCA-covered equipment/products to duplicative energy conservation standards at both the motor level and the finished product/equipment stage and that DOE provides no rationale or explanation for doing so. (Joint Industry Stakeholders, No. 23 at pp. 3–4; AHAM and AHRI, No. 25 at pp. 7- 9) Further, the Joint Industry Stakeholders commented that ESEMs include special and definite purpose motors that have been built to meet the needs of original equipment manufacturer (''OEM'') products. The Joint Industry Stakeholders added that many of these OEM products are already regulated by DOE. (Joint Industry Stakeholders, No. 23 at p. 2)

As discussed in the October 2022 Final Rule, EPCA, as amended through EISA 2007, provides DOE with the authority to regulate the expanded scope of motors addressed in this rule. 87 FR 63588, 63596. Before the enactment of EISA 2007, EPCA defined the term ''electric motor'' as any motor that is a general purpose T-frame, single-speed, foot-mounting, polyphase squirrel-cage induction motor of the NEMA, Design A and B, continuous rated, operating on 230/460 volts and constant 60 Hertz line power as defined in NEMA Standards Publication MG1–1987. (*See* 42 U.S.C. 6311(13)(A) (2006)) Section 313(a)(2) of EISA 2007 removed that definition and the prior limits that narrowly defined what types of motors would be considered as electric motors. In its place, EISA 2007 inserted a new ''Electric motors'' heading, and created two new subtypes of electric motors: General purpose electric motor (subtype I) and general purpose electric motor (subtype II). (42 U.S.C. 6311(13)(A)–(B) (2011)) In addition, section 313(b)(2) of EISA 2007 established energy conservation standards for four types of electric motors: general purpose electric motors (subtype I) (*i.e.,* subtype I motors) with a power rating of 1 to 200 horsepower; fire pump motors; general purpose electric motor (subtype II) (*i.e.,* subtype II motors) with a power rating of 1 to 200 horsepower; and NEMA Design B, general purpose electric motors with a power rating of more than 200 horsepower, but less than or equal to 500 horsepower. (42 U.S.C. 6313(b)(2)) The term ''electric motor'' was left undefined. However, in a May 4, 2012 final rule amending the electric motors test procedure (the ''May 2012 TP Final Rule''), DOE adopted the broader definition of ''electric motor,'' currently found in 10 CFR 431.12, because DOE noted that the absence of a definition may cause confusion about which electric motors are required to comply with mandatory test procedures and energy conservation standards, and the broader definition provided DOE with the flexibility to set energy conservation standards for other types of electric motors without having to continuously update the definition of ''electric motors''. 77 FR 26608, 26613.

Some electric motors included in this proposed rule may be sold embedded into covered products and equipment or sold alone as replacements. DOE is proposing new energy conservation standards for ESEMs in this proposed rule that apply to the motor's efficiency regardless of whether the ESEM is being sold alone or embedded into a covered product or equipment. As discussed in section III.D of this document, DOE has determined that energy savings from the standard levels proposed in this NOPR are ''significant'' within the meaning of 42 U.S.C. 6316(a) and 42 U.S.C. 6295(o)(3)(B)

The provisions of EPCA make clear that DOE may regulate electric motors ''alone or as a component of another piece of equipment.'' (*See* 42 U.S.C. 6313(b)(1) and (2) (providing that standards for electric motors be applied to electric motors manufactured ''alone or as a component of another piece of equipment'')) In contrast, Congress exempted SEM that are a component of a covered product or a covered equipment from the standards that DOE was required to establish under 42 U.S.C. 6317(b). Congress did not, however, similarly restrict electric motors.

Congress defined what equipment comprises a SEM—specifically, ''a NEMA general purpose alternating current single-speed induction motor, built in a two-digit frame number series in accordance with NEMA Standards Publication MG1–1987.'' [28] (42 U.S.C. 6311(13)(G)) ESEMs, which are electric motors, are not SEMs because they do not satisfy the more specific statutory SEM definition. Unlike SEMs, the statute does not limit DOE's authority to regulate an electric motor with respect to whether ''electric motors'' are stand-alone equipment items or components of a covered product or covered equipment. Rather, Congress specifically provided that DOE could regulate electric motors that are components of other covered equipment in the standards established by DOE. (*See* 42 U.S.C. 6313(b)(1) (providing that standards for electric motors be applied to electric motors manufactured ''alone or as a component of another piece of equipment'')) Accordingly, DOE disagrees with commenters that the SEM component exemption should apply to ESEMs and, therefore, includes ESEMs installed as components in other DOE-regulated products and equipment in these proposed energy conservation standards.

In addition, ESEMs are built in standard NEMA frame sizes and are not common in currently regulated consumer products including those listed by AHAM and AHRI (*i.e.,* clothes washers (top and front load), clothes

[28] DOE clarified, at industry's urging, that the definition also includes motors that are IEC metric equivalents to the specified NEMA motors prescribed by the statute. *See* 74 FR 32059, 32061–32062 (July 7, 2009); 10 CFR 431.442.

dryers, food waste disposers, refrigerators, room air conditioners, and stick vacuums). Therefore, DOE believes the standards proposed in this NOPR would not impact manufacturers of consumer products. In commercial equipment, DOE identified the following equipment as potentially incorporating ESEMs: walk-in coolers and freezers,[29] circulator pumps,[30] air circulating fans,[31] and commercial unitary air conditioning equipment.[32] If the proposed energy conservation standards for these rules finalize as proposed, DOE has identified that these rules would all: (1) have a compliance year that is at or before the ESEM standard compliance year (2029) and/or (2) require a motor that is either outside of the scope of this rule (*e.g.,* an electronically commutated motor (''ECM'')) or an ESEM with an efficiency above the proposed ESEM standards, and therefore not be impacted by the proposed ESEM rule (*i.e.,* the ESEM rule would not trigger a redesign of these equipment).

Furthermore, EPCA requires that any new or amended standard for covered equipment must be designed to achieve the maximum improvement in energy efficiency that the Secretary of Energy determines is technologically feasible and economically justified. (42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(2)(A) and 42 U.S.C. 6295(o)(3)(B)) In this NOPR, DOE performs the necessary analyses to determine what new standards would meet the aforementioned criteria. Further, DOE has determined that the proposed standards provide cost-effective standards that would result in the significant conservation of energy. Further discussion on the analytical results and DOE's justification is provided in section V of this document.

NEEA commented that the term ''small, non-small electric motors'' is confusing and recommended using ''Other Small HP Motors (OSHM)'' or ''Other Small Electric Motors (OSEM)'' as alternative options. (NEEA, No. 33 at p. 2) DOE has opted to use the term ''ESEM'' in this NOPR.

The Joint Industry Stakeholders commented that the proposed definition for ESEMs used in the March 2022 Preliminary Analysis is vague. Specifically, the Joint Industry Stakeholders requested clarification regarding (1) the definition of full-rated load; (2) whether brushless permanent magnet motors were included; (3) whether some motors, which have motor assemblies that are connected to 60 Hz and which are rectified internally to DC power and require brush maintenance were included. (Joint Industry Stakeholders, No. 23 at pp. 1–2) In response, DOE notes that the October 2022 Final Rule finalized a definition for ''rated load,'' which is currently provided in 10 CFR 431.12 (87 FR 63588, 63623), and included specifications on what electric motors meet the definition of ESEM, which is currently provided in section 1 of appendix B (87 FR 63588, 63599). Specifically, 10 CFR 431.12 currently relates rated load to full-load, full rated load, or rated full-load, and defines it as ''the rated output power of an electric motor.'' Further, section 1.1 of appendix B states that an ESEM means a motor that ''is a single-speed induction motor capable of operating without an inverter or is an inverter-only electric motor''; therefore, the ESEM scope does not include non-induction electric motors. However, DOE does separately include in scope ''synchronous electric motors,'' which entails an electric motor that is ''synchronous'' and ''produces at least 0.25 hp but not greater than 750 hp''. *See* Section 1.1, appendix B. However, DOE is not adopting standards for synchronous electric motors in this NOPR. Finally, the ESEM scope specifically states that an electric motor would meet the scope if it operates on polyphase or single-phase alternating current 60-hertz (Hz) sinusoidal line power; or is used with an inverter that operates on polyphase or single-phase alternating current 60-hertz (Hz) sinusoidal line power. An ''inverter'' is defined as ''an electronic device that converts an input AC or DC power into a controlled output AC or DC voltage or current. An inverter may also be called a converter.'' 10 CFR 431.12.

The Joint Industry Stakeholders recommended that DOE exclude refrigeration compressor motors from the scope of the ESEM rulemaking. The Joint Industry Stakeholders explained that such motors are hermetically sealed and are cooled by the refrigerant flowing within the appliance/equipment, and that there is no accurate way to measure the efficiency of just the motor and thus, it is not appropriate or feasible to include refrigeration compressor motors in the scope of this rulemaking. (Joint Industry Stakeholders, No. 23 at p. 9) DOE defines a liquid-cooled electric motor as a motor that is cooled by liquid circulated using a designated cooling apparatus such that the liquid or liquid-filled conductors come into direct contact with the parts of the motor but is not submerged in a liquid during operation. 10 CFR 431.12. DOE reviewed refrigeration compressor motors and understands that they would be considered a liquid-cooled electric motor according to this definition because they require flowing refrigerant to adequately cool during operation. The designated cooling apparatus in this case is shared with the greater refrigeration system. Liquid-cooled electric motors are currently exempt from DOE's standards for electric motors, generally. *See* 10 CFR 431.25(l)(3). Accordingly, because the refrigeration compressor motor described by the commenters meets the definition of a ''liquid-cooled electric motor,'' it is exempt from the test procedure and energy conservation standards proposed by this NOPR. DOE also notes that many refrigeration compressor motors are not built in standard NEMA frame sizes, and this would also disqualify them from the scope of this NOPR. As such, DOE does not see a need to specifically exempt refrigeration compression motors from the scope of this NOPR, but may revisit the issue in the future, as necessary.

Additionally, NEMA stated that there is no room for explosion proof motors to accommodate a run capacitor because of the added enclosure constraints associated with explosion proof motors. (NEMA, No. 22 at p. 3) DOE agrees with NEMA that the enclosure constraints for explosion proof motors do not allow for the addition of a run capacitor. The new standard levels proposed by this NOPR will not require CSIR motors to incorporate an additional run capacitor and will not require CSIR motors to be replaced by CSCR motors. Therefore, DOE believes NEMA's concern is addressed.

The CA IOUs recommended exploring stakeholder interest in convening an ASRAC Working Group to clearly define the scope of an ESEM regulation before moving forward with an energy conservation standard rulemaking. (CA IOUs, No. 30 at p. 2) In response, DOE notes that several members of industry and other stakeholders did convene on a negotiation, which ended in the December 2022 Joint Recommendation. The December 2022 Joint Recommendation limited its scope to high-torque and medium-torque ESEMs, low-torque ESEMs, and polyphase ESEMs.

[29] The walk-in coolers and walk-in freezers standards rulemaking docket number is: EERE–2015–BT–STD–0016.

[30] The circulator pumps energy conservation standard rulemaking docket number is: EERE–2016–BT–STD–0004.

[31] The commercial and industrial fans and blowers energy conservation standard rulemaking docket number is: EERE–2013–BT–STD–0006. Air circulating fans are a subcategory of fans.

[32] The small, large, and very large air-cooled commercial package air conditioners and heat pumps energy conservation standard rulemaking docket number is: EERE–2013–BT–STD–0007.

The Joint Industry Stakeholders also commented that ESEMs are the same as SEMs and that DOE's reliance on the SEM data as an analog to ESEM performance demonstrates that the products are the same. Additionally, the Joint Industry Stakeholders said that DOE did not provide sufficient data to support its analysis or to allow commenters to fully understand, interpret, or analyze the March 2022 Preliminary TSD and provide meaningful comment. The Joint Industry Stakeholders also stated that DOE's reliance on old data for what DOE claims is a different product and its drawing of conclusions without providing further detail fails to meet the requirements of the Administrative Procedure Act (''APA'') or the Data Quality Act. (Joint Industry Stakeholders, No. 23 at pp. 2–3) As noted previously, EPCA provides a very specific definition for SEMs that DOE regulates under 10 CFR part 431 subpart X. ESEMs can be similar to SEMs in many aspects, but nevertheless fall outside of the EPCA-provided definition. Accordingly, ESEMs are treated differently for purposes of DOE's energy conservation standards. That DOE used SEMs data as an analog to ESEM performance to help construct the March 2022 Preliminary Analysis does not change the fact that they are treated differently under EPCA, or that, as electric motors, DOE may regulate ESEMs used as components in other covered equipment. Notably, in response to the comment from the Joint Stakeholders, DOE has made updates to the ESEMs analysis in this NOPR compared to what was presented in the March 2022 Preliminary Analysis; specifically, DOE has performed additional testing, teardowns, and modeling of electric motors that more closely align with the ESEM scope and updated the engineering analysis accordingly. In addition, DOE reviewed the latest motor catalog data to inform the updated analyses. Further discussion on this updated analysis is provided in section IV.C of this document. Therefore, DOE has met the APA's requirements as DOE has explained throughout this NOPR and in the NOPR TSD the details of the analysis conducted by DOE and the information DOE relied on in conducting that analysis. Further, DOE has complied with DOE's guidelines for implementing the Data Quality Act that ensure the quality, objectivity, utility, and integrity of the data presented in this document.[33]

2. Air-Over ESEMs

In response to the March 2022 Preliminary Analysis, AHRI commented that air-over motors are explicitly exempted from regulation in 10 CFR 431.25(l), and that DOE has not overcome the challenges to include these exempted products, procedurally or technically. AHRI added that the claimed similarities between SEMs and the newly proposed AO–ESEMs category warrant the same exemption for AO–ESEMs that Congress expressly provided for small electric motors, and AHRI referenced the requirement of EPCA, which says that energy conservation standards ''shall not apply to any small electric motor which is a component of a covered product under section 6292(a) of this title or covered equipment under section 6311 of this title.'' (AHRI, No. 26 at pp. 1, 2)

With regards to the comment from AHRI, DOE is covering AO–ESEMs under its ''electric motors'' authority. (42 U.S.C. 6311(1)(A); 42 U.S.C. 6313(b)) As discussed in section III.A of this document, the statute does not limit DOE's authority to regulate electric motors (that are not SEMs) with respect to whether they are stand-alone equipment items or as components of a covered product or covered equipment. *See* 42 U.S.C. 6313(b)(1) (providing that standards for electric motors be applied to electric motors manufactured ''alone or as a component of another piece of equipment'') AO–ESEMs do not fall within the SEMs definition under EPCA, and, therefore, DOE is regulating AO–ESEMs under its ''electric motors'' authority.

DOE's previous determination in the December 2013 Final Rule to exclude air-over electric motors from scope was due to insufficient information available to DOE at the time to support establishment of a test method. 78 FR 75962, 75974–75975. Since that time, NEMA published a test standard for air-over motors in Section IV, ''Performance Standards Applying to All Machines,'' Part 34 ''Air-Over Motor Efficiency Test Method'' of NEMA MG 1–2016 (''NEMA Air-over Motor Efficiency Test Method''). The air-over method was originally published as part of the 2017 NEMA MG–1 Supplements and is also included in the latest version of NEMA MG 1–2016. Accordingly, in the October 2022 Final Rule, DOE included air-over electric motors in the test procedure scope and established test procedures for such motors. 87 FR 63588, 63597. In this NOPR, DOE has analyzed the scope of electric motors based on the finalized test procedures and proposes new energy conservation standards for AO–ESEMs that align with the December 2022 Joint Recommendation.

3. Equipment Classes

When evaluating and establishing energy conservation standards, DOE may establish separate standards for a group of covered products (*i.e.,* establish a separate equipment class) if DOE determines that separate standards are justified based on the type of energy used, or if DOE determines that a product's capacity or other performance-related feature justifies a different standard. (42 U.S.C. 6316(a); 42 U.S.C. 6295(q)(1)) In making a determination whether a performance-related feature justifies a different standard, DOE must consider such factors as the utility of the feature to the consumer and other factors DOE determines are appropriate. (*Id.*)

In the March 2022 Preliminary Analysis, DOE considered potential equipment classes defined on the basis of motor horsepower rating, pole configuration (*i.e.,* 2, 4, 6, or 8 poles), enclosure type (*i.e.,* open or enclosed construction), locked-rotor torque level (*i.e.,* high, medium, or low), type of input power (*i.e.,* phase), and motor cooling approach (*i.e.,* air-over or non-air-over). *See* chapter 2 of the March 2022 Preliminary TSD.

Regarding horsepower, DOE has previously established separate equipment classes for electric motors on the basis of horsepower rating. In an electric motors final rule that published on May 29, 2014 (''May 2014 Electric Motors Final Rule''), DOE discussed that horsepower is a performance attribute of an electric motor that is directly related to the capacity of an electric motor to perform useful work, and that horsepower generally scales with efficiency. 79 FR 30934, 30958. For example, a 50-horsepower electric motor would generally be considered more efficient than a 10-horsepower electric motor. *Id.* For these reasons, DOE has tentatively determined that horsepower represents a performance-related feature that justifies separate equipment classes for ESEMs.

Regarding pole configuration, DOE has also previously established separate equipment classes for electric motors on the basis of pole configuration. In the May 2014 Electric Motors Final Rule, DOE discussed that the number of poles in an induction motor determines the synchronous speed (*i.e.,* revolutions per minute) of that motor, and that there is an inverse relationship between the number of poles and a motor's speed. *Id.* at 79 FR 30958–30959. As the number

[33] See the discussion of the Data Quality Act in section VI.J of this document; see also *www.energy.gov/sites/prod/files/cioprod/documents/finalinfoqualityguidelines03072011.pdf.*

of poles increases from two to four to six to eight, the synchronous speed drops from 3,600 to 1,800 to 1,200 to 900 revolutions per minute, respectively. *Id.* The number of poles has a direct impact on the electric motor's performance and achievable efficiency because the number of poles affects the amount of available space inside an electric motor that can be used to accommodate efficiency improvements. *Id.* For example, eight pole motors have twice as many poles as four-pole motors and, correspondingly, less space for efficiency improvements. *Id.* For these reasons, DOE has tentatively determined that pole configuration represents a performance-related feature that justifies separate equipment classes for ESEMs.

Regarding enclosure type, DOE has also previously established separate equipment classes for electric motors on the basis of enclosure type. In the May 2014 Electric Motors Final Rule, DOE discussed that electric motors manufactured with open construction allow a free interchange of air between the electric motor's interior and exterior. *Id.* at 79 FR 30959. Whereas, electric motors with enclosed construction have no direct air interchange between the motor's interior and exterior (but are not necessarily air-tight) and may be equipped with an internal fan for cooling. *Id.* Whether an electric motor is open or enclosed affects its utility; open motors are generally not used in harsh operating environments, whereas totally enclosed electric motors often are. *Id.* The enclosure type also affects an electric motor's ability to dissipate heat, which directly affects efficiency. For these reasons, DOE has tentatively determined that the enclosure type represents a performance-related feature that justifies separate equipment classes ESEMs.

Regarding locked-rotor torque level, DOE considered three classifications of locked-rotor torque in the March 2022 Preliminary Analysis: high, medium, and low. The high locked-rotor torque motor topologies included CSCR and CSIR motors; the medium locked-rotor torque topologies included split phase motors; and the low locked-rotor torque topologies included PSC and shaded pole motors. Locked-rotor torque refers to torque developed by an electric motor whose rotor is locked in place, *i.e.,* not rotating. Locked-rotor torque characterizes a motor's ability to begin moving loads at rest, an attribute which is important to varying degree across applications. Certain applications, for example, some fans, may be relatively indifferent to locked-rotor torque; whereas for others, a minimum locked-rotor torque may be required to begin operation. DOE understands that high and medium locked-rotor torque motors are generally physically larger than low-locked rotor torque motors and may not fit in many embedded applications that low locked-rotor torque motors are used in. Additionally, low locked-rotor torque motors may not provide sufficient starting torque (*i.e.,* the motor would stall and the application would never start) to the many applications that have a high starting load (*e.g.,* compressors and pumps). DOE also understands that high and medium locked-rotor torque motors generally operate inherently more efficiently than low locked-rotor torque motors. As such, DOE has tentatively determined that separate standards (*i.e.,* separate equipment classes) are warranted for the high/medium locked-rotor torque topologies (*i.e.,* CSCR, CSIR, and split phase) and low locked-rotor torque topologies (*i.e.,* PSC and shaded pole). In the March 2022 Preliminary Analysis, DOE sought comment on whether any applications require a low locked-rotor torque and would not operate with a high locked-rotor torque motor, and whether locked-rotor torque is necessary to maintain as an equipment class factor if the highest-torque motor types (*e.g.,* CSCR) can reach the highest available efficiency levels among the set of electric motors which are used as substitutes for similar applications. Section 2.3.1.2 of the March 2022 TSD.

In response to the equipment classes presented in the March 2022 Preliminary Analysis, NEMA agreed that locked-rotor torque (or alternatively, the motor technology) is necessary to maintain as an equipment class factor even if the high locked-rotor torque ESEMs can reach the highest efficiencies among the full range of ESEMs (regardless of locked-rotor torque categorization). They substantiated their recommendation by stating that certain high locked-rotor torque motors are often not interchangeable with lower locked-rotor torque motors in specific applications because of the larger physical size of the high locked-rotor torque motor due to the presence of additional capacitors. (NEMA, No. 22 at pp. 6–7) The December 2022 Joint Recommendation recommended equipment classes with locked-rotor torque as one of the differentiators among equipment classes, although in contrast to the March 2022 Preliminary Analysis, it merged the high and medium locked-rotor torque classes to form a single high locked-rotor torque class. DOE infers from this recommendation that the performance of split phase motors does not inherently differ substantially from the performance of CSCR and CSIR motors, such that a higher or lower energy conservation standard for split phase motors would not be warranted in relation to a standard established for CSCR and CSIR motors. As such, DOE has tentatively determined that separate equipment classes for ESEMs are warranted for two groupings of locked-rotor torque: high and medium locked-rotor torque (represented by the grouping of CSCR, CSIR, and split phase topologies) and low locked-rotor torque (represented by the grouping of PSC and shaded pole topologies).

Regarding motor cooling approach, DOE discussed the differentiation between air-over and non-air-over motors in the March 2022 Preliminary Analysis. *See* section 2.3.1.2 of the March 2022 Preliminary TSD. DOE currently defines an air-over electric motor at 10 CFR 431.12 as an electric motor ''rated to operate in and be cooled by the airstream of a fan or blower that is not supplied with the motor and whose primary purpose is providing airflow to an application other than the motor driving it.'' As such, air-over motors are often designed without an internal fan, which allows for smaller packaging, reduced cost, and the potential for higher-efficiency performance because the motor is not driving an internal fan. DOE notes, however, the inability to self-cool may be a limitation in many applications where cooling airflow is unavailable or too variable to provide a reliable cooling source. For these reasons, DOE has tentatively determined that the cooling approach represents a performance-related feature that justifies separate equipment classes for AO–ESEMs.

Based on the above considerations, DOE is proposing to establish equipment class groupings for ESEMs based on the following characteristics: horsepower rating, pole configuration (*i.e.,* 2, 4, 6, or 8 poles), enclosure type (*i.e.,* open or enclosed), locked-rotor torque level (*i.e.,* high and medium locked-rotor torque, represented by the grouping of CSCR, CSIR, and split phase topologies; and low locked-rotor torque, represented by the grouping of PSC and shaded pole topologies), type of input power (*i.e.,* phase), and motor cooling approach (*i.e.,* air-over or non-air-over). Table IV–1 presents the equipment class groups proposed in this NOPR. Within each equipment class group, DOE would establish individual equipment classes for each pole configuration, enclosure type, and horsepower range. The equipment class groups shown in Table IV–1 represent a total of 350 equipment classes.

TABLE IV–1—EQUIPMENT CLASS GROUPS

Equipment class groups (“ECG”)	Motor topology	Horsepower rating	Pole configuration	Enclosure	Cooling requirements
1	CSCR, CSIR, Split Phase	.25–3	2, 4, 6, 8	Open Enclosed.	Non-Air-Over.
2	PSC, Shaded Pole	.25–3	2, 4, 6, 8	Open Enclosed.	Non-Air-Over.
3	Polyphase	.25–3	2, 4, 6, 8	Open Enclosed.	Non-Air-Over.
4	CSCR, CSIR, Split Phase	.25–3	2, 4, 6, 8	Open Enclosed.	Air-Over
5	PSC, Shaded Pole	.25–3	2, 4, 6, 8	Open Enclosed.	Air-Over
6	Polyphase	.25–3	2, 4, 6, 8	Open	Air-Over

DOE requests comment on the proposed equipment classes for this NOPR.

4. Technology Options

In the March 2022 Preliminary Analysis market and technology assessment, DOE identified several technology options that were initially determined to improve the efficiency of ESEMs, as measured by the DOE test procedure. Table IV–2 presents the technology options considered in the March 2022 Preliminary Analysis.

TABLE IV–2—MARCH 2022 PRELIMINARY ANALYSIS TECHNOLOGY OPTIONS TO INCREASE MOTOR EFFICIENCY

Type of loss to reduce	Technology option
Stator I2R Losses	Increase cross-sectional area of copper in stator slots. Decrease the length of coil extensions.
Rotor I2R Losses	Increase cross-sectional area of end rings. Increase cross-sectional area of rotor conductor bars. Use a die-cast copper rotor cage.
Core Losses	Use electrical steel laminations with lower losses (watts/lb). Use thinner steel laminations. Increase stack length (*i.e.,* add electrical steel laminations).
Friction and Windage Losses	Optimize bearing and lubrication selection. Improve cooling system design.
Stray-Load Losses	Reduce skew on rotor cage. Improve rotor bar insulation.

DOE maintains the same technology options from the March 2022 Preliminary Analysis in this NOPR. DOE received a number of comments regarding technology options. As these options are applicable to electric motors, broadly, DOE responded to these comments in the June 2023 DFR and refers to that discussion for purposes of technology options considered in this NOPR. *See* 88 FR 36066, 36089–36090.

5. Imported Embedded Motors

In response to the March 2022 Preliminary Analysis, DOE received comments regarding compliance logistics and general issues regarding embedded motors being imported into the United States. NEMA commented that they estimate between 30 and 60 percent of ESEMs will be imported as a motor or embedded in a piece of equipment, and that the importers of these equipment are the responsible parties to comply. NEMA stated that if DOE ignores these importers, the rule will harm American equipment manufacturers incorporating ESEMs who compete with offshore suppliers and will not maintain a ‘‘level playing field’’ amongst motor manufacturers. NEMA added that they believe that adding the ESEM categories as defined in the March 2022 Preliminary TSD will have significant negative effects on U.S. suppliers and jobs, giving offshore equipment producers an unfair advantage over American producers. NEMA continued by saying that if DOE does not provide a funded and feasible border enforcement plan, the energy savings estimates for a regulation for ESEM will need to be adjusted by removing the savings of the offshore motors that escape regulation. (NEMA, No. 22 at pp. 18–19) DOE recognizes that importing embedded motors within larger pieces of equipment poses logistical challenges regarding the compliance of these embedded motors with the new energy conservation standards. However, DOE notes that imported motors that meet the scope criteria proposed in this NOPR will be subject to the energy conservation standards that are being promulgated regardless of whether the motor is imported on its own or embedded in a separate piece of equipment. DOE is committed to enforcing its regulations in a fair and equitable manner to ensure a level playing field is preserved for domestic manufacturers.

B. Screening Analysis

DOE uses the following five screening criteria to determine which technology options are suitable for further consideration in an energy conservation standards rulemaking:

(1) Technological feasibility. Technologies that are not incorporated in commercial products or in commercially viable, existing prototypes will not be considered further.

(2) Practicability to manufacture, install, and service. If it is determined that mass production of a technology in commercial products and reliable installation and servicing of the technology could not be achieved on the scale necessary to serve the relevant market at the time of the projected compliance date of the standard, then

that technology will not be considered further.

(3) Impacts on product utility. If a technology is determined to have a significant adverse impact on the utility of the product to subgroups of consumers, or result in the unavailability of any covered product type with performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as products generally available in the United States at the time, it will not be considered further.

(4) Safety of technologies. If it is determined that a technology would have significant adverse impacts on health or safety, it will not be considered further.

(5) Unique-pathway proprietary technologies. If a technology has proprietary protection and represents a unique pathway to achieving a given efficiency level, it will not be considered further, due to the potential for monopolistic concerns.

10 CFR 431.4; 10 CFR part 430, subpart C, appendix A, 6(c)(3) and 7(b).

In summary, if DOE determines that a technology, or a combination of technologies, fails to meet one or more of the listed five criteria, it will be excluded from further consideration in the engineering analysis. The reasons for eliminating any technology are discussed in the following sections.

The subsequent sections include comments from interested parties pertinent to the screening criteria, DOE's evaluation of each technology option against the screening analysis criteria, and whether DOE determined that a technology option should be excluded (''screened out'') based on the screening criteria.

1. Screened-Out Technologies

In the March 2022 Preliminary TSD, DOE screened out amorphous metal laminations and plastic bonded iron powder (''PBIP'') from the analysis. DOE requested further data on the feasibility of amorphous steel being used in electric motors at scale. *See* chapter 3 of the March 2022 Preliminary TSD. In response, DOE received comments regarding the technologies excluded from this engineering analysis, which DOE responded to in the June 2023 DFR as those comments are applicable to the broader suite of electric motors (including ESEMs). In the June 2023 DFR, DOE determined that it was not definitive that amorphous steel could meet all the screening criteria, and therefore, DOE continued to screen out amorphous metal in the June 2023 DFR on the basis of technological feasibility. 88 FR 36066, 36091. That reasoning continues to apply in the case of the ESEMs within the scope of this NOPR.

Accordingly, consistent with the March 2022 Preliminary Analysis and the June 2023 DFR, DOE is continuing to screen out amorphous metal laminations and PBIP in this NOPR.

2. Remaining Technologies

In the March 2022 Preliminary TSD, DOE did not screen out the following technology options: increasing cross-sectional area of copper in stator slots; decreasing the length of coil extensions; increasing cross-sectional area of end rings; increasing cross-sectional area of rotor conductor bars; using a die-cast copper rotor cage; using electrical steel laminations with lower losses (watts/lb); using thinner steel laminations; increasing stack length; optimizing bearing and lubrication selection; improving cooling system design; reducing skew on rotor cage; and improving rotor bar insulation. *See* chapter 3 of the March 2022 Preliminary TSD. DOE received comments regarding the remaining technologies included in this engineering analysis, which were responded to in the June 2023 DFR as those comments are applicable to the broader suite of electric motors (including ESEMs). 88 FR 36066, 36091–36092. DOE believes the responses to those comments in the June 2023 DFR are applicable to this discussion regarding ESEMs. Accordingly, DOE has not screened out any of these technologies for its analysis in this NOPR.

Otherwise, through a review of each technology, DOE concludes that all of the other identified technologies listed in this section met all five screening criteria to be examined further as design options in DOE's NOPR analysis. The design options screened-in are consistent with the design options from the March 2022 Preliminary Analysis. DOE determined that these technology options are technologically feasible because they are being used or have previously been used in commercially-available equipment or working prototypes. DOE also finds that all of the remaining technology options meet the other screening criteria (*i.e.,* practicable to manufacture, install, and service and do not result in adverse impacts on consumer utility, product availability, health, or safety). For additional details, see chapter 4 of the NOPR TSD.

DOE requests comment on the remaining technology options considered in this NOPR.

C. Engineering Analysis

The purpose of the engineering analysis is to establish the relationship between the efficiency and cost of ESEMs. There are two elements to consider in the engineering analysis; the selection of efficiency levels to analyze (*i.e.,* the ''efficiency analysis'') and the determination of product cost at each efficiency level (*i.e.,* the ''cost analysis''). In determining the performance of higher-efficiency equipment, DOE considers technologies and design option combinations not eliminated by the screening analysis. For each equipment class, DOE estimates the baseline cost, as well as the incremental cost for the product/equipment at efficiency levels above the baseline. The output of the engineering analysis is a set of cost-efficiency ''curves'' that are used in downstream analyses (*i.e.,* the LCC and PBP analyses and the NIA).

1. Efficiency Analysis

DOE typically uses one of two approaches to develop energy efficiency levels for the engineering analysis: (1) relying on observed efficiency levels in the market (*i.e.,* the efficiency-level approach), or (2) determining the incremental efficiency improvements associated with incorporating specific design options to a baseline model (*i.e.,* the design-option approach). Using the efficiency-level approach, the efficiency levels established for the analysis are determined based on the market distribution of existing equipment (in other words, based on the range of efficiencies and efficiency level ''clusters'' that already exist on the market). Using the design option approach, the efficiency levels established for the analysis are determined through detailed engineering calculations and/or computer simulations of the efficiency improvements from implementing specific design options that have been identified in the technology assessment. DOE may also rely on a combination of these two approaches. For example, the efficiency-level approach (based on actual products on the market) may be extended using the design option approach to ''gap fill'' levels (to bridge large gaps between other identified efficiency levels) and/or to extrapolate to the max-tech level (particularly in cases where the max-tech level exceeds the maximum efficiency level currently available on the market).

In this proposed rulemaking, DOE applied a combination of the efficiency-level approach and the design-option approach to establish efficiency levels to

analyze. The design-option approach was used to characterize efficiency levels that are not available on the market but appear to be market solutions for those higher efficiency levels if sufficient demand existed. For the efficiency levels available on the market, sufficient performance data was publicly available to characterize these levels.

a. Representative Units Analyzed

Due to the large number of equipment classes, DOE did not directly analyze all equipment classes of electric motors considered in this NOPR. Instead, DOE selected representative units based on two factors: (1) the quantity of motor models available within an equipment class and (2) the ability to scale to other equipment classes.

For this NOPR, DOE updated the horsepower output and pole configuration in response to feedback received on the March 2022 Preliminary Analysis and on feedback received through manufacturer interviews. For more information on the manufacturer interviews, see section IV.J.2 of this document. Table IV–3 presents the representative units analyzed, and the covered horsepower ranges for each of the representative units.

TABLE IV–3 REPRESENTATIVE UNITS ANALYZED

ECG	Representative unit (RU)	Representative unit horsepower	Represented horsepower range (all poles, all enclosures)
ESEM High Torque	1	0.25	0.25 ≤ hp ≤ 0.50.
	2	1	0.5 < hp ≤ 3.
ESEM Low Torque	3	0.25	0.25 hp.
	4	0.5	0.25 < hp ≤ 3.
ESEM Polyphase	5	0.25	0.25 ≤ hp ≤ 3.
AO–ESEM High Torque	6	0.25	0.25 ≤ hp ≤ 0.50.
	7	1	0.5 < hp ≤ 3.
AO–ESEM Low Torque	8	0.25	0.25 hp.
	9	0.5	0.25 < hp ≤ 3
AO–ESEM Polyphase	10	0.25	0.25 ≤ hp ≤ 3.

In response to the March 2022 Preliminary Analysis, DOE received a comment from NEMA stating that DOE should conduct more testing of motor efficiency at higher efficiency levels rather than relying so heavily on scaled results. (NEMA, No. 22 at pp. 15, 24) DOE notes that teardowns of motors at higher efficiency levels were conducted for each ECG that was directly analyzed. This comment was also discussed in section IV.C.1 of the June 2023 DFR. *See* 88 FR 36066, 36093. DOE believes the responses to that comment in the June 2023 DFR are applicable to this discussion regarding ESEMs. Additionally, for more information on scaling as it pertains to ESEMs, see section IV.C.5 of this document.

DOE requests comment on the representative units used in this NOPR.

b. Baseline Efficiency

For each equipment class, DOE generally selects a baseline model as a reference point for each class and measures changes resulting from potential energy conservation standards against the baseline. The baseline model in each equipment class represents the characteristics of an equipment typical of that class (*e.g.,* capacity, physical size). Generally, a baseline model is one that just meets current energy conservation standards, or, if no standards are in place, the baseline is typically the most common or least efficient unit on the market.

In the March 2022 Preliminary Analysis, DOE generated a baseline efficiency level for ESEMs by creating a curve-fit of motor losses vs. hp based on the SEM energy conservation standards located at 10 CFR 431.446, and shifting this curve-fit down to fit what was observed in catalog data for a given ESEM ECG. *See* chapter 5 of the March 2022 Preliminary TSD. In response to the March 2022 Preliminary Analysis, DOE received comments on how the baseline efficiencies were established for ESEMs.

The Joint Advocates commented that DOE tested five ESEMs with and without the fan using the proposed NOPR test procedure to determine the difference in efficiency between AO and non-AO motors. Removing the motor fan resulted in baseline efficiencies several percent higher for the AO–ESEMs. As such, the Joint Advocates recommend that DOE analyze appropriate baseline efficiency levels for AO motors. (Joint Advocates, No. 27 at p. 3)

NEMA disagreed with how DOE created the baseline for ESEMs and suggested that the baseline be determined through testing and not rely on unverified performance models. (NEMA, No. 22 at p. 15) With regards to the comment from NEMA, DOE acknowledges that testing individual models is the most ideal way to gather performance data for electric motors. However, due to the very high volume of combinations of motor topologies, horsepower, frame sizes, pole counts, speeds, unique motor construction, and other parameters, DOE has recognized it to be unrealistic to test every possible motor available in the U.S. market. As such, DOE is modeling performance using a catalog of all electric motors (including ESEMs) available for sale in the U.S. market, which contains specific data for all relevant parameters of electric motor performance, including locked rotor torque, pole count, horsepower output, speed, nominal efficiency, current draw, as well as many others. DOE created the baseline using a similar combination of the catalog performance data and trends that DOE developed and modeled in the 2010 SEM standard rulemaking when DOE was similarly faced with a high volume of potential SEM model possibilities. Given the similarities between SEMs and ESEMs, DOE believes that a baseline created with a methodology parallel to the previous SEM rulemaking is a reasonable approach for creating energy conservation standards for ESEMs. Accordingly, in this NOPR, DOE used a mix of catalog data, current SEM standards, and test data to establish the baseline efficiencies. For ECGs 1–3, DOE began with the methodology that was used in March 2022 Preliminary Analysis to establish the baseline. For ECGs 1 and 3, DOE then shifted the baseline (*i.e.,* increased the losses across all horsepowers by a flat multiplier to shift the entire curve uniformly) to

account for the least efficient ESEMs in each ECG at various horsepower ratings. For ECG 2, DOE used test data to determine the efficiency of shaded pole motors at the horsepower ratings where they are used and combined that with the shifted SEM standard to create a baseline. For more information, see chapter 5 of the NOPR TSD.

DOE requests comment on the baseline efficiencies used in this NOPR.

c. Higher Efficiency Levels

As part of DOE's analysis, the maximum available efficiency level is the highest efficiency unit currently available on the market. DOE also defines a ''max-tech'' efficiency level to represent the maximum possible efficiency for a given equipment.

In the March 2022 Preliminary Analysis, DOE established the higher efficiency levels by shifting the baseline efficiencies up a certain number of NEMA bands. In response to the March 2022 Preliminary Analysis, DOE received comments regarding the analysis used to determine efficiencies at higher levels, which were responded to in the June 2023 DFR. 88 FR 36066, 36096–36097. In that final rule, DOE determined that the approach used in the March 2022 Preliminary Analysis continued to be appropriate. *Id.* at 88 FR 36097. DOE believes the rationale from its responses in the June 2023 DFR is applicable to this NOPR. As such, for this NOPR, DOE considered several design options for higher efficiencies: improved electrical steel for the stator and rotor, using die-cast copper rotors, increasing stack length, and any other applicable design options remaining after the screening analysis when improving electric motor efficiency from the baseline level up to a max-tech level. As each of these design options are added, the manufacturer's cost generally increases and the electric motor's efficiency improves. DOE worked with a subject matter expert with design experience and motor performance simulation software to develop the highest efficiency levels technologically feasible for each representative unit analyzed, and used a combination of electric motor software design programs and subject matter expert input to develop these levels. The subject matter expert also checked his designs against tear-down data and calibrated his software using the relevant test results. DOE notes that for all efficiency levels of directly modeled representative units, the frame size was constrained to that of the baseline unit. DOE also notes that the full-load speed of the simulated motors did not stay the same throughout all efficiency levels. Depending on the materials used to meet a given efficiency level, the full-load speed of the motor may increase compared to a lower efficiency model, but for the representative units analyzed this was not always the case. Employing these design options, higher efficiency levels can be reached without resulting in any significant size increase and without changing the key electrical and mechanical characteristics of the motor. See chapter 5 of the NOPR TSD for more details on the full-load speeds of modeled units.

DOE requests comment on the proposal to constrain the frame size of all efficiency levels to that of the baseline unit.

For the max-tech efficiencies in the engineering analysis, DOE considered 35H210 silicon steel, which has the lowest theoretical maximum core loss of all steels considered in this engineering analysis, and the thinnest practical thickness for use in motor laminations. The max-tech designs also have the highest possible slot fill, maximizing the number of motor laminations that can fit inside the motor. Further details are provided in chapter 5 of the NOPR TSD.

The max-tech for all equipment classes was created by using the curve shape of motor losses vs. horsepower for the SEM energy conservation standards and shifting that curve up to intersect with the representative unit efficiencies for a given ECG. For intermediate efficiency levels that were higher than an ECG's baseline but not the max-tech efficiency considered, DOE used a consistent approach across all ECGs. EL 1 was an average of the full-load efficiencies of the baseline, EL 2 contained the levels recommended in the December 2022 Joint Recommendation, and EL 3 was an average of the full-load efficiencies of EL 2 and max-tech.

Table IV–4 presents a summary of the description of the higher efficiency levels analyzed in this NOPR. For additional details on the efficiency levels, see chapter 5 of the NOPR TSD.

TABLE IV–4—HIGHER EFFICIENCIES ANALYZED

EL0	EL1	EL2	EL3	EL4
Baseline	Average of EL0 and EL2	Joint Recommended Levels	Average of EL2 and EL4	Max-tech.

2. Cost Analysis

The cost analysis portion of the engineering analysis is conducted using one or a combination of cost approaches. The selection of cost approach depends on a suite of factors, including the availability and reliability of public information, characteristics of the regulated equipment, the availability and timeliness of purchasing the equipment on the market. The cost approaches are summarized as follows:

☐ *Physical teardowns:* Under this approach, DOE physically dismantles a commercially available equipment, component-by-component, to develop a detailed bill of materials for the product.

☐ *Catalog teardowns:* In lieu of physically deconstructing an equipment, DOE identifies each component using parts diagrams (available from manufacturer websites or appliance repair websites, for example) to develop the bill of materials for the equipment.

☐ *Price surveys:* If neither a physical nor catalog teardown is feasible (for example, for tightly integrated products such as fluorescent lamps, which are infeasible to disassemble and for which parts diagrams are unavailable) or cost-prohibitive and otherwise impractical (*e.g.* large commercial boilers), DOE conducts price surveys using publicly available pricing data published on major online retailer websites and/or by soliciting prices from distributors and other commercial channels.

In the March 2022 Preliminary Analysis, DOE conducted the analysis using a combination of physical teardowns and software modeling. DOE contracted a professional motor laboratory to disassemble various electric motors and record what types of materials were present and how much of each material was present, recorded in a final bill of materials (''BOM''). To supplement the physical teardowns, software modeling by a subject matter expert was also used to generate BOMs for select efficiency levels of directly analyzed representative units. The resulting bill of materials provides the basis for the manufacturer production cost (''MPC'') estimates. *See* chapter 5 of the March 2022 Preliminary TSD.

In response to the March 2022 Preliminary Analysis, DOE received a number of comments pertaining to the cost analysis, which were responded to in the June 2023 DFR. 88 FR 36066, 36098–36099. In that final rule, DOE determined that the approach used in the March 2022 Preliminary Analysis continued to be appropriate. *Id.* at 88 FR 36099. DOE believes the rationale from its responses in the June 2023 DFR is applicable to this NOPR. Accordingly, in this NOPR, DOE continues to use the approach from the March 2022 Preliminary Analysis by determining costs using a combination of physical teardowns and software modeling. In addition, as part of this NOPR, DOE supplemented other critical inputs to the MPC estimate, including material prices assumed, scrap costs, overhead costs, and conversion costs incurred by the manufacturer, using information provided by manufacturers under a nondisclosure agreement (''NDA'') through both manufacturer interviews and the Electric Motors Working Group. Through these nondisclosure agreements, DOE solicited and received feedback on inputs like recent electrical steel prices by grade, the cost of critical components of ESEMs like capacitors or conductors, motors at different efficiency levels, and rated motor output. See chapter 5 of the NOPR TSD for more detail on the scrap, overhead, and conversion costs, as well as material prices used.

Finally, to account for manufacturers' non-production costs and profit margin, DOE applies a non-production cost multiplier (the manufacturer markup) to the MPC. The resulting manufacturer selling price (''MSP'') is the price at which the manufacturer distributes a unit into commerce. DOE developed an average manufacturer markup by examining the annual Securities and Exchange Commission (''SEC'') 10–K reports filed by publicly-traded manufacturers primarily engaged in ESEM manufacturing and whose combined product range includes ESEMs. DOE used a non-production markup of 37 percent for all ESEMs considered in this NOPR.

3. Technical Specifications

DOE received comments in response to the March 2022 Preliminary Analysis regarding the technical design and performance specifications of ESEMs analyzed in this NOPR. The Joint Industry Stakeholders and AHAM and AHRI commented that more-efficient motors become heavier and larger and that DOE needs to account for the loss of consumer demanded utility in terms of portability or ease of lifting by one person. (Joint Industry Stakeholders, No. 23 at p. 6; AHAM and AHRI, No. 25 at p. 12) The Joint Industry Stakeholders commented that DOE must factor portability into its calculations and considerations for technological feasibility or risk violation of EPCA provision 42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII) The Joint Industry Stakeholders provided results of the AHAM Home Comfort Survey showing that portability is important to PAC owners. The Joint Industry Stakeholders added that DOE should screen out technology options that increase weight and should not use it as a design option in its analysis of higher efficiency levels. The Joint Industry Stakeholders added that DOE must account for physical growth (*i.e.,* girth) of appliances as a result of incorporation of larger ESEMs as a consumer-demanded utility with regards to portability, or fall short of EPCA 6295(o)(2)(B)(i)(I)–(VII). (Joint Industry Stakeholders, No. 23 at pp. 6–8) AHAM and AHRI noted that space constraints in many appliances require that manufacturers use the smallest possible component that meets the required performance for the product. Additionally, they stated larger motors will also decrease the space available for additional features, thereby preventing finished product manufacturers from offering those features to consumers. (AHAM and AHRI, No. 25 at p. 12)

In response to these comments, DOE notes that size increase of ESEMs analyzed as part of this NOPR is limited, and efficiency levels at or below the levels recommended in the December 2022 Joint Recommendation will not result in a significant weight increase relative to the present weight of ESEMs, specifically at the selected TSL 2 (*i.e.,* recommended level). DOE revised the preliminary analysis to account for space-constrained and non-space constrained motor designs that actively limit the amount of additional active material that can fit into the ESEM, limiting the potential for size and weight increase as well. DOE's analysis assumes that higher ELs can be reached without significant increase in size. DOE made this assumption to analyze a representative unit that could be more widely adopted without significant redesign from end-users. However, as discussed in section II.B.3 of this document, the Electric Motor Working Group expressed that any efficiency requirements at or above EL 3, could result in market disruption and may not allow smaller size motors to remain on the market. DOE acknowledges that at or above EL 3, some manufacturers may choose to rely on design options that would significantly increase the physical size of ESEMs. This could result in a significant and widespread disruption to the OEM markets that used ESEMs as an embedded product, as those OEMs may have to make significant changes to their equipment that use ESEMs because those ESEMs could become larger in physical size.[34]

DOE requests comment on the assumption that higher ELs (particularly ELs 3 and 4) can be reached without significant increase in size.

DOE requests comment on the potential for market disruption at higher ELs and if manufacturers could design motors at ELs 3 and 4 that do not increase in size, or if for the final rule, DOE should model motors larger than what is considered in this NOPR.

The Joint Industry Stakeholders commented that if lower speed motors are no longer available, appliances may be forced to incorporate higher speed motors which may cause short-cycling in HVAC and refrigeration applications and result in negative impacts in other appliances. The Joint Industry Stakeholders provided the example of a vacuum cleaner where a higher speed motor could lead to increased suction and reduce the ability to move the vacuum. (Joint Industry Stakeholders, No. 23 at pp. 8–9)

DOE notes that the ESEM performance models generated by the subject matter expert for the representative units did not always increase in speed as efficiency increased and that the energy conservation standards proposed by this NOPR apply to motors of varying operating speeds across multiple pole-configurations. As such, DOE does not expect the respective standard levels and equipment classes to result in the unavailability of motors with specific speed characteristics. DOE has also found that many vacuum cleaners currently on the market utilize suction[35] motors and universal[36] motors that have brushes, and are not

[34] DOE believes there will be several impacts of larger motors on downstream users and consumers of these motors, and the difficulty to accommodate a larger motor varies across applications. An increase in motor size may result in new motors that fit in their existing systems. DOE notes that this impact to OEMs and end users may be difficult to quantify because of range of applications these motors go into, and DOE expects the potential impacts of larger motors to vary by end use application.

[35] Suction motor design & operation are described at *www.ristenbatt.com/xcart/Suction-Motor-Design-and-Operation.html*—(last accessed on 5/31/2023).

[36] A major application of Universal Motors is electric vacuum cleaners. ''Universal motor'' is defined at *www.nidec.com/en/technology/motor/glossary/000/0565/* (last accessed on 5/31/2023).

single-speed induction motors, thus are not within the scope of this NOPR.

AHAM and AHRI commented that they expect electric motors, particularly fractional horsepower electric motors, would increase in price because larger/faster motors will require additional materials for the motor stack, windings, and other components. Moreover, AHAM and AHRI commented that efficiency requirements could push manufacturers to different, more expensive, motor topologies. AHAM and AHRI added that the certification, testing, and reporting requirements will also add cost. AHAM and AHRI provided an estimate that 6,015 basic models of equipment would have one or more motors under the scope of this proposed regulation. Applying a $304,000 per basic model cost estimate to redesign the equipment to accommodate a redesigned motor, AHAM and AHRI estimate the cost of this regulation for OEMs will exceed $1.83 billion. (AHAM and AHRI, No. 25 at pp. 9–12)

The Joint Industry Stakeholders and Lennox stated that if a new ESEM cannot be incorporated into an existing, previously-purchased appliance or OEM product, the consumer must source salvage/repaired component motors or purchase new products entirely. The Joint Stakeholders and Lennox commented that consumers will either face significant repair bills due to field modifications to incorporate new ESEM or lost use of devices due to inability to repair with a new ESEM. The Joint Industry Stakeholders and Lennox commented that DOE did not incorporate the impact of consumers being forced to prematurely purchase new equipment. The Joint Industry Stakeholders and Lennox added that DOE fails to account for these additional OEM equipment repair costs and for the fact that many consumers will be left without a repair option and forced to prematurely purchase new equipment or a new appliance and place additional burden on low-income consumers. (Joint Industry Stakeholders, No. 23 at pp. 5–6; Lennox, No. 29 at p. 5) AHAM and AHRI commented that setting energy conservation standards on motors that are components of finished goods would result in unavailability of replacement motors and consumers would be forced to purchase a new appliance they cannot afford because the existing equipment can no longer be serviced. (AHAM and AHRI, No. 25 at p. 10)

Lennox commented that DOE must thoroughly evaluate the loss of repairability for installed/owned HVACR systems that contain newly regulated ESEMs, which could force consumers to undertake unnecessary and costly premature replacement of HVACR systems. (Lennox, No. 29 at p. 5)

As discussed previously in this section, DOE revised the engineering analysis from the March 2022 Preliminary Analysis, and, as such, the proposed standards in this NOPR result in no significant increases to the size of an affected ESEM, which means there is no loss in repairability for previously-purchased appliances because the form, fit, and function of the ESEMs are maintained at the proposed TSLs. In addition, the proposed levels would preserve key criteria that are used to identify suitable replacement motors,[37] such as frame sizes, voltages, horsepower, pole configurations, enclosure constructions, and mountings, and DOE believes drop-in replacement motors would remain available and there would be no major market disruption, as highlighted by the Electric Motors Working Group. DOE further notes that OEM equipment can usually accommodate different models of motors and online cross-referencing tools[38] exist to help consumers identify motors that can be used as drop-in replacements. However, as discussed in section II.B.3 of this document, the Electric Motor Working group expressed that any efficiency requirements at or above EL 3, could result in market disruption and may not allow smaller size motor to remain on the market. Although DOE's engineering analysis assumes that higher ELs can be reached without significant increase in size, DOE acknowledges that at or above EL 3 (*i.e.,* above the proposed TSL), some manufacturers may choose to rely on design options that would significantly increase the physical size of ESEMs and there is uncertainty as to whether the size, fit and function would be maintained at these levels. At or above EL3, this could result in a significant and widespread disruption to the OEM markets that used ESEMs as an embedded product, as those OEMs may have to make significant changes to their equipment that use ESEMs because those ESEMs could become larger in physical size.

Regarding the additional OEM testing and certification costs, while DOE conducts a MIA to address the industry burden on the manufacturer of the considered covered equipment, DOE typically does not include the impacts to other manufacturers. The MIA for this rulemaking specifically examined the conversion costs that electric motor manufacturers (including OEMs that also manufacture electric motors) would incur due to the analyzed energy conservation standards for electric motors in comparison to the revenue and free cash electric motor manufacturers receive. The OEM testing and certification costs were not included in the MIA, and neither were the OEM revenues and free cash flows, as these costs and revenue are not specific to electric motor manufacturers. However, as noted by the Electric Motors Working Group, the proposed standards for ESEMs are not expected to cause broad market disruption. In addition, DOE fixed the frame size, which remained the same across efficiency levels. As such, the energy conservation standards proposed in this NOPR would preserve the frame sizes of electric motors on the market today. Further, as discussed in section IV.A.1 of this document, ESEMs are built in standard NEMA frame sizes and are not common in currently regulated consumer products including those listed by AHAM and AHRI (*i.e.,* clothes washers (top and front load), clothes dryers, food waste disposers, refrigerators, room air conditioners, and stick vacuums). Therefore, DOE believes the standards as proposed would not impact manufacturers of consumer products. In commercial equipment, DOE identified the following equipment as potentially incorporating ESEMs: walk-in coolers and freezers, circulator pumps, air circulating fans, and commercial unitary air conditioning equipment. If the proposed energy conservation standards for these rules finalize as proposed, DOE identified that these rules would all: (1) have a compliance year that is at or before the ESEM standard compliance year (2029) and/or (2) require a motor that is either outside of the scope of this rule (*e.g.,* an ECM) or an ESEM with an efficiency above the proposed ESEM standards, and therefore not be impacted by the proposed ESEM rule (*i.e.,* the ESEM rule would not trigger a redesign of these equipment). Therefore, DOE has tentatively determined that OEMs would already have to redesign these equipment to comply with these energy conservation standards, and the ESEM rule would not trigger another redesign of these equipment because the end-use equipment regulation would require

[37] See ''How to cross reference an OEM motor.'' Available at *http://hvacknowitall.com/blog/how-to-cross-reference-an-oem-motor* (last accessed September 28, 2023); Rheem and Ruud PROTECH ''Selecting a Motor.'' Available at *assets.unilogcorp.com/267/ITEM/DOC/PROTECH_51_100998_33_Catalog.pdf* (last accessed September 28, 2023).

[38] See *www.emotorsdirect.ca/hvac.*

higher efficiency ESEMs or out of scope electric motors. Consequently, although DOE did not include any OEM testing and certification costs in this NOPR, DOE does not estimate these impacts to be significant.

4. Cost-Efficiency Results

The results of the engineering analysis are reported as cost-efficiency data (or ''curves'') in the form of MSP (in dollars) versus full-load efficiency (in %), which form the basis for subsequent analysis. DOE developed ten curves representing the six equipment class groups. The methodology for developing the curves started with determining the full-load efficiency and MPCs for baseline motors. Above the baseline, DOE implemented various combinations of design options to achieve each efficiency level. Design options were implemented until all available technologies were employed (*i.e.,* at a max-tech level). To account for manufacturers' non-production costs and profit margin, DOE applies a manufacturer markup to the MPC, resulting in the MSP. See the following tables for the final results and chapter 5 of the NOPR TSD for additional detail on the engineering analysis.

Table IV-5 Cost-Efficiency Results (Non-Air-Over Representative Units)

RU	HP	Pole	ECG	Enclosure	Full-load Efficiency (%)					MSP (2022$)				
					EL0	EL1	EL2	EL3	EL4	EL0	EL1	EL2	EL3	EL4
6	.25	4	High/Medium Torque	Enclosed	46.78	53.14	59.50	66.41	73.31	$66.61	$69.55	$79.24	$126.22	$201.70
7	1	4	High/Medium Torque	Enclosed	65.53	72.77	80.00	82.80	85.59	$122.12	$132.21	$146.95	$222.58	$332.26
8	.25	6	Low Torque	Enclosed	36.23	47.72	59.20	65.49	71.77	$54.61	$66.18	$87.54	$121.65	$172.04
9	.5	6	Low Torque	Enclosed	56.33	61.06	65.80	73.35	80.90	$79.07	$103.86	$108.13	$160.54	$206.41
10	.25	4	Polyphase	Enclosed	57.86	62.93	68.00	74.61	81.21	$70.58	$74.34	$82.54	$112.63	$183.02

Table IV-6 Cost-Efficiency Results (Air-Over Representative Units)

RU	HP	Pole	ECG	Enclosure	Full-load Efficiency (%)					MSP (2022$)				
					EL0	EL1	EL2	EL3	EL4	EL0	EL1	EL2	EL3	EL4
6	.25	4	AO - High/Medium Torque	Enclosed	46.78	53.14	59.50	66.41	73.31	$62.06	$65.30	$75.57	$121.14	$195.82
7	1	4	AO - High/Medium Torque	Enclosed	65.53	72.77	80.00	82.80	85.59	$117.60	$127.88	$142.72	$218.00	$326.32
8	.25	6	AO - Low Torque	Enclosed	36.23	47.72	59.20	65.49	71.77	$50.16	$61.98	$83.06	$116.30	$166.07
9	.5	6	AO- Low Torque	Enclosed	56.33	61.06	65.80	73.35	80.90	$74.88	$99.12	$103.67	$154.32	$200.11
10	.25	4	AO - Polyphase	Enclosed	57.86	62.93	68.00	74.61	81.21	$66.75	$70.77	$79.07	$108.88	$178.58

5. Scaling Methodology

Due to the large number of equipment classes, DOE was not able to perform a detailed engineering analysis on each one. Instead, DOE focused its analysis on the representative units and scaled the results to equipment classes not directly analyzed in the engineering analysis. In the March 2022 Preliminary Analysis, DOE used the current standards at 10 CFR 431.25 as a basis to scale the efficiency of the representative units to all other equipment classes. In order to scale for efficiency levels above baseline, the efficiencies for the representative units were shifted up or down by however many NEMA bands, because these bands are commonly used by industry when describing motor efficiency, that efficiency level was above current standards. DOE received a number of comments regarding scaling methodology, to which DOE responded to in the June 2023 DFR. 88 FR 36066, 36099–36100. In that final rule, DOE determined that the approach used in the March 2022 Preliminary Analysis continued to be appropriate. *Id.* at 88 FR 36100. DOE believes the rationale from its responses in the June 2023 DFR is applicable to this NOPR.

In this NOPR, to scale across horsepower, pole configuration, and enclosure, DOE again relied on industry-recognized levels of efficiency when possible, or shifted forms of these levels. For example: when an efficiency level for a representative unit was NEMA Premium, Table 12–12 of NEMA MG 1–2016 was used to determine the efficiency of all the non-representative unit equipment classes. This method of scaling was also done for IE4 levels of efficiency, electric motor fire pump levels, and shifted versions of NEMA Premium (see section IV.C.1 of this document for a description of efficiency levels analyzed). DOE relied on industry-recognized levels because they sufficiently capture the effects of enclosure, pole configuration, frame size, and horsepower on motor efficiency.

D. Markups Analysis

The markups analysis develops appropriate markups (*e.g.,* manufacturer markups, retailer markups, distributor markups, contractor markups) in the distribution chain and sales taxes to convert the MSP estimates derived in the engineering analysis to consumer

prices, which are then used in the LCC and PBP analysis and in the manufacturer impact analysis. At each step in the distribution channel, companies mark up the price of the equipment to cover business costs and profit margin.

In the March 2022 Preliminary Analysis, DOE identified distribution channels for electric motors and their respective market shares (*i.e.,* percentage of sales going through each channel). For ESEMs, the main parties in the distribution chain are OEMs, equipment or motor wholesalers, retailers, and contractors. See section 6.2 of the March 2022 Preliminary TSD. DOE did not receive any comment on the distribution channels identified in response to the March 2022 Preliminary Analysis. DOE retained these distribution channels for this NOPR.

DOE developed baseline and incremental markups for each actor in the distribution chain. Baseline markups are applied to the price of equipment with baseline efficiency, while incremental markups are applied to the difference in price between baseline and higher-efficiency models (the incremental cost increase). The incremental markup is typically less than the baseline markup and is designed to maintain similar per-unit operating profit before and after new or amended standards.[39]

In the March 2022 Preliminary Analysis, DOE relied on economic data from the U.S. Census Bureau and on 2020 RS Means Electrical Cost Data to estimate average baseline and incremental markups. Specifically, DOE estimated the OEM markups for electric motors based on financial data of different sets of OEMs that use respective electric motors from the latest 2019 Annual Survey of Manufactures.[40] The relevant sets of OEMs identified were listed in Table 6.4.2 of the March 2022 Preliminary TSD, using six-digit code level North American Industry Classification System (''NAICS''). Further, DOE collected information regarding sales taxes from the Sales Tax Clearinghouse.[41]

In response to the March 2022 Preliminary Analysis, NEMA agreed that 95 percent of ESEMs reach the market through the OEM equipment channel. NEMA further commented that Table 6.4.2 of the March 2022 Preliminary TSD should be replaced by Table IV.3 of the Import Data Declaration Proposed Rule.[42] (NEMA, No. 22 at p. 18) Table IV.3 of the Import Data Declaration Proposed Rule provides a list of five-digit code level NAICS.[43] DOE reviewed the corresponding six-digit code level NAICS and identified the following additional OEM as relevant in the context of OEMs incorporating ESEMs in their equipment: 333991 ''Power-driven handtool manufacturing;'' 333999 ''All other miscellaneous general Purpose machinery manufacturing;'' 335210 ''Small electrical appliance manufacturing;'' and 335220 ''Major appliance manufacturing''. Other NAICS codes were either already included in the March 2022 Preliminary Analysis or did not correspond to OEMs incorporating ESEMs in their equipment.

For this NOPR, DOE revised the OEM baseline and incremental markups calculation to account for these additional NAICS codes. In addition, DOE relied on updated data from the economic data from the U.S. Census Bureau, 2023 RS Means Electrical Cost Data, and the updated data from the Sales Tax Clearinghouse.

Chapter 6 of the NOPR TSD provides details on DOE's development of markups for ESEMs.

DOE requests data and information to characterize the distribution channels for ESEMs and associated market shares.

E. Energy Use Analysis

The purpose of the energy use analysis is to determine the annual energy consumption of ESEMs at different efficiencies for a representative sample of residential, commercial, and industrial consumers, and to assess the energy savings potential of increased ESEM efficiency. The energy use analysis estimates the range of energy use of ESEMs in the field (*i.e.,* as they are actually used by consumers). For each consumer in the sample, the energy use is calculated by multiplying the annual average motor input power by the annual operating hours. The energy use analysis provides the basis for other analyses DOE performed, particularly assessments of the energy savings and the savings in consumer operating costs that could result from adoption of new standards.

1. Consumer Sample

DOE created a consumer sample to represent consumers of electric motors in the commercial, industrial, and residential sectors. DOE used the sample to determine electric motor annual energy consumption as well as to conduct the LCC and PBP analyses. Each consumer in the sample was assigned a sector, an application, and a region. The sector and application determine the usage profile of the electric motor and the economic characteristics of the motor owner vary by sector and region. In addition, residential consumers were assigned household income groups. In the March 2022 Preliminary Analysis, DOE primarily relied on data from the 2018 Commercial Building Energy Consumption Survey (''CBECS''),[44] the 2018 Manufacturing Energy Consumption Survey (''MECS''),[45] the 2015 Residential Energy Consumption Survey (''RECS''), a previous DOE Technical Support Document (''January 2021 Final Determination Technical Support Document'') related to small electric motors,[46] and a DOE–AMO report ''U.S. Industrial and Commercial Motor System Market Assessment Report Volume 1: Characteristics of the Installed Base'' (''MSMA'' or ''DOE–AMO report'').[47] See chapter 7 of the March 2022 Preliminary TSD.

Specifically, in the March 2022 Preliminary Analysis, for ESEMs, DOE used information from the Small Electric Motors January 2021 Final Determination Technical Support Document to develop sector specific distributions. Since the publication of the March 2022 Preliminary Analysis, DOE updated the consumer sample to

[39] Because the projected price of standards-compliant equipment is typically higher than the price of baseline equipment, using the same markup for the incremental cost and the baseline cost would result in higher per-unit operating profit. While such an outcome is possible, DOE maintains that in markets that are reasonably competitive it is unlikely that standards would lead to a sustainable increase in profitability in the long run.

[40] U. S. Census Bureau. 2019 Annual Survey of Manufactures (ASM): Statistics for Industry Groups and Industries. *www.census.gov/programs-surveys/asm.html* (last accessed March 23, 2021).

[41] Sales Tax Clearinghouse Inc. State Sales Tax Rates Along with Combined Average City and County Rates. July 2021. *thestc.com/STrates.stm* (last accessed July 1, 2021).

[42] NEMA also provided the following link: *www.regulations.gov/document/EERE-2015-BT-CE-0019-0001.*

[43] Each five-digit code level NAICS includes several six-digit code level NAICS.

[44] U.S. Department of Energy–Energy Information Administration, ''2018 Commercial Buildings Energy Consumption Survey (CBECS),'' 2018 CBECS Survey Data, 2018, *https://www.eia.gov/consumption/commercial/data/2018/index.php?view=methodology.*

[45] 2018 Manufacturing Energy Consumption Survey,'' *https://www.eia.gov/consumption/manufacturing/data/2018/pdf/Table11_1.pdf.*

[46] Technical Support Document: Energy Efficiency Program for Consumer Products and Commercial and Industrial Equipment: Small Electric Motors Final Determination (Prepared for the Department of Energy by Staff Members of Navigant Consulting, Inc and Lawrence Berkeley National Laboratory, January 2021),'' *www.regulations.gov/document/EERE-2019-BT-STD-0008-0035.*

[47] Prakash Rao *et al.,* ''U.S. Industrial and Commercial Motor System Market Assessment Report Volume 1: Characteristics of the Installed Base,'' January 12, 2021, *doi.org/10.2172/1760267.*

reflect the latest version of RECS (*i.e.,* 2020 RECS).[48] DOE also revised the distribution of ESEMs by sector to reflect that the majority of single-phase motors are used in the residential and commercial sectors [49] and incorporate the industrial and commercial sector distributions as published in the June 2023 DFR.

In response to DOE's requests for feedback regarding consumer sample in the March 2022 Preliminary Analysis, NEMA referred DOE to the MSMA report (NEMA, No. 22 at p. 19) As previously described, DOE relied on information from the MSMA report to inform its consumer sample. DOE did not receive any additional comments related to the consumer sample developed in the March 2022 Preliminary Analysis and, in this NOPR, DOE continued to rely on the MSMA report to characterize motor use in the commercial and industrial sectors.

DOE requests data and information to characterize the distribution of ESEMs by sector (commercial, industrial, and residential sectors) as well as the distribution of ESEMs by application in each sector.

2. Motor Input Power

In the March 2022 Preliminary Analysis, DOE calculated the motor input power as the sum of (1) the electric motor's rated horsepower multiplied by its operating load (*i.e.,* the motor output power), and (2) the losses at the operating load (*i.e.,* part-load losses). DOE estimated distributions of motor average annual operating load by application and sector based on information from the MSMA report. DOE determined the part-load losses using outputs from the engineering analysis (full-load efficiency at each efficiency level) and published part-load efficiency information from 2016 and 2020 catalog data from several manufacturers to model motor part-load losses as a function of the motor's operating load. See section 7.2.2 of the March 2022 Preliminary TSD.

In response to DOE's requests for feedback regarding distributions of average annual operating load by application and sector in the March 2022 Preliminary Analysis, NEMA referred DOE to the MSMA report. (NEMA, No. 22 at p. 19) As previously described, DOE relied on information from the MSMA report to characterize average annual operating loads. DOE did not receive any additional comments related to the distributions of operating loads developed in the March 2022 Preliminary Analysis and retained the same approach for this NOPR.

DOE did not receive any comments on its approach to determine part-load losses and retained the same methodology for this NOPR. However, DOE updated its analysis to account for more recent part-load efficiency information from 2022 manufacturer catalogs.

DOE seeks data and additional information to characterize ESEM operating loads.

3. Annual Operating Hours

In the March 2022 Preliminary Analysis, DOE used information from the MSMA report to establish distributions of motor annual hours of operation by application for the commercial and industrial sectors. See section 7.2.5 of the March 2022 Preliminary TSD. The MSMA report provided average, mean, median, minimum, maximum, and quartile boundaries for annual operating hours across industrial and commercial sectors by application and showed no significant difference in average annual hours of operation between horsepower ranges. DOE used this information to develop application-specific statistical distributions of annual operating hours in the commercial and industrial sectors.

For electric motors used in the agricultural sector (which were not included in the MSMA report), DOE derived statistical distributions of annual operating hours of irrigation pumps by region using data from the 2013 Census of Agriculture Farm and Ranch Irrigation Survey.

For ESEMs used in the residential sector (which is a sector that was not studied in the MSMA report), DOE did not receive any comments specific to the residential sector. DOE retained the approach used in the March 2022 Preliminary Analysis and relied on the distributions of operating hours by application as presented in chapter 7 of the January 2021 Final Determination Technical Support Document pertaining to SEMs.

In response to DOE's requests for feedback regarding distributions of average annual operating hours by application and sector in the March 2022 Preliminary Analysis, NEMA referred DOE to the MSMA report. (NEMA, No. 22 at p. 20) As previously described, DOE relied on information from the MSMA report to inform its distributions of annual operating hours in the commercial and industrial sectors. For other sectors not included in the MSMA report, DOE relied on additional data sources as previously described. DOE did not receive any additional comments related to the distributions of operating hours developed in the March 2022 Preliminary Analysis and retained the same approach for this NOPR.

DOE requests comment on the distribution of average annual operating hours by application and sector used to characterize the variability in energy use for ESEMs.

4. Impact of Electric Motor Speed

Any increase in operating speeds as the efficiency of the motor is increased could affect the energy saving benefits of more efficient motors in certain variable torque applications (*i.e.,* fans, pumps, and compressors) due to the cubic relation between speed and power requirements (*i.e.,* ''affinity law''). In the March 2022 Preliminary Analysis, DOE accounted for any changes in the motor's rated speed with an increase in efficiency levels, for those electric motors that are currently regulated under 10 CFR 431.25 and for AO–MEMs and for which the engineering analysis provided speed information by EL. Based on information from a European motor study,[50] DOE assumed that 20 percent of consumers with fan, pump, and air compressor applications would be negatively impacted by higher operating speeds. For other electric motor categories that it analyzed in the March 2022 Preliminary Analysis, including ESEMs, DOE did not characterize the motor speed by ELs as part of the engineering analysis and DOE did not include this impact in the analysis. See section 7.2.2.1 of the March 2022 Preliminary TSD.

[48] ''2020 Residential Energy Consumption Survey Data,'', *https://www.eia.gov/consumption/residential/data/2020/https://www.eia.gov/consumption/residential/data/2020/* (last accessed July 5, 2023).

[49] Goetzler, William, Sutherland, Timothy, and Reis, Callie. Energy Savings Potential and Opportunities for High-Efficiency Electric Motors in Residential and Commercial Equipment. United States: N. p., 2013. Web. doi:10.2172/1220812. Available at: *osti.gov/biblio/1220812* (last accessed April 18, 2023).

[50] ''EuP–LOT–30-Task-7-Jun-2014.Pdf,'' Available at *www.eup-network.de/fileadmin/user_upload/EuP-LOT-30-Task-7-Jun-2014.pdf* (last accessed April 26, 2021). The European motor study estimated, as a ''worst case scenario,'' that up to 40 percent of consumers purchasing motors for replacement applications may not see any decrease or increase in energy use due to this impact and did not incorporate any change in energy use with increased speed. In addition, the European motor study also predicts that any energy use impact will be reduced over time because new motor driven equipment would be designed to take account of this change in speed. Therefore, the study did not incorporate this effect in the analysis (*i.e.,* 0 percent of negatively impacted consumers). In the absence of additional data to estimate the percentage of consumers that may be negatively impacted in the compliance year, DOE relied on the mid-point value of 20 percent.

In response to the March 2022 Preliminary Analysis, the Joint Advocates requested clarifications regarding how DOE accounted for the impact of the increase motor speed on the energy use, as well as how motor slip was incorporated into the energy use analysis. (Joint Advocates, No. 27 at pp. 4–5) [51]

DOE described the method and assumptions used to calculate the impact of higher speed on energy use in section 7.2.2.1 of the March 2022 Preliminary TSD. In this NOPR, DOE provided additional details on the methodology and equations used as part of Appendix 7A in the NOPR TSD.

NEMA commented that nearly 100 percent of fans, pumps and compressors using ESEMs would be negatively impacted by an increase in speed. In addition, NEMA commented that it would take up to two years for OEMs to redesign and recertify an equipment with a motor that has higher speed and provided an example calculation to illustrate the impacts of higher speed operation. (NEMA, No. 22 at pp. 20–21, 49)

The Joint Industry Stakeholders commented that DOE should consider the full impact of higher speed motors by considering new products as well as replacement. The Joint Industry Stakeholders added that DOE only incorporated the effect of increased speeds in currently regulated motors and air-over motors and that this effect should also be accounted for in ESEMs. The Joint Industry Stakeholders commented that if lower speed motors are no longer available, appliances may be forced to incorporate higher speed motors, which may cause short-cycling in HVAC and refrigeration applications and result in negative impacts in other appliances. (Joint Industry Stakeholders, No. 23 at pp. 8–9)

In this NOPR, DOE included the effect of increased speeds in the energy use calculation for all equipment classes. DOE reviewed information related to pump, fans, and compressor applications driven by electric motors [52] and notes that in the commercial land industrial sectors: (1) 7 to 20 percent of motors used in these applications are paired with VFDs, which allow the user to adjust the speed of the motor; [53] (2) approximately half of fans operate with belts, which also allow the user to adjust the speed of the driven fan; [54] (3) some applications would benefit from increase in speeds as the work would be completed at a higher load in less operating hours (*e.g.,* pump filling water tank faster at increased speed); and (4) not all fans, pumps and compressors are variable torque loads to which the affinity laws applies. Therefore, less than 100 percent of motor in these applications would experience an increase in energy use as a result of an increase in speed. In addition, as described in the European motor study, the increase in speed would primarily impact replacement motors installed in applications that previously operated with a lower speed motor. For these reasons, DOE has determined that assuming that 100 percent of fans, pumps and compressors using ESEM would be negatively impacted by an increase in speed would not be representative. DOE continues to rely on a 20 percent assumption used in the March 2022 Preliminary Analysis, based on the European motor study. In addition, DOE incorporated a sensitivity analysis allowing the user to consider this effect for three additional scenarios described in appendix 7–A of the NOPR TSD (*i.e.,* 0 percent, 50 percent and 100 percent).

Chapter 7 of the NOPR TSD provides details on DOE's energy use analysis for ESEMs.

DOE seeks data and additional information to support the analysis of projected energy use impacts related to any increases in motor nominal speed.

F. Life-Cycle Cost and Payback Period Analysis

DOE conducted LCC and PBP analyses to evaluate the economic impacts on individual consumers of potential energy conservation standards for ESEMs. The effect of new energy conservation standards on individual consumers usually involves a reduction in operating cost and an increase in purchase cost. DOE used the following two metrics to measure consumer impacts:

☐ The LCC is the total consumer expense of an equipment over the life of that equipment, consisting of total installed cost (manufacturer selling price, distribution chain markups, sales tax, and installation costs) plus operating costs (expenses for energy use, maintenance, and repair). To compute the operating costs, DOE discounts future operating costs to the time of purchase and sums them over the lifetime of the equipment.

☐ The PBP is the estimated amount of time (in years) it takes consumers to recover the increased purchase cost (including installation) of a more-efficient equipment through lower operating costs. DOE calculates the PBP by dividing the change in purchase cost at higher efficiency levels by the change in annual operating cost for the year that new standards are assumed to take effect.

For any given efficiency level, DOE measures the change in LCC relative to the LCC in the no-new-standards case, which reflects the estimated efficiency distribution of ESEMs in the absence of new energy conservation standards. In contrast, the PBP for a given efficiency level is measured relative to the baseline equipment.

For each considered efficiency level in each equipment class, DOE calculated the LCC and PBP for a nationally representative set of consumers. As stated previously, DOE developed consumer samples from various data sources (*see* section IV.E.1 of this document). For each sample consumer, DOE determined the energy consumption for the ESEM and the appropriate energy price. By developing a representative sample of consumers, the analysis captured the variability in energy consumption and energy prices associated with the use of ESEMs.

Inputs to the calculation of total installed cost include the cost of the equipment—which includes MPCs, manufacturer markups, retailer and distributor markups, and sales taxes—and installation costs. Inputs to the calculation of operating expenses include annual energy consumption, energy prices and price projections, repair and maintenance costs, equipment lifetimes, and discount rates. DOE created distributions of values for equipment lifetime, discount rates, and sales taxes, with probabilities attached to each value, to account for their uncertainty and variability.

The computer model DOE uses to calculate the LCC relies on a Monte Carlo simulation to incorporate uncertainty and variability into the analysis. The Monte Carlo simulations randomly sample input values from the probability distributions and ESEM consumer samples. The model calculated the LCC for equipment at each efficiency level for 10,000 consumers per simulation run. The analytical results include a distribution of 10,000 data points showing the range of LCC savings for a given efficiency

[51] The motor slip is the difference between the motor's synchronous speed and actual speed which is lower than the synchronous speed). At higher ELs, the speed of a given motor may increase and the motor slip may decrease.

[52] DOE did not have data specific to pumps driven by ESEMs and relied on pump, fans, and compressor applications driven by the broader category of electric motors.

[53] See Figure 64 and Figure 71 of the MSMA report.

[54] *See* 2016 Fan Notice of Data Availability, 81 FR 75742 (Nov. 1, 2016); LCC spreadsheet, ''LCC sample'' worksheet, ''Belt vs. direct driven fan distribution'' available at *www.regulations.gov/document/EERE-2013-BT-STD-0006-0190.*

level relative to the no-new-standards case efficiency distribution. In performing an iteration of the Monte Carlo simulation for a given consumer, equipment efficiency is chosen based on its probability. If the chosen equipment efficiency is greater than or equal to the efficiency of the standard level under consideration, the LCC calculation reveals that a consumer is not impacted by the standard level. By accounting for consumers who already purchase more-efficient equipment, DOE avoids overstating the potential benefits from increasing equipment efficiency. DOE calculated the LCC and PBP for consumers of ESEMs as if each were to purchase a new equipment in the first year of required compliance with new standards. DOE used 2029 as the first year of compliance with any new standards for ESEMs as discussed in section II.B.3 of this document.

Table IV–7 summarizes the approach and data DOE used to derive inputs to the LCC and PBP calculations. The subsections that follow provide further discussion. Details of the spreadsheet model, and of all the inputs to the LCC and PBP analyses, are contained in chapter 8 of the NOPR TSD and its appendices.

TABLE IV–7—SUMMARY OF INPUTS AND METHODS FOR THE LCC AND PBP ANALYSIS *

Inputs	Source/method
Equipment Cost	Derived by multiplying MPCs by manufacturer and retailer markups and sales tax, as appropriate. Used a constant price trend to project equipment costs based on historical data.
Installation Costs	Assumed no change with efficiency level other than shipping costs.
Annual Energy Use	Motor input power multiplied by annual operating hours per year. *Variability:* Primarily based on the MSMA report, 2018 CBECS, 2018 MECS, and 2020 RECS.
Energy Prices	*Electricity:* Based on EEI Typical Bills and Average Rates Reports data for 2022. *Variability:* Regional energy prices determined for four census regions.
Energy Price Trends	Based on *AEO2023* price projections.
Repair and Maintenance Costs	Assumed ESEMs are not repaired. Assumed no change in maintenance costs with efficiency level.
Equipment Lifetime	*Average:* 7.1 years (6.8 to 9.3 years depending on the equipment class group and horsepower considered).
Discount Rates	*Residential:* Approach involves identifying all possible debt or asset classes that might be used to purchase the considered appliances, or might be affected indirectly. Primary data source was the Federal Reserve Board's Survey of Consumer Finances. *Non-residential:* Calculated as the weighted average cost of capital for entities purchasing electric motors. Primary data source was Damodaran Online.
Compliance Date	2029.

* Not used for PBP calculation. References for the data sources mentioned in this table are provided in the sections following the table or in chapter 8 of the NOPR TSD.

In response to the March 2022 Preliminary Analysis, the Joint Industry Stakeholders commented that double-regulation has no corresponding consumer benefits in the form of reduced power consumption given the appliance regulations being unchanged and the fact that a more efficient motor does not necessarily translate to a more efficient product when incorporated into a finished good. The Joint Industry Stakeholders commented that to potentially increase the cost of an OEM product, without a corresponding energy savings, would mean a net loss for consumers and negative national impacts. The Joint Industry Stakeholders noted that the DOE used operating hours for the following categories of equipment: air compressors, refrigeration compressors, fans and blowers, pumps material handling, material processing, other, and agricultural pumps. Of these, the Joint Industry Stakeholders noted that electric motors used in air compressors, refrigeration compressors, fans and blowers, pumps and agricultural pumps are already regulated to some extent and that DOE made no apparent effort to account for this and deduct a significant portion of those estimated hours. (Joint Industry Stakeholders, No. 23 at p. 5) AHAM and AHRI commented that expanding coverage to special and definite purpose motors would force manufacturers to incorporate more expensive motors and increase the cost of appliances and equipment, while not necessarily improving the energy performance of the finished product (whether it be a covered product/equipment or not). (AHAM and AHRI, No. 25 at p. 9) Lennox commented that DOE must accurately assess, and avoid double-counting, energy savings when assessing potential efficiency improvements from motors used in already-regulated HVAC equipment. Lennox commented that it is unclear in the LCC and PBP analysis if DOE accounted for double regulation and eliminated energy savings already achieved from system-level HVACR regulation. (Lennox, No. 29 at p. 4) HI commented that there is a potential for duplicate accounting of energy savings when regulating motors in general. HI stated that, in addition to the ESEMs, there is a potential for other motor product efficiencies to be counted twice such as the use of inverter-only products in pumps when the DOE calculates savings in their evaluations (one for inverter only motors, and another for pumps using those motors). (HI, No. 31 at p. 1)

As highlighted in a previous DOE report, motor energy savings potential and opportunities for higher efficiency electric motors in commercial and residential equipment would result in overall energy savings.[55] In addition, some manufacturers advertise electric motors as resulting in energy savings in HVAC equipment.[56] All other characteristics of the equipment and motor being held constant, increasing the efficiency of the motor component will increase the efficiency of the overall equipment.[57] Therefore, DOE disagrees with the Joint Industry Stakeholders that an increase in motor efficiency would not result in a more

[55] U.S. DOE Building technology Office, Energy Savings Potential and Opportunities for High-Efficiency Electric Motors in residential and Commercial Equipment, December 2013. Available at: *www.energy.gov/eere/buildings/downloads/motor-energy-savings-potential-report.*

[56] See, for example, Nidec and ABB: *http://acim.nidec.com/motors/usmotors/industry-applications/hvac;bit.ly/3wEIQyu.*

[57] As discussed in section IV.E.4 of this document, DOE acknowledges that in some cases higher efficiency motors may operate at higher speeds which could offset some of the expected energy savings.

efficient equipment when incorporated into a given equipment. In addition, DOE's analysis ensures the LCC and NIA analysis do not result in double-counting of energy savings by accounting for consumers who already purchase more-efficient products and calculating LCC and energy savings relative to a no-new standards case efficiency distribution. *See* section IV.F.8 of this document. Finally, any future analysis in support of energy conservation standards for equipment incorporating motors would also account for equipment that already incorporate more-efficient electric motors and would not result in any double counting of energy savings resulting from motor efficiency improvements.

1. Equipment Cost

To calculate consumer equipment costs, DOE multiplied the MSPs developed in the engineering analysis by the distribution channel markups described previously (along with sales taxes). DOE used different markups for baseline equipment and higher-efficiency equipment, because DOE applies an incremental markup to the increase in MSP associated with higher-efficiency equipment.

To project an equipment price trend for electric motors, DOE obtained historical Producer Price Index (''PPI'') data for integral horsepower motors and generators manufacturing spanning the time period 1969–2022 and for fractional horsepower motors and generators manufacturing between 1967–2022 from the Bureau of Labor Statistics (''BLS'').[58] The PPI data reflect nominal prices, adjusted for electric motor quality changes. An inflation-adjusted (deflated) price index for integral and fractional horsepower motors and generators manufacturing was calculated by dividing the PPI series by the implicit price deflator for Gross Domestic Product. The deflated price index for integral horsepower motors was found to align with the copper, steel and aluminum deflated price indices. DOE believes that the extent to how these trends will continue in the future is very uncertain. In addition, the deflated price index for fractional horsepower motors was mostly flat during the entire period from 1967 to 2022. Therefore, DOE relied on a constant price assumption as the default price factor index to project future electric motor prices.

DOE did not receive any comments on price trends in response to the March 2022 Preliminary Analysis and retained the same approach in this NOPR.

DOE requests data and information regarding the most appropriate price trend to use to project ESEM prices.

2. Installation Cost

Installation cost includes labor, overhead, and any miscellaneous materials and parts needed to install the equipment. Electric motor installation cost data from 2023 RS Means Electrical Cost Data show a variation in installation costs according to the motor horsepower (for three-phase electric motors), but not according to efficiency. DOE found no evidence that installation costs would be impacted with increased efficiency levels. Therefore, in the March 2022 Preliminary Analysis, DOE did not incorporate changes in installation costs for motors that are more efficient than baseline equipment. DOE assumed there is no variation in installation costs between a baseline efficiency motor and a higher efficiency motor except in terms of shipping costs. These shipping costs were based on weight data from the engineering analysis for the representative units. *See* section 8.2.4 of the March 2022 Preliminary Analysis.

In response to the March 2022 Preliminary Analysis, EASA commented that if a motor is replaced with a physically larger frame, the replacement would have higher installation costs because of the added complexity of modifying the mounting setup to accommodate the larger motor, and in some case would be impossible. (EASA, No. 21 at pp. 2–3)

As noted in section IV.C.1.c of this document, DOE fixed the frame size, which remains the same across efficiency levels in the analysis. Therefore, DOE did not account for any changes in installation costs due to changes in frame sizes and, in this NOPR, DOE retained the approach used in the March 2022 Preliminary Analysis and assumed there is no variation in installation costs between a baseline efficiency motor and a higher efficiency motor except in terms of shipping costs.

DOE requests comment on whether any of the efficiency levels considered in this NOPR might lead to an increase in installation costs, and if so, DOE seeks supporting data regarding the magnitude of the increased cost per unit for each relevant efficiency level and the reasons for those differences.

3. Annual Energy Consumption

For each sampled consumer, DOE determined the energy consumption for an electric motor at different efficiency levels using the approach described previously in section IV.E of this document.

4. Energy Prices

Because marginal electricity price more accurately captures the incremental savings associated with a change in energy use from higher efficiency, it provides a better representation of incremental change in consumer costs than average electricity prices. Therefore, DOE applied average electricity prices for the energy use of the equipment purchased in the no-new-standards case, and marginal electricity prices for the incremental change in energy use associated with the other efficiency levels considered.

DOE derived electricity prices in 2022 using data from EEI Typical Bills and Average Rates reports. Based upon comprehensive, industry-wide surveys, this semi-annual report presents typical monthly electric bills and average kilowatt-hour costs to the customer as charged by investor-owned utilities. For the residential sector, DOE calculated electricity prices using the methodology described in Coughlin and Beraki (2018).[59] For the non-residential sectors, DOE calculated electricity prices using the methodology described in Coughlin and Beraki (2019).[60]

DOE's methodology allows electricity prices to vary by sector, region and season. In the analysis, variability in electricity prices is chosen to be consistent with the way the consumer economic and energy use characteristics are defined in the LCC analysis. For electric motors, DOE relied on variability by region and sector. See chapter 8 of the NOPR TSD for more details.

To estimate energy prices in future years, DOE multiplied the 2022 energy prices by the projection of annual average price changes for each of the nine census divisions from the Reference case in *AEO2023,* which has an end year of 2050.[61] To estimate price trends after 2050, the 2050 prices were held constant.

[58] Series ID PCU3353123353123 and PCU3353123353121 for integral and fractional horsepower motors and generators manufacturing, respectively; *www.bls.gov/ppi/.*

[59] Coughlin, K. and B. Beraki.2018. Residential Electricity Prices: A Review of Data Sources and Estimation Methods. Lawrence Berkeley National Lab. Berkeley, CA. Report No. LBNL–2001169. *https://ees.lbl.gov/publications/residential-electricity-prices-review.*

[60] Coughlin, K. and B. Beraki. 2019. Non-residential Electricity Prices: A Review of Data Sources and Estimation Methods. Lawrence Berkeley National Lab. Berkeley, CA. Report No. LBNL–2001203. *https://ees.lbl.gov/publications/non-residential-electricity-prices.*

[61] Energy Information Administration. *Annual Energy Outlook 2023.* Available at *www.eia.gov/outlooks/aeo/* (last accessed May 1, 2023).

5. Maintenance and Repair Costs

Repair costs are associated with repairing or replacing equipment components that have failed in an equipment; maintenance costs are associated with maintaining the operation of the equipment.

In the March 2022 Preliminary Analysis, for the maintenance costs, DOE did not find data indicating a variation in maintenance costs between baseline efficiency and higher efficiency motors. The cost of replacing bearings, which is the most common maintenance practice, is constant across efficiency levels. Therefore, DOE did not include maintenance costs in the LCC analysis. See Section 8.3.3 of the March 2022 Preliminary Analysis.

DOE did not receive any comments related to maintenance costs and retained the same approach in this NOPR.

DOE considers a motor repair as including rewinding and reconditioning. See section 8.3.3 of the March 2022 Preliminary Analysis TSD. In the March 2022 Preliminary Analysis, DOE only included repair costs for units with a horsepower greater than 20 horsepower and did not consider any repair for the ESEM representative units. *See* section 8.3.3 of the March 2022 Preliminary Analysis.

In response to the March 2022 Preliminary Analysis, EASA commented that the definition of repair must be clear for the purposes of estimating the number of repairs and should be provided in a separate ''Definitions'' section. (EASA, No. 21 at p. 5) As noted previously, DOE considers a motor repair as including rewinding and reconditioning and describes the term in chapter 8 of the NOPR TSD (this was also described in chapter 8 of the March 2022 Preliminary Analysis). Other non-rewinding related practices, such as bearing replacement, were considered as part of the maintenance costs.

DOE did not receive any comments supporting inclusion of repair costs for ESEMs and, in this NOPR, continued to exclude repair costs for ESEMs in line with the approach used in the March 2022 Preliminary Analysis.

DOE requests comment on whether any of the efficiency levels considered in this NOPR might lead to an increase in maintenance and repair costs, and if so, DOE seeks supporting data regarding the magnitude of the increased cost per unit for each relevant efficiency level and the reasons for those differences.

6. Equipment Lifetime

In the March 2022 Preliminary Analysis, DOE established separate average mechanical lifetime estimates for single phase and polyphase ESEMs and AO–ESEMs. DOE then developed Weibull distributions of mechanical lifetimes (in hours). The lifetime in years for a sampled electric motor is calculated by dividing the sampled mechanical lifetime by the sampled annual operating hours of the electric motor. In addition, DOE considered that ESEMs and AO–ESEMs are typically embedded in a piece of equipment (*i.e.,* an application). For such applications, DOE developed Weibull distributions of application lifetimes expressed in years and compared the sampled motor mechanical lifetime (in years) with the sampled application lifetime. DOE assumed that the electric motor would be retired at the earlier of the two ages. See section 8.3.4 of the March 2022 Preliminary Analysis.

In response to the March 2022 Preliminary Analysis, EASA commented that the definition of lifetime must be clear and should be provided in a separate ''Definitions'' section. (EASA, No. 21 at p. 5) In response, DOE notes that it considers a motor lifetime as the age at which an equipment is retired from service and describes the term in chapter 8 of the NOPR TSD (this was also described in chapter 8 of the March 2022 Preliminary Analysis).

DOE did not receive any comments regarding ESEMs and AO–ESEMs lifetimes and continued to apply the same approach in this NOPR as in the March 2022 Preliminary Analysis.

DOE requests comment on the equipment lifetimes (both in years and in mechanical hours) used for each representative unit considered in the LCC and PBP analyses.

7. Discount Rates

In the calculation of LCC, DOE applies discount rates appropriate to consumers to estimate the present value of future operating cost savings. DOE estimated a distribution of sector-specific discount rates for ESEMs based on the opportunity cost of consumer funds.

DOE applies weighted average discount rates calculated from consumer debt and asset data, rather than marginal or implicit discount rates.[62] The LCC analysis estimates net present value over the lifetime of the equipment, so the appropriate discount rate will reflect the general opportunity cost of consumer funds, taking this time scale into account. Given the long-time horizon modeled in the LCC, the application of a marginal interest rate associated with an initial source of funds is inaccurate. Regardless of the method of purchase, consumers are expected to continue to rebalance their debt and asset holdings over the LCC analysis period, based on the restrictions consumers face in their debt payment requirements and the relative size of the interest rates available on debts and assets. DOE estimates the aggregate impact of this rebalancing using the historical distribution of debts and assets.

To establish residential discount rates for the LCC analysis, DOE identified all relevant household debt or asset classes in order to approximate a consumer's opportunity cost of funds related to appliance energy cost savings. It estimated the average percentage shares of the various types of debt and equity by household income group using data from the Federal Reserve Board's triennial Survey of Consumer Finances[63] (''SCF'') starting in 1995 and ending in 2019. Using the SCF and other sources, DOE developed a distribution of rates for each type of debt and asset by income group to represent the rates that may apply in the year in which the new standards would take effect. DOE assigned each sample household a specific discount rate drawn from one of the distributions. The average rate across all types of household debt and equity and income groups, weighted by the shares of each type, is 3.7 percent.

To establish non-residential discount rates, DOE estimated the weighted-average cost of capital using data from Damodaran Online.[64] The weighted-average cost of capital is commonly used to estimate the present value of cash flows to be derived from a typical company project or investment. Most companies use both debt and equity capital to fund investments, so their cost of capital is the weighted average of the cost to the firm of equity and debt financing. DOE estimated the cost of equity using the capital asset pricing

[62] The implicit discount rate is inferred from a consumer purchase decision between two otherwise identical goods with different first cost and operating cost. It is the interest rate that equates the increment of first cost to the difference in net present value of lifetime operating cost, incorporating the influence of several factors: transaction costs; risk premiums and response to uncertainty; time preferences; interest rates at which a consumer is able to borrow or lend. The implicit discount rate is not appropriate for the LCC analysis because it reflects a range of factors that influence consumer purchase decisions, rather than the opportunity cost of the funds that are used in purchases.

[63] Federal Reserve Board. *Survey of Consumer Finances (SCF)* for 1995, 1998, 2001, 2004, 2007, 2010, 2013, 2016, and 2019.

[64] Damodaran, A. *Data Page: Historical Returns on Stocks, Bonds and Bills—United States.* 2021. *pages.stern.nyu.edu/~adamodar/* (last accessed April 26, 2022).

model, which assumes that the cost of equity for a particular company is proportional to the systematic risk faced by that company. The average commercial and industrial discount rates are 6.8 percent and 7.3 percent, respectively.

See chapter 8 of the NOPR TSD for further details on the development of consumer discount rates.

8. Energy Efficiency Distribution in the No-New-Standards Case

To accurately estimate the share of consumers that would be affected by a potential energy conservation standard at a particular efficiency level, DOE's LCC analysis considered the projected distribution (market shares) of equipment efficiencies under the no-new-standards case (*i.e.,* the case without amended or new energy conservation standards).

In the March 2022 Preliminary Analysis, DOE relied on model counts by efficiency from the 2016 and 2020 Manufacturer Catalog Data to estimate the energy efficiency distribution of electric motors for 2027 and assumed no changes in electric motor efficiency over time. For some AO–ESEM representative units, DOE did not have enough models with efficiency information and used the efficiency distributions of the corresponding non-AO equipment class instead. In the March 2022 Preliminary Analysis, DOE used a Monte Carlo simulation to draw from the efficiency distributions and randomly assign an efficiency to the electric motor purchased by each sample household in the no-new-standards case. The resulting percent shares within the sample match the market shares in the efficiency distributions. *See* chapter 8 of the March 2022 Preliminary TSD.

In response to the March 2022 Preliminary Analysis, NEMA disagreed with the DOE estimates for ESEM and AO–ESEM efficiency distributions and commented that these distributions were modeled/estimated, rather than gathered properly and accurately through testing and other means. NEMA commented that DOE should not develop estimates and interpolations and instead finalize test procedures. NEMA added that energy efficiency information does not exist because Federal test procedures for some of these motors have not been established. (NEMA, No. 22 at p. 23)

As noted previously, due to the very high volume of combinations of motor topologies, horsepower, frame sizes, pole counts, speeds, unique motor construction, and other parameters, DOE has recognized it to be unrealistic to test every possible motor available in the U.S. market. In the absence of such data, DOE relied on model counts by efficiency from manufacturer Catalog Data and updated the data to reflect 2022 catalog offerings (using the 2022 Motor Database). In addition, the electric motors test procedure finalized in the October 2022 Final Rule relies on industry test methods published in 2016.[65] 87 FR 63588. For ESEMs, DOE believes manufacturers have used, and currently use, these industry test methods to evaluate the efficiency of electric motors as reported in their catalogs.

As previously noted, in the March 2022 Preliminary Analysis, DOE assumed no changes in electric motor efficiency over time. DOE did not receive any comment on this assumption and retained the same approach in this NOPR: to estimate the energy efficiency distribution of electric motors for 2029, DOE assumed no changes in electric motor efficiency over time. The estimated market shares for the no-new-standards case for electric motors are shown in Table IV–8 by equipment class group and horsepower range.

TABLE IV–8—NO-NEW STANDARDS CASE EFFICIENCY DISTRIBUTIONS IN THE COMPLIANCE YEAR

Equipment class group	Horsepower range	EL0 (%)	EL1 (%)	EL2 (%)	EL3 (%)	EL4 (%)
ESEM High/Med Torque	0.25 ≤ hp ≤ 0.50	24.1	43.1	16.2	16.0	0.7
	0.5 < hp ≤ 3	37.5	49.1	11.9	1.4	0.1
ESEM Low Torque	0.25 hp	4.2	16.0	79.9	0.0	0.0
	0.25 < hp ≤ 3	41.5	22.0	26.8	9.8	0.0
ESEM Polyphase	0.25 ≤ hp ≤ 3	9.6	23.1	53.3	13.4	0.5
AO–ESEM High/Med Torque	0.25 ≤ hp ≤ 0.50	26.7	33.3	20.0	6.7	13.3
	0.5 < hp ≤ 3	32.4	38.2	17.6	11.8	0.0
AO–ESEM Low Torque	0.25 hp	1.8	21.8	58.2	18.2	0.0
	0.25 < hp ≤ 3	9.8	26.1	55.4	8.7	0.0
AO–ESEM Polyphase	0.25 ≤ hp ≤ 3	37.7	26.0	33.8	2.6	0.0

* May not sum to 100% due to rounding.

The LCC Monte Carlo simulations draw from the efficiency distributions and randomly assign an efficiency to the ESEM purchased by each sample household in the no-new-standards case. The resulting percent shares within the sample match the market shares in the efficiency distributions.

The existence of market failures in the commercial and industrial sectors is well supported by the economics literature and by a number of case studies as discussed in the remainder of this section. DOE did not receive any comments specific to the random assignment of no-new-standards case efficiencies (sampled from the developed efficiency distribution) in the LCC model and continued to rely on the same approach to reflect market failures in the ESEM market, as noted in the following examples. First, a recognized problem in commercial settings is the principal-agent problem, where the building owner (or building developer) selects the equipment and the tenant (or subsequent building owner) pays for energy costs.[66] [67] In the case of ESEMs, for many companies, the energy bills are paid for the company as a whole and

[65] NEMA Standards Publication MG 1–2016, ''Motors and Generators: Air-Over Motor Efficiency Test Method Section IV Part 34'', *www.nema.org/docs/default-source/standards-document-library/part-34-addition-to-mg1-2016-watermarkd91d7834-cf4f-4a87-b86f-bef96b7dad54.pdf?sfvrsn=cbf1386d_3.*

[66] Vernon, D., and Meier, A. (2012). ''Identification and quantification of principal-agent problems affecting energy efficiency investments and use decisions in the trucking industry,'' *Energy Policy,* 49, 266–273.

[67] Blum, H. and Sathaye, J. (2010). ''Quantitative Analysis of the Principal-Agent Problem in Commercial Buildings in the U.S.: Focus on Central Space Heating and Cooling,'' Lawrence Berkeley National Laboratory, LBNL–3557E. (Available at: *escholarship.org/uc/item/6p1525mg*) (Last accessed January 20, 2022).

not allocated to individual departments. This practice provides maintenance and engineering staff little incentives to pursue energy saving investments because the savings in energy bills provide little benefits to the decision-making maintenance and engineering staff. (Nadel et al.)[68] Second, the nature of the organizational structure and design can influence priorities for capital budgeting, resulting in choices that do not necessarily maximize profitability.[69] In the case of ESEMs, within manufacturing as a whole, motor system energy costs constitute less than 1 percent of total operating costs and energy efficiency has a low level of priority among capital investment and operating objectives. (Xenergy,[70] Nadel et al.) Third, there are asymmetric information and other potential market failures in financial markets in general, which can affect decisions by firms with regard to their choice among alternative investment options, with energy efficiency being one such option.[71] In the case of electric motors, Xenergy identified the lack of information concerning the nature of motor system efficiency measures—their benefits, costs, and implementation procedures—as a principal barrier to their adoption. In addition, Almeida[72] reports that the attitude of electric motor end-user is characterized by bounded rationality where they adopt ''rule of thumb'' routines because of the complexity of market structure which makes it difficult for motors end-users to get all the information they need to make an optimum decision concerning allocation of resources. The rule of thumb is to buy the same type and brand as the failed motor from the nearest retailer. Almeida adds that the same problem of bounded rationality exists when end-users purchase electric motors incorporated in larger equipment. In general, end-users are only concerned about the overall performance of a machine, and energy efficiency is rarely a key factor in this performance. Motor selection is therefore often left to the OEM, which are not responsible for energy costs and prioritize price and reliability.

See chapter 8 of the NOPR TSD for further information on the derivation of the efficiency distributions.

DOE seeks information and data to help establish efficiency distribution in the no-new standards case for ESEMs. DOE requests data and information on any trends in the electric motor market that could be used to forecast expected trends in market share by efficiency levels for each equipment class.

9. Payback Period Analysis

The payback period is the amount of time (expressed in years) it takes the consumer to recover the additional installed cost of more-efficient equipment, compared to baseline equipment, through energy cost savings. Payback periods that exceed the life of the equipment mean that the increased total installed cost is not recovered in reduced operating expenses.

The inputs to the PBP calculation for each efficiency level are the change in total installed cost of the equipment and the change in the first-year annual operating expenditures relative to the baseline. DOE refers to this as a ''simple PBP'' because it does not consider changes over time in operating cost savings. The PBP calculation uses the same inputs as the LCC analysis when deriving first-year operating costs.

As noted previously, EPCA establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that the additional cost to the consumer of purchasing an equipment complying with an energy conservation standard level will be less than three times the value of the first year's energy savings resulting from the standard, as calculated under the applicable test procedure. (42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(2)(B)(iii)) For each considered efficiency level, DOE determined the value of the first year's energy savings by calculating the energy savings in accordance with the applicable DOE test procedure, and multiplying those savings by the average energy price projection for the year in which compliance with the new standards would be required.

G. Shipments Analysis

DOE uses projections of annual equipment shipments to calculate the national impacts of potential new energy conservation standards on energy use, NPV, and future manufacturer cash flows.[73] The shipments model takes an accounting approach, tracking market shares of each equipment class and the vintage of units in the stock. Stock accounting uses equipment shipments as inputs to estimate the age distribution of in-service product stocks for all years. The age distribution of in-service product stocks is a key input to calculations of both the NES and NPV, because operating costs for any year depend on the age distribution of the stock.

First, in the March 2022 Preliminary Analysis, DOE estimated shipments in the base year (2020). DOE estimated the total shipments of ESEMs in 2020 to be 28.6 million units (including 7.9 million units of AO ESEMs). DOE developed a distribution of shipments by equipment class group and horsepower range based on model counts from the 2020 and 2016/2020 Manufacturer Catalog Data. See chapter 9 of the March 2022 Preliminary Analysis TSD.

DOE did not receive any comments related to the base year shipments estimates for ESEMs and retained the values estimated in the preliminary analysis in this NOPR, however, DOE only included motors up to 3hp, which were in the recommended scope of the December 2022 Joint Recommendation. For ESEMs (including AO ESEMs), DOE revised the distribution of shipments by horsepower range based on model counts from the 2022 Manufacturer Catalog Data.

In the March 2022 Preliminary Analysis, DOE projected shipments for ESEMs in the no-new standards case under the assumption that long-term growth of electric motor shipments will be driven the following sector-specific market drivers from *AEO2021:* commercial building floor space, housing numbers, and value of manufacturing activity for the commercial, residential, and industrial sector, respectively. In addition, DOE kept the distribution of shipments by

[68] Nadel, S., R.N. Elliott, M. Shepard, S. Greenberg, G. Katz & A.T. de Almedia. 2002. *Energy-Efficient Motor Systems: A Handbook on Technology, Program and Policy Opportunities.* Washington, DC: American Council for an Energy-Efficient Economy. Second Edition.

[69] DeCanio, S.J. (1994). ''Agency and control problems in US corporations: the case of energy-efficient investment projects,'' *Journal of the Economics of Business,* 1(1), 105–124.

Stole, L.A., and Zwiebel, J. (1996). ''Organizational design and technology choice under intrafirm bargaining,'' *The American Economic Review,* 195–222.

[70] Xenergy, Inc. (1998). United States Industrial Electric Motor Systems Market Opportunity Assessment. (Available at: *www.energy.gov/sites/default/files/2014/04/f15/mtrmkt.pdf*) (Last accessed January 20, 2022).

[71] Fazzari, S.M., Hubbard, R.G., Petersen, B.C., Blinder, A.S., and Poterba, J.M. (1988). ''Financing constraints and corporate investment,'' *Brookings Papers on Economic Activity,* 1988(1), 141–206.

Cummins, J.G., Hassett, K.A., Hubbard, R.G., Hall, R.E., and Caballero, R.J. (1994). ''A reconsideration of investment behavior using tax reforms as natural experiments,'' *Brookings Papers on Economic Activity,* 1994(2), 1–74.

DeCanio, S.J., and Watkins, W.E. (1998). ''Investment in energy efficiency: do the characteristics of firms matter?'' *Review of Economics and Statistics,* 80(1), 95–107.

Hubbard R.G. and Kashyap A. (1992). ''Internal Net Worth and the Investment Process: An Application to U.S. Agriculture,'' *Journal of Political Economy,* 100, 506–534.

[72] de Almeida, E.L.F. (1998). ''Energy efficiency and the limits of market forces: The example of the electric motor market in France'', *Energy Policy,* 26(8), 643–653.

[73] DOE uses data on manufacturer shipments as a proxy for national sales, as aggregate data on sales are lacking. In general, one would expect a close correspondence between shipments and sales.

equipment class group and horsepower range constant across the analysis period.

In response to the March 2022 Preliminary Analysis, NEMA commented that legacy induction motors are being replaced by PDS (or power drive systems) consisting of a motor and controls/drives as a means to dramatically reduce power and integrate motor driven systems into sophisticated control schemes that continuously monitor processes managing flow, pressure, etc., to reduce operating costs and emissions. (NEMA, No. 22 at p. 23) In the case of ESEMs, DOE agrees with NEMA that some ESEMs could be replaced by non-induction motors such as ECMs. However, DOE does not have sufficient data to quantify the magnitude of such substitution, which could result in lower ESEM shipments. Instead, DOE established two additional shipments sensitivity scenario to account for the impacts of lower/higher ESEMs shipments estimates.

DOE did not receive any other comments specific to ESEM shipments projections and retained the same methodology as in the March 2022 Preliminary Analysis in this NOPR and revised the projections based on *AEO2023.*

DOE requests comment and additional data on its 2020 shipments estimates for ESEMs. DOE seeks comment on the methodology used to project future shipments of ESEMs. DOE seeks information on other data sources that can be used to estimate future shipments.

H. National Impact Analysis

The NIA assesses the NES and the NPV from a national perspective of total consumer costs and savings that would be expected to result from new standards at specific efficiency levels.[74] (''Consumer'' in this context refers to consumers of the equipment being regulated.) DOE calculates the NES and NPV for the potential standard levels considered based on projections of annual equipment shipments, along with the annual energy consumption and total installed cost data from the energy use and LCC analyses. For the present analysis, DOE projected the energy savings, operating cost savings, product costs, and NPV of consumer benefits over the lifetime of ESEMs sold from 2029 through 2058.

DOE evaluates the impacts of new standards by comparing a case without such standards with standards-case projections. The no-new-standards case characterizes energy use and consumer costs for each equipment class in the absence of new energy conservation standards. For this projection, DOE considers any historical trends in efficiency and various forces that are likely to affect the mix of efficiencies over time. DOE compares the no-new-standards case with projections characterizing the market for each equipment class if DOE adopted new standards at specific energy efficiency levels (*i.e.,* the TSLs or standards cases) for that class. For the standards cases, DOE considers how a given standard would likely affect the market shares of equipment with efficiencies greater than the standard.

DOE uses a spreadsheet model to calculate the energy savings and the national consumer costs and savings from each TSL. Interested parties can review DOE's analyses by changing various input quantities within the spreadsheet. The NIA spreadsheet model uses typical values (as opposed to probability distributions) as inputs.

Table IV–9 summarizes the inputs and methods DOE used for the NIA analysis for the NOPR. Discussion of these inputs and methods follows the table. See chapter 10 of the NOPR TSD for further details.

TABLE IV–9—SUMMARY OF INPUTS AND METHODS FOR THE NATIONAL IMPACT ANALYSIS

Inputs	Method
Shipments	Annual shipments from shipments model.
Compliance Date of Standard	2029.
Efficiency Trends	*No-new-standards case:* constant trend. *Standards cases:* constant trend.
Annual Energy Consumption per Unit	Annual weighted-average values are a function of energy use at each TSL.
Total Installed Cost per Unit	Annual weighted-average values are a function of cost at each TSL. Incorporates projection of future product prices based on historical data. (constant trend).
Annual Energy Cost per Unit	Annual weighted-average values as a function of the annual energy consumption per unit and energy prices.
Repair and Maintenance Cost per Unit	*Maintenance costs:* No change with efficiency level. *Repair costs:* No repair.
Energy Price Trends	*AEO2023* projections (to 2050) and held constant thereafter.
Energy Site-to-Primary and FFC Conversion	A time-series conversion factor based on *AEO2023.*
Discount Rate	Three and seven percent.
Present Year	2024.

1. Equipment Efficiency Trends

A key component of the NIA is the trend in energy efficiency projected for the no-new-standards case and each of the standards cases. Section IV.F.8 of this document describes how DOE developed an energy efficiency distribution for the no-new-standards case (which yields a shipment-weighted average efficiency) for each of the considered equipment classes for the year of anticipated compliance with a new standard. To project the trend in efficiency absent new standards for ESEMs and AO–ESEMs over the entire shipments projection period, DOE applied a constant trend, similar to what was done in the March 2022 Preliminary Analysis. The approach is further described in chapter 10 of the NOPR TSD.

For the standards cases, DOE used a ''roll-up'' scenario to establish the shipment-weighted efficiency for the year that standards are assumed to become effective (2029). In this scenario, the market shares of equipment in the no-new-standards case that do not meet the standard under consideration would ''roll up'' to meet the new standard level, and the market share of products above the standard would remain unchanged.

[74] The NIA accounts for impacts in the 50 states and U.S. territories.

To develop standards case efficiency trends after 2029, DOE assumed no change over the forecast period.

DOE did not receive any comments on the projected efficiency trends in response to the March 2022 Preliminary Analysis and retained the same approach in this NOPR.

2. National Energy Savings

The national energy savings analysis involves a comparison of national energy consumption of the considered products between each potential standards case (''TSL'') and the case with no new energy conservation standards. DOE calculated the national energy consumption by multiplying the number of units (stock) of each equipment (by vintage or age) by the unit energy consumption (also by vintage). DOE calculated annual NES based on the difference in national energy consumption for the no-new-standards case and for each higher efficiency standard case. DOE estimated energy consumption and savings based on site energy and converted the electricity consumption and savings to primary energy (*i.e.,* the energy consumed by power plants to generate site electricity) using annual conversion factors derived from *AEO2023.* Cumulative energy savings are the sum of the NES for each year over the timeframe of the analysis.

Use of higher-efficiency equipment is sometimes associated with a direct rebound effect, which refers to an increase in utilization of the equipment due to the increase in efficiency. In the March 2022 Preliminary Analysis, DOE requested comment and data regarding the potential increase in utilization of electric motors due to any increase in efficiency. *See* section 2.10.1 of the March 2022 Preliminary TSD. DOE did not find any data on the rebound effect specific to electric motors [75] and did not receive any comments supporting the inclusion of a rebound effect for ESEMs and AO–ESEMs. Therefore, DOE did not apply a rebound effect for ESEMs and AO–ESEMs.

In 2011, in response to the recommendations of a committee on ''Point-of-Use and Full-Fuel-Cycle Measurement Approaches to Energy Efficiency Standards'' appointed by the National Academy of Sciences, DOE announced its intention to use FFC measures of energy use and greenhouse gas and other emissions in the national impact analyses and emissions analyses included in future energy conservation standards rulemakings. 76 FR 51281 (Aug. 18, 2011). After evaluating the approaches discussed in the August 18, 2011 notice, DOE published a statement of amended policy in which DOE explained its determination that EIA's National Energy Modeling System (''NEMS'') is the most appropriate tool for its FFC analysis and its intention to use NEMS for that purpose. 77 FR 49701 (Aug. 17, 2012). NEMS is a public domain, multi-sector, partial equilibrium model of the U.S. energy sector [76] that EIA uses to prepare its *Annual Energy Outlook.* The FFC factors incorporate losses in production and delivery in the case of natural gas (including fugitive emissions) and additional energy used to produce and deliver the various fuels used by power plants. The approach used for deriving FFC measures of energy use and emissions is described in appendix 10B of the NOPR TSD.

3. Net Present Value Analysis

The inputs for determining the NPV of the total costs and benefits experienced by consumers are (1) total annual installed cost, (2) total annual operating costs (energy costs and repair and maintenance costs), and (3) a discount factor to calculate the present value of costs and savings. DOE calculates net savings each year as the difference between the no-new-standards case and each standards case in terms of total savings in operating costs versus total increases in installed costs. DOE calculates operating cost savings over the lifetime of each equipment shipped during the projection period.

As discussed in section IV.F.1 of this document, DOE developed constant ESEM price trends based on historical PPI data. DOE applied the same trends to project prices for each equipment class at each considered efficiency level. DOE's projection of equipment prices is described in appendix 10C of the NOPR TSD.

To evaluate the effect of uncertainty regarding the price trend estimates, DOE investigated the impact of different equipment price projections on the consumer NPV for the considered TSLs for ESEMs. In addition to the default price trend, DOE considered two equipment price sensitivity cases: (1) a high price decline case and (2) a low price decline case based on historical PPI data. The derivation of these price trends and the results of these sensitivity cases are described in appendix 10C of the NOPR TSD.

The energy cost savings are calculated using the estimated energy savings in each year and the projected price of the appropriate form of energy. To estimate energy prices in future years, DOE multiplied the average regional energy prices by the projection of annual national-average residential energy price changes in the Reference case from *AEO2023,* which has an end year of 2050. To estimate price trends after 2050, the 2050 value was used for all years. As part of the NIA, DOE also analyzed scenarios that used inputs from variants of the *AEO2023* Reference case that have lower and higher economic growth. Those cases have lower and higher energy price trends compared to the Reference case. NIA results based on these cases are presented in appendix 10C of the NOPR TSD.

In calculating the NPV, DOE multiplies the net savings in future years by a discount factor to determine their present value. For this NOPR, DOE estimated the NPV of consumer benefits using both a 3-percent and a 7-percent real discount rate. DOE uses these discount rates in accordance with guidance provided by the Office of Management and Budget (''OMB'') to Federal agencies on the development of regulatory analysis.[77] The discount rates for the determination of NPV are in contrast to the discount rates used in the LCC analysis, which are designed to reflect a consumer's perspective. The 7-percent real value is an estimate of the average before-tax rate of return to private capital in the U.S. economy. The 3-percent real value represents the ''social rate of time preference,'' which is the rate at which society discounts future consumption flows to their present value.

DOE requests comment and data regarding the potential increase in utilization of electric motors due to any increase in efficiency (''rebound effect'').

I. Consumer Subgroup Analysis

In analyzing the potential impact of new energy conservation standards on consumers, DOE evaluates the impact on identifiable subgroups of consumers that may be disproportionately affected by a new national standard. The purpose of a subgroup analysis is to determine the extent of any such

[75] *See, e.g.,* 86 FR 36111 for further discussion regarding DOE's explanation and findings regarding rebound effect for electric motors, broadly.

[76] For more information on NEMS, refer to *The National Energy Modeling System: An Overview 2009,* DOE/EIA–0581(2009), October 2009. Available at *www.eia.gov/forecasts/aeo/index.cfm* (last accessed 5/1/2023).

[77] United States Office of Management and Budget. *Circular A–4: Regulatory Analysis.* September 17, 2003. Section E. Available at *georgewbush-whitehouse.archives.gov/omb/memoranda/m03-21.html* (last accessed May 1, 2023).

disproportional impacts. DOE evaluates impacts on particular subgroups of consumers by analyzing the LCC impacts and PBP for those particular consumers from alternative standard levels. For this NOPR, DOE analyzed the impacts of the considered standard levels on three subgroups: (1) low-income households (for ESEMs used in the residential sector); (2) senior-only households (for ESEMs used in the residential sector); and (3) small-businesses. The analysis used subsets of the RECS 2020 sample composed of households that meet the criteria for the low-income and senior-only household subgroups. For small-businesses subgroup, DOE used the same sample of consumers but with subgroup-specific inputs. DOE determined the impact on the electric motors subgroups using the same LCC model, which is used for all consumers, but with subgroup-specific inputs as applicable.

In response to the March 2022 Preliminary Analysis, AHAM and AHRI commented that a forced redesign of motors used in finished goods will force changes by the OEM. AHAM and AHRI commented that this would be particularly damaging for small appliances and floor care products, which use special purpose motors and are sensitive to even small increases in component part costs. AHAM and AHRI commented that the increased cost could make some appliances and equipment too costly for low-income consumers to purchase and delay purchases of more efficient appliances and equipment for middle-income consumers. (AHAM and AHRI, No. 25 at pp. 9–10) In response to these comments, DOE performed a subgroup analysis for low-income consumers showing these consumers would not be disproportionately impacted. *See* section V.B.1.b of this document.

Chapter 11 in the NOPR TSD describes the consumer subgroup analysis.

DOE requests comment and data on the overall methodology used for the consumer subgroup analysis. DOE requests comment on whether additional consumer subgroups may be disproportionately affected by a new standard and warrant additional analysis in the final rule.

J. Manufacturer Impact Analysis

1. Overview

DOE performed an MIA to estimate the financial impacts of new energy conservation standards on manufacturers of ESEMs and to estimate the potential impacts of such standards on employment and manufacturing capacity. The MIA has both quantitative and qualitative aspects and includes analyses of projected industry cash flows, the INPV, investments in research and development (''R&D'') and manufacturing capital, and domestic manufacturing employment. Additionally, the MIA seeks to determine how new energy conservation standards might affect manufacturing employment, capacity, and competition, as well as how standards contribute to overall regulatory burden. Finally, the MIA serves to identify any disproportionate impacts on manufacturer subgroups, including small business manufacturers.

The quantitative part of the MIA primarily relies on the GRIM, an industry cash flow model with inputs specific to this proposed rulemaking. The key GRIM inputs include data on the industry cost structure, unit production costs, equipment shipments, manufacturer markups, and investments in R&D and manufacturing capital required to produce compliant products. The key GRIM outputs are the INPV, which is the sum of industry annual cash flows over the analysis period, discounted using the industry-weighted average cost of capital, and the impact to domestic manufacturing employment. The model uses standard accounting principles to estimate the impacts of energy conservation standards on a given industry by comparing changes in INPV and domestic manufacturing employment between a no-new-standards case and the various standards cases (*i.e.,* TSLs). To capture the uncertainty relating to manufacturer pricing strategies following new standards, the GRIM estimates a range of possible impacts under different manufacturer markup scenarios.

The qualitative part of the MIA addresses manufacturer characteristics and market trends. Specifically, the MIA considers such factors as a potential standard's impact on manufacturing capacity, competition within the industry, the cumulative impact of other DOE and non-DOE regulations, and impacts on manufacturer subgroups. The complete MIA is outlined in chapter 12 of the NOPR TSD.

DOE conducted the MIA for this rulemaking in three phases. In Phase 1 of the MIA, DOE prepared a profile of the ESEMs manufacturing industry based on the market and technology assessment, preliminary manufacturer interviews, and publicly-available information. This included a top-down analysis of ESEM manufacturers that DOE used to derive preliminary financial inputs for the GRIM (*e.g.,* revenues; materials, labor, overhead, and depreciation expenses; selling, general, and administrative expenses (''SG&A''); and R&D expenses). DOE also used public sources of information to further calibrate its initial characterization of the ESEM manufacturing industry, including company filings of form 10–K from the SEC, corporate annual reports,[78] the U.S. Census Bureau's *Economic Census,*[79] and reports from D&B Hoovers.[80]

In Phase 2 of the MIA, DOE prepared a framework industry cash-flow analysis to quantify the potential impacts of new energy conservation standards. The GRIM uses several factors to determine a series of annual cash flows starting with the announcement of the standard and extending over a 30-year period following the compliance date of the standard. These factors include annual expected revenues, costs of sales, SG&A and R&D expenses, taxes, and capital expenditures. In general, energy conservation standards can affect manufacturer cash flow in three distinct ways: (1) creating a need for increased investment, (2) raising production costs per unit, and (3) altering revenue due to higher per-unit prices and changes in sales volumes.

In addition, during Phase 2, DOE developed interview guides to distribute to manufacturers of ESEMs in order to develop other key GRIM inputs, including product and capital conversion costs, and to gather additional information on the anticipated effects of energy conservation standards on revenues, direct employment, capital assets, industry competitiveness, and subgroup impacts.

In Phase 3 of the MIA, DOE conducted structured, detailed interviews with representative manufacturers. During these interviews, DOE discussed engineering, manufacturing, procurement, and financial topics to validate assumptions used in the GRIM and to identify key issues or concerns. See section IV.J.3 of this document for a description of the key issues raised by manufacturers during the interviews. As part of Phase 3, DOE also evaluated subgroups of manufacturers that may be disproportionately impacted by new standards or that may not be accurately represented by the average cost assumptions used to develop the industry cash flow analysis. Such manufacturer subgroups may include

[78] *See www.sec.gov/edgar.*

[79] *See www.census.gov/programs-surveys/asm/data/tables.html.*

[80] *See app.avention.com.*

small business manufacturers, low-volume manufacturers, niche players, and/or manufacturers exhibiting a cost structure that largely differs from the industry average. DOE identified one subgroup for a separate impact analysis: small business manufacturers. The small business subgroup is discussed in section VI.B, ''Review under the Regulatory Flexibility Act'', of this document and in chapter 12 of the NOPR TSD.

2. Government Regulatory Impact Model and Key Inputs

DOE uses the GRIM to quantify the changes in cash flow due to new standards that result in a higher or lower industry value. The GRIM uses a standard, annual discounted cash-flow analysis that incorporates manufacturer costs, markups, shipments, and industry financial information as inputs. The GRIM models changes in costs, distribution of shipments, investments, and manufacturer margins that could result from new energy conservation standard. The GRIM spreadsheet uses the inputs to arrive at a series of annual cash flows, beginning in 2024 (the base year of the analysis) and continuing to 2058. DOE calculated INPVs by summing the stream of annual discounted cash flows during this period. For manufacturers of ESEMs, DOE initially estimated a real discount rate of 9.1 percent, which was the real discount rate used in the previous medium electric motors final rule that published on May 29, 2014 (''May 2014 Electric Motors Final Rule''). 79 FR 30934, 30938. DOE then asked for feedback on this value during manufacturer interviews. Manufacturers agreed this was still an appropriate value to use. Therefore, DOE used a real discount rate of 9.1 percent for the analysis in this NOPR.

The GRIM calculates cash flows using standard accounting principles and compares changes in INPV between the no-new-standards case and each standards case. The difference in INPV between the no-new-standards case and a standards case represents the financial impact of new energy conservation standards on manufacturers. As discussed previously, DOE developed critical GRIM inputs using a number of sources, including publicly available data, results of the engineering analysis, and information gathered from industry stakeholders during the course of manufacturer interviews and subsequent working group meetings. The GRIM results are presented in section V.B.2 of this document. Additional details about the GRIM, the discount rate, and other financial parameters can be found in chapter 12 of the NOPR TSD.

a. Manufacturer Production Costs

Manufacturing more efficient equipment is typically more expensive than manufacturing baseline equipment due to the use of more complex components, which are typically more costly than baseline components. The changes in the MPCs of covered equipment can affect the revenues, gross margins, and cash flow of the industry.

DOE conducted the engineering analysis using a combination of physical teardowns and software modeling. DOE contracted a professional motor laboratory to disassemble various ESEMs and record what types of materials were present and how much of each material was present, recorded in a final BOM. To supplement the physical teardowns, software modeling by a subject matter expert was also used to generate BOMs for select efficiency levels of directly analyzed representative units.

For a complete description of the MPCs, see chapter 5 of the NOPR TSD.

b. Shipments Projections

The GRIM estimates manufacturer revenues based on total unit shipment projections and the distribution of those shipments by efficiency level. Changes in sales volumes and efficiency mix over time can significantly affect manufacturer finances. For this analysis, the GRIM uses the NIA's annual shipment projections derived from the shipments analysis from 2024 (the base year) to 2058 (the end year of the analysis period). See chapter 9 of the NOPR TSD for additional details.

c. Product and Capital Conversion Costs

New energy conservation standards could cause manufacturers to incur conversion costs to bring their production facilities and equipment designs into compliance. DOE evaluated the level of conversion-related expenditures that would be needed to comply with each considered efficiency level in each equipment class. For the MIA, DOE classified these conversion costs into two major groups: (1) product conversion costs; and (2) capital conversion costs. Product conversion costs are investments in research, development, testing, marketing, and other non-capitalized costs necessary to make equipment designs comply with new energy conservation standards. Capital conversion costs are investments in property, plant, and equipment necessary to adapt or change existing production facilities such that new compliant equipment designs can be fabricated and assembled.

DOE calculated the product and capital conversion costs using a bottom-up approach based on feedback from manufacturers during manufacturer interviews. During manufacturer interviews, DOE asked manufacturers questions regarding the estimated equipment and capital conversion costs needed to produce ESEMs within an equipment class at each specific EL. DOE used the feedback provided by manufacturers to estimate the approximate amount of engineering time, testing costs, and capital equipment that would need to be purchased in order to redesign a single frame size for each EL. Some of the types of capital conversion costs manufacturers identified were the purchase of lamination die sets, winding machines, frame casts, and assembly equipment as well as other retooling costs. The two main types of product conversion costs manufacturers shared with DOE during interviews were the number of engineer hours necessary to re-engineer frames to meet higher efficiency standards and the testing costs, including thermal protection testing, to comply with higher efficiency standards.

DOE then took average values (*i.e.,* costs or number of hours) based on the range of responses given by manufacturers to calculate both the equipment and capital conversion cost necessary for a manufacturer to increase the efficiency of one frame size to a specific EL. DOE multiplied the conversion costs associated with manufacturing a single frame size at each EL by the number of frames each interviewed manufacturer produces. DOE finally scaled this number based on the market share of the manufacturers DOE interviewed to arrive at an industry-wide bottom-up product and capital conversion cost estimate for each representative unit at each EL.

In response to the March 2022 Preliminary Analysis, the Joint Industry Stakeholders and Lennox commented that there may be instances where substitution of a newer, larger, heavier, faster ESEM is feasible, but that it was not reasonable to assume this is always the case. The Joint Industry Stakeholders and Lennox added that OEM companies would be forced to expend significant resources seeking retrofit and repair options for recently purchased end-use OEM goods to account for unnecessary motor subcomponent changes. (Joint Industry Stakeholders, No. 23 at pp. 5–6; Lennox, No. 29 at p. 5) The Joint Industry

Stakeholders added that this could particularly impact small businesses. (Joint Industry Stakeholders, No. 23 at p. 5–6) The Joint Stakeholder also commented that while OEM manufacturers would likely redesign product, and incur a cost to do so, to avoid issues resulting from new motors, there may not be suitable replacement motors, which are immediately available due to DOE's proposed certification requirements, limiting approvals to a few third-party labs. The Joint Stakeholder added that these costs need to be accounted for in DOE's analysis. (*Id.* at p. 8)

In this NOPR, as noted in section IV.C.1 of this document, DOE assumes higher efficiency levels can be reached without resulting in any significant size increase and without changing the key electrical and mechanical characteristics of the motor. Therefore, DOE disagrees with the Joint Stakeholders and Lennox that the higher efficiency levels would force OEMs to redesign their equipment and result in redesign and re-tooling costs.

As previously discussed, DOE revised the March 2022 Preliminary Analysis to account for space-constrained and non-space constrained motor designs, which will continue to provide repair options to consumers. As stated in the December 2022 Joint Recommendation, motor manufacturers believe that efficiency levels higher than EL 2 could result in significant increases in the physical size of certain motors. (Electric Motors Working Group, No. 38 at p. 4) As part of the engineering analysis, DOE models representative units that are able to meet the efficiency requirements of EL 2 and below that would not result in a significantly increase in the physical size of the ESEMs. For ELs higher than EL 2 (*i.e.,* EL 3 and EL 4), DOE recognizes that ESEMs may significantly increase in physical size in order to meet those higher efficiency requirements. DOE also recognizes that this may result in a significant disruption to the OEM markets that used ESEMs as an embedded product. In addition, as discussed in section IV.C.3 of this document, DOE accounted for the impacts of any potential changes in speeds at higher efficiency levels.

In response to the March 2022 Preliminary Analysis, NEMA stated that many ESEMs have agency listings for thermal protection and any redesign of the motor will require retesting with the respective agencies. NEMA commented additionally that the time needed to complete this testing should be considered when setting the compliance date of any ESEM energy conservation standards, and that the cost associated with this agency testing must be accounted for in the cost analysis. (NEMA, No. 22 at pp. 3, 17) As previously stated in this section, DOE accounted for additional thermal protection testing in addition to the costs associated with redesigning each ESEM model as part of the product conversion costs. These product conversion costs, in addition to the capital conversion costs, are included when calculating the potential change in manufacturer INPV.

NEMA also commented that DOE must capture the OEM impacts in terms of costs of redesigning and retooling. NEMA noted that these costs will have a very wide variation: some will involve a few hours' worth of work while others could require several hundred hours plus material and recertification to regulating bodies and safety testers. NEMA commented further that single phase (and some small three phase) motors with agency certified overload protection will need several years to be recertified. In addition, NEMA noted that DOE should capture the installation cost impacts on end-users trying to repair appliances with larger, heavier, or faster replacement motors built to meet new standards. (NEMA, No. 22 at p. 21)

In response to these comments and as noted in section IV.F of this document, DOE determined that the installation costs for ESEMs would not change at higher efficiency levels compared to the baseline as DOE is maintaining the frame size of ESEMs constant across all efficiency levels analyzed. DOE is further limiting the stack length to be no greater than 20 percent longer than the baseline unit for that representative unit. In addition, as noted in section IV.C.3 of this document, the speed of the ESEMs across efficiency levels did not always increase with increasing efficiency and DOE accounted for speed variations in its energy use analysis (see section IV.E.4 of this document for more details).

In general, DOE assumes all conversion-related investments occur between the year of publication of the final rule and the year by which manufacturers must comply with new standards. The conversion cost figures used in the GRIM can be found in section V.B.2 of this document. For additional information on the estimated capital and product conversion costs, see chapter 12 of the NOPR TSD.

d. Manufacturer Markup Scenarios

MSPs include direct manufacturing production costs (*i.e.,* labor, materials, and overhead estimated in DOE's MPCs) and all non-production costs (*i.e.,* SG&A, R&D, and interest), along with profit. To calculate the MSPs in the GRIM, DOE applied non-production cost markups to the MPCs estimated in the engineering analysis for each equipment class and efficiency level. Modifying these markups in the standards case yields different sets of impacts on manufacturers. For the MIA, DOE modeled two standards-case markup scenarios to represent uncertainty regarding the potential impacts on prices and profitability for manufacturers following the implementation of new energy conservation standards: (1) a preservation of gross margin scenario; and (2) a preservation of operating profit scenario. These scenarios lead to different markup values that, when applied to the MPCs, result in varying revenue and cash flow impacts.

Under the preservation of gross margin scenario, DOE applied a single uniform ''gross margin percentage'' across all efficiency levels, which assumes that manufacturers would be able to maintain the same amount of profit as a percentage of revenues at all efficiency levels within an equipment class. DOE initially estimated a manufacturer markup of 1.37 for all ESEMs covered by this rulemaking in the no-new-standards case, which was the manufacturer markup for medium electric motors under 5 hp used in the May 2014 Electric Motors Final Rule. 79 FR 30934, 30938. DOE then asked for feedback on this manufacturer markup during manufacturer interviews. Manufacturers agreed this was an appropriate manufacturer markup to use for ESEMs covered by this rulemaking. Therefore, DOE used this same manufacturer markup of 1.37 for all equipment classes and ELs at each TSL (*i.e.,* the standards cases) in the preservation of gross margin scenario. This manufacturer markup scenario represents the upper-bound of manufacturer INPV and is the manufacturer markup scenario used to calculate the economic impacts on consumers.

Under the preservation of operating profit scenario, DOE modeled a situation in which manufacturers are not able to increase per-unit operating profit in proportion to increases in MPCs. Under this scenario, as MPCs increase, manufacturers reduce their manufacturer margins to maintain a cost competitive offering in the market. However, in this scenario manufacturers maintain their total operating profit in absolute dollars in the standards case, despite higher product costs and investment. Therefore, gross margin (as a percentage) shrinks in the standards cases for this manufacturer markup

scenario. This manufacturer markup scenario represents the lower-bound to industry profitability under new energy conservation standards.

A comparison of industry financial impacts under the two markup scenarios is presented in section V.B.2.a of this document.

3. Manufacturer Interviews

DOE conducted additional interviews with manufacturers following the publication of the March 2022 Preliminary TSD in preparation for this analysis. In interviews, DOE asked manufacturers to describe their major concerns regarding this rulemaking. The following section highlights manufacturer concerns that helped inform the projected potential impacts of new standards on the industry. Manufacturer interviews are conducted under NDAs, so DOE does not document these discussions in the same way that it does public comments in the comment summaries and DOE's responses throughout the rest of this document.

During these interviews, most manufacturers stated that they were concerned that if energy conservation standards were set at the higher ELs, ESEM manufacturers may have to increase the size and footprint of potentially non-compliant ESEM models to meet these higher ELs. While ESEM manufacturers stated it is possible for them to meet higher ELs by increasing the size or footprint of their ESEMs, many of the ESEMs that they manufacture are embedded or incorporated in another product or equipment. They further stated that several of these products or equipment with embedded ESEMs are not able to accommodate a larger ESEMs into these space-constrained products or equipment.

As previously discussed, DOE revised the engineering analysis for this NOPR based on comments from the December 2022 Joint Recommendation, to assume that ESEMs at EL 2 or below would not result in a significant increase in physical size. (*See* Electric Motors Working Group, No. 38 at p. 4) For ELs higher than EL 2 (*i.e.,* EL 3 and EL 4), DOE recognizes that ESEMs may significantly increase in physical size in order to meet those higher efficiency requirements. DOE also recognizes that this may result in a significant disruption to the OEM market that used ESEMs as an embedded product.

K. Emissions Analysis

The emissions analysis consists of two components. The first component estimates the effect of potential energy conservation standards on power sector and site (where applicable) combustion emissions of CO_2, NO_X, SO_2, and Hg. The second component estimates the impacts of potential standards on emissions of two additional greenhouse gases, CH_4 and N_2O, as well as the reductions in emissions of other gases due to ''upstream'' activities in the fuel production chain. These upstream activities comprise extraction, processing, and transporting fuels to the site of combustion.

The analysis of electric power sector emissions of CO_2, NO_X, SO_2, and Hg uses emissions intended to represent the marginal impacts of the change in electricity consumption associated with new standards. The methodology is based on results published for the *AEO,* including a set of side cases that implement a variety of efficiency-related policies. The methodology is described in appendix 13A in the NOPR TSD. The analysis presented in this notice uses projections from *AEO2023.* Power sector emissions of CH_4 and N_2O from fuel combustion are estimated using Emission Factors for Greenhouse Gas Inventories published by the EPA.[81]

FFC upstream emissions, which include emissions from fuel combustion during extraction, processing, and transportation of fuels, and ''fugitive'' emissions (direct leakage to the atmosphere) of CH_4 and CO_2, are estimated based on the methodology described in chapter 15 of the NOPR TSD.

The emissions intensity factors are expressed in terms of physical units per MWh or MMBtu of site energy savings. For power sector emissions, specific emissions intensity factors are calculated by sector and end use. Total emissions reductions are estimated using the energy savings calculated in the national impact analysis.

1. Air Quality Regulations Incorporated in DOE's Analysis

DOE's no-new-standards case for the electric power sector reflects the *AEO,* which incorporates the projected impacts of existing air quality regulations on emissions. *AEO2023* reflects, to the extent possible, laws and regulations adopted through mid-November 2022, including the emissions control programs discussed in the following paragraphs the emissions control programs discussed in the following paragraphs, and the Inflation Reduction Act.[82]

SO_2 emissions from affected electric generating units (''EGUs'') are subject to nationwide and regional emissions cap-and-trade programs. Title IV of the Clean Air Act sets an annual emissions cap on SO_2 for affected EGUs in the 48 contiguous States and the District of Columbia (''DC''). (42 U.S.C. 7651 *et seq.*) SO_2 emissions from numerous States in the eastern half of the United States are also limited under the Cross-State Air Pollution Rule (''CSAPR''). 76 FR 48208 (Aug. 8, 2011). CSAPR requires these states to reduce certain emissions, including annual SO_2 emissions, and went into effect as of January 1, 2015.[83] The *AEO* incorporates implementation of CSAPR, including the update to the CSAPR ozone season program emission budgets and target dates issued in 2016. 81 FR 74504 (Oct. 26, 2016). Compliance with CSAPR is flexible among EGUs and is enforced through the use of tradable emissions allowances. Under existing EPA regulations, for states subject to SO_2 emissions limits under CSAPR, any excess SO_2 emissions allowances resulting from the lower electricity demand caused by the adoption of an efficiency standard could be used to permit offsetting increases in SO_2 emissions by another regulated EGU.

However, beginning in 2016, SO_2 emissions began to fall as a result of the Mercury and Air Toxics Standards (''MATS'') for power plants.[84] 77 FR 9304 (Feb. 16, 2012). The final rule establishes power plant emission standards for mercury, acid gases, and non-mercury metallic toxic pollutants. Because of the emissions reductions under the MATS, it is unlikely that excess SO_2 emissions allowances resulting from the lower electricity demand would be needed or used to

[81] Available at *www.epa.gov/sites/production/files/2021-04/documents/emission-factors_apr2021.pdf* (last accessed July 12, 2021).

[82] For further information, see the Assumptions to *AEO2023* report that sets forth the major assumptions used to generate the projections in the Annual Energy Outlook. Available at *www.eia.gov/outlooks/aeo/assumptions/* (last accessed May 1, 2023).

[83] CSAPR requires states to address annual emissions of SO_2 and NO_X, precursors to the formation of fine particulate matter (''$PM_{2.5}$'') pollution, in order to address the interstate transport of pollution with respect to the 1997 and 2006 $PM_{2.5}$ National Ambient Air Quality Standards (''NAAQS''). CSAPR also requires certain states to address the ozone season (May-September) emissions of NO_X, a precursor to the formation of ozone pollution, in order to address the interstate transport of ozone pollution with respect to the 1997 ozone NAAQS. 76 FR 48208 (Aug. 8, 2011). EPA subsequently issued a supplemental rule that included an additional five states in the CSAPR ozone season program; 76 FR 80760 (Dec. 27, 2011) (Supplemental Rule), and EPA issued the CSAPR Update for the 2008 ozone NAAQS. 81 FR 74504 (Oct. 26, 2016).

[84] In order to continue operating, coal power plants must have either flue gas desulfurization or dry sorbent injection systems installed. Both technologies, which are used to reduce acid gas emissions, also reduce SO_2 emissions.

permit offsetting increases in SO_2 emissions by another regulated EGU. Therefore, energy conservation standards that decrease electricity generation will generally reduce SO_2 emissions. DOE estimated SO_2 emissions reduction using emissions factors based on *AEO2023.*

CSAPR also established limits on NO_X emissions for numerous states in the eastern half of the United States. Energy conservation standards would have little effect on NO_X emissions in those states covered by CSAPR emissions limits if excess NO_X emissions allowances resulting from the lower electricity demand could be used to permit offsetting increases in NO_X emissions from other EGUs. In such case, NO_X emissions would remain near the limit even if electricity generation goes down. Depending on the configuration of the power sector in the different regions and the need for allowances, however, NO_X emissions might not remain at the limit in the case of lower electricity demand. That would mean that standards might reduce NO_X emissions in covered states. Despite this possibility, DOE has chosen to be conservative in its analysis and has maintained the assumption that standards will not reduce NO_X emissions in states covered by CSAPR. Standards would be expected to reduce NO_X emissions in the states not covered by CSAPR. DOE used *AEO2023* data to derive NO_X emissions factors for the group of states not covered by CSAPR.

The MATS limit mercury emissions from power plants, but they do not include emissions caps and, as such, DOE's energy conservation standards would be expected to slightly reduce Hg emissions. DOE estimated mercury emissions reduction using emissions factors based on *AEO2023,* which incorporates the MATS.

L. Monetizing Emissions Impacts

As part of the development of this NOPR, for the purpose of complying with the requirements of Executive Order 12866, DOE considered the estimated monetary benefits from the reduced emissions of CO_2, CH_4, N_2O, NO_X, and SO_2 that are expected to result from each of the TSLs considered. In order to make this calculation analogous to the calculation of the NPV of consumer benefit, DOE considered the reduced emissions expected to result over the lifetime of equipment shipped in the projection period for each TSL. This section summarizes the basis for the values used for monetizing the emissions benefits and presents the values considered in this NOPR.

To monetize the benefits of reducing GHG emissions, this analysis uses the interim estimates presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990* published in February 2021 by the IWG.

1. Monetization of Greenhouse Gas Emissions

DOE estimates the monetized benefits of the reductions in emissions of CO_2, CH_4, and N_2O by using a measure of the SC of each pollutant (*e.g.,* SC–CO_2). These estimates represent the monetary value of the net harm to society associated with a marginal increase in emissions of these pollutants in a given year, or the benefit of avoiding that increase. These estimates are intended to include (but are not limited to) climate-change-related changes in net agricultural productivity, human health, property damages from increased flood risk, disruption of energy systems, risk of conflict, environmental migration, and the value of ecosystem services.

DOE exercises its own judgment in presenting monetized climate benefits as recommended by applicable Executive orders, and DOE would reach the same conclusion presented in this NOPR in the absence of the social cost of greenhouse gases. That is, the social costs of greenhouse gases, whether measured using the February 2021 interim estimates presented by the Interagency Working Group on the Social Cost of Greenhouse Gases or by another means, did not affect this NOPR by DOE.

DOE estimated the global social benefits of CO_2, CH_4, and N_2O reductions using SC–GHG values that were based on the interim values presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990,* published in February 2021 by the IWG. (''February 2021 SC–GHG TSD'') The SC–GHGs is the monetary value of the net harm to society associated with a marginal increase in emissions in a given year, or the benefit of avoiding that increase. In principle, SC–GHGs includes the value of all climate change impacts, including (but not limited to) changes in net agricultural productivity, human health effects, property damage from increased flood risk and natural disasters, disruption of energy systems, risk of conflict, environmental migration, and the value of ecosystem services. The SC–GHGs therefore, reflect the societal value of reducing emissions of the gas in question by one metric ton. The SC–GHGs is the theoretically appropriate value to use in conducting benefit-cost analyses of policies that affect CO_2, N_2O and CH_4 emissions. As a member of the IWG involved in the development of the February 2021 SC–GHG TSD, DOE agrees that the interim SC–GHG estimates represent the most appropriate estimate of the SC–GHG until revised estimates have been developed reflecting the latest, peer-reviewed science.

The SC–GHGs estimates presented here were developed over many years, using transparent process, peer-reviewed methodologies, the best science available at the time of that process, and with input from the public. Specifically, in 2009, the IWG, that included the DOE and other executive branch agencies and offices was established to ensure that agencies were using the best available science and to promote consistency in the social cost of carbon (''SC–CO_2'') values used across agencies. The IWG published SC–CO_2 estimates in 2010 that were developed from an ensemble of three widely cited integrated assessment models (''IAMs'') that estimate global climate damages using highly aggregated representations of climate processes and the global economy combined into a single modeling framework. The three IAMs were run using a common set of input assumptions in each model for future population, economic, and CO_2 emissions growth, as well as equilibrium climate sensitivity—a measure of the globally averaged temperature response to increased atmospheric CO_2 concentrations. These estimates were updated in 2013 based on new versions of each IAM. In August 2016 the IWG published estimates of the social cost of methane (''SC–CH_4'') and nitrous oxide (''SC–N_2O'') using methodologies that are consistent with the methodology underlying the SC–CO_2 estimates. The modeling approach that extends the IWG SC–CO_2 methodology to non-CO_2 GHGs has undergone multiple stages of peer review. The SC–CH_4 and SC–N_2O estimates were developed by Marten *et al.*[85] and underwent a standard double-blind peer review process prior to journal publication. In 2015, as part of the response to public comments received to a 2013 solicitation for comments on the SC–CO_2 estimates, the IWG announced a National Academies of Sciences, Engineering, and Medicine review of the SC–CO_2 estimates to offer

[85] Marten, A.L., E.A. Kopits, C.W. Griffiths, S.C. Newbold, and A. Wolverton. Incremental CH_4 and N_2O mitigation benefits consistent with the US Government's SC–CO_2 estimates. *Climate Policy.* 2015. 15(2): pp. 272–298.

advice on how to approach future updates to ensure that the estimates continue to reflect the best available science and methodologies. In January 2017, the National Academies released their final report, Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide, and recommended specific criteria for future updates to the SC–CO_2 estimates, a modeling framework to satisfy the specified criteria, and both near-term updates and longer-term research needs pertaining to various components of the estimation process.[86] Shortly thereafter, in March 2017, President Trump issued Executive Order 13783, which disbanded the IWG, withdrew the previous TSDs, and directed agencies to ensure SC–CO_2 estimates used in regulatory analyses are consistent with the guidance contained in OMB's Circular A–4, ''including with respect to the consideration of domestic versus international impacts and the consideration of appropriate discount rates'' (E.O. 13783, Section 5(c)). Benefit-cost analyses following E.O. 13783 used SC–GHG estimates that attempted to focus on the U.S.-specific share of climate change damages as estimated by the models and were calculated using two discount rates recommended by Circular A–4, 3 percent and 7 percent. All other methodological decisions and model versions used in SC–GHG calculations remained the same as those used by the IWG in 2010 and 2013, respectively.

On January 20, 2021, President Biden issued Executive Order 13990, which re-established the IWG and directed it to ensure that the U.S. Government's estimates of the social cost of carbon and other greenhouse gases reflect the best available science and the recommendations of in the National Academies 2017 report. The IWG was tasked with first reviewing the SC–GHG estimates currently used in Federal analyses and publishing interim estimates within 30 days of the E.O. that reflect the full impact of GHG emissions, including by taking global damages into account. The interim SC–GHG estimates published in February 2021 are used here to estimate the climate benefits for this proposed rulemaking. The E.O. instructs the IWG to undertake a fuller update of the SC–GHG estimates that takes into consideration the advice in the National Academies 2017 report and other recent scientific literature. The February 2021 SC–GHG TSD provides a complete discussion of the IWG's initial review conducted under E.O. 13990. In particular, the IWG found that the SC–GHG estimates used under E.O. 13783 fail to reflect the full impact of GHG emissions in multiple ways.

First, the IWG found that the SC–GHG estimates used under E.O. 13783 fail to fully capture many climate impacts that affect the welfare of U.S. citizens and residents, and those impacts are better reflected by global measures of the SC–GHG. Examples of omitted effects from the E.O. 13783 estimates include direct effects on U.S. citizens, assets, and investments located abroad, supply chains, U.S. military assets and interests abroad, and tourism, and spillover pathways such as economic and political destabilization and global migration that can lead to adverse impacts on U.S. national security, public health, and humanitarian concerns. In addition, assessing the benefits of U.S. GHG mitigation activities requires consideration of how those actions may affect mitigation activities by other countries, as those international mitigation actions will provide a benefit to U.S. citizens and residents by mitigating climate impacts that affect U.S. citizens and residents. A wide range of scientific and economic experts have emphasized the issue of reciprocity as support for considering global damages of GHG emissions. If the United States does not consider impacts on other countries, it is difficult to convince other countries to consider the impacts of their emissions on the United States. The only way to achieve an efficient allocation of resources for emissions reduction on a global basis—and so benefit the U.S. and its citizens—is for all countries to base their policies on global estimates of damages. As a member of the IWG involved in the development of the February 2021 SC–GHG TSD, DOE agrees with this assessment and, therefore, in this NOPR, DOE centers attention on a global measure of SC–GHG. This approach is the same as that taken in DOE regulatory analyses from 2012 through 2016. A robust estimate of climate damages that accrue only to U.S. citizens and residents does not currently exist in the literature. As explained in the February SC–GHG 2021 TSD, existing estimates are both incomplete and an underestimate of total damages that accrue to the citizens and residents of the U.S. because they do not fully capture the regional interactions and spillovers discussed above, nor do they include all of the important physical, ecological, and economic impacts of climate change recognized in the climate change literature. As noted in the February 2021 SC–GHG TSD, the IWG will continue to review developments in the literature, including more robust methodologies for estimating a U.S.-specific SC–GHG value, and explore ways to better inform the public of the full range of carbon impacts. As a member of the IWG, DOE will continue to follow developments in the literature pertaining to this issue.

Second, the IWG found that the use of the social rate of return on capital (7 percent under current OMB Circular A–4 guidance) to discount the future benefits of reducing GHG emissions inappropriately underestimates the impacts of climate change for the purposes of estimating the SC–GHG. Consistent with the findings of the National Academies and the economic literature, the IWG continued to conclude that the consumption rate of interest is the theoretically appropriate discount rate in an intergenerational context,[87] and recommended that discount rate uncertainty and relevant aspects of intergenerational ethical considerations be accounted for in selecting future discount rates.

Furthermore, the damage estimates developed for use in the SC–GHG are estimated in consumption-equivalent terms, and so an application of OMB Circular A–4's guidance for regulatory analysis would then use the consumption discount rate to calculate the SC–GHG. DOE agrees with this assessment and will continue to follow developments in the literature pertaining to this issue. DOE also notes

[86] National Academies of Sciences, Engineering, and Medicine. *Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide.* 2017. The National Academies Press: Washington, DC. *http://nap.nationalacademies.org/catalog/24651/valuing-climate-damages-updating-estimation-of-the-social-cost-of.*

[87] Interagency Working Group on Social Cost of Carbon. *Social Cost of Carbon for Regulatory Impact Analysis under Executive Order 12866.* 2010. United States Government. *www.epa.gov/sites/default/files/2016-12/documents/scc_tsd_2010.pdf* (last accessed April 15, 2022); Interagency Working Group on Social Cost of Carbon. *Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866.* 2013. *www.federalregister.gov/documents/2013/11/26/2013-28242/technical-support-document-technical-update-of-the-social-cost-of-carbon-for-regulatory-impact* (last accessed April 15, 2022); Interagency Working Group on Social Cost of Greenhouse Gases, United States Government. Technical Support Document: Technical Update on the Social Cost of Carbon for Regulatory Impact Analysis-Under Executive Order 12866. August 2016. *www.epa.gov/sites/default/files/2016-12/documents/sc_co2_tsd_august_2016.pdf* (last accessed January 18, 2022); Interagency Working Group on Social Cost of Greenhouse Gases, United States Government. Addendum to Technical Support Document on Social Cost of Carbon for Regulatory Impact Analysis under Executive Order 12866: Application of the Methodology to Estimate the Social Cost of Methane and the Social Cost of Nitrous Oxide. August 2016. *www.epa.gov/sites/default/files/2016-12/documents/addendum_to_sc-ghg_tsd_august_2016.pdf* (last accessed January 18, 2022).

that while OMB Circular A–4, as published in 2003, recommends using 3% and 7% discount rates as ''default'' values, Circular A–4 also reminds agencies that ''different regulations may call for different emphases in the analysis, depending on the nature and complexity of the regulatory issues and the sensitivity of the benefit and cost estimates to the key assumptions.'' On discounting, Circular A–4 recognizes that ''special ethical considerations arise when comparing benefits and costs across generations,'' and Circular A–4 acknowledges that analyses may appropriately ''discount future costs and consumption benefits . . . at a lower rate than for intragenerational analysis.'' In the 2015 Response to Comments on the Social Cost of Carbon for Regulatory Impact Analysis, OMB, DOE, and the other IWG members recognized that ''Circular A–4 is a living document'' and ''the use of 7 percent is not considered appropriate for intergenerational discounting. There is wide support for this view in the academic literature, and it is recognized in Circular A–4 itself.'' Thus, DOE concludes that a 7% discount rate is not appropriate to apply to value the social cost of greenhouse gases in the analysis presented in this analysis.

To calculate the present and annualized values of climate benefits, DOE uses the same discount rate as the rate used to discount the value of damages from future GHG emissions, for internal consistency. That approach to discounting follows the same approach that the February 2021 TSD recommends ''to ensure internal consistency—*i.e.,* future damages from climate change using the SC–GHG at 2.5 percent should be discounted to the base year of the analysis using the same 2.5 percent rate.'' DOE has also consulted the National Academies' 2017 recommendations on how SC–GHG estimates can ''be combined in RIAs with other cost and benefits estimates that may use different discount rates.'' The National Academies reviewed several options, including ''presenting all discount rate combinations of other costs and benefits with [SC–GHG] estimates.''

As a member of the IWG involved in the development of the February 2021 SC–GHG TSD, DOE agrees with the above assessment and will continue to follow developments in the literature pertaining to this issue. While the IWG works to assess how best to incorporate the latest, peer reviewed science to develop an updated set of SC–GHG estimates, it set the interim estimates to be the most recent estimates developed by the IWG prior to the group being disbanded in 2017. The estimates rely on the same models and harmonized inputs and are calculated using a range of discount rates. As explained in the February 2021 SC–GHG TSD, the IWG has recommended that agencies revert to the same set of four values drawn from the SC–GHG distributions based on three discount rates as were used in regulatory analyses between 2010 and 2016 and were subject to public comment. For each discount rate, the IWG combined the distributions across models and socioeconomic emissions scenarios (applying equal weight to each) and then selected a set of four values recommended for use in benefit-cost analyses: an average value resulting from the model runs for each of three discount rates (2.5 percent, 3 percent, and 5 percent), plus a fourth value, selected as the 95th percentile of estimates based on a 3 percent discount rate. The fourth value was included to provide information on potentially higher-than-expected economic impacts from climate change. As explained in the February 2021 SC–GHG TSD, and DOE agrees, this update reflects the immediate need to have an operational SC–GHG for use in regulatory benefit-cost analyses and other applications that was developed using a transparent process, peer-reviewed methodologies, and the science available at the time of that process. Those estimates were subject to public comment in the context of dozens of proposed rulemakings as well as in a dedicated public comment period in 2013.

There are a number of limitations and uncertainties associated with the SC–GHG estimates. First, the current scientific and economic understanding of discounting approaches suggests discount rates appropriate for intergenerational analysis in the context of climate change are likely to be less than 3 percent, near 2 percent or lower.[88] Second, the IAMs used to produce these interim estimates do not include all of the important physical, ecological, and economic impacts of climate change recognized in the climate change literature and the science underlying their ''damage functions''—*i.e.,* the core parts of the IAMs that map global mean temperature changes and other physical impacts of climate change into economic (both market and nonmarket) damages—lags behind the most recent research. For example, limitations include the incomplete treatment of catastrophic and non-catastrophic impacts in the integrated assessment models, their incomplete treatment of adaptation and technological change, the incomplete way in which inter-regional and intersectoral linkages are modeled, uncertainty in the extrapolation of damages to high temperatures, and inadequate representation of the relationship between the discount rate and uncertainty in economic growth over long time horizons. Likewise, the socioeconomic and emissions scenarios used as inputs to the models do not reflect new information from the last decade of scenario generation or the full range of projections. The modeling limitations do not all work in the same direction in terms of their influence on the SC–CO_2 estimates. However, as discussed in the February 2021 TSD, the IWG has recommended that, taken together, the limitations suggest that the interim SC–GHG estimates used in this NOPR likely underestimate the damages from GHG emissions. DOE concurs with this assessment.

DOE's derivations of the SC–CO_2, SC–N_2O, and SC–CH_4 values used for this NOPR are discussed in the following sections, and the results of DOE's analyses estimating the benefits of the reductions in emissions of these GHGs are presented in section V.B.6 of this document.

In response to the March 2022 Preliminary Analysis, NEMA disagreed with DOE's approach for estimating monetary benefits associated with emissions reductions. NEMA commented that this topic is too convoluted and subjective to be included in a rulemaking analysis for electric motor standards. NEMA added that DOE does not adequately examine or account for the significant impacts from ever-increasing investment in and use of renewable energy sources and associated decrease in emissions. (NEMA, No. 22 at p. 25)

DOE acknowledges that increasing use of renewable electricity sources will reduce CO_2 emissions and likely other emissions from the power sector faster than could have been expected when *AEO2023* was prepared. Nevertheless, DOE has used *AEO2023* for the purposes of quantifying emissions as DOE believes it continues to be the most appropriate projection at this time for such purposes. And to comply with the requirements of Executive Order 12866, DOE considered the estimated monetary benefits from the reduced emissions of CO_2, CH_4, N_2O, NO_X, and SO_2 that are

[88] Interagency Working Group on Social Cost of Greenhouse Gases (IWG). 2021. Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990. February. United States Government. Available at: *www.whitehouse.gov/briefing-room/blog/2021/02/26/a-return-to-science-evidence-based-estimates-of-the-benefits-of-reducing-climate-pollution/.*

expected to result from each of the TSLs considered. It is important to note that even a significant reduction in the emissions benefits projected in this NOPR would not change DOE's decision about which standard levels to propose based on the December 2022 Joint Recommendation and DOE's analysis.

a. Social Cost of Carbon

The SC–CO_2 values used for this NOPR were based on the values developed for the IWG's February 2021 TSD, which are shown in Table IV–10 in five-year increments from 2020 to 2050. The set of annual values that DOE used, which was adapted from estimates published by EPA,[89] is presented in Appendix 14A of the NOPR TSD. These estimates are based on methods, assumptions, and parameters identical to the estimates published by the IWG (which were based on EPA modeling) and include values for 2051 to 2070.

TABLE IV–10—ANNUAL SC–CO_2 VALUES FROM 2021 INTERAGENCY UPDATE, 2020–2050

[2020$ per metric ton CO_2]

Year	Discount rate and statistic			
	5% Average	3% Average	2.5% Average	3% 95th percentile
2020	14	51	76	152
2025	17	56	83	169
2030	19	62	89	187
2035	22	67	96	206
2040	25	73	103	225
2045	28	79	110	242
2050	32	85	116	260

DOE multiplied the CO_2 emissions reduction estimated for each year by the SC–CO_2 value for that year in each of the four cases. DOE adjusted the values to 2022$ using the implicit price deflator for gross domestic product (''GDP'') from the Bureau of Economic Analysis. To calculate a present value of the stream of monetary values, DOE discounted the values in each of the four cases using the specific discount rate that had been used to obtain the SC–CO_2 values in each case.

b. Social Cost of Methane and Nitrous Oxide

The SC–CH_4 and SC–N_2O values used for this NOPR were based on the values developed for the February 2021 TSD. Table IV–11 shows the updated sets of SC–CH_4 and SC–N_2O estimates from the latest interagency update in 5-year increments from 2020 to 2050. The full set of annual values used is presented in Appendix 14–A of the NOPR TSD. To capture the uncertainties involved in regulatory impact analysis, DOE has determined it is appropriate to include all four sets of SC–CH_4 and SC–N_2O values, as recommended by the IWG. DOE derived values after 2050 using the approach described above for the SC–CO_2.

TABLE IV–11—ANNUAL SC–CH_4 AND SC–N_2O VALUES FROM 2021 INTERAGENCY UPDATE, 2020–2050

[2020$ per metric ton]

Year	SC–CH_4				SC–N_2O			
	Discount rate and statistic				Discount rate and statistic			
	5% Average	3% Average	2.5% Average	3% 95th percentile	5% Average	3% Average	2.5% Average	3% 95th percentile
2020	670	1,500	2,000	3,900	5,800	18,000	27,000	48,000
2025	800	1,700	2,200	4,500	6,800	21,000	30,000	54,000
2030	940	2,000	2,500	5,200	7,800	23,000	33,000	60,000
2035	1,100	2,200	2,800	6,000	9,000	25,000	36,000	67,000
2040	1,300	2,500	3,100	6,700	10,000	28,000	39,000	74,000
2045	1,500	2,800	3,500	7,500	12,000	30,000	42,000	81,000
2050	1,700	3,100	3,800	8,200	13,000	33,000	45,000	88,000

DOE multiplied the CH_4 and N_2O emissions reduction estimated for each year by the SC–CH_4 and SC–N_2O estimates for that year in each of the cases. DOE adjusted the values to 2022$ using the implicit price deflator for GDP from the Bureau of Economic Analysis. To calculate a present value of the stream of monetary values, DOE discounted the values in each of the cases using the specific discount rate that had been used to obtain the SC–CH_4 and SC–N_2O estimates in each case.

2. Monetization of Other Emissions Impacts

For this NOPR, DOE estimated the monetized value of NO_X and SO_2 emissions reductions from electricity generation using the latest benefit-per-ton estimates for that sector from the EPA's Benefits Mapping and Analysis Program.[90] DOE used EPA's values for $PM_{2.5}$-related benefits associated with NO_X and SO_2 and for ozone-related benefits associated with NO_X for 2025, 2030, and 2040, calculated with

[89] See EPA, Revised 2023 and Later Model Year Light-Duty Vehicle GHG Emissions Standards: Regulatory Impact Analysis, Washington, DC, December 2021. Available at *nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P1013ORN.pdf* (last accessed February 21, 2023).

[90] U.S. Environmental Protection Agency. Estimating the Benefit per Ton of Reducing Directly-Emitted $PM_{2.5}$, $PM_{2.5}$ Precursors and Ozone Precursors from 21 Sectors. *www.epa.gov/benmap/estimating-benefit-ton-reducing-directly-emitted-pm25-pm25-precursors-and-ozone-precursors.*

discount rates of 3 percent and 7 percent. DOE used linear interpolation to define values for the years not given in the 2025 to 2040 period; for years beyond 2040, the values are held constant. DOE combined the EPA regional benefit-per-ton estimates with regional information on electricity consumption and emissions from *AEO2023* to define weighted-average national values for NO_X and SO_2 (see appendix 14B of the NOPR TSD).

DOE multiplied the site emissions reduction (in tons) in each year by the associated $/ton values, and then discounted each series using discount rates of 3 percent and 7 percent as appropriate.

DOE requests comment on how to address the climate benefits and non-monetized effects of the proposal.

M. Utility Impact Analysis

In the March 2022 Preliminary Analysis, DOE described the approach for conducting the utility impact analysis. See chapter 15 of the March 2022 Preliminary TSD. In response, NEMA commented that the proposed approach for assessing utility impacts appears to be sufficient. (NEMA, No. 22 at p. 25) In this NOPR, DOE continues to follow the same approach.

The utility impact analysis estimates the changes in installed electrical capacity and generation projected to result for each considered TSL. The analysis is based on published output from the NEMS associated with *AEO2023.* NEMS produces the *AEO* Reference case, as well as a number of side cases that estimate the economy-wide impacts of changes to energy supply and demand. For the current analysis, impacts are quantified by comparing the levels of electricity sector generation, installed capacity, fuel consumption and emissions in the *AEO2023* Reference case and various side cases. Details of the methodology are provided in the appendices to chapters 13 and 15 of the NOPR TSD.

The output of this analysis is a set of time-dependent coefficients that capture the change in electricity generation, primary fuel consumption, installed capacity and power sector emissions due to a unit reduction in demand for a given end use. These coefficients are multiplied by the stream of electricity savings calculated in the NIA to provide estimates of selected utility impacts of potential new energy conservation standards.

N. Employment Impact Analysis

In the March 2022 Preliminary Analysis, DOE described the approach for conducting the employment impact analysis. *See* chapter 16 of the March 2022 Preliminary TSD. In response, NEMA commented that the proposed approach for assessing national employment impacts appears to be sufficient. (NEMA, No. 22 at p. 25) In this NOPR, DOE continues to follow the same approach.

DOE considers employment impacts in the domestic economy as one factor in selecting a proposed standard. Employment impacts from new energy conservation standards include both direct and indirect impacts. Direct employment impacts are any changes in the number of employees of manufacturers of the products subject to standards, their suppliers, and related service firms. The MIA addresses those impacts. Indirect employment impacts are changes in national employment that occur due to the shift in expenditures and capital investment caused by the purchase and operation of more-efficient appliances. Indirect employment impacts from standards consist of the net jobs created or eliminated in the national economy, other than in the manufacturing sector being regulated, caused by (1) reduced spending by consumers on energy, (2) reduced spending on new energy supply by the utility industry, (3) increased consumer spending on the products to which the new standards apply and other goods and services, and (4) the effects of those three factors throughout the economy.

One method for assessing the possible effects on the demand for labor of such shifts in economic activity is to compare sector employment statistics developed by the Labor Department's BLS. BLS regularly publishes its estimates of the number of jobs per million dollars of economic activity in different sectors of the economy, as well as the jobs created elsewhere in the economy by this same economic activity. Data from BLS indicate that expenditures in the utility sector generally create fewer jobs (both directly and indirectly) than expenditures in other sectors of the economy.[91] There are many reasons for these differences, including wage differences and the fact that the utility sector is more capital-intensive and less labor-intensive than other sectors. Energy conservation standards have the effect of reducing consumer utility bills. Because reduced consumer expenditures for energy likely lead to increased expenditures in other sectors of the economy, the general effect of efficiency standards is to shift economic activity from a less labor-intensive sector (*i.e.,* the utility sector) to more labor-intensive sectors (*e.g.,* the retail and service sectors). Thus, the BLS data suggest that net national employment may increase due to shifts in economic activity resulting from energy conservation standards.

DOE estimated indirect national employment impacts for the standard levels considered in this NOPR using an input/output model of the U.S. economy called Impact of Sector Energy Technologies version 4 (''ImSET'').[92] ImSET is a special-purpose version of the ''U.S. Benchmark National Input-Output'' (''I–O'') model, which was designed to estimate the national employment and income effects of energy-saving technologies. The ImSET software includes a computer- based I–O model having structural coefficients that characterize economic flows among 187 sectors most relevant to industrial, commercial, and residential building energy use.

DOE notes that ImSET is not a general equilibrium forecasting model, and that the uncertainties involved in projecting employment impacts, especially changes in the later years of the analysis. Because ImSET does not incorporate price changes, the employment effects predicted by ImSET may over-estimate actual job impacts over the long run for this proposed rule. Therefore, DOE used ImSET only to generate results for near-term timeframes (2034), where these uncertainties are reduced. For more details on the employment impact analysis, see chapter 16 of the NOPR TSD.

V. Analytical Results and Conclusions

The following section addresses the results from DOE's analyses with respect to the considered energy conservation standards for ESEMs. It addresses the TSLs examined by DOE, the projected impacts of each of these levels if adopted as energy conservation standards for ESEMs, and the standards levels that DOE is proposing to adopt in this NOPR. Additional details regarding DOE's analyses are contained in the NOPR TSD supporting this document.

A. Trial Standard Levels

In general, DOE typically evaluates potential new standards for products

[91] See U.S. Department of Commerce—Bureau of Economic Analysis. *Regional Multipliers: A User Handbook for the Regional Input-Output Modeling System (RIMS II).* 1997. U.S. Government Printing Office: Washington, DC. Available at *www.bea.gov/scb/pdf/regional/perinc/meth/rims2.pdf* (last accessed July 1, 2021).

[92] Livingston, O.V., S.R. Bender, M.J. Scott, and R.W. Schultz. *ImSET 4.0: Impact of Sector Energy Technologies Model Description and User Guide.* 2015. Pacific Northwest National Laboratory: Richland, WA. PNNL–24563.

and equipment by grouping individual efficiency levels for each class into TSLs. Use of TSLs allows DOE to identify and consider manufacturer cost interactions between the equipment classes, to the extent that there are such interactions, and price elasticity of consumer purchasing decisions that may change when different standard levels are set.

In the analysis conducted for this NOPR, DOE analyzed the benefits and burdens of four TSLs for ESEMs. DOE developed TSLs that combine efficiency levels for each analyzed equipment class. DOE presents the results for the TSLs in this document, while the results for all efficiency levels that DOE analyzed are in the NOPR TSD.[93]

Table V–1 presents the TSLs and the corresponding efficiency levels that DOE has identified for potential new energy conservation standards for ESEMs. TSL 4 represents the maximum technologically feasible (''max-tech'') energy efficiency for all equipment classes. TSL 3 is equivalent to EL 3 for all equipment classes. TSL 2 is equivalent to EL 2 for all equipment classes and corresponds to the Electric Motors Working Group recommended levels. TSL 1 is equivalent to EL 1 for all equipment classes.

TABLE V–1—TRIAL STANDARD LEVELS FOR ESEMS

Equipment class group	Horsepower range	TSL1	TSL2	TSL3	TSL4
		Average of EL0 and EL2	Recommended levels	Average of EL2 and EL4	Max-tech
ESEM High/Med Torque	0.25 ≤ hp ≤ 0.50	EL1	EL2	EL3	EL4.
	0.5 < hp ≤ 3	EL1	EL2	EL3	EL4.
ESEM Low Torque	0.25 hp	EL1	EL2	EL3	EL4.
	0.25 < hp	EL1	EL2	EL3	EL4.
ESEM Polyphase	0.25 ≤ hp	EL1	EL2	EL3	EL4.
AO–ESEM High/Med Torque	0.25 ≤ hp ≤ 0.50	EL1	EL2	EL3	EL4.
	0.5 < hp ≤ 3	EL1	EL2	EL3	EL4.
AO–ESEM Low Torque	0.25 hp	EL1	EL2	EL3	EL4.
	0.25 < hp	EL1	EL2	EL3	EL4.
AO–ESEM Polyphase	0.25 ≤ hp	EL1	EL2	EL3	EL4.

DOE constructed the TSLs for this NOPR to include ELs representative of ELs with similar characteristics (*i.e.,* using similar efficiencies). Specifically, DOE aligned the efficiency levels for air-over and non-air-over ESEMs because of the similarities in the manufacturing processes between air-over and non-air-over ESEMs. In some cases, an AO–ESEM could be manufactured on the same line as a non-air-over ESEM by omitting the steps of manufacturing associated with the fan of a motor. DOE notes this alignment is in line with Electric Motors Working Group's recommendation in the December 2022 Joint Recommendation. While representative ELs were included in the TSLs, DOE considered all efficiency levels as part of its analysis.[94]

B. Economic Justification and Energy Savings

1. Economic Impacts on Individual Consumers

DOE analyzed the economic impacts on ESEM consumers by looking at the effects that potential ESEM standards at each TSL would have on the LCC and PBP. DOE also examined the impacts of potential standards on selected consumer subgroups. These analyses are discussed in the following sections.

a. Life-Cycle Cost and Payback Period

In general, higher-efficiency equipment affect consumers in two ways: (1) purchase price increases and (2) annual operating costs decrease. Inputs used for calculating the LCC and PBP include total installed costs (*i.e.,* equipment price plus installation costs), and operating costs (*i.e.,* annual energy use, energy prices, energy price trends, repair costs, and maintenance costs). The LCC calculation also uses equipment lifetime and a discount rate. Chapter 8 of the NOPR TSD provides detailed information on the LCC and PBP analyses.

Table V–2 through Table V–21 show the LCC and PBP results for the TSLs considered for each equipment class. In the first of each pair of tables, the simple payback is measured relative to the baseline product. In the second table, the impacts are measured relative to the efficiency distribution in the no-new-standards case in the compliance year (see section IV.F.8 of this document). Because some consumers purchase equipment with higher efficiency in the no-new-standards case, the average savings are less than the difference between the average LCC of the baseline equipment and the average LCC at each TSL. The savings refer only to consumers who are affected by a standard at a given TSL. Those who already purchase an equipment with efficiency at or above a given TSL are not affected. Consumers for whom the LCC increases at a given TSL experience a net cost.

[93] Results by efficiency level are presented in chapters 8, 10, and 12 of the NOPR TSD.

[94] Efficiency levels that were analyzed for this NOPR are discussed in section IV.C.4 of this document. Results by efficiency level are presented in chapters 8, 10, and 12 of the NOPR TSD.

TABLE V–2—AVERAGE LCC AND PBP RESULTS FOR ESEM—HIGH/MED TORQUE, 0.25 hp

TSL	Efficiency level	Average costs (2022$)				Simple payback (years)	Average lifetime (years)
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
	Baseline	186	98	509	696		7.7
1	1	192	86	447	639	0.5	7.7
2	2	211	76	397	607	1.1	7.7
3	3	296	68	354	649	3.7	7.7
4	4	434	62	322	755	6.9	7.7

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the baseline product.

TABLE V–3—AVERAGE LCC SAVINGS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR ESEM—HIGH/MED TORQUE, 0.25 hp

TSL	Efficiency level	Life-cycle cost savings	
		Percent of consumers that experience net cost	Average LCC savings * (2022)
1	1	2.0	56
2	2	16.7	51
3	3	51.2	−1
4	4	85.9	−107

* The savings represent the average LCC for affected consumers.

TABLE V–4—AVERAGE LCC AND PBP RESULTS FOR ESEM—HIGH/MED TORQUE, 1 hp

TSL	Efficiency level	Average costs (2022$)				Simple payback (years)	Average lifetime (years)
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
	Baseline	351	243	1,272	1,624		7.5
1	1	368	218	1,142	1,510	0.7	7.5
2	2	395	196	1,028	1,423	0.9	7.5
3	3	534	189	989	1,522	3.4	7.5
4	4	733	183	955	1,688	6.3	7.5

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the baseline product.

TABLE V–5—AVERAGE LCC SAVINGS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR ESEM—HIGH/MED TORQUE, 1 hp

TSL	Efficiency level	Life-cycle cost savings	
		Percent of consumers that experience net cost	Average LCC savings * (2022)
1	1	3.5	116
2	2	11.7	138
3	3	53.5	21
4	4	82.5	−145

* The savings represent the average LCC for affected consumers.

TABLE V–6—AVERAGE LCC AND PBP RESULTS FOR ESEM—LOW TORQUE, 0.25 hp

TSL	Efficiency level	Average costs (2022$)				Simple payback (years)	Average lifetime (years)
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
	Baseline	153	216	956	1,108		6.8
1	1	174	163	718	892	0.4	6.8
2	2	213	131	576	789	0.7	6.8

TABLE V–6—AVERAGE LCC AND PBP RESULTS FOR ESEM—LOW TORQUE, 0.25 hp—Continued

TSL	Efficiency level	Average costs (2022$)				Simple payback (years)	Average lifetime (years)
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
3	3	277	118	518	795	1.3	6.8
4	4	366	107	470	836	2.0	6.8

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the baseline product.

TABLE V–7—AVERAGE LCC SAVINGS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR ESEM—LOW TORQUE, 0.25 hp

TSL	Efficiency level	Life-cycle cost savings	
		Percent of consumers that experience net cost	Average LCC savings * (2022)
1	1	0.2	213
2	2	2.9	147
3	3	52.0	24
4	4	67.7	−17

* The savings represent the average LCC for affected consumers.

TABLE V–8—AVERAGE LCC AND PBP RESULTS FOR ESEM—LOW TORQUE, 0.5 hp

TSL	Efficiency level	Average costs (2022$)				Simple payback (years)	Average lifetime (years)
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
	Baseline	223	237	1,074	1,297		6.9
1	1	269	218	987	1,256	2.4	6.9
2	2	276	201	908	1,184	1.5	6.9
3	3	372	178	805	1,177	2.5	6.9
4	4	455	159	719	1,174	3.0	6.9

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the baseline product.

TABLE V–9—AVERAGE LCC SAVINGS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR ESEM—LOW TORQUE, 0.5 hp

TSL	Efficiency level	Life-cycle cost savings	
		Percent of consumers that experience net cost	Average LCC savings * (2022)
1	1	10.8	41
2	2	7.8	100
3	3	30.4	78
4	4	40.1	73

* The savings represent the average LCC for affected consumers.

TABLE V–10—AVERAGE LCC AND PBP RESULTS FOR ESEM—POLYPHASE TORQUE, 0.25 hp

TSL	Efficiency level	Average costs (2022$)				Simple payback (years)	Average lifetime (years)
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
	Baseline	199	68	432	631		9.3
1	1	206	62	394	600	1.2	9.3
2	2	222	57	362	584	2.0	9.3
3	3	277	51	325	602	4.6	9.3
4	4	405	47	297	702	9.7	9.3

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the baseline product.

TABLE V–11—AVERAGE LCC SAVINGS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR ESEM—POLYPHASE, 0.25 hp

TSL	Efficiency level	Life-cycle cost savings	
		Percent of consumers that experience net cost	Average LCC savings * (2022)
1	1	1.0	32
2	2	7.2	26
3	3	58.6	−8
4	4	95.0	−107

* The savings represent the average LCC for affected consumers.

TABLE V–12—AVERAGE LCC AND PBP RESULTS FOR AO–ESEM—HIGH/MED TORQUE, 0.25 hp

TSL	Efficiency level	Average costs (2022$)				Simple payback (years)	Average lifetime (years)
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
	Baseline	174	158	695	869		6.8
1	1	180	139	611	791	0.3	6.8
2	2	200	123	543	743	0.8	6.8
3	3	282	110	485	767	2.3	6.8
4	4	419	101	444	863	4.3	6.8

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the baseline product.

TABLE V–13—AVERAGE LCC SAVINGS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR AO–ESEM—HIGH/MED TORQUE, 0.25 hp

TSL	Efficiency level	Life-cycle cost savings	
		Percent of consumers that experience net cost	Average LCC savings * (2022)
1	1	1.3	76
2	2	7.8	83
3	3	36.0	37
4	4	64.6	−61

* The savings represent the average LCC for affected consumers.

TABLE V–14—AVERAGE LCC AND PBP RESULTS FOR AO–ESEM—HIGH/MED TORQUE, 1 hp

TSL	Efficiency level	Average costs (2022$)				Simple payback (years)	Average lifetime (years)
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
	Baseline	338	312	1,492	1,830		7.0
1	1	355	283	1,352	1,707	0.6	7.0
2	2	382	255	1,219	1,601	0.8	7.0
3	3	520	246	1,173	1,693	2.7	7.0
4	4	716	238	1,138	1,854	5.1	7.0

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the baseline product.

TABLE V–15—AVERAGE LCC SAVINGS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR AO–ESEM—HIGH/MED TORQUE, 1 hp

TSL	Efficiency level	Life-cycle cost savings	
		Percent of consumers that experience net cost	Average LCC savings * (2022)
1	1	2.0	122
2	2	5.9	160
3	3	44.4	37

TABLE V–15—AVERAGE LCC SAVINGS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR AO–ESEM—HIGH/MED TORQUE, 1 hp—Continued

TSL	Efficiency level	Life-cycle cost savings	
		Percent of consumers that experience net cost	Average LCC savings * (2022)
4	4	81.9	−128

* The savings represent the average LCC for affected consumers.

TABLE V–16—AVERAGE LCC AND PBP RESULTS FOR AO–ESEM—LOW TORQUE, 0.25 hp

TSL	Efficiency level	Average costs (2022$)				Simple payback (years)	Average lifetime (years)
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
	Baseline	141	218	962	1,103		6.8
1	1	163	164	722	885	0.4	6.8
2	2	202	132	579	781	0.7	6.8
3	3	264	119	521	785	1.2	6.8
4	4	352	108	472	824	1.9	6.8

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the baseline product.

TABLE V–17—AVERAGE LCC SAVINGS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR AO–ESEM—LOW TORQUE, 0.25 hp

TSL	Efficiency level	Life-cycle cost savings	
		Percent of consumers that experience net cost	Average LCC savings * (2022$)
1	1	0.1	217
2	2	3.7	121
3	3	39.1	32
4	4	67.9	−13

* The savings represent the average LCC for affected consumers.

TABLE V–18—AVERAGE LCC AND PBP RESULTS FOR AO–ESEM—LOW TORQUE, 0.5 hp

TSL	Efficiency level	Average costs (2022$)				Simple payback (years)	Average lifetime (years)
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
	Baseline	213	257	1,144	1,357		6.8
1	1	257	237	1,053	1,310	2.2	6.8
2	2	265	218	969	1,234	1.3	6.8
3	3	358	194	860	1,218	2.3	6.8
4	4	441	174	770	1,211	2.7	6.8

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the baseline product.

TABLE V–19—AVERAGE LCC SAVINGS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR AO–ESEM—LOW TORQUE, 0.5 hp

TSL	Efficiency level	Life-cycle cost savings	
		Percent of consumers that experience net cost	Average LCC savings * (2022$)
1	1	2.1	48
2	2	2.9	88
3	3	34.4	50
4	4	42.2	52

* The savings represent the average LCC for affected consumers.

TABLE V–20—AVERAGE LCC AND PBP RESULTS FOR AO–ESEM—POLYPHASE, 0.25 hp

TSL	Efficiency level	Average costs (2022$)				Simple payback (years)	Average lifetime (years)
		Installed cost	First year's operating cost	Lifetime operating cost	LCC		
	Baseline	189	81	488	678		8.9
1	1	197	74	446	643	1.1	8.9
2	2	212	68	411	623	1.8	8.9
3	3	267	61	369	636	3.9	8.9
4	4	394	56	340	734	8.3	8.9

Note: The results for each TSL are calculated assuming that all consumers use products at that efficiency level. The PBP is measured relative to the baseline product.

TABLE V–21—AVERAGE LCC SAVINGS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR AO–ESEM—POLYPHASE, 0.25 hp

TSL	Efficiency level	Life-cycle cost savings	
		Percent of consumers that experience net cost	Average LCC savings * (2022$)
1	1	2.7	35
2	2	9.7	40
3	3	48.6	13
4	4	87.8	−85

* The savings represent the average LCC for affected consumers.

b. Consumer Subgroup Analysis

In the consumer subgroup analysis, DOE estimated the impact of the considered TSLs on low-income households (for representative units with consumers in the residential sector [95]), senior-only households (for representative units with consumers in the residential sector), and small businesses. Table V–22 to Table V–24 compare the average LCC savings and PBP at each efficiency level for the consumer subgroups with similar metrics for the entire consumer sample for all equipment classes. In most cases, the average LCC savings and PBP for low-income households, senior-only household, and small-businesses at the considered efficiency levels are not substantially different from the average for all. Chapter 11 of the NOPR TSD presents the complete LCC and PBP results for the subgroups.

TABLE V–22—COMPARISON OF LCC SAVINGS AND PBP FOR LOW-INCOME HOUSEHOLD SUBGROUP AND ALL CONSUMERS

TSL	Average LCC savings * (2021$)		Simple payback (years)		Consumers with net benefit (%)		Consumers with net cost (%)	
	Low-income	All	Low-income	All	Low-income	All	Low-income	All
ESEM—High/Med Torque, 0.25 hp								
1	56	56	0.5	0.5	22.3	22.5	1.7	2.0
2	53	51	1.4	1.5	52.1	51.0	14.3	16.7
3	7	−1	4.9	5.3	36.1	32.4	45.9	51.2
4	−90	−107	9.2	10.0	19.7	13.6	77.9	85.9
ESEM—High/Med Torque, 1 hp								
1	116	116	0.7	0.7	33.9	34.0	3.4	3.5
2	138	138	1.0	1.1	74.4	74.2	11.1	11.7
3	24	21	4.6	4.7	46.0	44.9	51.9	53.5
4	−138	−145	8.6	8.7	18.9	17.4	80.5	82.5
ESEM—Low Torque, 0.25 hp								
1	210	213	0.4	0.4	3.9	4.0	0.2	0.2
2	148	147	0.9	1.0	17.5	17.5	2.6	3.0
3	29	24	3.1	3.3	50.2	48.0	48.1	52.0
4	−6	−17	4.6	5.0	35.7	32.3	62.6	67.7

[95] All representative units except for the ESEM Polyphase and AO–ESEM Polyphase, 0.5 hp are used in the residential sector.

TABLE V–22—COMPARISON OF LCC SAVINGS AND PBP FOR LOW-INCOME HOUSEHOLD SUBGROUP AND ALL CONSUMERS—Continued

TSL	Average LCC savings * (2021$)		Simple payback (years)		Consumers with net benefit (%)		Consumers with net cost (%)	
	Low-income	All	Low-income	All	Low-income	All	Low-income	All
ESEM—Low Torque, 0.5 hp								
1	43	41	2.3	2.4	32.0	31.7	10.0	10.8
2	101	100	1.2	1.3	56.2	56.2	7.1	7.8
3	84	78	2.7	2.8	61.1	60.1	28.3	30.4
4	82	73	3.2	3.3	61.0	59.9	37.7	40.1
AO–ESEM—High/Med Torque, 0.25 hp								
1	77	76	0.3	0.3	25.1	25.5	1.2	1.3
2	84	83	0.9	1.0	51.1	51.5	7.0	7.8
3	44	37	3.0	3.2	44.6	43.0	32.8	36.0
4	−46	−61	5.7	6.1	25.7	21.8	59.1	64.6
AO–ESEM—High/Med Torque, 1 hp								
1	122	122	0.6	0.6	30.5	30.6	2.0	2.0
2	160	160	0.9	0.9	65.3	65.5	5.8	5.9
3	39	37	3.9	3.9	44.3	44.0	43.8	44.4
4	−124	−128	7.6	7.7	18.8	18.1	80.9	81.9
AO–ESEM—Low Torque, 0.25 hp								
1	220	217	0.4	0.4	1.6	1.7	0.1	0.1
2	124	121	1.0	1.1	20.4	20.5	3.3	3.7
3	36	32	2.9	3.1	45.0	43.2	36.1	39.1
4	−3	−13	4.6	4.9	35.7	32.1	62.7	67.9
AO–ESEM—Low Torque, 0.5 hp								
1	51	48	2.1	2.2	7.1	7.0	2.0	2.2
2	90	88	0.8	0.8	31.9	32.0	2.5	2.9
3	56	50	2.8	3.0	58.0	56.7	31.5	34.4
4	64	52	3.2	3.4	59.3	57.8	38.8	42.2

TABLE V–23—COMPARISON OF LCC SAVINGS AND PBP FOR SENIOR-ONLY HOUSEHOLD SUBGROUP AND ALL CONSUMERS

TSL	Average LCC savings * (2021$)		Simple payback (years)		Consumers with net benefit (%)		Consumers with net cost (%)	
	Senior-only	All	Senior-only	All	Senior-only	All	Senior-only	All
ESEM—High/Med Torque, 0.25 hp								
1	56	56	0.5	0.5	22.4	22.5	2.1	2.0
2	51	51	1.5	1.5	51.0	51.0	16.7	16.7
3	−1	−1	5.3	5.3	32.4	32.4	51.3	51.2
4	−107	−107	10.0	10.0	13.6	13.6	85.9	85.9
ESEM—High/Med Torque hp								
1	116	116	0.7	0.7	34.0	34.0	3.5	3.5
2	138	138	1.1	1.1	74.1	74.2	11.7	11.7
3	21	21	4.7	4.7	44.8	44.9	53.6	53.5
4	−145	−145	8.7	8.7	17.4	17.4	82.5	82.5
ESEM—Low Torque, 0.25 hp								
1	212	213	0.4	0.4	4.0	4.0	0.2	0.2
2	146	147	1.0	1.0	17.5	17.5	3.0	3.0
3	24	24	3.3	3.3	48.0	48.0	52.0	52.0
4	−17	−17	5.0	5.0	32.1	32.3	67.9	67.7

TABLE V–23—COMPARISON OF LCC SAVINGS AND PBP FOR SENIOR-ONLY HOUSEHOLD SUBGROUP AND ALL CONSUMERS—Continued

TSL	Average LCC savings * (2021$)		Simple payback (years)		Consumers with net benefit (%)		Consumers with net cost (%)	
	Senior-only	All	Senior-only	All	Senior-only	All	Senior-only	All
ESEM—Low Torque, 0.5 hp								
1	41	41	2.4	2.4	31.6	31.7	10.8	10.8
2	99	100	1.3	1.3	56.2	56.2	7.8	7.8
3	78	78	2.8	2.8	60.0	60.1	30.5	30.4
4	72	73	3.3	3.3	59.8	59.9	40.2	40.1
AO–ESEM—High/Med Torque, 0.25 hp								
1	76	76	0.3	0.3	25.5	25.5	1.3	1.3
2	83	83	1.0	1.0	51.4	51.5	7.9	7.8
3	37	37	3.2	3.2	42.9	43.0	36.1	36.0
4	−62	−61	6.1	6.1	21.7	21.8	64.7	64.6
AO–ESEM—High/Med Torque, 1 hp								
1	122	122	0.6	0.6	30.6	30.6	2.0	2.0
2	160	160	0.9	0.9	65.5	65.5	5.9	5.9
3	37	37	3.9	3.9	44.0	44.0	44.4	44.4
4	−128	−128	7.7	7.7	18.1	18.1	81.9	81.9
AO–ESEM—Low Torque, 0.25 hp								
1	216	217	0.4	0.4	1.7	1.7	0.1	0.1
2	121	121	1.1	1.1	20.5	20.5	3.7	3.7
3	31	32	3.1	3.1	43.2	43.2	39.2	39.1
4	−14	−13	4.9	4.9	32.1	32.1	67.9	67.9
AO–ESEM—Low Torque, 0.5 hp								
1	47	48	2.2	2.2	7.0	7.0	2.1	2.2
2	88	88	0.8	0.8	32.0	32.0	2.9	2.9
3	50	50	3.0	3.0	56.7	56.7	34.5	34.4
4	52	52	3.4	3.4	57.8	57.8	42.2	42.2

TABLE V–24—COMPARISON OF LCC SAVINGS AND PBP FOR SMALL BUSINESS AND ALL CONSUMERS

TSL	Average LCC savings * (2021$)		Simple payback (years)		Consumers with net benefit (%)		Consumers with net cost (%)	
	Small business	All	Small business	All	Small business	All	Small business	All
ESEM—High/Med Torque, 0.25 hp								
1	58	56	0.5	0.5	22.5	22.5	2.0	2.0
2	54	51	1.4	1.5	51.2	51.0	16.5	16.7
3	3	−1	4.9	5.3	33.8	32.4	49.9	51.2
4	−102	−107	9.3	10.0	15.2	13.6	84.3	85.9
ESEM—High/Med Torque, 1 hp								
1	121	116	0.6	0.7	34.0	34.0	3.4	3.5
2	145	138	1.0	1.1	74.4	74.2	11.5	11.7
3	28	21	4.3	4.7	46.0	44.9	52.4	53.5
4	−136	−145	8.1	8.7	19.1	17.4	80.8	82.5
ESEM—Low Torque, 0.25 hp								
1	220	213	0.4	0.4	4.0	4.0	0.2	0.2
2	153	147	1.0	1.0	17.6	17.5	2.9	3.0
3	27	24	3.2	3.3	50.6	48.0	49.4	52.0
4	−12	−17	4.7	5.0	34.6	32.3	65.4	67.7

TABLE V–24—COMPARISON OF LCC SAVINGS AND PBP FOR SMALL BUSINESS AND ALL CONSUMERS—Continued

TSL	Average LCC savings * (2021$)		Simple payback (years)		Consumers with net benefit (%)		Consumers with net cost (%)	
	Small business	All	Small business	All	Small business	All	Small business	All
ESEM—Low Torque, 0.5 hp								
1	44	41	2.3	2.4	32.0	31.7	10.5	10.8
2	105	100	1.2	1.3	56.4	56.2	7.6	7.8
3	85	78	2.6	2.8	61.1	60.1	29.4	30.4
4	82	73	3.1	3.3	61.7	59.9	38.3	40.1
ESEM—Polyphase, 0.5 hp								
1	33	32	1.0	1.1	9.3	9.2	1.0	1.0
2	28	26	2.4	2.6	26.4	26.3	7.1	7.2
3	−7	−8	6.8	7.4	29.1	27.8	57.3	58.6
4	−105	−107	14.3	15.6	5.2	4.5	94.3	95.0
AO–ESEM—High/Med Torque, 0.25 hp								
1	79	76	0.3	0.3	25.5	25.5	1.3	1.3
2	86	83	0.9	1.0	51.6	51.5	7.7	7.8
3	42	37	3.0	3.2	44.4	43.0	34.6	36.0
4	−56	−61	5.7	6.1	23.4	21.8	62.9	64.6
AO–ESEM—High/Med Torque, 1 hp								
1	128	122	0.5	0.6	30.6	30.6	2.0	2.0
2	168	160	0.8	0.9	65.6	65.5	5.8	5.9
3	46	37	3.6	3.9	45.0	44.0	43.4	44.4
4	−119	−128	7.1	7.7	20.2	18.1	79.8	81.9
AO–ESEM—Low Torque, 0.25 hp								
1	225	217	0.4	0.4	1.7	1.7	0.1	0.1
2	127	121	1.0	1.1	20.6	20.5	3.7	3.7
3	35	32	2.9	3.1	45.1	43.2	37.3	39.1
4	−9	−13	4.6	4.9	34.3	32.1	65.7	67.9
AO–ESEM—Low Torque, 0.5 hp								
1	51	48	2.1	2.2	7.1	7.0	2.1	2.2
2	92	88	0.8	0.8	32.1	32.0	2.8	2.9
3	55	50	2.8	3.0	58.1	56.7	33.1	34.4
4	60	52	3.3	3.4	59.7	57.8	40.3	42.2
AO–ESEM—Polyphase, 0.5 hp								
1	37	35	1.0	1.1	33.8	33.7	2.6	2.7
2	42	40	1.9	2.0	53.4	53.3	9.6	9.7
3	16	13	4.7	5.1	50.1	48.8	47.3	48.6
4	−81	−85	9.9	10.8	13.9	12.2	86.1	87.8

c. Rebuttable Presumption Payback

As discussed in section IV.F.9 of this document, EPCA establishes a rebuttable presumption that an energy conservation standard is economically justified if the increased purchase cost for a product that meets the standard is less than three times the value of the first-year energy savings resulting from the standard. (42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(2)(B)(iii)) In calculating a rebuttable presumption payback period for each of the considered TSLs, DOE used discrete values, and, as required by EPCA, based the energy use calculation on the DOE test procedures for ESEMs. In contrast, the PBPs presented in section V.B.1.a of this document were calculated using distributions that reflect the range of energy use in the field.

Table V–25 presents the rebuttable-presumption payback periods for the considered TSLs for ESEMs. While DOE examined the rebuttable-presumption criterion, it considered whether the standard levels considered for this proposed rule are economically justified through a more detailed analysis of the economic impacts of those levels, pursuant to 42 U.S.C. 6313(a) and 42 U.S.C. 6295(o)(2)(B)(i), that considers the full range of impacts to the consumer, manufacturer, Nation, and environment. The results of that analysis serve as the basis for DOE to definitively evaluate the economic justification for a potential standard level, thereby supporting or rebutting the results of any preliminary determination of economic justification.

TABLE V–25—REBUTTABLE-PRESUMPTION PAYBACK PERIODS

Equipment class	Payback period (years)			
	TSL1	TSL2	TSL3	TSL4
ESEM—High and Medium Torque, 0.25 hp	0.4	1.0	3.1	5.8
ESEM—High and Medium Torque, 1 hp	0.6	0.8	2.9	5.4
ESEM—Low Torque, 0.25 hp	0.4	0.7	1.2	1.8
ESEM—Low Torque, 0.5 hp	2.2	1.3	2.3	2.7
ESEM—Polyphase, 0.25 hp	1.0	1.7	3.9	8.3
AO–ESEM—High and Medium Torque, 0.25 hp	0.3	0.6	1.9	3.7
AO–ESEM—High and Medium Torque, 1 hp	0.5	0.7	2.4	4.4
AO–ESEM—Low Torque, 0.25 hp	0.4	0.6	1.1	1.7
AO–ESEM—Low Torque, 0.5 hp	2.0	1.2	2.1	2.5
AO–ESEM—Polyphase, 0.25 hp	0.9	1.5	3.4	7.1

2. Economic Impacts on Manufacturers

DOE performed an MIA to estimate the impact of new energy conservation standards on manufacturers of ESEM. The following section describes the expected impacts on manufacturers at each considered TSL. Chapter 12 of the NOPR TSD explains the analysis in further detail.

a. Industry Cash Flow Analysis Results

In this section, DOE provides GRIM results from the analysis, which examines changes in the industry that would result from new standards. The following tables summarize the estimated financial impacts (represented by changes in INPV) of potential new energy conservation standards on manufacturers of ESEMs, as well as the conversion costs that DOE estimates manufacturers of ESEMs would incur at each TSL.

To evaluate the range of cash flow impacts on the ESEM industry, DOE modeled two manufacturer markup scenarios that correspond to the range of possible market responses to new standards. Each manufacturer markup scenario results in a unique set of cash flows and corresponding INPVs at each TSL.

In the following discussion, the INPV results refer to the difference in industry value between the no-new-standards case and the standards cases that result from the sum of discounted cash flows from the base year (2024) through the end of the analysis period (2058). The results also discuss the difference in cash flows between the no-new standards case and the standards cases in the year before the estimated compliance date for new energy conservation standards. This figure represents the size of the required conversion costs relative to the cash flow generated by the ESEM industry in the absence of new energy conservation standards.

To assess the upper (less severe) end of the range of potential impacts on ESEM manufacturers, DOE modeled a preservation of gross margin scenario. This scenario assumes that, in the standards cases, ESEM manufacturers will be able to pass along all the higher MPCs required for more efficient equipment to their customers. Specifically, the industry will be able to maintain its average no-new-standards case gross margin (as a percentage of revenue) despite the higher MPCs in the standards cases. In general, the larger the MPC increases, the less likely manufacturers are to achieve the cash flow from operations calculated in this scenario because it is less likely that manufacturers will be able to fully pass on these larger production cost increases.

To assess the lower (more severe) end of the range of potential impacts on the ESEM manufacturers, DOE modeled a preservation of operating profit scenario. This scenario represents the lower end of the range of impacts on manufacturers because no additional operating profit is earned on the higher MPCs, eroding profit margins as a percentage of total revenue.

TABLE V–26—INDUSTRY NET PRESENT VALUE FOR ESEM MANUFACTURERS—PRESERVATION OF GROSS MARGIN SCENARIO

	Units	No-new-standards case	Trial standard level *			
			1	2	3	4
INPV	*2022$ millions*	2,019	1,883	1,888	1,820	1,710
Change in INPV	*2022$ millions*	.....	(136)	(131)	(199)	(309)
	%	.....	(6.7)	(6.5)	(9.9)	(15.3)

* Numbers may not sum exactly due to rounding. Numbers in parentheses are negative numbers.

TABLE V–27—INDUSTRY NET PRESENT VALUE FOR ESEM MANUFACTURERS—PRESERVATION OF OPERATING PROFIT SCENARIO

	Units	No-new-standards case	Trial standard level *			
			1	2	3	4
INPV	*2022$ millions*	2,019	1,818	1,755	1,035	73
Change in INPV	*2022$ millions*	.....	(201)	(264)	(984)	(1,946)
	%	.....	(9.9)	(13.1)	(48.7)	(96.4)

* Numbers may not sum exactly due to rounding. Numbers in parentheses are negative numbers.

TABLE V–28—CASH FLOW ANALYSIS FOR ESEM MANUFACTURERS

	Units	No-new-standards case	Trial standard level *			
			1	2	3	4
Free Cash Flow (2028)	*2022$ millions*	154	45	17	(313)	(764)
Change in Free Cash Flow (2028)	*2022$ millions*		(110)	(137)	(468)	(919)
	%		(71)	(89)	(303)	(595)
Product Conversion Costs	*2022$ millions*		125	141	326	572
Capital Conversion Costs	*2022$ millions*		149	198	792	1,584
Total Conversion Costs	*2022$ millions*		274	339	1,118	2,156

* Numbers may not sum exactly due to rounding. Numbers in parentheses are negative numbers.

TSL 4 sets the efficiency level at EL 4 for all ESEM equipment classes. At TSL 4, DOE estimates the impacts to INPV will range from a decrease of $1,946 million to a decrease of $309 million, which represents decreases to INPV by approximately 96.4 percent and 15.3 percent, respectively. At TSL 4, industry free cash flow (operating cash flow minus capital expenditures) is estimated to decrease to −$764 million, or a drop of 595 percent, compared to the no-new-standards case value of $154 million in 2028, the year leading up to the compliance date of new energy conservation standards. The significantly negative free cash flow in the years leading up to the compliance date implies that most, if not all, ESEM manufacturers will need to borrow funds in order to make the investments necessary to comply with standards at TSL 4. This has the potential to significantly alter the market dynamics as some smaller ESEM manufacturers may not be able to secure this funding and could exit the market as a result of standards set at TSL 4.

In the absence of new energy conservation standards, DOE estimates that less than 1 percent of ESEM (High/Med Torque), no ESEM (Low Torque), less than 1 percent of ESEM (Polyphase), 6 percent of AO–ESEM (High/Med Torque), no AO–ESEM (Low Torque), and no AO–ESEM (Polyphase) shipments will meet the ELs required at TSL 4 in 2029, the compliance year of new standards. Therefore, DOE estimates that manufacturers will have to redesign models representing over 99 percent of all ESEM shipments by the compliance date. It is unclear if most ESEM manufacturers would have the engineering capacity to complete the necessary redesigns within the 4-year compliance period. If manufacturers require more than 4 years to redesign their non-compliant ESEM models, they will likely prioritize redesigns based on sales volume, which could result in customers not being able to obtain compliant ESEMs covering the entire range of horsepower and motor configurations that they require.

Almost all ESEMs covered by this rulemaking will need to be redesigned at TSL 4. Therefore, DOE estimates that manufacturers will have to make significant investments in their manufacturing production equipment and the engineering resources dedicated to redesigning ESEM models. DOE estimates that manufacturers will incur approximately $572 million in product conversion costs and approximately $1,584 million in capital conversion costs. Product conversion costs include the engineering time to redesign almost all ESEM models and to re-test these newly redesigned models to meet the standards set at TSL 4. Capital conversion costs include the purchase of almost all new lamination die sets, winding machines, frame casts, and assembly equipment as well as other retooling costs to accommodate almost all ESEM models covered by this proposed rulemaking that will need to be redesigned.

At TSL 4, under the preservation of gross margin scenario, the shipment weighted average MPC significantly increases by approximately 117.7 percent relative to the no-new-standards case MPC. While this price increase results in additional revenue for manufacturers, the $2,156 million in total conversion costs estimated at TSL 4 outweighs this increase in manufacturer revenue and results in moderately negative INPV impacts at TSL 4 under the preservation of gross margin scenario.

Under the preservation of operating profit scenario, manufacturers earn the same nominal operating profit as would be earned in the no-new-standards case, but manufacturers do not earn additional profit from their investments. The significant increase in the shipment weighted average MPC results in a lower average manufacturer margin. This lower average manufacturer margin and the significant $2,156 million in total conversion costs result in significantly negative INPV impacts at TSL 4 under the preservation of operating profit scenario.

TSL 3 sets the efficiency level at EL 3 for all ESEM equipment classes. At TSL 3, DOE estimates the impacts to INPV will range from a decrease of $984 million to a decrease of $199 million, which represents decreases to INPV by approximately 48.7 percent and 9.9 percent, respectively. At TSL 3, industry free cash flow is estimated to decrease to −$313 million, or a drop of 303 percent, compared to the no-new-standards case value of $154 million in 2028, the year leading up to the compliance date of new energy conservation standards. The negative free cash flow in the years leading up to the compliance date implies that most, if not all, ESEM manufacturers will need to borrow funds in order to make the investments necessary to comply with standards. This has the potential to significantly alter the market dynamics as some smaller ESEM manufacturers may not be able to secure this funding and could exit the market as a result of standards set at TSL 3.

In the absence of new energy conservation standards, DOE estimates that 8 percent of ESEM (High/Med Torque), 8 percent of ESEM (Low Torque), 14 percent of ESEM (Polyphase), 15 percent of AO–ESEM (High/Med Torque), 11 percent of AOESEM (Low Torque), and 3 percent of AO–ESEM (Polyphase) shipments will meet or exceed the ELs requires at TSL 3 in 2029, the compliance year of new standards. Therefore, DOE estimates that manufacturers will have to redesign models representing approximately 91 percent of all ESEM shipments by the compliance date. It is unclear if most ESEM manufacturers would have the engineering capacity to complete the necessary redesigns within the 4-year compliance period. If manufacturers require more than 4 years to redesign their non-compliant ESEM models, they will likely prioritize redesigns based on sales volume, which could result in customers not being able

to obtain compliant ESEMs covering the entire range of horsepower and motor configurations that they require.

The majority of ESEMs covered by this rulemaking will need to be redesigned at TSL 3. Therefore, DOE estimates that manufacturers will have to make significant investments in their manufacturing production equipment and the engineering resources dedicated to redesigning ESEM models. DOE estimates that manufacturers will incur approximately $326 million in product conversion costs and approximately $792 million in capital conversion costs. Product conversion costs include the engineering time to redesign approximately 91 percent of all ESEM models and to re-test these newly redesigned models to meet the standards set at TSL 3. Capital conversion costs include the purchase of almost all new lamination die sets, winding machines, frame casts, and assembly equipment as well as other retooling costs for approximately 91 percent of all ESEM models covered by this proposed rulemaking.

At TSL 3, under the preservation of gross margin scenario, the shipment weighted average MPC significantly increases by approximately 56.4 percent relative to the no-new-standards case MPC. While this price increase results in additional revenue for manufacturers, the $1,118 million in total conversion costs estimated at TSL 3 outweighs this increase in manufacturer revenue and results in moderately negative INPV impacts at TSL 3 under the preservation of gross margin scenario.

Under the preservation of operating profit scenario, manufacturers earn the same nominal operating profit as would be earned in the no-new-standards case, but manufacturers do not earn additional profit from their investments. The significant increase in the shipment weighted average MPC results in a lower average manufacturer margin. This lower average manufacturer margin and the significant $1,118 million in total conversion costs result in significantly negative INPV impacts at TSL 3 under the preservation of operating profit scenario.

TSL 2 sets the efficiency level at EL 2 for all ESEM equipment classes, which is the recommended level from the December 2022 Joint Recommendation. At TSL 2, DOE estimates the impacts to INPV will range from a decrease of $264 million to a decrease of $131 million, which represents decreases to INPV by approximately 13.1 percent and 6.5 percent, respectively. At TSL 2, industry free cash flow is estimated to decrease to $17 million, or a drop of 89 percent, compared to the no-new-standards case value of $154 million in 2028, the year leading up to the compliance date of new energy conservation standards.

In the absence of new energy conservation standards, DOE estimates that 22 percent of ESEM (High/Med Torque), 45 percent of ESEM (Low Torque), 67 percent of ESEM (Polyphase), 34 percent of AO–ESEM (High/Med Torque), 67 percent of AO–ESEM (Low Torque), and 36 percent of AO–ESEM (Polyphase) shipments will meet or exceed the ELs requires at TSL 2 in 2029, the compliance year of new standards. Therefore, DOE estimates that manufacturers will have to redesign models representing approximately 55 percent of all ESEM shipments by the compliance date.

DOE estimates that manufacturers will incur approximately $141 million in product conversion costs and approximately $198 million in capital conversion costs. Product conversion costs primarily include engineering time to redesign non-compliance ESEM models and to re-test these newly redesigned models to meet the standards set at TSL 2. Capital conversion costs include the purchase of lamination die sets, winding machines, frame casts, and assembly equipment as well as other retooling costs for all non-compliant ESEM models covered by this proposed rulemaking.

At TSL 2, under the preservation of gross margin scenario, the shipment weighted average MPC increases by approximately 9.6 percent relative to the no-new-standards case MPC. While this price increase results in additional revenue for manufacturers, the $339 million in total conversion costs estimated at TSL 2 outweighs this increase in manufacturer revenue and results in moderately negative INPV impacts at TSL 2 under the preservation of gross margin scenario.

Under the preservation of operating profit scenario, manufacturers earn the same nominal operating profit as would be earned in the no-new-standards case, but manufacturers do not earn additional profit from their investments. The increase in the shipment weighted average MPC results in a slightly lower average manufacturer margin. This lower average manufacturer margin and the $339 million in total conversion costs result in moderately negative INPV impacts at TSL 2 under the preservation of operating profit scenario.

TSL 1 sets the efficiency level at EL 1 for all ESEM equipment classes. At TSL 1, DOE estimates the impacts to INPV will range from a decrease of $201 million to a decrease of $136 million, which represents decreases to INPV by approximately 9.9 percent and 6.7 percent, respectively. At TSL 1, industry free cash flow is estimated to decrease to $45 million, or a drop of 71 percent, compared to the no-new-standards case value of $154 million in 2028, the year leading up to the compliance date of new energy conservation standards.

In the absence of new energy conservation standards, DOE estimates that 68 percent of ESEM (High/Med Torque), 66 percent of ESEM (Low Torque), 90 percent of ESEM (Polyphase), 70 percent of AO–ESEM (High/Med Torque), 92 percent of AO–ESEM (Low Torque), and 62 percent of AO–ESEM (Polyphase) shipments will meet or exceed the ELs requires at TSL 1 in 2029, the compliance year of new standards. Therefore, DOE estimates that manufacturers will have to redesign models representing approximately 26 percent of all ESEM shipments by the compliance date.

DOE estimates that manufacturers will incur approximately $125 million in product conversion costs and approximately $149 million in capital conversion costs. Product conversion costs primarily include engineering time to redesign non-compliance ESEM models and to re-test these newly redesigned models to meet the standards set at TSL 1. Capital conversion costs include the purchase of lamination die sets, winding machines, frame casts, and assembly equipment, as well as other retooling costs for all non-compliant ESEM models covered by this proposed rulemaking.

At TSL 1, under the preservation of gross margin scenario, the shipment weighted average MPC increases slightly by approximately 4.7 percent relative to the no-new-standards case MPC. While this price increase results in additional revenue for manufacturers, the $274 million in total conversion costs estimated at TSL 1 outweighs this increase in manufacturer revenue and results in moderately negative INPV impacts at TSL 1 under the preservation of gross margin scenario.

Under the preservation of operating profit scenario, manufacturers earn the same nominal operating profit as would be earned in the no-new-standards case, but manufacturers do not earn additional profit from their investments. The increase in the shipment weighted average MPC results in a slightly lower average manufacturer margin. This lower average manufacturer margin and the $274 million in total conversion costs result in moderately negative INPV impacts at TSL 1 under the preservation of operating profit scenario.

b. Direct Impacts on Employment

To quantitatively assess the potential impacts of new energy conservation standards on direct employment in the ESEM industry, DOE used the GRIM to estimate the domestic labor expenditures and number of direct employees in the no-new-standards case and in each of the standards cases during the analysis period.

DOE used statistical data from the U.S. Census Bureau's 2021 Annual Survey of Manufacturers (''ASM''), the results of the engineering analysis, and interviews with manufacturers to determine the inputs necessary to calculate industry-wide labor expenditures and domestic employment levels. Labor expenditures involved with the manufacturing of ESEMs are a function of the labor intensity of the product, the sales volume, and an assumption that wages remain fixed in real terms over time.

In the GRIM, DOE used the labor content of each piece of equipment and the MPCs to estimate the annual labor expenditures of the industry. DOE used Census data and interviews with manufacturers to estimate the portion of the total labor expenditures attributable to domestic labor.

The production worker estimates in this employment section cover only workers up to the line-supervisor level who are directly involved in fabricating and assembling ESEMs within a motor facility. Workers performing services that are closely associated with production operations, such as material handling with a forklift, are also included as production labor. DOE's estimates account for only production workers who manufacture the specific equipment covered by this proposed rulemaking.

The employment impacts shown in Table V–29 represent the potential production employment impacts resulting from new energy conservation standards. The upper bound of the results estimates the maximum change in the number of production workers that could occur after compliance with new energy conservation standards when assuming that manufacturers continue to produce the same scope of covered equipment in the same production facilities. It also assumes that domestic production does not shift to lower-labor-cost countries. Because there is a real risk of manufacturers evaluating sourcing decisions in response to new energy conservation standards, the lower bound of the employment results includes the estimated total number of U.S. production workers in the industry who could lose their jobs if some existing ESEM production was moved outside of the U.S. While the results present a range of employment impacts following 2029, this section also includes qualitative discussions of the likelihood of negative employment impacts at the various TSLs. Finally, the employment impacts shown are independent of the indirect employment impacts from the broader U.S. economy, which are documented in chapter 16 of the NOPR TSD.

Based on 2021 ASM data and interviews with manufacturers, DOE estimates approximately 15 percent of ESEMs covered by this proposed rulemaking sold in the U.S. are manufactured domestically. Using this assumption, DOE estimates that in the absence of new energy conservation standards, there would be approximately 784 domestic production workers involved in manufacturing all ESEMs covered by this rulemaking in 2029. Table V–29 shows the range of potential impacts of new energy conservation standards on U.S. production workers involved in the production of ESEMs covered by this rulemaking.

TABLE V–29—POTENTIAL CHANGE IN THE NUMBER OF DOMESTIC ESEM WORKERS

	No-new-standards case	Trail standard level			
		1	2	3	4
Domestic Production Workers in 2029	784	821	859	1,226	1,706
Domestic Non-Production Workers in 2029	449	470	492	702	977
Total Domestic Employment in 2029	1,233	1,291	1,351	1,928	2,683
Potential Changes in Total Domestic Employment in 2029*		58–(37)	118–(75)	695–(442)	1,450–(784)

* DOE presents a range of potential impacts. Numbers in parentheses indicate negative values.

At the upper end of the range, all examined TSLs show an increase in the number of domestic production workers for ESEMs. The upper end of the range represents a scenario where manufacturers increase production hiring due to the increase in the labor associated with adding the required components and additional labor (*e.g.,* hand winding, etc.) to make more efficient ESEMs. However, as previously stated, this assumes that in addition to hiring more production employees, all existing domestic production would remain in the United States and not shift to lower labor-cost countries.

At the lower end of the range, all examined TSLs show a decrease in domestic production employment. The lower end of the domestic employment range assumes that some, or all, ESEM domestic production employment may shift to lower labor-cost countries in response to energy conservation standards. DOE estimates that approximately 85 percent of all ESEMs sold in the U.S. are manufactured abroad. At max-tech, TSL 4, DOE conservatively estimates that the remaining 15 percent of domestic production could shift to foreign production locations. DOE estimated this lower bound potential change in domestic employment based on the percent change in the MPC at each TSL.[96]

[96] Except for TSL 4, which has an MPC increase of higher than 100 percent. Therefore, DOE assumes all domestic employment moves abroad at this TSL.

c. Impacts on Manufacturing Capacity

The December 2022 Joint Recommendation stated that standards set at EL 2 for the ESEM High/Med Torque equipment class would minimize potential market disruptions by allowing CSIR and split-phase topologies to remain on the market, but only at smaller (0.25–0.5 hp) horsepower ratings. (Electric Motors Working Group, No. 38 at p. 3) The December 2022 Joint Recommendation also stated that standards set at EL 2 for the ESEM Low Torque equipment class would not create widespread market disruptions and that standards set at higher ELs could result in significant increases in the physical size, unavailability of product, and in some cases, may be extremely difficult to

achieve with current PSC technology. (*Id.*)

Many ESEM manufacturers do not offer any ESEM models that would meet max-tech levels or one EL below max-tech (*i.e.,* TSL 4 and TSL 3, respectively). Based on the shipments analysis used in the NIA, DOE estimates that less than one percent and 9 percent of all ESEM shipments will meet max-tech and one EL below max-tech, respectively, in the no-new-standards case in 2029, the compliance year of new standards. Therefore, at TSL 4 and TSL 3, DOE estimates that manufacturers will have to redesign models representing over 99 percent and 91 percent, respectively, of all ESEM shipments by the compliance date. It is unclear if any ESEM manufacturers would have the engineering capacity to complete the necessary redesigns within the 4-year compliance period. If manufacturers require more than 4 years to redesign their non-compliant ESEM models, they will likely prioritize redesigns based on sales volume, which could result in customers not being able to obtain compliant ESEMs covering the entire range of horsepower and motor configurations that they require.

Lastly, during manufacturer interviews, most manufacturers stated they would not be able to provide a full portfolio of any ESEM equipment class for any standards that would be met using copper rotors. In DOE's engineering analysis, all representative units, except the ESEM—Low Torque, 0.5 hp and AO–ESEM—Low Torque, 0.5 hp representative units, are modeled to use copper rotors at the max-tech efficiency design (*i.e.,* EL 4). No other lower ELs are modeled to use die-cast copper rotors. Most manufacturers stated that they do not currently have the machinery, technology, or engineering resources to produce copper rotors in-house. Some manufacturers claim that the few manufacturers that do have the capability of producing copper rotors are not able to produce these motors in volumes sufficient to fulfill all shipments of that equipment class and would not be able to ramp up those production volumes over the four-year compliance period. For manufacturers to either completely redesign their motor production lines or significantly expand their very limited copper rotor production line would require a massive retooling and engineering effort, which could take more than a decade to complete. Most manufacturers stated they would have to outsource copper rotor production because they would not be able to modify their facilities and production processes to produce copper rotors in-house within a four-year time period. Most manufacturers agreed that outsourcing rotor die casting would constrain capacity by creating a bottleneck in rotor production, as there are very few companies that produce copper rotors.

Manufacturers also pointed out that there is substantial uncertainty surrounding the global availability and price of copper, which has the potential to constrain capacity. Several manufacturers expressed concern that the combination of all of these factors would make it impossible to support existing customers while redesigning equipment lines and retooling.

DOE estimates there is a strong likelihood of manufacturer capacity constraints in the near term for any standards that would likely require the use of copper rotors for any equipment classes both due to the uncertainty of the global supply of copper and due to the quantity of machinery that would need to be purchased and the engineering resources that would be required to produce copper rotors. Therefore, there could be significant market disruption for any standards set at EL 4 for any equipment class, except for the ESEM—Low Torque, 0.25–3 hp and the AO–ESEM—Low Torque, 0.25–3 hp equipment classes.

d. Impacts on Subgroups of Manufacturers

Using average cost assumptions to develop an industry cash-flow estimate may not be adequate for assessing differential impacts among manufacturer subgroups. Small manufacturers, niche equipment manufacturers, and manufacturers exhibiting cost structures substantially different from the industry average could be affected disproportionately. DOE discusses the impacts on small businesses in section VI.B of this document and did not identify any other adversely impacted ESEM-related manufacturer subgroups for this proposed rulemaking based on the results of the industry characterization.

e. Cumulative Regulatory Burden

One aspect of assessing manufacturer burden involves looking at the cumulative impact of multiple DOE standards and the product-specific regulatory actions of other Federal agencies that affect the manufacturers of a covered product or equipment. While any one regulation may not impose a significant burden on manufacturers, the combined effects of several existing or impending regulations may have serious consequences for some manufacturers, groups of manufacturers, or an entire industry. Assessing the impact of a single regulation may overlook this cumulative regulatory burden. In addition to energy conservation standards, other regulations can significantly affect manufacturers' financial operations. Multiple regulations affecting the same manufacturer can strain profits and lead companies to abandon equipment lines or markets with lower expected future returns than competing products. For these reasons, DOE conducts an analysis of cumulative regulatory burden as part of its rulemakings pertaining to appliance efficiency. DOE requests information regarding the impact of cumulative regulatory burden on manufacturers of ESEMs associated with multiple DOE standards or product-specific regulatory actions of other Federal agencies.

DOE evaluates product-specific regulations that will take effect approximately 3 years before or after the 2029 compliance date of any new energy conservation standards for ESEMs. This information is presented in Table V.30.

TABLE V.30—COMPLIANCE DATES AND EXPECTED CONVERSION EXPENSES OF FEDERAL ENERGY CONSERVATION STANDARDS AFFECTING ESEM MANUFACTURERS

Federal energy conservation standard	Number of mfrs *	Number of manufacturers affected from this rule **	Approx. standards year	Industry conversion costs (millions)	Industry conversion costs/product revenue *** (%)
Dedicated-Purpose Pool Pump Motors 88 FR 66966 (Sep. 28, 2023)	5	5	2026 & 2028	$56.2 (2022$)	5.1
Distribution Transformer 88 FR 1722 (Jan. 11, 2023) †	27	6	2027	$343 (2021$)	2.7

TABLE V.30—COMPLIANCE DATES AND EXPECTED CONVERSION EXPENSES OF FEDERAL ENERGY CONSERVATION STANDARDS AFFECTING ESEM MANUFACTURERS—Continued

Federal energy conservation standard	Number of mfrs *	Number of manufacturers affected from this rule **	Approx. standards year	Industry conversion costs (millions)	Industry conversion costs/product revenue *** (%)
Electric Motors 88 FR 36066 (Jun. 1, 2023)	74	74	2027	$468 (2021$)	2.6

* This column presents the total number of manufacturers identified in the energy conservation standard rule contributing to cumulative regulatory burden.
** This column presents the number of manufacturers producing ESEMs that are also listed as manufacturers in the listed energy conservation standard contributing to cumulative regulatory burden.
*** This column presents industry conversion costs as a percentage of product revenue during the conversion period. Industry conversion costs are the upfront investments manufacturers must make to sell compliant products/equipment. The revenue used for this calculation is the revenue from just the covered product/equipment associated with each row. The conversion period is the time frame over which conversion costs are made and lasts from the publication year of the final rule to the compliance year of the energy conservation standard. The conversion period typically ranges from 3 to 5 years, depending on the rulemaking.
† Indicates a proposed rulemaking. Final values may change upon the publication of a final rule.

In response to the March 2022 Preliminary Analysis, the Joint Stakeholders commented that regulating motors that are components significantly increases the burden on manufacturers if all products using special and definite purpose motors were suddenly forced to certify compliance with standards for component parts, including the testing, paperwork, and record-keeping requirements that accompany certification. (Joint Stakeholders, No. 23 at p. 5) As stated in section II.A and section IV.A.1 of this document, EPCA, as amended through EISA 2007, provides DOE with the authority to regulate the expanded scope of motors addressed in this rule, whether those electric motors are manufactured alone or as a component of another piece of equipment. DOE believes this ESEM proposed rulemaking would not impact manufacturers of consumer products. For commercial equipment, DOE identified the following equipment as potentially incorporating ESEMs: walk-in coolers and freezers, circulator pumps, air circulating fans, and commercial unitary air conditioning equipment. If the proposed energy conservation standards for these rules finalize as proposed, DOE identified that these rules would all: (1) have a compliance year that is at or before the ESEM standard compliance year (2029) and/or (2) require a motor that is either outside of the scope of ESEM (*e.g.,* an ECM) or an ESEM with an efficiency above the proposed ESEM standards, and therefore would not be impacted by this ESEM proposed rulemaking (*i.e.,* the ESEM rule would not trigger a redesign of these equipment).

3. National Impact Analysis

This section presents DOE's estimates of the national energy savings and the NPV of consumer benefits that would result from each of the TSLs considered as potential new standards.

a. Significance of Energy Savings

To estimate the energy savings attributable to potential new standards for ESEMs, DOE compared their energy consumption under the no-new-standards case to their anticipated energy consumption under each TSL. The savings are measured over the entire lifetime of products purchased in the 30-year period that begins in the year of anticipated compliance with new standards (2029–2058). Table V–31 presents DOE's projections of the national energy savings for each TSL considered for ESEMs. The savings were calculated using the approach described in section IV.H.2 of this document.

TABLE V–31—CUMULATIVE NATIONAL ENERGY SAVINGS FOR ESEMS; 30 YEARS OF SHIPMENTS

[2029–2058]

	Trial standard level			
	1	2	3	4
	(Quads)			
Primary energy	3.0	8.7	16.5	23.6
FFC energy	3.1	8.9	17.0	24.2

OMB Circular A–4 [97] requires agencies to present analytical results, including separate schedules of the monetized benefits and costs that show the type and timing of benefits and costs. Circular A–4 also directs agencies to consider the variability of key elements underlying the estimates of benefits and costs. For this NOPR, DOE undertook a sensitivity analysis using 9 years, rather than 30 years, of equipment shipments. The choice of a 9-year period is a proxy for the timeline in EPCA for the review of certain energy conservation standards and potential revision of and compliance with such revised standards.[98] The review

[97] U.S. Office of Management and Budget. *Circular A–4: Regulatory Analysis.* September 17, 2003. *http://obamawhitehouse.archives.gov/omb/circulars_a004_a-4* (last accessed May 1, 2023).

[98] EPCA requires DOE to review its standards at least once every 6 years, and requires, for certain products, a 3-year period after any new standard is promulgated before compliance is required, except that in no case may any new standards be required within 6 years of the compliance date of the previous standards. (42 U.S.C. 6316(a); 42 U.S.C. 6295(m)) While adding a 6-year review to the 3-year compliance period adds up to 9 years, DOE notes that it may undertake reviews at any time within the 6-year period and that the 3-year compliance date may yield to the 6-year backstop. A 9-year

timeframe established in EPCA is generally not synchronized with the equipment lifetime, equipment manufacturing cycles, or other factors specific to ESEMs. Thus, such results are presented for informational purposes only and are not indicative of any change in DOE's analytical methodology. The NES sensitivity analysis results based on a 9-year analytical period are presented in Table V–32. The impacts are counted over the lifetime of ESEMs purchased in 2029–2037.

TABLE V–32—CUMULATIVE NATIONAL ENERGY SAVINGS FOR ESEMS; 9 YEARS OF SHIPMENTS

[2029–2037]

	Trial standard level			
	1	2	3	4
	(Quads)			
Primary energy	0.8	2.4	4.5	6.4
FFC energy	0.8	2.4	4.6	6.6

b. Net Present Value of Consumer Costs and Benefits

DOE estimated the cumulative NPV of the total costs and savings for consumers that would result from the TSLs considered for ESEMs. In accordance with OMB's guidelines on regulatory analysis,[99] DOE calculated NPV using both a 7-percent and a 3-percent real discount rate. Table V–33 shows the consumer NPV results with impacts counted over the lifetime of equipment purchased in 2029–2058.

TABLE V–33—CUMULATIVE NET PRESENT VALUE OF CONSUMER BENEFITS FOR ESEMS; 30 YEARS OF SHIPMENTS

[2029–2058]

Discount rate	Trial standard level			
	1	2	3	4
	(billion 2022$)			
3 percent	14.0	45.0	50.4	36.8
7 percent	6.4	21.0	21.0	11.2

The NPV results based on the aforementioned 9-year analytical period are presented in Table V–34. The impacts are counted over the lifetime of equipment purchased in 2029–2037. As mentioned previously, such results are presented for informational purposes only and are not indicative of any change in DOE's analytical methodology or decision criteria.

TABLE V–34—CUMULATIVE NET PRESENT VALUE OF CONSUMER BENEFITS FOR ESEMS; 9 YEARS OF SHIPMENTS

[2029–2037]

Discount rate	Trial standard level			
	1	2	3	4
	(billion 2022$)			
3 percent	5.1	16.3	18.1	12.9
7 percent	3.2	10.3	10.1	5.2

The previous results reflect the use of a default trend to estimate the change in price for ESEMs over the analysis period (see section IV.F.1 of this document). DOE also conducted a sensitivity analysis that considered one scenario with a price decline and one scenario with a price increase compared to the reference case. The results of these alternative cases are presented in appendix 10C of the NOPR TSD. In the decreasing price case, the NPV of consumer benefits is higher than in the default case. In the increasing price case, the NPV of consumer benefits is lower than in the default case.

c. Indirect Impacts on Employment

DOE estimates that new energy conservation standards for ESEMs will reduce energy expenditures for consumers of those equipment, with the resulting net savings being redirected to other forms of economic activity. These expected shifts in spending and economic activity could affect the demand for labor. As described in section IV.N of this document, DOE used an input/output model of the U.S. economy to estimate indirect

analysis period may not be appropriate given the variability that occurs in the timing of standards reviews and the fact that for some products, the compliance period is 5 years rather than 3 years.

[99] U.S. Office of Management and Budget. *Circular A–4: Regulatory Analysis.* September 17, 2003. *obamawhitehouse.archives.gov/omb/circulars_a004_a-4* (last accessed July 1, 2021).

employment impacts of the TSLs that DOE considered. There are uncertainties involved in projecting employment impacts, especially changes in the later years of the analysis. Therefore, DOE generated results for near-term timeframes (2029–2034), where these uncertainties are reduced.

The results suggest that the proposed standards are likely to have a negligible impact on the net demand for labor in the economy. The net change in jobs is so small that it would be imperceptible in national labor statistics and might be offset by other, unanticipated effects on employment. Chapter 16 of the NOPR TSD presents detailed results regarding anticipated indirect employment impacts.

4. Impact on Utility or Performance of Products

As discussed in section IV.C.1.c of this document, DOE has tentatively concluded that the standards proposed in this NOPR would not lessen the utility or performance of the ESEMs under consideration in this proposed rulemaking. Manufacturers of these products currently offer units that meet or exceed the proposed standards.

5. Impact of Any Lessening of Competition

DOE considered any lessening of competition that would be likely to result from new or amended standards. As discussed in section III.F.1.e of this document, the Attorney General determines the impact, if any, of any lessening of competition likely to result from a proposed standard, and transmits such determination in writing to the Secretary, together with an analysis of the nature and extent of such impact. To assist the Attorney General in making this determination, DOE has provided DOJ with copies of this NOPR and the accompanying NOPR TSD for review. DOE will consider DOJ's comments on the proposed rule in determining whether to proceed to a final rule. DOE will publish and respond to DOJ's comments in that document. DOE invites comment from the public regarding the competitive impacts that are likely to result from this proposed rule. In addition, stakeholders may also provide comments separately to DOJ regarding these potential impacts. See the **ADDRESSES** section for information to send comments to DOJ.

6. Need of the Nation To Conserve Energy

Enhanced energy efficiency, where economically justified, improves the Nation's energy security, strengthens the economy, and reduces the environmental impacts (costs) of energy production. Reduced electricity demand due to energy conservation standards is also likely to reduce the cost of maintaining the reliability of the electricity system, particularly during peak-load periods. Chapter 15 in the NOPR TSD presents the estimated impacts on electricity generating capacity, relative to the no-new-standards case, for the TSLs that DOE considered in this proposed rulemaking.

Energy conservation resulting from potential energy conservation standards for ESEMs is expected to yield environmental benefits in the form of reduced emissions of certain air pollutants and greenhouse gases. Table V–35 provides DOE's estimate of cumulative emissions reductions expected to result from the TSLs considered in this NOPR. The emissions were calculated using the multipliers discussed in section IV.L of this document. DOE reports annual emissions reductions for each TSL in chapter 13 of the NOPR TSD.

TABLE V–35—CUMULATIVE EMISSIONS REDUCTION FOR ESEMS SHIPPED IN 2029–2058

	Trial standard level			
	1	2	3	4
Electric Power Sector Emissions				
CO_2 (*million metric tons*)	50.0	145.6	277.6	397.2
CH_4 (*thousand tons*)	3.4	10.0	19.2	27.5
N_2O (*thousand tons*)	0.5	1.4	2.6	3.8
SO_2 (*thousand tons*)	23.3	67.8	129.6	185.6
NO_X (*thousand tons*)	14.7	42.9	82.6	118.6
Hg (*tons*)	0.1	0.3	0.6	0.8
Upstream Emissions				
CO_2 (*million metric tons*)	5.1	14.9	28.4	40.6
CH_4 (*thousand tons*)	464.2	1,352.2	2,574.8	3,682.0
N_2O (*thousand tons*)	0.0	0.1	0.1	0.2
SO_2 (*thousand tons*)	79.6	232.0	441.7	631.7
NO_X (*thousand tons*)	0.3	0.9	1.7	2.5
Hg (*tons*)	0.0	0.0	0.0	0.0
Total FFC Emissions				
CO_2 (*million metric tons*)	55.1	160.5	306.0	437.8
CH_4 (*thousand tons*)	467.6	1,362.2	2,593.9	3,709.4
N_2O (*thousand tons*)	0.5	1.4	2.8	4.0
SO_2 (*thousand tons*)	102.9	299.8	571.3	817.3
NO_X (*thousand tons*)	15.0	43.8	84.3	121.1
Hg (*tons*)	0.1	0.3	0.6	0.8

As part of the analysis for this rulemaking, DOE estimated monetary benefits likely to result from the reduced emissions of CO_2 that DOE estimated for each of the considered TSLs for ESEMs. Section IV.L of this document discusses the SC–CO_2 values that DOE used. Table V–36 presents the value of CO_2 emissions reduction at

each TSL for each of the SC–CO_2 cases. The time-series of annual values is presented for the proposed TSL in chapter 14 of the NOPR TSD.

TABLE V–36—PRESENT VALUE OF CO_2 EMISSIONS REDUCTION FOR ESEMS SHIPPED IN 2029–2058

TSL	SC–CO_2 case			
	Discount rate and statistics			
	5% Average	3% Average	2.5% Average	3% 95th percentile
	(billion 2022$)			
1	0.61	2.55	3.95	7.76
2	1.79	7.43	11.52	22.59
3	3.42	14.18	21.97	43.10
4	4.89	20.29	31.43	61.67

As discussed in section IV.L.2 of this document, DOE estimated the climate benefits likely to result from the reduced emissions of methane and N_2O that DOE estimated for each of the considered TSLs for ESEMs. Table V–37 presents the value of the CH_4 emissions reduction at each TSL, and Table V–38 presents the value of the N_2O emissions reduction at each TSL. The time-series of annual values is presented for the proposed TSL in chapter 14 of the NOPR TSD.

TABLE V–37—PRESENT VALUE OF METHANE EMISSIONS REDUCTION FOR ESEMS SHIPPED IN 2029–2058

TSL	SC–CH_4 case			
	Discount rate and statistics			
	5% Average	3% Average	2.5% Average	3% 95th percentile
	(billion 2022$)			
1	0.24	0.68	0.94	1.80
2	0.69	1.99	2.75	5.26
3	1.32	3.79	5.24	10.01
4	1.88	5.42	7.49	14.32

TABLE V–38—PRESENT VALUE OF NITROUS OXIDE EMISSIONS REDUCTION FOR ESEMS SHIPPED IN 2029–2058

TSL	SC–N_2O case			
	Discount rate and statistics			
	5% Average	3% Average	2.5% Average	3% 95th percentile
	(billion 2022$)			
1	0.002	0.008	0.012	0.022
2	0.006	0.024	0.036	0.063
3	0.012	0.045	0.070	0.121
4	0.017	0.065	0.100	0.173

DOE is well aware that scientific and economic knowledge about the contribution of CO_2 and other GHG emissions to changes in the future global climate and the potential resulting damages to the global and U.S. economy continues to evolve rapidly. DOE, together with other Federal agencies, will continue to review methodologies for estimating the monetary value of reductions in CO_2 and other GHG emissions. This ongoing review will consider the comments on this subject that are part of the public record for this and other rulemakings, as well as other methodological assumptions and issues. DOE notes that the proposed standards would be economically justified even without inclusion of monetized benefits of reduced GHG emissions.

DOE also estimated the monetary value of the health benefits associated with NO_X and SO_2 emissions reductions anticipated to result from the considered TSLs for ESEMs. The dollar-per-ton values that DOE used are discussed in section IV.L of this document. Table V–39 presents the present value for NO_X emissions reduction for each TSL calculated using 7-percent and 3-percent discount rates, and Table V–40 presents similar results for SO_2 emissions reductions. The results in these tables reflect application of EPA's low dollar-per-ton values, which DOE used to be conservative. The time-series of annual values is presented for the proposed TSL in chapter 14 of the NOPR TSD.

TABLE V–39—PRESENT VALUE OF NO_X EMISSIONS REDUCTION FOR ESEMS SHIPPED IN 2029–2058

TSL	7% Discount rate	3% Discount rate
	(million 2022$)	
1	2,249.3	5,221.7
2	6,551.5	15,211.6
3	12,497.5	29,002.1
4	17,883.3	41,492.7

TABLE V–40—PRESENT VALUE OF SO_2 EMISSIONS REDUCTION FOR ESEMS SHIPPED IN 2029–2058

TSL	3% Discount rate	7% Discount rate
	(million 2022$)	
1	467.5	1,065.7
2	1,362.5	3,106.6
3	2,624.4	5,981.4
4	3,767.9	8,586.2

Not all the public health and environmental benefits from the reduction of greenhouse gases, NO_X, and SO_2 are captured in the values above, and additional unquantified benefits from the reductions of those pollutants as well as from the reduction of direct PM and other co-pollutants may be significant. DOE has not included monetary benefits of the reduction of Hg emissions because the amount of reduction is very small.

7. Other Factors

The Secretary of Energy, in determining whether a standard is economically justified, may consider any other factors that the Secretary deems to be relevant. (42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(2)(B)(i)(VII)) No other factors were considered in this analysis.

8. Summary of Economic Impacts

Table V–41 presents the NPV values that result from adding the estimates of the potential economic benefits resulting from reduced GHG and NO_X and SO_2 emissions to the NPV of consumer benefits calculated for each TSL considered in this proposed rulemaking. The consumer benefits are domestic U.S. monetary savings that occur as a result of purchasing the covered ESEMs and are measured for the lifetime of products shipped in 2029–2058. The climate benefits associated with reduced GHG emissions resulting from the proposed standards are global benefits and are also calculated based on the lifetime of ESEMs shipped in 2029–2058.

TABLE V–41—CONSUMER NPV COMBINED WITH PRESENT VALUE OF CLIMATE BENEFITS AND HEALTH BENEFITS

Category	TSL 1	TSL 2	TSL 3	TSL 4
Using 3% discount rate for Consumer NPV and Health Benefits (billion 2022$)				
5% Average SC–GHG case	21.2	65.8	90.1	93.7
3% Average SC–GHG case	23.6	72.8	103.4	112.7
2.5% Average SC–GHG case	25.2	77.6	112.6	125.9
3% 95th percentile SC–GHG case	29.9	91.2	138.6	163.1
Using 7% discount rate for Consumer NPV and Health Benefits (billion 2022$)				
5% Average SC–GHG case	10.0	31.4	40.8	39.7
3% Average SC–GHG case	12.4	38.3	54.1	58.7
2.5% Average SC–GHG case	14.1	43.2	63.4	71.9
3% 95th percentile SC–GHG case	18.7	56.8	89.3	109.1

C. Conclusion

When considering new or amended energy conservation standards, the standards that DOE adopts for any type (or class) of covered equipment must be designed to achieve the maximum improvement in energy efficiency that the Secretary determines is technologically feasible and economically justified. (42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(2)(A)) In determining whether a standard is economically justified, the Secretary must determine whether the benefits of the standard exceed its burdens by, to the greatest extent practicable, considering the seven statutory factors discussed previously. (42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(2)(B)(i)) The new or amended standard must also result in significant conservation of energy. (42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(3)(B))

For this NOPR, DOE considered the impacts of new standards for ESEMs at each TSL, beginning with the maximum technologically feasible level, to determine whether that level was economically justified. Where the max-tech level was not justified, DOE then considered the next most efficient level and undertook the same evaluation until it reached the highest efficiency level that is both technologically feasible and economically justified and saves a significant amount of energy.

To aid the reader as DOE discusses the benefits and/or burdens of each TSL, tables in this section present a summary

of the results of DOE's quantitative analysis for each TSL. In addition to the quantitative results presented in the tables, DOE also considers other burdens and benefits that affect economic justification. These include the impacts on identifiable subgroups of consumers who may be disproportionately affected by a national standard and impacts on employment.

1. Benefits and Burdens of TSLs Considered for ESEM Standards

Table V–42 and Table V–43 summarize the quantitative impacts estimated for each TSL for ESEMs. The national impacts are measured over the lifetime of ESEMs purchased in the 30-year period that begins in the anticipated year of compliance with new standards (2029–2058). The energy savings, emissions reductions, and value of emissions reductions refer to full-fuel-cycle results. The efficiency levels contained in each TSL are described in section V.A of this document.

TABLE V–42—SUMMARY OF ANALYTICAL RESULTS FOR ESEMS TSLS: NATIONAL IMPACTS

Category	TSL 1	TSL 2	TSL 3	TSL 4
Cumulative FFC National Energy Savings				
Quads	3.1	8.9	17.0	24.2
Cumulative FFC Emissions Reduction				
CO_2 (*million metric tons*)	55.1	160.5	306.0	437.8
CH_4 (*thousand tons*)	467.6	1,362.2	2,593.9	3,709.4
N_2O (*thousand tons*)	0.5	1.4	2.8	4.0
SO_2 (*thousand tons*)	102.9	299.8	571.3	817.3
NO_X (*thousand tons*)	15.0	43.8	84.3	121.1
Hg (*tons*)	0.1	0.3	0.6	0.8
Present Value of Benefits and Costs (*3% discount rate, billion 2022$*)				
Consumer Operating Cost Savings	18.7	54.7	107.0	154.5
Climate Benefits *	3.2	9.4	18.0	25.8
Health Benefits **	6.3	18.3	35.0	50.1
Total Benefits †	28.3	82.4	160.0	230.3
Consumer Incremental Equipment Costs ‡	4.7	9.7	56.7	117.7
Consumer Net Benefits	14.0	45.0	50.4	36.8
Total Net Benefits	23.6	72.8	103.4	112.7
Present Value of Benefits and Costs (*7% discount rate, billion 2022$*)				
Consumer Operating Cost Savings	8.94	26.10	51.09	73.76
Climate Benefits *	3.24	9.45	18.01	25.77
Health Benefits **	2.72	7.91	15.12	21.65
Total Benefits †	14.89	43.46	84.23	121.18
Consumer Incremental Equipment Costs ‡	2.49	5.14	30.12	62.52
Consumer Net Benefits	6.45	20.95	20.98	11.24
Total Net Benefits	12.41	38.31	54.11	58.66

Note: This table presents the costs and benefits associated with ESEMs shipped in 2029–2058. These results include consumer, climate, and health benefits which accrue after 2058 from the products shipped in 2029–2058.

* Climate benefits are calculated using four different estimates of the SC–CO_2, SC–CH_4 and SC–N_2O. Together, these represent the global SC–GHG. For presentational purposes of this table, the climate benefits associated with the average SC–GHG at a 3 percent discount rate are shown; however, DOE emphasizes the importance and value of considering the benefits calculated using all four sets of SC–GHG estimates. To monetize the benefits of reducing GHG emissions, this analysis uses the interim estimates presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990* published in February 2021 by the IWG.

** Health benefits are calculated using benefit-per-ton values for NO_X and SO_2. DOE is currently only monetizing (for NO_X and SO_2) $PM_{2.5}$ precursor health benefits and (for NO_X) ozone precursor health benefits, but will continue to assess the ability to monetize other effects such as health benefits from reductions in direct $PM_{2.5}$ emissions. The health benefits are presented at real discount rates of 3 and 7 percent. See section IV.L of this document for more details.

† Total and net benefits include consumer, climate, and health benefits. For presentation purposes, total and net benefits for both the 3-percent and 7-percent cases are presented using the average SC–GHG with 3-percent discount rate.

‡ Costs include incremental equipment costs.

TABLE V–43—SUMMARY OF ANALYTICAL RESULTS FOR ESEMS TSLS: MANUFACTURER AND CONSUMER IMPACTS

Category	TSL 1	TSL 2	TSL 3	TSL 4
Manufacturer Impacts				
Industry NPV (*million 2022$*) (No-new-standards case INPV = 2,019).	1,883 to 1,818	1,888 to 1,755	1,820 to 1,035	1,710 to 73.
Industry NPV (*% change*)	(6.7) to (9.9)	(6.5) to (13.1)	(9.9) to (48.7)	(15.3) to (96.4).
Consumer Average LCC Savings (2022$)				
ESEM—High/Medium Torque, 0.25 hp	55.6	51.3	(0.8)	(106.5).
ESEM—High/Medium Torque, 1 hp	116.1	137.7	20.8	(145.2).

TABLE V–43—SUMMARY OF ANALYTICAL RESULTS FOR ESEMS TSLS: MANUFACTURER AND CONSUMER IMPACTS—Continued

Category	TSL 1	TSL 2	TSL 3	TSL 4
ESEM—Low Torque, 0.25 hp	212.8	146.8	24.1	(16.7).
ESEM—Low Torque, 0.5 hp	41.2	99.6	77.8	72.5.
ESEM—Polyphase, 0.25 hp	31.9	26.2	(8.3)	(107.3).
AO–ESEM—High/Medium Torque, 0.25 hp	76.3	82.9	37.4	(61.4).
AO–ESEM—High/Medium Torque, 1 hp	121.9	160.3	37.1	(128.2).
AO–ESEM—Low Torque, 0.25 hp	217.2	121.3	31.6	(13.4)..
AO–ESEM—Low Torque, 0.5 hp	47.6	88.4	50.0	52.4.
AO–ESEM—Polyphase, 0.25 hp	35.1	39.9	12.7	(85.0).
Shipment-Weighted Average *	82.8	101.8	43.6	(9.6).
Consumer Simple PBP (years)				
ESEM—High/Medium Torque, 0.25 hp	0.5	1.5	5.3	10.0.
ESEM—High/Medium Torque, 1 hp	0.7	1.1	4.7	8.7.
ESEM—Low Torque, 0.25 hp	0.4	1.0	3.3	5.0.
ESEM—Low Torque, 0.5 hp	2.4	1.3	2.8	3.3.
ESEM—Polyphase, 0.25 hp	1.1	2.6	7.4	15.6.
AO–ESEM—High/Medium Torque, 0.25 hp	0.3	1.0	3.2	6.1.
AO–ESEM—High/Medium Torque, 1 hp	0.6	0.9	3.9	7.7.
AO–ESEM—Low Torque, 0.25 hp	0.4	1.1	3.1	4.9.
AO–ESEM—Low Torque, 0.5 hp	2.2	0.8	3.0	3.4.
AO–ESEM—Polyphase, 0.25 hp	1.1	2.0	5.1	10.8.
Shipment-Weighted Average *	1.5	1.2	3.6	5.7.
Percent of Consumers that Experience a Net Cost				
ESEM—High/Medium Torque, 0.25 hp	2%	17%	51%	86%.
ESEM—High/Medium Torque, 1 hp	3%	12%	54%	82%.
ESEM—Low Torque, 0.25 hp	0%	3%	52%	68%.
ESEM—Low Torque, 0.5 hp	11%	8%	30%	40%.
ESEM—Polyphase, 0.25 hp	1%	7%	59%	95%.
AO–ESEM—High/Medium Torque, 0.25 hp	1%	8%	36%	65%.
AO–ESEM—High/Medium Torque, 1 hp	2%	6%	44%	82%.
AO–ESEM—Low Torque, 0.25 hp	0%	4%	39%	68%.
AO–ESEM—Low Torque, 0.5 hp	2%	3%	34%	42%
AO–ESEM—Polyphase, 0.25 hp	3%	10%	49%	88%.
Shipment-Weighted Average *	5%	8%	41%	59%.

Parentheses indicate negative (−) values.
* Weighted by shares of each equipment class in total projected shipments in 2022.

DOE first considered TSL 4, which represents the max-tech efficiency levels. TSL 4 would save an estimated 24.2 quads of energy, an amount DOE considers significant. Under TSL 4, the NPV of consumer benefit would be $11.24 billion using a discount rate of 7 percent and $36.8 billion using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 4 are 437.8 Mt of CO_2, 817.3 thousand tons of SO_2, 121.1 thousand tons of NO_X, 0.8 tons of Hg, 3,709.4 thousand tons of CH_4, and 4.0 thousand tons of N_2O. The estimated monetary value of the climate benefits from reduced GHG emissions (associated with the average SC–GHG at a 3-percent discount rate) at TSL 4 is $25.8 billion. The estimated monetary value of the health benefits from reduced SO_2 and NO_X emissions at TSL 4 is $21.7 billion using a 7-percent discount rate and $50.1 billion using a 3-percent discount rate.

Using a 7-percent discount rate for consumer benefits and costs, health benefits from reduced SO_2 and NO_X emissions, and the 3-percent discount rate case for climate benefits from reduced GHG emissions, the estimated total NPV at TSL 4 is $58.7 billion. Using a 3-percent discount rate for all benefits and costs, the estimated total NPV at TSL 4 is $112.7 billion. The estimated total NPV is provided for additional information, however DOE primarily relies upon the NPV of consumer benefits when determining whether a standard level is economically justified.

At TSL 4, the average LCC impact for non-air over ESEMs is a savings of −$107 and −$145 for high/medium torque ESEMs (0.25 and 1 hp, respectively); −$17 and $73 for low torque ESEMs (0.25 and 0.5 hp, respectively); and −$107 for Polyphase ESEMs. At TSL 4, the average LCC impact for AO–ESEMs is a savings of −$61 and −$128 for high/medium torque AO–ESEMs (0.25 and 1 hp, respectively); −$13 and $52 for low torque AO–ESEMs (0.25 and 0.5 hp, respectively); and −$85 for Polyphase AO–ESEMs. Overall, the shipments-weighted average LCC impact is a savings of −$10. The simple payback period for non-air-over ESEMs is 6.9 and 6.3 years for high/medium torque ESEMs (0.25 and 1 hp, respectively); 2.0 and 3.0 years for low torque ESEMs (0.25 and 0.5 hp, respectively); and 9.7 years for polyphase ESEMs. The simple payback period for AO–ESEMs is 4.3 and 5.1 years for high/medium torque AO–ESEMs (0.25 and 1 hp, respectively); 1.9 and 2.7 years for low torque AO–ESEMs (0.25 and 0.5 hp, respectively); and 8.3 years for polyphase AO–ESEMs. Overall, the shipments-weighted average PBP is 4.0 years. The fraction of consumers experiencing a net LCC cost for non-air-over ESEMs is 85.9 and 82.5 percent for high/medium torque ESEMs (0.25 and 1 hp, respectively); 67.7 and 40.1 percent

for low torque ESEMs (0.25 and 0.5 hp, respectively); and 95.0 percent for polyphase ESEMs. The fraction of consumers experiencing a net LCC cost for AO–ESEMs is 64.6 and 81.9 percent for high/medium torque AO–ESEMs (0.25 and 1 hp, respectively); 67.9 and 42.2 percent for low torque AO–ESEMs (0.25 and 0.5 hp, respectively); and 87.8 percent for polyphase AO–ESEMs. Overall, the shipments-weighted average fraction of consumers experiencing a net LCC cost is 59.3 percent.

At TSL 4, the projected change in INPV ranges from a decrease of $1,946 million to a decrease of $309 million, which corresponds to decreases of 96.4 percent and 15.3 percent, respectively. DOE estimates that industry must invest $2,156 million to redesign almost all ESEM models and to purchase new lamination die sets, winding machines, frame casts, and assembly equipment as well as other retooling costs to manufacturer compliant ESEM models at TSL 4. An investment of $2,156 million in conversion costs represents over 3.3 times the sum of the annual free cash flows over the years between the expected publication of the final rule and the compliance year (*i.e.,* the time period that these conversion costs would be incurred) and represents over 100 percent of the entire no-new-standards case INPV over the 30-year analysis period.[100]

In the no-new-standards case, free cash flow is estimated to be $154 million in 2028, the year before the compliance date. At TSL 4, the estimated free cash flow is −$764 million in 2028. This represents a decrease in free cash flow of 595 percent, or a decrease of $919 million, in 2028. A negative free cash flow implies that most, if not all, manufacturers will need to borrow substantial funds to be able to make investments necessary to comply with energy conservation standards at TSL 4. The extremely large drop in free cash flows could cause some ESEM manufacturers to exit the ESEM market entirely, even though recovery may be possible over the 30-year analysis period. At TSL 4, models representing less than 1 percent of all ESEM shipments are estimated to meet the efficiency requirements at this TSL in the no-new-standards case by 2029, the compliance year. Therefore, models representing over 99 percent of all ESEM shipments will need be remodeled in the 4-year compliance period.

Manufacturers are unlikely to have the engineering capacity to conduct this massive redesign effort in 4 years. Instead, they will likely prioritize redesigns based on sales volume, which could leave market gaps in equipment offered by manufacturers and even the entire ESEMs industry. The resulting market gaps in equipment offerings could result in sub-optimal selection of ESEMs for some applications. Lastly, although DOE's analysis assumes that TSL 4 can be reached without significant increase in size, as discussed in sections IV.C.3 and IV.J.2.c of this NOPR and in the December 2022 Joint Recommendation, the Electric Motor Working group expressed that in order to meet the efficiency requirements at TSL 4, some manufacturers may choose to rely on design options that could significantly increase the physical size of ESEMs. This could result in a significant and widespread disruption to the OEM markets that used ESEMs as an embedded product, as those OEMs may have to make significant changes to their equipment that use ESEMs because those ESEMs could become larger in physical size.

DOE requests comment on if manufacturers would have the engineering capacity to conduct design efforts to be able to offer a full portfolio of complaint ESEM at TSL 4. If not, please provide any data or information on the potential impacts that could arise due to these market gaps in equipment offerings.

Under 42 U.S.C. 6316(a) and 42 U.S.C. 6295(o)(2)(B)(i), DOE determines whether a standard is economically justified after considering seven factors. Based on these factors, the Secretary tentatively concludes that at TSL 4 for ESEMs, the benefits of energy savings, positive NPV of consumer benefits, emission reductions, and the estimated monetary value of the emissions reductions would be outweighed by the economic burden on many consumers and the impacts on manufacturers, including the extremely large conversion costs (representing over 3.3 times the sum of the annual free cash flows during the time period that these conversion costs will be incurred and over 100 percent of the entire no-new-standards case INPV), profitability impacts that could result in a large reduction in INPV (up to a decrease of 96.4 percent), the large negative free cash flows in the years leading up to the compliance date (annual free cash flow is estimated to be −$764 million in the year before the compliance date), the lack of manufacturers currently offering equipment meeting the efficiency levels required at TSL 4 (models representing over 99 percent of shipments will need to be redesigned to meet this TSL), and the likelihood of the significant disruption in the ESEM market. Due to the limited amount of engineering resources each manufacturer has, it is unclear if most manufacturers will be able to redesign models representing on average 99 percent of their ESEM shipments covered by this rulemaking in the 4-year compliance period. Consequently, the Secretary has tentatively concluded that TSL 4 is not economically justified.

DOE then considered TSL 3, which represents efficiency level 3 for all equipment class groups. TSL 3 would save an estimated 17 quads of energy, an amount DOE considers significant. Under TSL 3, the NPV of consumer benefit would be $11.2 billion using a discount rate of 7 percent and $36.8 billion using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 3 are 306.0 Mt of CO_2, 571.3 thousand tons of SO_2, 84.3 thousand tons of NO_X, 0.6 tons of Hg, 2,593.9 thousand tons of CH_4, and 2.8 thousand tons of N_2O. The estimated monetary value of the climate benefits from reduced GHG emissions (associated with the average SC–GHG at a 3-percent discount rate) at TSL 3 is $18.0 billion. The estimated monetary value of the health benefits from reduced SO_2 and NO_X emissions at TSL 3 is $15.1 billion using a 7-percent discount rate and $35.0 billion using a 3-percent discount rate.

Using a 7-percent discount rate for consumer benefits and costs, health benefits from reduced SO_2 and NO_X emissions, and the 3-percent discount rate case for climate benefits from reduced GHG emissions, the estimated total NPV at TSL 3 is $54.1 billion. Using a 3-percent discount rate for all benefits and costs, the estimated total NPV at TSL 3 is $103.4 billion. The estimated total NPV is provided for additional information, however DOE primarily relies upon the NPV of consumer benefits when determining whether a standard level is economically justified.

At TSL 3, the average LCC impact for non-air over ESEMs is a savings of −$1 and $21 for high/medium torque ESEMs (0.25 and 1 hp, respectively); $24 and $78 for low torque ESEMs (0.25 and 0.5 hp, respectively); and −$8 for Polyphase ESEMs. At TSL 3, the average LCC impact for AO–ESEMs is a savings of $37 and $37 for high/medium torque AO–ESEMs (0.25 and 1 hp, respectively); $32 and $50 for low

[100] The sum of annual free cash flows is estimated to be $636 million for 2025–2028 in the no-new-standards case and the no-new-standards case INPV is estimated to be $2,019 million.

torque AO ESEMs (0.25 and 0.5 hp, respectively); and $13 for Polyphase AO–ESEMs. Overall, the shipments-weighted average LCC impact is a savings of $44. The simple payback period for non-air-over ESEMs is 3.7 and 3.4 years for high/medium torque ESEMs (0.25 and 1 hp, respectively); 1.3 and 2.5 years for low torque ESEMs (0.25 and 0.5 hp, respectively); and 4.6 years for polyphase ESEMs. The simple payback period for AO–ESEMs is 2.3 and 2.7 years for high/medium torque AO–ESEMs (0.25 and 1 hp, respectively); 1.2 and 2.3 years for low torque AO–ESEMs (0.25 and 0.5 hp, respectively); and 3.9 years for polyphase AO–ESEMs. Overall, the shipments-weighted average PBP is 2.6 years. The fraction of consumers experiencing a net LCC cost, for non-air-over ESEMs is 51.2 and 53.5 percent for high/medium torque ESEMs (0.25 and 1 hp, respectively); 52.0 and 30.4 percent for low torque ESEMs (0.25 and 0.5 hp, respectively); and 58.6 percent for polyphase ESEMs. The fraction of consumers experiencing a net LCC cost, for AO–ESEMs is 36.0 and 44.4 percent for high/medium torque AO–ESEMs (0.25 and 1 hp, respectively); 39.1 and 34.4 percent for low torque AO–ESEMs (0.25 and 0.5 hp, respectively); and 48.6 percent for polyphase AO–ESEMs. Overall, the shipments-weighted average fraction of consumers experiencing a net LCC cost is 40.6 percent.

At TSL 3, the projected change in INPV ranges from a decrease of $1,035 million to a decrease of $199 million, which corresponds to decreases of 48.7 percent and 9.9 percent, respectively. DOE estimates that industry must invest $1,118 million to redesign the majority of ESEM models and to purchase new lamination die sets, winding machines, frame casts, and assembly equipment as well as other retooling costs to manufacturer compliant ESEM models at TSL 3. An investment of $1,118 million in conversion costs represents over 1.7 times the sum of the annual free cash flows over the years between the expected publication of the final rule and the compliance year (*i.e.,* the time period that these conversion costs would be incurred) and represents over 55 percent of the entire no-new-standards case INPV over the 30-year analysis period.[101]

In the no-new-standards case, free cash flow is estimated to be $154 million in 2028, the year before the compliance date. At TSL 3, the estimated free cash flow is −$313 million in 2028. This represents a decrease in free cash flow of 303 percent, or a decrease of $468 million, in 2028. A negative free cash flow implies that most, if not all, manufacturers will need to borrow substantial funds to be able to make investments necessary to comply with energy conservation standards at TSL 3. The extremely large drop in free cash flows could cause some ESEM manufacturers to exit the ESEM market entirely, even though recovery may be possible over the 30-year analysis period. At TSL 3, models representing approximately 9 percent of all ESEM shipments are estimated to meet the efficiency requirements at this TSL in the no-new-standards case by 2029, the compliance year. Therefore, models representing approximately 91 percent of all ESEM shipments will need be remodeled in the 4-year compliance period.

Manufacturers are unlikely to have the engineering capacity to conduct this massive redesign effort in 4 years. Instead, they will likely prioritize redesigns based on sales volume, which could leave market gaps in equipment offered by manufacturers and even the entire ESEMs industry. The resulting market gaps in equipment offerings could result in sub-optimal selection of ESEMs for some applications. Lastly, although DOE's analysis assumes that TSL 3 can be reached without significant increase in size, as discussed in sections IV.C.3 and IV.J.2.c of this NOPR and in the December 2022 Joint Recommendation, the Electric Motor Working group expressed that in order to meet the efficiency requirements at TSL 3, some manufacturers may choose to rely on design options that would significantly increase the physical size of ESEMs. This could result in a significant and widespread disruption to the OEM markets that used ESEMs as an embedded product, as those OEMs may have to make significant changes to their equipment that use ESEMs since those ESEMs could become larger in physical size.

DOE requests comment on if manufacturers would have the engineering capacity to conduct design efforts to be able to offer a full portfolio of compliant ESEMs at TSL 3. If not, please provide any data or information on the potential impacts that could arise due to these market gaps in equipment offerings.

Under 42 U.S.C. 6316(a) and 42 U.S.C. 6295(o)(2)(B)(i), DOE determines whether a standard is economically justified after considering seven factors. Based on these factors, the Secretary tentatively concludes that at TSL 3 for ESEMs, the benefits of energy savings, the economic benefit on many consumers, positive NPV of consumer benefits, emission reductions, and the estimated monetary value of the emissions reductions would be outweighed by the impacts on manufacturers, including the extremely large conversion costs (representing over 1.7 times the sum of the annual free cash flows during the time period that these conversion costs will be incurred and over 55 percent of the entire no-new-standards case INPV), profitability impacts that could result in a large reduction in INPV (up to a decrease of 48.7 percent), the large negative free cash flows in the years leading up to the compliance date (annual free cash flow is estimated to be −$313 million in the year before the compliance date), the lack of manufacturers currently offering equipment meeting the efficiency levels required at this TSL (models representing approximately 91 percent of shipments will need to be redesigned to meet this TSL), and the likelihood of the significant disruption in the ESEM market. Due to the limited amount of engineering resources each manufacturer has, it is unclear if most manufacturers will be able to redesign models representing on average 91 percent of their ESEM shipments covered by this rulemaking in the 4-year compliance period. Consequently, the Secretary has tentatively concluded that TSL 3 is not economically justified.

DOE then considered TSL 2, the standards level recommended in the December 2022 Joint Recommendation, which represents EL 2 for all equipment class groups. TSL 2 would save an estimated 8.9 quads of energy, an amount DOE considers significant. Under TSL 2, the NPV of consumer benefit would be $21.0 billion using a discount rate of 7 percent and $45.0 billion using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 2 are 160.5 Mt of CO_2, 299.8 thousand tons of SO_2, 43.8 thousand tons of NO_X, 0.3 tons of Hg, 1,362.2 thousand tons of CH_4, and 1.4 thousand tons of N_2O. The estimated monetary value of the climate benefits from reduced GHG emissions (associated with the average SC–GHG at a 3-percent discount rate) at TSL 2 is $9.4 billion. The estimated monetary value of the health benefits from reduced SO_2 and NO_X emissions at TSL 2 is $7.9 billion using a 7-percent discount rate and $18.3 billion using a 3-percent discount rate.

[101] The sum of annual free cash flows is estimated to be $636 million for 2025–2028 in the no-new-standards case and the no-new-standards case INPV is estimated to be $2,019 million.

Using a 7-percent discount rate for consumer benefits and costs, health benefits from reduced SO_2 and NO_X emissions, and the 3-percent discount rate case for climate benefits from reduced GHG emissions, the estimated total NPV at TSL 2 is $38.3 billion. Using a 3-percent discount rate for all benefits and costs, the estimated total NPV at TSL 2 is $72.8 billion. The estimated total NPV is provided for additional information, however DOE primarily relies upon the NPV of consumer benefits when determining whether a standard level is economically justified.

At TSL 2, the average LCC impact for non-air over ESEMs is a savings of $51 and $138 for high/medium torque ESEMs (0.25 and 1 hp, respectively); $147 and $100 for low torque ESEMs (0.25 and 0.5 hp, respectively); and $26 for Polyphase ESEMs. At TSL 2, the average LCC impact for AO–ESEMs is a savings of $83 and $160 for high/medium torque AO–ESEMs (0.25 and 1 hp, respectively); $121 and $88 for low torque AO–ESEMs (0.25 and 0.5 hp, respectively); and $40 for Polyphase AO–ESEMs. Overall, the shipments-weighted average LCC impact is a savings of $102. The simple payback period for non-air-over ESEMs is 1.1 and 0.9 years for high/medium torque ESEMs (0.25 and 1 hp, respectively); 0.7 and 1.5 years for low torque ESEMs (0.25 and 0.5 hp, respectively); and 2.0 years for polyphase ESEMs. The simple payback period for AO–ESEMs is 0.8 and 0.8 years for high/medium torque AO–ESEMs (0.25 and 1 hp, respectively); 0.7 and 1.3 years for low torque AO–ESEMs (0.25 and 0.5 hp, respectively); and 1.8 years for polyphase AO–ESEMs. Overall, the shipments-weighted average PBP is 1.2 years. The fraction of consumers experiencing a net LCC cost, for non-air-over ESEMs is 16.7 and 11.7 percent for high/medium torque ESEMs (0.25 and 1 hp, respectively); 3.0 and 7.8 percent for low torque ESEMs (0.25 and 0.5 hp, respectively); and 7.2 percent for polyphase ESEMs. The fraction of consumers experiencing a net LCC cost for AO–ESEMs is 7.8 and 5.9 percent for high/medium torque AO–ESEMs (0.25 and 1 hp, respectively); 3.7 and 2.9 percent for low torque AO–ESEMs (0.25 and 0.5 hp, respectively); and 9.7 percent for polyphase AO–ESEMs. Overall, the shipments-weighted average fraction of consumers experiencing a net LCC cost is 7.8 percent.

At TSL 2, the projected change in INPV ranges from a decrease of $264 million to a decrease of $131 million, which corresponds to decreases of 13.1 percent and 6.5 percent, respectively. DOE estimates that industry must invest $339 million to comply with standards set at TSL 2. An investment of $339 million in conversion costs represents approximately 53 percent of the sum of the annual free cash flows over the years between the expected publication date of the final rule and the standards year (*i.e.,* the time period that these conversion costs would be incurred) and represents approximately 17 percent of the entire no-new-standards case INPV over the 30-year analysis period.[102]

Under 42 U.S.C. 6316(a) and 42 U.S.C. 6295(o)(2)(B)(i), DOE determines whether a standard is economically justified after considering seven factors. After considering the seven factors and weighing the benefits and burdens, the Secretary has tentatively concluded that standards set at TSL 2, the recommended TSL from the Electric Motors Working Group, for ESEMs would be economically justified. At this TSL, the average LCC savings for all equipment classes is positive. An estimated 7.8 percent of ESEM consumers experience a net cost. The FFC national energy savings are significant and the NPV of consumer benefits is positive using both a 3-percent and 7-percent discount rate. Notably, the benefits to consumers vastly outweigh the cost to manufacturers. At TSL 2, the NPV of consumer benefits, even measured at the more conservative discount rate of 7 percent is over 79 times higher than the maximum estimated manufacturers' loss in INPV. The proposed standard levels at TSL 2 are economically justified even without weighing the estimated monetary value of emissions reductions. When those emissions reductions are included—representing $9.4 billion in climate benefits (associated with the average SC–GHG at a 3-percent discount rate), and $18.3 billion (using a 3-percent discount rate) or $7.9 billion (using a 7-percent discount rate) in health benefits—the rationale becomes stronger still.

Accordingly, the Secretary has tentatively concluded that TSL 2, the TSL recommended by the Electric Motors Working Group, would offer the maximum improvement in efficiency that is technologically feasible and economically justified and would result in the significant conservation of energy. In addition, as discussed in section V.A of this document, DOE is establishing the TSLs by equipment class groups and aligning the AO–ESEM levels with the non-AO–ESEMs. Although results are presented here in terms of TSLs, DOE analyzes and evaluates all possible ELs for each equipment class in its analysis. For all equipment classes, TSL 2 is comprised of EL 2, and represents two levels below max-tech. The max tech efficiency levels (TSL 4) result in negative LCC savings for most equipment classes and a large percentage of consumers that experience a net LCC cost for most equipment classes, in addition to significant manufacturer impacts. The ELs one level below max tech (TSL 3) result in negative LCC savings for some equipment classes and a large percentage of consumers that experience a net LCC cost for most equipment classes. Additionally, the impact to manufacturers is significantly reduced at TSL 2. While manufacturers will have to invest $339 million to comply with standards at TSL 2, annual free cash flows remain positive for all years leading up to the modeled compliance date. DOE also estimates that most ESEM manufacturers will have the engineering capacity to complete these redesigns in a 4-year compliance period. Lastly, as discussed in the December 2022 Joint Recommendation,[103] TSL 2 would not result in ESEMs significantly increasing in physical size and therefore would not result in a significant and widespread disruption to the OEM markets that used ESEMs as an embedded product.

The ELs two levels below max-tech (TSL 2), which represents the proposed standard levels as recommended by the Electric Motors Working Group, result in positive LCC savings for all equipment classes, significantly reduce the number of consumers experiencing a net cost, and reduce the decrease in INPV and conversion costs to the point where DOE has tentatively concluded they are economically justified, as discussed for TSL 2 in the preceding paragraphs.

As presented in section V.A in this document, DOE developed TSLs that aligned the efficiency levels for air-over and non-air-over ESEMs because of the similarities in the manufacturing processes between air-over and non-air-over ESEMs. In some cases, an air-over ESEM could be manufactured on the same line as a non-air-over ESEM by omitting the steps of manufacturing associated with the fan of a motor.

While DOE did not explicitly analyze a TSL that would require TSL 3 efficiency levels for AO–ESEMs and

[102] The sum of annual free cash flows is estimated to be $636 million for 2025–2028 in the no-new-standards case and the no-new-standards case INPV is estimated to be $2,019 million.

[103] See EERE–2020–BT–STD–0007–0038 at p. 4.

TSL 2 efficiency levels for non-air over ESEMs, DOE may consider this alternative combination for any potential final rule. In that case, DOE seeks feedback on the potential consequences of adopting a more-efficient level of AO–ESEMs as compared to non-air over ESEMs. DOE seeks information about whether there would be any decrease in the shipments of AO–ESEMs (and a decrease in the potential benefits from a more efficient proposed standard at TSL 3 efficiency levels for AO–ESEMs) by shifting the market to predominantly non-air over ESEMs. In such a scenario, the savings associated with this TSL option may never be realized. In addition, while DOE did not consider a TSL that would require TSL 2 for all equipment classes except TSL3 efficiency levels for low torque ESEMs (both air-over and non-air-over) due to the uncertainties as to whether the size, fit and function would be maintained and potential significant and widespread disruption to the OEM markets, DOE seeks information related to potential size increase and impact on OEM markets at TSL 3 and above.

DOE seeks comment on these alternative proposed standard levels. DOE requests comment on the unintended market consequences and the changes industry would make as a result of standards that require the use of different motor technologies for non-air over and AO–ESEMs. In addition, if DOE were to consider a TSL that would require TSL 2 for all equipment classes except TSL3 efficiency levels for low torque ESEMs, DOE seeks information related to potential ESEM size increase and impact on OEM markets at TSL 3 and above.

As stated, DOE conducts the walk-down analysis to determine the TSL that represents the maximum improvement in energy efficiency that is technologically feasible and economically justified as required under EPCA. The walk-down is not a comparative analysis, as a comparative analysis would result in the maximization of net benefits instead of energy savings that are technologically feasible and economically justified, which would be contrary to EPCA. 86 FR 70892, 70908 (Dec. 12, 2021). Although DOE has not conducted a comparative analysis to select the proposed new energy conservation standards, DOE notes that as compared to TSL 3 and TSL 4, TSL 2 has higher average LCC savings for consumers, significantly smaller percentages of consumers experiencing a net cost, a lower maximum decrease in INPV, lower manufacturer conversion costs, and a significant decrease in the likelihood of a major disruption to the both the ESEM market and the OEM markets that use ESEMs as an embedded product in their equipment, as DOE does not anticipate gaps in ESEM equipment offerings or a significant increase in the physical size of ESEMs at TSL 2.

Although DOE considered proposing new standard levels for ESEMs by grouping the efficiency levels for each equipment class into TSLs, DOE evaluates all analyzed efficiency levels in its analysis. For all equipment classes, TSL 2 represents the maximum energy savings that does not result in significant negative economic impacts to ESEM manufacturers. At TSL 2, conversion costs are estimated to be $339 million, significantly less than at TSL 3 ($1,118 million) or at TSL 4 ($2,156 million). At TSL 2, conversion costs represent a significantly smaller size of the sum of ESEM manufacturers' annual free cash flows for 2025 to 2028 (53 percent), than at TSL 3 (176 percent) or at TSL 4 (339 percent) and a significantly smaller portion of ESEM manufacturers' no-new-standards case INPV (17 percent), than at TSL 3 (55 percent) or at TSL 4 (107 percent). At TSL 2, ESEM manufacturers will have to redesign a significantly smaller portion of their ESEM models to meet the ELs set at TSL 2 (models representing 55 percent of all ESEM shipments), than at TSL 3 (91 percent) or at TSL 4 (99 percent). Lastly, ESEM manufacturers' free cash flow remains positive at TSL 2 for all years leading up to the compliance date. Whereas at TSL 3 annual free cash flow is estimated to be −$313 million and at TSL 4 annual free cash flow is estimated to be −$764 million in 2028, the year before the compliance year. Additionally, the ELs at the proposed TSL result in average positive LCC savings for all equipment class groups and significantly reduce the number of consumers experiencing a net cost to the point where DOE has tentatively concluded they are economically justified, as discussed for TSL 2 in the preceding paragraphs.

Therefore, based on the previous considerations, DOE proposes to adopt the energy conservation standards for ESEMs at TSL 2, which was the recommended TSL by the Electric Motors Working Group. The proposed energy conservation standards for ESEMs, which are expressed as average full-load efficiency, are shown in Table V–44 through Table V–46.

TABLE V–44—PROPOSED ENERGY CONSERVATION STANDARDS FOR HIGH AND MEDIUM-TORQUE ESEMS

hp	Average full load efficiency							
	Open				Enclosed			
	2-pole	4-pole	6-pole	8-pole	2-pole	4-pole	6-pole	8-pole
0.25	59.5	59.5	57.5	.....	59.5	59.5	57.5	.....
0.33	64.0	64.0	62.0	50.5	64.0	64.0	62.0	50.5
0.5	68.0	69.2	68.0	52.5	68.0	67.4	68.0	52.5
0.75	76.2	81.8	80.2	72.0	75.5	75.5	75.5	72.0
1	80.4	82.6	81.1	74.0	77.0	80.0	77.0	74.0
1.5	81.5	83.8	.....	.....	81.5	81.5	80.0	.....
2	82.9	84.5	.....	.....	82.5	82.5	.....	.....
3	84.1	.....	.....	.....	84.0	.....	.....	.....

TABLE V–45—PROPOSED ENERGY CONSERVATION STANDARDS FOR LOW-TORQUE ESEMS

hp	Average full load efficiency							
	Open				Enclosed			
	2-pole	4-pole	6-pole	8-pole	2-pole	4-pole	6-pole	8-pole
0.25	63.9	66.1	60.2	52.5	60.9	64.1	59.2	52.5
0.33	66.9	69.7	65.0	56.6	63.9	67.7	64.0	56.6
0.5	68.8	70.1	66.8	57.1	65.8	68.1	65.8	57.1
0.75	70.5	74.8	73.1	62.8	67.5	72.8	72.1	62.8
1	74.3	77.1	77.3	65.7	71.3	75.1	76.3	65.7
1.5	79.9	82.1	80.5	72.2	76.9	80.1	79.5	72.2
2	81.0	82.9	81.4	73.3	78.0	80.9	80.4	73.3
3	82.4	84.0	82.5	74.9	79.4	82.0	81.5	74.9

TABLE V–46—PROPOSED ENERGY CONSERVATION STANDARDS FOR POLYPHASE ESEMS

hp	Average full load efficiency							
	Open				Enclosed			
	2-pole	4-pole	6-pole	8-pole	2-pole	4-pole	6-pole	8-pole
0.25	65.6	69.5	67.5	62.0	66.0	68.0	66.0	62.0
0.33	69.5	73.4	71.4	64.0	70.0	72.0	70.0	64.0
0.5	73.4	78.2	75.3	66.0	72.0	75.5	72.0	66.0
0.75	76.8	81.1	81.7	70.0	75.5	77.0	74.0	70.0
1	77.0	83.5	82.5	75.5	75.5	77.0	74.0	75.5
1.5	84.0	86.5	83.8	77.0	84.0	82.5	87.5	78.5
2	85.5	86.5	.....	86.5	85.5	85.5	88.5	84.0
3	85.5	86.9	.....	87.5	86.5	86.5	89.5	85.5

2. Annualized Benefits and Costs of the Proposed Standards

The benefits and costs of the proposed standards can also be expressed in terms of annualized values. The annualized net benefit is (1) the annualized national economic value (expressed in 2022$) of the benefits from operating equipment that meet the proposed standards (consisting primarily of operating cost savings from using less energy, minus increases in equipment purchase costs, and (2) the annualized monetary value of the climate and health benefits from emission reductions.

Table V–47 shows the annualized values for ESEMs under TSL 2, expressed in 2022$. The results under the primary estimate are as follows.

Using a 7-percent discount rate for consumer benefits and costs and NO_X and SO_2 reduction benefits, and a 3-percent discount rate case for GHG social costs, the estimated cost of the proposed standards for ESEMs is $543 million per year in increased equipment costs, while the estimated annual benefits are $2,757 million in reduced product operating costs, $542 million in climate benefits, and $836 million in health benefits. In this case, the net benefit amounts to $3,592 million per year.

Using a 3-percent discount rate for all benefits and costs, the estimated cost of the proposed standards for ESEMs is $556 million per year in increased equipment costs, while the estimated annual benefits are $3,140 million in reduced operating costs, $542 million in climate benefits, and $1,052 million in health benefits. In this case, the net benefit amounts to $4,179 million per year.

TABLE V–47—ANNUALIZED MONETIZED BENEFITS AND COSTS OF PROPOSED STANDARDS FOR ESEMS

[Proposed TSL 2]

	Million 2022$/year		
	Primary estimate	Low-net-benefits estimate	High-net-benefits estimate
3% discount rate			
Consumer Operating Cost Savings	3,140	2,962	3,341
Climate Benefits *	542	526	562
Health Benefits **	1,052	1,021	1,089
Total Benefits †	4,734	4,509	4,992
Consumer Incremental Equipment Costs ‡	556	598	529
Net Benefits	4,179	3,911	4,464
Change in Producer Cashflow (INPV ††)	(25)–(13)	(25)–(13)	(25)–(13)
7% discount rate			
Consumer Operating Cost Savings	2,757	2,615	2,921

TABLE V–47—ANNUALIZED MONETIZED BENEFITS AND COSTS OF PROPOSED STANDARDS FOR ESEMS—Continued

[Proposed TSL 2]

	Million 2022$/year		
	Primary estimate	Low-net-benefits estimate	High-net-benefits estimate
Climate Benefits * (3% discount rate)	542	526	562
Health Benefits **	836	814	863
Total Benefits †	4,135	3,955	4,346
Consumer Incremental Equipment Costs ‡	543	578	520
Net Benefits	3,592	3,377	3,826
Change in Producer Cashflow (INPV ††)	(25)–(13)	(25)–(13)	(25)–(13)

Note: This table presents the costs and benefits associated with ESEMs shipped in 2029–2058. These results include consumer, climate, and health benefits which accrue after 2058 from the equipment shipped in 2029–2058. The Primary, Low Net Benefits, and High Net Benefits Estimates utilize projections of energy prices from the *AEO2023* Reference case, Low Economic Growth case, and High Economic Growth case, respectively. In addition, incremental equipment costs reflect a constant rate in the Primary Estimate, an increasing rate in the Low Net Benefits Estimate, and a declining rate in the High Net Benefits Estimate. The methods used to derive projected price trends are explained in sections IV.F.1 and IV.H.3 of this document. Note that the Benefits and Costs may not sum to the Net Benefits due to rounding.

* Climate benefits are calculated using four different estimates of the global SC–GHG (see section IV.L of this notice). For presentational purposes of this table, the climate benefits associated with the average SC–GHG at a 3 percent discount rate are shown, but DOE does not have a single central SC–GHG point estimate, and it emphasizes the importance and value of considering the benefits calculated using all four sets of SC–GHG estimates. To monetize the benefits of reducing GHG emissions, this analysis uses the interim estimates presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990* published in February 2021 by the IWG.

** Health benefits are calculated using benefit-per-ton values for NO_X and SO_2. DOE is currently only monetizing (for SO_2 and NO_X) $PM_{2.5}$ precursor health benefits and (for NO_X) ozone precursor health benefits, but will continue to assess the ability to monetize other effects such as health benefits from reductions in direct $PM_{2.5}$ emissions. See section IV.L of this document for more details.

† Total benefits for both the 3-percent and 7-percent cases are presented using the average SC–GHG with 3-percent discount rate, but DOE does not have a single central SC–GHG point estimate.

‡ Costs include incremental equipment costs.

†† Operating Cost Savings are calculated based on the life cycle costs analysis and national impact analysis as discussed in detail below. See sections IV.F and IV.H of this document. DOE's national impacts analysis includes all impacts (both costs and benefits) along the distribution chain beginning with the increased costs to the manufacturer to manufacture the equipment and ending with the increase in price experienced by the consumer. DOE also separately conducts a detailed analysis on the impacts on manufacturers (the MIA). See section IV.J of this document. In the detailed MIA, DOE models manufacturers' pricing decisions based on assumptions regarding investments, conversion costs, cashflow, and margins. The MIA produces a range of impacts, which is the rule's expected impact on the INPV. The change in INPV is the present value of all changes in industry cash flow, including changes in production costs, capital expenditures, and manufacturer profit margins. The annualized change in INPV is calculated using the industry weighted average cost of capital value of 9.1 percent that is estimated in the MIA (see chapter 12 of the NOPR TSD for a complete description of the industry weighted average cost of capital). For ESEMs, those values are −$25 million and −$13 million. DOE accounts for that range of likely impacts in analyzing whether a TSL is economically justified. See section V.C of this document. DOE is presenting the range of impacts to the INPV under two markup scenarios: the Preservation of Gross Margin scenario, which is the manufacturer markup scenario used in the calculation of Consumer Operating Cost Savings in this table, and the Preservation of Operating Profit Markup scenario, where DOE assumed manufacturers would not be able to increase per-unit operating profit in proportion to increases in manufacturer production costs. DOE includes the range of estimated annualized change in INPV in the above table, drawing on the MIA explained further in section IV.J of this document, to provide additional context for assessing the estimated impacts of this rule to society, including potential changes in production and consumption, which is consistent with OMB's Circular A–4 and E.O. 12866. If DOE were to include the INPV into the annualized net benefit calculation for this NOPR, the annualized net benefits would range from $4,154 million to $4,166 million at 3-percent discount rate and would range from $3,567 million to $3,579 million at 7-percent discount rate. Numbers in parentheses are negative numbers.

D. Reporting, Certification, and Sampling Plan

Manufacturers, including importers, must use equipment-specific certification templates to certify compliance to DOE. For currently regulated electric motors, the certification template is specified at 10 CFR 429.36. DOE is not proposing new product-specific certification reporting requirements for ESEMs. However, as discussed in section III.C of this document, DOE proposes to amend the determinations of represented values for ESEMs.

VI. Procedural Issues and Regulatory Review

A. Review Under Executive Orders 12866, 13563, and 14094

Executive Order (''E.O.'') 12866, ''Regulatory Planning and Review,'' as supplemented and reaffirmed by E.O. 13563, ''Improving Regulation and Regulatory Review,'' 76 FR 3821 (Jan. 21, 2011) and amended by E.O. 14094, ''Modernizing Regulatory Review,'' 88 FR 21879 (April 11, 2023), requires agencies, to the extent permitted by law, to (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public. DOE emphasizes as well that E.O. 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, the Office of Information and Regulatory Affairs (''OIRA'') in the Office of Management and Budget (''OMB'') has emphasized

that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. For the reasons stated in the preamble, this proposed regulatory action is consistent with these principles.

Section 6(a) of E.O. 12866 also requires agencies to submit ''significant regulatory actions'' to OIRA for review. OIRA has determined that this proposed regulatory action constitutes a ''significant regulatory action'' within the scope of section 3(f)(1) of E.O. 12866. Accordingly, pursuant to section 6(a)(3)(C) of E.O. 12866, DOE has provided to OIRA an assessment, including the underlying analysis, of benefits and costs anticipated from the proposed regulatory action, together with, to the extent feasible, a quantification of those costs; and an assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, and an explanation why the planned regulatory action is preferable to the identified potential alternatives. These assessments are summarized in this preamble and further detail can be found in the technical support document for this proposed rulemaking.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis (''IRFA'') for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by E.O. 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (Aug. 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's website (*www.energy.gov/gc/office-general-counsel*). DOE has prepared the following IRFA for the equipment that are the subject of this proposed rulemaking.

For manufacturers of ESEMs, the Small Business Administration (''SBA'') has set a size threshold, which defines those entities classified as ''small businesses'' for the purposes of the statute. DOE used the SBA's small business size standards to determine whether any small entities would be subject to the requirements of the rule. (See 13 CFR part 121.) The size standards are listed by North American Industry Classification System (''NAICS'') code and industry description and are available at *www.sba.gov/document/support-table-size-standards.* Manufacturing of ESEMs is classified under NAICS 335312, ''Motor and Generator Manufacturing.'' The SBA sets a threshold of 1,250 employees or fewer for an entity to be considered as a small business for this category.

1. Description of Reasons Why Action Is Being Considered

DOE previously established energy conservation standards for some types of electric motors at 10 CFR 431.25. These previous rulemakings did not establish energy conservation standards for ESEMs when establishing or amending energy conservation standards for other electric motors. In the March 2022 Preliminary Analysis, DOE analyzed potential efficiency levels for ESEMs. *See* 87 FR 11650 (March 2, 2022). On December 22, 2022, DOE received a joint recommendation for energy conservation standards for ESEMs. These standard levels were submitted jointly to DOE, by groups representing manufacturers, energy and environmental advocates, and consumer groups (the Electric Motors Working Group). The December 2022 Joint Recommendation recommends specific energy conservation standards for ESEMs.

2. Objectives of, and Legal Basis for, Rule

EPCA authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. Title III, Part C of EPCA, added by Public Law 95–619, Title IV, section 441(a) (42 U.S.C. 6311–6317, as codified), established the Energy Conservation Program for Certain Industrial Equipment, which sets forth a variety of provisions designed to improve the energy efficiency of certain types of industrial equipment, including ESEMs, a category of electric motors, the subject of this notice. (42 U.S.C. 6311(1)(A)).

DOE must follow specific statutory criteria for prescribing new or amended standards for covered equipment, including electric motors. Any new or amended standard for covered equipment must be designed to achieve the maximum improvement in energy efficiency that the Secretary of Energy determines is technologically feasible and economically justified. (42 U.S.C. 6316(a); 42 U.S.C. 6295(o)(2)(A) and 42 U.S.C. 6295(o)(3)(B))

3. Description and Estimated Number of Small Entities Regulated

To estimate the number of companies that could be small business manufacturers of ESEMs covered by this rulemaking, DOE conducted a market survey using publicly available information. DOE's research involved DOE's publicly available Compliance Certification Database (''CCD''), industry trade association membership directories (including NEMA), and information from previous rulemakings. DOE also asked stakeholders and industry representatives if they were aware of any other small manufacturers during manufacturer interviews and DOE working groups. DOE used information from these sources to create a list of companies that potentially manufacture ESEMs covered by this proposed rulemaking. As necessary, DOE contacted companies to determine whether they met the SBA's definition of a small business manufacturer. DOE screened out companies that do not offer equipment covered by this proposed rulemaking, do not meet the definition of a ''small business,'' or are foreign owned and operated.

DOE initially identified approximately 74 unique potential manufacturers of ESEMs sold in the U.S that are covered by this proposed rulemaking. DOE screened out companies that had more than 1,250 employees or companies that were completely foreign-owned and operated. Of the 74 manufacturers that potentially manufacture ESEMs covered by this proposed rulemaking, DOE identified 3 companies that meet SBA's definition of a small business.

4. Description and Estimate of Compliance Requirements Including Differences in Cost, if Any, for Different Groups of Small Entities

In this NOPR, DOE is proposing new energy conservation standards for ESEMs. The primary value added by these 3 small businesses is creating ESEMs that serve an application specific purpose that the OEMs require. This includes combining an ESEM with specific mechanic couplings, weatherproofing, or controls to suit the OEM's needs. Most small businesses manufacture motor housing and couplings but do not manufacture the rotors and stators used in the ESEMs they sell. While these small businesses may have to create new ESEM housings and/or couplings if the ESEM characteristics change in response to the proposed energy conservation

standards, DOE was not able to identify any small businesses that own their own lamination dies sets and winding machines that are used to manufacture rotors and stators for ESEMs.

The 3 small businesses identified do not manufacture the rotors and stators of their ESEMs and instead purchase these components from other manufacturers. Thus, they would not need to purchase the machinery necessary to manufacture these components (*i.e.,* would not need to purchase costly lamination dies sets and winding machines) nor would they need to spend R&D efforts to develop ESEM designs to meet energy conservation standards. Instead, these small manufacturers may have to create new moldings for ESEM housings (if the ESEM characteristics change in response to the proposed energy conservation standards).

DOE estimated conversion costs associated with redesigning an equipment line for ESEM housings. DOE estimates this will cost approximately $50,000 in molding equipment per ESEM housing; $37,330 in engineering design effort per ESEM housing; [104] and $10,000 in testing costs per ESEM housing. Based on these estimates, each ESEM housing that will need to be redesigned would cost a small business approximately $97,330.

DOE displays in Table VI–1 the estimated average conversion costs per small business compared to the annual revenue for each small business. DOE used D&B Hoovers [105] to estimate the annual revenue for each small business. Manufacturers will have 4 years between the expected publication of the final rule and the date of compliance with the proposed energy conservation standards. Therefore, DOE presents the estimated conversion costs and testing costs as a percent of the estimated 4 years of annual revenue for each small business.

TABLE VI–1—ESTIMATED CONVERSION COSTS AND ANNUAL REVENUE FOR EACH SMALL BUSINESS

Manufacturer	Number of ESEM housing that need to be redesigned	Total conversion costs	Estimated annual revenue	4 Years of annual revenue	Conversion costs as a % of 4 years of annual revenue
Small Business 1	27	$2,627,910	$6,270,000	$25,080,000	10.5
Small Business 2	19	1,849,270	10,120,00	40,480,000	4.6
Small Business 3	24	2,335,920	28,210,000	112,840,000	2.1
Average Small Business	23	2,271,033	14,866,667	59,466,667	3.8

5. Duplication, Overlap, and Conflict With Other Rules and Regulations

As described in section IV.A. of this document, DOE believes the standards proposed in this NOPR would not impact manufacturers of consumer products. In commercial equipment, DOE identified the following equipment as potentially incorporating ESEMs: walk-in coolers and freezers, circulator pumps, air circulating fans, and commercial unitary air conditioning equipment. If the proposed energy conservation standards for these rules finalize as proposed, DOE has identified that these rules would all: (1) have a compliance year that is at or before the ESEM standard compliance year (2029) and/or (2) require a motor that is either outside of the scope of this rule (*e.g.,* an ECM) or an ESEM with an efficiency above the proposed ESEM standards, and therefore not be impacted by the proposed ESEM rule (*i.e.,* the ESEM rule would not trigger a redesign of these equipment).

6. Significant Alternatives to the Rule

The discussion in the previous section analyzes impacts on small businesses that would result from DOE's proposal to adopt standards represented by TSL 2. In reviewing alternatives to the proposed rule, DOE examined energy conservation standards set at lower efficiency levels. While TSL 1 would reduce the impacts on small business manufacturers, it would come at the expense of a reduction in energy savings and consumer NPV. TSL 1 achieves 65 percent lower energy savings and 69 percent lower consumer NPV compared to the energy savings at TSL 2.

Based on the presented discussion, proposing standards at TSL 2 balances the benefits of the energy savings at TSL 2 with the potential burdens placed on ESEM manufacturers, including small business manufacturers. Accordingly, DOE does not propose one of the other TSLs considered in the analysis, or the other policy alternatives examined as part of the regulatory impact analysis and included in chapter 17 of the NOPR TSD.

Additional compliance flexibilities may be available through other means. Manufacturers subject to DOE's energy efficiency standards may apply to DOE's Office of Hearings and Appeals for exception relief under certain circumstances. Manufacturers should refer to 10 CFR part 1003 for additional details.

C. Review Under the Paperwork Reduction Act

Manufacturers of expanded scope electric motors must test their equipment according to the DOE test procedures for ESEMs, including any amendments adopted for those test procedures, and use the results of the test procedure and applicable sampling plan if they choose to make representations of the energy efficiency or energy use of ESEMs. DOE has established regulations for recordkeeping requirements for all covered consumer products and commercial equipment, including ESEMs. (*See generally* 10 CFR part 429). The collection-of-information requirement for the testing and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (''PRA''). This requirement has been approved by OMB under OMB control number 1910–1400 and is in the process of being renewed. Public reporting burden is estimated to average 35 hours per response,

[104] DOE estimated that it would take approximately three months of engineering time to redesign each ESEM housing. Based on data from BLS, the mean hourly wage of an electrical engineer is $54.83 (*www.bls.gov/oes/current/oes172071.htm*) and wages comprise 70.5 percent of an employee's total compensation (*www.bls.gov/news.release/archives/ecec_06162023.pdf*).

$54.83 (hourly wage) ÷ 0.705 (wage as a percentage of total compensation) = $77.77 (fully burdened hourly labor rate).

$77.77 × 8 (hours in a workday) × 20 (working days in a month) × 3 (months) = $37,330

[105] *app.avention.com.*

including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. DOE does not currently have certification or labeling requirements for ESEMs and is not proposing to establish either of those as part of this proposed rule. Thus, DOE expects the recordkeeping requirements associated with testing and maintaining test data would be less than the average estimate per response for this paperwork package.

Currently, DOE is seeking comment on DOE's renewal of its paperwork reduction approval under OMB control number 1910–1400. *See* 88 FR 65994 (Sept. 26, 2023).

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

D. Review Under the National Environmental Policy Act of 1969

DOE is analyzing this proposed regulation in accordance with the National Environmental Policy Act of 1969 (''NEPA'') and DOE's NEPA implementing regulations (10 CFR part 1021). DOE's regulations include a categorical exclusion for rulemakings that establish energy conservation standards for consumer products or industrial equipment. 10 CFR part 1021, subpart D, appendix B5.1. DOE anticipates that this proposed rulemaking qualifies for categorical exclusion B5.1 because it is a rulemaking that establishes energy conservation standards for consumer products or industrial equipment, none of the exceptions identified in categorical exclusion B5.1(b) apply, no extraordinary circumstances exist that require further environmental analysis, and it otherwise meets the requirements for application of a categorical exclusion. *See* 10 CFR 1021.410. DOE will complete its NEPA review before issuing the final rule.

E. Review Under Executive Order 13132

E.O. 13132, ''Federalism,'' 64 FR 43255 (Aug. 10, 1999), imposes certain requirements on Federal agencies formulating and implementing policies or regulations that preempt state law or that have federalism implications. The Executive order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the states and to carefully assess the necessity for such actions. The Executive order also requires agencies to have an accountable process to ensure meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this proposed rule and has tentatively determined that it 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. EPCA governs and prescribes Federal preemption of state regulations as to energy conservation for the equipment that are the subject of this proposed rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (*See* 42 U.S.C. 6316(a) and (b); 42 U.S.C. 6297) Therefore, no further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of E.O. 12988, ''Civil Justice Reform,'' imposes on Federal agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity, (2) write regulations to minimize litigation, (3) provide a clear legal standard for affected conduct rather than a general standard, and (4) promote simplification and burden reduction. 61 FR 4729 (Feb. 7, 1996). Regarding the review required by section 3(a), section 3(b) of E.O. 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies the preemptive effect, if any, (2) clearly specifies any effect on existing Federal law or regulation, (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction, (4) specifies the retroactive effect, if any, (5) adequately defines key terms, and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this proposed rule meets the relevant standards of E.O. 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (''UMRA'') requires each Federal agency to assess the effects of Federal regulatory actions on state, local, and Tribal governments and the private sector. Public Law 104–4, section 201 (codified at 2 U.S.C. 1531). For a proposed regulatory action likely to result in a rule that may cause the expenditure by state, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of state, local, and Tribal governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. DOE's policy statement is also available at *www.energy.gov/sites/prod/files/gcprod/documents/umra_97.pdf.*

Although this proposed rule does not contain a Federal intergovernmental mandate, it may require expenditures of $100 million or more in any one year by the private sector. Such expenditures may include: (1) investment in research and development and in capital expenditures by ESEM manufacturers in the years between the final rule and the compliance date for the new standards and (2) incremental additional expenditures by consumers to purchase higher-efficiency ESEMs, starting at the compliance date for the applicable standard.

Section 202 of UMRA authorizes a Federal agency to respond to the content requirements of UMRA in any other statement or analysis that accompanies the proposed rule. (2 U.S.C. 1532(c)) The content requirements of section 202(b) of UMRA relevant to a private sector mandate substantially overlap the economic analysis requirements that apply under section 325(o) of EPCA and

Executive Order 12866. The **SUPPLEMENTARY INFORMATION** section of this NOPR and the TSD for this proposed rule respond to those requirements.

Under section 205 of UMRA, DOE is obligated to identify and consider a reasonable number of regulatory alternatives before promulgating a rule for which a written statement under section 202 is required. (2 U.S.C. 1535(a)) DOE is required to select from those alternatives the most cost-effective and least burdensome alternative that achieves the objectives of the proposed rule unless DOE publishes an explanation for doing otherwise, or the selection of such an alternative is inconsistent with law. As required by 42 U.S.C. 6316(a) and 42 U.S.C. 6295(o), this proposed rule would establish new energy conservation standards for that are designed to achieve the maximum improvement in energy efficiency that DOE has determined to be both technologically feasible and economically justified. A full discussion of the alternatives considered by DOE is presented in chapter 17 of the TSD for this proposed rule.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This proposed rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

Pursuant to E.O. 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 53 FR 8859 (Mar. 15, 1988), DOE has determined that this proposed rule would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for Federal agencies to review most disseminations of information to the public under information quality guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). Pursuant to OMB Memorandum M–19–15, Improving Implementation of the Information Quality Act (April 24, 2019), DOE published updated guidelines which are available at *www.energy.gov/sites/prod/files/2019/12/f70/DOE%20Final%20Updated%20IQA%20Guidelines%20Dec%202019.pdf.* DOE has reviewed this NOPR under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

E.O. 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA at OMB, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

DOE has tentatively concluded that this proposed regulatory action, which proposes new energy conservation standards for ESEMs, is not a significant energy action because the proposed standards are not likely to have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as such by the Administrator at OIRA. Accordingly, DOE has not prepared a Statement of Energy Effects on this proposed rule.

L. Information Quality

On December 16, 2004, OMB, in consultation with the Office of Science and Technology Policy (''OSTP''), issued its Final Information Quality Bulletin for Peer Review (''the Bulletin''). 70 FR 2664 (Jan. 14, 2005). The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal Government, including influential scientific information related to agency regulatory actions. The purpose of the bulletin is to enhance the quality and credibility of the Government's scientific information. Under the Bulletin, the energy conservation standards rulemaking analyses are ''influential scientific information,'' which the Bulletin defines as ''scientific information the agency reasonably can determine will have, or does have, a clear and substantial impact on important public policies or private sector decisions.'' 70 FR 2664, 2667.

In response to OMB's Bulletin, DOE conducted formal peer reviews of the energy conservation standards development process and the analyses that are typically used and has prepared a report describing that peer review.[106] Generation of this report involved a rigorous, formal, and documented evaluation using objective criteria and qualified and independent reviewers to make a judgment as to the technical/scientific/business merit, the actual or anticipated results, and the productivity and management effectiveness of programs and/or projects. Because available data, models, and technological understanding have changed since 2007, DOE has engaged with the National Academy of Sciences to review DOE's analytical methodologies to ascertain whether modifications are needed to improve DOE's analyses. DOE is in the process of evaluating the resulting report.[107]

VII. Public Participation

A. Attendance at the Public Meeting

The time, date, and location of the public meeting are listed in the **DATES** and **ADDRESSES** sections at the beginning of this document. If you plan to attend the public meeting, please notify the Appliance and Equipment Standards staff at (202) 287–1445 or *Appliance_Standards_Public_Meetings@ee.doe.gov.*

Please note that foreign nationals visiting DOE Headquarters are subject to advance security screening procedures which require advance notice prior to attendance at the public meeting. If a foreign national wishes to participate in the public meeting, please inform DOE of this fact as soon as possible by contacting Ms. Regina Washington at

[106] The 2007 ''Energy Conservation Standards Rulemaking Peer Review Report'' is available at the following website: *energy.gov/eere/buildings/downloads/energy-conservation-standards-rulemaking-peer-review-report-0* (last accessed October 10, 2023).

[107] The report is available at *www.nationalacademies.org/our-work/review-of-methods-for-setting-building-and-equipment-performance-standards.*

(202) 586–1214 or by email (*Regina.Washington@ee.doe.gov*) so that the necessary procedures can be completed.

DOE requires visitors to have laptops and other devices, such as tablets, checked upon entry into the Forrestal Building. Any person wishing to bring these devices into the building will be required to obtain a property pass. Visitors should avoid bringing these devices, or allow an extra 45 minutes to check in. Please report to the visitor's desk to have devices checked before proceeding through security.

Due to the REAL ID Act implemented by the Department of Homeland Security (''DHS''), there have been recent changes regarding ID requirements for individuals wishing to enter Federal buildings from specific states and U.S. territories. DHS maintains an updated website identifying the state and territory driver's licenses that currently are acceptable for entry into DOE facilities at *www.dhs.gov/real-id-enforcement-brief.* A driver's licenses from a state or territory identified as not compliant by DHS will not be accepted for building entry and one of the alternate forms of ID listed below will be required. Acceptable alternate forms of Photo-ID include U.S. Passport or Passport Card; an Enhanced Driver's License or Enhanced ID-Card issued by states and territories as identified on the DHS website (Enhanced licenses issued by these states and territories are clearly marked Enhanced or Enhanced Driver's License); a military ID or other Federal Government-issued Photo-ID card.

In addition, you can attend the public meeting via webinar. Webinar registration information, participant instructions, and information about the capabilities available to webinar participants will be published on DOE's website at *www.eere.energy.gov/buildings/appliance_standards/product.aspx/productid/50.* Participants are responsible for ensuring their systems are compatible with the webinar software.

B. Procedure for Submitting Prepared General Statements for Distribution

Any person who has plans to present a prepared general statement may request that copies of his or her statement be made available at the public meeting. Such persons may submit requests, along with an advance electronic copy of their statement in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format, to the appropriate address shown in the **ADDRESSES** section at the beginning of this document. The request and advance copy of statements must be received at least one week before the public meeting and are to be emailed. Please include a telephone number to enable DOE staff to make follow-up contact, if needed.

C. Conduct of the Public Meeting

DOE will designate a DOE official to preside at the public meeting and may also use a professional facilitator to aid discussion. The meeting will not be a judicial or evidentiary-type public hearing, but DOE will conduct it in accordance with section 336 of EPCA. (42 U.S.C. 6306) A court reporter will be present to record the proceedings and prepare a transcript. DOE reserves the right to schedule the order of presentations and to establish the procedures governing the conduct of the public meeting. There shall not be discussion of proprietary information, costs or prices, market share, or other commercial matters regulated by U.S. anti-trust laws. After the public meeting, interested parties may submit further comments on the proceedings, as well as on any aspect of the proposed rulemaking, until the end of the comment period.

The public meeting will be conducted in an informal, conference style. DOE will present a general overview of the topics addressed in this rulemaking, allow time for prepared general statements by participants, and encourage all interested parties to share their views on issues affecting this proposed rulemaking. Each participant will be allowed to make a general statement (within time limits determined by DOE), before the discussion of specific topics. DOE will allow, as time permits, other participants to comment briefly on any general statements.

At the end of all prepared statements on a topic, DOE will permit participants to clarify their statements briefly. Participants should be prepared to answer questions by DOE and by other participants concerning these issues. DOE representatives may also ask questions of participants concerning other matters relevant to this proposed rulemaking. The official conducting the public meeting will accept additional comments or questions from those attending, as time permits. The presiding official will announce any further procedural rules or modification of the previous procedures that may be needed for the proper conduct of the public meeting.

A transcript of the public meeting will be included in the docket, which can be viewed as described in the *Docket* section at the beginning of this document and will be accessible on the DOE website. In addition, any person may buy a copy of the transcript from the transcribing reporter.

D. Submission of Comments

DOE will accept comments, data, and information regarding this proposed rule before or after the public meeting, but no later than the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments, data, and other information using any of the methods described in the **ADDRESSES** section at the beginning of this document.

Submitting comments via *www.regulations.gov.* The *www.regulations.gov* web page will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment itself or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Otherwise, persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to *www.regulations.gov* information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (''CBI'')). Comments submitted through *www.regulations.gov* cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through *www.regulations.gov* before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed

simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that *www.regulations.gov* provides after you have successfully uploaded your comment.

Submitting comments via email, hand delivery/courier, or postal mail. Comments and documents submitted via email, hand delivery/courier, or postal mail also will be posted to *www.regulations.gov.* If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information in a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via postal mail or hand delivery/courier, please provide all items on a CD, if feasible, in which case it is not necessary to submit printed copies. No telefacsimiles (''faxes'') will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, that are written in English, and that are free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email two well-marked copies: one copy of the document marked ''confidential'' including all the information believed to be confidential, and one copy of the document marked ''non-confidential'' with the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

E. Issues on Which DOE Seeks Comment

Although DOE welcomes comments on any aspect of this proposal, DOE is particularly interested in receiving comments and views of interested parties concerning the following issues:

(1) DOE requests comments on the proposal to use a represented value of average full-load efficiency for ESEMs and proposed revisions to 10 CFR 429.64 and 429.70(j).

(2) DOE requests comment on the proposed equipment classes for this NOPR.

(3) DOE requests comment on the remaining technology options considered in this NOPR.

(4) DOE requests comment on the representative units used in this NOPR.

(5) DOE requests comment on the baseline efficiencies used in this NOPR.

(6) DOE requests comment on the proposal to constrain the frame size of all efficiency levels to that of the baseline unit.

(7) DOE requests comment on the assumption that higher ELs (particularly ELs 3 and 4) can be reached without significant increase in size.

(8) DOE requests comment on the potential for market disruption at higher ELs and if manufacturers could design motors at ELs 3 and 4 that do not increase in size, or if for the final rule, DOE should model motors larger than what is considered in this NOPR.

(9) DOE requests data and information to characterize the distribution channels for ESEMs and associated market shares.

(10) DOE requests data and information to characterize the distribution of ESEMs by sector (commercial, industrial, and residential sectors) as well as the distribution of ESEMs by application in each sector.

(11) DOE seeks data and additional information to characterize ESEM operating loads.

(12) DOE requests comment on the distribution of average annual operating hours by application and sector used to characterize the variability in energy use for ESEMs

(13) DOE seeks data and additional information to support the analysis of projected energy use impacts related to any increases in motor nominal speed.

(14) DOE requests data and information regarding the most appropriate price trend to use to project ESEM prices.

(15) DOE requests comment on whether any of the efficiency levels considered in this NOPR might lead to an increase in installation costs, and if so, DOE seeks supporting data regarding the magnitude of the increased cost per unit for each relevant efficiency level and the reasons for those differences.

(16) DOE requests comment on whether any of the efficiency levels considered in this NOPR might lead to an increase in maintenance and repair costs, and if so, DOE seeks supporting data regarding the magnitude of the increased cost per unit for each relevant efficiency level and the reasons for those differences.

(17) DOE requests comment on the equipment lifetimes (both in years and in mechanical hours) used for each representative unit considered in the LCC and PBP analyses

(18) DOE seeks information and data to help establish efficiency distribution in the no-new standards case for ESEMs. DOE requests data and information on any trends in the electric motor market that could be used to forecast expected trends in market share by efficiency levels for each equipment class.

(19) DOE requests comment and additional data on its 2020 shipments estimates for ESEMs. DOE seeks comment on the methodology used to project future shipments of ESEMs. DOE seeks information on other data sources that can be used to estimate future shipments.

(20) DOE requests comment and data regarding the potential increase in utilization of electric motors due to any increase in efficiency (''rebound effect'').

(21) DOE requests comment and data on the overall methodology used for the consumer subgroup analysis. DOE requests comment on whether additional consumer subgroups may be disproportionately affected by a new standard and warrant additional analysis in the final rule.

(22) DOE requests comment on how to address the climate benefits and non-monetized effects of the proposal.

(23) DOE requests comment on if manufacturers would have the engineering capacity to conduct design efforts to be able to offer a full portfolio of complaint ESEM at TSL 4. If not, please provide any data or information on the potential impacts that could arise due to these market gaps in equipment offerings.

(24) DOE requests comment on if manufacturers would have the engineering capacity to conduct design efforts to be able to offer a full portfolio of compliant ESEMs at TSL 3. If not, please provide any data or information

on the potential impacts that could arise due to these market gaps in equipment offerings.

(25) DOE seeks comment on these alternative proposed standard levels. DOE requests comment on the unintended market consequences and the changes industry would make as a result of standards that require the use of different motor technologies for non-air over and AO–ESEMs. In addition, if DOE were to consider a TSL that would require TSL 2 for all equipment classes except TSL3 efficiency levels for low torque ESEMs, DOE seeks information related to potential ESEM size increase and impact on OEM markets at TSL 3 and above.

Additionally, DOE welcomes comments on other issues relevant to the conduct of this proposed rulemaking that may not specifically be identified in this document.

VIII. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this notice of proposed rulemaking and announcement of public meeting.

List of Subjects

10 CFR Part 429

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Reporting and recordkeeping requirements.

10 CFR Part 431

Administrative practice and procedure, Confidential business information, Energy conservation test procedures, and Reporting and recordkeeping requirements.

Signing Authority

This document of the Department of Energy was signed on November 21, 2023, by Jeffrey Marootian, Principal Deputy Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on November 29, 2023.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

For the reasons set forth in the preamble, DOE is proposing to amend parts 429 and 431 of chapter II, subchapter D, of title 10 of the Code of Federal Regulations, as set forth below:

PART 429—CERTIFICATION, COMPLIANCE, AND ENFORCEMENT FOR CONSUMER PRODUCTS AND COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 1. The authority citation for part 429 continues to read as follows:

Authority: 2 U.S.C. 6291–6317; 28 U.S.C. 2461 note.

■ 2. Amend § 429.64 by:
■ a. Revising paragraphs (a)(3) and (d)(2);
■ b. Revising paragraphs (e) introductory text and (e)(1)(iii);
■ c. Redesignating paragraph (e)(1)(iv) as paragraph (e)(1)(v);
■ d. Adding paragraph (e)(1)(iv); and
■ e. Revising paragraphs (e)(2) introductory text and (e)(2)(ii).

The revisions and addition read as follows:

§ 429.64 Electric motors.

(a) * * *

(3) On or after April 17, 2023, manufacturers of electric motors that are subject to the test procedures in appendix B of subpart B of part 431 but are not subject to the energy conservation standards in subpart B of part 431 of this subchapter, must, if they chose to voluntarily make representations of energy efficiency, follow the provisions in paragraph (e) of this section.

* * * * *

(d) * * *

(2) Testing was conducted using a laboratory other than an accredited laboratory that meets the requirements of paragraph (f) of this section, or the represented value of the electric motor basic model was determined through the application of an AEDM pursuant to the requirements of § 429.70(j), and a third-party certification organization that is nationally recognized in the United States under § 429.73 has certified the represented value of the electric motor basic model through issuance of a certificate of conformity for the basic model.

(e) *Determination of represented value.* Manufacturers of electric motors that are subject to energy conservation standards in subpart B of part 431 of this subchapter, and for which minimum values of nominal full-load efficiency are prescribed, must determine the represented value of nominal full-load efficiency (inclusive of the inverter for inverter-only electric motors) for each basic model of electric motor either by testing in conjunction with the applicable sampling provisions or by applying an AEDM as set forth in this section and in § 429.70(j). Manufacturers of electric motors that are subject to energy conservation standards in subpart B of part 431 of this subchapter, and for which minimum values of average full-load efficiency are prescribed, must determine the represented value of average full-load efficiency (inclusive of the inverter for inverter-only electric motors) for each basic model of electric motor either by testing in conjunction with the applicable sampling provisions or by applying an AEDM as set forth in this section and in § 429.70(j).

(1) * * *

(iii) *Nominal Full-load Efficiency.* Manufacturers of electric motors that are subject to energy conservation standards in subpart B of part 431 of this subchapter, and for which minimum values of nominal full-load efficiency are prescribed, must determine the nominal full-load efficiency by selecting an efficiency from the ''Nominal Full-load Efficiency'' table in appendix B that is no greater than the average full-load efficiency of the basic model as calculated in paragraph (e)(1)(ii) of this section.

(iv) *Represented value.* For electric motors subject to energy conservation standards in subpart B of part 431 of this subchapter and for which minimum values of nominal full-load efficiency are prescribed the represented value is the nominal full-load efficiency of a basic model of electric motor and is to be used in marketing materials and all public representations, as the certified value of efficiency, and on the nameplate. (See § 431.31(a) of this subchapter.) For electric motors subject to energy conservation standards in subpart B of part 431 of this subchapter and for which minimum values of average full-load efficiency are prescribed the represented value is the average full-load efficiency of a basic model of electric motor and is to be used in marketing materials and all public representations, as the certified value of efficiency, and on the nameplate. (See § 431.31(a) of this subchapter.)

* * * * *

(2) *Alternative efficiency determination methods.* In lieu of

testing, the represented value of a basic model of electric motor must be determined through the application of an AEDM pursuant to the requirements of § 429.70(j) and the provisions of this section, where:

* * * * *

(ii) For electric motors subject to energy conservation standards in subpart B of part 431 of this subchapter and for which minimum values of nominal full-load efficiency are prescribed the represented value is the nominal full-load efficiency of a basic model of electric motor and is to be used in marketing materials and all public representations, as the certified value of efficiency, and on the nameplate. (See § 431.31(a) of this subchapter) Determine the nominal full-load efficiency by selecting a value from the ''Nominal Full-Load Efficiency'' table in appendix B to subpart B of this part, that is no greater than the simulated full-load efficiency predicted by the AEDM for the basic model. For electric motors subject to energy conservation standards in subpart B of part 431 of this subchapter and for which minimum values of average full-load efficiency are prescribed the represented value is the average full-load efficiency of a basic model of electric motor and is to be used in marketing materials and all public representations, as the certified value of efficiency, and on the nameplate. (See § 431.31(a) of this subchapter.)

* * * * *

■ 3. Amend § 429.70 by revising paragraph (j)(2)(i)(D) to read as follows:

§ 429.70 Alternative methods for determining energy efficiency and energy use.

* * * * *

(j) * * *

(2) * * *

(i) * * *

(D) Each basic model must have the lowest represented value of nominal full-load efficiency or represented value of average full-load efficiency, as applicable, among the basic models within the same equipment class.

* * * * *

PART 431—ENERGY EFFICIENCY PROGRAM FOR CERTAIN COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 4. The authority citation for part 431 continues to read as follows:

Authority: 42 U.S.C. 6291–6317; 28 U.S.C. 2461 note.

■ 5. Amend § 431.12 by adding in alphabetical order definitions for ''Capacitor start capacitor run motor'', ''Capacitor start induction run motor'', ''Permanent split capacitor motor'', ''Polyphase motor'', ''Shaded pole motor'', and ''Split-phase motor'' to read as follows:

§ 431.12 Definitions.

* * * * *

Capacitor start capacitor run motor means a single-phase induction electric motor equipped with a start capacitor to provide the starting torque, as well as a run capacitor to maintain a running torque while the motor is loaded.

Capacitor start induction run motor means a single-phase induction electric motor equipped with a start capacitor to provide the starting torque, which is capable of operating without a run capacitor.

* * * * *

Permanent split capacitor motor means a single-phase induction electric motor that has a capacitor permanently connected in series with the starting winding of the motor and is permanently connected in the circuit both at starting and running conditions of the motor.

* * * * *

Polyphase motor means an electric motor that has a stator containing multiple distinct windings per motor pole, driven by corresponding time-shifted sine waves.

* * * * *

Shaded pole motor means a self-starting single-phase induction electric motor with a copper ring shading one of the poles.

* * * * *

Split-phase motor means a single-phase induction electric motor that possesses two windings: a main/running winding, and a starting/auxiliary winding.

* * * * *

■ 6. Revise § 431.25 to read as follows:

§ 431.25 Energy conservation standards and effective dates.

(a) For purposes of determining the required minimum nominal full-load efficiency or minimum average full-load efficiency of an electric motor that has a horsepower or kilowatt rating between two horsepower or two kilowatt ratings listed in any table of energy conservation standards in paragraphs (b) through (d) of this section, each such electric motor shall be deemed to have a listed horsepower or kilowatt rating, determined as follows:

(1) A horsepower at or above the midpoint between the two consecutive horsepowers shall be rounded up to the higher of the two horsepowers;

(2) A horsepower below the midpoint between the two consecutive horsepowers shall be rounded down to the lower of the two horsepowers; or

(3) A kilowatt rating shall be directly converted from kilowatts to horsepower using the formula 1 kilowatt = ($1/0.746$) horsepower. The conversion should be calculated to three significant decimal places, and the resulting horsepower shall be rounded in accordance with paragraph (a)(1) or (a)(2) of this section, whichever applies.

(b) This section applies to electric motors manufactured (alone or as a component of another piece of equipment) on or after June 1, 2016, but before June 1, 2027, that satisfy the criteria in paragraph (b)(1)(i) of this section, with the exclusion listed in paragraph (b)(1)(ii) of this section.

(1) *Scope.* (i) The standards in paragraph (b)(2) of this section apply only to electric motors, including partial electric motors, that satisfy the following criteria:

(A) Are single-speed, induction motors;

(B) Are rated for continuous duty (MG 1) operation or for duty type S1 (IEC);

(C) Contain a squirrel-cage (MG 1) or cage (IEC) rotor;

(D) Operate on polyphase alternating current 60-hertz sinusoidal line power;

(E) Are rated 600 volts or less;

(F) Have a 2-, 4-, 6-, or 8-pole configuration,

(G) Are built in a three-digit or four-digit NEMA frame size (or IEC metric equivalent), including those designs between two consecutive NEMA frame sizes (or IEC metric equivalent), or an enclosed 56 NEMA frame size (or IEC metric equivalent),

(H) Produce at least one horsepower (0.746 kW) but not greater than 500 horsepower (373 kW); and

(I) Meet all of the performance requirements of one of the following motor types: A NEMA Design A, B, or C motor or an IEC Design N, NE, NEY, NY or H, HE, HEY, HY motor.

(ii) The standards in paragraph (b)(2) of this section do not apply to the following electric motors exempted by the Secretary, or any additional electric motors that the Secretary may exempt:

(A) Air-over electric motors;

(B) Component sets of an electric motor;

(C) Liquid-cooled electric motors;

(D) Submersible electric motors; and

(E) Inverter-only electric motors.

(2) *Standards.* (i) Each NEMA Design A motor, NEMA Design B motor, and IEC Design N (including NE, NEY, or NY variants) motor that is an electric motor meeting the criteria in paragraph (b)(1) of this section and with a power

rating from 1 horsepower through 500 horsepower, but excluding fire pump electric motors, shall have a nominal full-load efficiency of not less than the following:

TABLE 1 TO PARAGRAPH (b)(2)(i)—NOMINAL FULL-LOAD EFFICIENCIES OF NEMA DESIGN A, NEMA DESIGN B AND IEC DESIGN N, NE, NEY OR NY MOTORS (EXCLUDING FIRE PUMP ELECTRIC MOTORS) AT 60 Hz

Motor horsepower/standard kilowatt equivalent	Nominal full-load efficiency (%)							
	2 Pole		4 Pole		6 Pole		8 Pole	
	Enclosed	Open	Enclosed	Open	Enclosed	Open	Enclosed	Open
1/.75	77.0	77.0	85.5	85.5	82.5	82.5	75.5	75.5
1.5/1.1	84.0	84.0	86.5	86.5	87.5	86.5	78.5	77.0
2/1.5	85.5	85.5	86.5	86.5	88.5	87.5	84.0	86.5
3/2.2	86.5	85.5	89.5	89.5	89.5	88.5	85.5	87.5
5/3.7	88.5	86.5	89.5	89.5	89.5	89.5	86.5	88.5
7.5/5.5	89.5	88.5	91.7	91.0	91.0	90.2	86.5	89.5
10/7.5	90.2	89.5	91.7	91.7	91.0	91.7	89.5	90.2
15/11	91.0	90.2	92.4	93.0	91.7	91.7	89.5	90.2
20/15	91.0	91.0	93.0	93.0	91.7	92.4	90.2	91.0
25/18.5	91.7	91.7	93.6	93.6	93.0	93.0	90.2	91.0
30/22	91.7	91.7	93.6	94.1	93.0	93.6	91.7	91.7
40/30	92.4	92.4	94.1	94.1	94.1	94.1	91.7	91.7
50/37	93.0	93.0	94.5	94.5	94.1	94.1	92.4	92.4
60/45	93.6	93.6	95.0	95.0	94.5	94.5	92.4	93.0
75/55	93.6	93.6	95.4	95.0	94.5	94.5	93.6	94.1
100/75	94.1	93.6	95.4	95.4	95.0	95.0	93.6	94.1
125/90	95.0	94.1	95.4	95.4	95.0	95.0	94.1	94.1
150/110	95.0	94.1	95.8	95.8	95.8	95.4	94.1	94.1
200/150	95.4	95.0	96.2	95.8	95.8	95.4	94.5	94.1
250/186	95.8	95.0	96.2	95.8	95.8	95.8	95.0	95.0
300/224	95.8	95.4	96.2	95.8	95.8	95.8	.....	.....
350/261	95.8	95.4	96.2	95.8	95.8	95.8	.....	.....
400/298	95.8	95.8	96.2	95.8	.....	.....	.....	.....
450/336	95.8	96.2	96.2	96.2	.....	.....	.....	.....
500/373	95.8	96.2	96.2	96.2	.....	.....	.....	.....

(ii) Each NEMA Design C motor and IEC Design H (including HE, HEY, or HY variants) electric motor meeting the criteria in paragraph (b)(1) of this section and with a power rating from 1 horsepower through 200 horsepower, shall have a nominal full-load efficiency that is not less than the following:

TABLE 2 TO PARAGRAPH (b)(2)(ii)—NOMINAL FULL-LOAD EFFICIENCIES OF NEMA DESIGN C AND IEC DESIGN H, HE, HEY OR HY MOTORS AT 60 Hz

Motor horsepower/standard kilowatt equivalent	Nominal full-load efficiency (%)					
	4 Pole		6 Pole		8 Pole	
	Enclosed	Open	Enclosed	Open	Enclosed	Open
1/.75	85.5	85.5	82.5	82.5	75.5	75.5
1.5/1.1	86.5	86.5	87.5	86.5	78.5	77.0
2/1.5	86.5	86.5	88.5	87.5	84.0	86.5
3/2.2	89.5	89.5	89.5	88.5	85.5	87.5
5/3.7	89.5	89.5	89.5	89.5	86.5	88.5
7.5/5.5	91.7	91.0	91.0	90.2	86.5	89.5
10/7.5	91.7	91.7	91.0	91.7	89.5	90.2
15/11	92.4	93.0	91.7	91.7	89.5	90.2
20/15	93.0	93.0	91.7	92.4	90.2	91.0
25/18.5	93.6	93.6	93.0	93.0	90.2	91.0
30/22	93.6	94.1	93.0	93.6	91.7	91.7
40/30	94.1	94.1	94.1	94.1	91.7	91.7
50/37	94.5	94.5	94.1	94.1	92.4	92.4
60/45	95.0	95.0	94.5	94.5	92.4	93.0
75/55	95.4	95.0	94.5	94.5	93.6	94.1
100/75	95.4	95.4	95.0	95.0	93.6	94.1
125/90	95.4	95.4	95.0	95.0	94.1	94.1
150/110	95.8	95.8	95.8	95.4	94.1	94.1
200/150	96.2	95.8	95.8	95.4	94.5	94.1

(iii) Each fire pump electric motor meeting the criteria in paragraph (b)(1) of this section and with a power rating of 1 horsepower through 500 horsepower, shall have a nominal full-load efficiency that is not less than the following:

TABLE 3 TO PARAGRAPH (b)(2)(iii)—NOMINAL FULL-LOAD EFFICIENCIES OF FIRE PUMP ELECTRIC MOTORS AT 60 Hz

Motor horsepower/standard kilowatt equivalent	Nominal full-load efficiency (%)							
	2 Pole		4 Pole		6 Pole		8 Pole	
	Enclosed	Open	Enclosed	Open	Enclosed	Open	Enclosed	Open
1/.75	75.5	.....	82.5	82.5	80.0	80.0	74.0	74.0
1.5/1.1	82.5	82.5	84.0	84.0	85.5	84.0	77.0	75.5
2/1.5	84.0	84.0	84.0	84.0	86.5	85.5	82.5	85.5
3/2.2	85.5	84.0	87.5	86.5	87.5	86.5	84.0	86.5
5/3.7	87.5	85.5	87.5	87.5	87.5	87.5	85.5	87.5
7.5/5.5	88.5	87.5	89.5	88.5	89.5	88.5	85.5	88.5
10/7.5	89.5	88.5	89.5	89.5	89.5	90.2	88.5	89.5
15/11	90.2	89.5	91.0	91.0	90.2	90.2	88.5	89.5
20/15	90.2	90.2	91.0	91.0	90.2	91.0	89.5	90.2
25/18.5	91.0	91.0	92.4	91.7	91.7	91.7	89.5	90.2
30/22	91.0	91.0	92.4	92.4	91.7	92.4	91.0	91.0
40/30	91.7	91.7	93.0	93.0	93.0	93.0	91.0	91.0
50/37	92.4	92.4	93.0	93.0	93.0	93.0	91.7	91.7
60/45	93.0	93.0	93.6	93.6	93.6	93.6	91.7	92.4
75/55	93.0	93.0	94.1	94.1	93.6	93.6	93.0	93.6
100/75	93.6	93.0	94.5	94.1	94.1	94.1	93.0	93.6
125/90	94.5	93.6	94.5	94.5	94.1	94.1	93.6	93.6
150/110	94.5	93.6	95.0	95.0	95.0	94.5	93.6	93.6
200/150	95.0	94.5	95.0	95.0	95.0	94.5	94.1	93.6
250/186	95.4	94.5	95.0	95.4	95.0	95.4	94.5	94.5
300/224	95.4	95.0	95.4	95.4	95.0	95.4	.....	.....
350/261	95.4	95.0	95.4	95.4	95.0	95.4	.....	.....
400/298	95.4	95.4	95.4	95.4	.....	.....	.....	.....
450/336	95.4	95.8	95.4	95.8	.....	.....	.....	.....
500/373	95.4	95.8	95.8	95.8	.....	.....	.....	.....

(c) This section applies to electric motors manufactured (alone or as a component of another piece of equipment) on or after June 1, 2027, but before January 1, 2029, that satisfy the criteria in paragraph (c)(1)(i) of this section, with the exclusion listed in paragraph (c)(1)(ii) of this section.

(1) *Scope.* (i) The standards in paragraph (c)(2) of this section apply only to electric motors, including partial electric motors, that satisfy the following criteria:

(A) Are single-speed, induction motors;

(B) Are rated for continuous duty (MG 1) operation or for duty type S1 (IEC);

(C) Contain a squirrel-cage (MG 1) or cage (IEC) rotor;

(D) Operate on polyphase alternating current 60-hertz sinusoidal line power;

(E) Are rated 600 volts or less;

(F) Have a 2-, 4-, 6-, or 8-pole configuration,

(G) Are built in a three-digit or four-digit NEMA frame size (or IEC metric equivalent), including those designs between two consecutive NEMA frame sizes (or IEC metric equivalent), or an enclosed 56 NEMA frame size (or IEC metric equivalent), or have an air-over enclosure and a specialized frame size,

(H) Produce at least one horsepower (0.746 kW) but not greater than 750 horsepower (559 kW); and

(I) Meet all of the performance requirements of one of the following motor types: A NEMA Design A, B, or C motor or an IEC Design N, NE, NEY, NY or H, HE, HEY, HY motor.

(ii) The standards in paragraph (c)(2) of this section do not apply to the following electric motors exempted by the Secretary, or any additional electric motors that the Secretary may exempt:

(A) Component sets of an electric motor;

(B) Liquid-cooled electric motors;

(C) Submersible electric motors; and

(D) Inverter-only electric motors.

(2) *Standards.* (i) Each NEMA Design A motor, NEMA Design B motor, and IEC Design N (including NE, NEY, or NY variants) motor that is an electric motor meeting the criteria in paragraph (c)(1) of this section but excluding fire pump electric motors and air-over electric motors, and with a power rating from 1 horsepower through 750 horsepower, shall have a nominal full-load efficiency of not less than the following:

TABLE 4 TO PARAGRAPH (c)(2)(i)—NOMINAL FULL-LOAD EFFICIENCIES OF NEMA DESIGN A, NEMA DESIGN B AND IEC DESIGN N, NE, NEY OR NY MOTORS (EXCLUDING FIRE PUMP ELECTRIC MOTORS AND AIR-OVER ELECTRIC MOTORS) AT 60 Hz

Motor horsepower/standard kilowatt equivalent	Nominal full-load efficiency (%)							
	2 Pole		4 Pole		6 Pole		8 Pole	
	Enclosed	Open	Enclosed	Open	Enclosed	Open	Enclosed	Open
1/.75	77.0	77.0	85.5	85.5	82.5	82.5	75.5	75.5
1.5/1.1	84.0	84.0	86.5	86.5	87.5	86.5	78.5	77.0

TABLE 4 TO PARAGRAPH (c)(2)(i)—NOMINAL FULL-LOAD EFFICIENCIES OF NEMA DESIGN A, NEMA DESIGN B AND IEC DESIGN N, NE, NEY OR NY MOTORS (EXCLUDING FIRE PUMP ELECTRIC MOTORS AND AIR-OVER ELECTRIC MOTORS) AT 60 Hz—Continued

Motor horsepower/standard kilowatt equivalent	Nominal full-load efficiency (%)							
	2 Pole		4 Pole		6 Pole		8 Pole	
	Enclosed	Open	Enclosed	Open	Enclosed	Open	Enclosed	Open
2/1.5	85.5	85.5	86.5	86.5	88.5	87.5	84.0	86.5
3/2.2	86.5	85.5	89.5	89.5	89.5	88.5	85.5	87.5
5/3.7	88.5	86.5	89.5	89.5	89.5	89.5	86.5	88.5
7.5/5.5	89.5	88.5	91.7	91.0	91.0	90.2	86.5	89.5
10/7.5	90.2	89.5	91.7	91.7	91.0	91.7	89.5	90.2
15/11	91.0	90.2	92.4	93.0	91.7	91.7	89.5	90.2
20/15	91.0	91.0	93.0	93.0	91.7	92.4	90.2	91.0
25/18.5	91.7	91.7	93.6	93.6	93.0	93.0	90.2	91.0
30/22	91.7	91.7	93.6	94.1	93.0	93.6	91.7	91.7
40/30	92.4	92.4	94.1	94.1	94.1	94.1	91.7	91.7
50/37	93.0	93.0	94.5	94.5	94.1	94.1	92.4	92.4
60/45	93.6	93.6	95.0	95.0	94.5	94.5	92.4	93.0
75/55	93.6	93.6	95.4	95.0	94.5	94.5	93.6	94.1
100/75	95.0	94.5	96.2	96.2	95.8	95.8	94.5	95.0
125/90	95.4	94.5	96.2	96.2	95.8	95.8	95.0	95.0
150/110	95.4	94.5	96.2	96.2	96.2	95.8	95.0	95.0
200/150	95.8	95.4	96.5	96.2	96.2	95.8	95.4	95.0
250/186	96.2	95.4	96.5	96.2	96.2	96.2	95.4	95.4
300/224	95.8	95.4	96.2	95.8	95.8	95.8	.....	.....
350/261	95.8	95.4	96.2	95.8	95.8	95.8	.....	.....
400/298	95.8	95.8	96.2	95.8	.....	.....	.....	.....
450/336	95.8	96.2	96.2	96.2	.....	.....	.....	.....
500/373	95.8	96.2	96.2	96.2	.....	.....	.....	.....
550/410	95.8	96.2	96.2	96.2	.....	.....	.....	.....
600/447	95.8	96.2	96.2	96.2	.....	.....	.....	.....
650/485	95.8	96.2	96.2	96.2	.....	.....	.....	.....
700/522	95.8	96.2	96.2	96.2	.....	.....	.....	.....
750/559	95.8	96.2	96.2	96.2	.....	.....	.....	.....

(ii) Each NEMA Design A motor, NEMA Design B motor, and IEC Design N (including NE, NEY, or NY variants) motor that is an air-over electric motor meeting the criteria in paragraph (c)(1) of this section, but excluding fire pump electric motors, and with a power rating from 1 horsepower through 250 horsepower, built in a standard frame size, shall have a nominal full-load efficiency of not less than the following:

TABLE 5 TO PARAGRAPH (c)(2)(ii)—NOMINAL FULL-LOAD EFFICIENCIES OF NEMA DESIGN A, NEMA DESIGN B AND IEC DESIGN N, NE, NEY OR NY STANDARD FRAME SIZE AIR-OVER ELECTRIC MOTORS (EXCLUDING FIRE PUMP ELECTRIC MOTORS) AT 60 Hz

Motor horsepower/standard kilowatt equivalent	Nominal full-load efficiency (%)							
	2 Pole		4 Pole		6 Pole		8 Pole	
	Enclosed	Open	Enclosed	Open	Enclosed	Open	Enclosed	Open
1/.75	77.0	77.0	85.5	85.5	82.5	82.5	75.5	75.5
1.5/1.1	84.0	84.0	86.5	86.5	87.5	86.5	78.5	77.0
2/1.5	85.5	85.5	86.5	86.5	88.5	87.5	84.0	86.5
3/2.2	86.5	85.5	89.5	89.5	89.5	88.5	85.5	87.5
5/3.7	88.5	86.5	89.5	89.5	89.5	89.5	86.5	88.5
7.5/5.5	89.5	88.5	91.7	91.0	91.0	90.2	86.5	89.5
10/7.5	90.2	89.5	91.7	91.7	91.0	91.7	89.5	90.2
15/11	91.0	90.2	92.4	93.0	91.7	91.7	89.5	90.2
20/15	91.0	91.0	93.0	93.0	91.7	92.4	90.2	91.0
25/18.5	91.7	91.7	93.6	93.6	93.0	93.0	90.2	91.0
30/22	91.7	91.7	93.6	94.1	93.0	93.6	91.7	91.7
40/30	92.4	92.4	94.1	94.1	94.1	94.1	91.7	91.7
50/37	93.0	93.0	94.5	94.5	94.1	94.1	92.4	92.4
60/45	93.6	93.6	95.0	95.0	94.5	94.5	92.4	93.0
75/55	93.6	93.6	95.4	95.0	94.5	94.5	93.6	94.1
100/75	95.0	94.5	96.2	96.2	95.8	95.8	94.5	95.0
125/90	95.4	94.5	96.2	96.2	95.8	95.8	95.0	95.0
150/110	95.4	94.5	96.2	96.2	96.2	95.8	95.0	95.0
200/150	95.8	95.4	96.5	96.2	96.2	95.8	95.4	95.0

TABLE 5 TO PARAGRAPH (c)(2)(ii)—NOMINAL FULL-LOAD EFFICIENCIES OF NEMA DESIGN A, NEMA DESIGN B AND IEC DESIGN N, NE, NEY OR NY STANDARD FRAME SIZE AIR-OVER ELECTRIC MOTORS (EXCLUDING FIRE PUMP ELECTRIC MOTORS) AT 60 Hz—Continued

Motor horsepower/standard kilowatt equivalent	Nominal full-load efficiency (%)							
	2 Pole		4 Pole		6 Pole		8 Pole	
	Enclosed	Open	Enclosed	Open	Enclosed	Open	Enclosed	Open
250/186	96.2	95.4	96.5	96.2	96.2	96.2	95.4	95.4

(iii) Each NEMA Design A motor, NEMA Design B motor, and IEC Design N (including NE, NEY, or NY variants) motor that is an air-over electric motor meeting the criteria in paragraph (c)(1) of this section, but excluding fire pump electric motors, and with a power rating from 1 horsepower through 20 horsepower, built in a specialized frame size, shall have a nominal full-load efficiency of not less than the following:

TABLE 6 TO PARAGRAPH (c)(2)(iii)—NOMINAL FULL-LOAD EFFICIENCIES OF NEMA DESIGN A, NEMA DESIGN B AND IEC DESIGN N, NE, NEY OR NY SPECIALIZED FRAME SIZE AIR-OVER ELECTRIC MOTORS (EXCLUDING FIRE PUMP ELECTRIC MOTORS) AT 60 Hz

Motor horsepower/standard kilowatt equivalent	Nominal full-load efficiency (%)							
	2 Pole		4 Pole		6 Pole		8 Pole	
	Enclosed	Open	Enclosed	Open	Enclosed	Open	Enclosed	Open
1/.75	74.0	.....	82.5	82.5	80.0	80.0	74.0	74.0
1.5/1.1	82.5	82.5	84.0	84.0	85.5	84.0	77.0	75.5
2/1.5	84.0	84.0	84.0	84.0	86.5	85.5	82.5	85.5
3/2.2	85.5	84.0	87.5	86.5	87.5	86.5	84.0	86.5
5/3.7	87.5	85.5	87.5	87.5	87.5	87.5	85.5	87.5
7.5/5.5	88.5	87.5	89.5	88.5	89.5	88.5	85.5	88.5
10/7.5	89.5	88.5	89.5	89.5	89.5	90.2	.....	.....
15/11	90.2	89.5	91.0	91.0	.....	.....	.....	.....
20/15	90.2	90.2	91.0	91.0	.....	.....	.....	.....

(iv) Each NEMA Design C motor and IEC Design H (including HE, HEY, or HY variants) electric motor meeting the criteria in paragraph (c)(1) of this section but excluding air-over electric motors and with a power rating from 1 horsepower through 200 horsepower, shall have a nominal full-load efficiency that is not less than the following:

TABLE 7 TO PARAGRAPH (c)(2)(iv)—NOMINAL FULL-LOAD EFFICIENCIES OF NEMA DESIGN C AND IEC DESIGN H, HE, HEY OR HY MOTORS (EXCLUDING AIR-OVER ELECTRIC MOTORS) AT 60 Hz

Motor horsepower/standard kilowatt equivalent	Nominal full-load efficiency (%)					
	4 Pole		6 Pole		8 Pole	
	Enclosed	Open	Enclosed	Open	Enclosed	Open
1/.75	85.5	85.5	82.5	82.5	75.5	75.5
1.5/1.1	86.5	86.5	87.5	86.5	78.5	77.0
2/1.5	86.5	86.5	88.5	87.5	84.0	86.5
3/2.2	89.5	89.5	89.5	88.5	85.5	87.5
5/3.7	89.5	89.5	89.5	89.5	86.5	88.5
7.5/5.5	91.7	91.0	91.0	90.2	86.5	89.5
10/7.5	91.7	91.7	91.0	91.7	89.5	90.2
15/11	92.4	93.0	91.7	91.7	89.5	90.2
20/15	93.0	93.0	91.7	92.4	90.2	91.0
25/18.5	93.6	93.6	93.0	93.0	90.2	91.0
30/22	93.6	94.1	93.0	93.6	91.7	91.7
40/30	94.1	94.1	94.1	94.1	91.7	91.7
50/37	94.5	94.5	94.1	94.1	92.4	92.4
60/45	95.0	95.0	94.5	94.5	92.4	93.0
75/55	95.4	95.0	94.5	94.5	93.6	94.1
100/75	95.4	95.4	95.0	95.0	93.6	94.1
125/90	95.4	95.4	95.0	95.0	94.1	94.1
150/110	95.8	95.8	95.8	95.4	94.1	94.1
200/150	96.2	95.8	95.8	95.4	94.5	94.1

(v) Each fire pump electric motor meeting the criteria in paragraph (c)(1) of this section, but excluding air-over electric motors, and with a power rating of 1 horsepower through 500 horsepower, shall have a nominal full-load efficiency that is not less than the following:

TABLE 8 TO PARAGRAPH (c)(2)(v)—NOMINAL FULL-LOAD EFFICIENCIES OF FIRE PUMP ELECTRIC MOTORS (EXCLUDING AIR-OVER ELECTRIC MOTORS) AT 60 Hz

Motor horsepower/standard kilowatt equivalent	Nominal full-load efficiency (%)							
	2 Pole		4 Pole		6 Pole		8 Pole	
	Enclosed	Open	Enclosed	Open	Enclosed	Open	Enclosed	Open
1/.75	75.5	.....	82.5	82.5	80.0	80.0	74.0	74.0
1.5/1.1	82.5	82.5	84.0	84.0	85.5	84.0	77.0	75.5
2/1.5	84.0	84.0	84.0	84.0	86.5	85.5	82.5	85.5
3/2.2	85.5	84.0	87.5	86.5	87.5	86.5	84.0	86.5
5/3.7	87.5	85.5	87.5	87.5	87.5	87.5	85.5	87.5
7.5/5.5	88.5	87.5	89.5	88.5	89.5	88.5	85.5	88.5
10/7.5	89.5	88.5	89.5	89.5	89.5	90.2	88.5	89.5
15/11	90.2	89.5	91.0	91.0	90.2	90.2	88.5	89.5
20/15	90.2	90.2	91.0	91.0	90.2	91.0	89.5	90.2
25/18.5	91.0	91.0	92.4	91.7	91.7	91.7	89.5	90.2
30/22	91.0	91.0	92.4	92.4	91.7	92.4	91.0	91.0
40/30	91.7	91.7	93.0	93.0	93.0	93.0	91.0	91.0
50/37	92.4	92.4	93.0	93.0	93.0	93.0	91.7	91.7
60/45	93.0	93.0	93.6	93.6	93.6	93.6	91.7	92.4
75/55	93.0	93.0	94.1	94.1	93.6	93.6	93.0	93.6
100/75	93.6	93.0	94.5	94.1	94.1	94.1	93.0	93.6
125/90	94.5	93.6	94.5	94.5	94.1	94.1	93.6	93.6
150/110	94.5	93.6	95.0	95.0	95.0	94.5	93.6	93.6
200/150	95.0	94.5	95.0	95.0	95.0	94.5	94.1	93.6
250/186	95.4	94.5	95.0	95.4	95.0	95.4	94.5	94.5
300/224	95.4	95.0	95.4	95.4	95.0	95.4	.....	.....
350/261	95.4	95.0	95.4	95.4	95.0	95.4	.....	.....
400/298	95.4	95.4	95.4	95.4	.....	.....	.....	.....
450/336	95.4	95.8	95.4	95.8	.....	.....	.....	.....
500/373	95.4	95.8	95.8	95.8	.....	.....	.....	.....

(d) This section applies to electric motors manufactured (alone or as a component of another piece of equipment) on or after January 1, 2029.

(1) The standards in paragraph (d)(1)(ii) of this section apply only to electric motors that satisfy the criteria in paragraph (d)(1)(i)(A) of this section and with the exclusion listed in paragraph (d)(1)(i)(B) of this section.

(i) *Scope.* (A) The standards in paragraph (d)(1)(ii) of this section apply only to electric motors, including partial electric motors, that satisfy the following criteria:

(*1*) Are single-speed, induction motors;

(*2*) Are rated for continuous duty (MG 1) operation or for duty type S1 (IEC);

(*3*) Contain a squirrel-cage (MG 1) or cage (IEC) rotor;

(*4*) Operate on polyphase alternating current 60-hertz sinusoidal line power;

(*5*) Are rated 600 volts or less;

(*6*) Have a 2-, 4-, 6-, or 8-pole configuration,

(*7*) Are built in a three-digit or four-digit NEMA frame size (or IEC metric equivalent), including those designs between two consecutive NEMA frame sizes (or IEC metric equivalent), or an enclosed 56 NEMA frame size (or IEC metric equivalent), or have an air-over enclosure and a specialized frame size,

(*8*) Produce at least one horsepower (0.746 kW) but not greater than 750 horsepower (559 kW); and

(*9*) Meet all of the performance requirements of one of the following motor types: A NEMA Design A, B, or C motor or an IEC Design N, NE, NEY, NY or H, HE, HEY, HY motor.

(B) The standards in paragraph (d)(1)(ii) of this section do not apply to the following electric motors exempted by the Secretary, or any additional electric motors that the Secretary may exempt:

(*1*) Component sets of an electric motor;

(*2*) Liquid-cooled electric motors;

(*3*) Submersible electric motors; and

(*4*) Inverter-only electric motors.

(ii) *Standards.* (A) Each NEMA Design A motor, NEMA Design B motor, and IEC Design N (including NE, NEY, or NY variants) motor that is an electric motor meeting the criteria in paragraph (d)(1)(i) of this section but excluding fire pump electric motors and air-over electric motors, and with a power rating from 1 horsepower through 750 horsepower, shall have a nominal full-load efficiency of not less than the following:

TABLE 9 TO PARAGRAPH (d)(1)(ii)(A)—NOMINAL FULL-LOAD EFFICIENCIES OF NEMA DESIGN A, NEMA DESIGN B AND IEC DESIGN N, NE, NEY OR NY MOTORS (EXCLUDING FIRE PUMP ELECTRIC MOTORS AND AIR-OVER ELECTRIC MOTORS) AT 60 Hz

Motor horsepower/standard kilowatt equivalent	Nominal full-load efficiency (%)							
	2 Pole		4 Pole		6 Pole		8 Pole	
	Enclosed	Open	Enclosed	Open	Enclosed	Open	Enclosed	Open
1/.75	77.0	77.0	85.5	85.5	82.5	82.5	75.5	75.5
1.5/1.1	84.0	84.0	86.5	86.5	87.5	86.5	78.5	77.0
2/1.5	85.5	85.5	86.5	86.5	88.5	87.5	84.0	86.5
3/2.2	86.5	85.5	89.5	89.5	89.5	88.5	85.5	87.5
5/3.7	88.5	86.5	89.5	89.5	89.5	89.5	86.5	88.5
7.5/5.5	89.5	88.5	91.7	91.0	91.0	90.2	86.5	89.5
10/7.5	90.2	89.5	91.7	91.7	91.0	91.7	89.5	90.2
15/11	91.0	90.2	92.4	93.0	91.7	91.7	89.5	90.2
20/15	91.0	91.0	93.0	93.0	91.7	92.4	90.2	91.0
25/18.5	91.7	91.7	93.6	93.6	93.0	93.0	90.2	91.0
30/22	91.7	91.7	93.6	94.1	93.0	93.6	91.7	91.7
40/30	92.4	92.4	94.1	94.1	94.1	94.1	91.7	91.7
50/37	93.0	93.0	94.5	94.5	94.1	94.1	92.4	92.4
60/45	93.6	93.6	95.0	95.0	94.5	94.5	92.4	93.0
75/55	93.6	93.6	95.4	95.0	94.5	94.5	93.6	94.1
100/75	95.0	94.5	96.2	96.2	95.8	95.8	94.5	95.0
125/90	95.4	94.5	96.2	96.2	95.8	95.8	95.0	95.0
150/110	95.4	94.5	96.2	96.2	96.2	95.8	95.0	95.0
200/150	95.8	95.4	96.5	96.2	96.2	95.8	95.4	95.0
250/186	96.2	95.4	96.5	96.2	96.2	96.2	95.4	95.4
300/224	95.8	95.4	96.2	95.8	95.8	95.8	.....	.....
350/261	95.8	95.4	96.2	95.8	95.8	95.8	.....	.....
400/298	95.8	95.8	96.2	95.8	.....	.....	.....	.....
450/336	95.8	96.2	96.2	96.2	.....	.....	.....	.....
500/373	95.8	96.2	96.2	96.2	.....	.....	.....	.....
550/410	95.8	96.2	96.2	96.2	.....	.....	.....	.....
600/447	95.8	96.2	96.2	96.2	.....	.....	.....	.....
650/485	95.8	96.2	96.2	96.2	.....	.....	.....	.....
700/522	95.8	96.2	96.2	96.2	.....	.....	.....	.....
750/559	95.8	96.2	96.2	96.2	.....	.....	.....	.....

(B) Each NEMA Design A motor, NEMA Design B motor, and IEC Design N (including NE, NEY, or NY variants) motor that is an air-over electric motor meeting the criteria in paragraph (d)(1)(i) of this section, but excluding fire pump electric motors, and with a power rating from 1 horsepower through 250 horsepower, built in a standard frame size, shall have a nominal full-load efficiency of not less than the following:

TABLE 10 TO PARAGRAPH (d)(1)(ii)(B)—NOMINAL FULL-LOAD EFFICIENCIES OF NEMA DESIGN A, NEMA DESIGN B AND IEC DESIGN N, NE, NEY OR NY STANDARD FRAME SIZE AIR-OVER ELECTRIC MOTORS (EXCLUDING FIRE PUMP ELECTRIC MOTORS) AT 60 Hz

Motor horsepower/standard kilowatt equivalent	Nominal full-load efficiency (%)							
	2 Pole		4 Pole		6 Pole		8 Pole	
	Enclosed	Open	Enclosed	Open	Enclosed	Open	Enclosed	Open
1/.75	77.0	77.0	85.5	85.5	82.5	82.5	75.5	75.5
1.5/1.1	84.0	84.0	86.5	86.5	87.5	86.5	78.5	77.0
2/1.5	85.5	85.5	86.5	86.5	88.5	87.5	84.0	86.5
3/2.2	86.5	85.5	89.5	89.5	89.5	88.5	85.5	87.5
5/3.7	88.5	86.5	89.5	89.5	89.5	89.5	86.5	88.5
7.5/5.5	89.5	88.5	91.7	91.0	91.0	90.2	86.5	89.5
10/7.5	90.2	89.5	91.7	91.7	91.0	91.7	89.5	90.2
15/11	91.0	90.2	92.4	93.0	91.7	91.7	89.5	90.2
20/15	91.0	91.0	93.0	93.0	91.7	92.4	90.2	91.0
25/18.5	91.7	91.7	93.6	93.6	93.0	93.0	90.2	91.0
30/22	91.7	91.7	93.6	94.1	93.0	93.6	91.7	91.7
40/30	92.4	92.4	94.1	94.1	94.1	94.1	91.7	91.7
50/37	93.0	93.0	94.5	94.5	94.1	94.1	92.4	92.4
60/45	93.6	93.6	95.0	95.0	94.5	94.5	92.4	93.0
75/55	93.6	93.6	95.4	95.0	94.5	94.5	93.6	94.1
100/75	95.0	94.5	96.2	96.2	95.8	95.8	94.5	95.0
125/90	95.4	94.5	96.2	96.2	95.8	95.8	95.0	95.0

TABLE 10 TO PARAGRAPH (d)(1)(ii)(B)—NOMINAL FULL-LOAD EFFICIENCIES OF NEMA DESIGN A, NEMA DESIGN B AND IEC DESIGN N, NE, NEY OR NY STANDARD FRAME SIZE AIR-OVER ELECTRIC MOTORS (EXCLUDING FIRE PUMP ELECTRIC MOTORS) AT 60 Hz—Continued

Motor horsepower/standard kilowatt equivalent	Nominal full-load efficiency (%)							
	2 Pole		4 Pole		6 Pole		8 Pole	
	Enclosed	Open	Enclosed	Open	Enclosed	Open	Enclosed	Open
150/110	95.4	94.5	96.2	96.2	96.2	95.8	95.0	95.0
200/150	95.8	95.4	96.5	96.2	96.2	95.8	95.4	95.0
250/186	96.2	95.4	96.5	96.2	96.2	96.2	95.4	95.4

(C) Each NEMA Design A motor, NEMA Design B motor, and IEC Design N (including NE, NEY, or NY variants) motor that is an air-over electric motor meeting the criteria in paragraph (d)(1)(i) of this section, but excluding fire pump electric motors, and with a power rating from 1 horsepower through 20 horsepower, built in a specialized frame size, shall have a nominal full-load efficiency of not less than the following:

TABLE 11 TO PARAGRAPH (d)(1)(ii)(C)—NOMINAL FULL-LOAD EFFICIENCIES OF NEMA DESIGN A, NEMA DESIGN B AND IEC DESIGN N, NE, NEY OR NY SPECIALIZED FRAME SIZE AIR-OVER ELECTRIC MOTORS (EXCLUDING FIRE PUMP ELECTRIC MOTORS) AT 60 Hz

Motor horsepower/standard kilowatt equivalent	Nominal full-load efficiency (%)							
	2 Pole		4 Pole		6 Pole		8 Pole	
	Enclosed	Open	Enclosed	Open	Enclosed	Open	Enclosed	Open
1/.75	74.0	.....	82.5	82.5	80.0	80.0	74.0	74.0
1.5/1.1	82.5	82.5	84.0	84.0	85.5	84.0	77.0	75.5
2/1.5	84.0	84.0	84.0	84.0	86.5	85.5	82.5	85.5
3/2.2	85.5	84.0	87.5	86.5	87.5	86.5	84.0	86.5
5/3.7	87.5	85.5	87.5	87.5	87.5	87.5	85.5	87.5
7.5/5.5	88.5	87.5	89.5	88.5	89.5	88.5	85.5	88.5
10/7.5	89.5	88.5	89.5	89.5	89.5	90.2	.....	.....
15/11	90.2	89.5	91.0	91.0	.....	.....	.....	.....
20/15	90.2	90.2	91.0	91.0	.....	.....	.....	.....

(D) Each NEMA Design C motor and IEC Design H (including HE, HEY, or HY variants) electric motor meeting the criteria in paragraph (d)(1)(i) of this section but excluding air-over electric motors and with a power rating from 1 horsepower through 200 horsepower, shall have a nominal full-load efficiency that is not less than the following:

TABLE 12 TO PARAGRAPH (d)(1)(ii)(D)—NOMINAL FULL-LOAD EFFICIENCIES OF NEMA DESIGN C AND IEC DESIGN H, HE, HEY OR HY MOTORS (EXCLUDING AIR-OVER ELECTRIC MOTORS) AT 60 Hz

Motor horsepower/standard kilowatt equivalent	Nominal full-load efficiency (%)					
	4 Pole		6 Pole		8 Pole	
	Enclosed	Open	Enclosed	Open	Enclosed	Open
1/.75	85.5	85.5	82.5	82.5	75.5	75.5
1.5/1.1	86.5	86.5	87.5	86.5	78.5	77.0
2/1.5	86.5	86.5	88.5	87.5	84.0	86.5
3/2.2	89.5	89.5	89.5	88.5	85.5	87.5
5/3.7	89.5	89.5	89.5	89.5	86.5	88.5
7.5/5.5	91.7	91.0	91.0	90.2	86.5	89.5
10/7.5	91.7	91.7	91.0	91.7	89.5	90.2
15/11	92.4	93.0	91.7	91.7	89.5	90.2
20/15	93.0	93.0	91.7	92.4	90.2	91.0
25/18.5	93.6	93.6	93.0	93.0	90.2	91.0
30/22	93.6	94.1	93.0	93.6	91.7	91.7
40/30	94.1	94.1	94.1	94.1	91.7	91.7
50/37	94.5	94.5	94.1	94.1	92.4	92.4
60/45	95.0	95.0	94.5	94.5	92.4	93.0
75/55	95.4	95.0	94.5	94.5	93.6	94.1
100/75	95.4	95.4	95.0	95.0	93.6	94.1
125/90	95.4	95.4	95.0	95.0	94.1	94.1
150/110	95.8	95.8	95.8	95.4	94.1	94.1
200/150	96.2	95.8	95.8	95.4	94.5	94.1

(E) Each fire pump electric motor meeting the criteria in paragraph (d)(1)(i) of this section, but excluding air-over electric motors, and with a power rating of 1 horsepower through 500 horsepower, shall have a nominal full-load efficiency that is not less than the following:

TABLE 13 TO PARAGRAPH (d)(1)(ii)(E)—NOMINAL FULL-LOAD EFFICIENCIES OF FIRE PUMP ELECTRIC MOTORS (EXCLUDING AIR-OVER ELECTRIC MOTORS) AT 60 Hz

Motor horsepower/standard kilowatt equivalent	Nominal full-load efficiency (%)							
	2 Pole		4 Pole		6 Pole		8 Pole	
	Enclosed	Open	Enclosed	Open	Enclosed	Open	Enclosed	Open
1/.75	75.5	.....	82.5	82.5	80.0	80.0	74.0	74.0
1.5/1.1	82.5	82.5	84.0	84.0	85.5	84.0	77.0	75.5
2/1.5	84.0	84.0	84.0	84.0	86.5	85.5	82.5	85.5
3/2.2	85.5	84.0	87.5	86.5	87.5	86.5	84.0	86.5
5/3.7	87.5	85.5	87.5	87.5	87.5	87.5	85.5	87.5
7.5/5.5	88.5	87.5	89.5	88.5	89.5	88.5	85.5	88.5
10/7.5	89.5	88.5	89.5	89.5	89.5	90.2	88.5	89.5
15/11	90.2	89.5	91.0	91.0	90.2	90.2	88.5	89.5
20/15	90.2	90.2	91.0	91.0	90.2	91.0	89.5	90.2
25/18.5	91.0	91.0	92.4	91.7	91.7	91.7	89.5	90.2
30/22	91.0	91.0	92.4	92.4	91.7	92.4	91.0	91.0
40/30	91.7	91.7	93.0	93.0	93.0	93.0	91.0	91.0
50/37	92.4	92.4	93.0	93.0	93.0	93.0	91.7	91.7
60/45	93.0	93.0	93.6	93.6	93.6	93.6	91.7	92.4
75/55	93.0	93.0	94.1	94.1	93.6	93.6	93.0	93.6
100/75	93.6	93.0	94.5	94.1	94.1	94.1	93.0	93.6
125/90	94.5	93.6	94.5	94.5	94.1	94.1	93.6	93.6
150/110	94.5	93.6	95.0	95.0	95.0	94.5	93.6	93.6
200/150	95.0	94.5	95.0	95.0	95.0	94.5	94.1	93.6
250/186	95.4	94.5	95.0	95.4	95.0	95.4	94.5	94.5
300/224	95.4	95.0	95.4	95.4	95.0	95.4	.....	.....
350/261	95.4	95.0	95.4	95.4	95.0	95.4	.....	.....
400/298	95.4	95.4	95.4	95.4	.....	.....	.....	.....
450/336	95.4	95.8	95.4	95.8	.....	.....	.....	.....
500/373	95.4	95.8	95.8	95.8	.....	.....	.....	.....

(2) The standards in paragraph (d)(2)(ii) of this section apply only to electric motors that satisfy the criteria in paragraph (d)(2)(i)(A) of this section and with the exclusion listed in paragraph (d)(2)(i)(B) of this section

(i) *Scope.* (A) The standards in paragraph (d)(2)(ii) of this section apply only to electric motors, including partial electric motors, that satisfy the following criteria:

(*1*) Are not small electric motors, as defined at § 431.442 and are not a dedicated pool pump motors as defined at § 431.483; and do not have an air-over enclosure and a specialized frame size if the motor operates on polyphase power;

(*2*) Are rated for continuous duty (MG 1) operation or for duty type S1 (IEC);

(*3*) Operate on polyphase or single-phase alternating current 60-hertz (Hz) sinusoidal line power; or are used with an inverter that operates on polyphase or single-phase alternating current 60-hertz (Hz) sinusoidal line power;

(*4*) Are rated for 600 volts or less;

(*5*) Are single-speed induction motors capable of operating without an inverter or are inverter-only electric motors;

(*6*) Produce a rated motor horsepower greater than or equal to 0.25 horsepower (0.18 kW); and

(*7*) Are built in the following frame sizes: any two-, or three-digit NEMA frame size (or IEC equivalent) if the motor operates on single-phase power; any two-, or three-digit NEMA frame size (or IEC equivalent) if the motor operates on polyphase power, and has a rated motor horsepower less than 1 horsepower (0.75 kW); or a two-digit NEMA frame size (or IEC metric equivalent), if the motor operates on polyphase power, has a rated motor horsepower equal to or greater than 1 horsepower (0.75 kW), and is not an enclosed 56 NEMA frame size (or IEC metric equivalent).

(B) The standards in paragraph (d)(2)(ii) of this section do not apply to the following electric motors exempted by the Secretary, or any additional electric motors that the Secretary may exempt:

(*1*) Component sets of an electric motor;

(*2*) Liquid-cooled electric motors;

(*3*) Submersible electric motors; and

(*4*) Inverter-only electric motors.

(ii) *Standards.* (A) Each high-torque and medium-torque electric motor (*i.e.,* capacitor-start-induction-run (''CSIR''), capacitor-start-capacitor-run (''CSCR''), and split-phase motor) meeting the criteria in paragraph (d)(2)(i) of this section and with a power rating of greater than or equal to 0.25 horsepower and less than or equal to 3 horsepower, shall have an average full-load efficiency that is not less than the following:

TABLE 14 TO PARAGRAPH (d)(2)(ii)(A)—AVERAGE FULL-LOAD EFFICIENCIES OF HIGH AND MEDIUM-TORQUE ELECTRIC MOTOR (CSIR, CSCR, AND SPLIT-PHASE MOTORS) AT 60 Hz

Motor horsepower/standard kilowatt equivalent	Average full-load efficiency (%)							
	2 Pole		4 Pole		6 Pole		8 Pole	
	Enclosed	Open	Enclosed	Open	Enclosed	Open	Enclosed	Open
.25/.19	59.5	59.5	59.5	59.5	57.5	57.5	.....	.....
.33/.25	64.0	64.0	64.0	64.0	62.0	62.0	50.5	50.5
.5/.37	68.0	68.0	67.4	69.2	68.0	68.0	52.5	52.5
.75/.56	75.5	76.2	75.5	81.8	75.5	80.2	72.0	72.0
1/.75	77.0	80.4	80.0	82.6	77.0	81.1	74.0	74.0
1.5/1.1	81.5	81.5	81.5	83.8	80.0	.....	.....	.....
2/1.5	82.5	82.9	82.5	84.5	.....	.....	.....	.....
3/2.2	84.0	84.1	.....	.....	.....	.....	.....	.....

(B) Each low-torque electric motor (*i.e.,* shaded pole and permanent split capacitor motor) meeting the criteria in paragraph (d)(2)(i) of this section and with a power rating of greater than or equal to 0.25 horsepower and less than or equal to 3 horsepower, shall have an average full-load efficiency of not less than the following:

TABLE 15 TO PARAGRAPH (d)(2)(ii)(B)—AVERAGE FULL-LOAD EFFICIENCIES OF LOW-TORQUE ELECTRIC MOTOR (SHADED POLE AND PERMANENT SPLIT CAPACITOR MOTORS) AT 60 Hz

Motor horsepower/standard kilowatt equivalent	Average full-load efficiency (%)							
	2 Pole		4 Pole		6 Pole		8 Pole	
	Enclosed	Open	Enclosed	Open	Enclosed	Open	Enclosed	Open
.25/.19	60.9	63.9	64.1	66.1	59.2	60.2	52.5	52.5
.33/.25	63.9	66.9	67.7	69.7	64.0	65.0	56.6	56.6
.5/.37	65.8	68.8	68.1	70.1	65.8	66.8	57.1	57.1
.75/.56	67.5	70.5	72.8	74.8	72.1	73.1	62.8	62.8
1/.75	71.3	74.3	75.1	77.1	76.3	77.3	65.7	65.7
1.5/1.1	76.9	79.9	80.1	82.1	79.5	80.5	72.2	72.2
2/1.5	78.0	81.0	80.9	82.9	80.4	81.4	73.3	73.3
3/2.2	79.4	82.4	82.0	84.0	81.5	82.5	74.9	74.9

(C) Each polyphase electric motor meeting the criteria in paragraph (d)(2)(i) of this section and with a power rating of greater than or equal to 0.25 horsepower and less than or equal to 3 horsepower, shall have an average full-load efficiency of not less than the following:

TABLE 16 TO PARAGRAPH (d)(2)(ii)(C)—AVERAGE FULL-LOAD EFFICIENCIES OF POLYPHASE ELECTRIC MOTOR AT 60 Hz

Motor horsepower/standard kilowatt equivalent	Average full-load efficiency (%)							
	2 Pole		4 Pole		6 Pole		8 Pole	
	Enclosed	Open	Enclosed	Open	Enclosed	Open	Enclosed	Open
.25/.19	66.0	65.6	68.0	69.5	66.0	67.5	62.0	62.0
.33/.25	70.0	69.5	72.0	73.4	70.0	71.4	64.0	64.0
.5/.37	72.0	73.4	75.5	78.2	72.0	75.3	66.0	66.0
.75/.56	75.5	76.8	77.0	81.1	74.0	81.7	70.0	70.0
1/.75	75.5	77.0	77.0	83.5	74.0	82.5	75.5	75.5
1.5/1.1	84.0	84.0	82.5	86.5	87.5	83.8	78.5	77.0
2/1.5	85.5	85.5	85.5	86.5	88.5	.....	84.0	86.5
3/2.2	86.5	85.5	86.5	86.9	89.5	.....	85.5	87.5

Appendix B to Subpart B of Part 431 [Amended]

■ 7. Appendix B to subpart B of part 431 is amended by:

■ a. In sections 1 and 1.2., removing the words ''Small, non-small-electric-motor electric motor'' wherever it appears, and adding in its place the words ''Expanded scope electric motor''.

■ b. In section 1.2, removing the term ''SNEM'' wherever it appears, and adding in its place ''ESEM''.

■ c. In sections 2.3, 2.3.1, and 2.3.3, removing the term ''SNEMs'' wherever it appears, and adding in its place ''ESEMs''.

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Part III

Securities and Exchange Commission

17 CFR Parts 200, 201, 232, et al.

Security-Based Swap Execution and Registration and Regulation of Security-Based Swap Execution Facilities; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 200, 201, 232, 240, 242, and 249

[Release No. 34–98845; File No. S7–14–22]

RIN 3235–AK93

Security-Based Swap Execution and Registration and Regulation of Security-Based Swap Execution Facilities

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''SEC'' or ''Commission'') is adopting a set of rules and forms under the Securities Exchange Act of 1934 (''SEA'') that would create a regime for the registration and regulation of security-based swap execution facilities (''SBSEFs'') and address other issues relating to security-based swap (''SBS'') execution generally. One of the rules being adopted implements an element of the Dodd-Frank Act that is intended to mitigate conflicts of interest at SBSEFs and national securities exchanges that trade SBS (''SBS exchanges''). Other rules being adopted address the cross-border application of the SEA's trading venue registration requirements and the trade execution requirement for SBS. In addition, the Commission is amending an existing rule to exempt, from the SEA definition of ''exchange,'' certain registered clearing agencies, as well as registered SBSEFs that provide a market place only for SBS. The Commission is also adopting a new rule that, while affirming that an SBSEF would be a broker under the SEA, exempts a registered SBSEF from certain broker requirements. Further, the Commission is adopting certain new rules and amendments to its Rules of Practice to allow persons who are aggrieved by certain actions by an SBSEF to apply for review by the Commission. Finally, the Commission is delegating new authority to the Director of the Division of Trading and Markets and to the General Counsel to take actions necessary to carry out the rules being adopted.

DATES:

Effective date: February 13, 2024.

Compliance dates: See section XVI (Compliance Schedule).

FOR FURTHER INFORMATION CONTACT: Michael E. Coe, Assistant Director; David Liu, Special Counsel; Leah Mesfin, Special Counsel; Michou Nguyen, Special Counsel; or Geoffrey Pemble, Special Counsel, at (202) 551–5000, Office of Market Supervision, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is adopting new 17 CFR 242.800 through 242.835 (''Regulation SE'') to create a regime for the registration and regulation of SBSEFs and to address other issues relating to SBS execution generally. Regulation SE consists of 17 CFR 242.800 through 242.835 (Rules 800 through 835). Key rules within Regulation SE include Rule 803, which establishes a process for SBSEF registration; Rules 804 to 810, which establish procedures for rule and product filings by SBSEFs; Rule 815, which establishes permissible execution methods for SBS that are subject to the SEA's trade execution requirement; Rule 816, which sets out a procedure for SBSEFs to make an SBS available to trade and establish certain exemptions from the trade execution requirement; Rules 818 to 831, which implement the 14 Core Principles for SBSEFs set forth in section 3D(d) of the SEA; Rules 832 to 833, which address cross-border matters; and Rule 834, which imposes requirements addressing conflicts of interest involving SBSEFs and SBS exchanges, as required by section 765 of the Dodd-Frank Act.

In addition to the rules described above, the Commission is also adopting 17 CFR 249.1701 (Form SBSEF), which is the form that an entity will use to register with the Commission as an SBSEF; 17 CFR 249.1702 (a submission cover sheet), which will be required to accompany filings with the Commission made by SBSEFs for rule and rule amendments and for product listings; adopting amendments to 17 CFR 232.405 (Rule 405 of Regulation S–T) to require various SBSEF filings to be provided in Inline eXtensible Business Reporting Language (''Inline XBRL''), a structured data language; adopting amendments to 17 CFR 240.3a1–1 (Rule 3a1–1) to exempt from the SEA definition of ''exchange'' certain registered clearing agencies, as well as registered SBSEFs that provide a market place only for SBS; adopting 17 CFR 240.15a–12 (Rule 15a–12), which, while affirming that an SBSEF would also be a broker under the SEA, exempts a registered SBSEF from certain broker requirements; providing for the sunset of existing temporary exemptions from the requirement to register as a clearing agency that, among other things, applies to an entity performing the functions of an SBSEF but that is not yet registered as such, and from the requirement to register as an SBSEF or a national securities exchange for entities that meet the statutory definition of SBSEF; adopting certain new rules and amendments to 17 CFR part 201 (Rules of Practice) to allow persons who are aggrieved by certain actions by an SBSEF to apply for review by the Commission; and adopting amendments to 17 CFR 200.30–3 and 17 CFR 200.30–14 regarding delegations of authority to the Director of the Division of Trading and Markets and to the General Counsel.

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I. Background

The Commission is adopting Regulation SE,[1] which governs the registration and regulation of SBSEFs, as required by section 3D of the SEA.[2] Section 3D was enacted as part of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'').[3] The Dodd-Frank Act was enacted, among other reasons, to promote the financial stability of the United States by improving accountability and transparency in the financial system.[4] The 2008 financial crisis highlighted significant issues in the over-the-counter (''OTC'') derivatives markets, which experienced dramatic growth in the years leading up to the financial crisis and are capable of affecting significant sectors of the U.S. economy.

Section 3D(a)(1) of the SEA provides that no person may operate a facility for the trading or processing of SBS unless the facility is registered as an SBSEF or as a national securities exchange. Section 3D(d) enumerates 14 Core Principles with which SBSEFs must comply.[5] And section 3D(f) requires the Commission to prescribe rules governing the regulation of SBSEFs. In addition, section 765 of the Dodd-Frank Act directs the Commission to adopt rules to mitigate conflicts of interest with respect to clearing agencies that clear SBS (''SBS clearing agencies''), SBSEFs, and national securities exchanges that post or make available for trading SBS (''SBS exchanges'').

On April 6, 2022, the Commission proposed Regulation SE, relating to the registration and regulation of SBSEFs and to SBS execution generally.[6] As discussed in the Proposing Release, the proposed rules superseded previous Commission proposals on these subjects.[7]

The SBS market is closely related to the swaps market, which is regulated by the Commodity Futures Trading Commission (''CFTC'').[8] In June 2013, the CFTC adopted rules (in 17 CFR chapter I) under Title VII of the Dodd-Frank Act for swap execution facilities (''SEFs'').[9] The swaps market has grown and matured within the framework established by the CFTC's rules.[10] As

[1] The Commission proposed Regulation SE on Apr. 6, 2022. *See* Rules Relating to Security-Based Swap Execution and Registration and Regulation of Security-Based Swap Execution Facilities (Proposed Rule), SEA Release No. 94615 (Apr. 6, 2022), 87 FR 28872 (May 11, 2022) (''Proposing Release'').

[2] 15 U.S.C. 78c–4. In this release, the Commission is defining the Securities Exchange Act as the ''SEA'' to distinguish it from the Commodity Exchange Act (''CEA'').

[3] Public Law 111–203, H.R. 4173, sec. 763(c).

[4] *See* Public Law 111–203 Preamble.

[5] *See infra* section VI (listing the Core Principles).

[6] *See* Proposing Release, *supra* note 1. In 2011, the Commission published for comment proposed Regulation SBSEF relating to, among other things, the registration and regulation of SBSEFs. Registration and Regulation of Security-Based Swap Execution Facilities, SEA Release No. 63825 (Feb. 2, 2011), 76 FR 10948 (Feb. 28, 2011) (''2011 SBSEF Proposal''). The Proposing Release, which contains a more detailed discussion of that and related proposals, withdrew the 2011 SBSEF Proposal. *See* Proposing Release, 87 FR at 28874.

[7] *See* Proposing Release, *supra* note 1, 87 FR at 28874. However, Rule 834 of proposed Regulation SE would implement section 765 only with respect to SBSEFs and SBS exchanges. *See infra* section VIII.

[8] In adopting Regulation SE, the Commission has consulted and coordinated with the CFTC and the prudential regulators, in accordance with the consultation mandate of the Dodd-Frank Act. Section 712(a)(2) of the Dodd-Frank Act provides in relevant part that the Commission shall ''consult and coordinate to the extent possible with the Commodity Futures Trading Commission and the prudential regulators for the purposes of assuring regulatory consistency and comparability, to the extent possible.'' In addition, section 752(a) of the Dodd-Frank Act provides in relevant part that ''[i]n order to promote effective and consistent global regulation of swaps and security-based swaps, the Commodity Futures Trading Commission, the Securities and Exchange Commission, and the prudential regulators . . . as appropriate, shall consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation (including fees) of swaps.'' The term ''prudential regulator'' is defined in section 1a(39) of the CEA, 7 U.S.C. 1a(39), and that definition is incorporated by reference in section 3(a)(74) of the SEA, 15 U.S.C. 78c(a)(74).

[9] *See* CFTC, Core Principles and Other Requirements for Swap Execution Facilities, 78 FR 33476 (June 4, 2013) (''2013 CFTC Final SEF Rules Release''); CFTC, Process for a Designated Contract Market or Swap Execution Facility To Make a Swap Available to Trade, Swap Transaction Compliance and Implementation Schedule, and Trade Execution Requirement Under the Commodity Exchange Act, 78 FR 33606 (June 4, 2013) (''2013 CFTC Final MAT Rules Release'').

[10] In 2018, the CFTC proposed to make fundamental changes to the SEF regulatory structure. *See* CFTC, Swap Execution Facilities and Trade Execution Requirement, 83 FR 61946 (Nov.

Continued

discussed in the Proposing Release, the SBS market is a small fraction of the overall swaps market, and the swaps market provides greater opportunities for revenue capture from swap execution as compared to SBS execution.[11] For example, as of November 25, 2022, the gross notional amount outstanding in the SBS market was approximately $8.5 trillion across the credit, equity, and interest rate asset classes,[12] while the gross notional amount outstanding in the swaps market was approximately $352 trillion across the interest rate, credit, and foreign-exchange asset classes.[13] The Commission was sensitive in the Proposing Release to the economic impact its proposed SBSEF rules could have.[14]

In addition, the Commission recognized that the entities that are most likely to register with the Commission as SBSEFs are existing, CFTC-registered SEFs, which have already made substantial investments in systems, policies, and procedures to comply with and adapt to the regulatory system developed by the CFTC. Harmonization between the Commission's SBSEF rules and the CFTC's SEF rules could facilitate the ability of entities to dually register and minimize costs by allowing incumbent SEFs to use their existing systems, policies, and procedures to comply with the Commission's SBSEF rules.[15]

Thus, in proposing Regulation SE, the Commission took the general approach of harmonizing closely with analogous CFTC SEF rules, except where differences in the SEC's statutory authority relative to the CFTC's statutory authority, or differences in the SBS market relative to the swaps market, necessitated differences between the Commission's rules and the CFTC's, or where the benefits of deviating from the CFTC's rules would otherwise justify the burdens and costs associated with imposing different or additional requirements than the corresponding CFTC rule. And the Commission sought public comment on this approach.[16]

One commenter opposes this harmonization approach, and argues that it does not make sense to harmonize with the ''looser'' rules of SEFs, which he believes would allow ''more fraud and false narratives to creep into the market,'' and instead advocates that the Commission start from scratch with new rules.[17] Many other commenters, however, generally support this harmonization approach.[18] Many of these commenters echo the Commission's rationale for harmonizing with the CFTC's SEF rules, and state that such harmonization would minimize the compliance burden for dually registered entities.[19] Two of these commenters also state that the CFTC's regulatory framework has been in place for almost a decade and has functioned well.[20] One commenter also supports the Commission's decision and rationale in withdrawing proposed Regulation MC[21] and the Commission's 2011 SBSEF Proposal.[22]

The Commission disagrees with the comment that harmonizing with the CFTC approach would allow for more fraud and false narratives in the SBS markets. Standing up a formal regulatory framework for SBSEFs where none yet exists will provide greater accountability and oversight for the SBS market and should, contrary to this commenter's views, serve to detect and deter abusive and manipulative trading practices by providing for a set of Commission rules that SBSEFs must adhere to in operating their platforms and by requiring SBSEFs to make filings with the Commission regarding the operation of their platforms and to make their rules publicly available, as described in detail in sections II through XVII below.

Given the relative size of the SBS market as compared to the swaps market, the fact that the CFTC's SEF regulation has been in place for many years now, and the cost efficiencies and reduced burdens that would result from harmonized rules for dually registered SEFs/SBSEFs, it is appropriate to generally harmonize the Commission's SBSEF regulatory framework with the CFTC's SEF regulatory framework. At the same time, where appropriate, adopted Regulation SE differs in certain targeted respects from the CFTC's regulatory framework for SEFs. This includes areas where differences in the Commission's statutory authority relative to the CFTC's statutory authority or differences in the SBS market relative to the swaps market necessitate differences between the

30, 2018) (''2018 SEF Proposal''). In 2021, the CFTC ultimately declined to finalize the 2018 SEF Proposal and elected instead ''to improve the SEF framework through targeted rulemakings that address distinct issues.'' Accordingly, the CFTC withdrew the unadopted portions of its 2018 proposal. *See* CFTC, Swap Execution Facilities and Trade Execution Requirement—Proposed rule; partial withdrawal, 86 FR 9304, 9304 (Feb. 12, 2021).

[11] *See* Proposing Release, *supra* note 1, 87 FR at 28874–76.

[12] *See* Report on Security-Based Swaps (Mar. 20, 2023), *available at https://www.sec.gov/files/report-security-based-swaps-032023.pdf. See also infra* note 815 and accompanying text (discussing security-based swap transactions data in the credit, equity, and interest rate derivatives asset classes reported by registered SBSDRs).

[13] *See* CFTC Swaps Report, *available at https://www.cftc.gov/MarketReports/SwapsReports/L3Grossexp.html* (accessed on Sept. 27, 2023).

[14] *See* Proposing Release, *supra* note 1, 87 FR at 28875.

[15] *See* Proposing Release, *supra* note 1, 87 FR at 28875.

[16] The comment letters are available at *https://www.sec.gov/comments/s7-14-22/s71422.htm.* The Commission also received comments on topics outside the scope of the proposal that are not addressed in this release. *See, e.g.,* Letter from Anonymous (Apr. 27, 2022) (discussing CFTC oversight and transparency); Letter from Anonymous (Apr. 20, 2022) (discussing securities financial transactions).

[17] *See* Letter from Robert McLaughlin (Apr. 7, 2022).

[18] *See, e.g.,* Letter from Robert Laorno, General Counsel, ICE Swap Trade, LLC, to Vanessa A. Countryman, Secretary, Commission, at 1–2 (June 20, 2022) (''ICE Letter''); Letter from Stephen W. Hall, Legal Director and Securities Specialist, and Jason Grimes, Senior Counsel, Better Markets, Inc., to Vanessa A. Countryman, Secretary, Commission, at 9–11 (June 10, 2022) (''Better Markets Letter''); Letter from Derek J. Kleinbauer, Vice-President, Bloomberg SEF LLC, and Benjamin MacDonald, Global Head Enterprise Products, Bloomberg L.P., to Vanessa A. Countryman, Secretary, Commission, at 1–2 (June 10, 2022) (''Bloomberg Letter''); Letter from Bella Rosenberg, Senior Counsel and Head of Legal and Regulatory Practice Group, International Swaps and Derivatives Association, Inc., and Kyla Brandon, Managing Director, Head of Derivatives Policy, Securities Industry and Financial Markets Association, to Vanessa Countryman, Secretary, Commission, at 1–2 (June 10, 2022) (''ISDA–SIFMA Letter''); Letter from Sarah A. Bessin Associate General Counsel, and Nicholas Valderrama, Counsel, Investment Company Institute, at 1–2 (June 10, 2022) (''ICI Letter''); Letter from Elizabeth Kirby, Head of U.S. Market Structure, Tradeweb Markets Inc., to Vanessa A. Countryman, Secretary, Commission, at 1–2 (June 10, 2022) (''Tradeweb Letter''); Letter from Williams Shields, Chairman, Wholesale Markets Brokers' Association, Americas, to Vanessa A. Countryman, Secretary, Commission, at 1–2 (June 10, 2022) (''WMBAA Letter''); Letter from Lindsey Weber Keljo, Head of SIFMA Asset Management Group, and William Thun, Associate General Counsel, SIFMA Asset Management Group, to Vanessa A. Countryman, Secretary, Commission, at 1–2 (June 10, 2022) (''SIFMA AMG Letter''); Letter from Jennifer W. Han, Chief Counsel & Head of Regulatory Affairs, Managed Funds Association, at 1–2 (June 10, 2022) (''MFA Letter''); Letter from Stephen John Berger, Global Head of Government & Regulatory Policy, Citadel and Citadel Securities (June 10, 2022) (''Citadel Letter''). While these commenters support the Commission's general harmonization approach, they also provide specific recommendations on changes to the Commission's Regulation SE proposal that they believe would improve the rules, as described in detail below in the sections discussing these individual rules. *See infra* sections II through XVII.

[19] *See, e.g.,* ICE Letter, *supra* note 18, at 1–2; ISDA–SIFMA Letter, *supra* note 18, at 1–2; ICI Letter, *supra* note 18, at 1–2; Tradeweb Letter, *supra* note 18, at 1–2; WMBAA Letter, *supra* note 18, at 1–2; MFA Letter, *supra* note 18, at 1.

[20] *See, e.g.,* ISDA–SIFMA Letter, *supra* note 18, at 1–2; SIFMA AMG Letter, *supra* note 18, at 1–2.

[21] Ownership Limitations and Governance Requirements for Security-Based Swap Clearing Agencies, Security-Based Swap Execution Facilities, and National Securities Exchanges With Respect to Security-Based Swaps Under Regulation MC, SEA Release No. 63107 (Oct. 14, 2010), 75 FR 65882 (Oct. 26, 2010) (''Regulation MC Proposal'').

[22] *See* Bloomberg Letter, *supra* note 18, at 2.

Commission's rules and the CFTC's, or where the benefits of deviating from the CFTC's rules would otherwise justify the burdens and costs associated with imposing different or additional requirements than the corresponding CFTC rule. The specific approach to harmonization that the Commission has pursued, along with differences from CFTC's regime for SEFs, are described in detail in sections II through XVII below.

As discussed below, the Commission is modifying the proposed provisions of Regulation SE regarding the definition of ''block trade,'' [23] the treatment of package transactions,[24] the treatment of SBS transactions that are intended to be cleared but are not accepted for clearing by a registered clearing agency,[25] permitting SBSEFs to contract with designated contract markets (''DCMs'') to provide services to assist in complying with the SEA and Commission rules thereunder,[26] the content and timing of the Daily Market Data Report,[27] an exception to ownership and voting restrictions for SBSEFs,[28] the application of deadlines and standard of review for Commission review of SBSEF actions,[29] and the applicability of electronic filing and structured-data requirements with respect to specific SBSEF filings.[30] Otherwise, the rules of Regulation SE are generally being adopted as proposed, in some instances with minor or technical modifications, which are described in more detail below.[31]

II. Introductory Provisions of Regulation SE

A. Rule 800—Scope

Proposed Rule 800 is based on 17 CFR 37.1, which provides that part 37 of the CFTC's regulations applies to every SEF that is registered or applying to become registered as a SEF under section 5h of the CEA. Proposed Rule 800 would provide that the provisions of Regulation SE apply to every SBSEF that is registered or is applying to become registered as an SBSEF under section 3D of the SEA.

The Commission received no comments on Proposed Rule 800 and is adopting Rule 800 as proposed, with minor technical modifications,[32] for the reasons stated in the Proposing Release.

B. Rule 801—Applicable Provisions

Proposed Rule 801 is based on § 37.2 of the CFTC's rules, which provides that a SEF shall comply with the requirements of part 37 and all other applicable CFTC regulations, including 17 CFR 1.60 and part 9, and including any related definitions and cross-referenced sections. Proposed Rule 801 would require an SBSEF to comply with the requirements of Regulation SE and all other applicable Commission rules, including any related definitions and cross-referenced sections.

The Commission did not receive any comments on Proposed Rule 801 and is adopting Rule 801 as proposed, with minor technical modifications.[33]

C. Rule 802—Definitions

Proposed Rule 802 would set forth the definitions of terms that are used in multiple rules in proposed Regulation SE. The majority of these terms were adapted from the CFTC's swaps rules. Other terms were taken from section 3 of the SEA [34] or from a Commission rule under the SEA. In particular, Proposed Rule 802 would define the term ''security-based swap execution facility'' by cross-referencing the definition of that term provided in section 3(a)(77) of the SEA,[35] but with one carve-out. An entity that is registered with the Commission as a clearing agency pursuant to section 17A of the SEA [36] and limits its SBSEF functions to operation of a trading session that is designed to further the accuracy of end-of-day valuations—*i.e.,* a ''forced trading session''—would be exempt from the definition of ''security-based swap execution facility.'' [37]

Although the Commission received comments regarding the proper application of the proposed definitions with respect to registration requirements, discussed below in section III.A.2, and the proposed amendments to Rule 3a1–1, discussed below in section X, the Commission did not receive comments suggesting a modification of the definitions themselves. The term ''security-based swap execution facility'' is defined directly in section 3(a)(77) of the SEA as ''a trading system or platform in which multiple participants have the ability to execute or trade security-based swaps by accepting bids and offers made by multiple participants in the facility or system. . . .'' [38] and it is appropriate to adopt the same definition in Rule 802, with a narrow exception to address certain activities of registered clearing agencies in furthering the accuracy of end-of-day valuations.[39]

Specifically, it is necessary or appropriate in the public interest, and is consistent with the protection of investors, to exempt a registered clearing agency that utilizes a forced trading functionality for SBS from the definition of ''security-based swap execution facility.'' Such an entity will continue to be registered as a clearing agency and subject to the requirements of section 17A of the SEA. Furthermore, a registered clearing agency is a self-regulatory organization (''SRO''); therefore, all of its rules—including

[23] *See infra* section V.E.1(c).

[24] *See infra* section V.E.4.

[25] *See infra* section V.E.7.

[26] *See infra* section VI.B.5.

[27] *See infra* section VI.H.

[28] *See infra* section VIII.B.

[29] *See infra* section XIV.E.

[30] *See infra* section XIII.

[31] *See infra* note 32.

[32] In several instances, here and as noted below, the Commission has made technical modifications to the proposed regulatory text to conform cross-references in the regulatory text to the CFR to the required style, as well as to correct simple typographical errors. Here, the Commission has modified Rule 800 to change a reference from ''[t]he provisions of this section'' to ''[t]he provisions of §§ 242.800 through 242.835.'' In other instances, the Commission has added the words ''of this section'' to a CFR cross-reference to conform to the required form of citation. Other types of technical modifications, and any substantive modifications, are described below with respect to specific instances.

[33] *See id.*

[34] 15 U.S.C. 78c.

[35] 15 U.S.C. 78c(a)(77).

[36] 15 U.S.C. 78q–1.

[37] *See* Proposing Release, *supra* note 1, 87 FR at 28878. This provision codifies a series of exemptions granted by the Commission to SBS clearing agencies that operate ''forced trading'' sessions. *See, e.g.,* Order Granting Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection With Request on Behalf of ICE U.S. Trust LLC Related to Central Clearing of Credit Default Swaps, and Request for Comments, SEA Release No. 59527 (Mar. 6, 2009), 74 FR 10791, 10796 (Mar. 12, 2009) (providing, among other things, an exemption from sections 5 and 6 of the SEA because ''ICE Trust will periodically require ICE Trust Participants to execute certain CDS trades at the applicable end-of-day settlement price. Requiring ICE Trust Participants to trade CDS periodically in this manner is designed to help ensure that such submitted prices reflect each ICE Trust Participant's best assessment of the value of each of its open positions in Cleared CDS on a daily basis, thereby reducing risk by allowing ICE Trust to impose appropriate margin requirements''); Order Extending and Modifying Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection With Request of Chicago Mercantile Exchange Inc. Related to Central Clearing of Credit Default Swaps, and Request for Comments, SEA Release No. 61164 (Dec. 14, 2009), 74 FR 67258, 67262 (Dec. 18, 2009) (providing, among other things, an exemption from sections 5 and 6 of the SEA because, ''[a]s part of the CDS clearing process, CME will periodically require CDS clearing members to trade at prices generated by their indicative settlement prices where those indicative settlement prices generate crossed bids and offers, pursuant to CME's price quality auction methodology'').

[38] 15 U.S.C. 78c(a)(77).

[39] Because this exception for certain clearing agencies specifies ''an entity that is registered with the Commission as a clearing agency pursuant to section 17A of the [SEA]'' and meets other specified conditions, the exception would not be available to any exempt clearing agency.

those governing the forced trading session—have to be submitted to the Commission pursuant to section 19 of the SEA. Therefore, codification of the exemption from the definitions of ''exchange'' and ''security-based swap execution facility'' preserves the status quo and eliminates a largely duplicative and unnecessary set of regulatory requirements. This exemption covers only the forced-trading functionality of an SBS clearing agency; any other exchange or SBSEF activity in which a clearing agency might engage could subject the clearing agency to the SEA provisions and the Commission's rules thereunder applying to exchanges or SBSEFs.

Proposed Rule 802 would have defined the term ''block trade'' to be an SBS transaction that, among other requirements, is an SBS based on a single credit instrument (or issuer of credit instruments) or a narrow-based index of credit instruments (or issuers of credit instruments) having a notional size of $5 million or greater.[40] The Commission received a number of comments on the proposed definition of ''block trade.'' These comments are discussed below in section V.E.1(c) relating to Rule 815(a), which specifies mandatory methods of execution for a Required Transaction that is not a block trade. As discussed in detail below in section V.E.1(c), the Commission is not adopting the proposed definition of ''block trade.[41]

Therefore, the Commission is adopting Rule 802 as proposed, except for the definition of ''block trade,'' which it is reserving, and minor technical modifications.[42]

III. Registration of SBSEFS

Section 3D(a)(1) of the SEA[43] provides that no person may operate a facility for the trading or processing of SBS[44] unless the facility is registered as an SBSEF or as a national securities exchange. After issuing the 2011 SBSEF Proposal, the Commission granted temporary exemptions pursuant to section 36(a)(1) of the SEA[45] to entities that meet the definition of ''security-based swap execution facility'' from having to register with the Commission as an SBSEF or national securities exchange (''Temporary SBSEF Exemptions'').[46] According to their terms, the Temporary SBSEF Exemptions expire upon the earliest compliance date for the Commission's final rules regarding SBSEF registration.[47]

A. Rule 803—Requirements and Procedures for Registration

1. Summary of Proposed Rule 803

Proposed Rule 803 of Regulation SE is closely modeled on § 37.3 of the CFTC's rules and would set forth a process for registration with the Commission as an SBSEF.

Paragraph (a)(1) of Proposed Rule 803 would track the language of § 37.3(a)(1) closely, and would provide that any person operating a facility that offers a trading system or platform in which more than one market participant has the ability to execute or trade security-based swaps with more than one other market participant on the system or platform shall register the facility as a security-based swap execution facility under this section or as a national securities exchange pursuant to section 6 of the SEA.[48]

Paragraph (a)(2) of Rule 803, like § 37.3(a)(2), would require an SBSEF, at a minimum, to offer an order book, which would be defined in Rule 802 to mean an electronic trading facility, a trading facility, or a trading system or platform in which all market participants in the trading system or platform have the ability to enter multiple bids and offers, observe or receive bids and offers entered by other market participants, and transact on such bids and offers.[49]

Paragraph (a)(3) of Rule 803 is closely modeled on § 37.3(a)(4) and would provide a narrow exception to the requirement to provide an order book for a Required Transaction[50] to allow an SBSEF not to offer an order book for the SBS component(s) of a package transaction that contains a mix of products, with some parts of the

[40] *See* Proposing Release, *supra* note 1, 87 FR at 28896, 28975.

[41] Additionally, as discussed below, the Commission is removing the term ''block trade'' from the text of certain rules *other than* Rule 815(a), *see infra* sections VI.B.1 (Rule 819(a)(3)), V.B (Rule 812(b)), VI.B.4 (Rule 819(d)(1)), VI.H (Rule 825(c)(1)(i) and (ii)), and is adding language regarding future definition of ''block trade'' in Rule 825(c)(1)(iii). *See infra* section VI.H.

[42] *See supra* note 32. The Commission has also replaced the term ''SBSEF'' with ''security-based swap execution facility,'' defined ''SBS exchange'' when the term is first used, added the words ''of this definition of trading facility'' to paragraph (2)(C)(ii) of the definition of ''trading facility,'' and moved the definition of ''dormant security-based swap execution facility'' so that it appears in alphabetical order.

[43] 15 U.S.C. 78c–4(a)(1).

[44] The term ''security-based swap'' is defined in section 3(a)(68) of the SEA, 15 U.S.C. 78c(a)(68), to include, among other things, a swap that is based on a single security or loan, including any interest therein or on the value thereof. A single security could include, for example, a cash equity, a crypto/digital asset security, or a security option.

[45] 15 U.S.C. 78mm(a)(1).

[46] *See* SEA Release No. 64678 (June 15, 2011), 76 FR 36287 (June 22, 2011) (temporarily exempting entities that meet the definition of ''security-based swap execution facility'' from the requirement to register with the Commission as an SBSEF) (''June 2011 Exemptive Order''); SEA Release No. 64795 (July 1, 2011), 76 FR 39927 (July 7, 2011) (temporarily exempting entities that meet the definition of ''security-based swap execution facility'' from the restrictions and requirements of sections 5 and 6 of the SEA) (''July 2011 Exemptive Order''). An entity that meets the definition of ''security-based swap execution facility'' is required to register as an SBSEF under section 3D of the SEA or as an exchange under section 6 of the SEA. But because the Commission has not previously adopted final rules relating to SBSEFs, such entities have been unable to register with the Commission as SBSEFs. The Temporary SBSEF Exemptions have allowed such entities to continue trading SBS without needing to register either as SBSEFs or national securities exchanges before the compliance date of the SBSEF registration rules.

[47] *See* June 2011 Exemptive Order, *supra* note 46, 76 FR at 36293, 36306; July 2011 Exemptive Order, *supra* note 46, 76 FR at 39934, 39939. The July 2011 Exemptive Order also provided an exemption from the broker registration requirements of section 15(a)(1) of the SEA, 15 U.S.C. 78*o*(a)(1), and other requirements of the SEA and the Commission's rules thereunder that apply to a broker, solely in connection with broker activities involving SBS (''Broker Exemptions''). The Broker Exemptions generally expired on Oct. 6, 2021; however, because an entity that meets the definition of ''security-based swap execution facility'' also would also meet the definition of ''broker'' in section 3(a)(4) of the SEA, 15 U.S.C. 78c(a)(4), the Commission extended the Broker Exemptions solely for persons acting as an SBSEF until the expiration of the Temporary SBSEF Exemptions (*i.e.,* the earliest compliance date set forth in any of the Commission's final rules regarding registration of SBSEFs). *See* SEA Release No. 87005 (Sept. 19, 2019), 84 FR 68550, 68602 (Dec. 16, 2019).

[48] A person that registers with the Commission as a national securities exchange pursuant to section 6 of the SEA does not fall within the statutory definition of ''security-based swap execution facility,'' *see* sec. 3(a)(77) of the SEA, 15 U.S.C. 78c(a)(77), and thus does not need to register as an SBSEF under Rule 803. Furthermore, as discussed below, *see infra* section X (discussing proposed paragraph (a)(4) of SEA Rule 3a1–1), a person that registers as an SBSEF under Rule 803 and provides a market place for no securities other than SBS is exempt from the definition of ''exchange'' and does not need to register as such pursuant to section 6 of the SEA. 15 U.S.C. 78c(a)(1) (defining ''exchange'' as ''any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange'').

[49] Section 37.3(a)(3) defines ''trading facility'' and ''electronic trading facility'' by cross-referencing definitions of those terms in the CEA. Rather than cross-referencing the CEA, the Commission adapted the CEA definitions of those terms directly into Rule 802. *See* Proposed Rule 802 (defining ''trading facility'' and ''electronic trading facility'').

[50] As discussed below in section V.E.1(a), the Commission is incorporating into Regulation SE the concepts of ''Required Transaction'' and ''Permitted Transaction'' in a manner closely modeled on the CFTC's use of those terms. A Required Transaction would be a transaction involving an SBS that is subject to the trade execution requirement. Section 37.3 of the CFTC's rules requires an order book as a minimum trading functionality for all SEFs and is not limited to provision of an order book only for Required Transactions.

package being subject to a trade execution requirement and some not.

Paragraph (b) of Proposed Rule 803 is closely modeled on § 37.3(b) and would set out procedures for full registration of an SBSEF. Paragraph (b)(1), like § 37.3(b)(1), would provide that an applicant requesting registration must file electronically a complete Form SBSEF or any successor forms, and all information and documentation described in such forms with the Commission using the Electronic Data Gathering, Analysis, and Retrieval (''EDGAR'') system as an Interactive Data File in accordance with Rule 405 of Regulation S–T, and must provide to the Commission, upon the Commission's request, any additional information and documentation necessary to review an application.

Paragraph (b)(2) of Proposed Rule 803, like § 37.3(b)(2), would provide that an applicant requesting registration as an SBSEF must identify with particularity any information in the application that will be subject to a request for confidential treatment pursuant to Rule 24b–2 under the SEA.[51] Paragraph (b)(2) would also provide that, as set forth in Rule 808, certain information provided in an application shall be made publicly available.

Paragraph (b)(3) of Proposed Rule 803 would address amendments to the SBSEF registration application. Like § 37.3(b)(3), Rule 803(b)(3) would provide that an applicant amending a pending application or requesting an amendment to an order of registration shall file an amended application electronically with the Commission using the EDGAR system as an Interactive Data File in accordance with Rule 405 of Regulation S–T. Subsequent to being registered, an SBSEF would be required to submit rule and product filings under Rule 806 or Rule 807, as well as provide other updates as may be required pursuant to other rules for SBSEFs.

Paragraph (b)(4) of Proposed Rule 803 would address the effect of an incomplete application. Like § 37.3(b)(4), Proposed Rule 803(b)(4) would provide that, if an application is incomplete, the Commission shall notify the applicant that its application will not be deemed to have been submitted for purposes of the Commission's review.

Paragraph (b)(5) of Proposed Rule 803 would establish the Commission review period for an application to register as an SBSEF. Proposed Rule 803(b)(5) is closely modeled on § 37.3(b)(5) and would require the Commission to approve or deny an application for registration as an SBSEF within 180 days of the filing of the application. Proposed Rule 803(b)(5) would further provide that, if the Commission notifies the person that its application is materially incomplete and specifies the deficiencies in the application, the running of the 180-day period would be stayed from the time of that notification until the application is resubmitted in completed form. In such a case, the Commission would have not less than 60 days to approve or deny the application from the time the application is resubmitted in completed form.

Paragraph (b)(6)(i) of Proposed Rule 803, like § 37.3(b)(6)(i), would provide that the Commission shall issue an order granting registration upon a Commission determination, in its discretion, that the applicant has demonstrated compliance with the SEA and the Commission's rules applicable to SBSEFs. Paragraph (b)(6)(i) would allow the Commission to issue an order granting registration, subject to conditions. Paragraph (b)(6)(ii) of Proposed Rule 803, modeled on § 37.3(b)(6)(ii), would provide that the Commission may issue an order denying registration upon a Commission determination, in its own discretion, that the applicant has not demonstrated compliance with the SEA and the Commission's rules applicable to SBSEFs. If the Commission denies an application under Rule 803(b)(6)(ii), it would be required to specify the grounds for the denial.

Paragraph (c) of Proposed Rule 803, like § 37.3(d), would address reinstatement of a dormant registration. Proposed Rule 803(c) would provide that a dormant SBSEF[52] may reinstate its registration under the procedures of Rule 803(b). Proposed Rule 803(c) would further provide that the applicant may rely upon previously submitted materials if such materials accurately describe the dormant SBSEF's conditions at the time that it applies for reinstatement of its registration.

Paragraph (d) of Proposed Rule 803, like § 37.3(e), would set out procedures for an SBSEF to request a transfer of registration. Paragraph (d)(1), which is closely modeled on § 37.3(e)(1), would provide that an SBSEF seeking to transfer its registration from its current legal entity to a new legal entity as a result of a corporate change shall file a request for approval to transfer such registration with the Commission in the form and manner specified by the Commission. Paragraph (d)(2), modeled on § 37.3(e)(2), would provide that a request for transfer of registration shall be filed no later than three months prior to the anticipated corporate change; or in the event that the SBSEF could not have known of the anticipated change three months prior to the anticipated change, as soon as it knows of that change.

Paragraph (d)(3) of Proposed Rule 803, like § 37.3(e)(3), would require an SBSEF's request for a transfer of registration to include the underlying agreement governing the corporate change, a description of the corporate change, a discussion of the transferee's ability to comply with the SEA, the governing documents of the transferee, the transferee's rules marked to show changes from the rules of the SBSEF, and specified representations by the transferee.[53]

Paragraph (d)(4) of Proposed Rule 803, modeled on § 37.3(e)(4), would provide that, upon review of a request for transfer of registration, the Commission, as soon as practicable, shall issue an order either approving or denying the request.

Paragraph (e) of Proposed Rule 803, like § 37.3(f), would provide that an applicant for registration as an SBSEF may withdraw its application by filing a withdrawal request electronically with the Commission using the EDGAR system as an Interactive Data File in accordance with Rule 405 of Regulation S–T.[54] Proposed Rule 803(e) would further provide that withdrawal of an application for registration shall not affect any action taken or to be taken by

[51] *See* 17 CFR 240.24b–2 (setting forth the procedures for identifying and redacting the portion of a submission under the SEA for which confidential treatment is requested). As the Commission stated in the Proposing Release, it is not necessary or appropriate to establish and utilize one set of procedures to handle confidential treatment requests made by SBSEFs while utilizing a different set of procedures for other persons who request confidential treatment from the Commission under the SEA. *See* Proposing Release, *supra* note 1, 87 FR at 28880 n.50.

[52] *See* Proposed Rule 802 (defining ''dormant security-based swap execution facility'' to mean ''a security-based swap execution facility on which no trading has occurred for the previous 12 consecutive calendar months; provided, however, that no security-based swap execution facility shall be considered to be a dormant security-based swap execution facility if its initial and original Commission order of registration was issued within the preceding 36 consecutive calendar months''). This definition is modeled on the definition of ''dormant swap execution facility'' found in § 40.1(f).

[53] *See* Proposing Release, *supra* note 1, 87 FR at 28880–81.

[54] 17 CFR 232.405. The proposed electronic filing requirement discussed above does not appear in the CFTC version of this provision. The Commission is adding this specification to implement the Inline XBRL and EDGAR electronic filing requirements for certain documents required by Regulation SE. *See infra* section XIII.A.

the Commission based upon actions, activities, or events occurring during the time that the application was pending with the Commission.

Paragraph (f) of Proposed Rule 803, like § 37.3(g), would provide that an SBSEF may request that its registration be vacated by filing a vacation request electronically with the Commission using the EDGAR system and must be provided as an Interactive Data File in accordance with Rule 405 of Regulation S–T at least 90 days prior to the date that the vacation is requested to take effect.

2. Comments and Analysis

(a) Registration Requirements, Generally

Two commenters support the proposed SBSEF registration requirements under Rule 803 being modeled on the CFTC's rules and state that, as market participants are familiar with CFTC's requirements, they appreciate the Commission's attempts to minimize registration burdens and expedite the establishment of the SBSEF regime.[55]

One commenter states that the Commission should ensure that all multilateral trading venues for SBS are required to register as an SBSEF, regardless of the specific trading protocol used.[56] Another commenter argues that section 3D(a)(1) of the SEA requires the registration of *any* ''facility for the trading or processing of SBS,'' not just those that meet the statutory definition of SBSEF, which includes multiple-to-multiple trading.[57] Accordingly, this commenter states that single-dealer platforms should be required to register as SBSEFs and to change their operations to offer multiple-to-multiple trading, consistent with the definition of SBSEF.[58]

One commenter asks the Commission to ''make clear that the SBSEF registration requirement applies only to these types of platforms that are within the statutory and proposed regulatory definition and does not include any broader CFTC staff interpretations purporting to expand the SEF definition.'' [59] This commenter states that CFTC Staff Letter 21–19 [60] maintains that platforms can be required to register as SEFs ''(i) even where multiple participants cannot *simultaneously* request, make, or accept bids and offers from market participants; or (ii) where multiple participants can initiate a one-to-many communication.'' [61] The commenter states that extending the definition of SBSEF to include ''facilities offering one-to-many or bilateral communications if more than one participant is able to submit an RFQ on the platform'' would ''contradict Congress' express intent'' to limit the scope of SBSEF registration requirements to multiple-to-multiple platforms; that the Commission should make clear that the CFTC staff guidance is inapplicable to SBSEFs; and that the Commission should confirm that it is not adopting or incorporating, explicitly or implicitly, similar guidance.[62]

The Commission agrees with the comment that the definition of SBSEF applies to multilateral trading facilities regardless of the specific trading protocol used. As the statutory definition of SBSEF makes clear, a trading facility would fall under the definition of SBSEF if it offers ''multiple participants the ability to execute or trade security-based swaps by accepting bids and offers made by multiple participants in the facility or system, *through any means of interstate commerce.* . . .'' [63] Whether a specific instance or practice of brokering in fact offers multiple participants the ability to accept the bids or offers made by multiple participants, though, will depend on the attendant facts and circumstances of that instance or practice. The Commission does not, however, agree with the comment that the language of SEA section 3D(a)(1) means that single-dealer platforms for trading SBS must register as SBSEFs and, consistent with the statutory definition of SBSEF, change their operations to provide multiple-to-multiple trading. SEA section 3D is titled ''Security-based swap execution facilities,'' and section 3D(a)(1) states, in full, ''No person may operate a facility for the trading or processing of security-based swaps, unless the facility is registered as a security-based swap execution facility or as a national securities exchange under this section.'' [64] The Commission is not persuaded that the phrase ''facility for the trading or processing of security-based swaps'' in this context can reasonably be read to apply more broadly to encompass anything *other than* an SBSEF or an SBS exchange. Since the definitions of both SBSEF and exchange include the concept of multiple-to-multiple trading,[65] single-dealer ''one-to-many'' trading platforms that do not offer multiple-to-multiple trading are outside the scope of the provisions of section 3D(a)(1).

It is not necessary to incorporate the guidance in CFTC Staff Letter 21–19 into this release, because the CFTC staff letter in large part refers to fact-specific circumstances that the Commission has yet to encounter since Reg SE is not yet effective and the application of the SBSEF definition depends on the particular facts and circumstances of a platform's structure and operations. For the same reason, it would be premature to reject the possibility of taking a position similar to that of the CFTC guidance with regard to SBSEFs, as one commenter suggested.[66] Moreover, because the statutory definition of SBSEF does not include the word ''simultaneous,'' the Commission declines to issue its own guidance to reflect a requirement for simultaneity here. Where operators of SBS trading platforms have questions about the facts and circumstances particular to their situations, they can discuss their particular circumstances with Commission staff.

(b) Abbreviated Registration Procedures for CFTC-Registered SEFs

Several commenters state that the Commission should use its exemptive authority to provide a streamlined registration process for SBSEFs that are already registered with the CFTC as

[55] *See* SIFMA AMG Letter, *supra* note 18, at 5; *see also* Bloomberg Letter, *supra* note 18, at 11.

[56] *See* Citadel Letter, *supra* note 18, at 9 (''[A] security-based swap transaction executed via a fully electronic multilateral RFQ protocol should be subject to the same regulations as one executed by voice with the assistance of a voice broker (who may or may not be employed by the SBSEF)'').

[57] As discussed above, *see supra* note 38 and accompanying text, the statutory definition of SBSEF provides in relevant part that an SBSEF is ''a trading system platform in which *multiple participants* have the ability to execute or trade security-based swaps by accepting bids and offers made by *multiple participants.* . . .'' SEA section 3(a)(77), 15 U.S.C. 78c(a)(77) (emphasis added). This is sometimes referred to as ''multiple-to-multiple trading.''

[58] *See* Better Markets Letter, *supra* note 18, at 11–13.

[59] *See* MFA Letter, *supra* note 18, at 3.

[60] *See* CFTC Staff Advisory on Swap Execution Facility Registration Requirement, Letter No. 21–19 (Sept. 29, 2021), *available at https://www.cftc.gov/node/238336.*

[61] *See* MFA Letter, *supra* note 18, at 3 (quoting CFTC Staff Letter No. 21–19, *supra* note 60 (emphasis in original)).

[62] MFA Letter, *supra* note 18, at 3–4 (internal quotations omitted).

[63] SEA section 3(a)(77), 15 U.S.C. 78c(a)(77) (emphasis added).

[64] SEA section 3D(a)(1), 15 U.S.C. 78c–4(a)(1).

[65] *See* SEA section 3(a)(77), 15 U.S.C. 78c(a)(77) (defining SBSEF in relevant part as ''a trading system or platform in which multiple participants have the ability to execute or trade security-based swaps by accepting bids and offers made by multiple participants in the facility or system . . .''); SEA section 3(a)(1), 15 U.S.C. 78c(a)(1) (defining an exchange in relevant part as ''any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for *bringing together purchasers and sellers* of securities'') (emphasis added).

[66] *See supra* notes 59–62 and accompanying text.

SEFs.[67] One commenter states that, because many entities will likely be registering with both the Commission and the CFTC, a streamlined SBSEF registration process will ease the burden of new requirements imposed on potential dual-registrants.[68] This commenter further states that allowing currently registered CFTC SEFs to become SEC-registered SBSEFs would be more efficient and would more quickly kick-start the Commission's SBS regime. This commenter thus supports the use of exemptive authority for SEFs that are currently registered, provided that the Commission's approach to exemptive authority does not disrupt the existing market structure and the relationships between venues and participants. Another commenter states that a streamlined registration process for SEFs currently registered and in good standing with the CFTC would have the potential to lower the costs of registration and encourage the entry of market participants.[69]

One commenter that supports a streamlined SBSEF registration process for SEFs states that a prolonged registration process, particularly for venues already registered with the CFTC, only further delays the introduction of regulated price discovery, liquidity formation, and trade execution for SBS.[70] This commenter also states that SBSEF registration also further expedites SBS data reporting to the extent SBSEFs will report trades to an SBS swap data repository under the Commission's Regulation SBSR, as this service cannot be provided until SBSEFs are registered and operational. If the Commission were not to retain the exemptive authority within Rule 803, this commenter supports a process that gives deference to existing CFTC SEFs and provides a more streamlined process for such registrants. The commenter states that, as the Commission observed in the proposing release, most of the SBS liquidity will likely be centralized around a few facilities, with most (if not all) of them already operating CFTC-regulated SEFs.[71]

Another commenter states that SEFs that are currently registered and in good standing with the CFTC should be permitted to register with the Commission utilizing their current documentation filed pursuant to the requirements of Form SEF.[72] This commenter states that CFTC registered SEFs are required to keep their Form SEF and its exhibits current through post-registration amendments and that, as the Commission is modeling proposed Form SBSEF on the CFTC's Form SEF, substituting the forms should not be problematic for the Commission to review. The commenter states that the Commission should permit registered SEFs seeking to register as an SBSEF to submit their Form SEF and exhibits, with an accompanying addendum reflecting only those changes necessary to fulfill the specific requirements of proposed Regulation SE, in lieu of filing a new Form SBSEF.

One commenter, however, stated that ''relaxing or eliminating any registration requirements would be highly inappropriate,'' and argued that the Commission must be ''rigorous in reviewing and approving SBSEFs applicants while upholding complete impartiality.'' [73] This commenter further states that both active SEFs and non-SEFs seeking to register SBSEFs ''must be held under the same standard to avoid any conflict of interests.'' [74] Therefore, this commenter states that the Commission should not use exemptive authority under SEA section 36(a)(1) to adopt an abbreviated procedure for SEFs seeking to register as SBSEFs, because doing so would rely on the ''CFTC's biased judgment'' and would not permit an ''unprejudiced determination'' by the Commission.[75]

In the Proposing Release, the Commission stated that it was considering that, after adopting final rules establishing a registration process for SBSEFs, it could exercise its exemptive authority under section 36(a)(1) of the SEA [76] to relax or eliminate entirely certain of the registration requirements for entities that are already registered as SEFs with the CFTC.[77] The Commission recognizes that many of the entities that will seek registration with the Commission as SBSEFs are already registered with the CFTC as SEFs. Entities that seek dual registration presumably see efficiencies in utilizing the same systems, policies, and procedures to trade both swaps and SBS. As noted throughout this release, the Commission has sought to harmonize the SBSEF regulatory regime as closely as practicable with the CFTC's SEF regulatory regime, achieving similar regulatory benefits as the CFTC regime while minimizing costs so as to impose only marginal costs on dually registered SEF/SBSEFs and their members. As a result of these harmonized regimes, SEFs that seek dual registration with the SEC would likely need to make only minor adjustments to their rules and trading procedures to support trading of SBS in addition to the trading of swaps.

While one commenter states that it would be inappropriate to relax or eliminate any SBSEF registration requirements for CFTC-registered SEFs,[78] an entity's status as a registered SEF in good standing with the CFTC is relevant when considering its application to register as an SBSEF and that reducing the registration burden for CFTC-registered SEFs, where possible, is appropriate. However, granting exemptive relief under section 36(a)(1), which this commenter opposes, or providing for a formally abbreviated SBSEF registration regime for CFTC-registered SEFs is not necessary to accomplish expedited registration and reduced registration burdens.[79] Requiring all applicants to submit Form SBSEF will support consistency in the review by the Commission and its staff of applications for registration of SBSEFs, which will include a review of the proposed rules for the SBSEFs. The Commission expects that prospective SBSEFs will be able to use the information in their SEF applications to complete their SBSEF applications, as discussed below.

For the reasons discussed above, the Commission is adopting Rule 803 as proposed, with minor technical modifications.[80]

B. Form SBSEF

The Commission proposed new § 249.2001 to require that entities use Form SBSEF to register with the Commission as an SBSEF. Form SBSEF would also be used for submitting any

[67] *See* SIFMA AMG Letter, *supra* note 18, at 5; Bloomberg Letter, *supra* note 18, at 11; WMBAA Letter, *supra* note 18, at 3; ICE Letter, *supra* note 18, at 5.

[68] *See* SIFMA AMG Letter, *supra* note 18, at 5.

[69] *See* Bloomberg Letter, *supra* note 18, at 11.

[70] *See* WMBAA Letter, *supra* note 18, at 3.

[71] *See* WMBAA Letter, *supra* note 18, at 3–4.

[72] *See* ICE Letter, *supra* note 18, at 5.

[73] Letter from J. T. at 1 (May 26, 2022).

[74] *Id.*

[75] *Id.*

[76] 15 U.S.C. 78mm(a)(1).

[77] *See* Proposing Release, *supra* note 1, 87 FR at 28882.

[78] *See supra* note 75 and accompanying text.

[79] In the Proposing Release, the Commission stated that it was ''preliminarily considering'' that it would exercise exemptive authority under section 36(a)(1) of the Act, 15 U.S.C. 78mm(a)(1), ''to relax or eliminate entirely certain of the registration requirements for entities that are already registered as SEFs with the CFTC.'' Proposing Release, *supra* note 1, 87 FR at 28882.

[80] *See supra* note 32. The Commission is also deleting the header text ''Minimum trading functionality'' from paragraph (a)(3), and is adding the header text ''Request to register'' to paragraph (b)(1), in order to maintain consistency of style in the regulatory text. Additionally, the Commission is removing the requirement to use an Interactive Data File for filing requests to withdraw or vacate an application for registration pursuant to Rules 803(e) and 803(f). *See infra* section XIII.A.

updates, corrections, or supplemental information to a pending application for registration. Form SBSEF is closely modeled on the CFTC's Form SEF for entities that seek to register with the CFTC as SEFs, with only minor changes to remove from the form the concept of post-registration amendments, as the proposed rule would not require any amendments to Form SBSEF post-registration. The exhibits that were proposed along with Form SBSEF are very similar to the exhibits in Form SEF. As with Form SEF, each applicant submitting a Form SBSEF would be required to provide the Commission with documents and descriptions pertaining to its business organization, financial resources, and compliance program, including various documents describing the applicant's legal and financial status. An applicant would be required to disclose any affiliates, provide a brief description of the nature of the affiliation, and submit copies of any agreements between the SBSEF and third parties that would assist the applicant in complying with its duties under the SEA. In addition, an applicant would be required to demonstrate operational capability through documentation, including technical manuals and third-party service provider agreements.

Under Rule 803(b)(1), an applicant for SBSEF registration would be required to complete Form SBSEF and provide, upon the Commission's request, any additional necessary information and documentation in order review the application. The determination as to when an application submission is complete would be at the sole discretion of the Commission. The Commission would review Form SBSEF and, at the conclusion of its review, by order either: (i) grant registration; (ii) deny the application for registration; or (iii) grant registration subject to certain conditions. After an applicant is granted registration, any updates or amendments to the information contained in its Form SBSEF by an active SBSEF would be required to be submitted as rules or rule amendments under Rule 806 or Rule 807 or as may be required by other rules in Regulation SE.

One commenter states that the Commission should closely harmonize the rules for SBSEF registration with the CFTC's rules, with the exception of Exhibits D and H of Form SBSEF, which require: (a) a list of all affiliates and a description of any material pending legal proceedings of such affiliates, and (b) the financial statements of the affiliates. This commenter states that the information required by these exhibits is ''burdensome and not fit for purpose'' and should not be required unless the affiliate provides support services to the SBSEF or the legal proceedings are expected to have a material effect on the applicant or the operation of its proposed SBSEF.[81] As discussed above, several commenters expressed support for the Commission providing an expedited process for CFTC-registered SEFs that wish to register as SBSEFs.

The CFTC adopted rules for the registration and regulation of SEFs in 2013,[82] and the CFTC's process for registering SEFs appears to be well understood by the industry and well designed for being adapted to the SBS market. Therefore, the Commission has used the CFTC's process as a basis for its own process for registering SBSEFs, and information about SBSEF affiliates is relevant to the Commission's oversight of SBSEFs and, in particular, oversight of SBSEF compliance with Rule 828 (conflicts of interest).[83] In addition, we assume that most if not all SBSEFs will be dually registered as SEFs.

However, while the content and exhibits of Form SBSEF closely match the form and content of Form SEF, exhibits to Form SEF are provided to the CFTC as unstructured documents, whereas most exhibits to Form SBSEF will be provided to the Commission as structured, machine-readable documents. Permitting SBSEFs to provide copies of Form SEF exhibits in lieu of Form SBSEF exhibits, while likely resulting in an expedited registration process for most SBSEFs, would also potentially result in a much higher volume of unstructured data, making the Form SBSEF disclosures more difficult for market participants and the Commission to analyze in an efficient manner. Thus, notwithstanding some commenters' support for an expedited registration process, the final rules do not permit SBSEFs to provide copies of Form SEF exhibits in lieu of Form SBSEF exhibits. The Commission is therefore adopting 17 CFR 249.2001 as proposed, but is renumbering it as 17 CFR 249.1701 under new subpart R (''Forms for Registration of, and Filings by, Security-Based Swap Execution Facilities'') and is making a minor technical correction.[84]

IV. Rule and Product Filings by SBSEFs

Unlike section 19(b) of the SEA,[85] which sets out a process whereby national securities exchanges and other SROs submit filings to the Commission to add, delete, or amend rules (including rules to list products), section 3D of the SEA [86] does not set out an equivalent process for SBSEFs, which are not SROs. It can be expected, however, that an SBSEF will seek to change its rules over time in order, for example, to implement new trading methodologies and to expand its product offerings to make its market more attractive to participants, and adopting rules for filings related to these changes will promote public transparency regarding the changes, as well as consistent handling of those filings by the Commission.

An appropriate review process is necessary to assess whether changes to an SBSEF's rules and product offerings are consistent with section 3D of the SEA and the Commission's rules thereunder, and the CFTC's filing procedures are an appropriate model on which to base the Commission's own filing procedures. Furthermore, because of the likelihood that most if not all SBSEFs will be dually registered with the CFTC as SEFs, and that many rule changes for a dual registrant will affect both its SBS and swap trading businesses, close harmonization with the CFTC's filing procedures would allow a dual registrant to make a similar filing to each agency, allowing each agency to carry out its oversight functions while minimizing the burdens on dual registrants.

Parts 37 and 40 of the CFTC's rules set out processes whereby SEFs may establish or amend rules and list products. These processes allow a SEF to voluntarily submit a rule, rule amendment, or new product for CFTC review and approval, or to ''self-certify'' that a rule, rule amendment, or new product meets applicable standards under the CEA and the CFTC's rules thereunder without obtaining CFTC approval, although the CFTC retains the ability, in certain circumstances, to stay the self-certification for further review before it may become effective. Using its general authority to impose any requirement on SBSEFs and to prescribe rules governing the regulation of SBSEFs,[87] the Commission proposed to

[81] *See* Bloomberg Letter, *supra* note 18, at 11.

[82] *See* 2013 CFTC Final SEF Rules Release, *supra* note 9.

[83] *See infra* section VI.K.

[84] The Commission is correcting the text in Instruction 20 to Form SBSEF to read ''a list with the name(s) of the clearing agency(ies)'' instead of ''a list of the name of the clearing organization(s).''

[85] 15 U.S.C. 78s(b).

[86] 15 U.S.C. 78c–4.

[87] *See* 15 U.S.C. 78c–4(d)(1)(A)(ii) (requiring an SBSEF, in order to be registered and to maintain registration, to comply with any requirement that the Commission may impose by rule or regulation); 15 U.S.C. 78c–4(f) (directing the Commission to prescribe rules governing the regulation of SBSEFs).

establish similar filing processes for registered SBSEFs in Rules 804 to 810 of Regulation SE.[88]

A. Rule 804—Listing Products for Trading by Certification

1. Summary of the Proposed Rule

Proposed Rule 804 is modeled on 17 CFR 40.2 of the CFTC's rules and would set forth procedures by which an SBSEF may list a product via certification. Paragraph (a)(1) of Proposed Rule 804 would require an SBSEF to file its submission electronically with the Commission using the EDGAR system as an Interactive Data File in accordance with Rule 405 of Regulation S–T.

Paragraph (a)(2) of Proposed Rule 804 would provide that the Commission must receive the submission by the open of business on the business day that is 10 business days preceding the product's listing.[89]

Paragraph (a)(3) of Proposed Rule 804 would require a self-certification to include a copy of the submission cover sheet;[90] a copy of the product's rules, including all rules related to its terms and conditions; the intended listing date; a certification by the SBSEF that the product to be listed complies with the SEA and the Commission's rules thereunder; a concise explanation and analysis of the product and its compliance with applicable provisions of the SEA, including the Core Principles, and the Commission's rules thereunder; a certification that the SBSEF posted a notice of pending product certification with the Commission and a copy of the submission, concurrent with the filing of a submission with the Commission, on the SBSEF's website;[91] and a request for confidential treatment, if appropriate, as permitted pursuant to SEA Rule 24b–2.[92]

Paragraph (b) of Proposed Rule 804, modeled on § 40.2(b), would provide that, if requested by Commission staff, an SBSEF shall provide any additional evidence, information, or data that demonstrates that the SBS meets, initially or on a continuing basis, the requirements of the SEA or the Commission's rules or policies thereunder.

Paragraph (c)(1) of Proposed Rule 804 would provide that the Commission may stay the certification of a new product by issuing a notification informing the SBSEF that the Commission is staying the certification on the grounds that the product presents novel or complex issues that require additional time to analyze, is accompanied by an inadequate explanation, or is potentially inconsistent with the SEA or the Commission's rules thereunder.[93] Under paragraph (c)(1), the Commission would have an additional 90 days from the date of the notification to conduct the review.

Paragraph (c)(2) would require the Commission to provide a 30-day comment period during that 90-day period, and to publish a notice of the 30-day comment period on the Commission's website. Comments from the public could be submitted as specified in that notice.

Paragraph (c)(3) would provide that the product that had been stayed would become effective, pursuant to the certification, at the expiration of the 90-day review period, unless the Commission withdraws the stay prior to that time, or the Commission notifies the SBSEF during the 90-day time period that it objects to the proposed certification on the grounds that the proposed product is inconsistent with the SEA or the Commission's rules.

2. Comments and Analysis

One commenter states that, while the proposed self-certification process does include improvements to the CFTC's self-certification process, including extending the initial review period from one business day to 10 business days and expanding the scope of reasons for staying the self-certification, it is still fundamentally flawed. This commenter states that the CFTC's self-certification process is mandated by statute and that, in the absence of any statutory mandate analogous to that applicable to the CFTC, the Commission must, at the very least, provide a coherent policy justification for its proposed self-certification process.[94]

This commenter states that it is not clear why it is necessary or desirable for SBSEFs to be able to bring new products to the market ''speedily'' and that self-certification turns the regulatory process on its head, creating in effect a presumption of regulatory compliance and putting the onus on the agency, under a predetermined timeline, to fully evaluate a proposed product that may threaten significant harm to investors and market stability.[95] This is especially the case, the commenter states, considering the context in which the SEC was given comprehensive authority to regulate and oversee the SBS market, *i.e.,* a financial crisis caused in large part by SBS and other novel financial products whose risks regulators and market participants thought were well understood, but in fact were not. Given this context, the commenter states, it ''makes little policy sense to establish a regime whereby an SBSEF could introduce a new potentially dangerous product to the financial system without an affirmative, independent SEC

[88] The CFTC has proposed to amend the rules that govern how CFTC-registered entities submit self-certifications and requests for approval of their rules, rule amendments, and new products for trading and clearing, as well as the CFTC's review and processing of such submissions. *See* CFTC, Provisions Common to Registered Entities (Notice of Proposed Rulemaking), 88 FR 61432 (Sept. 9, 2023). The CFTC's proposing release states that the proposed amendments ''are intended to clarify, simplify and enhance the utility of those regulations for market participants and the [CFTC].'' *Id.* at 61432. The CFTC has not yet taken action on this proposal.

[89] By contrast, the parallel provision in § 40.2(a) provides that a DCM or SEF must file the self-certification only one business day before listing the product. *See* § 40.2(a)(2) (one of the conditions for a valid self-certification of a product is that the CFTC has received the submission by the open of business on the business day preceding the product's listing).

[90] The Commission proposed, in new § 249.2002, a submission cover sheet (with instructions) that is closely modeled on the CFTC's submission cover sheet.

[91] Under Rule 804(a)(3)(vi), information that the SBSEF seeks to keep confidential can be redacted from the documents published on the SBSEF's website but would have to be republished consistent with any determination made pursuant to SEA Rule 24b–2.

[92] Section 40.2(a)(3) instructs filers to make any request for confidential treatment pursuant to § 40.8 of the CFTC's rules, which in turn cross-references 17 CFR 145.9. The Commission proposed instead to direct filers to make any request for confidential treatment pursuant to existing SEA Rule 24b–2. *See supra* note 51.

[93] Rule 807(c) is based on § 40.2(c), which provides that the CFTC may stay the listing of a contract pursuant to paragraph (a) of this section during the pendency of CFTC proceedings for filing a false certification or during the pendency of a petition to alter or amend the contract terms and conditions pursuant to section 8a(7) of the CEA. The SEA does not include the CEA's provisions regarding altering or amending the terms and conditions of an SBS listed by an SBSEF like the authority granted to the CFTC with respect to products listed by SEFs, such that the Commission would be able to stay the listing of an SBS that it believes may be inconsistent with the SEA, pending proceedings to exercise that authority. Nor are proceedings for false certification of an SBS contemplated by the SEA. For this reason, in lieu of harmonizing with § 40.2(c), the Commission proposed, in Rule 804(c), a provision that would allow the Commission to stay the certification of a new product in the same manner that Rule 807(c) would allow the Commission to stay the self-certification of a new rule or rule amendment.

[94] *See* Better Markets Letter, *supra* note 18, at 13.

[95] *See* Better Markets Letter, *supra* note 18, at 13–14; *see also* Letter from Bryce Keeney (Apr. 27, 2022) (''Keeney Letter'') (stating that ''[d]erivatives are not the purpose of the market'' and that the Commission should ''align rules to focus on the primary purpose, not to support tertiary aspects that result in systemic risk and systemic abuse''); Letter from Kevin (Apr. 20, 2023) (''Kevin Letter'') (stating that the proposed rules do not protect retail investors and that ''[c]reating a self governing regime, allowing easier swaps trading across borders, exemption exchanges and registered brokers . . . sound like a terrible recipe for disaster in a multi-trillion marketplace'').

determination that such product not only complies with the SBSEF Core Principles and other requirements, but also that it does not pose an unwarranted danger to investors, the financial system, and the broader economy.'' [96]

For several reasons the Commission does not agree with the objections raised by this commenter. *First,* the Commission does not agree that the self-certification process of Rule 804 either ''turns the regulatory process on its head'' or would deny the Commission the opportunity to ''fully evaluate a proposed product that may threaten significant harm to investors and market stability.'' [97] The ability of the Commission to stay the effectiveness of any product self-certification, to seek public comment on that self-certification, and to object to (*i.e.,* effectively disapprove) the proposed certification on the grounds that the product is inconsistent with the SEA or the Commission's rules will provide the Commission with sufficient opportunity (including the opportunity to seek public comment) to consider the self-certified rules and take steps to protect investors and maintain fair, orderly, and efficient markets. Further, the self-certification process does not create a ''presumption of compliance,'' because: (a) Rule 804(b) requires an SBSEF to provide, at Commission request, any ''additional evidence, information, or data that demonstrates that the SBS meets, initially or on a continuing basis, the requirements of the SEA or the Commission's rules or policies thereunder''; (b) Rule 804(c)(1) permits the Commission to suspend a new product certification because ''the product presents novel or complex issues that require additional time to analyze, is accompanied by an inadequate explanation, or *is potentially* inconsistent with the SEA or the Commission's rules thereunder'' (emphasis added); and (c) Rule 804(c)(3) does not create a presumption of compliance but instead provides the Commission a mechanism by which to object to a proposed certification ''on the grounds that the proposed product is inconsistent with the SEA or the Commission's rules.'' [98]

Second, given the relationship between the swaps market and the SBS market, as well as the likelihood that most or all entities seeking to register as SBSEFs will be CFTC-registered SEFs, harmonization with the CFTC filing procedures for new products should facilitate the ability of entities to dually register and minimize costs by allowing incumbent SEFs to use their existing systems, policies, and procedures to comply with the Commission's SBSEF rules. The aim of the rule is, however, not merely to allow SBSEFs to bring products to market ''speedily,'' or at minimal cost, and, as discussed below in this section, it is appropriate for its rules to provide for a longer review period than the CFTC's rules.

And third, the Commission disagrees with this commenter's view that the self-certification process ''would pose an unwarranted danger to investors, the financial system, and the broader economy.'' The new-product provisions of Regulation SE must be read in the context of the other relevant provisions of Title VII of the Dodd-Frank Act and the Commission's rules thereunder, which include, among other things, rules governing the registration and regulation of Security-Based Swap Dealers (''SBSDs'') and Major Security-Based Swap Participants (''MSBSPs''); [99] capital, margin, and segregation requirements for SBSDs and MSBSPs; [100] business conduct standards and chief compliance officer requirements for SBSDs and MSBSPs; [101] and post-trade reporting and public dissemination of SBS transactions.[102] Because of the significant role these other rules play in addressing potential risks posed by SBS, the Commission's ability to require SBSEFs to provide any evidence, information, or data demonstrating that the SBS meets, initially or on a continuing basis, the requirements of the SEA or the Commission's rules or policies thereunder, and the Commission's ability to suspend and ultimately object to SBSEF self-certifications, are appropriate to protect investors, the financial system, and the broader economy with respect to new SBSEF products and rules.[103] Thus, the self-certification process in this context is appropriate for the underlying aims of the Dodd-Frank Act.

Two commenters state that the relatively low volume of SBS products expected to be self-certified supports a shorter review period than the proposed ten-business-day Commission review period.[104] Both commenters recommend a shorter review period of one day to harmonize with the CFTC's approach.[105] Alternatively, one of the commenters suggests a two-day review period.[106] This commenter suggests that a shorter review period would be beneficial to allow market operators to meet participants' demands to transact on regulated platforms in a reasonable period of time.[107] The commenter also states that a shorter review period would accommodate participants' needs to hedge risk in a timely manner.[108] The other commenter states that a longer review period would reduce the competitive benefit to SBSEFs that develop new products because a 10-day review period would enable competitors to list similar products.[109] This commenter also suggests varying from the one-day review period in certain limited circumstances, such as when an SBSEF submits an SBS for a made-available-to-trade determination.[110]

While a ten-day review period differs from the CFTC's one-day review period, one business day would not provide the SEC staff sufficient time to review a new product filing for error or incompleteness, let alone review a new product for compliance with the SEA or Regulation SE. Further, if a product does warrant a stay, the Commission would also need sufficient time to go through the administrative steps of formally issuing the stay.[111] The

[96] Better Markets Letter, *supra* note 18, at 13–14.

[97] *See supra* note 96 and accompanying text.

[98] Section IV.D, *infra,* discusses the process for self-certification of rule changes, including the Commission's ability to stay the effectiveness of such a filing, which would lead to a public comment period and the opportunity for the Commission to object to the certification.

[99] *See* Registration Process for Security-Based Swap Dealers and Major Security-Based Swap Participants, SEA Release No. 75611 (Aug. 5, 2015), 80 FR 48963 (Aug. 14, 2015) (''SBSD and MSBSP Registration Release'').

[100] *See* Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital and Segregation Requirements for Broker-Dealers, SEA Release No. 86175 (June 21, 2019), 84 FR 43872 (Aug. 22, 2019) (''Capital, Margin, and Segregation Release'').

[101] *See* Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants, SEA Release No. 77617 (Apr. 14, 2016), 81 FR 29959 (May 13, 2016) (''Business Conduct Standards Release'').

[102] *See* Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, SEA Release No, 78321 (July 14, 2016), 81 FR 53546 (Aug. 12, 2016) (''Regulation SBSR Release'').

[103] The Commission's rules for SBSEFs do not directly affect retail investors. Only eligible contract participants (''ECPs'') are eligible to trade on an SBSEF, *see* section 6(l) of the SEA, 15 U.S.C. 78f(l), and retail investors would have access to an SBS only after an SBS exchange has filed a proposed rule change with the Commission under Rule 19b–4, 17 CFR 240.19b–4, to amend its rules to permit the listing of a registered SBS, with that proposed rule change being published for public comment.

[104] *See* WMBAA Letter, *supra* note 18, at 4; ICE Letter, *supra* note 18, at 2.

[105] *See* WMBAA Letter, *supra* note 18, at 4; ICE Letter, *supra* note 18, at 2.

[106] *See* WMBAA Letter, *supra* note 18, at 4.

[107] See *id.*

[108] *See id.*

[109] *See* ICE Letter, *supra* note 18, at 3.

[110] *See id.*

[111] *See infra* sections XV.D and XV.E (delegating authority to the Director of the Division of Trading and Markets to stay the effectiveness of a self-

proposed ten-business-day review period for self-certified products also accords with the CFTC's ten-business-day review period for self-certified rules,[112] which the Commission is replicating in Rule 807(a)(3).[113]

Further, while a shorter review period may allow SBS to trade on an SBSEF more quickly, failing to provide the Commission with a meaningful period for review of a new product would hamper the Commission's ability to protect market participants and maintain fair, orderly, and efficient SBS markets. A ten-day review period would still permit market participants to trade SBS on regulated platforms within a ''reasonable period'' and would provide the Commission the time it needs to review submissions. The Commission also disagrees with the comment that a shorter review period is necessary to accommodate market participants' need to hedge risk in a timely manner. During the relatively brief and time-limited period for Commission review of an SBSEF new-product filings, market participants would remain able to hedge that risk in other ways, such as in the OTC SBS market or other related securities markets, depending on the risk to be managed. Finally, while the 10-day review period might reduce the first-to-market competitive advantage of an SBSEF that first lists a given SBS,[114] the extent of such an advantage may vary considerably based on other factors in the SBSEF market, and that, in any event, the need for the Commission to have sufficient time to review a new product before it is listed justifies the potential competitive effect.

Thus, a ten-business-day review period strikes an appropriate balance between allowing SBSEFs to list new products quickly and affording Commission staff a sufficient time period in which to assess those products prior to listing.

One commenter asks the Commission to confirm that it does not expect SBSEFs to self-certify for every security for which there may exist a related SBS.[115] This commenter states that, for example, while an SBSEF may publish ''terms and conditions'' relevant for an instrument (like a single-name total return SBS) under Rule 804, the Commission might receive thousands of underlying national market system equity stocks from each SBSEF, exponentially increasing the number of products the Commission would need to review. The commenter also states that, given the potential 10-day review period (compared to the CFTC's shorter timeframe), SBSEFs will be forced to proactively self-certify every potential SBS in an attempt to meet all potential participant demand without a two-week delay, only increasing the volume of self-certifications the Commission may receive. This commenter states that listing the instrument, and not each equity that may be linked to the instrument, is an appropriate approach to balance the SBSEFs and the Commission's resources with respect to product self-certification.

The Commission is conscious of the large number of individual SBS that may constitute a ''class'' of SBS, such as single-name, total return SBS given as an example by the commenter. While an SBSEF should not necessarily be required to make an individual filing for each of the securities underlying a single such class of SBS, a filing for a simple class certification that merely described the parameters of the SBS covered by the certification would not necessarily provide sufficient information for the Commission to determine whether all the potential products covered by the class are consistent with the SEA and the rules thereunder, including Regulation SE. Therefore, while the Commission is not providing for ''class certifications'' of SBS, the Commission will not necessarily require separate submissions for each underlying security.[116] The Commission will consider submissions for an SBS that might overlie one or more of a list of securities, provided that those potential underlying securities are specifically identified and that the submission addresses, as part of the requirement in Rule 804 to submit ''a concise explanation and analysis of the product and its compliance with applicable provisions of the Act, including core principles, and the Commission's rules thereunder,'' [117] why *all* included underlying securities meet the applicable provisions of the SEA and the Commission's rules thereunder.[118]

Accordingly, for the reasons discussed above, the Commission is adopting Rule 804 as proposed, with the exception of the proposed Inline XBRL and EDGAR filing requirements, and with minor technical modifications.[119]

B. Rule 805—Voluntary Submission of New Products for Commission Review and Approval

Proposed Rule 805 is closely modeled on § 40.3 of the CFTC's rules and would set forth procedures by which an SBSEF may voluntarily submit new SBS products for Commission review and approval.

Paragraph (a) of Proposed Rule 805 would adapt these requirements for SBSEFs.[120] First, an SBSEF would be required to file its submission electronically with the Commission using the EDGAR system as an Interactive Data File in accordance with Rule 405 of Regulation S–T. The filing would also have to include a copy of the submission cover sheet, a copy of the rules that set forth the terms and conditions of the SBS to be listed, and an explanation and analysis of the product and its compliance with applicable provisions of the SEA, including the Core Principles and the Commission's rules thereunder.[121] The submission would also have to describe any agreements or contracts entered into

certification and to extend the period for consideration of a new product).

[112] *See* § 40.6(a)(3) (one of the conditions for a valid self-certification of a rule or rule amendment is that the CFTC has received the submission not later than the open of business on the business day that is 10 business days prior to the registered entity's implementation of the rule or rule amendment).

[113] *See infra* section IV.D.

[114] *Cf.* ICI Letter, *supra* note 18, at 9 n.29 (discussing ''first mover'' advantage in the context of an SBSEF that has made an SBS available to trade).

[115] *See* WMBAA Letter, *supra* note 18, at 4.

[116] By contrast, paragraph (d) of § 40.2 provides that a DCM or SEF may submit a class certification of swaps based on an ''excluded commodity,'' subject to certain conditions. *See* section 1a(19) of the CEA, 7 U.S.C. 1a(19) (defining ''excluded commodity'').

[117] Rule 804(a)(3)(v).

[118] For example, a submission might cover a single-name total return SBS on any of the components of a given index, provided that the submission explains why the minimum criteria for inclusion in that index are sufficient to ensure that the proposed SBS are consistent with the requirements of the SEA and the rules thereunder, including Regulation SE.

[119] *See supra* note 32. As described in further detail in the discussion of electronic filing systems and structured data, the Commission will require all rule and product filings required by Rules 804 through 807 and 816 to be filed in unstructured format through EFFS, rather than in Inline XBRL through EDGAR. *See infra* section XIII.A.

[120] Paragraph (a) of Rule 805 omits two provisions in § 40.3(a). First, § 40.3(a)(6) requires the submitting entity to include the certifications required in 17 CFR 41.22 for product approval of a commodity that is a security future or a security futures product, as defined in sections 1a(44) or 1a(45) of the CEA, respectively. The Commission did not propose to adapt this provision into proposed Regulation SE because it pertains to security futures and security futures products, not to swaps or SBS. Second, § 40.3(a)(8) requires the submitting entity to include a filing fee. The Commission is not proposing to charge SBSEFs filing fees for submitting new product proposals.

[121] This explanation and analysis would have to either be accompanied by the documentation relied upon to establish the basis for compliance with the applicable law, or incorporate information contained in such documentation, with appropriate citations to data sources.

with other parties that enable the SBSEF to carry out its responsibilities.

Furthermore, paragraph (a) of Proposed Rule 805, modeled on § 40.3(a), would require the SBSEF to include, if requested by Commission staff, additional evidence, information, or data demonstrating that the SBS meets, initially or on a continuing basis, the requirements of the SEA, or other requirement for registration under the SEA, or the Commission's rules or policies thereunder. The SBSEF would be required to submit the requested information by the open of business on the date that is two business days from the date of request by Commission staff, or at the conclusion of such extended period agreed to by Commission staff after timely receipt of a written request from the SBSEF. Paragraph (a) of Proposed Rule 805, like § 40.3(a), would permit the submitting SBSEF to include a request for confidential treatment.[122] Finally, paragraph (a) of Proposed Rule 805, like § 40.3(a), would require the SBSEF to certify that it posted a notice of its request for Commission approval of the new product and a copy of the submission, concurrent with the filing of a submission with the Commission, on the SBSEF's website.[123]

Paragraph (b) of Proposed Rule 805, like § 40.3(b), would provide that the Commission shall approve a new product unless the terms and conditions of the product violate the SEA or the Commission's rules thereunder.

Paragraph (c) of Proposed Rule 805, modeled on § 40.3(c), would provide that a product submitted for Commission approval under Rule 805 shall be deemed approved by the Commission 45 days after receipt by the Commission, or at the conclusion of an extended period as provided under Rule 805(d), unless notified otherwise within the applicable period, if the submission complies with the requirements of Rule 805(a) and the SBSEF does not amend the terms or conditions of the product or supplement the request for approval, except as requested by the Commission or for correction of typographical errors, renumbering, or other non-substantive revisions, during that period. Paragraph (c) would also provide that any voluntary, substantive amendment by the SBSEF would be treated as a new submission under Rule 805.

Paragraph (d) of Proposed Rule 805, modeled on § 40.3(d), would provide that the Commission may extend the 45-day review period in paragraph (c) for an additional 45 days, if the product raises novel or complex issues that require additional time to analyze, in which case the Commission shall notify the SBSEF within the initial 45-day review period and briefly describe the nature of the specific issue(s) for which additional time for review is required. Paragraph (d) would also provide that the Commission may extend the 45-day review period for any length of time to which the SBSEF agrees in writing.

Paragraph (e) of Proposed Rule 805 would provide that the Commission may, at any time during its review, notify the SBSEF that it will not, or is unable to, approve the product. This notification would have to briefly specify the nature of the issues raised and the specific provision of the SEA or the Commission's rules thereunder, including the form or content requirements of Rule 805(a), that the product violates, appears to violate, or potentially violates but which cannot be ascertained from the submission.

Paragraph (f) of Proposed Rule 805, like § 40.3(f), would provide that a notification of the Commission's determination not to approve a product does not prejudice the SBSEF from subsequently submitting a revised version of the product for Commission approval, or from submitting the product as initially proposed pursuant to a supplemented submission. Furthermore, the notification would be presumptive evidence that the entity may not truthfully certify under Rule 804 that the same, or substantially the same, product does not violate the SEA or the Commission's rules thereunder.

The Commission did not receive any comments on this proposed rule. It is reasonable and appropriate to supplement the product certification procedures in Rule 804 by also including in Regulation SE, as Rule 805, procedures for voluntary submission of new products for Commission review and approval. Providing this approval process, as the CFTC does, can be valuable to an SBSEF seeking the Commission's concurrence that a new product does not violate the SEA or the Commission's rules thereunder prior to listing it. The CFTC's procedures in this regard are well articulated and well understood by SEFs, and that closely harmonizing with these procedures would yield comparable regulatory benefits while minimizing burdens on SBSEFs.[124] Therefore, the Commission is adopting Rule 805 as proposed, with the exception of the proposed Inline XBRL and EDGAR filing requirements, and with minor technical modifications.[125]

C. Rule 806—Voluntary Submission of Rules for Commission Review and Approval

Proposed Rule 806 is closely modeled on § 40.5 of the CFTC's rules and would set forth procedures by which an SBSEF may voluntarily submit rules, rule amendments, or dormant rules for Commission review and approval.

Paragraph (a) of Proposed Rule 806 would provide that an SBSEF may request that the Commission approve a new rule, rule amendment, or dormant rule prior to implementation of the rule. First, an SBSEF must file its submission electronically with the Commission using the EDGAR system as an Interactive Data File in accordance with Rule 405 of Regulation S–T. The filing would be required to include a copy of the submission cover sheet and to set forth the text of the rule or rule amendment (in the case of a rule amendment, deletions and additions must be indicated). Further, the SBSEF would be required to describe the proposed effective date of the rule or rule amendment and any action taken or anticipated to be taken to adopt the proposed rule by the SBSEF or by its governing board or by any committee

[122] Section 40.3(a), like § 40.2(a)(3), instructs filers to make any request for confidential treatment pursuant to § 40.8 of the CFTC's rules, which in turn cross-references § 145.9. As noted previously, the Commission proposes instead to direct filers to make any request for confidential treatment pursuant to SEA Rule 24b–2. *See supra* note 51.

[123] Information that the SBSEF seeks to keep confidential could be redacted from the documents published on the SBSEF's website but would have to be republished consistent with any determination made pursuant to SEA Rule 24b–2.

[124] As stated in the Proposing Release, the Commission does not discount the possibility that an entity might elect to register as an SBSEF with the SEC but not as a SEF with the CFTC. In such case, the SEC-only registrant would not have any familiarity with the CFTC's rules and filing procedures. Nevertheless, because most if not all entities that will seek SBSEF registration with the SEC are or will also be registered as SEFs with the CFTC, such dual registrants would benefit from harmonized rules. Furthermore, because the Commission is adopting these procedures substantially as proposed, is unnecessary to establish and apply one set of procedures for dual registrants and a different set for SEC-only SBSEFs. *See* Proposing Release, *supra* note 1, 87 FR at 28956 (stating that if the Commission ''establishe[d] different or additive requirements, dually registered entities and their market participants might need to incur costs and burdens to modify their systems, policies, and procedures to comply with the SEC-specific rules''). *See also* Bloomberg Letter, *supra* note 18, at 10 (''[A] harmonized framework has the potential to lower compliance costs by allowing SBSEFs and market participants to integrate with existing operational and compliance frameworks. Any potential differences would require SBSEF registrants to devote resources toward assessing the potential gaps and consequences of regulatory divergence.'').

[125] *See supra* note 32. As described in further detail in the discussion of electronic filing systems and structured data, the Commission will require all rule and product filings required by Rules 804 through 807 and 816 to be filed in unstructured format through EFFS, rather than in Inline XBRL through EDGAR. *See infra* section XIII.A.

thereof, and to cite the rules of the SBSEF that authorize the adoption of the proposed rule. The SBSEF would be required to provide an explanation and analysis of the operation, purpose, and effect of the proposed rule or rule amendment and its compliance with applicable provisions of the SEA, including the Core Principles relating to SBSEFs and the Commission's rules thereunder, and, as applicable, a description of the anticipated benefits to market participants or others, any potential anticompetitive effects on market participants or others, and how the rule fits into the SBSEF's framework of regulation.

Additionally, if a proposed rule affects, directly or indirectly, the application of any other rule of the SBSEF, the pertinent text of any such rule would be required to be set forth and the anticipated effect described. The SBSEF would also be required to provide a brief explanation of any substantive opposing views expressed to the SBSEF by governing board or committee members, members of the SBSEF, or market participants that were not incorporated into the rule, or a statement that no such opposing views were expressed.

The SBSEF could, as appropriate, include a request for confidential treatment as permitted under SEA Rule 24b–2. Finally, the SBSEF would be required to certify that it posted a notice of the pending rule with the Commission and a copy of the submission, concurrent with the filing of a submission with the Commission, on the SBSEF's website.[126]

Paragraph (b) of Proposed Rule 806, modeled on § 40.5(b), would provide that the Commission shall approve a new rule or rule amendment unless the rule or rule amendment is inconsistent with the SEA or the Commission's rules thereunder. Paragraph (c) of Proposed Rule 806, like § 40.5(c), would provide that a rule or rule amendment submitted for Commission approval under Rule 806 shall be deemed approved by the Commission 45 days after receipt by the Commission, or at the conclusion of such extended period as provided under paragraph (d) of this section, unless the SBSEF is notified otherwise within the applicable period, if the submission complies with the requirements of Rule 806(a) and the SBSEF does not amend the proposed rule or supplement the submission, except as requested by the Commission, during the pendency of the review period, other than for correction of typographical errors, renumbering, or other non-substantive revisions. Paragraph (c) would also provide that any amendment or supplementation not requested by the Commission would be treated as the submission of a new filing under Rule 806.

Paragraph (d) of Proposed Rule 806, modeled on § 40.5(d), would provide that the Commission may further extend the review period in paragraph (c) for an additional 45 days, if the proposed rule or rule amendment raises novel or complex issues that require additional time for review or is of major economic significance, the submission is incomplete, or the requestor does not respond completely to Commission questions in a timely manner, in which case the Commission shall notify the submitting SBSEF within the initial 45-day review period and shall briefly describe the nature of the specific issues for which additional time for review shall be required. Paragraph (d) would also allow an extension to which the SBSEF agrees in writing.

Paragraph (e) of Proposed Rule 806, like § 40.5(e), would provide that, at any time during its review, the Commission may notify the SBSEF that it will not, or is unable to, approve the new rule or rule amendment. This notification would have to briefly specify the nature of the issues raised and the specific provision of the SEA or the Commission's rules thereunder, including the form or content requirements of Proposed Rule 806, with which the new rule or rule amendment is inconsistent or appears to be inconsistent with the SEA or the Commission's rules thereunder.

Paragraph (f) of Proposed Rule 806, like § 40.5(f), would provide that such a notification to an SBSEF would not prevent the SBSEF from subsequently submitting a revised version of the proposed rule or rule amendment for Commission review and approval or from submitting the new rule or rule amendment as initially proposed in a supplemented submission. Paragraph (f) would further provide that the revised submission would be reviewed without prejudice. Finally, paragraph (f) would provide that such a notification to an SBSEF of the Commission's determination not to approve a proposed rule or rule amendment shall be presumptive evidence that the SBSEF may not truthfully certify the same, or substantially the same, proposed rule or rule amendment under Rule 807(a).

Paragraph (g) of Proposed Rule 806, like § 40.5(g), would provide that, notwithstanding Rule 806(c), changes to a proposed rule or a rule amendment, including changes to terms and conditions of a product that are consistent with the SEA and the Commission's rules thereunder, may be approved by the Commission at such time and under such conditions as the Commission shall specify in the written notification; provided, however, that the Commission may, at any time, alter or revoke the applicability of such a notice to any particular product or rule amendment.

The Commission received no comments on Proposed Rule 806 and the Commission is adopting Rule 806 as proposed, with the exception of the proposed Inline XBRL and EDGAR filing requirements, and with minor technical modifications, for the reasons stated in the Proposing Release.[127]

D. Rule 807—Self-Certification of Rules

Proposed Rule 807 is closely modeled on § 40.6 of the CFTC's rules and would set forth procedures by which an SBSEF may self-certify changes to its rules. Paragraph (a) of Proposed Rule 807, modeled on § 40.6(a), would set forth the conditions that an SBSEF must comply with before implementing a rule or rule amendment via self-certification. Like § 40.6(a), Proposed Rule 807(a) would permit an SBSEF to implement a rule or rule amendment without obtaining the Commission's prior approval under Rule 806, but only if it ''self-certifies'' the rule or rule amendment in compliance with the conditions set forth in Rule 807. Proposed Rule 807(a) would also permit an SBSEF to self-certify a rule or rule amendment that the Commission had previously approved under Rule 806, or that the SBSEF had previously self-certified under Rule 807, but that in the interim had become a dormant rule (*i.e.,* unimplemented for 12 consecutive calendar months).[128]

[126] Information that the SBSEF seeks to keep confidential could be redacted from the documents published on the SBSEF's website but would have to be republished consistent with any determination made pursuant to SEA Rule 24b–2.

[127] *See supra* note 32. As described in further detail in the discussion of electronic filing systems and structured data, the Commission will require all rule and product filings required by Rules 804 through 807 and 816 to be filed in unstructured format through EFFS, rather than in Inline XBRL through EDGAR. *See infra* section XIII.A.

[128] Also, like § 40.6(a), Proposed Rule 807(a) would include an exception that would allow an SBSEF to implement a certain kind of rule without having to comply with the full set of conditions set forth in paragraphs (a)(1) through (8) of Rule 807, the details of which are discussed below. Specifically, the exception would provide that, when submitting a rule delisting or withdrawing the certification of a product with no open interest, an SBSEF would only be required to meet the conditions of paragraphs (a)(1), (a)(2), and (a)(6) of Rule 807. The introductory language in paragraph (a) of Proposed Rule 807 would generally track the language of § 40.6(a), with slight changes for clarity. However, Proposed Rule 807(a) would not include

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Paragraph (a)(1) of Proposed Rule 807 would require the SBSEF to file its submission electronically with the Commission using the EDGAR system as an Interactive Data File in accordance with Rule 405 of Regulation S–T. Paragraph (a)(2) would require the SBSEF to provide a certification that the SBSEF posted a notice of the self-certification with the Commission and a copy of the submission, concurrent with the filing of a submission with the Commission, on the SBSEF's website.[129] Paragraph (a)(3) would provide that the Commission must have received the submission not later than the open of business on the business day that is 10 business days before the SBSEF's implementation of the rule or rule amendment. Paragraph (a)(4) would provide that the SBSEF may not implement the rule or rule amendment if the Commission has stayed it pursuant to Rule 807(c).

Paragraph (a)(5) of Proposed Rule 807 would set out procedures for emergency rule certifications. Paragraph (a)(5)(i) would require a new rule or rule amendment that establishes standards for responding to an emergency [130] to be submitted pursuant to Rule 807(a). Paragraph (a)(5)(ii) would provide that a rule or rule amendment implemented under procedures of the governing board to respond to an emergency shall, if practicable, be filed with the Commission prior to implementation or, if not practicable, be filed with the Commission at the earliest possible time after implementation, but in no event more than 24 hours after implementation. In addition, paragraph (a)(5)(ii) would provide that any such submission be subject to the certification and stay provisions of Rules 807(b) and (c), described below.

Paragraph (a)(6) of Proposed Rule 807, modeled on § 40.6(a)(7), would set out the required elements for a rule submission under Rule 807. These requirements would include a copy of the submission cover sheet (in the case of a rule or rule amendment that responds to an emergency, ''Emergency Rule Certification'' should be noted in the description section of the submission cover sheet); the text of the rule (in the case of a rule amendment, deletions and additions must be indicated); the date of intended implementation; a certification by the SBSEF that the rule complies with the SEA and the Commission's rules thereunder; a concise explanation and analysis of the operation, purpose, and effect of the proposed rule or rule amendment and its compliance with applicable provisions of the SEA, including the Core Principles relating to SBSEFs and the Commission's rules thereunder; and a brief explanation of any substantive opposing views expressed to the SBSEF by governing board or committee members, members of the SBSEF, or market participants, that were not incorporated into the rule, or a statement that no such opposing views were expressed. Paragraph (a)(6)(vii) would also permit the SBSEF to include, as appropriate, a request for confidential treatment pursuant to the procedures provided in Rule 240.24b–2.[131]

Paragraph (a)(7) of Proposed Rule 807, like § 40.6(a)(8), would require an SBSEF to provide, if requested by Commission staff, additional evidence, information, or data that may be beneficial to the Commission in conducting a due diligence assessment of the filing and the SBSEF's compliance with any of the requirements of the SEA or the Commission's rules or policies thereunder.

Paragraph (b) of Proposed Rule 807, modeled on § 40.6(b), would provide the Commission 10 business days to review the new rule or rule amendment before it is deemed certified and can be made effective, unless the Commission notifies the SBSEF during that ten-business-day review period that it intends to issue a stay of the certification under Rule 807(c).

Paragraph (c)(1) of Proposed Rule 807, modeled on § 40.6(c)(1), would provide that the Commission may stay the certification of a new rule or rule amendment by issuing a notification informing the SBSEF that the Commission is staying the certification on the grounds that it presents novel or complex issues that require additional time to analyze, is accompanied by an inadequate explanation, or is potentially inconsistent with the SEA or the Commission's rules thereunder. In addition, paragraph (c)(1) affords the Commission an additional 90 days from the date of the notification to conduct the review.

Paragraph (c)(2) of Proposed Rule 807, modeled on § 40.6(c)(2), would require the Commission to provide a 30-day comment period within the 90-day period in which the stay is in effect. The Commission would be required to publish a notice of the 30-day comment period on the Commission's internet website, and comments from the public could be submitted as specified in that notice.

Paragraph (c)(3) of Proposed Rule 807, modeled on § 40.6(c)(3), would provide that the new rule or rule amendment subject to the stay shall become effective, pursuant to the certification, at the expiration of the 90-day review period, unless the Commission withdraws the stay prior to that time, or the Commission notifies the SBSEF during the 90-day period that it objects to the proposed certification on the grounds that the proposed rule or rule amendment is inconsistent with the SEA or the Commission's rules thereunder.

Paragraph (d) of Proposed Rule 807, modeled on § 40.6(d), would provide that certain kinds of rules or rule amendments may be put into effect by an SBSEF without certification to the Commission if similar enumerated conditions are met. Some would be subject to a Weekly Notification of Rule Amendments, which is closely modeled on the CFTC notification; others would not be subject to any notification requirement.

Under paragraph (d)(2) of Proposed Rule 807, the following types of rules could be put into effect by an SBSEF without self-certification, so long as they are disclosed on the Weekly Notification of Rule Amendments:

- *Non-substantive revisions.* Corrections of typographical errors, renumbering, periodic routine updates to identifying information about the SBSEF, and other such non-substantive revisions of a product's terms and conditions that have no effect on the economic characteristics of the product;

an equivalent of the reference in § 40.6(a) to submissions under § 40.10, which concerns only systemically important derivatives clearing organizations and thus is not relevant to SBSEFs.

[129] Information that the SBSEF seeks to keep confidential could be redacted from the documents published on the SBSEF's website but must be republished consistent with any determination made pursuant to SEA Rule 24b–2.

[130] *See* § 40.1(h) (defining ''emergency'' as ''any occurrence or circumstance that, in the opinion of the governing board of a registered entity, or a person or persons duly authorized to issue such an opinion on behalf of the governing board of a registered entity under circumstances and pursuant to procedures that are specified by rule, requires immediate action and threatens or may threaten such things as the fair and orderly trading in, or the liquidation of or delivery pursuant to, any agreements, contracts, swaps or transactions or the timely collection and payment of funds in connection with clearing and settlement by a derivatives clearing organization''). The definition goes on to list a series of circumstances that are deemed emergencies under the definition. The Commission is adopting a definition of ''emergency'' in Rule 802 that is adapted from § 40.1(h).

[131] Section 40.6(a)(7)(vii) directs the submitting entity to follow the procedures in § 40.8 when making a request for confidential treatment, which in turn cross-references § 145.9. As noted previously, the Commission proposes instead to direct filers to make any request for confidential treatment pursuant to SEA Rule 24b–2. *See supra* note 51.

• *Fees.* Fees or fee changes, other than fees or fee changes associated with market making or trading incentive programs, that total $1.00 or more per contract, and are established by an independent third party or are unrelated to delivery, trading, clearing, or dispute resolution.

• *Survey lists.* Changes to lists of banks, brokers, dealers, or other entities that provide price or cash market information to an independent third party and that are incorporated by reference as product terms;

• *Approved brands.* Changes in lists of approved brands or markings pursuant to previously certified or Commission approved standards or criteria;

• *Trading months.* The initial listing of trading months, which may qualify for implementation without notice, within the currently established cycle of trading months; or

• *Minimum tick.* Reductions in the minimum price fluctuation (or ''tick'').

Under paragraph (d)(3)(ii) of Rule 807, the following types of rules can be put into effect by an SBSEF without self-certification and without having to be disclosed on the Weekly Notification of Rule Amendments:

• *Transfer of membership or ownership.* Procedures and forms for the purchase, sale, or transfer of membership or ownership, but not including qualifications for membership or ownership, any right or obligation of membership or ownership, or dues or assessments;

• *Administrative procedures.* The organization and administrative procedures of governing bodies such as a governing board, officers, and committees, but not voting requirements, governing board, or committee composition requirements or procedures, decision-making procedures, use or disclosure of material non-public information gained through the performance of official duties, or requirements relating to conflicts of interest;

• *Administration.* The routine daily administration, direction, and control of employees, requirements relating to gratuity and similar funds, but not guaranty, reserves, or similar funds; declaration of holidays; and changes to facilities housing the market, trading floor, or trading area;

• *Standards of decorum.* Standards of decorum or attire or similar provisions relating to admission to the floor, badges, or visitors, but not the establishment of penalties for violations of such rules;

• *Fees.* Fees or fee changes, other than fees or fee changes associated with market making or trading incentive programs that are less than $1.00 or relate to matters such as dues, badges, telecommunication services, booth space, real-time quotations, historical information, publications, software licenses, or other matters that are administrative in nature.

• *Trading months.* The initial listing of trading months which are within the currently established cycle of trading months.

One commenter states that the CFTC's self-certification process has been relied upon by CFTC registrants for most submissions, leaving little that is reviewed or capable of challenge by market participants or the CFTC unless it is inconsistent with the statute or CFTC regulation.[132] This commenter states that rulebook or contractual changes can alter protections within Commission-regulated markets and that the Commission should be able to object to any such change it deems inconsistent with Commission policy, including considerations of compliance costs and the impact on consumer protections, all of which would be best informed by a requirement for public comment prior to certification. Under the CFTC regime, the commenter states, there is no formal process to allow market participants to object to a submission for changes that are submitted for certification. Decisions to adopt or modify rules by self-certification are typically made by the registrant's board of directors or a board committee, this commenter states, with market participants only learning of the rule after the registrant has self-certified the rule or amendment. This commenter supports an alternative approach in which the Commission can review all material rule and contractual changes by SBSEFs, clearing agencies, SBS data depositories, and exchanges. This commenter also recommends that the Commission adopt a requirement for public comment for such changes.

Regulation SE will afford the Commission a sufficient mechanism to assess new SBSEF rules and rule amendments for consistency with section 3D of the SEA, while also permitting SBSEFs to submit new rules and rule amendments using a self-certification process closely aligned with § 40.6. The CFTC's procedures are well articulated and well understood by SEFs, and closely harmonizing with these procedures should yield comparable regulatory benefits while minimizing burdens on SBSEFs. It is likely that certain rules of dually registered SEF/SBSEFs will apply to member behavior generally—and not to one product market (*e.g.,* swaps or SBS) exclusively—and that these rules will thus have to be filed with both the SEC and CFTC. Adding a default comment period or otherwise altering the standard so that the Commission reviews all material rule or contractual changes by SBSEFs, as requested by one commenter,[133] would significantly alter the timing of self-certified SBSEF rules compared to their SEF equivalents. By contrast, closely harmonizing the SEC's filing procedures and standards of review with the CFTC's would allow dually registered entities to submit the same (or substantially the same) filing to both agencies for review. Moreover, if the Commission exercises its authority to stay the effectiveness of a self-certified rule and seek public comment—*i.e.,* with respect to a rule that is novel, complex, inadequately explained, or potentially inconsistent with the SEA or the regulations thereunder, including Regulation SE—market participants would be able to convey their concerns regarding that rule to the Commission.

The specified types of SBSEF rules or rule amendments that may be put into effect under Rule 807(d) without certification to the Commission are appropriate because they are limited to the types of rule changes described earlier in this section (*e.g.,* administration), which do not implicate significant protections to market participants, including compliance costs and customer protection. Therefore, the Commission has harmonized Rule 807(d) with § 40.6(d) to allow such filings to be made without self-certification or Commission review.

Thus, it is not necessary to require SBSEFs to make a substantially different type of filing to the SEC than to the CFTC for the same underlying rule. For the reasons discussed above, the Commission is adopting Rule 807 as proposed, with the exception of the proposed Inline XBRL and EDGAR filing requirements, and with minor technical modifications.[134]

[132] *See* SIFMA AMG Letter, *supra* note 18, at 5–6. Another commenter raised questions specifically about self-certification in the context of a determination by an SBSEF that an SBS has been ''made available to trade.'' *See* MFA Letter, *supra* note 18, at 6. This comment is discussed below in the context of made-available-to-trade determinations under Rule 816(a). *See infra* section V.F.2.

[133] *See* SIFMA AMG Letter, *supra* note 18, at 5–6.

[134] *See supra* note 32. The Commission has also moved the word ''and'' from the end of paragraph (d)(3)(D) to the end of paragraph (d)(3)(E)(2). As described in further detail in the discussion of electronic filing systems and structured data, the

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E. Submission Cover Sheet and Instructions

In proposed new § 249.2002, the Commission proposed to require that an SBSEF use a submission cover sheet in conjunction with filings submitted pursuant to Rules 804 through 807, 809, and 816. The cover sheet and the instructions therein are modeled on the cover sheet and instructions used by SEFs in conjunction with their analogous filings with the CFTC.[135]

The same cover sheet and instructions would be used for a new rule, rule amendment, or new product filing, with the SBSEF checking the appropriate box to indicate which of these types the filing represents. The SBSEF would also be required to check boxes to indicate whether the submission was seeking approval by the Commission or whether it was being filed as a certification by the SBSEF; and to identify the specific provision in the Commission's rules pursuant to which the filing was being submitted. The submission cover sheet also includes a box that the SBSEF would check if it intends to submit a request for a joint interpretation from the Commission and the CFTC regarding whether the product is a swap, an SBS, or mixed swap pursuant to SEA Rule 3a68–2.[136] Finally, the cover sheet includes a check box by which an SBSEF can indicate that it is requesting confidential treatment of materials in the submission.

The cover sheet divides the rule and rule amendment filings into two categories: one for general rules of the SBSEF and the other for rules relating to the terms and conditions of a product. Additional boxes would need to be checked if a filing under the terms-and-conditions category concerned specifically a determination by the SBSEF that a particular SBS was now to be considered ''made available to trade'' (or ''MAT''); [137] or if the filing concerned the delisting of an SBS with no open interest.[138] The cover sheet would need to be used in conjunction with the weekly notifications that SBSEFs would be required to file pursuant to Rule 807(d) for certain changes that do not need to be approved or certified, as discussed above.

Paragraph (a) of the submission cover sheet instructions provides that a properly completed submission cover sheet must accompany all rule and product submissions filed electronically with the Commission by an SBSEF using the Electronic Form Filing System (EFFS).[139] Per paragraph (a), a properly completed submission cover sheet would include: (1) the name and platform ID of the SBSEF; [140] (2) the date of the filing; (3) an indication as to whether the filing is a new rule, rule amendment, or new product; (4) for rule filings, the rule number(s) being adopted or, in the case of rule amendments, the number of the rule(s) being modified; and (4) for rule or rule amendment filings, a description of the new rule or rule amendment, including a discussion of its expected impact on the SBSEF, its members, and the overall market. The instructions state that the narrative should describe the substance of the submission with enough specificity to characterize all material aspects of the filing.

Paragraph (b) of the submission cover sheet instructions states that a submission must comply with all applicable filing requirements for proposed rules, rule amendments, or products, and that the filing of the submission cover sheet does not obviate the SBSEF's responsibility to comply with applicable filing requirements.

Paragraph (c) of the submission cover sheet states that checking the box marked ''confidential treatment requested'' does not obviate the submitter's responsibility to comply with all applicable requirements for requesting confidential treatment under SEA Rule 24b–2 and does not substitute for notice or full compliance with such requirements.

One commenter states that the submission cover sheet and instructions for SBSEF filings should harmonize with those of the CFTC.[141] This commenter states that entities currently registered with the CFTC as SEFs will be able to seamlessly enact the necessary steps for required SEC filings because of their familiarity with the CFTC's filing process. This commenter also states that any identifiers regarded as necessary should be included on the cover sheet.

The Commission agrees that the use of a submission cover sheet that is harmonized with that required for CFTC filings by SEFs is likely to facilitate the filing process for SBSEFs that are also registered as SEFs. For this reason, the proposed submission coversheet is harmonized with the CFTC's, with differences only in the details specific to the rules and processes of the SEC. The Commission contemplates providing for electronic completion (as well as submission) of the cover sheet and attachment of the submissions required by Rules 804, 805, 806, 807, and 809, and intends to advise affected persons regarding its use by public announcement in advance of the effective date of these rules.[142]

For the reasons discussed above, the Commission is adopting 17 CFR 249.2002 as proposed, but is renumbering it as 17 CFR 249.1702 under new subpart R (''Forms for Registration of, and Filings by, Security-Based Swap Execution Facilities''), and is also adopting the submission cover sheet and instructions as proposed with the exception of the proposed Inline

Commission will require all rule and product filings required by Rules 804 through 807 and 816 to be filed in unstructured format through EFFS, rather than in Inline XBRL through EDGAR. *See infra* section XIII.A.

[135] The CFTC cover sheet and instructions, found in appendix D to part 40 of the CFTC's rules, are designed for rule and product filings from a wider range of registered entities than just SEFs, and thus include entries that are omitted from the Commission's proposed adaptation.

[136] Rule 809 provides that a product filing will be stayed or tolled, as applicable, if such a request for a joint interpretation is made by the SBSEF, the SEC, or the CFTC. *See infra* section IV.G.

[137] Rule 809 provides that a product filing will be stayed or tolled, as applicable, if such a request for a joint interpretation is made by the SBSEF, the SEC, or the CFTC. *See infra* section IV.G.

[138] *See supra* note 128.

[139] The Electronic Form Filing System (EFFS) is a secure, web-based system used for filing Forms 19b–4, 19b–7, and SCI. The system also supports pre-filings of certain types of Form 19b–4 filings. EFFS is used for form filing by SROs, including national securities exchanges, national securities associations, clearing agencies, and Systems Compliance Integrity (SCI) entities, including SCI SROs, SCI alternative trading systems, plan processors, and exempt clearing agencies subject to Automation Review Policy. *See https://www.sec.gov/tm/electronic-form-filing-system-resources.*

[140] ''Platform ID'' is a term utilized in Regulation SBSR, 17 CFR 242.900 *et seq.,* and means the unique identification code assigned to a platform on which an SBS is executed. *See* 17 CFR 242.900(w). The term ''platform'' includes an SBSEF. *See* Rule 900(v), 17 CFR 242.900(v). A registered SBSEF is required by Rule 903(a) of Regulation SBSR, 17 CFR 242.903(a), to use as its platform ID an identifier issued by an internationally recognized standards-setting system (''IRSS'') if the IRSS meets enumerated criteria and has therefore been recognized by the Commission pursuant to Rule 903(a). This identification requirement stems from a registered SBSEF's status as a ''participant'' of a registered SBSDR under Rule 900(u), 17 CFR 242.900(u), because the term ''participant'' includes a ''platform,'' as defined in Rule 900(v), 17 CFR 242.900(v), that incurs reporting duties under Rule 901(a), 17 CFR 242.901(a). Currently, the Global Legal Entity Identifier System (''GLEIS'') is the only IRSS that has been recognized by the Commission under Rule 903(a). *See* Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, SEA Release No. 74244 (Feb. 11, 2015), 80 FR 14563, 14631–32 (Mar. 19, 2015) (''Regulation SBSR Adopting Release I''). Therefore, Legal Entity Identifiers (''LEIs'') issued through the GLEIS are currently the only allowable platform IDs that may be used by registered SBSEFs.

[141] *See* Letter from J.T. (May 26, 2022). In section XIII.B, *infra,* the Commission discusses the use of identifiers, such as the LEI.

[142] Below in section XIII.A, the Commission addresses the requirements to use the EDGAR system and Inline XBRL for submissions.

XBRL and EDGAR filing requirements.[143]

F. Rule 808—Availability of Public Information

Proposed Rule 808 is closely modeled on § 40.8 of the CFTC's rules.[144] Proposed Rule 808(a) would provide that certain parts of an application to register as an SBSEF would be made publicly available on the Commission's website, unless confidential treatment is obtained pursuant to SEA Rule 24b–2. Specifically, Proposed Rule 808(a) would make the following parts of a Form SBSEF publicly available: the (i) transmittal letter and first part of the application cover sheet; (ii) Exhibit C; (iii) Exhibit G; (iv) Exhibit L; and (v) Exhibit M.[145]

Paragraph (b) of Proposed Rule 808, adapted from § 40.8(c), would provide that the Commission shall make publicly available on its website, unless confidential treatment is obtained pursuant to SEA Rule 24b–2,[146] an SBSEF's filing of new products pursuant to the self-certification procedures of Rule 804, new products for Commission review and approval pursuant to Rule 805, new rules and rule amendments for Commission review and approval pursuant to Rule 806, and new rules and rule amendments pursuant to the self-certification procedures of Rule 807. Paragraph (c), adapted from § 40.8(d), would provide that the terms and conditions of a product submitted to the Commission pursuant to any of Rules 804 through 807 shall be made publicly available at the time of submission unless confidential treatment is obtained pursuant to SEA Rule 24b–2.

The Commission received one comment on Proposed Rule 808. This commenter states that the Commission should not allow requests for confidential treatment and that these requests are currently abused and result in little information being made available to the public.[147] A blanket prohibition on requesting confidential treatment would not be appropriate, however, because each request for confidential treatment should be addressed on its particular facts and circumstances. Moreover, as the Commission stated in the Proposing Release, ''it is not necessary or appropriate to establish and utilize one set of procedures to handle confidential treatment requests made by SBSEFs while utilizing a different set of procedures for other persons who request confidential treatment from the Commission under the SEA.'' [148] The Commission anticipates that while SBSEFs may request confidential treatment for their filings pursuant to existing SEA Rule 24–2, the items enumerated in Rule 808 are not of the type that typically would constitute confidential information. Finally, it is appropriate to adopt a rule that is adapted from § 40.8, because Rule 808 will apply to submissions made under Rules 804–807, which are, as discussed above, also based on provisions of the CFTC's rules for SEFs. Therefore, the Commission is adopting Rule 808 as proposed.

G. Rule 809—Staying of Certification and Tolling of Review Period Pending Jurisdictional Determination

Section 718 of the Dodd-Frank Act, entitled ''Determining Status of Novel Derivative Products,'' sets forth a mechanism for addressing a situation in which a person wishes to list or trade a novel derivative product that may have elements of both securities and contracts of sale of a commodity for future delivery (or options on such contracts or options on commodities)—*i.e.,* a situation in which it is unclear whether the product in question is a security under the jurisdiction of the SEC or a future under the jurisdiction of the CFTC. Section 718(a) provides that the SEC or the CFTC may request that the other agency issue a determination as to the classification of that product, and section 718(b) provides that the CFTC and SEC may petition for judicial review of any such determination.[149]

As described in the Proposing Release, Proposed Rule 809 is loosely modeled on § 40.12, but modified to focus on the products and jurisdictional issues that are more likely to be relevant to SBSEFs.[150] Paragraph (a) of Proposed Rule 809, modeled on § 40.12(b), would provide that a product certification made by an SBSEF pursuant to Rule 804 shall be stayed, or the review period for a product that has been submitted for Commission approval by an SBSEF pursuant to Rule 805 shall be tolled, upon request for a joint interpretation of whether the product is a swap, SBS, or mixed swap made pursuant to Rule 3a68–2 under the SEA [151] by the SBSEF, the SEC, or the CFTC. Paragraph (b) is modeled on § 40.12(b)(1) and would require the SEC to provide the SBSEF with a written notice of the stay or tolling pending issuance of a joint interpretation by the SEC and CFTC. Paragraph (c) is modeled on § 40.12(b)(2) and would provide that the stay shall be withdrawn, or the approval review period shall resume, if a joint interpretation finding that the SEC has jurisdiction over the product is issued.

The Commission did not receive any comments on Proposed Rule 809. While section 718 of the Dodd-Frank Act addresses situations where it is unclear whether a product is a security or a future, the SEC and the CFTC have adopted separate rules—SEA Rule 3a68–2 and 17 CFR 1.8, respectively—governing requests for interpretation regarding a product that might be an SBS, a swap, or a mixed swap. It is appropriate for Regulation SE to include a mechanism for the staying or tolling of a filing by an SBSEF when it is unclear whether the product is a swap or an SBS, and it would be appropriate for Rule 809 to reflect the process set forth in SEA Rule 3a68–2. Tailoring, as proposed, the scope of Rule 809, in relation to § 40.12, appropriately addresses the jurisdictional questions that are likely to arise from a product listed by an SBSEF.[152] Therefore, the Commission is adopting Rule 809 as proposed.

[143] *See id.*

[144] Section 40.8 of the CFTC's rules is entitled ''Availability of public information.''

[145] Section 40.8(a) does not provide a list of the exhibits required to be made public, but rather refers to a general description of items required to be made public. For purposes of clarity and ease of reference, however, the Commission proposed to list the specific corresponding exhibits in Rule 808 that would be made publicly available. Exhibit C would require a narrative that sets forth the fitness standards for the governing board and its composition; Exhibit G would require a copy of the corporate governance documents for the applicant; Exhibit L would require a narrative and any other form of documentation that describes the manner in which the applicant is able to comply with each core principle; and Exhibit M would require a copy of the applicant's proposed rules and any technical manuals, guides, or other instructions for members.

[146] An application for confidential treatment shall contain, among other things, a statement of the grounds of objection referring to, and containing an analysis of, the applicable exemption(s) from disclosure under the Freedom of Information Act, and a justification of the period of time for which confidential treatment is sought. *See* 17 CFR 240.24b–2(b)(2)(ii).

[147] *See* Keeney Letter, *supra* note 95.

[148] Proposing Release, *supra* note 1, 87 FR at 28880 n.50.

[149] Section 40.12 of the CFTC's rules is entitled ''Staying of certification and tolling of review period pending jurisdictional determination'' and reflects the process described in section 718 of the Dodd-Frank Act. Section 40.12 provides that if a SEF (among other registered entities) certifies, submits for approval, or otherwise files a proposal to list or trade such a novel derivative product, the product certification shall be stayed or the approval review period shall be tolled until a final determination order is issued under section 718.

[150] As noted in the Proposing Release, an SBSEF might seek to list a product where it is unclear whether the product is a swap or an SBS. *See* Proposing Release, *supra* note 1, 87 FR at 28890.

[151] 17 CFR 240.3a68–2.

[152] The objective of Rule 809 is consistent with the objective of § 40.12: to provide for a stay or tolling of a product filing where it is unclear whether the product is under the jurisdiction of the SEC or the CFTC.

H. Rule 810—Product Filings by SBSEFs That Are Not Yet Registered and by Dormant SBSEFs

Proposed Rule 810 is closely modeled on § 37.4 of the CFTC's rules and would provide a process whereby a not-yet-registered SBSEF or a dormant SBSEF could submit product filings. Specifically, Proposed Rule 810 would provide that an applicant for registration as an SBSEF may submit an SBS's terms and conditions prior to listing the product as part of its application for registration and that any such terms and conditions or rules submitted as part of an SBSEF's application for registration shall be considered for approval by the Commission at the time the Commission issues the SBSEF's order of registration. Similarly, any SBS terms and conditions or rules submitted as part of an application to reinstate the registration of a dormant SBSEF would be considered for approval by the Commission at the time the Commission approves the reinstatement of registration of the dormant SBSEF.

The Commission did not receive any comments on Proposed Rule 810 and is adopting Rule 810 as proposed, for the reasons stated in the Proposing Release.

V. Miscellaneous Requirements

Sections 37.5 to 37.12 of the CFTC's rules impose miscellaneous requirements on SEFs, and the Commission proposed to impose similar requirements on SBSEFs in Rules 811 to 817 of Regulation SE.

A. Rule 811—Information Relating to SBSEF Compliance

1. Harmonization With § 37.5

Paragraphs (a) to (c) of Proposed Rule 811 are modeled on § 37.5, which is entitled ''Information regarding swap execution facility compliance.'' Paragraph (a) of Proposed Rule 811 is closely modeled on § 37.5(a) and would provide that, upon the Commission's request, an SBSEF shall file with the Commission information related to its business as an SBSEF in the form and manner, and within the timeframe, specified by the Commission. Paragraph (b) is closely modeled on § 37.5(b) and would provide that, upon the Commission's request, an SBSEF shall file with the Commission a written demonstration, containing supporting data, information, and documents, that it is in compliance with one or more Core Principles or with its other obligations under the SEA or the Commission's rules thereunder, as the Commission specifies in its request. Also, under Proposed Rule 811(b), the SBSEF would be required to file such written demonstration in the form and manner, and within the timeframe, specified by the Commission.

Paragraph (c)(1) of Proposed Rule 811 is closely modeled on § 37.5(c)(1) and would provide that an SBSEF shall file with the Commission a notification of any transaction involving the direct or indirect transfer of 50% or more of the equity interest in the SBSEF. Also, under Proposed Rule 811(c)(1), the Commission could, upon receiving such a notification, request supporting documentation of the transaction. Paragraph (c)(2) is closely modeled on § 37.5(c)(2) and would provide that the equity interest transfer notice shall be filed with the Commission in a form and manner specified by the Commission at the earliest possible time, but in no event later than the open of business 10 business days following the date upon which the SBSEF enters into a firm obligation to transfer the equity Interest. Paragraph (c)(3) is closely modeled on § 37.5(c)(3) and would provide that, notwithstanding the foregoing, if any aspect of an equity interest transfer requires an SBSEF to file a rule, the SBSEF shall comply with the applicable rule filing requirements of Rule 806 or Rule 807.

Paragraph (c)(4) of Proposed Rule 811 is closely modeled on § 37.5(c)(4) and would provide that, upon a transfer of an equity interest of 50% or more in an SBSEF, the SBSEF shall file with the Commission, in a form and manner specified by the Commission, a certification that the SBSEF meets all of the requirements of section 3D of the SEA and the Commission rules thereunder, no later than two business days following the date on which the equity interest of 50% or more was acquired.

The Commission did not receive any comments on Rule 811(a) to (c). It is appropriate for Regulation SE to include provisions requiring an SBSEF to provide the Commission with the information described above. Information about an SBSEF's business as an SBSEF and transfers of 50% or more of its equity would promote understanding of its operations and ownership, which should facilitate oversight of the SBSEF. Therefore, the Commission is clarifying, as proposed, that, similar to the CFTC, it may request such information from an SBSEF. In addition, as anticipated in the Proposing Release, should questions about compliance arise, the Commission should be able to obtain from an SBSEF supporting data, information, and documents that the SBSEF is in compliance with relevant obligations under the SEA, and the rule provides for this. By modeling its proposed requirements on existing CFTC rules, the Commission seeks to obtain comparable regulatory benefits while imposing only marginal additional burdens on dually registered entities that are already subject to similar obligations.

The Commission is changing the phrase ''a transfer of an equity interest of 50 percent or more in a security-based swap execution facility'' in paragraph (c)(4) to ''an equity transfer described in paragraph (c)(1) of this section'' because the text of paragraph (c)(4) should be modified to parallel the text of paragraphs (c)(2) and (c)(3). For these reasons, the Commission is adopting Rule 811(a) to (c) as proposed, with the change described to paragraph (c)(4).

2. Harmonization With § 1.60

Paragraph (d) of Proposed Rule 811 is not modeled on § 37.5, but rather on § 1.60 of the CFTC's rules, which is entitled ''Pending legal proceedings.'' Because it is conceptually similar to § 37.5 in that it would require another type of information relevant to the regulatory oversight of a SEF, the Commission proposed to adapt this provision into Rule 811.[153]

Paragraph (d)(1) of Proposed Rule 811 is closely modeled on § 1.60(a) and would provide that an SBSEF shall submit to the Commission a copy of the complaint, any dispositive or partially dispositive decision, any notice of appeal filed concerning such decision, and such further documents as the Commission may thereafter request filed in any material legal proceeding to which the SBSEF is a party or to which its property or assets are subject. Paragraph (d)(2) is closely modeled on § 1.60(c) and would provide that an SBSEF shall submit to the Commission a copy of the complaint, any dispositive or partially dispositive decision, any notice of appeal filed concerning such decision, and such further documents as the Commission may thereafter request filed in any material legal proceeding instituted against any officer, director, or other official of the SBSEF from conduct in such person's capacity as an official of the SBSEF and alleging violations of the SEA or any rule, regulation, or order thereunder; the

[153] Section 1.60 requires a SEF (among other entities) to provide the CFTC with copies of any legal proceeding to which it is a party, or to which its property or assets is subject. Paragraph (d) of Rule 811 would adapt paragraphs (a), (c), and (e) of § 1.60 to apply to SBSEFs. Paragraphs (b) and (d) of § 1.60 apply to futures commission merchants and do not appear germane to SEFs or SBSEFs. Therefore, the Commission is not adapting these paragraphs into Rule 811(d).

constitution, bylaws, or rules of the SBSEF; or the applicable provisions of state law relating to the duties of officers, directors, or other officials of business organizations.

Paragraph (d)(3) of Proposed Rule 811 is loosely modeled on § 1.60(e) and would provide that documents required by Rule 811(d) to be submitted to the Commission shall be submitted electronically in a form and manner specified by the Commission within 10 days after the initiation of the legal proceedings to which they relate, after the date of issuance, or after receipt by the SBSEF of the notice of appeal, as the case may be.

Paragraph (d)(4) of Proposed Rule 811 is closely modeled on the final two sentences of § 1.60(e) and would provide that, for purposes of Rule 811(d), a ''material legal proceeding'' includes but is not limited to actions involving alleged violations of the SEA or the Commission rules thereunder, and that a legal proceeding is not ''material'' for the purposes of Rule 811 if the proceeding is not in a Federal or State court or if the Commission is a party.

The Commission did not receive any comments on Proposed Rule 811(d) and is adopting Rule 811(d) as proposed, for the reasons stated in the Proposing Release.

B. Rule 812—Enforceability

Proposed Rule 812 generally is modeled on § 37.6. Paragraph (a) of Rule 812, which is based on § 37.6(a)(1), and would provide that a transaction on or pursuant to the rules of an SBSEF cannot be invalidated as a result of a violation by the SBSEF of section 3D of the SEA or the Commission's rules thereunder.[154] An SBS executed on an SBSEF should not be invalidated by the SBSEF's violation of any of the securities laws, given that swaps executed on SEFs are afforded the same legal certainty under § 37.6(a).

Paragraph (b) of Proposed Rule 812 is modeled on the first sentence of § 37.6(b), which requires a SEF to provide each counterparty to a transaction that is entered into on or pursuant to the rules of the SEF with a written record of all of the terms of the transaction which shall legally supersede any previous agreement.[155] Proposed Rule 812(b) differs, however, in that it would provide that an SBSEF shall, as soon as technologically practicable after the time of execution of a transaction entered into on or pursuant to the rules of the facility, provide a written record to each counterparty of all of the terms of the transaction *that were agreed to on the facility,* which shall legally supersede any previous agreement regarding such terms.

One commenter agrees that Rule 812 should be modeled on § 37.6 and states that, like § 37.6, Rule 812 should require the SBSEF to confirm ''all the terms of the transaction,'' rather than being limited, as proposed, to ''all of the terms that were agreed to on the facility.'' [156] This commenter states that Rule 812 as proposed may cause issues with clearing SBS because SBS clearing agencies will likely require SBSEFs to represent that any transaction executed on the SBSEF is final and irrevocable (as CFTC-registered clearing agencies require for SEFs). Since Rule 812 only requires an SBSEF confirmation to be limited in scope to ''all of the terms that were agreed to on the facility,'' this commenter states the SBSEF would not necessarily know any terms agreed upon by counterparties outside the SBSEF, and therefore could not represent to the clearing agency that the transaction is ''final and irrevocable,'' which would be a roadblock for straight-through processing and full adoption of clearing for SBS.[157] This commenter states that, to address this issue, SBSEFs should have the ability to prohibit trading relationship documentation or enablements for cleared SBS transactions executed on an SBSEF, which are prohibited for CFTC-registered SEFs in accordance with the CFTC's 2013 Staff Impartial Access Guidance,[158] and that Rule 812 should require that the SBSEF confirm ''all of the terms of the transaction.'' [159]

Another commenter, however, states that it is not practical or cost effective for an SBSEF to collect, review, and store each free-standing agreement underlying an SBS transaction entered into between numerous counterparties.[160] This commenter states that the CFTC has not required SEFs to comply with the requirements of 37.6(b) since 2014, when staff no-action relief was issued due to the impracticability of compliance.[161] Thus, this commenter supports the proposal in Rule 812 to require an SBSEF to provide a written record of all the terms of the transaction that were agreed to on an SBSEF, which shall legally supersede any previous agreement regarding such terms.

It is appropriate to require an SBSEF to inform counterparties as soon as technologically practicable after they have effected a trade on or pursuant to the rules of the SBSEF, and to provide them with a written record of the terms to which they have agreed to on the SBSEF. With respect to uncleared SBS, it would be impractical for an SBSEF to be aware of, or responsible for, confirming terms of an SBS that were agreed to off the SBSEF's trading platform, such as terms contained in a credit support agreement between the two counterparties to an uncleared SBS. Thus, the Commission is not including in Rule 812 a requirement that the SBSEF provide a written record of any such terms.[162]

[154] The Commission is not adapting into Rule 812 paragraphs (a)(2) and (a)(3) of § 37.6, which provide that a transaction on a SEF may not be invalidated by CFTC proceedings that alter or supplement SEF rules, terms, and conditions, because the Commission has no authority in the SEA analogous to the CFTC's authority under section 8a(7) of the CEA to conduct such proceedings. *See supra* note 93 and accompanying text. *See also* Proposing Release, *supra* note 1, 87 FR at 28893 n.90.

[155] Furthermore, under § 37.6(b), the confirmation of all terms of the transaction must take place at the same time as execution, provided that specific customer identifiers for accounts included in bunched orders need not be included in confirmations if certain conditions are met.

[156] *See* Bloomberg Letter, *supra* note 18, at 4, 12–13.

[157] *See infra* section VI.F (discussing, among other things, straight-through processing).

[158] *See* CFTC Division of Clearing and Risk, Division of Market Oversight, and Division of Swap Dealer and Intermediary Oversight, Guidance on Application of Certain Commission Regulations to Swap Execution Facilities (Nov. 14, 2013), *available at https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/dmostaffguidance111413.pdf.*

[159] *See* Bloomberg Letter, *supra* note 18, at 4, 12–13.

[160] *See* ICE Letter, *supra* note 18, at 5.

[161] *See id.* (citing CFTC Division of Market Oversight, Staff No-Action Position Regarding SEF Confirmations and Recordkeeping Requirements under Certain Provisions Included in Regulations 37.6(b) and 45.2, Letter No. 14–108 (Aug. 18, 2014), *available at https://www.cftc.gov/csl/14-108/download*).

[162] Section 37.6(b) requires a SEF to provide a written record of ''all of the terms of the transaction which shall legally supersede any previous agreement and serve as a confirmation of the transaction.'' In the adopting release for the final part 37 rules, the CFTC explained that, with respect to uncleared swaps, a SEF could satisfy this requirement by incorporating by reference terms set forth in agreements previously negotiated by the counterparties, provided that such agreements had been submitted to the SEF ahead of execution. *See* 2013 CFTC Final SEF Rules Release, *supra* note 9, 78 FR at 33491 n.195. The CFTC staff has taken a no-action position with respect to the confirmation requirements for uncleared swaps in response to assertions by industry participants that it is impracticable for a SEF to satisfy the written confirmation requirements by incorporating by reference terms from previously negotiated agreements between the counterparties if the SEF must receive copies of such agreements prior to execution. *See* CFTC No Action Letter 17–17 (Mar. 24, 2017) (issued by the CFTC's Division of Market Oversight). In the no-action letter, the CFTC staff stated that it was continuing to assess confirmation requirements, including establishing a permanent solution to the issues raised. Given these circumstances, it is appropriate to require an SBSEF

Continued

In response to the comment that Proposed Rule 812 may cause issues with clearing because the rule requires SBSEFs to confirm only the terms of an SBS transaction ''that were agreed to on the facility,'' additional terms in trading relationship documents or enablements are unlikely to hinder the acceptance by a clearing agency of SBS that are intended to be cleared or might inhibit impartial access to trading of cleared SBS on an SBSEF. First, a cleared SBS would be a standardized product, the complete terms of which would be known to the SBSEF, agreed to by the counterparties trading that SBS on the SBSEF, and capable of being confirmed to the parties in writing by the SBSEF, as well as represented to the clearing agency by the SBSEF as ''final and irrevocable.'' Thus, all the terms of the cleared transaction are confirmed when executed on the SBSEF. And second, Proposed Rule 819(c) would require that an SBSEF provide impartial access to its market and market services,[163] and it would not be consistent with an SBSEF's impartial access obligations to permit members to incorporate additional terms for a cleared SBS in trading relationship documentation, enablement documentation, or elsewhere, or to otherwise permit improper discrimination with respect to trading in cleared SBS against SBSEF members who have a direct or indirect clearing relationship with the clearing agency for a given SBS.

Therefore, for the foregoing reasons, the Commission is adopting Rule 812 as proposed.

C. Rule 813—Prohibited Use of Data Collected for Regulatory Purposes

Proposed Rule 813 is modeled on § 37.7, and would provide that an SBSEF shall not use, for business or marketing purposes, any proprietary data or personal information that it collects or receives from or on behalf of any person for the purpose of fulfilling its regulatory obligations. An SBSEF would be able to use such data or information for business or marketing purposes if the person consents, but the SBSEF would not be able to condition access to the SBSEF on the person's providing such consent. Finally, Proposed Rule 813 would provide that an SBSEF, where necessary for regulatory purposes, may share such data or information with another SBSEF or a national securities exchange.

The Commission did not receive any comments on Proposed Rule 813 and is adopting Rule 813 as proposed, for the reasons stated in the Proposing Release.

D. Rule 814—Entity Operating Both a National Securities Exchange and an SBSEF

Proposed Rule 814 is modeled on § 37.8. Paragraph (a) of Proposed Rule 814 would provide that an entity intending to operate both a national securities exchange and an SBSEF shall separately register the two facilities pursuant to section 6 of the SEA and Rule 803 under the SEA. Paragraph (b), although consistent with § 37.8(b), draws its specific language from section 3D(c) of the SEA,[164] which contemplates that a single entity may operate both a national securities exchange and an SBSEF. Paragraph (b) of Proposed Rule 814 would provide that a national securities exchange shall, to the extent that the exchange also operates an SBSEF and uses the same electronic trade execution system for listing and executing trades of SBS on or through the exchange and the facility, identify whether electronic trading of SBS is taking place on or through the national securities exchange or the SBSEF.

Two commenters state that the key requirements applicable to SBSEFs should also apply to SBS exchanges to create a level regulatory environment and avoid encouraging regulatory arbitrage.[165] One of the commenters specifically identifies trading protocols, impartial access, limits on pre-execution communication, and straight-through processing as important aspects of SBSEF regulation that should also apply to SBS exchanges.[166] Another commenter states that more detailed rules are needed to address the separation of SBSEFs from SBS exchanges in order to avoid the aggregation of power in the financial markets and to clearly separate the roles of an entity operating both an SBSEF and an SBS exchange.[167]

The comment suggesting that requirements for SBSEFs should be applied to SBS exchanges is outside the scope of this rulemaking, which is designed to set forth requirements for SBSEFs, not exchanges.

Additionally, more detailed rules are not necessary to separate the roles of an entity operating both an SBSEF and an SBS exchange. Each entity would be required to make rule or new product submissions to the Commission under a separate set of rules—Rules 804 to 807 for SBSEFs, and Rule 19b–4 for national securities exchanges—making it clear which rules will apply on which platform. Also, Rule 814(b)—which requires that a national securities exchange that also operates an SBSEF identify the platform on which an SBS transaction occurs—will provide further clarity to the market about the roles of an entity operating both an SBSEF and an SBS exchange. Further, the ability of an entity to operate both an SBSEF and an SBS exchange is unlikely to lead to the aggregation of power in the financial markets, because allowing for a variety of SBS trading platforms and ownership models should promote competition in the market for SBS trading.

It is appropriate for proposed Regulation SE to include a rule that clarifies the registration status of an entity that operates both an exchange and an SBSEF, and that broadly parallels § 37.8. Therefore, for the reasons discussed above, the Commission is adopting Rule 814 as proposed.

E. Rule 815—Methods of Execution for Required and Permitted Transactions

1. Rule 815(a)

(a) Background

The Dodd-Frank Act provides that if the Commission makes a mandatory clearing determination regarding an SBS, such SBS becomes subject to mandatory trade execution if at least one exchange or SBSEF makes the product ''available to trade.'' [168] The Dodd-Frank Act does not require, however, that all SBS be subject to mandatory clearing or mandatory trade execution, and it does not impose any execution requirements for transactions in an SBS unless the SBS is subject to mandatory clearing *and* it has been made available to trade. Section 37.9 of the CFTC's rules addresses these issues for SEFs using the concepts of ''Required Transactions'' and ''Permitted Transactions,'' and the Commission proposed Rule 815 of Regulation SE to adapt § 37.9 for

to provide counterparties with a written record of only those terms that are agreed to on the SBSEF. Additionally, the CFTC recently issued a notice of proposed rulemaking to adopt a rule codifying the no-action position, which would enable SEFs to incorporate such terms by reference in an uncleared swap confirmation without being required to obtain the underlying, previously negotiated agreements. *See* CFTC, Swap Confirmation Requirements for Swap Execution Facilities (Notice of Proposed Rulemaking), 88 FR 58145, 58147 (Aug. 25, 2023). The CFTC has not yet taken action on this proposal.

[163] *See infra* section VI.B.3 (discussing the impartial access requirements of Rule 819(c)).

[164] 15 U.S.C. 78c–4(c).

[165] *See* Citadel Letter, *supra* note 18, at 17; MFA Letter, *supra* note 18, at 14.

[166] *See* Citadel Letter, *supra* note 18, at 17.

[167] *See* Keeney Letter, *supra* note 95.

[168] *See* 15 U.S.C. 78c–3(a)(1) (mandatory clearing for SBS) and 78c–3(h) (trade execution for SBS). *See also infra* section V.F.3 (discussing the six factors that an SBSEF shall consider, as appropriate, before making an SBS ''available to trade'').

SBSEFs. Rule 815(a)(1) defines ''Required Transaction'' as ''any transaction involving a security-based swap that is subject to the trade execution requirement in section 3C(h) of the Act.''

(b) Methods of Execution for Required Transactions

(i) Background

Proposed Rule 815(a)(2) would require that, except for block trades or the exceptions described in paragraph (d) or (e) of the rule and discussed below,[169] the mandatory execution methods for a Required Transaction would be either: (a) an order book or (b) an RFQ system in conjunction with an order book, and the rule permits the SBSEF to use any means of interstate commerce for providing these execution methods.[170]

Proposed Rule 815(a)(3) would define an RFQ system as ''a trading system or platform in which a market participant transmits a request for a quote to buy or sell a specific instrument to no less than three market participants in the trading system or platform, to which all such market participants may respond'' and would specify other requirements for an RFQ system to be recognized as such under the rule. The three market participants to which the RFQ is addressed could not be affiliates of or controlled by the requester and cannot be affiliates of or controlled by each other. The proposed rule would also provide that an SBSEF that offers an RFQ system in connection with a Required Transaction must have the following functionalities: (i) at the same time that the requester receives the first responsive bid or offer, the SBSEF must communicate to the requester any firm bid or offer pertaining to the same SBS resting on any of the SBSEF's order books; (ii) the SBSEF must provide the requester with the ability to execute against those firm resting bids or offers along with any responsive orders; and (iii) the SBSEF must ensure that its trading protocols provide each of its members with equal priority in receiving requests for quotes and in transmitting and displaying for execution responsive orders. The requirements of Proposed Rule 815(a)(3) are referred to as the ''RFQ-to-3 requirement.''

(ii) Comments on the RFQ-to-3 Requirement

The Commission received comments on the proposed RFQ-to-3 requirement in Proposed Rule 815(a)(3).[171] One commenter suggests that the Commission expand the permitted modes of SBS execution for swaps mandated for trading on SBSEFs in order to provide for a less prescriptive, more principles-based approach that balances transparency, competition, and liquidity through a flexible set of rules and states that any means of execution that provides sufficient pre-trade price transparency and preserves competition should be available.[172] This commenter, while supporting general harmonization between the Commission's and the CFTC's rules on trading protocols and methods of execution, argues that the Commission's rule also needs to balance harmonization with the need to reflect the unique and sensitive liquidity conditions that exist in SBS markets.

Stating that an RFQ-to-3 requirement for Required Transactions that are SBSs means something completely different than for swaps, this commenter urges the Commission to consider a lower RFQ threshold given the nature of the SBS market. This commenter states that, in some cases, for an asset manager to seek three quotes would effectively require the asset manager to contact many of the primary price makers in the SBS market, as there simply are not the same number of liquidity providers, particularly for less liquid, more thinly traded SBSs, as the number of participants, the trading volume, and the depth of market liquidity are very different in the SBS market. The commenter suggests that requesting quotes from two participants, for example, would allow the asset manager to retain some control over the information disseminated about its interest to the market while preserving the statute's ''multiple to multiple'' definition requirement.[173]

Another commenter also urges the Commission to consider an alternative approach to the proposed RFQ-to-3 requirement, and to provide a ''phased-in compliance'' with the required methods of execution, whereby a MAT SBS product may be executed on an SBSEF via any method of execution until such time as it is determined through notice and comment that an appropriate level of liquidity exists to enable an order book or RFQ-to-3 system.[174] This commenter states that, considering the lack of liquidity in SBS products, pre-trade transparency via the proposed RFQ-to-3 requirement could negatively impact liquidity provision for end-users. The commenter states that, if clients are required to ''show their hand to three liquidity providers,'' it may lead to information leakage and an inability to hedge the clients' risks through the SBS markets.[175] The commenter asserts that this is particularly so given that there are a relatively small number of active dealers for many SBS products, stating that, based on DTCC[176] data on credit SBS for the top 700 issuers, there are on average 2.7 dealers, and 400 of the top 700 issuers have fewer than three active dealers per month.[177]

This commenter further argues that an RFQ-to-3 requirement would be problematic for SBS equities, where the current execution processes are very different from their swaps counterpart. The commenter states that clients in SBSs typically ask their preferred dealer to execute shares in SBS at market price (or some other pricing structure), the dealer then purchases the shares directly for hedging purposes, and the dealer then executes the swap at the end of the day with the client at an average market price.[178] The commenter states that, in this case, the dealer's interaction is more akin to a broker than a dealer counterparty, and that these trading practices would not be possible on an RFQ-to-3 or order book system. In addition, the commenter states that it has ''compared the credit swaps activity that occurred on-venue back in 2012 before the CFTC trade execution requirement kicked in, with the credit SBS activity that occurs on-venue today'' and asserts that the results suggest ''that the swaps market was much more ready for the implementation of the trade execution requirement than the SBS market is today.''[179] This commenter states that, ''[a]bsent a phased-in implementation approach, the SBS market could suffer from significant disruptions.''[180]

While the Commission acknowledges that there are differences between the liquidity in the SBS market and the

[169] *See infra* section V.E.3.

[170] Proposed Rule 815(a)(2)(ii) would provide that any means of interstate commerce includes, but is not limited to, the mail, internet, email, and telephone, provided that the chosen execution method satisfies the requirements for order books in 17 CFR 242.800(x) or in paragraph (a)(3) of Rule 815.

[171] *See* ISDA–SIFMA Letter, *supra* note 18, at 5–6; SIFMA AMG Letter, *supra* note 18, at 8–9.

[172] *See* SIFMA AMG Letter, *supra* note 18, at 8.

[173] *See id.* at 9.

[174] *See* ISDA–SIFMA Letter, *supra* note 18, at 5–6.

[175] *Id.* at 6.

[176] ''DTCC'' refers to the Depository Trust and Clearing Corporation.

[177] *See* ISDA–SIFMA Letter, *supra* note 18, at 6.

[178] The commenter also stipulates that at the onset of the relationship, clients will negotiate a grid with dealers where certain short/long benchmarks and spreads are agreed for equity issuers on a jurisdictional or other basis. *See* ISDA–SIFMA Letter, *supra* note 18, at 6.

[179] *Id.*

[180] *Id.*

swaps market, the process required before the execution requirement would apply to an SBS will reduce the risk of ''substantial disruptions.'' The required methods of execution would be applied to an SBS only to the extent that it is subject to the clearing mandate *and* has been ''made available to trade.'' Before making an SBS subject to the clearing mandate, the Commission would be able to take into account a number of factors, including the existence of significant outstanding notional exposures, trading liquidity, and the adequacy of pricing data.[181]

Further, to make an SBS ''available to trade,'' an SBSEF would, under Proposed Rule 816(a)(1),[182] have to make a filing with the Commission under Rule 806 or Rule 807—both of which would allow the Commission to find that a filing was not consistent with the requirements of the SEA or Regulation SE.[183] Moreover, the SBSEF's filing would, under Proposed Rule 816(b), have to address, as appropriate, a number of relevant factors, including whether there are ready and willing buyers and sellers; the frequency or size of transactions; the trading volume; the number and types of market participants; the bid/ask spread; and the usual number of resting firm or indicative bids and offers. Similarly, a national securities exchange that wished to make an SBS ''available to trade'' would have to file a rule change under Rule 19b–4,[184] and that proposed rule change would be subject to Commission review for compliance with the requirements of the SEA, which requires that the rules of a national securities exchange, among other things, promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the SEA.[185] Thus, before an SBS becomes subject to the trade execution requirement, the Commission would have had multiple opportunities to consider the trading characteristics of that SBS.

Additionally, most, if not all, SBSEFs are likely to be dually registered with the CFTC as SEFs, and that most, if not all, market participants in the SBS market will be participants in the swaps market. The Commission remains concerned that different or additive requirements—particularly for the key concept of a ''Required Transaction''—could introduce complexity and confusion if one set of trading protocols applied to Required Transactions for swaps but different protocols—different from ones that have been understood and utilized for many years—applied to Required Transactions for SBS transactions.

Thus, it is not appropriate to modify the requirement that a qualifying RFQ system under Proposed Rule 815(c) transmit a request for a quote to no fewer than three market participants in the trading system or platform. The question whether sufficient liquidity exists in the market for a given SBS to trade RFQ-to-3 can be addressed when the SBS is subject to the clearing mandate and when a national securities exchange or SBSEF seeks to make that SBS available to trade. Until that time, SBSs would be Permitted Transactions on SBSEFs and thus could be traded using other methods of execution, thus avoiding any potential disruptions to liquidity in the SBS markets.

(iii) RFQ Functionalities

The Commission also received two comment letters on the functionalities required for RFQ systems under Proposed Rule 815(a)(3).[186] Both commenters suggest that the proposed rule be amended to require an SBSEF to communicate any firm bid or offer pertaining to the same instrument resting on any of the SBSEF's trading systems or protocols, not just firm bids or offers on the SBSEF's order book.[187] One of the commenters argues that, in practice, order books continue to be infrequently used on SEFs that offer RFQ systems and that, therefore, the same interaction requirement on SEFs has had little impact.[188] The commenter cites, for example, that ''request for stream'' trading protocols, which allow liquidity providers to stream firm prices, are not required to be communicated to clients sending an RFQ.

This commenter also suggests that the proposed rule should be modified to ensure that the RFQ requester has the ability to execute against all of the prices provided in connection with an RFQ on the same screen. The commenter argues that this will prevent an SBSEF from requiring the RFQ requester to click through multiple screens in order to execute against firm prices, which, the commenter argues, serves to disadvantage those prices versus other prices provided in response to an RFQ.[189] Finally, the commenter recommends that the requirements of Rule 815(a)(3) be modified to apply to all SBS transactions on an SBSEF, not solely Required Transactions, as they argued that this will help ensure that market participants transacting on SBSEFs are always provided with the necessary transparency to achieve the most favorable execution possible.[190]

The other commenter also urges the Commission to modify the requirement to ensure that the SBSEF communicates to the requester any firm prices available on the SBSEF, in addition to resting firm bids or quotes on the SBSEFs order book(s), and that they make this functionality available for Permitted Transactions as well.[191] In the commenter's view, this approach is necessary in order to ensure the availability of quotes for SBS transactions that will be essential to maintaining liquidity and promoting open and equitable participation in the markets.

As previously noted, given that most if not all SBSEFs will be dually registered as SEFs, there is a public interest in harmonizing its requirements for trading protocols with those of the CFTC.[192] The commenters' suggestions to apply the proposed interaction requirement to all trading systems and protocols on the SBSEF would be a deviation from the CFTC's requirements for SEFs that would likely introduce operational and compliance challenges created by having different standards. This would undercut the Commission's goal of minimizing operational and compliance burdens by seeking to harmonize requirements between SEFs and SBSEFs. For instance, the commenters' suggestions to apply the order interaction requirement to all transactions on the SBSEF, not only Required Transactions, or to require that firm interest outside the SBSEF's order

[181] *See* SEA section 3C(b)(4)(i), 15 U.S.C. 78c–3(b)(4)(i). *See also* SEA section 3C(b)(4)(ii) through (v), 15 U.S.C. 78c–3(b)(4)(ii) through (v) (discussing other factors that the Commission would be required to take into account when making a mandatory clearing determination).

[182] *See infra* section V.F.2.

[183] *See supra* sections IV.A and B.

[184] 17 CFR 240.19b–4.

[185] *See* Section 6(b)(5) and (8) of the SEA, 15 U.S.C. 78f(b)(5) and (8).

[186] *See* Citadel Letter, *supra* note 18, at 13–14; MFA Letter, *supra* note 18, at 8.

[187] *See* Citadel Letter, *supra* note 18, at 13; MFA Letter, *supra* note 18, at 8. Rule 813(a)(3)(i) requires an SBSEF to communicate to the requester any firm bid or offer pertaining to the same instrument resting on any of the SBSEF's order books.

[188] *See* Citadel Letter, *supra* note 18, at 13; *see also* MFA Letter, *supra* note 18, at 8 (also referencing the request-for-stream protocol).

[189] *See* Citadel Letter, *supra* note 18, at 13–14.

[190] *See id.* at 14.

[191] *See* MFA Letter, *supra* note 18, at 8.

[192] *See supra* section I.

book be communicated in response to RFQs, would be a significant deviation from the CFTC's method-of-execution requirements and would have wide ramifications for the SBS markets, particularly in view of the liquidity and information leakage concerns that other commenters expressed elsewhere regarding the less liquid and thinly traded SBS products that may trade on an SBSEF.[193] As a result, applying such requirements to Permitted Transactions, which the CFTC does *not* do, would be likely to have the undesirable effect of discouraging market participants from voluntarily executing Permitted Transactions on SBSEFs, which would lessen market transparency and would not provide greater opportunities for market participants to interact with trading interest not subject to the trade execution requirement. Further, it is not necessary for the Commission to mandate the technical details of how the SBSEF displays responses to RFQs to its members. Rule 819(c), discussed below,[194] requires SBSEFs to provide all ECPs and independent software vendors with impartial access market and market services, and this requirement is sufficient to address a situation in which an SBSEF designed its RFQ responses to systematically disadvantage certain market participants or types of market participants.

(c) Block-Trade Exception

(i) General Treatment of Block Trades

Under both the CEA and SEA, Core Principle 2 requires a SEF/SBSEF to specify trading procedures to be used in entering and executing orders on the facility, including block trades.[195] The CFTC implemented this provision by excepting block trades from the required execution methods in § 37.9(a)(2).[196] Proposed Rule 815(a)(2) would also exclude block trades from the required execution methods using language closely modeled on § 37.9(a)(2). Specifically, Proposed Rule 815(a)(2)(i) would apply required methods of execution to ''[e]ach Required Transaction *that is not a block trade*.'' [197]

Thus, the Commission's proposal to include an exception from the required methods of execution for block trades in Regulation SE is consistent with the approach taken by the CFTC. The purpose of having a block-trade exception to the required methods of execution is to balance the promotion of price competition and all-to-all trading against the potential costs to market participants who wish to trade large orders. Forcing a market participant who seeks liquidity to expose a large order to an order book or to utilize RFQ-to-3 could cause the market to move against the liquidity requester before it can obtain an execution. Under the CFTC's rules, a block trade in a product that is subject to mandatory trade execution may be traded on-SEF using flexible means of execution on the SEF's non-order-book trading system or platform, or away from a SEF's trading system or platform, provided that it is executed pursuant to the SEF's rules and procedures. As noted above, the Commission proposed a similar approach for block trades on SBSEFs, excepting block trades from the required execution methods of Proposed Rule 815(a)(2).

The Commission received a number of comments on its proposal for a block trade exception. Commenters generally support the inclusion of a block trade exception from the Required Transaction requirement in Rule 815(a)(2).[198]

One commenter, supporting the Commission's harmonization with the CFTC's approach to block trades by providing an exception for those trades, states that a flexible block execution regime permits trading of larger-sized transactions in a manner that incentivizes dealers to provide liquidity and capital without creating market distortions.[199] Another commenter asserts that exempting block trades from order book and RFQ execution requirements is critical to the functioning of the SBS markets, particularly to execute large trades without affecting price.[200] This commenter expresses concerns that, absent such an exception, market participants would have difficulty executing, or would be unable to execute, large bona fide trades, since they would be required to do so only through the order book. This would increase the cost of trading and hedging, the commenter says, which could reduce participation in certain markets, resulting in less liquidity and increased volatility.

Another commenter states that the proposed exception for block trades would provide important flexibility for market participants executing SBS transactions of a significantly large size, and that rules that facilitate swap block trades allow market participants, such as regulated funds, to engage in large transactions while mitigating the risks of information leakage and impairment of market liquidity.[201] Another commenter also supports the Commission's proposal to align closely its approach to block trades with the approach taken by the CFTC.[202] This commenter agrees with the Proposing Release's assessment that the block exception to the required methods of execution balances the promotion of price competition and all-to-all trading against the potential costs to the market participants who wish to trade large orders, the importance of which they note is more acute in the SBS market, which is a smaller and less liquid market than the swaps market.

The Commission agrees with these commenters that a block-trade exception is appropriate, not only to maintain harmonization with the CFTC regime for swaps but also to facilitate trading of SBS. This approach, which is consistent with the approach of the CFTC for swaps, will be especially important in the smaller, less liquid SBS markets if and when a clearing determination has been made for one or more SBS. A block-trade exception for SBSs subject to the trade-execution requirement, provided that ''block trade'' is appropriately defined for those SBSs, can help ensure that large trades are not significantly more difficult and costly to execute because of the risks posed by information leakage and the potential for adverse price movement, which could significantly impair liquidity in the markets for those SBSs. Therefore, the Commission is adopting Rule 815(a) as proposed, but is, as discussed immediately below, modifying the proposal with respect to the definition of ''block trade'' in Rule 802.

(ii) Block-Trade Definition for Credit SBS

The Commission also proposed to align the regulatory text defining ''block trade'' in proposed Regulation SE with the CFTC's definition. The proposed definition in Rule 802 of Regulation SE was based on the four-pronged definition found in § 43.2(a), but with one modification. The third prong of the

[193] *See supra* note 175 and accompanying text.

[194] *See infra* section VI.B.3.

[195] 15 U.S.C. 78c–4(d)(2)(C); 7 U.S.C. 7b–3(f)(2)(C).

[196] That rule cross-references § 43.2, which defines the term ''block trade'' for purposes of public dissemination of swap transactions.

[197] *See* Proposed Rule 815(a)(2)(i) (emphasis added).

[198] *See* Bloomberg Letter, *supra* note 18, at 14; Citadel Letter, *supra* note 18, at 9–10, ICI Letter, *supra* note 18, at 10–13; SIFMA AMG Letter, *supra* note 18, at 9–10; ISDA–SIFMA Letter, *supra* note 18, at 7–9; MFA Letter, *supra* note 18, at 5–6. Many of these commenters raised questions about the proposed size of the block-trade threshold. *See infra* section V.E.1(c).

[199] *See* SIFMA AMG Letter, *supra* note 18, at 10.

[200] *See* MFA Letter, *supra* note 18, at 5–6.

[201] *See* ICI Letter, *supra* note 18, at 10.

[202] *See* Bloomberg Letter, *supra* note 18, at 14.

CFTC definition characterizes a block trade in a particular swap as having ''a notional or principal amount at or above the appropriate minimum block size applicable to such swap.'' [203]

For the third prong of the ''block trade'' definition, the Commission proposed that the SBS be based on a single credit instrument (or issuer of credit instruments) or a narrow-based index of credit instruments (or issuers of credit instruments) having a notional size of $5 million or greater,[204] considered the distribution of transactions in the single-name CDS market [205] and took into consideration that FINRA applies a $5 million cap when disseminating transaction reports of economically similar cash debt securities.[206]

A number of commenters question the basis for the proposed $5 million block threshold size and advocate a variety of different approaches to establishing the block size threshold for SBS products, as alternatives to the proposed $5 million notional size block trade threshold.[207]

One commenter presents data that it argues supports its assertion that the block threshold for credit SBS should be recalibrated.[208] The commenter recommends that the Commission first establish an appropriate methodology to determine block thresholds based on current market-wide data. This commenter states that, otherwise, the already illiquid SBS market will be required to comply with an arbitrary, ''one-size-fits-all'' threshold amount that fails to consider the unique levels of market liquidity and risk sensitivity of various instruments. The commenter suggests that average daily volume (''ADV'') is an appropriate indicator of liquidity levels because it represents a measure of how much trading occurs in a given issuer across the market as a whole, and that the lower the ADV, the lower the liquidity of the product. Based on its analysis of ADV data for credit default swaps (''CDS''), which it retrieved from the DTCC Trade Information Warehouse, the commenter posits that liquidity in single-name CDS is significantly lower than in broad-based CDS. Thus, the commenter argues, it is not appropriate to mirror the block threshold for credit SBS to the threshold for debt securities, when there are clear differences in liquidity levels within the CDS market itself.

This commenter also asserts that the data reveal that liquidity in single-name CDS is disproportionately concentrated in the most actively traded issuers, which, the commenter contends, corroborates its assertion that block thresholds should be calibrated at a more granular level in order to reflect the different liquidity levels of credit SBS products. The commenter cautions that, absent a data-based approach to setting block thresholds for credit SBS instruments, the proposal runs the risk that $5 million may be an inappropriately high threshold for those products, which may widen bid/offer spreads, further reduce liquidity, and force large-sized transactions to be publicly reported with their full size, leaving the dealer that ''wins'' in the position of risking the market moving against the dealer before the dealer is able to adequately lay-off its exposure. This risk to the dealer, the commenter asserts, could increase the costs of transacting with immediacy substantially, leading to overall increased costs and time delays in executing hedges, and adding to or taking down positions, which would have a direct impact on clients and end-users, who will ultimately bear the increased costs and inefficiencies when forced to split large trades into smaller sizes for liquidity purposes. The commenter states that these clients, end-users, and liquidity providers may decide that it is more economical to exit the market entirely, given that most of them do not trade in large volumes of SBS.[209]

The same commenter also states that, because ''the appropriate block threshold depends on factors such as liquidity and risk sensitivity[,] which can change over time, . . . the rules should provide a formal adjustment mechanism that would allow market participants to petition the Commission to temporarily change block thresholds based on observed market conditions, or enable the Commission's staff to do so, subject to a public comment process.'' [210]

Several commenters argue for establishing a range of block trade threshold sizes, based on the product.[211] One commenter recommends that the Commission delay implementation of the required execution methods until it considers its approach to block trades more comprehensively.[212] This commenter argues that calibrating appropriate block threshold sizes for SBSs has significant implications for market participants from both a pre- and a post-trade transparency perspective. With respect to pre-trade transparency, the commenter states that requiring a fund to disclose its trading interest in an SBS of a large notional size to multiple participants—via an order book or an RFQ system—would ''enable opportunistic market participants to piece together information about the fund's holdings or investment strategy and lead to frontrunning of those potential trades.'' [213] With respect to post-trade transparency, the commenter states that setting a block trade threshold that is too high would unnecessarily limit the ability to report large-sized SBS transactions on a delay, which would make it difficult for liquidity providers to hedge such positions, leading to higher trading costs and less efficient trading for funds and other market participants. The commenter also states that the magnitude of these risks depends on, among other factors, an SBS's liquidity profile. The commenter also states that having a single threshold—across all applicable SBSs with respect to SBSEF trading and for any additional future rulemaking related to post-trade public reporting—does not adequately account for varying levels of liquidity across different categories or types of SBSs. The commenter recommends that, given the differences in liquidity across different SBSs, the Commission should base its thresholds on more comprehensive transaction data obtained pursuant to Regulation SBSR. The commenter asserts that taking such a data-driven approach would allow the Commission to assess the liquidity of different SBSs based on, for example, swap term, underlying security, and other characteristics. The commenter also argues that this would enable the Commission, similar to the CFTC, to formulate different types or categories of

[203] Appendix F to the CFTC's part 43 divides swap asset classes into a number of categories and sets forth a minimum block size threshold to each category. SBSs are not within the CFTC's jurisdiction, so the CFTC had not considered what an appropriate minimum block size threshold would be for any SBS asset class. In this respect, there was no CFTC-defined threshold for the Commission to harmonize with, so the Commission proposed to establish a threshold tailored specifically for the SBS market, *see* Proposing Release, *supra* note 1, 87 FR at 28956, as discussed below.

[204] *See* Proposing Release, *supra* note 1, 87 FR at 28896.

[205] *See id.* at 28944.

[206] *See id.* at 28944 n.369.

[207] *See* Citadel Letter, *supra* note 18, at 9; ICI Letter, *supra* note 18, at 10–12; MFA Letter, *supra* note 18, at 5–8; SIFMA AMG Letter, *supra* note 18, at 10; ISDA–SIFMA Letter, *supra* note 18, at 7–9.

[208] *See* ISDA–SIFMA Letter, *supra* note 18, at 7–9.

[209] *See id.*

[210] *Id.* at 9 n.23.

[211] *See* MFA Letter, *supra* note 18, at 7; ICI Letter, *supra* note 18, at 11; SIFMA AMG Letter, *supra* note 18, at 10.

[212] *See* ICI Letter, *supra* note 18, at 11–12.

[213] *Id.* at 11.

SBSs and propose differing block trade sizes that are more appropriately tailored to the liquidity characteristics of each type or group.

Another commenter states that the CFTC sets different minimum block sizes for different categories of swaps and argues that the Commission should similarly develop a more structured and tailored approach.[214] The commenter expresses concerns that setting a miscalibrated block size will likely limit the utility of the block trade exception, thereby preventing many market participants from executing transactions on SBSEFs. Another commenter recommends that the Commission adopt the CFTC's approach for block trades based on a ''67 percent notional amount calculation.'' [215] That commenter also recommends that the Commission reserve the ability to update block thresholds on a regular basis to ensure they remain representative of current market conditions.[216] Another commenter states that the proposed block threshold is not a result of any empirical analysis on the market conditions for credit SBSs and suggested that, as the SBS market develops and grows, it may become more appropriate for amendments to the credit SBS threshold.[217]

The Commission has considered the comments received and has determined, for the reasons discussed below, not to adopt a definition of ''block trade.'' While the Commission had proposed the single block threshold for credit SBS based on its preliminary view that the block-trade threshold applicable to an SBS trade should be consistent with any reporting cap for that SBS trade, and any reporting cap applicable to the cash markets for the securities,[218] the Commission acknowledges commenters' concerns that the proposed $5 million block-trade threshold for all credit SBSs would not be sufficiently tailored to the unique and varying trading and risk characteristics of the full range of credit SBS, creating the potential for the adverse market risks that commenters point out may arise from having a one-size-fits-all block threshold.

Further, unless and until the Commission has made a clearing determination for a given SBS *and* an SBSEF or a national securities exchange has made that SBS ''available to trade,'' *all* transactions in that SBS will be Permitted Transactions. On the effective date of Regulation SE, and until the Commission has made a clearing determination for an SBS, no SBSEF or national securities exchange will be able to make that SBS ''available to trade.'' Consequently, there could be no mandatory trading requirement and thus there are no transactions to be excepted. Without a mandatory trading requirement, a block-trade threshold, therefore, has no effect on the ability of market participants to choose their preferred means of execution for trades in that SBS. Unless and until the Commission has made a mandatory clearing determination regarding an SBS, it is not necessary to define a block-trade threshold for SBS, and it would be appropriate for the Commission to identify a block-trade threshold in the future after considering credit SBS transaction data and credit SBS markets at that time. In addition, the Commission agrees with commenters that additional consideration of credit SBS transaction data, including data reported under Regulation SBSR, would help the Commission determine the appropriate block threshold for credit SBS products, including whether different thresholds should apply to different types or groups of SBS. The Commission also agrees with commenters that the credit SBS markets are likely to evolve over time and that analysis of market data continues to be an important aspect of setting appropriate thresholds for both block trades and credit SBS public trade reporting.[219]

Therefore, the Commission is not adopting the proposed definition of ''block trade'' under Proposed Rule 802, or any other block-trade threshold.[220] In conjunction with any mandatory clearing determination by the Commission for SBS, or with any Commission proposal to specify the criteria for determining what constitutes a large notional SBS transaction for particular markets and contracts with respect to trade reporting, the Commission will have the opportunity to engage in rulemaking to propose a definition of ''block trade'' for purposes of Regulation SE—and to solicit public comment on Commission's proposal and its economic analysis of the proposed definition—before it considers adopting a definition.

In response to the comment that the Commission should delay implementation of the trade execution requirement until it has considered block trades more comprehensively, unless and until the Commission has made a clearing determination for a given SBS *and* an SBSEF or a national securities exchange has made that SBS ''available to trade,'' *all* transactions in that SBS will be Permitted Transactions. Thus, it is not necessary to formally delay the implementation of the trade execution requirement, because the Commission will have the opportunity if and when it makes a clearing determination for SBS—*i.e.,* before any SBS transaction becomes a Required Transaction—to address whether a block-trade threshold should be set; what methodology should be used to determine that threshold; and what that threshold would be. At that time, because amending Rule 802 to define ''block trade'' would entail notice-and-comment rulemaking, market participants would have the opportunity to comment on the Commission's proposed action.

For the reasons discussed above, the Commission is not adopting the definition of ''block trade'' in Rule 802 as proposed but is instead adding a note to Rule 802 informing stakeholders the Commission has not yet adopted a definition of ''block trade.'' [221]

(iii) Block-Trade Definition for Equity SBS

In the Proposing Release, the Commission did not propose a definition of ''block trade'' applicable to equity SBS. Accordingly, no equity SBS would qualify for the exception to required means of execution for block trades in Proposed Rule 815(a)(2).[222]

[214] *See* MFA Letter, *supra* note 18, at 7.

[215] *See* Citadel Letter, *supra* note 18, at 9.

[216] *See id.* at 10.

[217] *See* SIFMA AMG Letter, *supra* note 18, at 10.

[218] *See* 2019 Cross-Border Application of Certain Security-Based Swap Requirements, SEA Release No. 87780 (Dec. 18, 2019), 85 FR 6270, 6347 (Feb. 4, 2020) (''2019 Cross-Border Adopting Release'').

[219] In adopting Regulation SBSR, the Commission directed its staff to make reports in connection with the determination of block thresholds and reporting delays for security-based swap transaction data. *See* 17 CFR 242.901 (Appendix) (discussing the studies for the determination of block thresholds and reporting delays); *see also* Regulation SBSR Adopting Release I, *supra* note 140, 80 FR at 14625. The Commission stated that it intends to use these reports to inform its specification of the criteria for determining what constitutes a large notional SBS transaction (*i.e.,* block trade) for particular markets and contracts; and the appropriate time delay for reporting large notional SBS transactions to the public. *See* 17 CFR 242.901 (Appendix). The reports for each asset class are to be completed no later than two years following the initiation of public dissemination of security-based swap transaction data by the first registered SDR in that asset class—in other words, the reports are anticipated to be complete by Feb. 14, 2024—and then published for comment in the **Federal Register**. *See id.*

[220] Because the Commission is not adopting a definition of ''block trade'' at this time, it is also modifying other rules within Regulation SE that reference block trades. *See supra* note 41.

[221] The Commission has corrected a cross-reference from 242.800(x) to 242.802.

[222] As discussed in the Proposing Release, appendix F to part 43 of the CFTC's rules does not define a block trade for equity swaps, and accordingly, no equity swap transaction could qualify for the exception to the required means of execution for block trades under § 37.9(a)(2). *See* Proposing Release, *supra* note 1, 87 FR at 28896.

Several commenters submitted comment letters on the proposal to exclude equity swaps from the proposed block-trade exception.[223] One commenter states that, in its view, the use of block trades for equity SBS is at least as necessary as for credit SBS, due to the need to customize the size of transactions and to obtain timely and efficient executions.[224] This commenter asserts that requiring equity SBS trades to be executed only through the order book or RFQ system could result in these trades having ''significant price impact'' on SBSEF products, which would ultimately inhibit the ability of market participants to efficiently arrange and execute large, customized trades that are essential for market participants' risk management activities.[225] The commenter also asserts that this would disincentivize market participants from using equity SBS for their legitimate business purposes, including hedging, which could increase volatility and reduce liquidity in equity SBS markets (as well as underlying equity markets). The commenter also argues that excluding equity SBS block trades would ultimately inhibit capital formation as an inability to execute blocks in equity SBS would make it riskier, more expensive, and more difficult to hedge, which would in turn inhibit market participants from participating in offerings.

This commenter further states that equity SBS are quite distinct from CFTC equity swaps in ways that make it more critical to allow block trades in equity SBS. Specifically, the commenter states that since CFTC-regulated equity swaps are based on broad-based equity indices, which reflect markets and not individual issuers, they are used to assume or hedge exposure to the relevant market or sector generally. By contrast, the commenter posits that equity SBS may reference a single name and are therefore a preferred tool for hedging exposure to specific equities, which makes them essential to capital formation. The commenter also argues that markets for SBS on individual equities will, in many cases, be less liquid than the markets for broad-based equity index swaps, further necessitating the opportunity for block trades.[226]

Another commenter also recommends that the Commission conduct further analysis before determining block treatment for equity SBSs.[227] That commenter states that it previously disagreed with CFTC's similar approach with respect to equity swaps. The commenter argues that the Commission should undertake additional analysis to demonstrate that the CFTC's justifications for its approach apply equally to the categories or types of equity-based swaps specifically under its jurisdiction, which include, for example, total return swaps based on a single security or loan, or a narrow-based security index. The commenter also recommends that the Commission determine whether block treatment would be appropriate for equity-based SBSs in the pre-trade transparency context. The commenter argues that similar to other categories or types of large-sized SBSs that would qualify for block treatment, flexible execution with respect to large-sized, equity-based SBSs is important to avoid information leakage regarding a market participant's investment strategies.

One commenter suggests that, if there is the ability to have fungible, single-name total return swaps in equity products, and they become subject to mandatory clearing in the future, that the commenter would expect there to be appropriately calibrated block size thresholds that are applied to those equity-based swaps.[228] Another commenter suggests that if an equity SBS product becomes subject to mandatory trade execution, there should be an appropriate methodology for establishing equity block thresholds.[229]

While the Commission acknowledges commenters' concerns, the general concerns expressed about the need for equity blocks lack specificity or analysis regarding a particular definition of ''block trade'' for equity SBS—whether a specific threshold or a methodology—that the Commission could adopt. Commenters' concerns focus on the need to customize the size of equity SBS transactions, to obtain timely and efficient executions, and to avoid information leakage. And commenters state that the lack of a block-trade exception could result in significant price impact and inhibit the large, customized trades essential for risk management and hedging, which would discourage hedging, increase volatility and reduce liquidity in equity SBS markets (as well as underlying equity markets), and ultimately inhibit capital formation and participation in offerings.

With respect to the stated need for certain parties to use an equity SBS block-trade exception, a relevant consideration for the Commission in determining whether to establish a block-size threshold for equity SBSs, if and when it makes a clearing determination for those SBSs, is whether establishing that block-trade threshold would have the potential to create a situation where SBSEFs provide less transparency than exists in the underlying cash equity markets or the listed options markets. An inappropriate block-trade threshold for equity SBSs could create incentives for market participants to favor equity SBS markets over cash equities or listed options markets, either of which may be used, in many cases, to achieve economically equivalent trading objectives as strategies using equity SBS, and neither of which provides for block-trade reporting delays. If transactions were to migrate from cash equities or listed options markets to the SBS market, this could lead to decreased market transparency and could potentially undercut the goal of the Dodd-Frank Act to bring transparency to the trading of SBS.[230]

Additionally, as a general matter, it is important to harmonize the treatment of equity SBS with the treatment of equity swaps. There is no block-trade exception for equity swaps in the CFTC's rules, and the Commission does not wish to create incentives for market participants to trade equity SBS over swaps. And while a commenter states that equity SBS are quite distinct from equity swaps, the treatment of equity SBS transactions should be broadly consistent with the treatment of transactions in the cash equities underlying them to avoid, as discussed above, creating incentives for market participants to trade equity SBS instead of the underlying cash instruments.

For these reasons and those discussed above regarding credit SBS,[231] the Commission has determined not to adopt a definition of ''block trade'' in Rule 802. Thus, with respect to commenters' concerns, until the Commission has made a clearing determination with respect to equity SBS, equity SBS will be able to trade OTC, just as their underlying cash equities can trade OTC. Moreover, before making a clearing determination for an equity SBS—which would create

[223] *See* MFA Letter, *supra* note 18, at 6–7; ICI Letter, *supra* note 18, at 12–13; ISDA–SIFMA Letter, *supra* note 18, at 9; SIFMA AMG Letter, *supra* note 18, at 10.

[224] *See* MFA Letter, *supra* note 18, at 6–7.

[225] *Id.* at 6.

[226] *See* MFA Letter, *supra* note 18, at 6–7.

[227] *See* ICI Letter, *supra* note 18, at 12–13.

[228] *See* SIFMA AMG Letter, *supra* note 18, at 10.

[229] *See* ISDA–SIFMA Letter, *supra* note 18, at 9.

[230] *See* Proposing Release, *supra* note, 87 FR at 28894 (''The legislative history of the Dodd-Frank Act indicates that exchange trading is a mechanism to 'provide pre- and post-trade transparency for end users, market participants, and regulators.' '' S. Rep. No. 111–176, at 34 (2010)).

[231] *See supra* section V.E.1(c)(ii).

the circumstances in which equity SBS might be MAT and therefore subject to the trade-execution requirement—the Commission would have the opportunity to solicit and consider additional public comment on the effect of such a determination, including comment with respect to the concerns commenters have raised to date regarding, among other things, timely and efficient executions, hedging, and capital formation.

2. Rule 815(b)

Paragraph (b) of Proposed Rule 815 would require a time delay for certain orders being entered by a broker or dealer on an SBSEF's order book. This provision would only apply to situations in which the broker or dealer is seeking to trade against a customer order (a ''facilitation cross'') or to cross two customer orders (a ''customer cross''), following some form of pre-arrangement or pre-negotiation of such orders, and where the transaction is a Required Transaction.[232] Under Proposed Rule 815(b)(1), an SBSEF would require that the broker or dealer must expose one of the two orders in this transaction on the SBSEF order book for a minimum time period of 15 seconds so that other market participants have the opportunity to offer a better price than the broker or dealer had intended for the cross. Proposed Rule 815(b)(2) would permit the SBSEF to adjust the time period of the required delay based on the SBS's liquidity or other product-specific considerations, provided that the time delay is a sufficient period of time so that an order is exposed to the market and other market participants have a meaningful opportunity to execute against the order.

The Commission received comments on the provisions regarding the prearrangement or pre-negotiation of trades in Proposed Rule 815(b).[233] One commenter requests that the Commission address the extent to which market participants may utilize ''pre-execution communications'' when trading on an SBSEF, noting that the CFTC has specified that such communications may occur pursuant to a SEF's rules that have been certified or approved by the CFTC.[234] This commenter urges the Commission to align its rules to those of the CFTC in this respect, given that pre-execution communication is a standard market practice that investment advisers use to guard against information leakage and obtain fair pricing for large-sized trades and packaged transactions, among other types of transactions, on behalf of funds and other clients.

Another commenter, arguing that the Proposing Release and the CFTC rules are silent with respect to the permissibility of pre-arrangement on RFQ systems, urges the Commission to require SBSEF rulebooks to prohibit the pre-arrangement of Required Transactions, arguing that it is important that pre-trade transparency and the RFQ-to-3 requirement not be undermined through bilateral pre-arrangement of a Required Transaction followed by a directed RFQ that merely formalizes the transaction.[235]

The Commission agrees with the comment that it should view pre-execution communications in a way that is consistent with CFTC guidance on this matter.[236] The CFTC has viewed pre-execution communications as communications between market participants to discern interest in the execution of a transaction prior to the exposure of the market participants' orders (*e.g.,* price, size, and other terms) to the market and has stated that such communications include discussion of the size, side of market, or price of an SBS order or a potentially forthcoming order.[237] Consistent with the CFTC's approach, the Commission is generally of the view that the terms ''pre-negotiation'' and ''pre-arrangement'' within the meaning of Rule 802(b) should ordinarily be understood to include all communications between market participants to discern interest in the execution of a transaction prior to the exposure of the market participants' orders (*e.g.,* price, size, and other terms) to the market, including discussion of the size, side of market, or price of an SBS order, or a potentially forthcoming order.

Additionally, while the CFTC has acknowledged that pre-execution communications may be permitted by a SEF, it has stated that any SEF that allows pre-execution communications must adopt rules regarding such communications that have been certified to or approved by the CFTC.[238] Consistent with this view, the rulebook of an SBSEF generally should address, with clarity, the application of the terms ''pre-arrangement'' and ''pre-negotiation'' in Rule 802(b) so that market participants will know what types of pre-execution communications are covered by the rule. An SBSEF's rules in this regard must, of course, also comply with the other provisions of the SEA and the rules thereunder, including the impartial access requirement of Rule 819(c).[239]

With respect to the comment that the Commission should ban pre-arrangement or pre-negotiation of RFQ trades on an SBSEF, while the CFTC regulation is silent regarding the permissibility of pre-arrangement on RFQ systems, the CFTC's adopting release with respect to its SEF rules expressly contemplates the permissible pre-arrangement of trades executed via RFQ.[240] Moreover, the CFTC explained in its adopting release that it refrained from requiring a time delay for Required Transactions entered into RFQ systems because the requirement to send an RFQ to three other market participants already provides pre-trade price transparency.[241] Thus, the CFTC has acknowledged that pre-arranged Required Transactions may be submitted into a SEF's RFQ system, and without a time delay.

The Commission recognizes that, as one of the commenters also states, pre-execution communications are a standard practice for many participants in the SBS market, and that to prohibit them entirely would be a major departure from the CFTC's approach and could have significant negative ramifications on the ability of market participants to effect their SBS transactions. Accordingly, and to maintain harmonization with the CFTC's treatment of pre-arrangement and pre-negotiation of swaps transactions, the Commission is not modifying Rule 815(b) to prohibit the use of pre-arrangement or pre-negotiation with respect to SBS transactions via RFQ or to impose a time delay before any such SBS can be executed via RFQ.

One of the commenters also requests that the Commission require SBSEFs to provide periodic regulatory reporting around pre-arranged trading on their platforms, including reporting the percentage of pre-arranged orders for which other SBSEF participants step in to join the trade, and that it also require an SBSEF to demonstrate that it offers a bona fide order book in order for the SBSEF to permit the execution of pre-arranged orders (such as a minimum

[232] The Commission has modified the text of Rule 815(b)(1) to specify that the requirements in this provision only apply with regards to Required Transactions.

[233] *See* Citadel Letter, *supra* note 18, at 14–15; ICI Letter, *supra* note 18, at 13–14.

[234] *See* ICI Letter, *supra* note 18, at 13–14.

[235] *See* Citadel Letter, *supra* note 18, at 15.

[236] *See* ICI Letter, *supra* note 18, at 13–14.

[237] *See* 2013 CFTC Final SEF Rules Release, *supra* note 9, 78 FR at 33503.

[238] *See id.*

[239] *See infra* section VI.B.3.

[240] *See* 2013 CFTC Final SEF Rules Release, *supra* note 9, 78 FR at 33504.

[241] *See id.*

level of trading activity on the order book or a minimum percentage of pre-arranged orders where pricing is improved as a result of other SBSEF participants stepping in).[242]

The suggested reporting requirements or ''bona fide order book'' standard, however, would exceed what SEFs are required to do under the CFTC rules. The Commission is concerned that different or additive requirements to the key concept of an order book, such as whether that order book is ''bona fide,'' could introduce complexity and confusion if one set of trading protocols applied to Required Transactions for swaps but different protocols—different from ones that have been understood and utilized for many years—applied to Required Transactions for SBS transactions. Moreover, the commenter's proposed reporting requirements—such as a minimum percentage of pre-arranged orders where pricing is improved as a result of other SBSEF participants stepping in—appear to be primarily relevant to an evaluation of a particular SBSEF has met the standard for having a ''bona fide'' order book. Accordingly, because the added complexity and costs associated with imposing the ''bona fide'' order book standard have not been justified, it is not appropriate to adopt the proposed regulatory reporting requirement suggested by the commenter with respect to cross-trading.

For the reasons discussed above, the Commission is adopting Rule 815(b) as proposed, with a clarifying change to the rule text to reiterate that the requirement applies only to Required Transactions.[243]

3. Rule 815(c)

Proposed Rule 815(c) is modeled on § 37.9(c) of the CFTC's rules and would define a ''Permitted Transaction'' as a transaction not involving an SBS that is subject to the mandatory trade execution requirement. This rule provides that an SBSEF may offer any method of execution for Permitted Transactions.

The Commission did not receive any comments on the definition of Permitted Transactions [244] and is adopting Rule 815(c) as proposed, for the reasons discussed in the Proposing Release.

4. Rule 815(d)

Paragraph (d) of § 37.9 provides an exception for package transactions that allows for flexible methods of execution for what would otherwise be Required Transactions. The Commission proposed to include similar exceptions in Proposed Rule 815(d). Proposed Rule 815(d)(1) would define ''package transaction'' as two or more component transactions executed between two or more counterparties where at least one component is a Required Transaction, execution of each component is contingent upon the execution of all other components, and the component transactions are priced or quoted together as one economic transaction with simultaneous (or near-simultaneous) execution of all components. Proposed Rule 815(d)(2) would provide that a Required Transaction that is executed as a component of a package transaction that includes a component SBS that is subject exclusively to the Commission's jurisdiction, but is not subject to mandatory clearing, may be executed on an SBSEF using any method of execution as if it were a Permitted Transaction.

Proposed Rule 815(d)(3) would provide that a Required Transaction that is executed as a component of a package transaction that includes a component that is not an SBS may be executed on an SBSEF using any method of execution as if it were a Permitted Transaction. Proposed Rule 815(d)(3) would further state that this general exception, which allows flexible means of execution for certain package transactions, shall not apply to a Required Transaction that is executed as a component of a package transaction in which all other non-SBS components are U.S. Treasury securities; a Required Transaction that is executed as a component of a package transaction in which all other non-SBS components are contracts for the purchase or sale of a commodity for future delivery; a Required Transaction that is executed as a component of a package transaction in which all other non-SBS components are agency mortgage-backed securities; or a Required Transaction that is executed as a component of a package transaction that includes a component transaction that is the issuance of a bond in a primary market.

The Commission received comments on the proposed exception for packaged transactions.[245] Several commenters support the Commission's proposal.[246] One commenter supports the proposal to harmonize with the CFTC rules, but suggested modifications to the proposed rule text.[247] First, the commenter suggests that Rule 815(d)(2) be modified so that the package-transaction exception is not available if the other SBS in the package is either subject to the clearing requirement *or intended to be cleared.* This commenter states that, because the scope of any future clearing requirement for SBSs is unclear, there may be significant trading activity in packages containing SBSs that are intended to be cleared, but not subject to the clearing requirement, and the commenter states that, for purposes of the package transaction exception, SBS that are cleared, whether by mandate or intention, should be treated the same. This commenter also recommends that Rule 815(d)(3) be modified to clarify that the exception would not apply to package transactions where all of the other components are swaps subject to the CFTC's trade execution requirement. The commenter states that this modification would prevent evasion for packages containing only SBSs and swaps that are subject to trade execution requirements on the Commission and the CFTC side, respectively.[248]

Another commenter, while agreeing that it is appropriate to treat package transactions differently from outright, single-legged transactions, suggests that the Commission take a different approach from that of the CFTC, stating that the current state of the CFTC's rules reflect the culmination of a phased implementation approach developed over time via no-action letters.[249] That commenter argues that it would be better for the Commission to tailor its rules for packaged transactions to address the particular market dynamics relevant to the SBS market instead of the swaps market. The commenter recommends that the Commission build into the MAT determination process a framework for identifying what types of package transactions exist for prospectively MAT SBS and then develop tailored rules around the execution of such transactions.

Rule 815(d) is closely modeled on § 37.9(d) and is designed to balance the goal of promoting transparency in the

[242] *See* Citadel Letter, *supra* note 18, at 14–15.

[243] The heading of the proposed rule text already indicated that it was a ''Time delay requirement for Required Transactions on an order book.'' The rule text has been modified only to add ''With regard to Required Transactions,'' at the beginning of the rule text, to reiterate the parameters indicated in the title and to clarify its application.

[244] As discussed above, one commenter recommends that the requirements of Rule 815(a)(3) be modified to apply to all SBS transactions on an SBSEF, which would include Permitted Transactions. *See supra* note 190 and accompanying text (describing and discussing that comment).

[245] *See* Bloomberg Letter, *supra* note 18, at 14, Citadel Letter, *supra* note 18, at 12–13, and ISDA–SIFMA Letter, *supra* note 18, at 9–10.

[246] *See* Bloomberg Letter, *supra* note 18, at 14 and ISDA–SIFMA Letter, *supra* note 18, at 9–10.

[247] *See* Citadel Letter, *supra* note 18, at 12–13.

[248] *See id.*

[249] *See* ISDA–SIFMA Letter, *supra* note 18, at 9–10.

SBS market through required methods of execution against the market efficiency of allowing multiple instruments to trade as a package using flexible methods of execution.[250] As noted in the Proposing Release, a rule that was too lenient could subvert the goal of promoting transparency and competition through all-to-all trading, while a rule that was too strict could cause market participants to break the package into its individual components, thereby increasing transaction costs and reducing the economic purpose and efficiency of the package transaction.[251]

The Commission agrees with a commenter's suggestions that Proposed Rule 815(d)(2) and (3) should be modified to narrow the scope of the package-transaction exception. Accordingly, the Commission is modifying these rules so that neither an SBS that is intended to be cleared (even if it is not required to be cleared) nor a swap subject to a CFTC trade execution requirement would create an exception from required methods of execution for a Required Transaction that is part of the same package. For purposes of exempting a Required Transaction in a package transaction from the required means of execution, there is no reason to distinguish mandatorily cleared SBS from voluntarily cleared SBS, or cleared swaps from cleared SBS. Therefore, the Commission is adding the words ''and is not intended to be cleared'' to Rule 815(d)(2) so that it covers only a Required Transaction that is executed as a component of a package transaction that includes a component security-based swap that is subject exclusively to the Commission's jurisdiction but is not subject to the clearing requirement under section 3C of the SEA *and is not intended to be cleared.* And the Commission is adding new subsection (iv) to Rule 815(d)(3) to provide that a Required Transaction in a package transaction is ineligible to be treated as a Permitted Transaction if it is ''[a] Required Transaction that is executed as a component of a package transaction in which all other non-SBS components are swaps that are subject to a trade execution requirement under the CFTC's rules.''

With respect to the suggestion that the Commission take a different approach from that of the CFTC and develop tailored rules for SBS, the package-transaction rule is not the appropriate place to recognize the differences between the swaps and the SBS market. Rather, the clearing determinations and MAT determinations will necessarily consider the trading characteristics of a given SBS, and both these determinations will have to be made before the package transaction exception would ever potentially be relevant to a transaction in that SBS.

For the foregoing reasons, the Commission is adopting Rule 815(d) with the modifications to paragraph (d)(2) and (d)(3), as described above.

5. Rule 815(e)

Proposed Rule 815(e) is modeled on § 37.9(e), which requires SEFs to maintain rules and procedures for resolution of operational and clerical error trades, which could be for swaps that otherwise would be subject to required methods of execution. Proposed Rule 815(e) would also require an SBSEF to maintain rules and procedures that facilitate the resolution of error trades and sets forth certain requirements designed to promote resolution in a fair, transparent, and consistent manner. Definitions of the terms ''correcting trade,'' ''error trade,'' and ''offsetting trade'' would be included in Rule 802 rather than in Rule 815(e).[252]

The Commission received one comment letter on this provision.[253] The commenter states that, with respect to a cleared SBS, correcting an error trade that was rejected by a clearing agency is not feasible unless the rejected error trade is declared by the SBSEF void *ab initio.* Otherwise, the commenter states, the parties might be encumbered by unresolved obligations related to the rejected SBS trade, and this might further prevent a timely and efficient resolution of the error. For this reason, the commenter recommends that the SBSEF should be able to declare void *ab initio* any trade rejected by a clearing agency.[254]

The CFTC's rules for addressing error trades are well articulated and well understood by the market, and they continue to serve as an appropriate model for the Commission's rules. Furthermore, because most if not all SBSEFs also will be registered with the CFTC as SEFs, close harmonization in this regard would allow dually registered entities to employ the same procedures for addressing error trades, whether they arise in the context of swap trading or SBS trading. Therefore, the rules for addressing error trades should not differ between the SBS regime and the swaps regime. While the Commission appreciates the difficulties that might arise in trying to correct an error trade that has been rejected by a clearing agency, under Proposed Rule 815(e), an SBSEF would be required to adopt rules and procedures for addressing such situations, which it could do by, among other things, declaring trades rejected by a clearing agency as void *ab initio,* as it would be required to do for non-error trades that are rejected for clearing under Rule 815(g). For the foregoing reasons, the Commission is adopting Rule 815(e) as proposed.

6. Rule 815(f)

Rule 815(f) is modeled on § 37.9(f), which addresses counterparty anonymity and is widely referred to as the prohibition on ''post-trade name give-up'' (''PTNGU''). Proposed Rule 815(f) would generally prohibit any person, directly or indirectly (including through a third-party service provider), from disclosing the identity of a counterparty to an SBS that is executed anonymously on an SBSEF and intended to be cleared and requires the SBSEF to establish and maintain rules to that effect. Furthermore, it provides that ''executed anonymously'' as used in the rule includes an SBS that is pre-arranged or pre-negotiated anonymously, including by an SBSEF participant. Finally, Rule 815(f) provides that, for a package transaction that includes a component SBS that is not intended to be cleared, disclosing the identity of a counterparty would not violate the rule.

The Commission received several comments on Proposed Rule 815(f).[255] Most of the commenters support the

[250] To the extent that counterparties may be facilitating a package transaction that involves a ''swap,'' as defined in section 1(a)(47) of the CEA, 7 U.S.C. 1a(47), or any contract for the purchase or sale of a commodity for future delivery (or option on such a contract), or any component agreement, contract, or transaction over which the Commission does not have exclusive jurisdiction, the Commission does not opine on whether such activity complies with other applicable law and regulations.

[251] *See* Proposing Release, *supra* note 1, 87 FR at 28896.

[252] *See* Proposed Rule 802 (defining ''correcting trade'' as a trade executed and submitted for clearing to a registered clearing agency with the same terms and conditions as an error trade other than any corrections to any operational or clerical error and the time of execution); Proposed Rule 802 (defining ''error trade'' as any trade executed on or subject to the rules of an SBSEF that contains an operational or clerical error); Proposed Rule 802 (defining ''offsetting trade'' as a trade executed and submitted for clearing to a registered clearing agency with terms and conditions that economically reverse an error trade that was accepted for clearing). These definitions are modeled on the definitions of the same terms in § 37.9(e)(1).

[253] *See* Bloomberg Letter, *supra* note 18, at 3, 14.

[254] *See id.*

[255] *See* Bloomberg Letter, *supra* note 18, at 14–15, Citadel Letter, *supra* note 18, at 10–12, SIFMA AMG Letter, *supra* note 18, at 10–12, WMBAA Letter, *supra* note 18, at 5.

rule.[256] Several commenters state that they strongly support the proposal harmonizing with the CFTC rules to prohibit PTNGU for SBSs executed anonymously on SBSEFs and that are intended to be cleared.[257] One commenter asserts that PTNGU has no legitimate purpose for centrally cleared financial instruments, since trading counterparties face the central clearinghouse and do not have any credit, operational, or legal exposure to each other post-trade.[258] This commenter states that PTNGU functions as a source of uncontrolled information leakage since a market participant has no control over who it will be matched with when executing through a pre-trade anonymous trading protocol, such as an order book. Accordingly, a buy-side firm must be comfortable potentially sharing its trading activity with every other participant on the trading venue, including other buy-side firms before using an anonymous order book with PTNGU. The commenter considers this an unattractive proposition for buy-side firms that completely undermines the anonymous nature of the trading protocol and deters access and participation. The commenter also argues that PTNGU is a discriminatory practice that impedes market participant access to trading venues by allowing dealers to monitor whether buy-side firms have started to transact in anonymous order books and use this information as a policing mechanism to deter buy-side access and participation.[259] The commenter also states that Rule 815(f)(3)[260] is drafted to prevent evasion by voice brokers. Other commenters express similar views.[261]

Another commenter states that if the Commission prohibits PTNGU, its policy would mirror the CFTC's approach and that certain traders would be more likely to participate on venues that offer anonymous execution, including order book functionality.[262] This, in turn, the commenter argues, could result in deeper liquidity pools on SBSEFs and promote the development, innovation, and growth of the SBS market.[263] The commenter asserts that the Commission's rules should be designed to better promote the development, innovation, and growth of the swaps market, with the intent of attracting liquidity formation onto SBSEFs, in a manner that adds to efficiency for the market and market participants.

One commenter also states that PTNGU was a more important feature of the market when few swaps were centrally cleared and market participants needed to know their counterparty's identity to manage the associated credit risk; however, with the prevalence of central clearing, the need for PTNGU is diminished for cleared swaps.[264]

A few commenters, while generally supportive of the rule, suggest some modifications to it.[265] One commenter argues that Rule 815(f)(4)[266] is overbroad and may significantly limit the scope of the prohibition.[267] Specifically, this commenter states that many security-based swaps are transacted as part of a package transaction with other instruments (*e.g.,* single-name CDS and index CDS). The commenter argues that, at a minimum, any exception for package transactions should only apply to packages that include a component that is not an SBS intended to be cleared *or a swap that is intended to be cleared.* The commenter expresses concern that the current language would appear to exempt packages containing CFTC-regulated swaps, even if those instruments should be subject to an equivalent prohibition (notwithstanding the working of the corresponding CFTC exception for packages). The commenter encourages the Commission to work with the CFTC to avoid creating a loophole for common packages containing swaps and security-based swaps that are all intended to be cleared. Furthermore, the commenter questions the need for Rule 815(f)(4) at all. The commenter states that, as proposed, the prohibition on PTNGU applies only to security-based swaps that are executed anonymously and intended to be cleared. The commenter argues that PTNGU could still be used for the uncleared security-based swap leg of a package transaction containing both a cleared security-based swap and an uncleared security-based swap, even without Rule 815(f)(4).

One commenter argues that the Commission should take an evolutionary approach to the prohibition on name give-up, which initially should apply only to Required Transactions, and not Permitted Transactions on an SBSEF where clearing may not be certain leading up to or at the time of trade execution.[268] This commenter believes that this approach would encourage liquidity formation and further development of less liquid SBSs where an SBSEF trading mandate is not required.

One commenter suggests that the Commission augment the rule with a prohibition on trade-relationship documentation for SBS that are intended to be cleared and grant the SBSEF the ability to void *ab initio* trades rejected from clearing to avoid the necessity of post-trade name disclosure in case of an error trade.[269]

The Commission agrees with commenters that prohibiting post-trade name give-up for cleared trades is reasonably necessary to facilitate and promote trading on SBSEFs, and Proposed Rule 815(f) would accomplish these goals.

The Commission disagrees with the comment that Rule 815(f)(4) is overbroad and unnecessary. The Commission finds that Rule 815(f)(4) is necessary and important to provide clarity about the application of the PTNGU prohibition to package transactions and also to provide consistency with the CFTC's approach. Narrowing the exception in Rule 815(f)(4) as suggested by one commenter so that it would not apply if a component of a package transaction were a cleared swap would cause the Commission's approach to PTNGU to differ from that of the CFTC and create the potential for different PTNGU rules to apply to different components of the same package transaction. That is, if the Commission modified Rule 815(f)(4) as the commenter suggests, in the case of a package transaction comprising an

[256] *See* Bloomberg Letter, *supra* note 18, at 14–15, Citadel Letter, *supra* note 18, at 10–12, SIFMA AMG Letter, *supra* note 18, at 10–12.

[257] *See* Citadel Letter, *supra* note 18, at 10; SIFMA AMG Letter, *supra* note 18, at 10.

[258] *See* Citadel Letter, *supra* note 18, at 10.

[259] *See* Citadel Letter, *supra* note 18, at 11. This commenter also cites news articles relating the accounts of buy-side firms of dealers contacting them to get them not to join SEF platforms. *See id.* at 11 n.20.

[260] Rule 815(f)(3) provides that SBSs that are ''executed anonymously'' include SBSs that are pre-arranged or pre-negotiated anonymously, which would include voice broker trades.

[261] *See* SIFMA AMG Letter, *supra* note 18, at 10 (stating that PTNGU for anonymously traded cleared SBSs is unnecessary and does not provide any advantages to clients, but rather leads to uncontrolled information leakage); Bloomberg Letter, *supra* note 18, at 15 (stating that prohibiting PTNGU facilitates and promotes trading on SBSEFs and promotes pre-trade price transparency by encouraging more participants to bid anonymously, whereas the practice of requiring disclosure of one counterparty's name to the other counterparty increases the risk of information leakage and can deter participation by liquidity seekers on SBSEFs).

[262] *See* SIFMA AMG Letter, *supra* note 18, at 10.

[263] *See id.* at 11.

[264] *See* Bloomberg Letter, *supra* note 18, at 15.

[265] *See* Bloomberg Letter, *supra* note 18, at 15, Citadel Letter, *supra* note 18, at 11, WMBAA Letter, *supra* note 18, at 5.

[266] Rule 815(f)(4) provides that, for a package transaction that includes a component transaction that is not an SBS intended to be cleared, disclosing the identity of a counterparty shall not violate the other provisions in the rule that prohibit the disclosure of the identity of a counterparty for SBSs executed anonymously.

[267] *See* Citadel Letter, *supra* note 18, at 11.

[268] *See* WMBAA Letter, *supra* note 18, at 5.

[269] *See* Bloomberg Letter, *supra* note 18, at 15.

SBS that is intended to be cleared and a swap that is intended to be cleared, Rule 815(f)(4) would *prohibit* PTNGU, but § 37.9(f)(4) would *permit* PTNGU.[270] To avoid this situation, the Commission declines to modify Rule 815(f)(4) as suggested.

Further, the Commission disagrees with the comment that the prohibition on PTNGU should initially apply only to Required Transactions. The prohibition on PTNGU is designed to promote pre-trade price transparency by encouraging a greater number, and a more diverse set, of market participants to anonymously post bids and offers on regulated markets, and it does so by preventing the sharing of the names of counterparties where such sharing is unnecessary—namely, when a transaction is cleared. Whether clearing the transaction is required or voluntary is not relevant to the purposes of prohibiting PTNGU. With regards to trades rejected from clearing, the prohibition on PTNGU would apply to all trades that are *intended* to be cleared, not just those that are successfully cleared, so that prohibition would also apply to a trade that is submitted but then rejected for clearing. For the foregoing reasons, the Commission is adopting Rule 815(f), as proposed, with minor technical modifications.[271]

7. Rule 815(g)

One commenter states that in order to protect counterparty anonymity in the event of an SBS that is executed anonymously and intended to be cleared, but is nonetheless rejected for clearing, the SBSEF should declare the trade void *ab initio.*[272] The commenter suggests that the Commission augment the rule to prohibit trade relationship documentation for SBS that are intended to be cleared and to grant SBSEFs the ability to declare trades rejected from clearing void *ab initio* in order to avoid post-trade name disclosure in the case of a rejected trade.

The Commission agrees that declaring such trades void *ab initio,* which helps prevent trades rejected from clearing from effectively becoming bilateral transactions where the identity of counterparties might be disclosed. This approach is also consistent with practices in the swaps market with respect to such trades.[273] Therefore, the Commission is amending Rule 815 to add a new paragraph (g), which specifies that SBSEFs shall establish and enforce rules that provide that a security-based swap that is intended to be cleared at the time of the transaction, but is not accepted for clearing at a registered clearing agency, shall be void *ab initio.* In light of new paragraph (g), the Commission is generally of the view that it would not be consistent with the impartial-access requirements of Rule 819(c) for an SBSEF to permit its members to require bilateral relationship documentation from their counterparties with respect to SBS that are intended to be cleared.[274] Consequently, the Commission finds that it is not necessary to include a prohibition on trade relationship documentation in Rule 815 for SBS that are intended to be cleared.

For the foregoing reasons, the Commission adopting Rule 815(f)(1) through (4), with minor technical modifications,[275] and is also adding a new paragraph (g), as discussed above.

F. Rule 816—Trade Execution Requirement and Exemptions Therefrom

Section 3C of the SEA [276] sets out a procedure whereby an SBS becomes subject to mandatory clearing. Section 3C(h) of the SEA provides that, if a transaction involving an SBS is subject to the mandatory clearing requirement, the counterparties shall execute the transaction on an exchange, on an SBSEF registered under section 3D of the SEA, or on an SBSEF that is exempt from registration under section 3D(e) of the SEA, unless no national securities exchange or SBSEF makes the SBS available to trade or the SBS transaction is subject to an exception from the clearing requirement under section 3C(g) of the SEA. This obligation under section 3C(h) is commonly referred to as the ''trade execution requirement.''

Proposed Rule 816 of Regulation SE establishes procedures for an SBSEF to make an SBS ''available to trade'' (assuming it is also subject to the clearing requirement), thereby activating the trade execution requirement with respect to that SBS. Rule 816 also includes three proposed exemptions from the trade execution requirement.

Paragraphs (a) through (d) of Rule 816 are modeled on § 37.10 of the CFTC's rules and establish a process whereby an SBS product is MAT by an SBSEF. An SBSEF may list an SBS that is subject to mandatory clearing, but listing the product does not by itself subject the product to the trade execution requirement in section 3C(h) of the SEA. Only if a product that is subject to mandatory clearing is listed *and* a MAT determination has been made would the SBS then become subject to the trade execution requirement. A MAT determination would have to be made and filed by an SBSEF pursuant to Rule 816 to trigger the trade execution requirement, similar to the MAT process of § 37.10.

1. General Comments on Harmonization With CFTC MAT Process

Several commenters cite efforts by the CFTC to review its MAT process as an indication that the Commission should take a different approach for making MAT determinations rather than align with the CFTC's current rule.[277] One commenter cites to the findings of the Market Risk Advisory Committee (''MRAC''), an advisory committee that provided recommendations to the CFTC, and states that the MRAC and the CFTC raised concerns regarding the current MAT process for swaps.[278] This commenter states that reforming the MAT process was included as an agenda item in the CFTC 2021 fall rulemaking agenda and that, for this reason, the Commission should align the MAT process for SBS with the recommendations made by the MRAC or, in the alternative, coordinate with the CFTC to ensure that the MAT process is aligned and conducted in a manner that allows input from a variety of stakeholders and the Commission. Another commenter also urges the Commission to review the CFTC MRAC's recommendations with an eye towards adopting a more flexible regime given the unique characteristics of the

[270] Section 37.9(f)(4) provides, in relevant part, that ''[f]or a package transaction that includes a component transaction that is not a swap intended to be cleared, disclosing the identity of a counterparty shall not violate'' the prohibition against PTNGU. 17 CFR 37.9(f)(4).

[271] The Commission has corrected a reference in paragraph (f)(2) to a ''security-based swap execution facility'' to refer instead to a ''security-based swap.'' The Commission has also changed first instance of the word ''paragraph'' in paragraph (f)(4) to ''paragraphs.''

[272] *See* Bloomberg Letter, *supra note* 18, at 14–15. *See also* Citadel Letter, *supra note* 18, at 5 (stating that the CFTC guidance regarding trades that are void *ab initio* has eased trading of cleared swaps on SEFs and ''facilitated the entry of new liquidity providers that do not have legacy bilateral trading documentation in place with clients'').

[273] *See* CFTC, Division of Clearing and Risk and Division of Market Oversight Staff Guidance on Swaps Straight-Through Processing (Sept. 26, 2013), *available at https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/stpguidance.pdf* (''CFTC 2013 STP Guidance'').

[274] *See also infra* section VI.B.3.

[275] *See supra* note 271.

[276] 15 U.S.C. 78c–3.

[277] *See* Bloomberg Letter, *supra* note 18, at 15–16; ISDA–SIFMA Letter, *supra* note 18, at 5.

[278] *See* Bloomberg Letter, *supra* note 18, at 15–16.

SBS market.[279] One commenter strongly recommends that the Commission refrain from adopting a MAT determination process that is based on the existing CFTC process, but rather coordinate with the CFTC as it considers potential reforms to improve its MAT process.[280]

It is appropriate for Regulation SE to establish a MAT SBS process that aligns with the CFTC's process as closely as possible. While commenters state that the CFTC may be considering changes to its MAT process, the CFTC has not yet proposed any such changes, so it is not certain that the CFTC would adopt the recommendations of the MRAC, either in whole or in part, or with modification, or when the CFTC might act if it does make changes to its MAT process. Additionally, because no MAT determination can be made with respect to an SBS unless and until the Commission has made a mandatory clearing determination as to that SBS, the Commission would have the opportunity, if and when it makes a mandatory clearing determination with respect to an SBS, or category of SBS, to consider whether changes to the process for a MAT determination with respect to that SBS would be appropriate. Further, in the event that the CFTC does move forward with changes to its MAT process, the Commission will have the opportunity to reassess its own MAT process and to consider further harmonization with the CFTC regime, as appropriate. For the present, the CFTC's procedures are well articulated and well understood by SBS markets, so closely harmonizing with these procedures would yield comparable regulatory benefits while minimizing burdens on SBSEFs. In particular, even though the SEF and SBSEF markets differ in ways that are relevant to the *application* of the criteria for MAT determinations, the criteria themselves are equally applicable to the SEF and SBSEF markets. Thus, the Commission is adopting the rule as proposed, without any different or additional criteria that would have to be considered by an SBSEF in order to MAT an SBS product.

2. Rule 816(a)

Paragraph (a)(1) of Rule 816 provides that an SBSEF that makes an SBS available to trade in accordance with paragraph (b) of the rule must submit to the Commission its determination with respect to that SBS, pursuant to the procedures under Rule 806 (voluntary submission for Commission review and approval) or Rule 807 (self-certification).[281] Paragraph (a)(2) provides that an SBSEF that makes an SBS available to trade must demonstrate that it lists or offers that SBS for trading on its trading system or platform.

The Commission received a number of comments on Rule 816(a).[282] Many commenters raise concerns about an SBSEF having the sole ability to make a MAT determination and generally advocate that the Commission and other market participants have a greater role in making MAT determinations.[283] One commenter states that experience with the existing CFTC regime suggests that the scope of the trade execution requirement should not be determined solely by the SBSEFs.[284] This commenter states that the trade execution requirement is a key pillar of the G20 post-crisis reforms and recommends that the Commission also be able to propose MAT determinations for public comment, based on its independent assessment of the criteria set forth in Rule 816(b). One commenter asserts that it has long believed that a MAT determination should not rest solely with a single SBSEF.[285] This commenter states that such an approach risks introducing commercial and other motives beyond an objective assessment of the factors set forth in the rule.

Another commenter states that it does not believe that a trading venue should be solely responsible for identifying the types of products that should be subject to a trade execution requirement.[286] Instead, the commenter states that a Commission-led process is more appropriate. The commenter argues that a Commission-led process would ensure that the views of all relevant market participants (including SBSEFs) are considered in making a MAT determination. In addition, the commenter asserts that the Commission is likely to have better access to data regarding the overall SBS market than any individual trading venue will have. The commenter requests that the Commission provide in Regulation SE that MAT determinations are to be made by the Commission following a notice and comment rulemaking process that takes into account the views of SBSEFs and other market participants.

Because no MAT determination can be made for an SBS until the Commission has made a mandatory clearing determination for that SBS, the MAT-determination process is, in that sense, inherently a Commission-led process. Moreover, because the SBSEFs will have direct experience with the trading of SBSs on SBSEFs, they will be best positioned make the initial decision as to whether it is appropriate to submit a MAT determination for an SBS. However, the Commission would still play a primary role in the MAT process, as it will have the opportunity to review all SBSEF MAT determinations, whether they are self-certified or voluntarily filed for Commission approval, to determine whether those determinations are adequately supported by evidence and consistent with the SEA and the rules thereunder, including the six factors to be considered for MAT determinations under Rule 816(b), which are discussed below. In the absence of such evidence, the Commission can decline to approve or can stay and then object to a MAT petition, which will ultimately allow the Commission to prevent an inappropriate MAT determination from taking effect.

Some commenters also recommend that the MAT process provide other market participants the ability to provide comment on any MAT proposal.[287] One commenter proposes that market participants have a meaningful opportunity to review and opine on a petitioning SBSEF's proposed MAT determination.[288] This commenter argues that the MAT factors are intended to measure trading liquidity that is available and that this assessment should include the perspectives of market participants.[289] Another commenter also states that it has long believed that market participants should have the ability or a forum to comment on proposed MAT determinations.[290] One commenter recommends that, in order to support the MAT process and to guard against inappropriate MAT determinations, the Commission permit market participants and other interested parties to participate in the MAT analysis by introducing a public notice and

[279] *See* ISDA–SIFMA Letter, *supra* note 18, at 5.

[280] *See* ICI Letter, *supra* note 18, at 5.

[281] *See supra* sections IV.C (discussing Rule 806) and IV.D (discussing Rule 807).

[282] *See* Bloomberg Letter, *supra* note 18, at 15–16; Citadel Letter, *supra* note 18, at 15–16; ICI Letter, *supra* note 18, at 4–10; ISDA–SIFMA Letter, *supra* note 18, at 4–5; MFA Letter, *supra* note 18, at 9; SIFMA AMG Letter, *supra* note 18, at 6–8; WMBAA Letter, *supra* note 18, at 5; Tradeweb Letter, *supra* note 18, at 3–4.

[283] *See* Citadel Letter, *supra* note 18, at 15–16; *see* Bloomberg Letter, *supra* note 18, at 15–16; ICI Letter, *supra* note 18, at 5–8; ISDA–SIFMA Letter, *supra* note 18, at 4–5.

[284] *See* Citadel Letter, *supra* note 18, at 15–16.

[285] *See* WMBAA Letter, *supra* note 18, at 5.

[286] *See* Tradeweb Letter, *supra* note 18, at 3–4.

[287] *See* SIFMA AMG Letter, *supra* note 18, at 7; MFA Letter, *supra* note 18, at 9; ICI Letter, *supra* note 18, at 5, 7–8.WMBAA Letter, *supra* note 18, at 5.

[288] *See* SIFMA AMG Letter, *supra* note 18, at 7.

[289] *See id.*

[290] *See* WMBAA Letter, *supra* note 18, at 5.

comment period into the MAT assessment timeline.[291] This commenter states that this would provide market participants, who would be those most affected by a MAT determination, with the opportunity to identify specific aspects of individual SBS products that may limit their liquidity, which would help ensure each MAT determination is appropriate for the relevant SBS product. Another commenter states that one of the shortcomings of the MAT process is that it puts too much responsibility in the hands of the trading platform and does not require, or even consider, input from market participants.[292] This commenter states that the implications of this outcome are even more evident in the context of an SBS MAT determination, as such a determination would only be relevant to a small segment of the global SBS market, which the commenter states is much smaller and less liquid than its swaps counterpart.

One commenter also states that the proposed approach will give SBSEFs the sole ability to dictate the scope of SBSEF trading for market participants based on the commercial interests of SBSEFs.[293] This commenter recommends that the Commission require a 30-day public comment period for all MAT determinations. The commenter expresses concern that, under the proposal, it would be possible for a MAT determination to become effective without an opportunity for public comment and that the MAT process would be controlled almost entirely by one segment of the SBS markets, the SBSEFs. The commenter states that market participants can provide the Commission with invaluable commentary, insights, and data on the potential effects of proposed rules, as well as help to ensure that rules are implemented in a fair and orderly manner. The commenter asserts that, because MAT determinations are data intensive, 30 days would give market participants sufficient time to analyze the data presented by the SBSEF, prepare their own data and analyses, and comment effectively on operational and technological implications. This commenter also recommends that the Commission consider creating an advisory board to provide recommendations both to the Commission and to SBSEFs on SBSs that should be added to or removed from the list of SBSs that are subject to the trade execution requirements.[294] The commenter states that the advisory board should have appropriate expertise and balanced representation, including from the buy side, sell side, and other stakeholders. The commenter asserts that this would help further address some of their concerns about the MAT process and ensure that the SBSs made subject to the trade execution requirement are only the most liquid. Furthermore, the commenter argues that the advisory board could also help the Commission assess the functioning of the MAT determination process and of the overall SBS regulatory framework and provide recommendations for improvement.[295]

Another commenter states that the process for MAT determinations should include input from both market participants and the Commission.[296] The commenter states that market participants may trade on multiple venues and in multiple jurisdictions and have a greater or different perspective from the SBSEF making the MAT determination. Additionally, the commenter states that the Commission's input should be considered as well.

The Commission will have sufficient opportunity to assess self-certified MAT determinations for consistency with the criteria of Rule 816(b), as well as with the SEA and the other regulations thereunder, while also permitting SBSEFs to use a self-certification process closely aligned with § 40.6. The CFTC's procedures are well articulated and well understood by SEFs, and closely harmonizing with these procedures should yield comparable regulatory benefits while minimizing burdens on SBSEFs. Certain MAT determinations of dually registered SEF/SBSEFs may apply to SBSs and swaps that are related and that related MAT determinations will thus have to be filed with both the SEC and CFTC. Adding a default comment period or otherwise altering the standard so that the Commission reviews all MAT determinations by SBSEFs, as commenters requested, would significantly alter the timing of self-certified SBSEF MAT determinations compared to their SEF equivalents. By contrast, closely harmonizing the SEC's filing procedures and standards of review with the CFTC's would allow dually registered entities to submit related MAT determinations to both agencies for review. Moreover, if the Commission exercises its authority to stay the effectiveness of a self-certified MAT determination and seek public comment—*i.e.,* with respect to a rule that is novel, complex, inadequately explained, or potentially inconsistent with the SEA or the regulations thereunder, including Regulation SE—market participants would be able to convey their concerns regarding that rule to the Commission.

For SBS MAT determinations submitted under the Rule 806 process that present novel or complex issues or meet other criteria under Rule 806(d), the initial 45-day review period for rule approval submissions may be extended for an additional 45 days. The Commission recognizes the importance of public input regarding any MAT determination, and not only does Rule 808(b) provide that the Commission make publicly available on its website Rule 806 filings, such as an SBSEF's MAT filing, but the Commission is also, as discussed below, delegating to its staff the authority to make filings under Rule 806 available on the Commission's website, which will expedite the process of providing interested persons with the ability to review a MAT-determination filing so that they can communicate their views to the Commission. Thus, in either process, if MAT petitions present novel or complex issues, the Commission will have sufficient time to receive and consider public comment for those submissions. Further, accepting public comment from all interested market participants in the context of a specific MAT determination would more efficiently aid the Commission's review of SBSEF MAT-determination filings than forming a formal advisory board to offer opinions on adding or removing SBS from the list of products that have been MAT.

Several commenters question the extent of the Commission's role in the MAT determination process.[297] One commenter cites the lack of Commission authority to delay or decline an SBSEF submission for a MAT determination, particularly without comment from market participants, as the basis for its concerns about the proposed MAT process.[298] Another commenter recommends that the Commission enhance its oversight by ensuring that it has a more meaningful ability to review and reject MAT determinations, as well as the ability to initiate determinations itself as appropriate.[299] This commenter also expresses concern that the Commission would not have adequate time to consider, or authority to

[291] *See* MFA Letter, *supra* note 18, at 9.

[292] *See* ISDA–SIFMA Letter, *supra* note 18, at 4–5.

[293] *See* ICI Letter, *supra* note 18, at 5, 7–8.

[294] *See id.* at 9–10.

[295] *See id.*

[296] *See* Bloomberg Letter, *supra* note 18, at 15–16.

[297] *See* SIFMA AMG Letter, *supra* note 18, at 6; ICI Letter, *supra* note 18, at 6–7.

[298] *See* SIFMA AMG Letter, *supra* note 18, at 6.

[299] *See* ICI Letter, *supra* note 18, at 5–8.

challenge, the basis for a MAT determination. The Commission, however, does have the authority to prevent an SBSEF MAT determination under either Rule 806 or Rule 807 from taking effect. As noted above, under Rule 806, the Commission has a 45-day period to consider a submission under Rule 806, which could be extended for another 45 days. The Commission can, if it finds the determination to be inconsistent with the SEA or the rules thereunder, notify the SBSEF that it will not, or is unable to, approve the new rule or rule amendment. Under Rule 807, MAT determinations cannot go into effect for at least 10 business days, during which the Commission has the opportunity to determine whether the determination presents novel or complex issues, if it is inadequately explained, or if it is potentially inconsistent with the SEA or the rules thereunder. If the Commission determines that any of these concerns is present, the Commission can stay the MAT determination for a 90-day period for further review. Within those 90 days, the Commission will have the opportunity to object to the proposed certification on the grounds that the proposed rule or rule amendment is inconsistent with the SEA or the Commission's rules thereunder, thereby preventing the self-certified MAT determination from going into effect. Therefore, the processes for submitting MAT determinations do afford the Commission sufficient time and authority to review and, where appropriate, decline to approve, or object to, MAT determinations.

For the reasons discussed above, the Commission is adopting Rule 816(a) as proposed.

3. Rule 816(b)

Paragraph (b) of Rule 816 sets forth six factors that an SBSEF shall consider, as appropriate, when making a MAT determination for an SBS product, which are the same six factors enumerated in the CFTC rule. Those factors are: (1) whether there are ready and willing buyers and sellers; (2) the frequency or size of transactions; (3) the trading volume; (4) the number and types of market participants; (5) the bid/ask spread; and (6) the usual number of resting firm or indicative bids and offers.

The Commission received several comments on the factors for making a MAT determination described in Rule 816(b).[300] Several commenters express concern that the factors for consideration enumerated in Rule 816(b) are not mandatory.[301] One commenter states that the rule requires that an SBSEF's submission consider the factors in the rule, as appropriate, when making a MAT determination.[302] This commenter proposes that all of the MAT factors *must* be considered for mandatory SBSEF trading. This commenter also urges the Commission to assess the MAT factors on the basis of the current trading activity of the relevant SBSs on the SBSEF against stringent standards, and in the aggregate, in order to determine whether there is proven liquidity on SBSEFs to support mandatory SBSEF trading. The commenter also proposes that the Commission expand the MAT factors to require evidence demonstrating that the SBSEF has the requisite infrastructure to support mandatory SBSEF trading by: (a) adding an assessment of technological readiness, and (b) requiring threshold numbers of SBSEFs as well as liquidity providers on the SBSEF transacting in the relevant SBS. The commenter argues that, while the expansion of MAT factors may be viewed as requiring more intervention and resources by the Commission, the revised approach will ultimately lead to a streamlined process, while at the same time avoiding a potential sacrifice of liquidity if a particular SBS is mandated for SBSEF trading prematurely.

One commenter also expresses concern that the factors in Rule 816(b) are neither mandatory nor based on calculated thresholds, and that they would permit SBSEFs to assert that an SBS should be MAT even absent objective evidence of a sufficiently liquid trading market.[303] This commenter states that this could have negative consequences for buy-side participants such as funds—requiring SBSs with insufficient liquidity to be traded via order book or an RFQ system, which would raise a significant risk of revealing advisers' sensitive portfolio management strategies. This commenter also states that, without requiring SBSEFs to consider any objective factors (*e.g.,* threshold levels), it is not clear how the Commission could ever find that a MAT determination is inconsistent with the SEA or the Commission's rules. This commenter recommends that the Commission enhance the MAT determination factors by: clarifying that all factors must be evaluated, rather than just one or a subset; adding as a factor the number of SBSEFs that list the SBS; requiring that at least two SBSEFs list the SBS; and requiring a minimum amount of trading history (*e.g.,* that an SBS has been listed for at least 90 days). The commenter also recommends that the Commission make the MAT determination factors more robust by establishing at least some objective mandatory criteria. The commenter argues that adopting these recommendations would provide the Commission with greater authority to reject a MAT determination and would address the conflict raised by an SBSEF's commercial incentive to make an SBS MAT, as well as ensure that there is enough liquidity in an SBS before it is subject to a MAT determination. The commenter urges that a more robust MAT determination process is critical to bring consistency to the SBS market over time, as having objective standards would avoid MAT determinations based on subjective assessments of liquidity that may change over time.

The Commission's approach of requiring the MAT factors to be considered as appropriate, rather than mandating the consideration of all the factors, is consistent with the approach the CFTC has taken. The CFTC adopted its approach to provide more flexibility so that its markets could accommodate swaps with different trading characteristics that can be supported in a centralized trading environment.[304] And a similarly flexible approach is appropriate for the different SBSs that would be traded on its SBSEFs, as the appropriate thresholds on any of the factors may vary depending on the SBS and over time. Adopting specific thresholds would create excessive rigidity at the outset. MAT submissions, under Rules 806(a)(5) and 807(a)(6), would be required to contain an explanation and analysis of the SBSEF's determination, including a discussion of the factors enumerated in the rule, and how it complies with the SEA and the Commission's regulations thereunder. Rule 816(b) requires SBSEFs to consider all the factors enumerated in the rule, as appropriate. However, such consideration, to be meaningful, generally should discuss the factors in the context of the general market, relative to some outside benchmark. And the SBSEF would have the burden of providing support for any assertions it makes regarding the adequacy of any of the factors it considers, with

[300] *See* SIFMA AMG Letter, *supra* note 18, at 6–8; ICI Letter, *supra* note 18, at 5; MFA Letter, *supra* note 18, at 9; WMBAA Letter, *supra* note 18, at 5.

[301] *See* SIFMA AMG Letter, *supra* note 18, at 7–8; ICI Letter, *supra* note 18, at 5; WMBAA Letter, *supra* note 18, at 5.

[302] *See* SIFMA AMG Letter, *supra* note 18, at 6–8.

[303] *See* ICI Letter, *supra* note 18, at 5–6.

[304] *See* 2013 CFTC Final MAT Rules Release, *supra* note 9, 78 FR at 33613.

reference to some external, objective standard. The explanations and analyses provided by the SBSEF generally should provide adequate justification as to how all the factors considered apply to the SBS MAT determination, as well as to why any factors enumerated in Rule 816(b) that are not addressed are not relevant. A failure, on the part of the SBSEF, to address any factors that are relevant or to adequately support its assertions would be a basis for the Commission to find that a MAT determination is inconsistent with the SEA and its rules.

One commenter, while supporting harmonization with the CFTC's MAT standards, expresses concern with the current framework for determining whether mandatorily cleared SBS should also be mandated for SBSEF trading through the MAT process. This commenter urges that there be a substantive analysis of whether an SBS has sufficient liquidity available to market participants on the SBSEF. The commenter states that, absent a robust MAT process requiring the SBSEF to demonstrate that voluntary exchange trading has met minimum liquidity and other standards, an absence of liquidity for the newly MAT-ed product on the SBSEF could shut out asset managers from accessing liquidity for their clients once OTC trading is prohibited. To this end, the commenter recommends that the Commission specify that the MAT standards are not synonymous with the clearing requirement standards. The commenter asserts that its assessment reflects the fact that necessary market conditions that make central clearing appropriate are different from the necessary market conditions that make mandatory SBSEF execution appropriate.[305]

Another commenter, while generally supporting the Commission's approach to MAT determinations and the six factors enumerated in the rule, urges the Commission to take a cautious approach in its assessment of whether a MAT determination is appropriate. Specifically, the commenter recommends that the Commission carefully consider each factor, individually and collectively, in assessing whether a particular SBS has sufficient liquidity to support mandatory SBSEF trading. The commenter also cautions that the Commission should avoid broad MAT categorizations for specific types of SBS when individual SBS products within each category may be more or less suitable for a MAT designation.[306]

From the factors enumerated in Rule 816(b), it is clear that additional factors, beyond the fact that a product is subject to mandatory clearing, will need to be considered in determining whether an SBS is suitable to be MAT, and these factors are directly relevant to the liquidity of trading in a given SBS: whether there are willing buyers and sellers, the frequency and size of transactions, the trading volume, the number and types of market participants, the bid/ask spread, and the usual number of resting firm or indicative bids and offers. Adopting specific thresholds, however, would be too rigid an approach to accommodate the different kinds of SBSs that may be traded on an SBSEF, particularly at this early stage. As stated above, the Commission or its staff will review SBS products on a case-by-case basis, and for SBS products presenting novel or complex issues there will be an extended period for the Commission to review the submission and consider public comments on the appropriateness of a MAT determination on a case-by-case basis, taking into account the facts and circumstances of the SBS subject to the determination, including when a filing seeks to include a broad category of SBS within a MAT determination.

The Commission has carefully considered the concerns raised by commenters regarding the determination of when an SBS is appropriate for a MAT determination by an SBSEF, and the Commission is adopting Rule 816(b) as proposed. The Commission appreciates that a MAT determination for an SBS will be consequential for market participants, and that the enumerated factors in Rule 816(b) are important components of an analysis of whether an SBS is appropriate for a MAT determination. Rule 816(b) will require SBSEFs to consider each of the factors enumerated in Rule 816(b), as appropriate. As noted above, a flexible approach to the enumerated factors will accommodate the different kinds of SBSs that will be traded on SBSEFs. While the rule does not require that every factor be considered in every case, to the extent that a factor is relevant and an SBSEF's MAT determination submission fails to sufficiently address that factor, the Commission would be in a position to either disapprove the submission, if made under Rule 806, or stay and ultimately object to the submission, if self-certified under Rule 807.

Furthermore, the rules for filing MAT determinations require SBSEFs to provide, among other things, an explanation and analysis of the proposed MAT determination, including a discussion of its compliance with the SEA, the Core Principles for SBSEFs, and the Commission's rules thereunder. In the case of a MAT determination, the SBSEF generally should do more than simply state that it is consistent with the SEA and the Commission's rules thereunder, but should also provide supporting analysis, and supporting documentation as appropriate, for its conclusion. If an SBSEF fails to provide adequate explanation or analyses of the MAT determination, it would be difficult for the Commission to find that the determination is consistent with the SEA and the Commission's rules thereunder. Thus, MAT determination filings generally should be accompanied with adequate discussion and support for a MAT determination based on all relevant factors in Rule 816(b), including discussion supporting a conclusion that the SBS product subject to the MAT determination achieves the appropriate thresholds for that category of products. Furthermore, for MAT determinations presenting novel or complex issues, there will be an extended period for the Commission to solicit and consider public comments on, among other things, the appropriateness of the factors considered.

For the reasons discussed above, the Commission is adopting Rule 816(b) as proposed.

4. Rule 816(c)

Paragraph (c) of Rule 816 provides that, upon a determination that an SBS has been MAT on an SBSEF or SBS exchange,[307] all other SBSEFs and SBS exchanges shall comply with the requirements of section 3C(h) of the SEA in listing or offering that SBS for trading.

The Commission received no comments on Rule 816(c) and the Commission is adopting Rule 816(c) as proposed for the reasons stated in the Proposing Release.

5. Rule 816(d)

Paragraph (d) of Rule 816 provides that the Commission may issue a

[305] *See* SIFMA AMG Letter, *supra* note 18, at 6–7.

[306] *See* MFA Letter, *supra* note 18, at 9.

[307] An SBS exchange, like all national securities exchanges, must submit any rule change—including a rule change to list a new derivative securities product and/or to MAT an SBS product—pursuant to SEA Rule 19b–4, 17 CFR 240.19b–4. The proposed rule text did not establish a new procedure for SBS exchanges to list or MAT SBS products. *See* Proposing Release, 87 FR at 28898 n.107.

determination that an SBS is no longer MAT upon determining that no SBSEF or SBS exchange lists that SBS for trading.

The Commission received one comment on Rule 816(d).[308] This commenter recommends that the Commission modify its proposed approach to removing an SBS from the trade execution requirement. The commenter states that the proposed approach raises a significant risk that an SBS may be required to be traded on an SBSEF merely because it is listed on one SBSEF, even if there is no liquidity to sustain trading in that SBS, which could be detrimental for both buy-side and sell-side market participants. To ensure that there is adequate liquidity in MAT SBSs, the commenter recommends that the Commission adopt a process for removing an SBS from the MAT scope that is similar to the process for making a MAT determination. The commenter also urges the Commission, given the industry's recent experience with the COVID–19 crisis, and consistent with the MRAC Report, to consider the implications that a temporary outage at one or more SBSEFs or a major market disruption would have for SBSs subject to the trade execution requirement. For this reason, the commenter recommends that the Commission consider the circumstances under which it would allow for a temporary suspension of the trade execution requirement and any possible terms for such a suspension, as well as any other relief measures the Commission may be able to provide.[309]

The commenter's concern that an SBS may be required to be traded on an SBSEF merely because a single SBSEF has listed that SBS, even if there is no liquidity to sustain trading in that SBS, is addressed by the requirements in Rule 816(b) that must be met by an SBSEF before it submits a MAT determination under Rule 806 or Rule 807, as well as by the Commission's ability to disapprove, or stay and then object to, any MAT determination by an SBSEF. In considering an SBSEF's MAT submission, the Commission will generally consider how many SBSEFs list and trade a given SBS, as well as the liquidity and trading characteristics of that SBS. Further, to the extent market circumstances change to make a previous MAT determination unsuitable for then-prevailing market conditions, and if the SBSEF that has made a MAT determination is unwilling to withdraw that determination, the Commission would be able to grant exemptive relief (including on an emergency basis) pursuant to its authority in section 36 of the SEA in order to address that situation.[310] For these reasons, the Commission would have the ability to address market circumstances that disrupt the ability of market participants to trade SBS in compliance with the trade execution requirement.

Therefore, the Commission is adopting Rule 816(d) as proposed.

6. Rule 816(e)

Paragraph (e) of Proposed Rule 816 has no analog in § 37.10, but instead is adapted from 17 CFR 36.1 of the CFTC's rules, which sets out certain exemptions from the trade execution requirement. The exemptions incorporated into § 36.1 result from the CFTC's many years of experience in administering the CEA's trade execution requirement.

Paragraph (e)(1) of Rule 816 provides that an SBS transaction that is executed as a component of a package transaction and that also includes a component transaction that is the issuance of a bond in a primary market is exempt from the trade execution requirement in section 3C(h) of the SEA. In addition, paragraph (e)(1) provides that, for purposes of paragraph (e), a package transaction consists of two or more component transactions executed between two or more counterparties where: at least one component transaction is subject to the trade execution requirement in section 3C(h) of the SEA; execution of each component transaction is contingent upon the execution of all other component transactions; and the component transactions are priced or quoted together as one economic transaction with simultaneous or near-simultaneous execution of all components.

Paragraph (e)(2) of Rule 816, which is adapted from § 36.1(b), provides that section 3C(h) of the SEA does not apply to an SBS transaction that qualifies for an exception[311] under section 3C(g) of the SEA, or any exemption from the clearing requirement that is granted by the Commission, for which the associated requirements are met.[312] Unlike the CFTC, the Commission does not have a specific rule to cite to regarding exemptions from the clearing requirement, so Rule 816(e)(2) would refer only generally to such exemptions.

Paragraph (e)(3) of Rule 816, which is adapted from § 36.1(c), provides that section 3C(h) of the SEA does not apply to an SBS transaction that is executed between counterparties that qualify as ''eligible affiliate counterparties.''[313] Counterparties would be ''eligible affiliate counterparties'' for purposes of Rule 816(e)(3) if: (i) one counterparty, directly or indirectly, holds a majority ownership interest in the other counterparty, and the counterparty that holds the majority interest in the other counterparty reports its financial statements on a consolidated basis under Generally Accepted Accounting Principles (''GAAP'') or International Financial Reporting Standards (''IFRS''), and such consolidated financial statements include the financial results of the majority-owned counterparty; or (ii) a third party, directly or indirectly, holds a majority ownership interest in both counterparties, and the third party reports its financial statements on a consolidated basis under GAAP or IFRS, and such consolidated financial statements include the financial results of both of the counterparties. In addition, for purposes of Rule 816(e)(3), a counterparty or third party directly or indirectly would hold a majority ownership interest if it directly or indirectly holds a majority of the equity securities of an entity, or the right to receive upon dissolution, or the contribution of, a majority of the capital of a partnership.

The Commission received comments on Rule 816(e).[314] One commenter supports the proposed carve-out for package transactions.[315] Another commenter, however, states that the CFTC's rules for package transactions were ''developed by the CFTC, initially via staff no-action relief, after SEFs had adopted various MAT determinations and market participants had provided input to the CFTC regarding the particular types of package transactions

[308] *See* ICI Letter, *supra* note 18, at 9.

[309] See *id.*

[310] *See* 15 U.S.C. 78mm.

[311] Section 3C(g) of the SEA is entitled ''*Exceptions,*'' not ''*Exemptions.*''

[312] As with section 2(h)(8) of the CEA, section 3C(h) of the SEA provides that the trade execution requirement does not apply to SBS that are excepted from the clearing requirement pursuant to section 3C(g) of the SEA. However, the Commission could, like the CFTC, grant exemptions from the clearing requirement pursuant to other statutory authority, such as section 36 of the SEA.

[313] Section 36.1(c) provides that section 2(h)(8) of the CEA does not apply to a swap transaction that is executed between counterparties that have eligible affiliate counterparty status pursuant to paragraph (a) of § 50.52 of the CFTC's rules, which provides an exception from the clearing requirement for inter-affiliate swaps, subject to conditions. Counterparties to a swap that have eligible affiliate counterparty status may rely on the § 36.1(c) even if they clear the swap transaction. Since the Commission does not have an equivalent to § 50.52 to reference, the Commission is instead defining the term ''eligible affiliate counterparties'' directly in Rule 816(e)(3). These definitions are closely modeled on the equivalent definitions used in § 50.52, which are incorporated into § 36.1(c).

[314] *See* ISDA–SIFMA Letter, *supra* note 18, at 9–10; SIFMA AMG Letter, *supra* note 18, at 6.

[315] *See* SIFMA AMG Letter, *supra* note 18, at 6.

common in the market for the relevant types of MAT swaps.'' [316] The commenter states that it is for this reason that particular types of package transactions addressed by the CFTC generally focus on transactions common in the interest-rate swaps market, which make up the majority of MAT swaps. In addition, the commenter asserts that the current state of the CFTC's rules in this area reflect the culmination of a phased implementation approach developed over time via no-action letters. The commenter argues that, in light of this, it would be better for the Commission to tailor its rules for package transactions to address the particular market dynamics relevant to the SBS market instead of those in the swaps market. The commenter recommends that the Commission build into the MAT determination process a framework for identifying what types of package transactions exist for prospective MAT SBS and then develop tailored rules around the execution of such transactions.[317]

The Commission does not agree that it is necessary to tailor the Commission's rules for package transactions to address the particular market dynamics relevant to the SBS market, because no MAT determinations for SBS have been made, and no MAT determinations can yet be made because no SBS are required to be cleared. Moreover, the Commission does not yet have a sufficient basis on which to tailor the rules for package transactions to address SBS market dynamics, because the market dynamics relevant to trading of SBS on SBSEFs have yet to develop. It would be preferable to address those dynamics with respect to package transactions if and when it becomes necessary or appropriate to do so, because, at that point, the Commission and commenters would be better informed about the nature of trading various SBS on SBSEFs. In the meantime, it is desirable for Rule 816(e) to be harmonized with § 36.1 of the CFTC's rules to promote similar treatment of package trades, whether they involve SBS or swaps, as this will facilitate the participation of current SEF participants on SBSEFs. If, after SBSEFs have become operational and MAT determinations have been made, the Commission observes that the rules for package transactions are no longer suitable for the SBS market, the Commission could consider amending Rule 816(e) at that time.

For the reasons discussed above, the Commission is adopting Rule 816(e) as proposed.

G. Rule 817—Trade Execution Compliance Schedule

Proposed Rule 817 is modeled on § 37.12 of the CFTC's rules, which is designed to inform market participants of the precise date on which the trade execution requirement for a particular product commences.[318] Accordingly, paragraph (a) of Rule 817 provides that an SBS transaction shall be subject to the requirements of section 3C(h) of the SEA upon the later of (1) a determination by the Commission that the SBS is required to be cleared as set forth in section 3C(a) or any later compliance date that the Commission may establish as a term or condition of such determination or following a stay and review of such determination pursuant to section 3C(c) of the SEA and Rule 3Ca–1 thereunder; and (2) 30 days after the available-to-trade determination submission or certification for that SBS is, respectively, deemed approved under Rule 806 or deemed certified under Rule 807. Paragraph (b) of Rule 817 also provides that a counterparty may voluntarily comply with the trade execution requirement sooner than required by paragraph (a).

The Commission received several comment letters about the sufficiency of the time period allotted for compliance with a MAT determination.[319] One commenter encourages the Commission to provide an extended duration of time until any MAT determination becomes effective so that asset managers and other market participants have adequate time to make the necessary operational and market structure arrangements to accommodate the trade execution requirement.[320] Another commenter urges the Commission to ensure that all SBSEFs and market participants have adequate time to prepare for the operational and market conditions that come along with a MAT determination.[321]

Some commenters recommend that a MAT determination not be effective for at least 90 days.[322] One commenter emphasizes that, after a MAT determination, market participants should be provided with sufficient time to comply with any new trade execution requirement, and that commenter believes that market participants would benefit from 90 days to comply.[323] Another commenter, citing its experience with the MAT requirement, states that it has observed that 30 days provides insufficient time to adjust trading protocols and ensure a smooth transition to trading on SEFs.[324] In this regard, the commenter asks the Commission to extend the time between when a MAT determination is made and when it becomes effective from the proposed 30 days to 90 days. The commenter also asserts that this is consistent with the recommendations of the CFTC MRAC report that examined the appropriateness, efficacy, and sustainability of the MAT process.

Another commenter also cites the CFTC MRAC's report in recommending that the Commission provide 90 days after a MAT determination is final before it becomes effective. This commenter emphasizes that market participants will need an adequate compliance period after a mandatory clearing determination is made *and* after the SBS is first made available to trade on an SBSEF to prepare. The commenter expresses concern that, under the proposed approach, if an SBS is made available to trade fewer than 30 days before a mandatory clearing determination, then the SBS would be subject to mandatory trading on an SBEF with a less than 30-day compliance period. This commenter urges the Commission to clarify that the scope of eligible SBS for MAT determination is limited to only those that have already been determined to be subject to mandatory clearing. This commenter also asserts that, even when an SBS is already subject to mandatory clearing, the proposed 30-day compliance period would still be inadequate given the complex operational and technological steps that must be taken to trade a new SBS on an SBSEF. The commenter states that market participants such as regulated funds will need time to onboard to an SBSEF if necessary, and to further update their systems, processes, and procedures to transact via an SBSEF's order book or RFQ system.[325]

[316] ISDA–SIFMA Letter, *supra* note 18, at 9.

[317] *See* ISDA–SIFMA Letter, *supra* note 18, at 9–10.

[318] Rule 3Ca–1 under the SEA provides that the Commission may determine, following a submission from a clearing agency, that an SBS (or a group, category, type, or class of SBS) must be cleared. This determination could follow a stay of the clearing requirement for additional review. 17 CFR 240.3Ca–1.

[319] *See* Bloomberg Letter, *supra* note 18, at 16; ICI Letter, *supra* note 18, at 8–9; ISDA–SIFMA Letter, *supra* note 18, at 5, SIFMA AMG Letter, *supra* note 18, at 7; WMBAA Letter, *supra* note 18, at 5.

[320] *See* SIFMA AMG Letter, *supra* note 18, at 7.

[321] *See* WMBAA Letter, *supra* note 18, at 5.

[322] *See* Bloomberg Letter, *supra* note 18, at 16; ICI Letter, *supra* note 18, at 8; ISDA–SIFMA Letter, *supra* note 18, at 5.

[323] *See* Bloomberg Letter, *supra* note 18, at 16.

[324] *See* ISDA–SIFMA Letter, *supra* note 18, at 5.

[325] *See* ICI Letter, *supra* note 18, at 3, 8.

The Commission has considered commenters' requests for an extended compliance period for the mandatory trading requirement once a MAT determination has been made with respect to an SBS. The presence of ready and willing buyers and sellers and the number and types of market participants, among other things, are relevant factors in a MAT determination under Rule 816(b).[326] As noted above, the extent to which a MAT determination is likely to be disruptive to the market for a given SBS is best addressed in the context of making the MAT determination, which, as discussed above, allows for the Commission oversight of the determination through its review and approval or disapproval of a filing under Rule 806, or through staying and seeking public comment on a self-certification under Rule 807.[327] Further, with respect to the suggestion that the Commission clarify that the scope of eligible SBS for MAT determination is limited to only those that have already been determined to be subject to mandatory clearing, a MAT determination filing would not have any relevance until there are any SBSs subject to the clearing requirement.

It is not necessary to revise the 30-day period for compliance with a MAT determination, because the readiness of the market to comply with a MAT determination for a particular SBS would be relevant to the MAT determination itself, including the analysis of the six factors enumerated in Rule 816(b), and because an analysis of that readiness would best be undertaken based on the facts and circumstances attending a specific MAT determination.

For the reasons discussed above, the Commission is adopting Rule 817 as proposed.

VI. Implementation of Core Principles

Section 3D(d) of the SEA [328] sets forth 14 Core Principles with which SBSEFs must comply. These provisions, with one exception, correspond to the 15 Core Principles for SEFs set forth in section 5h(f) of the CEA.[329]

Core principle title	CEA #	SEA #
Compliance with Core Principles	1	1
Compliance with Rules	2	2
(Security-Based) Swaps Not Readily Susceptible to Manipulation	3	3
Monitoring of Trading and Trade Processing	4	4
Ability to Obtain Information	5	5
Position Limits or Accountability	6	n/a
Financial Integrity of Transactions	7	6
Emergency Authority	8	7
Timely Publication of Trading Information	9	8
Recordkeeping and Reporting	10	9
Antitrust Considerations	11	10
Conflicts of Interest	12	11
Financial Resources	13	12
System Safeguards	14	13
Designation of Chief Compliance Officer	15	14

It continues to be appropriate to closely harmonize with the CFTC rules that implement the SEF Core Principles, although there are some instances where close harmonization is not practicable. Where there are substantive differences between an existing CFTC rule and the SEC rule being adopted, the discussion below addresses those differences. The discussion below will also address where there is not, or at least there is not intended to be, a difference between the SEC rule and the analogous existing CFTC rule.

Part 37 of the CFTC's rules includes an appendix B, setting forth ''Guidance on, and Acceptable Practices in, Compliance with Core Principles.'' The introduction to appendix B provides that the guidance for the Core Principle is illustrative only and ''is not intended to be used as a mandatory checklist.'' [330] Where the CFTC has included guidance and/or accepted practices pertaining to a Core Principle for SEFs, the discussion below addresses how (if at all) the Commission has incorporated the substance of these statements into Regulation SE.

A. Rule 818—Core Principle 1—Compliance With Core Principles

Core Principle 1 [331] requires an SBSEF, to be registered and maintain registration as an SBSEF, and to comply with the Core Principles and any requirement that the Commission may impose by rule or regulation. Core Principle 1 also provides that an SBSEF shall have reasonable discretion in establishing the manner in which it complies with the Core Principles.[332] Proposed Rule 818, like § 37.100 of the CFTC's rules, repeats the relevant statutory text of the Core Principle.

The Commission received no comments on Proposed Rule 818 and is adopting Rule 818 as proposed for the reasons stated in the Proposing Release.

B. Rule 819—Core Principle 2—Compliance With Rules

Core Principle 2 requires an SBSEF to establish and enforce compliance with any rule that is established by the SBSEF, including the terms and conditions of the SBS that it trades or processes, and any limitation on access to the SBSEF.[333] It further requires the SBSEF to establish and enforce trading, trade processing, and participation rules that will deter abuses, and to have the capacity to detect, investigate, and enforce those rules, including the means to provide market participants with impartial access to the market and to capture information that may be used in establishing whether rule violations have occurred. Finally, Core Principle 2 requires an SBSEF to establish rules governing the operation of the facility, including rules specifying trading procedures to be used in entering and executing orders traded or posted on the

[326] *See supra* section V.F.3.

[327] *See supra* section V.F.2.

[328] 15 U.S.C. 78c–4(d).

[329] *Compare* 7 U.S.C. 7b–3(f) (enumerating 15 Core Principles for SEFs), *with* 15 U.S.C. 78c–4(d) (enumerating 14 Core Principles for SBSEFs). CEA Core Principle 6 for SEFs (Position Limits or Accountability) has no analog in the SEA, so the numbering of the subsequent Core Principles between the two statutes differs by one.

[330] 17 CFR appendix-B-to-part-37 1.

[331] Section 3D(d)(1) of the SEA, 15 U.S.C. 78c–4(d)(1).

[332] CEA Core Principle 1 is substantively identical. *See* 7 U.S.C. 7b–3(f)(1).

[333] Section 3D(d)(2) of the SEA, 15 U.S.C. 78c–4(d)(2).

facility, including block trades. Core Principle 2 for SEFs [334] is substantively identical, except that it includes an additional paragraph requiring a SEF to provide in its rules that, when a swap dealer or major swap participant enters into or facilitates a swap that is subject to the mandatory clearing requirement, the swap dealer or major swap participant shall be responsible for compliance with the trade execution requirement.[335]

As described in the Proposing Release, the Commission modeled Rules 819 (a) through (g) on subpart C of part 37 of the CFTC's rules,[336] and Rules 819 (h) through (k) on other parts of the CFTC's rules.[337]

1. Rule 819(a)—General

Paragraph (a) of Proposed Rule 819, like § 37.200 of the CFTC's rules,[338] would repeat the statutory text of Core Principle 2.[339] The Commission did not receive any comments on Proposed Rule 819(a). It is appropriate to repeat the statutory text of Core Principle 2 in Rule 819(a) and is adopting Rule 819(a) as proposed, except that it is deleting the words ''including block trades,'' in light of its decision not to adopt a definition of ''block trade.'' [340]

2. Rule 819(b)—Operation of Security-Based Swap Execution Facility and Compliance With Rules

Paragraph (b) of Proposed Rule 819 is closely modeled on § 37.201 of the CFTC's rules,[341] and would require an SBSEF to specify trading procedures (including for block trades, if offered) and to establish and impartially enforce compliance with the rules of the SBSEF.[342] The Commission did not receive any comments on Proposed Rule 819(b). It is appropriate for an SBSEF to specify trading procedures and to establish and impartially enforce compliance with its rules, and the Commission is adopting Rule 819(b) as proposed, except that it is deleting the words ''including block trades, if offered,'' in light of its decision not to adopt a definition of ''block trade,'' [343] which will have no effect on the requirement as compared to the proposed rule.

3. Rule 819(c)—Access Requirements

Paragraph (c) of Proposed Rule 819 is closely modeled on § 37.202 of the CFTC's rules,[344] and would require an SBSEF, consistent with section 3D(d)(2)(B)(i) of the SEA,[345] to provide any ECP and any independent software vendor with impartial access to its market(s) and market services, including any indicative quote screens or any similar pricing data displays. An SBSEF will also be required to establish nondiscriminatory fee structures for ECPs and independent software vendors based on the level of access to or services provided by the SBSEF. Rule 819 further requires an SBSEF to establish and impartially enforce rules governing any decision to allow, deny, suspend, or permanently bar an ECP's access to the SBSEF, including when a decision is made as part of a disciplinary or emergency action taken by the SBSEF.

Several commenters express general support for the adoption of impartial access standards for SBSEFs.[346] One commenter specifically supports the Commission's close harmonization with CFTC rules.[347]

One commenter expresses support for Proposed Rule 819(c), but states that the Commission's proposal does not provide market participants with sufficient clarity regarding how Proposed Rule 819(c) will be interpreted and applied in practice, and the commenter encourages the Commission to provide in the final rule that access to SBSEFs should be based on ''objective, pre-established'' criteria, and that any ECP should be able to demonstrate financial soundness by showing that it is a clearing member or that it has clearing arrangements in place with a clearing member.[348]

This commenter states that the CFTC has provided market participants with extensive guidance regarding impartial access and encourages the Commission to provide similar clarity when finalizing the SBSEF rules, including guidance with respect to membership criteria, trading protocols and functionality, and fee arrangements. Specifically, this commenter urges the Commission to provide in the final rule that an SBSEF may not limit membership to (i) self-clearing members; (ii) registered security-based swap dealers; (iii) banks or liquidity providers with a minimum amount of Tier 1 capital; (iv) liquidity providers that have been ''enabled'' by, or have bilateral documentation with, a minimum number of other liquidity providers; or (v) liquidity providers with a minimum amount of transaction volume.[349]

This commenter also states that SBSEFs should not be permitted to apply trading protocols in a manner that results in impermissible discrimination among market participants. Specifically, the commenter states that SBSEFs should not allow participants to selectively restrict their trading with other SBSEF participants through ''enablement mechanisms''; that market participants should be permitted to act as both liquidity providers and liquidity takers on an SBSEF; that all SBSEF participants should be permitted to both send and receive RFQs (instead of only designated liquidity providers being eligible to receive RFQs); and that SBSEFs should not be permitted to require participants to have bilateral documentation in place to trade cleared security-based swaps, as this could provide a pretext for some participants to restrict trading with other participants. This commenter further states that SBSEFs should not be permitted to use fee arrangements to effect otherwise impermissible discrimination with respect to access.[350]

Another commenter also urges the Commission to incorporate the CFTC's impartial access requirement guidance with respect to SBSEFs, which would assist market participants in interpreting how the impartial access rules should work. Coordination of impartial access ''not only affects an entity operating both an SEF and SBSEF but also their clients, many of whom use the same individual traders to trade both instrument types.[351] One commenter specifically encourages the Commission to address the potential use of restrictive requirements to obtain access to SBSEFs and to make clear that an SBSEF's reasonable discretion in establishing access criteria must be impartial,

[334] 7 U.S.C. 7b–3(f)(2).

[335] *See* 7 U.S.C. 7b–3(f)(2)(D).

[336] *See* Proposing Release, *supra* note 1, 87 FR at 28901–05.

[337] *See id.* at 28905–09.

[338] 17 CFR 37.200; *see also* Proposing Release, *supra* note 1, 87 FR at 28901.

[339] *See* Proposing Release, *supra* note 1, 87 FR at 28902.

[340] *See supra* section V.E.1(c).

[341] 17 CFR 37.201; *see also* Proposing Release, *supra* note 1, 87 FR at 28901.

[342] *See* Proposing Release, *supra* note 1, 87 FR at 28902.

[343] *See supra* section V.E.1(c).

[344] 17 CFR 37.202; *see also* Proposing Release, *supra* note 1, 87 FR at 28901.

[345] 15 U.S.C. 78c–4(d)(2)(B)(i) (''a security-based swap execution facility shall . . . establish and enforce trading, trade processing, and participation rules that will deter abuses and have the capacity to detect, investigate, and enforcement those rules, including means . . . to provide market participants with impartial access to the market'').

[346] *See* Citadel Letter, *supra* note 18, at 6–7; SIFMA AMG Letter, *supra* note 18, at 4; MFA Letter, *supra* note 18, at 10.

[347] *See* MFA Letter, *supra* note 18, at 10.

[348] *See* Citadel Letter, *supra* note 18, at 6–7.

[349] *See* Citadel Letter, *supra* note 18, at 6–7.

[350] *See id.*

[351] *See* MFA Letter, *supra* note 18, at 10.

transparent, and applied in a fair and nondiscriminatory manner.[352]

One commenter states that the trading documentation requirement of Rule 15Fi-5 may at times conflict with the impartial access requirement of Proposed Rule 819(c) because it is unlikely that all SBSEF members trading cleared swaps will have trading relationship documentation with all other members trading cleared SBS.[353] This commenter encourages the Commission to adopt the CFTC guidance regarding enablement mechanisms and states that such mechanisms were historically used to eliminate credit risk, but that no such risk exists if an SBSEF intended to be cleared is void *ab initio* if rejected for clearing.

The Commission agrees with commenters that impartial access to an SBSEF encompasses both impartial access to membership in an SBSEF and the ability to fully interact on the SBSEF's order book or RFQ system, and that an SBSEF's rules must incorporate impartial criteria for this access. The Commission expects that most, if not all, entities that will seek SBSEF registration with the SEC are or will also be registered as SEFs with the CFTC and that ensuring consistency of access to SBSEFs and SEFs will provide market participants with greater certainty about permissible practices regarding access to these platforms.[354] Efforts to undermine the principle of impartial access may take myriad forms over time. The text of Rule 819(c) is consistent with the text of § 37.202 of the CFTC's regulations and emphasizes the general principal that access to an SBSEF and its services must be impartial. The Commission does not find it necessary to describe within 819(c) specific practices that would violate its requirements. For the purposes of the Commission's review process for a denial or limitation of access or membership that is inconsistent with Rule 918(c), the Commission will apply a standard of review consistent with standards of review that the Commission uses in similar contexts.[355]

The Commission is aware of the CFTC staff guidance on impartial access related to § 37.202 of the CFTC's regulations.[356] The Commission finds it is appropriate to similarly provide guidance as to certain criteria or practices that are inconsistent with Rule 819(c)'s requirement to provide impartial access. The Commission agrees that it is inconsistent with providing impartial access for an SBSEF to limit membership based on an ECP's status, such as by limiting membership to (1) self-clearing members; (2) registered security-based swap dealers; (3) banks or liquidity providers with a minimum amount of Tier 1 capital; (4) liquidity providers that have been ''enabled'' by, or have bilateral documentation with, a minimum number of other liquidity providers; or (5) liquidity providers with a minimum amount of transaction volume.[357] Access to an SBSEF generally should be determined, for example, on an SBSEF's ''impartial evaluation of an applicant's disciplinary history and financial and operational soundness against objective, pre-established criteria.'' [358] As one example of such criteria, any ECP should be able to demonstrate financial soundness either by showing that it is a clearing member of a clearing agency that clears products traded on that SBSEF or by showing that it has clearing arrangements in place with such a clearing member.[359]

Further, providing impartial access as required by Proposed Rule 819(c) means providing all of an SBSEF's market participants—dealers and non-dealers alike—with the ability to fully interact on the order book or RFQ system as liquidity providers, liquidity takers, or both, including viewing, placing, or responding to all indicative or firm bids and offers and to place, receive, and respond to RFQs. Therefore, it would be incompatible with impartial access for an SBSEF's rules to permit mechanisms, schemes, functionalities, counterparty filters, or other arrangements that prevent an SBSEF participant from interacting or trading with, or viewing the bids and offers (firm or indicative) displayed by, any other market participant on that SBSEF, whether by means of any condition or restriction on its ability or authority to display a quote to any other market participant or to respond to any quote issued by any other market participant on that SBSEF with respect to security-based swap transactions that are intended to be cleared.

It is also inconsistent with impartial access for an SBSEF's rules to require bilateral documentation or to permit bilateral enablements in order to trade security-based swaps that are intended to be cleared, because providing for such documentation or enablements solely to address occasional trade rejections by a clearing agency would undercut the ability of all ECPs to post or interact with interest on security-based swaps that are intended to be cleared, and because such documentation or enablements are unnecessary in light of the provisions of Rule 815(g), which, as discussed *supra* section V.E.7, would require an SBSEF's rules to provide that a trade that is intended to be cleared at the time of the transaction, but is not accepted for clearing by a registered clearing agency, is void *ab initio.* Providing that such trades are void *ab initio* also reflects the economic reality that an uncleared transaction is significantly different from a cleared transaction in terms of the credit risk faced by the counterparties. Lastly, it is inconsistent with impartial access for an SBSEF to employ fee structures that would have a disproportionate or adverse effect on certain market participants based on their status, as described above,[360] with respect to the ability to fully interact on the order book or RFQ system as liquidity providers, liquidity takers, or both, including viewing, placing, or responding to all indicative or firm bids and offers and to place, receive, and respond to RFQs.

With respect to the comment that the documentation requirements of Rule 15Fi–5 may, at times, conflict with the impartial access requirement of Proposed Rule 819(c), no such conflict exists, because Rule 15Fi–5(a)(1)(ii) provides that the rule does not apply to cleared swaps, and Rule 15Fi(a)(1)(iii) further provides that the rule does not apply to security-based swap transactions executed anonymously on an SBSEF or a national securities

[352] *See* SIFMA AMG Letter, *supra* note 18, at 4.

[353] *See* Bloomberg Letter, *supra* note 18, at 3–4.

[354] *See* Proposing Release, *supra* note 1, 87 FR at 28876.

[355] *See* Rule 819(c)(4). The Commission is adopting Rule 819(c) with the addition of paragraph (c)(4). The Commission notes that the CFTC has a standard of review applicable to its process. See 17 CFR 9.2(c); 17 CFR 9.33(c).

[356] *See* Division of Clearing and Risk, Division of Market Oversight and Division of Swap Dealer and Intermediary Oversight Guidance on Application of Certain Commission Regulations to Swap Execution Facilities, CFTC (Nov. 14, 2013), *available at https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/dmostaffguidance111413.pdf.*

[357] *See* Citadel Letter, *supra* note 18, at 6. Membership requirements based on any combination of these factors would similarly be inconsistent with providing impartial access.

[358] *See* 2013 CFTC Final SEF Rules Release, *supra note* 9, at 78 FR at 33598 (discussing ''impartial access'' to swap execution facilities).

[359] *See id.* Similarly, it is not consistent with impartial access for an SBSEF to require that an ECP have clearing arrangements in order to trade security-based swaps that are not intended to be cleared. In such a case, the SBSEF's standards of financial soundness should be objective and impartial and should have a relevant relationship to trading on the SBSEF.

[360] *See supra* note 357 and accompanying text.

exchange, provided that certain conditions are met.[361]

4. Rule 819(d)—Rule Enforcement Program

Paragraph (d) of Proposed Rule 819 is closely modeled on § 37.203. Paragraph (d)(1) of Proposed Rule 819 would require an SBSEF to prohibit abusive trading practices generally, enumerating certain practices in particular.[362] Paragraph (d)(2) would require an SBSEF to have arrangements and resources for effective enforcement of its rules, including the authority to collect information and documents on both a routine and non-routine basis and to supervise its market to determine whether a rule violation has occurred. Paragraph (d)(3) would require an SBSEF to establish and maintain sufficient compliance staff and resources to ensure that it can conduct effective audit trail reviews, trade practice surveillance, market surveillance, and real-time market monitoring. Paragraph (d)(4) would require an SBSEF to maintain an automated trade surveillance system that meets certain criteria. Paragraph (d)(5) would require real-time market monitoring of all trading activity on the SBSEF. The SBSEF would also be required to have the authority to adjust trade prices or cancel trades when necessary to mitigate market disrupting events caused by malfunctions in its system(s) or platform(s) or errors in orders submitted by members. Paragraph (d)(6) is modeled on § 37.203(f), again using the same structure and rule text. Like § 37.203(f), Rule 819(d)(6) addresses investigations and investigation reports and includes provisions relating to procedures, timeliness, the reporting requirements when a reasonable basis does or does not exist for finding a violation, and warning letters.[363]

The Commission did not receive any comments on Rule 819(d) and is adopting Rule 819(d) as proposed, except that, in light of its decision not to adopt a definition of ''block trade,'' [364] the Commission is deleting the words ''block trades or other types of'' from the phrase ''pre-arranged trading (except for block trades or other types of transactions approved by or certified to the Commission pursuant to § 242.806 or § 242.807, respectively).'' While the deletion of this text would remove an automatic exemption for block trades from the prohibition against pre-arranged trading that an SBSEF's rules would be required to include, it is appropriate given that a definition of block trade has not been adopted. At such time as the Commission adopts a definition of block trade, an SBSEF could submit a rule change under Rule 806 or Rule 807 to address trades that meet the definition of block trade.

5. Rule 819(e)—Regulatory Services Provided by a Third Party

Paragraph (e) of Proposed Rule 819 is modeled on § 37.204 and would allow an SBSEF to contract with a regulatory services provider. If it does so, the SBSEF would have to ensure that such provider has the capacity and resources necessary to provide timely and effective regulatory services, retain sufficient compliance staff to supervise the quality and effectiveness of the regulatory services provided on its behalf, hold regular meetings with the regulatory service provider, and conduct periodic reviews of the adequacy and effectiveness of services provided on its behalf. The SBSEF would at all times remain responsible for the performance of any regulatory services received and retain exclusive authority in all substantive decisions made by its regulatory service provider.

One commenter states that SBSEFs should be able to use regulatory service providers and that the types of regulatory service providers permitted under Proposed Rule 819(e)(1) are appropriate.[365] Another commenter also supports the use of regulatory service providers but believes that the Commission should include DCMs among the types of entities permitted to act as regulatory service providers, as they are ''uniquely qualified'' and are permitted to act as regulatory service provider under the CFTC SEF regime.[366] This commenter states that DCMs have well-established regulatory protocols and are subject to CFTC oversight, conduct regulatory activities similar to registered futures associations, have developed expertise in securities markets, and are permitted to list futures on individual stocks and to list swap contracts for trading.[367]

The Commission agrees that SBSEFs should be able to contract with DCMS for the provision of regulatory services. As the commenter states, DCMs have well-established regulatory protocols and are subject to CFTC oversight, and they are permitted to act as regulatory service providers for SEFs. Additionally, permitting an SBSEF to use the same regulatory service provider as an affiliated SEF may create efficiencies for both the SBSEF and SEF, while maintaining regulatory oversight of the entity that is providing the regulatory services. While the CFTC's regulation for SEFs does not contain a reciprocal provision permitting national securities exchanges to perform regulatory services for SEFs, harmonization in practical terms with this aspect of the CFTC regime—*i.e.,* so that DCMs can perform regulatory services for both SBSEFs and SEFs—is appropriate in light of the relative size of the SBSEF market compared to the swaps market and because most if not all entities that will seek to register as SBSEFs are already registered as SEFs. Significantly, regardless of the type of entity acting as regulatory service provider for an SBSEF, the SBSEF will at all times remain responsible for the performance of any regulatory services received and retain exclusive authority in all substantive decisions made by its regulatory service provider. Accordingly, the Commission is adopting Rule 819(e) as amended to permit SBSEFs to contract with DCMs for the provision of services to assist in complying with the SEA and Commission rules thereunder, as approved by the Commission.[368]

6. Rule 819(f)—Audit Trail

Paragraph (f) of Proposed Rule 819 is modeled on § 37.205, using the same paragraph structure and rule text. Paragraph (f) would require an SBSEF to

[361] *See* 17 CFR 240.15Fi–5(a)(1)(ii) and (iii). Rule 15Fi–5(a)(1)(iii) provides in part that SBSs executed anonymously on an SEF or a national securities exchange are exempt from the provisions of Rule 15Fi–5, provided that: (1) the SBSs are intended to be cleared and are actually submitted for clearing to a clearing agency; (2) all terms of the SBSs conform to the rules of the clearing agency; and (3) upon acceptance of such an SBS by the clearing agency the original SBS is extinguished; the original SBS is replaced by equal and opposite SBS with the clearing agency; and all terms of the SBS conform to the product specifications of the cleared SBS established under the clearing agency's rules. *See* 17 CFR 240.15Fi–5(a)(1)(iii).

[362] To promote uniformity throughout proposed Regulation SE, it is appropriate to denote all persons who have a right to participate in an SBSEF's market as ''members.''

[363] Rule 819(d)(6)(v) provides that the rules of an SBSEF may authorize its compliance staff to issue a warning letter to a person or entity under investigation or to recommend that a disciplinary panel take such an action, and that no more than one warning letter could be issued to the same person or entity found to have committed the same rule violation within a rolling 12-month period.

[364] *See supra* section V.E.1(c).

[365] *See* Bloomberg Letter, *supra* note 18, at 16.

[366] *See* ICE Letter, *supra* note 18, at 3.

[367] *See id.* at 3–4 (also stating that, for example, ICE Futures U.S., Inc. is a DCM that provides regulatory services to SEFs).

[368] Specifically, the Commission is adding to Rule 819(e) the language ''a board of trade designated as a contract market (under section 5 of the Commodity Exchange Act)''—in other words, a DCM—to the list of entities with which an SBSEF may enter into a contract for the provision of regulatory services.

capture and retain all audit trail data necessary to detect, investigate, and prevent customer and market abuses, and imposes other requirements on the SBSEF's audit trail pertaining to the records that must be kept, electronic analysis capability, safe-storage capability, and enforcement of the audit trail requirements.

The Commission did not receive any comments on Proposed Rule 819(f). An audit trail is a crucial component of a trading venue's ability to ensure compliance with its rules. These requirements should be modeled on the parallel CFTC regulations regarding SEFs, as most, if not all, entities that will register as SBSEFs will be SEFs registered with the CFTC, and that consistent requirements will promote a consistent approach to compliance. Accordingly, the Commission is adopting Rule 819(f) as proposed, with minor technical modifications.[369]

7. Rule 819(g)—Disciplinary Procedures and Sanctions

Paragraph (g) of Proposed Rule 819 is based on § 37.206 of the CFTC's rules and generally tracks all of its rule text but would include additional language derived from guidance in appendix B of part 37 of the CFTC's rules. Converting the guidance to rule text, and thus grouping conceptually related items together, yields the most coherent and readable ruleset, instead of incorporating the guidance into a stand-alone section of the rules. Accordingly, paragraph (g)(1)(i) of Proposed Rule 819 is taken from § 37.206(a) and would require an SBSEF to establish and maintain sufficient enforcement staff and resources to effectively and promptly prosecute possible rule violations within the disciplinary jurisdiction of the SBSEF. Paragraphs (g)(1)(ii) through (iv) are taken from the appendix B guidance and would provide, respectively, that:

- The enforcement staff of an SBSEF shall[370] not include members or other persons whose interests conflict with their enforcement duties.
- A member of the enforcement staff shall not operate under the direction or control of any person or persons with trading privileges at the SBSEF.
- The enforcement staff of an SBSEF may operate as part of the SBSEF's compliance department.

Paragraph (g)(2) of Rule 819 is modeled on § 37.206(b) and would require an SBSEF to establish one or more disciplinary panels that are authorized to fulfill their obligations under Proposed Rule 819. Section 37.206(b) provides that disciplinary panels must meet the composition requirements of part 40. To help ensure fairness and prevent special treatment or preference of any person or member and to provide for consistency in the makeup of members of SBSEF major disciplinary committees and hearing panels, the Commission proposed instead to require the disciplinary panels established under Proposed Rule 819(g)(2) to meet the composition requirements of Rule 834(d), which apply to each major disciplinary committee and hearing panel of an SBSEF.[371]

Paragraphs (g)(3) through (8) of Proposed Rule 819 have no parallel in § 37.206 itself but derive from the guidance in appendix B pertaining to § 37.206, following the paragraph structure and wording of the guidance closely. Paragraph (g)(3) would impose procedural requirements relating to the notice of charges made to a respondent. Paragraph (g)(4) would provide that a respondent has a right to representation. Paragraph (g)(5) would provide that a respondent must be given adequate time to respond to any charges. Paragraph (g)(6) would state that the rules of an SBSEF may provide that, if a respondent admits or fails to deny any of the charges, a disciplinary panel may find that the violations alleged in the notice of charges have been committed. Paragraph (g)(6) would further state that, if the SBSEF's rules so provide, then: (i) The disciplinary panel may impose a sanction for each violation found to have been committed; (ii) The disciplinary panel shall promptly notify the respondent in writing of any sanction to be imposed and shall advise the respondent that the respondent may request a hearing on such sanction within the period of time, which shall be stated in the notice; and (iii) The rules of the SBSEF may provide that, if a respondent fails to request a hearing within the period of time stated in the notice, the respondent will be deemed to have accepted the sanction.

Paragraph (g)(7) of Proposed Rule 819 would provide that, where a respondent has requested a hearing on a charge that is denied, or on a sanction set by the disciplinary panel, the respondent shall be given an opportunity for a hearing in accordance with the rules of the SBSEF. Paragraph (g)(8) would address settlement offers.

Paragraph (g)(9) of Proposed Rule 819 returns to the text of § 37.206(c) for provisions regarding hearings. Paragraph (g)(9)(i) is modeled on § 37.206(c)(1) and would require an SBSEF to have rules requiring a hearing to be fair, conducted before members of the disciplinary panel, and promptly convened after reasonable notice to the respondent. The Commission proposed an additional provision, which derives from the guidance, that an SBSEF need not apply the formal rules of evidence for a hearing; nevertheless, the procedures for the hearing may not be so informal as to deny a fair hearing.

Paragraphs (g)(9)(ii) through (vi) of Proposed Rule 819 are also adapted from the guidance in appendix B of part 37. Paragraph (g)(9)(ii) would bar a member of the disciplinary panel for the hearing from having a financial, personal, or other direct interest in the matter under consideration. Paragraph (g)(9)(iii) would address the respondent's access to evidence in the SBSEF's possession. Paragraph (g)(9)(iv) would provide that the SBSEF's enforcement and compliance staffs shall[372] be parties to the hearing, and the enforcement staff shall present their case on those charges and sanctions that are the subject of the hearing. Paragraph (g)(9)(v) would provide that the respondent shall be entitled to appear personally at the hearing, to cross-examine any persons appearing as witnesses at the hearing, to call witnesses, and to present such evidence as may be relevant to the charges. Paragraph (g)(9)(vi) would provide that the SBSEF shall require persons within its jurisdiction who are called as witnesses to participate in the hearing and produce evidence.

Paragraph (g)(9)(vii) of Proposed Rule 819 is modeled on the text of § 37.206(c)(2) and would require that, if the respondent has requested a hearing, a copy of the hearing shall be made and shall become a part of the record of the proceeding. Paragraph (g)(9)(vii) would not require the record to be transcribed

[369] The Commission has corrected a reference to Core Principle 9 and corrected the phrase ''account(s) owner(s)'' to read ''account's owner(s).''

[370] In this bullet and the next bullet, the word used in the corresponding CFTC guidance was ''should,'' but the Commission proposed to replace ''should'' with ''shall'' in both places to convert the guidance into an enforceable rule.

[371] Proposed Rule 834(d) would require each SBSEF and SBS exchange to ensure that its disciplinary processes preclude any member, or group or class of its members, from dominating or exercising disproportionate influence on the disciplinary process, and that each major disciplinary committee or hearing panel include sufficient different groups or classes of its members so as to ensure fairness and to prevent special treatment or preference for any person or member in the conduct of the responsibilities of the committee or panel. *See infra* section VIII.

[372] The CFTC's guidance in appendix B that is adapted into paragraphs (g)(9)(ii) through (vi) of Proposed Rule 819 uses the word ''should'' here and in other similar instances. The Commission uses the word ''shall'' in such instances instead.

unless the transcript is requested by Commission staff or the respondent, the decision is appealed pursuant to the rules of the SBSEF, or the decision is reviewed by the Commission pursuant to § 201.442.[373] In all other instances, a summary record of a hearing is permitted.

Paragraph (g)(10) of Proposed Rule 819 is modeled on § 37.206(d) and would provide that, promptly following a hearing conducted in accordance with the rules of the SBSEF, the disciplinary panel shall render a written decision based upon the weight of the evidence contained in the record of the proceeding and shall provide a copy to the respondent. The written decision must include six enumerated elements, all of which are closely modeled on those in § 37.206(d).

Paragraph (g)(11) of Proposed Rule 819 would address emergency disciplinary actions and is drawn from the guidance in appendix B of part 37. It would provide that an SBSEF may impose a sanction, including suspension, or take other summary action against a person or entity subject to its jurisdiction upon a reasonable belief that such immediate action is necessary to protect the best interest of the market place. Furthermore, any emergency disciplinary action would have to be taken in accordance with an SBSEF's procedures that provide for notice (if practicable), rights for representation in all proceedings, an opportunity for a hearing as soon as reasonably practicable, and the rendering of a written decision promptly following the hearing based upon the weight of the evidence contained in the record. Proposed Rule 819(g)(11) would seek to balance the need to allow an SBSEF to take summary action against the need to afford due process to respondents.[374]

Paragraph (g)(12) of Proposed Rule 819 also is drawn from the appendix B guidance and would provide that, if the rules of the SBSEF permit appeals,[375] the SBSEF shall establish an appellate panel that is authorized to hear appeals. The composition of the panel would have to be consistent with Rule 834(d)[376] and could not include any members of the SBSEF's compliance staff or any person involved in adjudicating any other stage of the same proceeding. Promptly following the appeal or review proceeding, the appellate panel would be required to issue a written decision and to provide a copy to the respondent. As to the Commission's process of reviewing disciplinary actions, the Commission will apply a standard of review consistent with standards of review that the Commission uses in similar contexts.[377]

Paragraph (g)(13) of Proposed Rule 819 is adapted partly from § 37.206(e) and partly from the appendix B guidance. Paragraph (g)(13)(i) is drawn from § 37.206(e) and would provide that all disciplinary sanctions imposed by an SBSEF or its disciplinary panels shall be commensurate with the violations committed and shall be clearly sufficient to deter recidivism or similar violations by other members. All disciplinary sanctions, including sanctions imposed pursuant to an accepted settlement offer, would have to take into account the respondent's disciplinary history. In the event of demonstrated customer harm, any disciplinary sanction would have to include full customer restitution, except where the amount of restitution or to whom it should be provided cannot be reasonably determined. Paragraph (g)(13)(i) is adapted from the appendix B guidance and would allow an SBSEF to adopt a summary fine schedule for violations of rules relating to the failure to timely submit accurate records required for clearing or verifying each day's transactions.

The Commission received no comments on Proposed Rule 819(g) and, apart from the addition of paragraph (g)(14) regarding Commission review,[378] is adopting Rule 819(g) as proposed for the reasons stated in the Proposing Release.

8. Rule 819(h)—Activities of Security-Based Swap Execution Facility's Employees, Governing Board Members, Committee Members, and Consultants

Paragraph (h) of Proposed Rule 819 would generally prohibit persons who are employees of an SBSEF, or who otherwise might have access to confidential information because of their role with the SBSEF, from improperly utilizing that information. Proposed Rule 819(h) is modeled on § 1.59 of the CFTC's rules, which requires a SEF (among other CFTC-regulated entities) to place restrictions on trading by its governing board members, committee members, consultants, and employees and to prohibit any such person from disclosing any material, non-public information obtained as a result of their official duties with the SRO.

Paragraph (h)(2)(i) of Proposed Rule 819 would require an SBSEF to maintain in effect rules that, at a minimum, prohibit an employee of the SBSEF from trading, directly or indirectly, any ''covered interest.'' Proposed Rule 819(h)(1)(i) would define ''covered interest'' to mean, with respect to an SBSEF: an SBS that trades on the SBSEF; a security of an issuer that has issued a security that underlies an SBS that is listed on the SBSEF; or a derivative based on a security that falls within the immediately preceding prong. The opportunity to observe order submission and trading in an SBS on an SBSEF could yield material non-public information about the future performance not just of that SBS, but of all securities issued by that entity.[379]

Paragraph (h)(2)(ii), modeled on § 1.59(b)(1)(ii), would prohibit an SBSEF employee from disclosing to any other person any material non-public information that the employee obtains as a result of their employment at the SBSEF, and where the employee has or should have a reasonable expectation that the information disclosed may assist another person in trading any covered interest. In addition, paragraph (h)(2)(ii), like § 1.59(b)(1)(ii), would provide an exception for disclosures made in the course of an employee's duties, or disclosures made to another SBSEF, court of competent jurisdiction, or representative of any agency or department of the Federal or State

[373] *See infra* section XIV.E (discussing Rule 442, which establishes the right to appeal to the Commission certain actions taken by an SBSEF and sets out certain procedural matters relating to any such appeal).

[374] *Compare* Proposed Rule 819(g)(11)(i) (allowing an SBSEF to impose a sanction, including suspension, or take other summary action against a person or entity subject to its jurisdiction upon a reasonable belief that such immediate action is necessary to protect the best interest of the market place), *with* Proposed Rule 819(g)(11)(ii)(A) (providing that, if practicable, a respondent should be served with a notice before the action is taken, or otherwise at the earliest possible opportunity).

[375] Neither § 37.206 nor the associated guidance from appendix B requires a SEF to allow appeals. The guidance states, rather, that a SEF's rules ''may permit'' appeals and includes certain procedural requirements only if the rules of a swap execution facility permit appeals. The Commission adhered to this permissive approach in the proposal but sought comment on whether the final rules should require an SBSEF to create an appeals procedure.

[376] *See infra* section VIII.D.

[377] *See* Rule 819(g)(14); *see also supra* note 355.

[378] *See supra* note 377 and accompanying text.

[379] The single-name CDS market, in particular, is a market for assessing the creditworthiness of particular issuers. Non-public information derived from activity on the SBSEF pertaining to the market's assessment of an issuer's creditworthiness is likely to be material to the markets for that issuer's cash securities as well as to markets for derivatives based on the issuer's cash securities (*e.g.,* single-stock options).

government acting in their official capacity.

Paragraph (h)(3) of Proposed Rule 819, modeled on § 1.59(b)(2), would allow an SBSEF to adopt rules setting forth circumstances under which exemptions from the employee trading prohibition may be granted. In particular, paragraph (h)(3) would include the following possible carve-outs from the employee trading prohibition: (1) participation by an employee in a ''pooled investment vehicle'' where the employee has no direct or indirect control with respect to transactions executed for or on behalf of such vehicle; (2) trading by an employee in a derivative based on such a pooled investment vehicle; (3) trading by an employee in a derivative based on an index in which no covered interest constitutes more than 10% of the index; and (4) trading by an employee under circumstances enumerated in rules which the SBSEF determines are not contrary to applicable law, the public interest, or just and equitable principles of trade.[380]

The first and the fourth carve-outs listed above are comparable to those listed in § 1.59(b)(2). The Commission proposed to include the second and third carve-outs to permit an SBSEF employee to trade derivatives that provide indirect exposure to a covered interest where the exposure to the covered interest is sufficiently diluted.[381] In such cases, it would be unlikely that the employee would be using material non-public information about the covered interest to gain an unfair advantage when trading the derivative. The Commission proposed to depart from the CFTC definition of ''pooled investment vehicle'' [382] to adapt it for the SBS and securities markets. Rule (h)(1)(ii) defines ''pooled investment vehicle'' to mean an investment company registered under the Investment Company Act of 1940 in which no covered interest constitutes more than 10% of the investment company's assets. Thus, under this definition, if an SBSEF were to list a single-name CDS on company XYZ, a ''pooled investment vehicle'' would include a broad-based mutual fund or ETF that contains a security issued by company XYZ, assuming that the XYZ security does not exceed 10% of the fund's holdings. The 10% limit on a covered interest's composition of the fund is designed to permit SBSEF employees to trade most index-based mutual funds and ETFs that contain covered interests, except those where a component of the fund becomes sufficiently large that material non-public information about an issuer derived from activity on the SBSEF could provide an unfair advantage to an SBSEF employee when trading that fund.

Finally, under Proposed Rule 819(h)(3)—as with § 1.59(b)(2)—the exemptions from the trading restrictions would not be automatically available to SBSEF employees. Proposed Rule 819(h)(3) would still require the SBSEF to adopt rules that set forth circumstances under which exemptions from the trading prohibition may be granted. Furthermore, Proposed Rule 819(h)(3), which is modeled on § 1.59(b)(2), would state that any exemption must be administered by the SBSEF ''on a case-by-case basis.''

Paragraph (h)(4) of Proposed Rule 819, like § 1.59(d), would address prohibited conduct not just by employees of an SBSEF, but also of governing board members, committee members, and consultants of the SBSEF. Paragraph (h)(4)(i)(A) is modeled on § 1.59(d)(1)(i) and would prohibit any employee, governing board member, committee member, or consultant of the SBSEF from trading for their own account, or for or on behalf of any other account, in any covered interest on the basis of any material, non-public information obtained through special access related to the performance of their official duties as an employee, governing board member, committee member, or consultant. Paragraph (h)(4)(i)(B), modeled on § 1.59(d)(1)(ii), would prohibit any employee, governing board member, committee member, or consultant of the SBSEF from disclosing for any purpose inconsistent with the performance of their official duties as an employee, governing board member, committee member, or consultant any material, non-public information obtained through special access related to the performance of those duties. Paragraph (h)(4)(ii), modeled on § 1.59(d)(2), would provide that no person shall trade for their own account, or for or on behalf of any other account, in any covered interest on the basis of any material, non-public information that the person knows was obtained in violation of paragraph (h)(4) of this section from an employee, governing board member, committee member, or consultant.

The Commission received no comments on Proposed Rule 819(h) and is adopting Rule 819(h) as proposed, with minor technical modifications,[383] for the reasons stated in the Proposing Release.

9. Rule 819(i)—Service on Security-Based Swap Execution Facility Boards or Committees by Persons With Disciplinary Histories

Paragraph (i) of Proposed Rule 819 would bar persons with specified disciplinary histories from serving on the governing board or committees of an SBSEF and would impose certain other duties on the SBSEF associated with that fundamental requirement. Rule 819(i) is modeled on § 1.63 of the CFTC's rules, which imposes similar requirements in connection with SEFs and certain other entities.

Paragraph (i) of Proposed Rule 819 is closely modeled on § 1.63. Paragraph (i)(1), like § 1.63(b), would require an SBSEF to maintain rules [384] that render a person ineligible to serve on its disciplinary committees,[385] arbitration

[380] The first and the fourth carve-outs listed above are comparable to those listed in § 1.59(b)(2). The Commission proposed to include the second and third carve-outs to permit an SBSEF employee to trade derivatives that provide indirect exposure to a covered interest where the exposure to the covered interest is sufficiently diluted. In such cases, it would be unlikely that the employee would be using material non-public information about the covered interest to gain an unfair advantage when trading the derivative.

[381] *See* Proposing Release, *supra* note 1, 87 FR at 28905.

[382] *See* § 1.59(a)(10) (defining ''pooled investment vehicle'' to mean ''a trading vehicle organized and operated as a commodity pool within the meaning of § 4.10(d) of this chapter, and whose units of participation have been registered under the Securities Act of 1933, or a trading vehicle for which § 4.5 of this chapter makes available relief from regulation as a commodity pool operator, *i.e.,* registered investment companies, insurance company separate accounts, bank trust funds, and certain pension plans'').

[383] *See supra* note 32.

[384] Section 1.63(b), in relevant part, requires a SEF to maintain rules that have been submitted to the CFTC pursuant to section 5c(c) of the CEA and part 40 of the CFTC's rules. As noted above, the Commission proposed to adapt §§ 40.5 (Voluntary submission of rules for Commission review and approval) and 40.6 (Self-certification of rules) into Proposed Rules 806 and 807, respectively. Therefore, Proposed Rule 819(i)(1) would require an SBSEF to maintain in effect rules that have been submitted to the Commission pursuant to Rule 806 or Rule 807.

[385] Proposed Rule 802 would define ''disciplinary committee'' as any person or committee of persons, or any subcommittee thereof, that is authorized by an SBSEF or SBS exchange to issue disciplinary charges, to conduct disciplinary proceedings, to settle disciplinary charges, to impose disciplinary sanctions, or to hear appeals thereof in cases involving any violation of the rules of the SBSEF or SBS exchange, except those cases where the person or committee is authorized summarily to impose minor penalties for violating rules regarding decorum, attire, the timely submission of accurate records for clearing or verifying each day's transactions, or other similar activities. The CFTC rules contain two slightly different definitions of ''disciplinary committee'' that appear in § 1.63(a)(2) and § 1.69(a)(1), respectively. Because the definition in § 1.69(a)(1) is more comprehensive, the Commission has modeled its definition of ''disciplinary committee'' on § 1.69(a)(1) rather than on § 1.63(a)(2). The Commission is locating the

panels, oversight panels,[386] or governing boards if that person falls into any of six enumerated criteria, all of which are modeled closely on the criteria in § 1.63(b).[387] Paragraph (i)(2), modeled on § 1.63(c), would impose a direct bar on any person from serving on a disciplinary committee, arbitration panel, oversight panel, or governing board of an SBSEF if that person meets any of the six criteria enumerated in Rule 819(i)(1). Paragraph (i)(3), modeled on § 1.63(d), would require an SBSEF to submit to the Commission a schedule listing the rule violations that constitute disciplinary offenses that would trigger the bar and, to the extent necessary to reflect revisions, would have to submit an amended schedule within 30 days of the end of each calendar year. The SBSEF would be required to maintain and keep current this schedule and post it on its website so that it is in a public place designed to provide notice to members and otherwise ensure its availability to the general public. Paragraph (i)(4), like § 1.63(e), would require an SBSEF to submit to the Commission within 30 days of the end of each calendar year a certified list of any persons who have been removed from its disciplinary committees, arbitration panels, oversight panels, or governing board pursuant to Rule 819(i) during the prior year. Paragraph (i)(5), modeled on § 1.63(f), would provide that, whenever an SBSEF finds by final decision that a person has committed a disciplinary offense and that finding makes the person ineligible to serve on that SBSEF's disciplinary committees, arbitration panels, oversight panels, or governing board, the SBSEF shall inform the Commission of that finding and the length of the ineligibility, in a form and manner specified by the Commission.

Paragraph (i)(6) of Proposed Rule 819 would define the terms ''arbitration panel,'' ''disciplinary offense,'' and ''final decision'' that are used in Rule 819(i).[388] These definitions are closely modeled on those provided in § 1.63(a).[389]

The Commission received no comments on Proposed Rule 819(i) and is adopting Rule 819(i) as proposed, with minor technical modifications,[390] for the reasons stated in the Proposing Release.

10. Rule 819(j)—Notification of Final Disciplinary Action Involving Financial Harm to a Customer

Paragraph (j) of Proposed Rule 819 is a modified version of § 1.67 of the CFTC's rules. Paragraph (j)(1) of Proposed Rule 819 would be designed to replicate for SBSEFs the fundamental duty of § 1.67 and provides that, upon any final disciplinary action in which an SBSEF finds that a member has committed a rule violation that involved a transaction for a customer, whether executed or not, and that resulted in financial harm to the customer, the SBSEF must promptly provide written notice of the disciplinary action to the member. In addition, the SBSEF would be required to have established a rule pursuant to Rule 806 or Rule 807 that requires a member that receives such a notice to promptly provide that notice to the customer, as disclosed on the member's books and records.[391] Paragraph (j)(2) would provide that the written notice must include the principal facts of the disciplinary action and a statement that the SBSEF has found that the member has committed a rule violation that involved a transaction for the customer, whether executed or not, and that resulted in financial harm to the customer.

Paragraph (j)(3) of Proposed Rule 819 would provide definitions for two terms used in Rule 819(j). The definition of ''final disciplinary action'' is closely modeled on the CFTC's definition in § 1.67(a).[392] The definition of ''customer'' is only loosely modeled on the definition of ''customer'' provided in § 1.3, which includes complexities deriving from the CEA that are not necessary or appropriate to adapt into a rule that applies to SBSEFs.[393] The Commission proposed to define ''customer'' in Rule 819(j)(3)(i) as a person that utilizes an agent in connection with trading on an SBSEF.

The Commission received no comments on Proposed Rule 819(j) and is adopting Rule 819(j) as proposed, with minor technical modifications,[394] for the reasons stated in the Proposing Release.

11. Rule 819(k)—Designation of Agent for Non-U.S. Member

Paragraph (k) of Proposed Rule 819 would require non-U.S. persons who trade on an SBSEF to have an agent for service of process, which could be an agent of its own choosing or, by default, the SBSEF. Proposed Rule 819(k) is modeled on § 15.05(i) of the CFTC's rules, which concerns the designation of agents for foreign persons participating

definition in Rule 802, since the term is used by multiple rules in Regulation SE.

[386] Proposed Rule 802 would define ''oversight panel'' as any panel, or any subcommittee thereof, authorized by an SBSEF or SBS exchange to recommend or establish policies or procedures with respect to the surveillance, compliance, rule enforcement, or disciplinary responsibilities of the SBSEF or SBS exchange. The CFTC's definitions of ''oversight panel'' are contained in § 1.63(a)(4) and § 1.69(a)(4), respectively. Because the definition in § 1.69(a)(4) is more comprehensive, the Commission has modeled its definition of ''oversight panel'' on § 1.69(a)(4) rather than on § 1.63(a)(4). As with the definition of ''disciplinary committee,'' the Commission is locating the definition of ''oversight panel'' in Rule 802, since the term is used by multiple rules in Regulation SE.

[387] Section 1.63(b)(5) provides that one criterion for the bar would be that the person in question is subject to or has had imposed on him within the prior three years a CFTC registration revocation or suspension in any capacity for any reason, or has been convicted within the prior three years of any of the felonies listed in section 8a(2)(D)(ii) through (iv) of the CEA. Since the SEC is not subject to the CEA and cannot cross-reference those provisions, the Commission proposed for the equivalent criterion in Rule 819(i)(1)(v) that a person would be barred for having been convicted within the prior three years of any felony, without limitation on the type of felony. *See* Proposing Release, *supra* note 1, 87 FR at 28907 n.145.

[388] Proposed Rule 819(i)(6)(i) would define ''arbitration panel'' as any person or panel empowered by an SBSEF to arbitrate disputes involving the SBSEF's members or their customers. Rule 819(i)(6)(ii) defines ''disciplinary offense'' as: any violation of the rules of an SBSEF, except a violation resulting in fines aggregating to less than $5000 within a calendar year involving decorum or attire, financial requirements, or reporting or recordkeeping; any rule violation which involves fraud, deceit, or conversion or results in a suspension or expulsion; any violation of the SEA or the Commission's rules thereunder; or any failure to exercise supervisory responsibility when such failure is itself a violation of either the rules of the SBSEF, the SEA, or the Commission's rules thereunder. Proposed Rule 819(i)(6)(iii) would define ''final decision'' as a decision of an SBSEF which cannot be further appealed within the SBSEF, is not subject to the stay of the Commission or a court of competent jurisdiction, and has not been reversed by the Commission or any court of competent jurisdiction; or any decision by an administrative law judge, a court of competent jurisdiction, or the Commission which has not been stayed or reversed.

[389] Since these terms are used only in Proposed Rule 819(i) and not elsewhere in Regulation SE, the Commission has defined them in Proposed Rule 819(i) and not the omnibus definitions rule in Regulation SE (Proposed Rule 802).

[390] *See supra* note 32.

[391] The provision on which Proposed Rule 819(j)(1)(i)(B) is based, § 1.67(b)(1)(ii), requires a futures commission merchant or other registrant that receives such a notice to forward it to the injured customer. Because of differences in the respective agencies' statutory authority, the Commission proposed to require the SBSEF to establish a rule that requires the relevant member to forward the notice, not to propose a Commission rule that would impose such a duty on the member directly.

[392] *See* Proposed Rule 819(j)(3)(ii) (defining ''final disciplinary action'' as any decision by or settlement with an SBSEF in a disciplinary matter that cannot be further appealed at the SBSEF, is not subject to the stay of the Commission or a court of competent jurisdiction, and has not been reversed by the Commission or any court of competent jurisdiction).

[393] The definitions of ''customer'' and ''final disciplinary action'' would apply only within Proposed Rule 819(j), so the Commission has not included them in the omnibus definitions rule for proposed Regulation SE (Proposed Rule 802).

[394] *See supra* note 32.

on ''reporting markets,'' a category in the CFTC's rules that includes SEFs.[395]

Paragraph (k)(1) of Proposed Rule 819 is modeled on § 15.05(i) and would provide that an SBSEF that admits a non-U.S. person as a member shall be deemed to be the agent of the ''non-U.S. member'' [396] with respect to any SBS executed by the non-U.S. member. Under Proposed Rule 819(k)(1), service or delivery of any communication issued by or on behalf of the Commission to the SBSEF would constitute valid and effective service upon the non-U.S. member. If an SBSEF is served with a communication issued by or on behalf of the Commission to a non-U.S. member, the SBSEF would be required to transmit the communication to the non-U.S. member. Paragraph (k)(2) of Proposed Rule 819 is modeled on § 15.05(i)(1) and would provide that it shall be unlawful for an SBSEF to permit a non-U.S. member to execute SBS transactions on the facility unless the SBSEF informs the non-U.S. member in writing of the requirements of Rule 819(k).

Paragraph (k)(3) of Proposed Rule 819 is modeled on § 15.05(i)(2) and would permit a non-U.S. member of an SBSEF to utilize an agent for service of process other than the SBSEF. The non-U.S. member would have to provide a copy of its agreement with the alternate agent to the SBSEF, and the SBSEF would then have to file the agreement with the Commission, before executing any transaction on the SBSEF. Paragraph (k)(4) of Proposed Rule 819, modeled on § 15.05(i)(3), would require the non-U.S. member to notify the Commission if the agency agreement is no longer in effect.

For an SBSEF to have an effective regulatory program and thereby comply with Core Principle 2 (Compliance with Rules), the SBSEF must have jurisdiction over all of its members, including members who are not U.S. persons. Proposed Rule 819(k) would further an SBSEF's ability to ensure compliance by its non-U.S. members with its rules by requiring each non-U.S. member of the SBSEF to have an agent for service of process, whether an agent of its own choosing that has been disclosed to the SBSEF and the Commission or, as a default, the SBSEF itself. This would eliminate any question of how to provide valid notice to a non-U.S. member of any proceedings involving potential rule violations.

The Commission received no comments on Proposed Rule 819(k) and is adopting Rule 819(k) as proposed for the reasons stated in the Proposing Release.

C. Rule 820—Core Principle 3—SBS Not Readily Susceptible to Manipulation

Core Principle 3 [397] provides that an SBSEF may permit trading only in SBS that are not readily susceptible to manipulation. CEA Core Principle 3 for SEFs is substantively identical.[398] Proposed Rule 820 is modeled after § 37.300 of the CFTC's rules and would implement Core Principle 3.

The Commission received no comments on Proposed Rule 820, and is adopting Rule 820 as proposed for the reasons stated in the Proposing Release.

D. Rule 821—Core Principle 4—Monitoring of Trading and Trade Processing

Core Principle 4 [399] requires an SBSEF to establish and enforce rules or terms and conditions defining or specifications detailing: (1) trading procedures to be used in entering and executing orders traded on or through the facilities of the SBSEF; and (2) procedures for trade processing of SBS on or through the facilities of the SBSEF. Core Principle 4 also requires an SBSEF to monitor trading in SBS to prevent manipulation, price distortion, and disruptions of the delivery or cash settlement process through surveillance, compliance, and disciplinary practices and procedures, including methods for conducting real-time monitoring of trading and comprehensive and accurate trade reconstructions. CEA Core Principle 4 for SEFs [400] is substantively identical.

Proposed Rule 821 would implement Core Principle 4 and is closely modeled on the rules in subpart E of part 37 and the CFTC's guidance and acceptable practices in appendix B to part 37. As explained in the Proposing Release, paragraph (a) of Proposed Rule 821, like § 37.400 of the CFTC's rules, incorporates the requirements of Core Principle 4 described above, and the remaining paragraphs of Proposed Rule 821 are modeled on §§ 37.401 to 37.408 of the CFTC's rules and also incorporate guidance and acceptable practices from appendix B to part 37.[401]

Paragraph (b) of Proposed Rule 821 would specify an SBSEF's market-oversight obligations. Paragraph (c) of Proposed Rule 821 would specify requirements for an SBSEF's monitoring of physical-delivery SBS. Paragraph (d) of Proposed Rule 821 would specify additional requirements for cash-settled SBS. Paragraph (e) of Proposed Rule 821 would specify requirements for an SBSEF's ability to obtain information. Paragraph (f) of Proposed Rule 821 would require an SBSEF to establish and maintain risk control mechanisms to prevent and reduce the potential risk of market disruptions. Paragraph (g) of Proposed Rule 821 would require an SBSEF to have the ability to comprehensively and accurately reconstruct all trading on its facility and requires an SBSEF to make all audit-trail data and reconstructions available to the Commission. And paragraph (h) of Proposed Rule 821 would provide that an SBSEF shall comply with the rules in this section through a dedicated regulatory department or by contracting with a regulatory service provider pursuant to Rule 819(e).

The Commission received no comments on Proposed Rule 821 and is adopting Rule 821 as proposed for the reasons stated in the Proposing Release.

E. Rule 822—Core Principle 5—Ability To Obtain Information

Core Principle 5 [402] requires an SBSEF to establish and enforce rules that will allow the SBSEF to obtain any necessary information to perform any of the functions described in the Core Principles, provide the information to the Commission on request, and have the capacity to carry out such international information-sharing agreements as the Commission may require. CEA Core Principle 5 for SEFs [403] is substantively identical.

Proposed Rule 822 implements Core Principle 5 and is substantively identical to subpart F of part 37. Paragraph (a) of Proposed Rule 822

[395] A ''reporting market'' is defined in § 15.00(q) to mean a DCM or registered entity under section 1a(40) of the CEA. The term ''registered entity'' as defined in section 1a(40) of the CEA includes SEFs, among other entities.

[396] ''Non-U.S. member'' is a defined term in Rule 819(k) that does not appear in § 15.05 of the CFTC's rules but which appropriately conveys the meaning of the CFTC rule for purposes of SBSEFs in Proposed Rule 819(k). A foreign trader that executes contracts on a trading platform such as an SBSEF must be a member of that platform. Therefore, to promote uniformity throughout Regulation SE, the Commission is using the term ''member'' for this concept. Furthermore, the Commission has defined the term ''U.S. person'' for purposes of the cross-border application of its Title VII rules, *see* Rule 3a71–3(a)(4), § 240.3a71–3(a)(4), and has thus defined ''non-U.S. member'' in Rule 802 as ''a member of a security-based swap execution facility that is not a U.S. person.''

[397] Section 3D(d)(3) of the SEA, 15 U.S.C. 78c–4(d)(3).

[398] *See* Section 5h(f)(3) of the CEA, 7 U.S.C. 7b–3(f)(3).

[399] Section 3D(d)(4) of the SEA, 15 U.S.C. 78c–4(d)(4).

[400] Section 5h(f)(4) of the CEA, 7 U.S.C. 7b–3(f)(4).

[401] *See* Proposing Release, *supra* note 1, 87 FR at 28910–11.

[402] Section 3D(d)(5) of the SEA, 15 U.S.C. 78c–4(d)(5).

[403] Section 5h(f)(5) of the CEA, 7 U.S.C. 7b–3(f)(5).

would repeat the statutory text of Core Principle 5. Paragraph (b), modeled on § 37.501, would require that an SBSEF establish and enforce rules that will allow the SBSEF to have the ability and authority to obtain sufficient information to allow it to fully perform its operational, risk management, governance, and regulatory functions and any requirements under Regulation SE. Paragraph (c), like § 37.502, would require an SBSEF to have rules that allow it to collect information on a routine basis, allow for the collection of non-routine data from its members, and allow for its examination of books and records kept by members on its facility.[404] Paragraph (d), like § 37.503, would require that an SBSEF provide information in its possession to the Commission upon request, in a form and manner specified by the Commission. Finally, paragraph (e), like § 37.504, would require an SBSEF to share information with other regulatory organizations, data repositories, and third-party data reporting services as required by the Commission or as otherwise necessary and appropriate to fulfill its regulatory and reporting responsibilities, and that appropriate information-sharing agreements can be established with such entities, or the Commission can act in conjunction with the SBSEF to carry out such information sharing.

The Commission received no comments on Proposed Rule 822 and is adopting Rule 822 as proposed for the reasons stated in the Proposing Release.

F. Rule 823—Core Principle 6—Financial Integrity of Transactions

Core Principle 6 sets forth requirements related to the financial integrity of transactions that are entered on or through the facilities of an SBSEF.[405] Specifically, paragraph (a) of Proposed Rule 823 would require an SBSEF to establish and enforce rules and procedures for ensuring the financial integrity of SBS entered on or through the facilities of the SBSEF, including the clearance and settlement of SBS pursuant to section 3C(a)(1) of the SEA.[406] Paragraph (b) would provide that transactions required to be cleared or voluntarily cleared must be cleared through a registered clearing agency (or an exempt clearing agency). Paragraph (c) addresses the manner in which an SBSEF shall provide for the financial integrity of transactions. Finally, paragraph (d) would require an SBSEF to monitor its members to ensure that they continue to qualify as eligible contract participants. As described in the Proposing Release, the Commission modeled Rule 823 on subpart H of part 37 of the CFTC's rules,[407] which implements CEA Core Principle 7 for SEFs.[408]

1. Rule 823(a)—General

Paragraph (a) of Proposed Rule 823 would repeat the statutory text of SEA Core Principle 6 in the same manner that § 37.700 of the CFTC's rules [409] repeats the statutory language of CEA Core Principle 7 for SEFs.[410] Proposed Rule 823(a) would require an SBSEF to establish and enforce rules and procedures for ensuring the financial integrity of SBS entered on or through the facilities of the SBSEF, including the clearance and settlement of SBS pursuant to section 3C(a)(1) of the SEA.[411] The Commission did not receive any comments on Proposed Rule 823(a) and is adopting Rule 823(a) as proposed for the reasons stated in the Proposing Release.

2. Rule 823(b)—Required Clearing

Paragraph (b) of Proposed Rule 823 is closely modeled on § 37.701 of the CFTC's rules,[412] and it would provide that transactions executed on or through an SBSEF that are required to be cleared under section 3C(a)(1) of the SEA or are voluntarily cleared by the counterparties shall be cleared through a registered clearing agency or a clearing agency that has obtained an exemption from clearing agency registration to provide central counterparty services for SBS. The Commission did not receive any comments on Proposed Rule 823(b) and is adopting Rule 823(b) as proposed for the reasons stated in the Proposing Release.

3. Rule 823(c)—General Financial Integrity

Paragraph (c) of Proposed Rule 823 is closely modeled on § 37.702 of the CFTC's rules,[413] and would require an SBSEF to provide for the financial integrity of transactions by establishing minimum financial standards for its members, which shall at a minimum require members to be ECPs. Proposed Rule 823(c) would further require an SBSEF to provide for the financial integrity of transactions by ensuring that the SBSEF, for transactions cleared by a registered clearing agency, has the capacity to route transactions to the registered clearing agency in a manner acceptable to the clearing agency, and by coordinating with each registered clearing agency to which it submits transactions for clearing in the development of rules and procedures to facilitate prompt and efficient transaction processing.

One commenter characterizes the CFTC regime as providing detailed straight-through-processing (''STP'') standards for swaps executed on SEFs that are intended to be cleared but believes that the Commission's proposal lacks such standards.[414] The commenter observes that there is a lack of market consistency regarding the execution-to-clearing workflow for SBS that are intended to be cleared, which complicates the trading of cleared SBS. The commenter highlights ''clearing submission timeframes'' and ''clearing certainty'' as key issues and discusses the manner in which the CFTC has addressed these issues in its rules and guidance. The commenter states that the CFTC's STP standards, including ''pre-execution credit checks'' and ''well-defined submission timeframes,'' have been successfully implemented by the industry since 2013, enhancing the SEF trading environment. The commenter argues that the timeframes minimize delays between execution and clearing acceptance and increase pre-trade clearing certainty, decreasing market, credit, and operational risks for market participants and clearing agencies, and broadens the range of trading counterparties. For these reasons, the commenter recommends harmonizing with the CFTC by establishing STP standards, incorporating relevant CFTC guidance, and prohibiting breakage agreements for SBS that are intended to be cleared.[415]

Another commenter agrees that applying the CFTC's approach to STP would further harmonize SBSEFs with SEFs and would provide greater certainty of execution and clearing, encourage more clearing, facilitate

[404] While § 37.502 of subpart F uses the term ''market participant,'' Proposed Rule 822 would substitute the term ''member'' in these places, since the rule pertains to market participants who are acting as members of the SEF/SBSEF. *See supra* note 362.

[405] Section 3D(d)(6)(A) of the SEA, 15 U.S.C. 78c–4(d)(6).

[406] 15 U.S.C. 78c–3(a)(1). *See supra* note 168 and accompanying text (discussing mandatory clearing provisions).

[407] *See* Proposing Release, *supra* note 1, 87 FR at 28912.

[408] Section 5h(f)(7) of the CEA, 7 U.S.C. 7b–3(f)(7).

[409] 17 CFR 37.700; *see also* Proposing Release, *supra* note 1, 87 FR at 28912.

[410] Section 5h(f)(7) of the CEA, 7 U.S.C. 7b–3(f)(7).

[411] 15 U.S.C. 78c–3(a)(1).

[412] 17 CFR 37.701; *see also* Proposing Release, *supra* note 1, 87 FR at 28912.

[413] 17 CFR 37.702; *see also* Proposing Release, *supra* note 1, 87 FR at 28912.

[414] *See* Citadel Letter, *supra* note 18, at 4–6.

[415] *See id.*

electronic trading, and promote accessible, competitive markets and access to best execution.[416] Lastly, a third commenter supports harmonization and encourages the Commission to both codify the guidance in appendix B to part 37 of the CFTC regulations and the CFTC's staff guidance regarding STP.[417] The commenter believes that the STP requirements have been successfully implemented by market participants for nearly a decade, and modifying them now would introduce significant market, operational, and credit risk, along with additional complexity and cost for market participants.[418]

As previously stated, harmonization with the CFTC regime for SEFs is an important consideration for the Commission, given that it expects most registered SBSEFs to also be registered SEFs. Consistent with this view, Proposed Rule 823 is largely based on subpart H of part 37, and the key language of Rule 823(c)(2) relevant to STP is substantively identical to § 37.702(b). Both provisions require an SBSEF or SEF to (i) ensure that it has the capacity to route transactions to the relevant clearing agency in a manner acceptable to the clearing agency for purposes of clearing; and (ii) coordinate with each relevant clearing agency to which it submits transactions for clearing, in the development of rules and procedures to facilitate prompt and efficient transaction processing. Rule 249.1701, Exhibit T further requires SBSEFs to provide ''the name(s) of the clearing agency(ies) that will clear the Applicant's trades, and a representation that clearing members of that organization will be guaranteeing such trades.'' [419]

The Commission generally expects an SBSEF's rules and procedures to demonstrate compliance with these requirements with respect to SBS that are intended to be cleared or that would become subject to a mandatory clearing requirement in the future. Since SBSEFs are required to establish rules and procedures for clearing in coordination with each relevant clearing agency to which it submits trades, SBSEFs should be able to route executed trades to relevant clearing agencies promptly, particularly if fully automated systems are used. Furthermore, if an SBSEF were to act to purposefully delay clearing submission in order to favor certain market participants over others, that type of action could be addressed under the impartial access requirements of Rule 819(c).[420] Lastly, as noted previously, the Commission is adopting Rule 815(g), which specifies that SBSEFs shall establish and enforce rules that provide that a security-based swap that is intended to be cleared at the time of the transaction, but is not accepted for clearing at a registered clearing agency, shall be void *ab initio.* Together, these provisions should help ensure that SBSEFs will process trades promptly and efficiently. These provisions are also consistent with the CFTC's staff guidance related to SEFs. The CFTC staff guidance also addressed regulatory requirements related to intermediaries and clearing organizations that are beyond the scope of this rulemaking.

For the reasons stated above, the Commission is adopting Rule 823(c) as proposed.[421]

4. Rule 823(d)—Monitoring for Financial Soundness

Paragraph (d) of Proposed Rule 823 is closely modeled on § 37.703 of the CFTC's rules,[422] and it would require an SBSEF to monitor its members to ensure that they continue to qualify as ECPs. The Commission did not receive any comments on Rule 823(d) and is adopting Rule 823(d) as proposed for the reasons stated in the Proposing Release.

G. Rule 824—Core Principle 7—Emergency Authority

SEA Core Principle 7 [423] requires an SBSEF to adopt rules to provide for the exercise of emergency authority, in consultation or cooperation with the Commission, as is necessary and appropriate, including the authority to liquidate or transfer open positions in any SBS or to suspend or curtail trading in an SBS. CEA Core Principle 8 for SEFs [424] is substantively identical, and the CFTC implemented Core Principle 8 for SEFs in subpart I of part 37. Section 37.800 of subpart I repeats the statutory text of the Core Principle. Section 37.801 provides that a SEF ''may refer'' to the guidance in appendix B to part 37 ''to demonstrate to the Commission compliance with [Core Principle 8].''

Proposed Rule 824 would implement SEA Core Principle 7 and is closely modeled on subpart I of part 37 and the guidance for CEA Core Principle 8 in appendix B to part 37. Paragraph (a) of Proposed Rule 824 would repeat the statutory text of the Core Principle. Paragraph (b) of Proposed Rule 824 would incorporate much of the language in paragraph (a)(1) of the CFTC's guidance on CEA Core Principle 8. Under paragraph (b), an SBSEF would be required to adopt rules that are reasonably designed to:

(1) Allow the SBSEF to intervene as necessary to maintain markets with fair and orderly trading and to prevent or address manipulation or disruptive trading practices, whether the need for intervention arises exclusively from the SBSEF's market or as part of a coordinated, cross-market intervention;

(2) Have the flexibility and independence to address market emergencies in an effective and timely manner consistent with the nature of the emergency, as long as all such actions taken by the SBSEF are made in good faith to protect the integrity of the markets;

(3) Take market actions as may be directed by the Commission, including, in situations where an SBS is traded on more than one platform, emergency action to liquidate or transfer open interest as directed, or agreed to, by the Commission or the Commission's staff;

(4) Include procedures and guidelines for decision-making and implementation of emergency intervention that avoid conflicts of interest;

(5) Include alternate lines of communication and approval procedures to address emergencies associated with real-time events;

(6) Allow the SBSEF, to address perceived market threats, to impose or modify position limits, impose or modify price limits, impose or modify intraday market restrictions, impose special margin requirements, order the liquidation or transfer of open positions in any contract, order the fixing of a settlement price, extend or shorten the expiration date or the trading hours, suspend or curtail trading in any contract, transfer customer contracts and the margin, or alter any contract's settlement terms or conditions, or, if applicable, provide for the carrying out of such actions through its agreements

[416] *See* MFA Letter, *supra* note 18, at 12.

[417] *See* SIFMA AMG Letter, *supra* note 18, at 9.

[418] *See id.*

[419] *See* Form SBSEF (Exhibits Instructions, Instruction No. 20, Exhibit T); *see also supra* note 84.

[420] *See supra* section VI.B.3 (discussing the impartial access requirements of Proposed Rule 819(c)). For example, if an SBSEF purposefully delayed clearing submission of only certain market participants that the SBSEF favors, that would be contrary to the requirement of Proposed Rule 819(c) of providing impartial access to market services.

[421] While one commenter suggests that the Commission incorporate guidance from appendix B to part 37 of the CFTC rules, the appendix does not contain any guidance or acceptable practices under Core Principle 7 of section 5h of the CEA—Financial Integrity of Transactions.

[422] 17 CFR 37.703; *see also* Proposing Release, *supra* note 1, 87 FR at 28912.

[423] Section 3D(d)(7) of the SEA, 15 U.S.C. 78c–4(d)(7).

[424] Section 5h(f)(8) of the CEA, 7 U.S.C. 7b–3(f)(8).

with its third-party provider of clearing or regulatory services.

Paragraph (c) of Proposed Rule 824 is based on paragraph (a)(2) of the CFTC's guidance on CEA Core Principle 8 and would require an SBSEF to promptly notify the Commission of its exercise of emergency action, explaining its decision-making process, the reasons for using its emergency authority, and how conflicts of interest were minimized, including the extent to which the SBSEF considered the effect of its emergency action on the underlying markets and on markets that are linked or referenced to the contracts traded on its facility, including similar markets on other trading venues. In addition, Proposed Rule 824(c) would require information on all regulatory actions carried out pursuant to an SBSEF's emergency authority to be included in a timely submission of a certified rule pursuant to Rule 807.

The Commission received no comments on Proposed Rule 824 and is adopting Rule 824 as proposed, with minor technical modifications,[425] for the reasons stated in the Proposing Release.

H. Rule 825—Core Principle 8—Timely Publication of Trading Information

SEA Core Principle 8 [426] requires an SBSEF to make public timely information on price, trading volume, and other trading data on SBS to the extent prescribed by the Commission, and to have the capacity to electronically capture and transmit and disseminate trade information with respect to transactions executed on or through the facility. CEA Core Principle 9 [427] is substantively identical to SEA Core Principle 8, and the CFTC implemented CEA Core Principle 9 in subpart J of part 37.

Proposed Rule 825 would implement SEA Core Principle 8 and is closely modeled on subpart J of part 37. Paragraph (a) of Proposed Rule 825, like § 37.900, would repeat the statutory language of the Core Principle. While § 37.901 provides that a SEF shall report swap transaction data pursuant to parts 43 and 45 of the CFTC's rules, paragraph (b) of Proposed Rule 825 would direct SBSEFs to report SBS transaction data in a manner specified in the SEC's Regulation SBSR.[428]

Paragraph (c) of Proposed Rule 825 would require the publication, on an SBSEF's website, of a ''Daily Market Data Report.'' The data fields that the Commission proposed to require for the Daily Market Data Report approximated, although they were not the same as, those required by part 16. Under Proposed Rule 825(c)(1), the Daily Market Data Report for a business day would be required to contain the following information for each tenor of each SBS traded on that SBSEF during that business day:

(i) The trade count (including block trades but excluding error trades, correcting trades, and offsetting trades);

(ii) The total notional amount traded (including block trades but excluding error trades, correcting trades, and offsetting trades [429]);

(iii) The number of block trades;

(iv) The total notional amount of block trades;

(v) The opening and closing price;

(vi) The price that is used for settlement purposes, if different from the closing price; and

(vii) The lowest price of a sale or offer, whichever is lower, and the highest price of a sale or bid, whichever is higher, that the SBSEF reasonably determines accurately reflects market conditions. Bids and offers vacated or withdrawn shall not be used in making this determination. A bid is vacated if followed by a higher bid or price and an offer is vacated if followed by a lower offer or price.

Paragraph (c)(2) of Proposed Rule 825 would require an SBSEF to provide certain explanatory information regarding data presented on the Daily Market Data Report:

(i) The method used by the SBSEF in determining nominal prices and settlement prices; and

(ii) If discretion is used by the SBSEF in determining the opening and/or closing ranges or the settlement prices, an explanation that certain discretion may be employed by the SBSEF and a description of the manner in which that discretion may be employed. Discretionary authority would have to be noted explicitly in each case in which it is applied (for example, by use of an asterisk or footnote).

Paragraph (c)(3) of Proposed Rule 825 would set out various requirements regarding the form and manner by which an SBSEF makes available its Daily Market Data Report. Paragraph (c)(3)(i) would require the SBSEF to post on its website its Daily Market Data Report in a downloadable and machine-readable format using the most recent versions of the associated XML schema and PDF renderer as published on the Commission's website. Paragraph (c)(3)(ii) would require the SBSEF to make available its Daily Market Data Report without fees or other charges. Paragraph (c)(3)(iii) would prohibit the SBSEF from imposing any encumbrances on access or usage restrictions with respect to the Daily Market Data Report. Paragraph (c)(3)(iv) would prohibit the SBSEF from requiring a user to agree to any terms before being allowed to view or download the Daily Market Data Report, such as by waiving any requirements of Rule 825(c)(3). Paragraph (c)(3)(iv) would further provide that any such waiver agreed to by a user would be null and void.[430]

Paragraph (c)(4) of Proposed Rule 825 would require the SBSEF to publish the Daily Market Data Report on its website no later than the SBSEF's commencement of trading on the next business day after the day to which the information pertains. Finally, paragraph (c)(5) would require the SBSEF to keep each Daily Market Data Report available on its website in the same location as all other Daily Market Data Reports for no less than one year after the date of first publication.

Several commenters criticized the Daily Market Data Report required by Proposed Rule 825.[431] One commenter states that the Daily Market Report would require inappropriate and

[425] The Commission has corrected a reference to ''exercise of emergency action'' to read ''exercise of emergency authority.'' The Commission has also made two non-substantive corrections to the text of Proposed Rule 824. The Commission has replaced a period with a semicolon at the end of paragraph (b)(3) and has added the word ''and'' to the end of paragraph (b)(5).

[426] Section 3D(d)(8) of the SEA, 15 U.S.C. 78c–4(d)(8).

[427] Section 5h(f)(9) of the CEA, 7 U.S.C. 7b–3(f)(9).

[428] Section 13(m)(1) of the SEA, 15 U.S.C. 78m(m)(1), authorizes the Commission to make SBS transaction, volume, and pricing data available to the public in such form and at such times as the Commission determines appropriate to enhance price discovery. The Commission has adopted rules relating to the reporting and public dissemination of SBS transaction and pricing data as Regulation SBSR. Rule 901(a)(1) of Regulation SBSR, 17 CFR 242.901(a)(1), imposes certain reporting duties on SBSEFs.

[429] Each of these terms is defined in Proposed Rule 802 and also used in Proposed Rule 815.

[430] The presence of any such waiver requirements on a click-through screen could chill use of the Daily Market Data Report, because the user would be compelled to agree to the waiver even to view the report. The Commission recognizes that individual users may not have the time or the incentive to contest the appropriateness of any such waiver provisions in order to secure access. Proposed Rule 825(c)(3)(iv) is designed to assure such users that, even if an SBSEF were to insist on the waiver click-through as a condition of access, users would not in fact be sacrificing their ability to use the data free of charges and usage restrictions because the waiver would be null and void.

[431] *See* MFA Letter, *supra* note 18, at 13; WMBAA Letter, *supra* note 18, at 5–6; ISDA–SIFMA Letter, *supra* note 18, at 10; Bloomberg Letter, *supra* note 18, at 5, 17. Eleven commenters supported general transparency in markets but did not address the Daily Market Data Report specifically. *See, e.g.,* Letter from David Mounts (Oct. 29, 2022); Letter from Katie K. (Apr. 7, 2022).

detrimental disclosures that would undermine the Commission's goal of fostering a competitive and efficient market for SBS trading.[432] This commenter states that there are significant differences in the information required to be reported under the SEC and CFTC regimes. The commenter states that Proposed Rule 825(c)(1) increases the burden on SBSEFs compared to SEFs by requiring additional information regarding sale and offer prices, as well as qualitative descriptions of certain data that are reported.

This commenter further states that the Commission's proposal does not address why the CFTC's approach would not be acceptable in the context of SBSEFs and does not justify the increased operational costs to SBSEFs (which will ultimately be passed on to members). The commenter also states that the Commission has not considered the costs and potential for duplicative requirements in the context of Regulation SBSR reporting requirements. The commenter concludes that, in sum, the Daily Market Data Report is overly granular and duplicative, is unnecessary for transparency purposes, and could negatively impact the market and market participants. The commenter states that the Commission should therefore remove the Daily Market Data Report in favor of harmonizing with the analogous CFTC rules and that, if the Commission does not eliminate the Daily Market Data Report requirement altogether, it should adopt additional masking protections for trades, specifically with respect to block trades. Failure to do so, the commenter states, would cause inappropriate and detrimental disclosures and would ''negate the benefits that the rule purports to achieve by exempting block trades from clearing [sic] requirements.'' [433]

Another commenter states that the requirement for a Daily Market Data Report is a departure from the otherwise generally harmonized rule proposal and risks overly complicating the SBSEF regime for limited benefit, particularly with SBS reporting and dissemination in place through Regulation SBSR.[434] The commenter states that the Daily Market Data Report serves as a duplicative source of information that fails to improve price discovery or liquidity formation, and that the Daily Market Data Report could negatively impact conditions, particularly for block trades, especially given the relatively illiquid SBS market, which has a relatively small number participants. This commenter encourages the Commission to remove the proposed Daily Market Data Report and review this issue with the benefit of several years' experience with these rules, particularly once Regulation SBSR is fully operational.

One commenter states that the Daily Market Report is not necessary because the CFTC SEF regulatory framework, which does not impose such a requirement, provides sufficient price transparency.[435] This commenter states that the Commission has not pointed to any observable issues with the SEF transparency framework to justify a need for these reports, and the commenter states that the daily publication of information related to block trade numbers and block notional amounts, coupled with aggregate pricing information, would magnify the problems associated with the ''winner's curse.'' This is particularly concerning, the commenter states, where a dealer is unable to fully lay-off its risk from a block trade within the course of a single day—a scenario that is extremely likely considering the thin nature of SBS markets. Based on the information published in the report as proposed, the commenter states, SBSEF participants may be able to identify a particular block trade and the likely price point, and then use that information to up-charge the dealer who is seeking to lay off the rest of its risk, thus frustrating the key objective of block trading.

This commenter further states that the issues it has identified are amplified even further if the Daily Market Report does not follow the cap requirements that apply in the public price dissemination of data under the Commission's trade reporting rule and related Commission no-action relief. The commenter states that publication of uncapped trade sizes could, in certain cases, reveal the exact notional amount of a trade to the public, which is not permitted under the Commission's SBS trade reporting rules. The commenter states that this is especially concerning given that the proposed Daily Market Report provides detailed information by SBS product and tenor. The commenter states that the Commission should abandon its proposed Daily Market Report or, if it does not, require publication of the proposed report on a monthly or quarterly basis and make it subject to the cap size requirements imposed on SBSDRs. This, the commenter states, would ensure that the report does not conflict with the protections afforded to market participants per the cap size requirements and under the Commission's SBS trade reporting rules and related relief for SBS.[436]

Another commenter states that, in its experience with the reports required under CFTC part 16, which requires the compilation of similar information as the proposed Daily Market Data Report, the timeline for publication proposed under Rule 825(c)(4) would be impractical, if not technologically impossible.[437] This commenter states that it operates a SEF with trading hours that run from 00:01 hours to 24:00 hours, Sunday through Friday. The commenter envisions SBS trading to be permitted during the same trading hours and states that the break between the end of trading one day and the beginning of trading the next day—one minute—means that it would likely not be possible to compile the required report ''no later than the SBSEF's commencement of trading on the next business day.'' This commenter proposes synchronizing Rule 825(c)(4) with CFTC Rule 16.01(d)(2) to allow additional time for the publication of the Daily Market Data Report. With regard to the content of the report, this commenter states that the settlement price required under Rule 825(c)(1) should be included in the report only to the extent it is calculated by an SBSEF.

Many of the reporting requirements of the Daily Market Data Report under Proposed Rule 825 are closely aligned with the data required to be disclosed on a daily basis by SEFs under § 16.01 of the CFTC's rules. Both rules require the daily disclosure of: (1) a measure of trading volume in terms of trades or contracts;[438] (2) the total notional volume traded;[439] (3) the notional amount of block trades;[440] (4) the opening and closing prices;[441] (5) the price used for settlement, if different

[432] *See* MFA Letter, *supra* note 18, at 13.

[433] *See id.* Regulation SE does not address any exemption from clearing requirements.

[434] *See* WMBAA Letter, *supra* note 18, at 5–6.

[435] *See* ISDA–SIFMA Letter, *supra* note 18, at 10.

[436] *See id.*

[437] *See* Bloomberg Letter, *supra* note 18, at 5, 17.

[438] *Compare* Proposed Rule 825(c)(1)(i) (trade count, including block trades but excluding error trades, correcting trades, and offsetting trades), *with* 17 CFR 16.01(a)(1)(iii) (trading volume and open contracts by product type term life of the swap).

[439] *Compare* Proposed Rule 825(c)(1)(ii) (total notional amount traded, including block trades but excluding error trades, correcting trades, and offsetting trades), *with* 17 CFR 16.01(a)(2)(iv) (total trading volume in terms of the number of contracts traded for standard-sized contract or in terms of notional value for non-standard-sized contracts).

[440] *Compare* Proposed Rule 825(c)(1)(iv) (total notional amount of block trades), *with* 17 CFR 16.01(a)(2)(vi) (total volume of block trades included in the total volume of trading).

[441] *See* Proposed Rule 825(c)(1)(v); 17 CFR 16.01(b)(2)(i).

from the closing price;[442] (6) the lowest price of a sale or offer, whichever is lower, and the highest price of a sale or bid, whichever is higher, that the facility reasonably determines accurately reflects market conditions;[443] (7) the method used by the facility in determining nominal prices and settlement prices, and if discretion is used in determining the opening or closing ranges or the settlement prices, an explanation that certain discretion may be employed and a description of the manner in which that discretion may be employed;[444] and (8) in each instance in which such discretion was applied, an explicit notation that discretion was applied.[445]

Further, the Commission is modifying Proposed Rule 825 to resolve the two differences between the proposed Daily Market Data Report and the existing CFTC reporting scheme under § 16.01: (1) that the Daily Market Data Report would include the number of block trades executed;[446] and (2) that the Daily Market Data Report would be posted on the SBSEF's website no later than *the beginning of trading* on the next business day,[447] while the information required by § 16.01 must be made public no later than the next business day.[448]

A number of commenters raised specific concerns that the disclosures in the Daily Market Data Report would hamper the efficient trading of block trades.[449] The Commission agrees that the additional disclosed data element for SBSEFs—the number of block trades—could lead to additional information leakage while a dealer that facilitated a block trade might still be laying off the risk it undertook in facilitating that trade. Therefore, consistent with the CFTC's disclosure elements under § 16.01, the Commission is modifying Rule 825(c)(1) as proposed to delete paragraph (c)(1)(iii), which requires the disclosure of the number of block trades, and to renumber the following paragraphs accordingly. The Commission is also, pursuant to its determination not to adopt a definition of ''block trade,''[450] deleting the words ''including block trades but'' from the text of paragraph (c)(i) and (ii) of Rule 825, and is adding the words ''after such time as the Commission adopts a definition of 'block trade' '' to paragraph (c)(iii) of Rule 825 (formerly paragraph (c)(iv) of Proposed Rule 825[451]), which will have no effect on the requirement as compared to the proposed rule.

The Commission is also modifying Proposed Rule 825 to address the comment that an SBSEF that operates nearly 24 hours a day might not be able to comply with the requirement to publish the Daily Market Data Report before the beginning of trading on the next business day. Accordingly, the Commission is modifying Proposed Rule 825(c)(4) to require the publication of the Daily Market Data Report ''as soon as reasonably practicable on the next business day after the day to which the information pertains, but in no event later than 7 a.m. on the next business day.'' This modified requirement, while less stringent than the requirement as proposed, would differ slightly from the CFTC's requirement that such information must be made public ''no later than the next business day.''[452] Making each trading day's information available to market participants before the beginning of the next trading is reasonably designed to foster transparency and efficiency in the market for SBS.

With these modifications, the proposed Daily Market Data Report for SBSEFs is consistent with the required daily disclosures for SEFs. While one commenter states that Proposed Rule 825(c)(1) increases the burden on SBSEFs compared to SEFs, including by calling for qualitative descriptions of certain data, the data called for by Rule 825(c)(1), as modified, does not differ materially from that required to be published daily under § 16.01. Thus, the Commission does not agree with the commenter that the data required under the Commission approach differs materially from that required under the CFTC approach or that the Daily Market Data Report will result in an unjustified increase in operational costs.

Further, the Commission does not agree with commenters that the Daily Market Data Report would serve as a duplicative source of information to reporting under Regulation SBSR and therefore risks overly complicating the SBSEF regime for limited benefit, without benefit to price improvement or liquidity formation. Regulation SBSR requires the reporting and public dissemination of SBS transactions,[453] but because the transaction reports for credit SBS are permitted to be capped at a notional volume of $5 million,[454] market participants would be unable to glean the information provided by the Daily Market Data Report—which would publish daily total notional volumes based on uncapped transaction amounts—from the individual reports of SBS transactions under Regulation SBSR. Thus, the Daily Market Data Report would provide market participants with information about pricing and trading volume for SBS on SBSEFs that goes beyond the information that could be obtained from SBS transaction reports that are publicly disseminated pursuant to Regulation SBSR. And because individual trades would not be reported—and, with the modification the Commission is making, the number of block trades would also not be reported—a size cap on reporting volume used to provide summary data to the market is not necessary or appropriate. Additionally, with the respect to the comment that the settlement price required under Proposed Rule 825(c)(1) should be included in the report only to the extent it is calculated by an SBSEF, the language of the requirement—''[t]he price *that is used for* settlement. . .''[455]—means that if no settlement price is calculated for a given SBS, that data element does not need to be reported.

With respect to the means of publication of the information, while the means of publishing the Daily Market Data Report varies from that specified under the CFTC regime, the difference is not material. The Commission proposed that this information be posted on an SBSEF's website in the most recent XML schema and PDF renderer, without fees or charges, without any encumbrances on access or usage, and without requiring

[442] *See* Proposed Rule 825(c)(1)(vi); 17 CFR 16.01(b)(2)(ii).

[443] *See* Proposed Rule 825(c)(1)(vii); 17 CFR 16.01(b)(2)(iii).

[444] *See* Proposed Rule 825(c)(2)(i); 17 CFR 16.01(b)(4)(i).

[445] *See* Proposed Rule 825(c)(2)(ii); 17 CFR 16.01(b)(4)(ii).

[446] *See* Proposed Rule 825(c)(1)(iii).

[447] *See* Proposed Rule 825(c)(4).

[448] *See* 17 CFR 16.01(e). The Commission views the requirement to keep each Daily Market Data Report on an SBSEF's website for one year, *see* Proposed Rule 825(c)(5), as a small additional burden for an SBSEF and does not view it as a significant departure from harmonization with the CFTC's SEF regime.

[449] *See supra* notes 433–436 and accompanying text.

[450] *See supra* section V.E.1(c)(ii).

[451] The Commission is also correcting the form of a cross-reference in paragraph (b) to ''Regulation SBSR'' to read ''§§ 242.900 through 242.909 (Regulation SBSR).''

[452] *See* 17 CFR 16.01(e). The Commission views the requirement to keep each Daily Market Data Report on an SBSEF's website for one year, *see* Proposed Rule 825(c)(5), as a small additional burden for an SBSEF and does not view it as a significant departure from harmonization with the CFTC's SEF regime.

[453] *See* 17 CFR 242.900 *et seq.*

[454] *See* 2019 Cross-Border Adopting Release, *supra* note 218, 85 FR at 6347 (providing no-action relief with respect to Rule 902 of Regulation SBSR, 17 CFR 242.902, for reports of credit SBS transaction disseminated with a capped size of $5 million).

[455] *See* Proposed Rule 825(c)(1)(vi) (emphasis added).

a user to agree to any terms before viewing or downloading the report.[456] And the CFTC, in addition to requiring that this information be provided to the CFTC, requires it be made available to news media and the general public ''in a format that readily enables the consideration of such data.'' [457]

Proposed Rule 825(c)(3) is designed to promote wide use of the SBS trading information contained in the Daily Market Data Report by prohibiting an SBSEF from imposing any financial, legal, or operational burdens on that use, and, as the Commission stated in the Proposing Release, the prohibition against an SBSEF imposing any usage restrictions on its Daily Market Data Report would necessarily encompass a prohibition on bulk redistribution of the Daily Market Data Report or any information contained therein.[458] The Commission seeks to encourage market observers to access the Daily Market Data Report and scrub, reconfigure, aggregate, analyze, repurpose, or otherwise add value to the information contained in the report as they see fit.

For the reasons discussed above, the Commission is adopting Rule 825 as modified.[459]

I. Rule 826—Core Principle 9—Recordkeeping and Reporting

SEA Core Principle 9 [460] sets forth recordkeeping and reporting obligations for SBSEFs. Core Principle 9 requires an SBSEF to maintain records of all activities relating to the business of the facility, including a complete audit trail, in a form and manner acceptable to the Commission for a period of five years. The Core Principle further requires an SBSEF to report to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines to be necessary or appropriate for the Commission to perform its duties. Finally, under Core Principle 9, the Commission must adopt data collection and reporting requirements for SBSEFs that are comparable to requirements for clearing agencies and SBS data repositories.[461] CEA Core Principle 10 for SEFs, although it includes an additional clause not present in the equivalent SEA Core Principle 9,[462] is substantively identical.

To implement SEA Core Principle 9, the Commission proposed Rule 826, which roughly approximates §§ 1.31 and 45.2 of the CFTC's rules,[463] while also drawing on concepts from the books and records requirements applicable to brokers, SEC-registered SROs, and other SEC-registered entities.[464]

Paragraph (a) of Proposed Rule 826 would repeat the statutory text of the Core Principle. Paragraph (b) would require an SBSEF to keep full, complete, and systematic records,[465] together with all pertinent data and memoranda, of all activities relating to its business with respect to SBS. Under paragraph (b), such records would be required to include, without limitation, the audit trail information required under Rule 819(f) and all other records that an SBSEF is required to create or obtain under Regulation SE.

Paragraph (c) of Proposed Rule 826 would require an SBSEF to keep records of any SBS from the date of execution until the termination, maturity, expiration, transfer, assignment, or novation date of the transaction, and for a period of not less than five years, the first two years in an easily accessible place, after such date. Paragraph (c) also would require an SBSEF to keep each record (other than a record of an SBS noted in the previous sentence) for a period of not less than five years, the first two years in an easily accessible place, from the date on which the record was created. The five-year retention requirements would be consistent with section 3D(d) of the SEA [466] and are modeled on the requirements for SEFs in §§ 1.31 and 45.2. The proposed requirement that the records be kept ''in an easily accessible place'' for the first two years derives from an analogous requirement in the Commission's principal books and records rule for exchange members, brokers, and dealers.[467]

Paragraph (d)(1) of Proposed Rule 826 would require an SBSEF to retain all records in a form and manner that ensures the authenticity and reliability of such records in accordance with the SEA and the Commission's rules thereunder. Paragraph (d)(2) would require an SBSEF, upon request of any representative of the Commission, to promptly [468] furnish to the representative legible, true, complete, and current copies of any records required to be kept and preserved under Rule 826. Paragraph (d)(3) would provide that an electronic record shall be retained in a form and manner that allows for prompt production at the request of any representative of the Commission. Paragraph (d)(3) would also include provisions modeled on § 1.31(c)(2) requiring an SBSEF that maintains electronic records to establish appropriate systems and controls that ensure the authenticity and reliability of electronic records.

Paragraph (e) of Proposed Rule 826 would provide that all records required to be kept by an SBSEF pursuant to Rule 826 would be subject to examination by any representative of the Commission pursuant to section 17(b) of the SEA, which is the source of the Commission's examination authority for registered brokers (among other types of registered entities). Proposed Rule 826(e) is designed only to remind SBSEFs of this statutory authority and would not seek to limit or expand that authority using the Commission's powers over SBSEFs in section 3D of the SEA.

[456] *See* Proposed Rule 825(c)(3).

[457] 17 CFR 16.01(e).

[458] *See* Proposing Release, *supra* note 1, 87 FR at 28915.

[459] *See supra* note 32.

[460] Section 3D(d)(9) of the SEA, 15 U.S.C. 78c–4(d)(9).

[461] As discussed below in this section, the Commission is adopting Rule 826 to require an SBSEF to maintain records of all activities relating to the business of the SBSEF for a period of not less than five years. Similarly, Rule 17a–1 under the SEA, 17 CFR 240.17a–1, requires a clearing agency to keep and preserve one copy of all documents made or received in the course of its business and conduct of its self-regulatory activities for a period of not less than five years. In addition, Rule 13n–7(b) under the SEA, 17 CFR 240.13n–7(b), requires an SBS data repository to keep and preserve a copy of all documents made or received by it in the course of its business for at least five years.

[462] CEA Core Principle 10 includes a clause stating that a SEF shall keep any records relating to certain swaps open to inspection and examination by the SEC. *See* 7 U.S.C. 7b-3(f)(10)(A)(iii).

[463] Section 1.31 imposes on ''records entities'' (which term includes SEFs) various requirements relating to record retention and production. Section 45.2 imposes various recordkeeping, retention, and retrieval requirements applicable to SEFs (among others) to support trade reporting.

[464] *See infra* section XI (discussing in the context of Proposed Rule 15a–12 that an SBSEF registered with the Commission is also a registered broker and, as such, is subject to the SEA's recordkeeping and reporting requirements applicable to brokers).

[465] While § 1.31(a) defines the terms ''regulatory records'' and ''electronic regulatory records'' and utilizes them throughout § 1.31, the Commission is utilizing instead the term ''records,'' which is defined in section 3(a)(37) of the SEA, 15 U.S.C. 78c(a)(37). In doing so, the Commission seeks to avoid any ambiguities or inconsistencies that could arise by using variants of a term that is defined in the Commission's governing statute. The Commission has included a definition of ''records'' in Rule 802 that cross-references section 3(a)(37) of the SEA.

[466] *See* 15 U.S.C. 78c–4(d)(9)(A)(i) (requiring an SBSEF to ''maintain records of all activities relating to the business of the facility, including a complete audit trail, in a form and manner acceptable to the Commission, *for a period of five years*'') (emphasis added).

[467] *See* Rule 17a–4(b) under the SEA, 17 CFR 240.17a–4(b).

[468] In this context, ''prompt'' or ''promptly'' means making reasonable efforts to produce records that are requested by the staff during an examination without delay. In many cases, it is likely that an SBSEF could furnish records immediately or within a few hours of a request, and it would therefore be required to do so. An SBSEF generally should produce records within 24 hours unless there are unusual circumstances.

Proposed Rule 826 would include a paragraph (f) that is not modeled on any provision of § 1.31 or § 45.2, but rather on § 1.37(c) of the CFTC's rules, which would provide: ''Each designated contract market and swap execution facility shall keep a record in permanent form, which shall show the true name, address, and principal occupation or business of any foreign trader executing transactions on the facility or exchange. In addition, upon request, a designated contract market or swap execution facility shall provide to the Commission information regarding the name of any person guaranteeing such transactions or exercising any control over the trading of such foreign trader.'' Proposed Rule 826(f) is modeled closely on § 1.37(c), except that it would use the term ''non-U.S. member'' rather than ''foreign trader.'' [469]

The Commission received no comments on Proposed Rule 826 and is adopting Rule 826 as proposed, with minor technical modifications,[470] for the reasons stated in the Proposing Release.

J. Rule 827—Core Principle 10—Antitrust Considerations

SEA Core Principle 10 [471] provides that, unless necessary or appropriate to achieve the purposes of the SEA, an SBSEF shall not: (1) adopt any rules or take any actions that result in any unreasonable restraint of trade, or (2) impose any material anticompetitive burden on trading or clearing. CEA Core Principle 11 [472] is substantively identical. Proposed Rule 827 would implement SEA Core Principle 10 and reiterate the statutory text of the Core Principle.[473]

The Commission did not receive any comments on Proposed Rule 827 and is adopting Rule 827 as proposed, for the reasons stated in the Proposing Release.

K. Rule 828—Core Principle 11—Conflicts of Interest

SEA Core Principle 11 [474] requires an SBSEF to establish and enforce rules to minimize conflicts of interest in its decision-making process and to establish a process for resolving the conflicts of interest. CEA Core Principle 12 [475] is substantively identical, and the CFTC implemented CEA Core Principle 12 in subpart M of part 37.[476]

Proposed Rule 828 would implement SEA Core Principle 11. Paragraph (a) of Rule 828, like § 37.1200, would repeat the statutory text of the Core Principle. Paragraph (b) would direct an SBSEF to comply with the requirements of Rule 834, which, as discussed below, would implement section 765 of the Dodd-Frank Act for both SBSEFs and SBS exchanges.[477]

The Commission received no comments on Proposed Rule 828 and is adopting Rule 828 as proposed for the reasons stated in the Proposing Release.

L. Rule 829—Core Principle 12—Financial Resources

Core Principle 12 [478] sets forth certain requirements related to the financial resources of an SBSEF. Paragraph (a)(1) requires an SBSEF to have adequate financial, operational, and managerial resources to discharge each responsibility of the SBSEF, as determined by the Commission. Paragraph (a)(2) would provide that the financial resources of an SBSEF shall be considered to be adequate if the value of the financial resources: (i) enables the organization to meet its financial obligations to its members and participants notwithstanding a default by the member or participant creating the largest financial exposure for that organization in extreme but plausible market conditions; and (ii) exceeds the amount that would enable the SBSEF to cover operating costs of the SBSEF for a one-year period, as calculated on a rolling basis. Finally, paragraphs (b) through (g) provide details and instruction on how to comply with the requirements of Core Principle 12.

CEA Core Principle 13 for SEFs [479] is substantively identical to SEA Core Principle 12 but lacks the clause in section 3D(d)(12)(B)(i) of the SEA relating to an SBSEF meeting financial obligations to members and participants notwithstanding a default by the member or participant creating the largest financial exposure for the SBSEF in extreme but plausible market conditions. As described in the Proposing Release, the Commission modeled Rule 829 on subpart N of part 37 of the CFTC's rules,[480] which implements CEA Core Principle 13 for SEFs.

1. Rule 829(a)—General

Paragraph (a) of Proposed Rule 829 would repeat the statutory text of SEA Core Principle 12.

One commenter states that the language in paragraph (a)(2)(i) of Proposed Rule 829 that requires an SBSEF to have sufficient financial resources ''to meet its financial obligations to its members notwithstanding a default by a member creating the largest financial exposure for that organization in extreme but plausible market conditions'' is not adequate.[481] The commenter believes that an SBSEF should be required to have resources significantly in excess of this requirement because, during financial uncertainties and stress, the SBSEF would need even greater resources.[482]

Another commenter states that the same provision, paragraph (a)(2)(i) of Proposed Rule 829, is overly burdensome and unnecessary.[483] The commenter states that the provision would add significantly to the amount of capital required to operate an SBSEF with little corresponding benefit to the market. The commenter argues that trading platforms such as SEFs and SBSEFs will have credit exposure to a member in limited circumstances and

[469] Since a ''foreign trader'' in § 1.37(c) is executing transactions on the SEF, it must be a member of the SEF. Because the term ''member'' is used elsewhere in the CFTC rules pertaining to SEFs, the term ''member'' as used throughout Regulation SE is defined in Rule 802. The term ''non-U.S. member,'' also found in Rule 802, is defined as ''a member of a security-based swap execution facility that is not a U.S. person.''

[470] *See supra* note 32.

[471] Section 3D(d)(10) of the SEA, 15 U.S.C. 78c–4(d)(10).

[472] Section 5h(f)(11) of the CEA, 7 U.S.C. 7b–3(f)(11).

[473] The Commission has not adapted the guidance from appendix B pertaining to CEA Core Principle 11 into its rule. As explained in the Proposing Release, it is not appropriate to adapt this guidance into a rule that applies to SBSEFs because the SEA (which applies to SBSEFs) does not have a provision that is closely comparable to section 15(b) of the CEA (which applies to SEFs). *See* Proposing Release, *supra* note 1, 87 FR at 28917 n.196. Furthermore, the guidance pertaining to CEA Core Principle 10 for SEFs sets out only a general approach to how the CFTC addresses antitrust issues applying to SEFs and does not include provisions that can readily be adapted into rule text. *Id.*

[474] Section 3D(d)(11) of the SEA, 15 U.S.C. 78c–4(d)(11).

[475] 7 U.S.C. 7b–3(f)(12).

[476] Section 37.1200 of subpart M repeats the statutory text of Core Principle 12. There are no other provisions in subpart M, nor is there any guidance or acceptable practices associated with Core Principle 12 in appendix B to part 37. The CFTC has proposed additional rules regarding the mitigation of conflicts of interest but has not adopted any such rules. *See* CFTC, Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest, 75 FR 63732 (Oct. 18, 2010); CFTC, Governance Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities; Additional Requirements Regarding the Mitigation of Conflicts of Interest, 76 FR 722 (Jan. 6, 2011).

[477] *See infra* section VIII.

[478] Section 3D(d)(12) of the SEA, 15 U.S.C. 78c–4(d)(12).

[479] Section 5h(f)(13) of the CEA, 7 U.S.C. 7b–3(f)(13).

[480] *See* Proposing Release, *supra* note 1, 87 FR at 28919.

[481] *See* Letter from Chris Barnard to Commission at 2 (May 21, 2022) (submitted under cover email dated June 6, 2022).

[482] *See id.*

[483] *See* Bloomberg Letter, *supra* note 18, at 8.

for very limited periods of time. Therefore, this commenter states, requiring a trading platform to maintain capital sufficient to cover the largest financial exposure of a member trading on the SBSEF, when the trading platform will not be called upon to cover the cost of a default, is unnecessary and overly burdensome. The commenter also states that the provision is not in the parallel CFTC rule. The commenter suggests eliminating the provision or, in the alternative, affirm that satisfying the financial requirements in Rule 829(b), relating to having adequate resources to enable an SBSEF to comply with the SEA and applicable Commission rules for one year, would be sufficient to satisfy the requirements of Rule 829(a) as well.[484]

The requirements of Proposed Rule 829(a)(2)(i), which repeats the statutory text of SEA Core Principle 12, do not need to be more stringent, as suggested by the first commenter. The provision requires an SBSEF to have adequate resources to ''meet its financial obligations to its members'' even in case of a default by a member creating the largest financial exposure. By the plain meaning of its terms, the provision requires that an SBSEF meet its financial obligations. The Commission does not see a benefit to requiring an SBSEF to have the financial resources that exceed its obligations. As long as an SBSEF's obligations are met, its members can be made whole with respect to any obligations of the SBSEF and the SBSEF can continue to operate. Therefore, ensuring that an SBSEF can meet its financial obligations is sufficient. Furthermore, the provision itself already envisions ''extreme but plausible market conditions,'' analogous to the ''conditions of financial uncertainty and stress'' that the commenter discusses.

At the same time, Proposed Rule 829(a)(2)(i) should not be eliminated, and the rules should not be interpreted in a manner that allows the requirements of Proposed Rule 829(a)(2)(i) to be satisfied by complying with Proposed Rule 829(b). First, the requirement that an SBSEF be able to cover its financial obligations even when its largest member defaults is in the statutory language of the SEA, and the Commission is not adopting a rule inconsistent with this requirement. The statutory language is an appropriate requirement to impose on SBSEFs because it seeks to address a plausible risk caused by the default of a member, a financial risk that, if an SBSEF has not accounted for it, could endanger the SBSEF's ability to continue to operate. While, the commenter is correct that the CFTC's rules do not have a similar provision, it is also the case that the CEA does not have a similar provision. Therefore, while the Commission is, as explained above, generally striving for harmonization with the CFTC, the Commission is not modifying Proposed Rule 829(a) to remove the requirement that an SBSEF have adequate resources to meet its financial obligations to its members even in case of a default by a member creating the largest financial exposure. Second, the Commission will not affirm that it will, as requested by a commenter, interpret the rules in a manner that allows the requirement of Rule 829(a) to be satisfied by satisfying the requirements of Rule 829(b). The scope of Proposed Rule 829(a) and Proposed Rule 829(b) are different. Proposed Rule 829(a) would in general address having adequate financial (and operational and managerial) resources to discharge each responsibility of an SBSEF. Proposed Rule 829(b) would specifically address the financial (not operational or managerial) resources that are necessary to comply with one type (not each type) of responsibility of the SBSEF, *i.e.,* compliance with section 3D of the SEA and the applicable Commission rules. Because Proposed Rule 829(a) would address topics beyond the scope of Proposed Rule 829(b), including the topic of a default by a member creating the largest financial exposure, the requirements of Proposed Rule 829(a) cannot be satisfied by merely satisfying the requirements of Proposed Rule 829(b).

For the reasons discussed above, the Commission is adopting Rule 829(a) as proposed, with a minor technical modification.[485]

2. Rule 829(b)—General Requirements

Paragraph (b) of Proposed Rule 829 is closely modeled on § 37.1301 of the CFTC's rules,[486] and it requires an SBSEF to maintain financial resources that are adequate to enable it to comply with the SBSEF Core Principles set forth in the SEA and the Commission rules for a one-year period, calculated on a rolling basis.

The Commission did not receive any comments and is adopting Rule 829(b) as proposed for the reasons stated in the Proposing Release.

3. Rule 829(c)—Types of Financial Resources

Paragraph (c) of Proposed Rule 829 is closely modeled on § 37.1302 of the CFTC's rules,[487] and it describes the types of financial resources that may satisfy the requirements of Rule 829(b).

The Commission did not receive any comments on Proposed Rule 829(c) and is adopting Rule 829(c) as proposed for the reasons stated in the Proposing Release.

4. Rule 829(d)—Liquidity of Financial Resources

Paragraph (d) of Proposed Rule 829 is closely modeled on § 37.1303 of the CFTC's rules,[488] and would provide that the financial resources allocated by an SBSEF to meet the financial resources requirements shall include unencumbered, liquid financial assets equal to at least the greater of three months of projected operating costs or the projected costs needed to wind down the SBSEF's operations. If an SBSEF lacks sufficient unencumbered, liquid financial assets, it may satisfy this obligation by obtaining a committed line of credit in an amount at least equal to the deficiency.

The Commission did not receive any comments on Proposed Rule 829(d) and is adopting Rule 829(d) as proposed for the reasons stated in the Proposing Release.

5. Rule 829(e)—Computation of Costs To Meet Financial Resources Requirement

Paragraph (e) of Proposed Rule 829 is closely modeled on § 37.1304 of the CFTC's rules,[489] and would require an SBSEF, each fiscal quarter, to make a reasonable calculation of its projected operating costs and wind-down costs in order to determine its applicable obligations under Rule 829. Paragraph (e) would further provide that the SBSEF shall have reasonable discretion in determining the methodology used to compute such amounts, provided that the Commission may review the methodology and require changes as appropriate. Proposed Rule 829(e) would also append language based on the CFTC guidance from appendix B to part 37 concerning the following topics, all of which relate to computation of costs: (i) reasonableness of calculating projected operating costs and what may be excluded from such calculation; (ii)

[484] *See id.*

[485] The technical modification removes a stray parenthesis.

[486] 17 CFR 37.1301; *see also* Proposing Release, *supra* note 1, 87 FR at 28918.

[487] 17 CFR 37.1302; *see also* Proposing Release, *supra* note 1, 87 FR at 28918.

[488] 17 CFR 37.1303; *see also* Proposing Release, *supra* note 1, 87 FR at 28919.

[489] 17 CFR 37.1304; *see also* Proposing Release, *supra* note 1, 87 FR at 28919.

proration of expenses; and (iii) allocation of expenses among affiliates.

The Commission did not receive any comments on Proposed Rule 829(e) and is adopting Rule 829(e) as proposed, with a minor technical modification for the reasons stated in the Proposing Release.[490]

6. Rule 829(f)—Valuation of Financial Resources

Paragraph (f) of Proposed Rule 829 is closely modeled on § 37.1305 of the CFTC's rules,[491] and would provide that, no less than each fiscal quarter, an SBSEF must compute the current market value of each financial resource used to meet its obligations under Rule 829 and that reductions in value to reflect market and credit risk (''haircuts'') shall be applied as appropriate.

The Commission did not receive any comments on Proposed Rule 829(f) and is adopting Rule 829(f) as proposed for the reasons stated in the Proposing Release.

7. Rule 829(g)—Reporting to the Commission

Paragraph (g) of Proposed Rule 829 is closely modeled on § 37.1306 of the CFTC's rules,[492] and would address reporting to the Commission regarding an SBSEF's financial resources. Paragraph (g)(1) would generally provide that, each fiscal quarter, or at any time upon Commission request, an SBSEF shall report the amount of financial resources necessary to meet the requirements of Rule 829 and the market value of each financial resource available, and shall provide the Commission with financial statements prepared in accordance with GAAP. Paragraph (g)(2) would provide that the calculations required under Rule 829(g) shall be made as of the last business day of the SBSEF's fiscal quarter. Paragraph (g)(3) would generally require the SBSEF to provide the Commission with sufficient documentation to explain its methodology for computing its financial requirements. Paragraph (g)(4) would generally provide the timing for submission of reports and supporting documentation. Paragraph (g)(5) would require an SBSEF to provide notice to the Commission no later than 48 hours after it knows or reasonably should know that it no longer meets its obligations under Rule 829(b) and (d). Paragraph (g)(6) would require the use of EDGAR to submit reports and documentation required under Rule 829.

The Commission did not receive any comments on Proposed Rule 829(g) and is adopting Rule 829(g) as proposed, with minor technical modifications, for the reasons stated in the Proposing Release.[493]

M. Rule 830—Core Principle 13—System Safeguards

Paragraph (A) of SEA Core Principle 13[494] provides that an SBSEF must establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk, through the development of appropriate controls and procedures, and automated systems, that are reliable and secure and that have adequate scalable capacity. Paragraph (B) requires that an SBSEF must also establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allow for the timely recovery and resumption of operations; and the fulfillment of the responsibilities and obligations of the SBSEF. Finally, paragraph (C) of SEA Core Principle 13 requires an SBSEF to periodically conduct tests to verify that the backup resources of the SBSEF are sufficient to ensure continued order processing and trade matching; price reporting; market surveillance; and maintenance of a comprehensive and accurate audit trail. CEA Core Principle 14[495] is substantively identical to SEA Core Principle 13, and the CFTC implemented this Core Principle through subpart O of part 37, which is entitled ''System Safeguards.''

Proposed Rule 830 is closely modeled on subpart O of part 37 of the CFTC's rules, except in one aspect. Subpart O includes language relating to ''critical financial markets,''[496] which is a designation applied by the CFTC to certain of its registrants that would subject them to more stringent requirements, although the CFTC has not yet adopted any such requirements.[497] A similar concept in the SEC's rules is ''SCI entity.''[498] When adopting Regulation SCI, the Commission considered whether it should apply Regulation SCI to SBSEFs, among other entities, and determined not to do so,[499] and when proposing amendments to Regulation SCI in 2023 to, among other things, expand the definition of ''SCI entity,'' the Commission did not propose to include SBSEFs as SCI entities.[500]

One commenter states that it has seen no changes in the SBS market that should cause the Commission to revisit its decision not to apply Regulation SCI to SBSEFs. The commenter states that, as the Commission has noted, the greatest operations risk to a dually registered entity is likely to arise from the swap business rather than the SBS business. From this standpoint, according to the commenter, it is appropriate for the Commission to align with the CFTC approach to ensure that SEFs and SBSEFs alike have adequate system safeguards and business continuity protocols that are aligned with this risk.[501]

Subpart O is reasonably designed to promote SEF operational capability, and that the most appropriate way to implement SEA Core Principle 13 is to closely harmonize with the CFTC's rules that implement the corresponding Core Principle. As with SEA Core Principle 12 (Financial resources),[502] the Commission recognizes that the swap business of a dually registered SEF/SBSEF is likely to be much larger than its SBS business. Therefore, the greatest operational risk to a dually registered entity is likely to arise from the swap business rather than the SBS business, so it would be logical for the SEC to

[490] The technical modification corrects an incorrect internal cross-reference to a paragraph in the rule.

[491] 17 CFR 37.1305; *see also* Proposing Release, *supra* note 1, 87 FR at 28919.

[492] 17 CFR 37.1306; *see also* Proposing Release, *supra* note 1, 87 FR at 28919.

[493] *See supra* note 32. The Commission has also changed the word ''paragraph'' in Rule 829(g)(5) to the plural form.

[494] Section 3D(d)(13)(A) of the SEA, 15 U.S.C. 78c–4(d)(13).

[495] Section 5h(f)(14) of the CEA, 7 U.S.C. 7b–3(f)(14).

[496] *See* § 37.1401(c) (providing that SEFs determined by the CFTC to be critical financial markets are subject to more stringent requirements); § 37.1401(d); § 37.1401(j) (providing that part 40 governs the obligations of registered entities that the CFTC has determined to be critical financial markets, with respect to maintenance and geographic dispersal of disaster recovery resources sufficient to meet a same-day recovery time objective in the event of a wide-scale disruption).

[497] The provisions in subpart O relating to ''critical financial markets'' reference § 40.9 of the CFTC's rules, which is marked as ''Reserved.''

[498] *See* Rule 1000 of Regulation SCI (defining ''SCI entity''). In Nov. 2014, the Commission adopted Regulation Systems Compliance and Integrity (''SCI'') to strengthen the technology infrastructure of the U.S. securities markets, reduce the occurrence of systems issues in those markets, improve their resiliency when technological issues arise, and establish an updated and formalized regulatory framework, thereby helping to ensure more effective Commission oversight of such systems. *See Regulation Systems Compliance and Integrity,* SEA Release No. 73639 (Nov. 19, 2014), 79 FR 72252 (Dec. 5, 2014).

[499] *See id.,* 79 FR at 72363–64 (reviewing comments received regarding the potential application of Regulation SCI to SBSEFs, among others).

[500] *See* Regulation Systems Compliance and Integrity, SEA Release No. 97143 (Mar. 15, 2023), 88 FR 23146 (Apr. 14, 2023) (Proposed Amendments) (File No. S7–07–23).

[501] *See* Bloomberg Letter, *supra* note 18, at 18.

[502] *See supra* section VI.L (discussing Core Principle 12).

defer to the CFTC's approach for ensuring that SEFs have adequate system safeguards and business continuity protocols. Different or additive requirements imposed by the SEC could increase costs for SEF/SBSEFs while generating benefits that are marginal at best. The Commission does not observe any differences in the SBS market relative to the swaps market that warrant imposing different or additive operational capability requirements on SBSEFs. Additionally, because SBSEFs are not SCI entities and the corresponding CFTC rule has not imposed additional requirements on critical financial markets, it is not necessary or appropriate to adapt into Rule 830 the language of subpart O applicable to critical financial markets.[503]

Therefore, the Commission is adopting Rule 830 as proposed, with minor technical modifications.[504]

N. Rule 831—Core Principle 14—Designation of Chief Compliance Officer

SEA Core Principle 14 [505] requires each registered SBSEF to designate a chief compliance officer (''CCO''), and requires the CCO to review the SBSEF's compliance with the Core Principles, resolve conflicts of interest, be responsible for establishing and administering policies and procedures required under the Core Principles, establish procedures for the remediation of noncompliance, prepare and sign an annual report that describes the SBSEF's compliance, certify that the report is accurate and complete, and submit the report to the Commission. CEA Core Principle 15 for SEFs [506] is substantively identical.

Proposed Rule 831 would implement SEA Core Principle 14 and is closely modeled on subpart P of part 37, with two minor substantive exceptions.[507] The first relates to disqualification of the CCO. Section 37.1501(b)(2)(ii) states: ''No individual disqualified from registration pursuant to sections 8a(2) or 8a(3) of the [CEA] may serve as a chief compliance officer.'' The Commission proposed instead, in Rule 831(c)(2), that no individual that would be disqualified from serving on an SBSEF's governing board [508] or committees pursuant to the criteria set forth in § 242.819(i) may serve as the CCO. As noted above,[509] the disqualification criteria in Rule 819(i) are adapted from § 1.63 of the CFTC's rules. Second, the Commission adapted the acceptable practices pertaining to CEA Core Principle 15 into paragraph (c) of Proposed Rule 831.[510]

The Commission received one comment on Proposed Rule 831. The commenter states that he fully supports the intent of the proposed regulations and believes that the CCO role is the single most important compliance role in an SBSEF and that it is critical that its job description, and the entity's rules, structures, and procedures, act to secure and maintain the CCO's independence. For example, the commenter states, the CCO should have a single compliance role and no other competing role or responsibility that could create conflicts of interest or threaten its independence. Therefore, the commenter suggests that the rules restrict the CCO position from being held by an attorney who represents the SBSEF or its board of directors, such as an in-house or general counsel. The commenter also states that the remuneration of the CCO must be specifically designed in such a way that avoids potential conflicts of interest with its compliance role.[511]

The commenter further states that although the CCO would normally report to an executive officer, the CCO must also have a direct reporting line to the independent directors, and the CCO should report to the audit committee at least yearly. The commenter strongly recommends amending § 242.831 such that the authority and sole responsibility to designate or remove the CCO, or to materially change its duties and responsibilities, vests only with the independent directors and not with the full board. This would help, the commenter states, to ensure the independence of the CCO within the entity and would possibly mitigate the need to promulgate rules requiring the SBSEF to insulate the CCO from undue pressure and coercion or to address the potential conflict between and among compliance interests, commercial interests and ownership interests of an SBSEF.[512]

The CFTC has implemented CEA Core Principle 14 for SEFs in an appropriate way, and that closely harmonizing with subpart P of part 37 would yield comparable regulatory benefits while imposing only marginal additional costs. While the commenter's suggestions would support the independence of the CCO, key provisions of paragraph (b) of Proposed Rule 831 would sufficiently protect the independence and authority of an SBSEF's CCO in performing the required functions. Significantly, paragraph (b)(1) would require that the position of CCO carry with it sufficient authority and resources to fulfill the position's duties, and paragraph (b)(2) would provide that the CCO shall have supervisory authority over all staff acting at the CCO's direction. The SBSEF remains responsible for establishing and administering required policies and procedures.

The Commission also recognizes that most SBSEFs are likely to be dually registered SEF/SBSEFs and that the swaps business of a dually registered SEF/SBSEF is likely to be much larger than its SBS business. Therefore, the greatest compliance risks to a dually registered entity are likely to arise from the swap business rather than the SBS business, and it is thus logical for the SEC to harmonize with the CFTC's rules regarding the CCO. There are strong economic incentives for a dually registered entity to appoint the same individual to serve as the CCO for both the swap and SBS businesses, and for the CCO to carry out their functions under a similar set of rules. Different or additive requirements imposed by the SEC could increase costs for SEF/SBSEFs while generating benefits that are marginal at best. The Commission does not observe any differences in the SBS market relative to the swaps market that warrant imposing different or additive CCO requirements on SBSEFs relating to the CCO.

For the reasons discussed above, the Commission is adopting Rule 831 as

[503] While subpart O frequently uses the term ''market participant,'' Proposed Rule 830 would substitute the term ''member'' in these places, since the rule pertains to market participants who are engaging as members of the SEF/SBSEF. *See supra* note 362.

[504] *See supra* note 32.

[505] Section 3D(d)(14) of the SEA, 15 U.S.C. 78c–4(d)(14).

[506] Section 5h(f)(15) of the CEA, 7 U.S.C. 7b–3(f)(15).

[507] In addition, the requirement in Proposed Rule 831 that the CCO's annual compliance report be submitted electronically to the Commission, based on § 37.1501(e)(2), includes an added clause to provide that the submission must be made using the EDGAR system and must be provided as an Interactive Data File in accordance with Rule 405 of Regulation S–T, in conformance with other rules in Regulation SE requiring electronic submissions. *See* Proposed Rule 831(j)(2).

[508] Subpart P uses the term ''board of directors,'' while the Commission proposed to use the term ''governing board'' instead throughout proposed Regulation SE. *See* Proposing Release, *supra* note 1, 87 FR at 28877 n.29.

[509] *See supra* section VI.B.9.

[510] Proposed Rule 831(c) would provide that, in determining whether the background and skills of a potential CCO are appropriate for fulfilling the responsibilities of the role of the CCO, an SBSEF would have the discretion to base its determination on the totality of the qualifications of the potential CCO, including, but not limited to, compliance experience, related career experience, training, potential conflicts of interest, and any other relevant factors.

[511] *See* Letter from Chris Barnard (May 20, 2022) (submitted under cover email dated June 6, 2022).

[512] *See id.*

proposed, with minor technical modifications.[513]

VII. Cross-Border Rules

A. Rule 832—Cross-Border Mandatory Trade Execution

Given the global nature of the SBS market, where there is frequent interaction among counterparties domiciled in different jurisdictions, the Commission proposed Rule 832 to address when the trade execution requirement would apply to a cross-border SBS transaction.[514] The proposed rule would be consistent with the Commission's territorial approach to applying Title VII requirements in other contexts, where relevant activity need not occur wholly within the United States or solely between U.S. persons for Title VII requirements to apply.[515] As discussed further below, the relevant activity here is ''to engage in a security-based swap'' in whole or in part in the United States.[516]

Paragraph (a) of Rule 832 would provide that the trade execution requirement set forth in section 3C(h) of the SEA shall not apply to an SBS unless at least one counterparty to the SBS is a ''covered person'' as defined in paragraph (b). Paragraph (b) of Rule 832 would define the term ''covered person'' with respect to a particular security-based swap, as any person that is: (1) a U.S. person;[517] (2) a non-U.S. person whose performance under an SBS is guaranteed by a U.S. person; or (3) a non-U.S. person who, in connection with its SBS dealing activity, uses U.S. personnel located in a U.S. branch or office, or personnel of an agent of such non-U.S. person located in a U.S. branch or office, to arrange, negotiate, or execute a transaction. Taken together, the provisions of Rule 832 apply to persons who are—consistent with the relevant statutory provisions added by Title VII—engaging in SBS in the United States.

Two commenters express support for Rule 832 or its subparts. Specifically, one commenter states that inclusion of paragraphs (b)(2) and (b)(3) in the proposed rule—where one counterparty of an SBS transaction is a non-U.S. person whose performance under an SBS is guaranteed by a U.S. person (''guaranteed person transactions''), and where one counterparty of an SBS transaction is a non-U.S. person who, in connection with its SBS dealing activity, uses U.S. personnel located in a U.S. branch or office, or personnel of an agent of such non-U.S. person located in a U.S. branch or office, to arrange, negotiate, or execute a transaction (''ANE transactions''), respectively—are ''appropriately broad [and] will help prevent attempted evasion of the trade execution requirement by ensuring that it will apply where there is a significant connection to the U.S., even when neither counterparty is a U.S. person.''[518]

While generally supportive of Rule 832, this commenter believes that, in addition to guaranteed person transactions, the rule should also cover transactions that include a ''de facto guarantee'' by a U.S. person, which this commenter states represents ''an unspoken but nevertheless powerful arrangement whereby a parent or other U.S. person has a virtually irresistible incentive to cover the losses incurred by another affiliated entity'' given the reputational impact a failure of even a non-guaranteed affiliate could have.[519]

Another commenter expresses support for paragraph (b)(3) of Rule 832 relating to ANE transactions.[520] This commenter agrees that such transactions fall within the Commission's jurisdiction, even if they are booked to non-U.S. entities, and believes that, given the Commission's supervisory interests and policy objectives, it is warranted for the Commission to exercise its jurisdiction over ANE transactions. This commenter states that, ''following the CFTC granting no-action relief from the trade execution requirement for ANE transactions, interdealer trading activity in EUR interest rate swaps began to be booked almost exclusively to non-U.S. entities, a fact pattern that academic research found was 'consistent with (although not direct proof of) swap dealers strategically choosing the location of the desk executing a particular trade in order to avoid trading in a more transparent and competitive setting.' ''[521] The commenter states that this is ''an outcome to avoid in the SBS market.''[522]

Several commenters oppose certain aspects of Rule 832. One commenter disagrees with the Commission's application of the trade execution requirement to transactions involving foreign branches of U.S. persons, as well as to guaranteed person transactions.[523] This commenter believes that ''mandatory trade execution is not designed to address or mitigate systemic risk'' and, thus, it is unnecessary to extend SBSEF rules to transactions with non-U.S. counterparties ''where the lack of such rules would have no ability of posing risk to the U.S. financial system.''[524] This commenter states that guaranteed entities (by definition non-U.S. persons) and foreign branches of U.S. persons are both subject to the laws and regulations of their home country or the foreign jurisdictions in which they and their counterparties operate, respectively, and the commenter states that imposing the rule's mandatory trading obligations on them in transactions with non-U.S. counterparties would result in duplicative regulation, which would increase compliance costs and add complexity and inefficiencies to cross-border trading.[525] This commenter also states that foreign trading venues are already subject to comprehensive regulatory oversight in their home jurisdictions and, based on its experience with the CFTC's SEF trading rules prior to the grant of equivalency to major foreign trading platforms in Europe and Asia, ''foreign platforms will deny access to any entity with any connection to the United States, no matter how remote, for fear of being captured by the SEC's regime'' and will further fragment SBS markets.[526]

Several commenters also oppose subjecting ANE transactions to the trade execution requirement in Rule 832(b)(3). One commenter believes that ANE transactions fall outside the jurisdictional reach of Title VII, and that

[513] *See supra* note 32. The Commission has also deleted an extraneous ''and'' at the end of the text of Rule 831(a)(1)(v).

[514] *See supra* section V.F (discussing the trade execution requirement of section 3C(h) of the SEA); *see also* Proposing Release, *supra* note 1, 87 FR at 28922–25 (discussing proposed Rule 832 in more detail).

[515] *See* Proposing Release, *supra* note 1, 87 FR at 28922–23.

[516] *See* SEA section 3C(a)(1), 15 U.S.C. 78c–3(a)(1).

[517] Transactions effected through the foreign branch of a U.S. person would be subject to the trade execution requirement, as ''a foreign branch has no separate existence from the U.S. person itself.'' *See* Proposing Release, *supra* note 1, 87 FR at 28923.

[518] Better Markets Letter, *supra* note 18, at 14–15.

[519] *Id.* at 15–16. This commenter cited Citigroup's experience with certain structured investment vehicles during the 2008 financial crisis, which this commenter states Citigroup ''chose'' to bring onto its balance sheet even though it had no legal obligation to do so. *See id.*

[520] *See* Citadel Letter, *supra* note 18, at 16.

[521] *Id.* (citing Benos, E., Payne, R., and Vasios, M., Centralized trading, transparency and interest rate swap market liquidity: evidence from the implementation of the Dodd-Frank Act, Bank of England Staff Working Paper, at 30 (May 2018), *available at https://www.bankofengland.co.uk/-/media/boe/files/working-paper/2018/centralized-trading-transparency-and-interest-rate-swap-market-liquidity-update*).

[522] *Id.*

[523] *See* ISDA–SIFMA Letter, *supra* note 18, at 12–13.

[524] *Id.* at 12.

[525] *See id.* at 13.

[526] *Id.*

''the location of personnel or agents within the United States should not form the basis for extending the [Commission's] trading mandate. . . .'' [527] This commenter states that, when assessing the necessity of extending the extraterritorial reach of a particular ruleset, ''it is important to consider the objectives of individual rulesets'' and further states that ''platform trading rules are not intended to address or mitigate risk, and therefore, the Commission should exercise more flexibility'' when deciding whether these rules should extend to ANE transactions.[528] This commenter believes that including ANE transactions ''would bring a random selection of additional transactions into scope merely due to some supporting role played by a U.S. based sales person, trader or other function caught up in ANE.'' [529]

Several commenters warn of negative implications for the SBS market from applying the trade execution requirements to ANE transactions.[530] One commenter expresses concern generally about the rule's ''complexities and over-broad reach.'' [531] Another commenter states that firms and platforms would be required to make representations ''that no ANE touchpoint is present in the U.S. for any SBS subject to the trading mandate'' so as not to run afoul of Rule 832's requirements, which this commenter states would ''require the development of a costly parallel infrastructure completely devoid of U.S. touchpoints. . . .'' [532] Similarly, another commenter states that, without regulatory certainty and clear jurisdictional boundaries, market participants may be unsure of which rules apply to a particular SBS transaction because ''non-U.S. counterparties and platform operators frequently do not know whether a transaction involves U.S. ANE activities,'' which this commenter states will likely result in confusion among market participants and platform operators and may result in some market participants deciding not to transact in SBS at all.[533]

These commenters also state that foreign jurisdictions have adopted robust regulatory regimes that already subject non-U.S. persons and foreign trading venues to comparable and comprehensive regulations in their respective jurisdictions.[534] These commenters contrast the Commission's proposed approach with the CFTC's efforts ''to curtail the U.S.' approach to extra-territoriality in light of the progress made by other jurisdictions in establishing robust derivatives regulatory regimes,'' [535] with one noting that, in adopting its cross-border rules for certain swap-market participants in 2020, the CFTC announced that it would not consider ANE as a relevant factor in non-U.S. dealers' swap transactions.[536] Another commenter asks the Commission to be mindful of whether CFTC-registered SEFs would be forced to change their rules in order comply with the new proposed SBSEF rules.[537]

Finally, one commenter requests that the Commission make more explicit that the ''covered person'' definition in Rule 832 is a transaction-based test,[538] while another commenter requests additional clarity about the application of the rule.[539]

The Commission has considered the comments received for Rule 832 and is adopting the rule as proposed, with minor technical modifications.[540] As an initial matter, the Commission disagrees with those comments suggesting that Rule 832 may exceed the Commission's statutory authority. The trade execution requirement of section 3C(h)(1) provides that the Commission's authority with respect to trade execution is co-extensive with the Commission's authority to require SBS clearing under section 3C(a)(1) of SEA.[541] And the clearing requirement of section 3C(a)(1) provides for SBS clearing when a person is ''engage[d] in a security-based swap'' in the United States.[542] Thus, consistent with the Commission's territorial approach and Title VII, the relevant domestic activity that triggers the execution requirement is engaging in an SBS in the United States.

Rule 832 fits comfortably within the bounds of that statutory authority. A U.S. person undertaking SBS transactions within the United States is, as no commenter disputes, engaging in an SBS in the United States (irrespective of whether the counterparty is overseas). And this is true even if the U.S. person is undertaking the SBS transaction from a foreign office. As the Commission has explained, ''a foreign office has no separate existence from the U.S. person itself.'' [543] It is the U.S. based entity that has legal and financial responsibility for the SBS transaction and for the ensuing obligations that will flow from the transaction over the life of the SBS. Thus, it is reasonable to understand the U.S. entity to have engaged in the United States in the SBS even if the initial undertaking (*i.e.,* the SBS transaction) occurred in the entity's foreign office.

For similar reasons, a non-U.S. person who enters an SBS with another non-U.S. person has nonetheless engaged in an SBS in the United States (at least in part) if that SBS arrangement is guaranteed by a U.S. person. When a non-U.S. person operates with a guarantee from a U.S. person for the non-U.S. person's performance under an SBS, the SBS arrangement is economically equivalent and substantially identical with a transaction entered into directly with the U.S. guarantor. With such an arrangement, an essential element of the transaction from the viewpoint of the

[527] *Id.* at 11.

[528] *Id.* This commenter states that rules related to mandatory platform execution are intended to provide counterparties with a sufficient level of pre-trade price transparency and that they should be addressed by the market regulators in the jurisdiction where the majority of trading activity is taking place. *See id.*

[529] *Id.* at 12.

[530] *See* SIFMA AMG Letter, *supra* note 18, at 11; Tradeweb Letter, *supra* note 18, at 3–4; ISDA–SIFMA Letter, *supra* note 18, at 11–12.

[531] SIFMA AMG Letter, *supra* note 18, at 11.

[532] ISDA–SIFMA Letter, *supra* note 18, at 12.

[533] Tradeweb Letter, *supra* note 18, at 4–5.

[534] *See id.* at 4; ISDA–SIFMA Letter, *supra* note 18, at 12. *See also* SIFMA AMG Letter, *supra* note 18, at 11.

[535] ISDA–SIFMA Letter, *supra* note 18, at 12. *See also* Tradeweb Letter, *supra* note 18, at 4; SIFMA AMG Letter, *supra* note 18, at 11. Section VII.B, *infra,* discusses the exemptions under Rule 833.

[536] ISDA–SIFMA Letter, *supra* note 18, at 12 n.28. *See also* CFTC, Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants, 85 FR 56924, 56961–63 (Sept. 14, 2020); CFTC Release No. 8212–20 (July 23, 2020) (CFTC Withdraws ''ANE'' Staff Advisory and Issues New Cross-Border No-Action Relief).

[537] SIFMA AMG Letter, *supra* note 18, at 11.

[538] *See* ISDA–SIFMA Letter, *supra* note 18, at 11 n.26. Specifically, this commenter appreciates the Commission's clarification that the ''covered person'' definition is a transaction-based test but believes that the rule text could be more explicit in such regard by replacing: in prong (2) of the definition ''a security-based swap'' with ''that security-based swap;'' and in prong (3) of the definition ''a transaction'' with ''that security-based swap transaction.''

[539] *See* SIFMA AMG Letter, *supra* note 18, at 11–12.

[540] *See supra* note 32.

[541] Section 3C(h)(1) of the SEA (requiring trade execution ''[w]ith respect to transactions involving security-based swaps subject to the clearing requirement of subsection (a)(1)'' of the SEA).

[542] Section 3C(a)(1) of the SEA (''It shall be unlawful for any person to engage in a security-based swap unless that person submits such security-based swap for clearing to a clearing agency that is registered under this Act or a clearing agency that is exempt from registration . . . .'').

[543] Proposing Release, *supra* note 1, 87 FR at 28923 (citing Application of ''Security-Based Swap Dealer'' and ''Major Security-Based Swap Participant'' Definitions to Cross-Border Security-Based Swap Activities; Republication, SEA Release No. 72472 (June 25, 2014), 79 FR 47278, 47289 (Aug. 12, 2014) (''2014 Cross-Border Adopting Release'')).

guaranteed person's counterparty is the legal and financial obligations such a guarantee imposes on the U.S. guarantor (without which there would be no need to include the U.S. guarantor) and brings the U.S. person legally and financially into the transaction as an interested party. This economic reality makes it appropriate to include guaranteed non-U.S. persons within the definition of ''covered persons'' in Rule 832.

Further, the statutory language is, in the Commission's view, reasonably understood to encompass a non-U.S. person who, in connection with its SBS dealing activity, uses U.S. personnel located in a U.S. branch or office, or personnel of an agent of such non-U.S. person located in a U.S. branch or office, to arrange, negotiate, or execute an SBS transaction. These activities rise to the level of engaging in an SBS in the United States. Undertaking critical steps in an SBS transaction qualifies as engaging in an SBS in the United States, no less than placing ultimate legal or financial responsibility for an SBS with a person in the United States (as occurs in the cases discussed above of an SBS transaction involving either a foreign office of a U.S. person or a U.S. guarantor).

The Commission's assessment of the relevant domestic activities that constitute engaging in an SBS is consistent not only with the statutory text, but also the statutory objectives underlying the execution requirement. These objectives include, among other things, helping to ensure the financial stability of U.S. persons engaged in SBS transactions, the promotion of transparency in price formation for SBS transactions that have a nexus to the U.S. securities markets, and the prevention of manipulation, price distortion and disruptions of the delivery or cash settlement process within the U.S. market system. Each of the components of Rule 832 helps to advance one or more of these statutory goals and, thus, further supports the Commission's reasonable understanding of what constitutes engaging in an SBS in the United States.[544]

With that general explanation of how Rule 832 fits comfortably within our statutory authority, the Commission will address the specific comments that were received on the rule. For the reasons discussed above, the Commission disagrees with the comment that Rule 832 should not extend the trade execution requirement to transactions involving foreign branches of U.S. persons or guaranteed person transactions.[545] With respect to the commenter that believes Rule 832's definition of ''covered person'' should also cover a transaction that includes a ''de facto guarantee'' by a U.S. person,[546] the Commission appreciates that, even for an affiliate that is not a guaranteed person, a dealer or large trader might be unwilling to allow such an affiliate to fail because of the reputational and other consequences such a failure might have on its interactions with potential counterparties. At the same time, given the lack of a legal obligation by the ''de facto guarantor,'' it is not clear how the Commission could determine—before the fact—which ''de facto guarantees'' exist and which such ''de facto guarantors'' should be included, or how market participants, including counterparties, would be able to determine the applicability of Regulation SE to a transaction potentially subject to a ''de facto guarantee.'' Thus, the Commission is not including ''de facto guarantee'' transactions within Rule 832's definition of ''covered persons.''

For the reasons discussed above, as well as the reasons discussed immediately below, the Commission also disagrees with the argument that the Commission should not extend SBSEF rules, which include mandatory trade execution, to transactions with non-U.S. counterparties (even if they involve guaranteed persons) where the lack of such rules would have no ability of posing risk to the U.S. financial system.[547] While Title VII's trade execution requirements do not relate to systemic risk in precisely the same manner that certain other Title VII rules—such as capital, margin, and segregation requirements for SBSDs and MSBSPs,[548] post-trade reporting and public dissemination of SBS transactions,[549] registration and regulation of SBSDs and MSBSPs,[550] among others—the Commission disagrees with the notion that the trade execution and other SBSEF requirements are not important in addressing and mitigating risk, including potentially systemic risk, to the U.S. financial system. The application of the trade execution requirement to a cross-border SBS transaction is not simply a matter of whether a particular form of execution (such as RFQ-to-3 or the use of an order book) is required. Instead, the application of this requirement to such a transaction would subject the transaction to the various requirements of Regulation SE, many of which relate to mitigating risks to the counterparties of the transaction and, ultimately, the U.S. financial system. The Core Principles for SBSEFs—which are set forth in the Dodd-Frank Act[551] and implemented in the rules of Regulation SE—seek to, among other things, provide for transparency in price formation for SBS,[552] impartial access to SBS trading,[553] the financial resources of SBS trading venues,[554] the efficient submission of eligible SBS transactions to central clearing,[555] and the prevention of manipulation, price distortion, and disruptions of the delivery or cash settlement process.[556]

With respect to commenters' views opposing the inclusion of ANE transactions in Rule 832,[557] the Commission understands that this differs from the CFTC's policy towards ANE transactions and is cognizant of the potential complexities and costs that can arise if market participants are unsure of which jurisdictions' rules apply to a particular SBS transaction.

[544] In the alternative, the Commission relies on the anti-evasion authority of section 30(c) of the SEA, 15 U.S.C. 78dd(c), as statutory authority for Rule 832. Section 30(c) authorizes the Commission to apply Title VII requirements to persons transacting a business ''without the jurisdiction of the United States'' if they contravene rules that the Commission has prescribed as ''necessary or appropriate to prevent the evasion of any provision'' of Title VII. For example, without Rule 832(b)(2), U.S. persons could have an incentive to evade the trade execution requirement by engaging in SBS via a guaranteed affiliate, while the economic reality of transactions arising from that activity—including the risks these transactions introduce to the U.S. market—would be no different in most respects than transactions entered into directly by U.S. persons. *See* Proposing Release, *supra* note 1, 87 FR at 28923 n.228. And, without Rule 832(b)(3), non-U.S. persons could retain the benefits of operating in the United States while avoiding compliance with the trade execution requirement. *See id.* at 28923 n.230.

[545] *See supra* note 523 and accompanying text.

[546] *See supra* note 519 and accompanying text.

[547] *See supra* note 524 and accompanying text.

[548] *See* Capital, Margin, and Segregation Release, *supra* note 100.

[549] *See* Regulation SBSR Release, *supra* note 102.

[550] *See* SBSD and MSBSP Registration Release, *supra* note 99.

[551] Core Principles of section 3D(d) of the SEA, 15 U.S.C. 78c–4(d).

[552] *See, e.g.,* Rule 815 (methods of execution); Rule 816 (trade execution requirement); Rule 825 (Core Principle 8—timely publication of trading information).

[553] *See, e.g.,* Rule 819(c) (Core Principle 2—access requirements).

[554] *See, e.g.,* Rule 829 (Core Principle 12—financial resources).

[555] *See, e.g.,* Rule 823(c) (Core Principle 6—financial integrity of transactions).

[556] *See, e.g.,* Rule 820 (Core Principle 3—SBS not readily susceptible to manipulation); Rule 821(Core Principle 4—monitoring of trading and trade processing); Rule 823 (Core Principle 6—financial integrity of transactions).

[557] *See supra* notes 527–537 and accompanying text.

The Commission also recognizes commenters' views that certain foreign jurisdictions have adopted ''robust'' regulatory regimes.[558] However, the purpose of Rule 832 is to ''address when the . . . trade execution requirement applies to a cross-border SBS transaction.'' [559] Absent an exemption, the trade execution requirement applies in cross-border contexts wherever covered persons are involved in an SBS transaction, regardless of whether the relevant foreign jurisdictions have robust regulatory regimes—such as those the Commission may consider in connection with a foreign trading venue's application to the Commission for an exemption from the trade execution requirement under Rule 833(b).[560]

In adopting Rule 832, the Commission has been mindful of its impact on CFTC-registered SEFs and, as a commenter suggests,[561] whether they might be forced to change their rules because of the Commission's ANE approach for SBSEFs. As discussed below in section VII.B with respect to applications for exemptions relating to the trade execution requirement under Rule 833(b), foreign trading venues that have already received exemptive relief from the CFTC for swaps trading where robust regulatory regimes may exist with requirements comparable to those applicable to SBS transactions in the United States may apply for exemptive relief under Rule 833(b). If exempted under Rule 833(b), trading of SBS on such foreign trading venues would not require CFTC-registered SEFs to change their rules.[562] Similarly, for SBS transactions that the Commission exempts from the trade execution requirement based on an application submitted under Rule 833(b), the concerns expressed by commenters regarding complexities and costs would no longer be applicable,[563] and commenters' concerns regarding the Commission's treatment of ANE transactions should be allayed as well, because the effect of such exemptions would likely result in SBS transactions in foreign jurisdictions with what may be considered robust regulatory regimes being exempt from the Commission's trade execution requirement and, in practice, have similar treatment of transactions on applicable foreign trading venues as the CFTC. On the other hand, if the Commission does not grant an exemption to such an SBS transaction, that would mean that the Commission would not have made a finding that granting such an exemption would be in the public interest and consistent with the protection of investors, in light of any information submitted with the application which the Commission may have considered regarding comparable requirements in that foreign jurisdiction. For such SBS transactions, it would be appropriate for the trade execution requirements to apply.

The Commission also disagrees with the characterization of Rule 832 with respect to ANE transactions as bringing ''a random selection of additional transactions into scope'' and the belief that the location of personnel in the United States should not form the basis for applying the Commission's trade execution requirement.[564] The mere fact that an entity has personnel located in the U.S. does not subject an SBS transaction to the trade execution requirement; rather, it is the role such personnel play in arranging, negotiating, or executing the transaction that brings them within the definition of ''covered person'' for purposes of Rule 832. ANE transactions would not be a ''random selection of additional transactions;'' [565] instead, it would be appropriate to apply its carefully considered and tailored guidance given in other Title VII requirements for the phrase ''arranged, negotiated, or executed'' for the purposes of the application of the trade execution requirement in the cross-border context.

Specifically, the Commission has clarified that Title VII requirements using an ''arranged, negotiated, or executed'' test are not triggered in certain circumstances where the market-facing activity of U.S. personnel is ''so limited that it would not implicate the regulatory interests underlying the relevant Title VII requirements.'' [566] Such instances arise when U.S. personnel provide ''market color'' in connection with SBS transactions, where such market color is ''limited to background information regarding pricing or market conditions associated with particular instruments or with markets more generally'' [567] and when the U.S. personnel have no client responsibility [568] and do not receive any transaction-linked compensation.[569] However, market-facing activity by personnel located in the United States also would not be ''market color'' (*i.e.,* would be considered to be ''arranged, negotiated, or executed'') if such activity involves: providing recommendations, such as recommending particular instruments; providing predictions regarding potential merits or risks of, or providing trading ideas or strategies relating to, a proposed security-based swap transaction; structuring a particular SBS transaction; or finalizing or reaching agreement with respect to any pricing or non-pricing element, such as underlier, notional amount or tenor, that must be resolved to complete an SBS transaction.[570]

With this existing guidance that applies to cross-border ANE transactions subject to Rule 832,[571] declining to apply Title VII requirements to SBS transactions of foreign entities that use U.S. personnel to engage in ANE transactions would allow such entities to exit the Title VII regulatory regime without exiting the U.S. market.[572] This is problematic

[558] *See supra* note 534 and accompanying text.

[559] Proposing Release, *supra* note 1, 87 FR at 28924.

[560] *See infra* section VII.B (discussing cross-border exemptions under Rule 833, including exemptions relating to the trade execution requirement under Rule 833(b)). The Commission may consider, among other things, the extent to which the SBS traded in a foreign jurisdiction are subject to a comparable trade-execution requirement.

[561] *See supra* note 537 and accompanying text.

[562] *See infra* notes 624–627 and accompanying text.

[563] According to one commenter, these issues no longer apply in the SBS markets given that the CFTC resolved it ''when it granted equivalency to major foreign trading platforms in Europe and Asia.'' *See supra* note 526 and accompanying text. The CFTC has granted orders of exemptions to certain markets pursuant to CEA section 5h(g), which authorizes the CFTC to exempt, conditionally or unconditionally, a SEF from registration under CEA section 5h if the CFTC finds that the facility is ''subject to comparable, comprehensive supervision and regulation on a consolidated basis by . . . the appropriate governmental authorities in the home country of the facility.'' *See* ''Exemption of Foreign Swap Trading Facilities from SEF Registration,'' *available at https://www.cftc.gov/International/ForeignMarketsandProducts/ExemptSEFs.*

[564] *See supra* notes 527 and 529 and accompanying text.

[565] *See supra* note 564 and accompanying text.

[566] *See* 2019 Cross-Border Adopting Release, *supra* note 218, 85 FR at 6274.

[567] *Id.* at 6275–76. Background information includes information regarding (1) current or historic pricing, volatility or market depth, and (2) trends or predictions regarding pricing, volatility, or market depth, as well as information related to risk management. *See id.* at 6275.

[568] No client responsibility would mean that the U.S. personnel have not been assigned, and do not otherwise exercise, client responsibility in connection with the transaction. *See id.* at 6275–76.

[569] Not receiving any transaction-linked compensation means the U.S. personnel do not receive compensation based on, or otherwise linked to, the completion of individual transactions on which the U.S. personnel provide market color. *See id.*

[570] *See id.* at 6275.

[571] *See supra* notes 566–570 and accompanying text.

[572] *See* Proposing Release, *supra* note 1, 87 FR at 28923 (citing Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, SEA Release No. 78321 (July 14, 2016), 81 FR 53546, 53591 (Aug. 12, 2016) (''Regulation SBSR Adopting Release II'')).

because, as the Commission stated in the Proposing Release, ''applying the trade execution requirement to such persons is necessary or appropriate as a prophylactic measure to help prevent the evasion of the provisions of the SEA that were added by the Dodd-Frank Act, and thus help prevent the relevant purposes of the Dodd-Frank Act from being undermined. Without this rule, non-U.S. persons could retain the benefits of operating in the United States while avoiding compliance with the trade execution requirement.'' [573]

Finally, with respect to the request by one commenter that the Commission revise the ''covered person'' definition in Rule 832 to make more explicit that it is a transaction-based test,[574] the Commission affirms again that the definition is intended to apply on a transaction-by-transaction basis,[575] and views the language in the rule (*e.g.,* ''with respect to a particular security-based swap'') as sufficiently clear in this regard.[576]

Accordingly, for the reasons discussed above, the Commission is adopting Rule 832 as proposed, with minor technical modifications.[577]

B. Rule 833—Cross-Border Exemptions for Foreign Trading Venues and Relating to the Trade Execution Requirement

As discussed above, Rule 832 specifies when the trade execution requirement applies to an individual cross-border SBS transaction. When covered persons (as defined in Rule 832) are members of a foreign trading venue for SBS (a ''foreign SBS trading venue'') with respect to SBS transacted on that venue, whether or not such SBS are subject to the trade execution requirement, the foreign SBS trading venue could be required to register with the Commission as a national securities exchange or SBSEF [578] or, because the foreign SBS trading venue would be facilitating the execution of SBS between persons, a broker.[579]

To address the situation of a foreign SBS trading venue that wishes to avoid registering with the Commission in one or more of these capacities, the Commission proposed Rule 833(a). Rule 833(a), which would specify that a foreign SBS trading venue can request that the Commission grant it an exemption under section 36(a)(1) of the SEA [580] by submitting, pursuant to SEA Rule 0–12,[581] a complete application for exemptive relief. Rule 833(a) would also provide that such an application under section 36(a)(1) and Rule 0–12, relating to the status of the foreign SBS trading venue under the SEA, may state that the application is also submitted pursuant to Rule 833(a).[582] When such an application is submitted pursuant to Rule 833(a), the Commission would consider the submission as an application to exempt the foreign SBS trading venue, with respect to its providing a market place for SBS, from: the definition of ''exchange'' in section 3(a)(1) of the SEA; [583] the definition of ''security-based swap execution facility'' in section 3(a)(77) of the SEA; [584] the definition of ''broker'' in section 3(a)(4) of the SEA; [585] and section 3D(a)(1) of the SEA.[586] Because a foreign SBS trading venue for which the Commission grants an exemptive order under SEA section 36 and Rule 833(a) [587] would be exempt from these definitions and from section 3D(a)(1) of the SEA, the foreign SBS trading venue would not be required to register with the Commission as a national securities exchange, SBSEF, or broker, or to comply with other requirements applicable to such entities under the SEA or Commission rules thereunder.[588]

As with other exemptions issued pursuant to section 36, to issue a Rule 833(a) exemption, the Commission would be required to find that the exemption is necessary or appropriate in the public interest, and consistent with the protection of investors.[589] As contemplated in section 36(a)(1), the Commission may issue a Rule 833(a) exemption with conditions.

The Commission also proposed Rule 833(b), which would address requests for exemptive relief relating to the application of the trade execution requirement to transactions executed on a foreign SBS trading venue. Rule 833(b)(2) would provide that, in considering whether to issue a Rule 833(b) exemption, the Commission may consider: (i) the extent to which the SBS traded in the foreign jurisdiction covered by the request are subject to a trade execution requirement comparable to that in section 3C(h) of the SEA and the Commission's rules thereunder; (ii) the extent to which trading venues in the foreign jurisdiction covered by the request are subject to regulation and supervision comparable to that under the SEA, including section 3D of the SEA, and the Commission's rules thereunder; (iii) whether the foreign trading venue or venues where covered

[573] Proposing Release, *supra* note 1, 87 FR at 28923 n.230. *See also supra* note 521 and accompanying text (providing an example of swap dealers strategically choosing the location of the desk executing a particular trade in order to avoid trading in a more transparent and competitive setting after no-action relief from the trade execution requirement for ANE transaction).

[574] *See supra* note 538 and accompanying text.

[575] *See* Proposing Release, *supra* note 1, 87 FR at 28922 n.221 (''The proposed term 'covered person' is designed to apply on a transaction-by-transaction basis.'').

[576] With respect to the commenter that requested additional clarity with respect to Rule 832, *see supra* note 539 and accompanying text, the Commission's discussion of the rule in this section including, for example, the applicability of existing guidance with respect to ANE transactions and the availability of exemptions under Rule 833(b) from the mandatory trade execution requirement as discussed in section VII.B below, should provide market participants with more clarity on when and to whom the rule's requirements would apply.

[577] *See supra* notes 32 and 540.

[578] *See* 15 U.S.C. 78c–4(a)(1) (stating that no person may operate a facility for the trading or processing of SBS, unless the facility is registered as an SBSEF or national securities exchange).

[579] A ''broker'' is generally defined as a person engaged in the business of effecting transactions in securities for the account of others. *See* Section 3(a)(4) of the SEA, 15 U.S.C. 78c(a)(4). Section 15(a)(1) of the SEA, 15 U.S.C. 78*o*(a)(1), generally provides that it shall be unlawful for any broker to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security unless such broker is registered in accordance with SEA section 15(b). *See also infra* section XI (discussing Rule 15a–12).

[580] 15 U.S.C. 78mm(a)(1).

[581] 17 CFR 240.0–12 (setting forth procedures for filing applications for orders for exemptive relief under section 36 of the SEA).

[582] An application for an exemption under Rule 833(a) could be submitted by a foreign SBS trading venue itself or by another interested party. For example, a financial regulatory authority in a foreign jurisdiction could submit an application under Rule 833(a) on behalf of one or more SBS trading venues licensed and regulated in that jurisdiction.

[583] 15 U.S.C. 78c(a)(1).

[584] 15 U.S.C. 78c(a)(77).

[585] 15 U.S.C. 78c(a)(4).

[586] 15 U.S.C. 78c–4(a)(1) (stating that no person may operate a facility for the trading or processing of SBS, unless the facility is registered as an SBSEF or national securities exchange).

[587] For the remainder of this discussion, an exemption under SEA section 36 and Rule 833(a) will be referred to simply as a ''Rule 833(a) exemption.'' In addition, the Commission will use the term ''trading venue covered by an exemption order under Rule 833'' (or a similar formulation) rather than ''exempt exchange,'' ''exempt SBSEF'' or ''exempt broker'' because, pursuant to an exemption granted under Rule 833(a), the covered trading venue would no longer be an exchange, SBSEF, or broker (as defined by the SEA).

[588] However, as discussed further below, the Rule 833(a) exemption is designed to address only activities related to providing a market place for SBS. An entity that engages in other SBS-related activity or any activity involving non-SBS securities would, with respect to such other SBS-related activity or any activity involving non-SBS securities, still be subject to any applicable requirements to register with the Commission as a national securities exchange, SBSEF, or broker, or to comply with other requirements applicable to such entities under the SEA or Commission rules thereunder.

[589] *See* 15 U.S.C. 78mm(a)(1). Unlike the CFTC, which has exemptive authority under section 5h(g) of the CEA, the Commission would not be required to find that the foreign trading venue is subject to comparable, comprehensive supervision and regulation by a U.S. or foreign regulator.

persons intend to trade SBS have received an exemptive order contemplated by Rule 833(a); and (iv) any other factor that the Commission believes is relevant for assessing whether the exemption is in the public interest and consistent with the protection of investors.[590]

As with other exemptions issued pursuant to section 36, to issue a Rule 833(b) exemption, the Commission would be required to find that the exemption is necessary or appropriate in the public interest, and consistent with the protection of investors. As contemplated by section 36(a)(1), the Commission may issue a Rule 833(b) exemption with conditions.

One commenter expresses general support for the establishment of a rule granting exemptions for foreign trading venues and for cross-border trade execution exemptions, noting that ''difficulties that can arise when the trade execution requirement applies in two separate jurisdictions'' and that ''it is important for market participants and trading venues to have regulatory certainty while maintaining flexibility in where transactions may be consummated.'' [591]

Another commenter believes the Commission's proposed exemption rule should be made more robust to prevent evasion of the SBSEF registration and trade execution requirements. This commenter believes that Rule 833 does not provide meaningful standards for how the Commission will assess requests for such exemptions, which this commenter believes is insufficient, and provides the Commission with ''unreasonably broad, nearly unlimited, discretion, in how it assess foreign swaps regulatory frameworks,'' which this commenter believes may result in the Commission ''facilitating evasion of Title VII.'' [592] This commenter states that the Dodd-Frank Act ''requires that the SEC must, at the very least . . . make an affirmative determination that such an application demonstrates that the exemption could not be used to evade those requirements[, which would] require the SEC [to] make a credible, comprehensive determination that the foreign regulatory requirements applicable to the applicant is actually written, applied and enforced, are the same as those that would otherwise apply to the applicant absent an exemption.'' [593]

One commenter argues that Rule 833(b)'s requirements are unnecessary if a foreign trading venue has received an exemption under Rule 833(a), given that the Commission would be required to find that the Rule 833(a) exemption is ''necessary or appropriate in the public interest and consistent with the protection of investors,'' which this commenter believes ''should be sufficient for the purposes of trading SBS on foreign trading venues, even when the trade execution requirement applies.'' [594] Thus, this commenter requests that the Commission ''remove the 833(b) exemption and clarify that . . . if a foreign trading venue has been granted an 833(a) exemption . . ., a market participant should be permitted to trade SBS on that venue.'' [595]

Another commenter does not believe the exemptions in Rule 833 are sufficiently clear, and requests that the Commission consider setting forth charts or examples to better facilitate compliance.[596]

With respect to Rule 833(b) specifically, several comments appear to anticipate that, in order for a transaction on a foreign SBS trading venue to qualify for the trade execution exemption under Rule 833(b), the relevant foreign jurisdiction would have to require RFQ-to-3 or an order book for Required Transactions.[597] One commenter states that ''the CFTC, appropriately in our view, recognized that there are multiple ways that a regulator can ensure appropriate pre-trade transparency and competition, such that restricting execution methods to [central limit order books] and RFQ-to-3 systems are not the only ways to achieve these objectives. Failing to recognize this fact in the course of making comparability determinations would incorrectly turn the statutory comparability standard into a test for identical rules.'' [598] Two commenters state that it would be difficult for many foreign SBS trading venues to demonstrate comparability if RFQ-to-3 and an order book were required, with one stating that ''[f]ew jurisdictions require RFQ to 3, and some do not require SBS to be traded on an organized trading venue.'' [599]

Two commenters oppose requiring an exemption under Rule 833 to depend upon a ''rule-by-rule'' comparison or analysis. One commenter states that this would be ''unduly burdensome and at odds with the overall goal of achieving comparable outcomes.'' [600] The other commenter requests that the Commission adopt ''a more flexible approach to the recognition of foreign trading venues—one that relies on holistic outcomes and governing principles, rather than a rule-by-rule analysis.'' [601]

Several commenters believe that Rule 833, as they understand it, would result in various negative consequences. One commenter states that covered persons would not be able to fulfill the trade execution requirement and that, as a result, market participants would then be forced to trade on a limited subset of venues, disrupting liquidity and requiring them to expend time and resources in onboarding to a compliant trading venue.[602] Another commenter warns that ''the limited liquidity in the SBS market is not going to withstand significant disruptions, increased costs, and market fragmentation, thus making it more likely for market participants to exit the SBS markets entirely.'' [603] This commenter believes that the Commission's approach ''will force market participants to trade SBS within the jurisdictional borders of the United States, restricting access to global liquidity and thus further diminishing already thin SBS markets,'' rather than ''the decision where to trade the most standardized and liquid swaps [being] dictated by the available liquidity and

[590] For a more detailed discussion of the items in Rule 833(b)(2) that the Commission may consider, *see* Proposing Release, *supra* note 1, 87 FR at 28925–26.

[591] Bloomberg Letter, *supra* note 18, at 18. However, as discussed below in this section VII.B, this commenter criticizes various aspects of Rule 833.

[592] Better Markets Letter, *supra* note 18, at 16.

[593] *Id.*

[594] Bloomberg Letter, *supra* note 18, at 7.

[595] *Id.*

[596] *See* SIFMA AMG Letter, *supra* note 18, at 11–12.

[597] *See* Bloomberg Letter, *supra* note 18, at 6; Tradeweb Letter, *supra* note 18, at 5–6; ISDA–SIFMA Letter, *supra* note 18, at 14. *See also* ICE Letter, *supra* note 18, at 4.

[598] Tradeweb Letter, *supra* note 18, at 6.

[599] Bloomberg Letter, *supra* note 18, at 6. *See also* ICE Letter, *supra* note 18, at 4 (stating that ''EU and UK based multilateral trading facilities are not required under their home country regulation to ensure that a request-for-quote be sent to three different recipients or offer a central-limit-order-book'' and thus the proposed criteria cannot be satisfied from the outset); Bloomberg Letter, *supra* note 18, at 19 (stating that ''at least three Bloomberg-affiliated [foreign venues] would seek an exemption'' but may be ''effectively barred at the door by the Proposal's requirement that security-based swaps are subject to a trade execution requirement in the foreign jurisdiction that is comparable to that in 15 U.S.C. 78c–3(h) and the Commission's rules thereunder''); ISDA–SIFMA Letter, *supra* note 18, at 14 (stating that hardly any (if any at all) foreign trading venues would be able to enjoy an Exempt SBSEF status and that, as far as the commenter is aware, none of the CFTC recognized multilateral trading facilities or organized trading facilities are required to offer a central limit order books on their platforms).

[600] Bloomberg Letter, *supra* note 18, at 7.

[601] ISDA–SIFMA Letter, *supra* note 18, at 15.

[602] *See* Bloomberg Letter, *supra* note 18, at 6–7. *See also* Tradeweb Letter, *supra* note 18, at 6.

[603] ISDA–SIFMA Letter, *supra* note 18, at 15. *See also* Tradeweb Letter, *supra* note 18, at 6.

prices in global markets.'' [604] Similarly, another commenter contrasts the approach taken under Rule 833 with the approach the CFTC has taken to exempt certain foreign SEFs from SEF registration, and states that Rule 833 would prevent covered persons from trading SBS on such exempt SEFs and would impair their ability to manage risk effectively.[605] If covered persons are no longer able to trade SBS on these venues, this commenter states, they also ''may not find it feasible to trade other instruments, such as swaps and foreign corporate debt, due to the bifurcation of liquidity that will result.'' [606] This commenter states that the ability to combine trading interest in related products on the same trading platform is critical to the effective transfer of risk within the financial system, and preventing ''this single pool of liquidity jeopardizes that risk transfer and impairs price formation and ultimately increases systemic risk.'' [607]

These commenters argue that the Commission should instead align with the CFTC's approach to exemptions, which does not require exempt foreign SEFs to have order books or to satisfy the RFQ-to-3 requirement, stating that the CFTC's ''flexible, outcomes-based approach serves market participants well.'' [608] One commenter argues for the Commission to avoid the ''unintended economic disadvantage if other global market participants avoid trading with the managers' non-US fund clients solely to avoid being subject to the Commission's SBSEF requirements'' and the significant costs and burdens that would arise if the two regulatory approaches produce different outcomes for swaps and SBS.[609] These commenters state that the CFTC has ''already granted exemptions to a number of foreign trading venues across jurisdictions in Europe and Asia,'' [610] with one commenter stating that the ''CFTC process, while imperfect, provides a more streamlined and workable approach for the Commission.'' [611]

These commenters argue that the Commission should ''ensure that its proposed approach to granting exemption will produce outcomes similar to those of the CFTC'' so as to ''further harmonize with the CFTC's SEF framework, and promote consistency and simplicity. . . .'' [612] Several of these commenters recommend that the Commission grant automatic exemptions for trading venues that are currently exempt under the CFTC's rules.[613] Some commenters stated that this approach would be consistent with the Commission's general approach of harmonizing closely with the CFTC's SEF rules where appropriate and also stated that, as there are no distinctions outside of the United States between the regulation of swaps and the regulation of SBS, SBS are currently traded on foreign venues that have been recognized by the CFTC.[614] Three commenters requested that the Commission recognize such exemptions (*i.e.,* CFTC-exempt SEFs as ''exempt'' SBSEFs) at the adoption of Regulation SE.[615] And one of these three commenters also requests that, in the alternative, and ''in order to avoid duplicative or conflicting regulation . . . the Commission grant an exemption from the trade execution requirement if the SBS transaction at issue is subject to mandatory trading in another jurisdiction.'' [616]

The Commission has considered the comments received for Rule 833 and is adopting the rule as proposed. As the Commission stated in the Proposing Release,[617] Rule 833(a) is designed to address only activities relating to providing a market place for SBS and would not extend to trading in any other type of security or to other activities with respect to SBS.[618] A foreign SBS trading venue covered by an exemptive order under Rule 833(a) might offer trading in other types of securities; however, the exemptive order would permit covered persons to trade only SBS on that trading venue without causing the trading venue to have to register with the Commission as a national securities exchange, SBSEF, or broker. The exemptive order would not address any registration obligations that might arise from any other SBS-related activity or any activity involving non-SBS securities by the foreign trading venue.[619]

The bulk of the comments received opposing Rule 833 appear to emanate from commenters' interpretation—and misunderstanding—of what would be required in order to receive a Rule 833(b) exemption. The Commission proposed Rule 833(b) to address requests for exemptive relief relating to the application of the trade execution requirement under section 3C(h) of the SEA to transactions executed on a foreign SBS trading venue. Pursuant to section 3C(h) of the SEA, an SBS that is subject to the trade execution requirement must be executed on an exchange, on an SBSEF registered under section 3D of the SEA, or on an SBSEF that is exempt from registration under section 3D(e) of the SEA.[620] As a result, a covered person (as defined in Rule 832) would not be permitted to execute an SBS that is subject to the trade execution requirement on a foreign SBS trading venue unless that venue has registered with the Commission as a national securities exchange or an SBSEF, or has received an exemption under section 3D(e) of the SEA.

Several commenters interpret the rule and the Commission's discussion of the rule in the Proposing Release to mean that a foreign SBS trading venue must have RFQ-to-3 and an order book for Required Transactions in order for transactions on that venue to qualify for a Rule 833(b) exemption.[621] These commenters, however, are incorrect in this understanding of the requirements for a Rule 833(b) exemption.

First, Rule 833(b)(2) does not contain a list of items that ''are required,'' but rather lists items that the Commission ''may consider'' when it receives a

[604] ISDA–SIFMA Letter, *supra* note 18, at 14.

[605] *See* ICE Letter, *supra* note 18, at 4.

[606] *Id.*

[607] *Id.* at 4–5.

[608] Bloomberg Letter, *supra* note 18, at 7. *See also* ISDA–SIFMA Letter, *supra* note 18, at 14–15; Tradeweb Letter, *supra* note 18, at 6.

[609] ICI Letter, *supra* note 18, at 14.

[610] Bloomberg Letter, *supra* note 18, at 7. *See also* ICE Letter, *supra* note 18, at 4. *See also* ISDA–SIFMA Letter, *supra* note 18, at 14.

[611] Bloomberg Letter, *supra* note 18, at 7.

[612] ICI Letter, *supra* note 18, at 14. *See also* Bloomberg Letter, *supra* note 18, at 7, 18; ISDA–SIFMA Letter, *supra* note 18, at 14–15; Tradeweb Letter, *supra* note 18, at 6.

[613] *See* Bloomberg Letter, *supra* note 18, at 7, 18; ISDA–SIFMA Letter, *supra* note 18, at 14–15; Tradeweb Letter, *supra* note 18, at 6.

[614] *See* Bloomberg Letter, *supra* note 18, at 18–19; ISDA–SIFMA Letter, *supra* note 18, at 14–15.

[615] *See* ICE Letter, *supra* note 18, at 5; ISDA–SIFMA Letter, *supra* note 18, at 15; Tradeweb Letter, *supra* note 18, at 6.

[616] ISDA–SIFMA Letter, *supra* note 18, at 15.

[617] *See* Proposing Release, *supra* note 1, 87 FR at 28924.

[618] For example, although a foreign trading venue covered by a Rule 833(a) exemption would be exempt from the definition of ''broker,'' that exemption would extend only to the operation of a market place for SBS and would not permit the foreign trading venue to otherwise act as a securities broker using U.S. jurisdictional means.

[619] The Commission also emphasizes that a Rule 833(a) exemption would not have any impact on section 6(*l*) of the SEA, 15 U.S.C. 78f(*l*), which makes it unlawful for any person to effect a transaction in an SBS with or for a person that is not an ECP, unless such transaction is effected on a national securities exchange registered pursuant to section 6(b) of the SEA. Because a foreign SBS trading venue covered by a Rule 833(a) exemption would not be registered as a national securities exchange, the foreign SBS trading venue would not be permitted to effect SBS transactions with or for a covered person that is not an ECP.

[620] Section 3D(e) of the SEA gives the Commission authority to exempt an SBSEF from registration if it is subject to comparable, comprehensive supervision and regulation by the CFTC. *See* 15 U.S.C. 78c–4(e).

[621] *See supra* notes 597–599 and accompanying text.

request for a Rule 833(b) exemption.[622] And second, Rule 833(b)(2)(i) states, in relevant part, that the Commission may consider ''the extent to which the security-based swaps traded in the foreign jurisdiction covered by the request are subject to a trade execution requirement *comparable to* that in section 3C(h) of the Act . . . and the Commission's rules thereunder.'' (Emphasis added.) In the Proposing Release, the Commission described this requirement by stating that ''a trade execution requirement in a foreign jurisdiction would not be comparable to the trade execution requirement under the SEA if the foreign jurisdiction's rules did not require SBS products subject to that requirement to be executed through means *comparable to* Required Transactions as described in Rule 815 (*e.g.,* if the foreign jurisdiction allowed the use of single-dealer platforms to discharge any mandatory trading execution requirement in that jurisdiction).'' [623] That is, the Commission's proposed rule would not require foreign SBS trading venues to have RFQ-to-3 and an order book in order for the Commission to consider their SBS executions for an exemption under Rule 833(b).

While, as commenters correctly state, for Required Transactions, Rule 815 requires SBS transactions to be executed through a limit order book or an RFQ-to-3 system,[624] neither the text of Rule 833(b) nor the Commission's description of Rule 833(b) states that a limit order book or an RFQ-to-3 system is required to receive a Rule 833(b) exemption.[625] The phrase ''comparable to'' does not carry the same meaning as phrases such as ''identical to'' or ''substantially similar to,'' and the Commission uses this phrase with respect to Rule 833(b) exemptions because SBS transactions would not be disqualified from receiving a Rule 833(b) exemption simply because they were not executed through a limit order book or an RFQ-to-3 system. Rather, the Commission agrees with commenters that there may be foreign SBS trading venues—many of which have already received exemptive relief from the CFTC for swaps trading[626]—that may be appropriate candidates for exemptive relief, that are subject to what may be considered robust regulatory regimes for SBS trading. With respect to such foreign SBS trading venues, the Commission encourages market participants to submit a request for exemptive relief under Rule 833(b) if they seek to be exempt from the Commission's trade execution requirement for their SBS transactions.[627]

Certain commenters also object that, in their understanding, a Rule 833(b) exemption request would require a ''rule-by-rule'' comparison or analysis,[628] which one commenter characterized as unduly burdensome.[629] In addition to Rule 833(b)(2)(i) discussed above, another relevant factor (among others) that the Commission may consider is whether the trading venues in the foreign jurisdiction are subject to regulation and supervision comparable to that under the SEA, including section 3D of the SEA and the Commission's rules thereunder, which the Commission described in the Proposing Release to include being subject to rules designed to foster comparable levels of pre- and post-trade transparency, access, and liquidity.[630]

An 833(b) exemptive request generally should include an analysis that could assist the Commission's determination as to whether the regulation and supervision of a foreign SBS trading venue in an applicable foreign jurisdiction is subject to regulation and supervision comparable to that under the SEA. Given the central roles the jurisdiction's applicable laws, rules and regulations, as well as a foreign SBS trading venue's own rules, play in such a determination, an exemptive request generally should include an analysis of these requirements. A precise form of any such analysis—whether it is done as a ''rule-by-rule'' comparison or through some other methodology (*e.g.,* in a more holistic manner)—is not specified by Rule 833(b), would be at the discretion of the entity submitting the exemptive request, and should be provided in order to help the Commission and its staff understand what requirements apply to the foreign SBS trading venue.

With respect to the comments that the Commission should automatically provide exemptions for foreign trading venues that have received a parallel exemption from the CFTC for their SEF trading,[631] and that the Commission should do so contemporaneously with adopting Regulation SE,[632] while doing so would promote consistency, simplicity, and harmonization with the CFTC's SEF rules, such a blanket exemption would not afford the Commission the opportunity to appropriately consider the relevant facts and circumstances in support of a finding that an exemption is necessary or appropriate in the public interest and consistent with the protection of investors. However, persons interested in submitting a request for exemptive relief should be mindful of the implementation period that will take place before Regulation SE's requirements take effect, as described in more detail below.[633]

With respect to the comment that the provisions of Rule 833 are not robust enough,[634] the Commission disagrees. Importantly, in order to issue any exemption under Rule 833, the Commission would be required to find that the exemption is necessary or

[622] Rule 833(b)(2).

[623] Proposing Release, *supra* note 1, 87 FR at 28925 (emphasis added).

[624] *See supra* section V.E (discussing methods of execution and Rule 815).

[625] In the Proposing Release, the Commission stated its preliminary belief that ''the use of single-dealer platforms to discharge any mandatory trading execution requirement'' would not meet the proposed rule's requirements. *See* Proposing Release, *supra* note 1, 87 FR at 28925.

[626] *See www.cftc.gov/International/ForeignMarketsandProducts/ExemptSEFs* (listing foreign swap trading facilities that the CFTC has exempted from its SEF registration requirements, including certain such facilities in the European Union, Japan, and Singapore). Market practices continued in this regard without change after the United Kingdom (''UK'') withdrew from the European Union, based upon a CFTC staff no-action letter addressing certain UK swap trading facilities. *See* CFTC Letter No. 22–16 (Dec. 1, 2022), *available at https://www.cftc.gov/csl/22-16/download.*

[627] Several commenters describe the negative consequences that would occur because, they believe, the Commission's Rule 833(b) exemption would require foreign jurisdictions to require RFQ-to-3 and order book methods of execution, which these commenters believe forecloses many foreign trading venues from obtaining exemptive relief from the Commission for their SBS trading even though they have received similar exemptions from their CFTC. *See supra* notes 602–611 and accompanying text. Similarly, one commenter requests that, in the alternative, the Commission grant an exemption from the trade execution requirement if the SBS transaction at issue is subject to mandatory trading in another jurisdiction. *See supra* note 616 and accompanying text. As the Commission has explained, Rule 833(b) exemptions are not limited to those jurisdictions that require RFQ-to-3 and order books, but rather Rule 833(b)(2)(i) states that the Commission may consider the extent to which SBS transactions are subject to a trade execution requirement comparable to such methods of execution. Accordingly, SEFs would not be foreclosed from obtaining exemptive relief from the Commission for their SBS trading. For this reason, the Commission also does not agree with the commenter's suggested alternative to grant an exemption from the trade execution requirement if the SBS transaction at issue is subject to mandatory trading in another jurisdiction, because exemptive relief under 833(b) may be applied for in such instances, which would give the Commission the opportunity to appropriately consider the applicable facts and circumstances.

[628] *See supra* notes 600–601 and accompanying text.

[629] *See supra* note 600 and accompanying text.

[630] *See* Proposed Rule 833(b)(2)(ii) and Proposing Release, *supra* note 1, 87 FR at 28925.

[631] *See supra* notes 612–615 and accompanying text.

[632] *See supra* note 615 and accompanying text. *See also supra* note 626.

[633] *See infra* section VIII. *See also infra* note 787 and accompanying text.

[634] *See supra* note 593 and accompanying text.

appropriate in the public interest and consistent with the protection of investors, and the Commission may issue the exemptive relief with conditions. A blanket grant of exemptive relief would be inconsistent with carefully considering whether a specific exemptive request meets the applicable standard and might lead to a greater percentage of SBS transactions being executed beyond the scope of any U.S. regulatory oversight.

Finally, the Commission disagrees with the commenter that suggested that Rule 833(b)'s requirements are unnecessary if a foreign trading venue has received an exemption under Rule 833(a).[635] The two exemptions under Rule 833 provide exemptive relief from different requirements of the SEA and are also directed at different entities. Specifically, a Rule 833(a) exemption provides exemptive relief to a foreign trading venue that, absent the exemption, could be required to register with the Commission as an exchange, SBSEF, and/or broker if it traded SBS (regardless of whether such SBS are subject to the trade execution requirement). On the other hand, Rule 833(b)'s exemption provides exemptive relief to the counterparties of an SBS transaction with respect to the trading execution requirement in section 3C(h) of the SEA.[636]

Accordingly, for the reasons discussed above, the Commission is adopting Rule 833 as proposed.

VIII. Rule 834—Implementation of Section 765 of the Dodd-Frank Act and Governance of SBSEFs and SBS Exchanges

Section 765(a) of the Dodd-Frank Act[637] provides in relevant part that, to mitigate conflicts of interest, the Commission ''shall adopt rules which may include numerical limits on the control of, or the voting rights with respect to'' any clearing agency that clears SBS, or on the control of any SBSEF or SBS exchange by certain bank holding companies, certain nonbank financial companies, an affiliate of such a bank holding company or nonbank financial company, an SBS dealer, major SBS participant, or person associated with an SBS dealer or major SBS participant.[638] Section 765(b) states that the purpose of the statutory provision is ''to improve the governance of, or to mitigate systemic risk, promote competition, or mitigate conflicts of interest in connection with'' an SBS dealer or major SBS participant's conduct of business with, a clearing agency, SBSEF, or SBS exchange and in which such SBS dealer or major SBS participant ''has a material debt or equity investment.'' Finally, section 765(c) provides in relevant part that, in adopting rules pursuant to section 765, the Commission shall consider any conflicts of interest arising from the amount of equity owned by a single investor, the ability to vote, cause the vote of, or withhold votes entitled to be cast on any matters by the holders of the ownership interest.

In 2010, the Commission proposed Regulation MC to implement section 765.[639] In view of the significant amount of time that had elapsed and the significant evolution in the swap and SBS markets since the proposal of Regulation MC, the Commission withdrew that proposal,[640] and proposed Rule 834 to implement section 765 of the Dodd-Frank Act with respect to SBSEFs and SBS exchanges.[641]

A. Rule 834(a)

Paragraph (a) of Proposed Rule 834 would define terms used in Rule 834. The Commission received no comments on of Proposed Rule 834(a) and is adopting Rule 834(a) as proposed for the reasons stated in the Proposing Release.

B. Rule 834(b)

Paragraph (b) of Proposed Rule 834 would impose a cap on the size of the voting rights that an individual member of an SBSEF or SBS exchange may own or direct, barring an SBSEF or SBS exchange from permitting any of its members, either alone or together with any officer, principal, or employee of the member, to:

(1) Own, directly or indirectly, 20% or more of any class of voting securities or of other voting interest in the SBSEF or SBS exchange; or

(2) Directly or indirectly vote, cause the voting of, or give any consent or proxy with respect to the voting of, any interest that exceeds 20% of the voting power of any class of securities or of other ownership interest in the SBSEF or SBS exchange.

One commenter supports the Commission's goal to adopt rules that aim to achieve better governance and mitigation of conflicts of interest that arise out of the operation of SBSEFs, but the commenter opposes Rule 834 because it believes that the rule would disrupt the closely harmonized rules with the CFTC, as the CFTC has not adopted corresponding provisions for its SEF registrants. This commenter recommends that the Commission, like the CFTC, should focus on board governance, conflicts of interest, and antitrust considerations rather than proscriptive, bright line rules. The commenter states that the Commission's concerns regarding conflicts of interest ''can best be addressed by ensuring compliance with the SBSEF Core Principles rather than an additional regulation,''[642] and specifically that the proposed 20 percent limitation on the voting interest that may be held by members of any SBSEF or SBS exchange ''goes beyond what is necessary to effectively mitigate conflicts of interest.''[643] Rather, this commenter states, the ownership limit would limit access to necessary capital and act as barriers to entry for SBSEFs and SBS exchanges. The commenter also states that section 765 of Dodd-Frank does not require the Commission to restrict the ability to hold significant ownership interests in SBSEFs and that the statutory language instead provides that the Commission is authorized to adopt rules upon determining, after review, that such restrictions are necessary or appropriate to improve the governance of SBSEFs or to mitigate systemic risk, to promote competition, or mitigate conflicts of interest.[644]

Another commenter states that that the proposed 20% voting cap requirement could potentially thwart the Commission's objective to ensure that only incremental changes would be

[635] *See supra* note 595 and accompanying text.

[636] With respect to the commenter that requested additional clarity with respect to Rule 833, *see supra* note 596 and accompanying text, the Commission's discussion of the exemptions, including the standard of ''comparable to'' and the type of analysis that should be presented, should provide market participants with more clarity on how a person could seek exemptive relief.

[637] 15 U.S.C. 8343.

[638] The Commission recognizes that promulgating rules under section 765 alone will not result in a highly competitive market for SBS. There could be other ways for anticompetitive forces to impede the growth of SBS trading on transparent, regulated platforms other than by misuse of a large voting interest in the trading venue. For example, a large SBS dealer or coalition of SBS dealers, even absent any voting interest in any SBSEF or SBS exchange, could threaten to move their business elsewhere unless given an unfair advantage by the trading venue. A large SBS dealer or coalition of SBS dealers also could conspire to shut out end users who sought to trade more actively on these transparent, regulated venues rather than continuing to trade in the bilateral OTC markets. The Commission will be alert to any such anticompetitive practices and consider appropriate prophylactic measures. At present, adopting rules under section 765 is a necessary and appropriate first step to guard against conflicts of interest arising on SBSEFs and SBS exchanges. *See* Proposing Release, *supra* note 1, 87 FR at 28930.

[639] *See* Regulation MC Proposal, *supra* note 21.

[640] *See* Proposing Release, *supra* note 1, 87 FR at 28874.

[641] *See id.* at 29001–03.

[642] SIFMA AMG Letter, *supra* note 18, at 12.

[643] *Id.*

[644] *See id.*

necessary to adopt the SBSEF framework. The proposed cap, this commenter states, may require SEFs to set up an entirely new legal entity with a different governance structure, making it more challenging to obtain dual registration. The commenter also states that the conflicts of interest rules implemented by the CFTC, which do not include a 20% voting cap, sufficiently address any conflicts of interest concerns, as SEFs have operated under those rules for almost 10 years, and there have been no observable issues that would warrant such a regulatory shift.[645]

One commenter states that it strongly opposes Rule 834 and that, as written, Rule 834 would have the effect of prohibiting certain SBSEF participants from having common ownership and control as the SBSEF. An SBSEF, the commenter states, would likely not be able to onboard an affiliated introducing broker, even if the introducing broker would be subject to the same rules and practices as an unaffiliated participant. The commenter states that some CFTC-registered SEFs, including the commenter's member firms, have affiliated introducing-broker participants that execute their respective swaps business on their affiliated SEFs, and the affiliated transactions make up a majority of the SEF's business. The commenter states that these firms may choose not to register as an SBSEF and take on the costs and burdens of being an SBSEF if they cannot accommodate their affiliate's trade execution needs, which would thwart the goal of developing a competitive landscape of regulated SBS market places.[646]

This commenter further states that it and many others previously opposed these hard caps when they were proposed in 2010, and that—with a decade of experience operating SEFs and venues for other financial products, including Commission regulated alternative trading systems—the commenter still believes the rule's approach is ''too heavy-handed'' a way to solve a problem that has been more than adequately addressed through less burdensome measures.[647] The commenter states that the CFTC never adopted its proposed ownership/governance prohibition for SEFs, that the CFTC's existing conflicts of interest rules have proven satisfactory, and that, rather than mandating ownership limits, the Commission should instead permit SBSEFs to exercise reasonable discretion as to its mechanisms for mitigating conflicts of interest and should rely instead on the conflict of interest and antitrust provisions already embedded in the SBSEF regulatory regime.[648]

The Commission has considered the comments and, as discussed below, is modifying Proposed Rule 834 to provide an exemption from the ownership and voting caps for an SBSEF that has mitigated the potential conflict of interest with respect to compliance with the rules of the SBSEF by entering into an agreement with a registered futures association or a national securities association for the provision of regulatory services that encompass, at a minimum, real-time market monitoring, investigations, and investigation reports.

The 20% cap in Proposed Rule 834(b) is designed to balance competing policy interests. On one hand, execution venues need capital, expertise, and liquidity to establish and grow. Historically, market participants who become members of an execution venue are a source of all three components, and any person contributing capital to a new venture might reasonably expect to have a voting interest commensurate with the amount of capital contributed. Too low a cap, even if imposed in the name of eliminating conflicts of interest, could have the unintended effect of impeding the development of execution venues for SBS altogether, if market participants who become members have no (or substantially limited) ability to vote their equity interest.

On the other hand, allowing a member of an SBSEF or SBS exchange too large a voting interest could undermine the public policy benefits of having transparent, fair, and regulated markets for the trading of SBS. A member of an SBSEF or SBS exchange with a sufficiently large voting interest could exercise undue influence over the rules and policies applicable to members, the venue's access criteria, decisions regarding access, and disciplinary matters, among other things. In particular, members who are SBS dealers and conduct a significant amount of business in the bilateral OTC market have incentives to restrict the scope of SBS that an SBSEF or SBS exchange makes eligible for trading. Trading in a market with robust order competition and pre-trade transparency reduces search costs for end users and liquidity seekers and reduces the information and bargaining asymmetry of end users and liquidity seekers relative to SBS dealers. An SBS dealer with a large voting interest in an SBSEF or SBS exchange, if it perceived that trading on the regulated venue was diminishing the rents obtained from its bilateral OTC business, might seek to utilize its voting influence in a number of ways to degrade the capability of the regulated venue, thus making the OTC market by comparison a more attractive option.

Capping a member's voting interest at 20% strikes a reasonable balance between these competing interests, absent additional measures to ensure that a member or members with large voting power could tilt the playing field in their favor. And the Commission does not agree with the comment that a more general focus on board governance, conflicts of interest, and antitrust considerations, or on simply ensuring compliance with the SBSEF Core Principles,[649] is sufficient to address this concern because, based on its long experience in regulating the markets on which the instruments underlying SBS trade, the ownership and voting structure of a regulated entity can give rise to conflicts of interest between the organization's business interests and its regulatory obligations. Further, even if the CFTC has not to date adopted its own ownership and governance prohibitions for SEFs, the appropriate comparison with respect to ownership and governance for SBSEFs is national securities exchanges, because both types of entities operate markets to which fair or impartial access requirements comprehensively apply.[650] Therefore, SBSEFs should be subject to ownership restrictions that are similar to those in the rules of national securities exchanges, as approved by the Commission, which limit ownership by any one member and do not permit an exchange to merely ''exercise reasonable discretion'' with respect to its mechanisms for mitigating conflicts of interest.

The Commission, however, appreciates the concerns expressed by commenters that a cap of 20% on voting interest in all cases could prevent would-be SBSEFs from onboarding their affiliated introducing brokers, and that the burdens imposed in setting up an SBSEF that is legally remote from affiliated introducing brokers may dissuade current SEFs from registering as SBSEFs, which would lead to their ceasing to offer SBS trading on their

[645] *See* ISDA–SIFMA Letter, *supra* note 18, at 16.

[646] *See* WMBAA Letter, *supra* note 18, at 2.

[647] *Id.*

[648] *See id.* at 2–3.

[649] *See supra* note 642.

[650] *See* SEA sections 6(b)(2) and 6(c), 15 U.S.C. 78f(b)(2) and 78f(c). Alternative Trading Systems, by contrast, are subject to ''fair access'' requirements only if they meet certain volume trading thresholds. *See* Rule 301(b)(5)(i), 17 CFR 242.301(b)(5)(i).

platforms.[651] Therefore, the Commission is modifying Rule 834 as proposed to add new paragraph (b)(3) to provide an exemption from the 20% cap for an SBSEF that has entered into an agreement with a registered futures association or a national securities association for the provision of regulatory services that encompass, at a minimum, real-time market monitoring and investigations and investigation reports.

This exemption, which is conditioned upon an SBSEF conducting its market monitoring and investigative activities through a self-regulatory body that has broader membership than an individual SBSEF and that does not operate its own SBSEF, would mitigate concerns that members with large ownership shares might be given preferential treatment with respect to their compliance with the SBSEF's rules. And the exemption should also, by permitting SBSEFs to exceed the 20% ownership and voting cap, serve to facilitate the formation and registration of SBSEFs, thereby also facilitating the movement of SBS trading to venues that are more transparent and that have affirmative regulatory obligations.

The Commission acknowledges that this exemption, because it focuses on surveillance and compliance functions, does not directly address concerns about an SBSEF adopting rules that hamper impartial access to an SBSEF, restrict the scope of SBS that might trade on a given SBSEF, or degrade the capability of a given SBSEF in ways that would favor a member's OTC SBS business. These concerns, however, can be addressed in other ways. With respect to impartial access, the requirements of Proposed Rule 819(c), together with the guidance the Commission has provided regarding the application of that rule,[652] set clear limits on the ability of an SBSEF to favor the interest of any members, including its large members, by unfairly excluding other market participants. And competition among SBSEFs will discourage any individual SBSEF from declining to list particular SBS or from degrading the capability of the SBSEF to favor a member, as trading in the affected SBS may migrate not to the OTC market, but to a direct competitor.

Because the Commission has modified Proposed Rule 834 to provide for an exemption from the 20% ownership and voting cap, it is not the case that, as one commenter states, existing SEFs would necessarily be required to set up a new legal entity to operate an SBSEF, making it more challenging to obtain dual registration and potentially thwarting the Commission's objective to ensure that only incremental changes would be necessary to adopt the SBSEF framework. And although the Commission's proposed ownership rule departs from the CFTC's rules for SEFs, which do not include caps on ownership or voting, the Commission is also mindful of the trading relationship between SBS and their underlying securities—which trade on exchanges that have a similar 20% ownership and voting cap as a result of their Commission-approved rules—and the Commission wishes to avoid creating a regulatory incentive for activity to migrate from trading securities on national securities exchanges to trading SBS on SBSEF. For similar reasons, it would not be appropriate to extend the exemption in new paragraph (b)(3) of Proposed Rule 834 to SBS exchanges. Providing an exemption from the 20% ownership and voting cap requirements for SBS exchanges in Proposed Rule 834(b)(1) would result in different treatment from other national securities exchanges simply because one set of exchanges trades SBS, and this is not a sufficient reason to permit different ownership structures only for those exchanges, as this could lead to regulatory arbitrage by creating incentives for new exchanges to register first as SBS exchanges, without the ownership and voting caps, and then seek to amend their rulebooks to commence trading in cash equities. As it stated in the Proposing Release, the Commission proposed to apply the 20% ownership and voting on SBS exchanges based on its ''long experience with handling questions of member influence over national securities exchanges raised in applications to register with the Commission on Form 1 and in governance rule filings made on SEA Form 19b–4,'' [653] and SBSEF rules seeking to manage conflicts of interest would not by themselves be sufficient to mitigate conflict-of-interest concerns when those concerns arise from one or a few SBS dealers or a major SBS participants having majority voting rights in an SBSEF or SBS exchange in which they are a member.

Finally, the Commission reiterates that Proposed Rule 834(b) would cover both direct and indirect voting interests. The purpose of including indirect voting interest is to prevent potential circumvention of the 20% cap if, for example, a member placed its voting interest in an SBSEF or SBS exchange of 20% or more in a shell company or other affiliate and directed how the shell company or affiliate casts those votes. Accordingly, Proposed Rule 834(b) would look through the non-member entities holding interests in SBSEFs and SBS exchanges to consider whether any member could indirectly control 20% or more of the voting interest through the non-member entity having the direct interest. Furthermore, Proposed Rule 834(b) would look through the corporate structure of the SBSEF or SBS exchange to consider whether any member could indirectly have 20% or more of the voting interest in the underlying trading venue. For example, an SBSEF or SBS exchange could be wholly owned by a holding company. In such a case, the voting restriction in Proposed Rule 834(b) would apply to the voting interest in the parent holding company held by a member of the child SBSEF or SBS exchange, since a direct voting interest of 20% or more in the parent would equate to an indirect voting interest of 20% or more in the child trading venue.

And, similar to its approach to indirect voting interest, Proposed Rule 834(b) would aggregate the voting interest of the member itself with the voting interest held by any officer, principal, or employee of the member for purposes of determining compliance with the 20% cap. Without this provision, the member—or an officer, principal, or employee of the member—could split the voting interest held in the SBSEF or SBS exchange across multiple persons who would likely be voting that interest in concert, thereby potentially acting as a conflict of interest. The Commission did not receive comments on the aggregation-of-interest aspect of Proposed Rule 834(b).

For these reasons, the Commission is adopting Rule 834(b) with the modifications discussed above.

C. Rule 834(c)

Paragraph (c) of Proposed Rule 834 would include requirements designed to reinforce the 20% cap in paragraph (b). Paragraph (c) would require the rules of each SBSEF and SBS exchange to be reasonably designed, and have an effective mechanism, to:

(1) Deny effect to the portion of any voting interest held by a member in excess of the 20% limitation;

(2) Compel a member who possesses a voting interest in excess of the 20% limitation to divest enough of that voting interest to come within that limit; and

(3) Obtain information relating to its ownership and voting interests owned

[651] *See supra* notes 645–648.

[652] *See infra* section VI.B.3.

[653] *See* Proposing Release, *supra* note 1, 87 FR at 28927 and n.257.

or controlled, directly or indirectly, by its members.

The Commission received no comments on Proposed Rule 834(c) and is adopting Rule 834(c) as proposed, with minor technical modifications,[654] for the reasons stated in the Proposing Release.

D. Rule 834(d)

Paragraph (d) of Proposed Rule 834 is designed to mitigate conflicts of interest in the disciplinary process of an SBSEF or SBS exchange and would provide as follows: ''Each security-based swap execution facility and SBS exchange shall ensure that its disciplinary processes preclude any member, or group or class of its members, from dominating or exercising disproportionate influence on the disciplinary process. Each major disciplinary committee or hearing panel thereof shall include sufficient different groups or classes of its members so as to ensure fairness and to prevent special treatment or preference for any person or member in the conduct of the responsibilities of the committee or panel.'' Paragraph (d) of Proposed Rule 834 would recognize that one way that a conflict of interest could manifest itself is in the disciplinary process. Therefore, the Commission proposed, as the first sentence of Proposed Rule 834(d), that each SBSEF and SBS exchange should ''preclude any member, or group or class of its members, from dominating or exercising disproportionate influence on the disciplinary process.''

The second sentence of Proposed Rule 834(d) is adapted from § 1.64 of the CFTC's rules, which addresses the composition of various SRO governing boards and major disciplinary committees.[655] Proposed Rule 834(d) would reflect the Commission's belief that an SBSEF or SBS exchange should be mindful of its different membership interests, and how they are represented on disciplinary committees and hearing panels in particular matters, to avoid potential conflicts of interest.

The Commission received no comments on Proposed Rule 834(d) and is adopting Rule 834(d) as proposed for the reasons stated in the Proposing Release.

E. Rule 834(e)

Paragraph (e) of Proposed Rule 834 is closely modeled on § 1.64(b). Paragraph (e)(1)(i) would require each SBSEF and SBS exchange to ensure that 20% or more of the persons who are eligible to vote routinely on matters being considered by the governing board (excluding those members who are eligible to vote only in the case of a tie vote by the governing board) are persons who are knowledgeable of SBS trading or financial regulation, or otherwise capable of contributing to governing board deliberations. Paragraphs (e)(1)(ii) through (v) of Proposed Rule 834 are based on four of the prongs in § 1.64(b)(1)(ii) and would provide that 20% or more of the persons who are eligible to vote routinely on matters being considered by the governing board (excluding those members who are eligible to vote only in the case of a tie vote by the governing board) must not be: members of the SBSEF or SBS exchange;[656] salaried employees of the SBSEF or SBS exchange; primarily performing services for the SBSEF or SBS exchange in a capacity other than as a member of the governing board; or officers, principals, or employees of a firm which holds a membership at the SBSEF or SBS exchange, either in its own name or through an employee on behalf of the firm.

Paragraph (e)(2) of Proposed Rule 834, modeled on § 1.64(b)(3), would require each SBSEF and SBS exchange to ensure that membership of its governing board includes a diversity of groups or classes of its members.

The Commission did not receive comments on Proposed Rule 834(e) and is adopting Rule 834(e) as proposed, for the reasons stated in the Proposing Release.

F. Rule 834(f)

Paragraph (f) of Proposed Rule 834 is based closely on § 1.64(d) and would require each SBSEF and SBS exchange to submit to the Commission, within 30 days after each governing board election, a list of the governing board's members, the groups or classes of members that they represent, and how the composition of the governing board otherwise meets the requirements of Rule 834.

The Commission received no comments on Proposed Rule 834(f) and is adopting Rule 834(f) as proposed for the reasons stated in the Proposing Release.

G. Rule 834(g)

Paragraph (g) of Proposed Rule 834 is modeled on § 1.69, which requires an SRO to further address the avoidance of conflicts of interest in the execution of its self-regulatory functions. Proposed Rule 834(g) closely follows the paragraph structure and language of § 1.69, with a few minor exceptions (beyond modifying the rule's application to SBSEFs and SBS exchanges, rather than, in the CFTC original, all SROs). First, paragraph (g)(1)(i)(A) of Proposed Rule 834 is based closely on § 1.69(b)(1)(i) and would set out the types of relationships with the named party of interest that would create a conflict of interest for a member of the governing board, disciplinary committee, or oversight panel.[657] Second, Proposed Rule 834(g)(1)(ii)(C) is a simplified version of § 1.69(b)(2)(iii). Rather than incorporating the first four prongs of § 1.69(b)(2)(iii), which cross-reference definitions elsewhere in the CFTC's rules, Rule 834(g)(1)(ii)(C) would instead incorporate only the final, catch-all prong, which would cover any positions held by any member of an SBSEF's governing board, disciplinary committees, or oversight committees that would have been covered under the other four prongs.[658] Third, Proposed Rule 834(g)(1)(ii)(C) would omit a requirement in § 1.69(b)(2)(iv) that an SRO, when making a determination of whether a conflict of interest exists, must take into consideration ''[t]he most recent large trader reports and clearing records available to the self-regulatory organization.'' These types of reports

[654] The Commission has corrected an internal cross-reference within Proposed Rule 834.

[655] Proposed Rule 834(a)(2) would define ''major disciplinary committee'' as a committee of persons who are authorized by an SBSEF to conduct disciplinary hearings, to settle disciplinary charges, to impose disciplinary sanctions, or to hear appeals thereof in cases involving any violation of the rules of the SBSEF except those which are related to decorum or attire, financial requirements, or reporting or recordkeeping and do not involve fraud, deceit, or conversion.

[656] Proposed Rule 834(e)(1)(ii), read together with Proposed Rule 834(b), would allow four members of an SBSEF or SBS exchange to control up to 80% of the voting interest (assuming that each of the four holds 20%). Under Proposed Rule 834(e)(1)(ii), at least 20% of the voting interest would have to be held by non-members.

[657] Paragraph (g)(1)(i)(A) of Proposed Rule 834, however, would incorporate only four of the five prongs in § 1.69(b)(1)(i). The Commission did not propose to include a prong about being associated with a named party of interest through a ''broker association,'' as defined in § 156.1 of the CFTC's rules, as that concept does not exist under the SEA.

[658] Thus, the relevant language in Rule 834(g)(1)(ii)(C) would read, ''Such determination must include a review of any positions, whether maintained at that security-based swap execution facility, SBS exchange, or elsewhere, held in the member's personal accounts or the proprietary accounts of the member's affiliated firm that the security-based swap execution facility or SBS exchange reasonably expects could be affected by the significant action.'' Proposed Rule 834(a)(3) would define a ''member's affiliated firm'' as a firm in which the member is a principal or an employee, and Proposed Rule 834(a)(5) would define ''significant action'' to include several types of actions or rule changes by an SBSEF or SBS exchange that could be implemented without the Commission's prior approval related to addressing an emergency and certain changes in margin levels.

may not be as prevalent in the securities and SBS markets as the swaps market. The final, catch-all prong in § 1.69(b)(2)(iv)—''Any other source of information that is held by and reasonably available to the self-regulatory organization''—would suffice, and proposed it as Rule 834(g)(1)(ii)(C)(*2*).

The Commission did not receive comments on paragraph (g) of Proposed Rule 834 and is adopting Rule 834(g) as proposed, for the reasons stated in the Proposing Release.

H. Rule 834(h)

Proposed Rule 834(h) would require each SBSEF and SBS exchange to maintain in effect various rules that would be required under Rule 834. An SBSEF would be required to file these rules under Rule 806 or Rule 807 of Regulation SE; an SBS exchange would be required to file such rules under existing SEA Rule 19b–4.[659] Proposed Rule 834(h) is loosely modeled on various provisions in §§ 1.64 and 1.69 providing that the SRO rules required under those CFTC rules must be filed with the CFTC pursuant to relevant provisions of the CEA and the CFTC's rules thereunder.

The Commission received no comments on Proposed Rule 834(h) and is adopting Rule 834(h) as proposed for the reasons stated in the Proposing Release.

IX. Rule 835—Notice to Commission by SBSEF of Final Disciplinary Action, Denial or Conditioning of Membership, or Denial or Limitation of Access

The Commission proposed Rule 835 to require an SBSEF to provide the Commission notice of a final disciplinary action, a final action with respect to a denial or conditioning of membership, or a final action with respect to a denial or limitation of access. Such notice is designed to ensure that the Commission is kept aware of significant disciplinary actions, denials or conditionings of membership, or denials or limitations on access by SBSEFs that could be the subject of an aggrieved person's request for review by the Commission. The requirement to provide notice to the Commission would also obligate an SBSEF to be cognizant of, and make records for, each such instance, and such records would become a necessary part of the record should the aggrieved person seek Commission review of the SBSEF's action.

Specifically, paragraph (a) of Proposed Rule 835 would provide that, if an SBSEF issues a final disciplinary action against a member, or takes a final action with respect to a denial or conditioning of membership, or a final action with respect to a denial or limitation of access of a person to any services offered by the SBSEF, the SBSEF shall file a notice of such action with the Commission within 30 days and serve a copy on the affected person. Proposed Rule 835(a) would use the phrase ''final disciplinary action against a *member*'' (emphasis added) because an SBSEF may utilize its disciplinary authority under Core Principle 2 (Compliance with Rules) in section 3D of the SEA[660] only with respect to its members; but uses the phrase ''denies or limits access of a *person*'' (emphasis added) because the person whose access is denied or limited might not be a member. For example, a person that is denied membership by an SBSEF would fall under this category.

Paragraph (b)(1) of Proposed Rule 835 would provide that, for purposes of paragraph (a), a disciplinary action would not be considered final unless: (1) the affected person has sought an adjudication or hearing with respect to the matter, or otherwise exhausted their administrative remedies at the SBSEF; and (2) the disciplinary action is not a summary action permitted under Rule 819(g)(13)(ii).[661] In addition, paragraph (b)(2) of Proposed Rule 835 would provide that, for purposes of paragraph (a), a disposition of a matter with respect to a denial or conditioning of membership, or a denial or limitation of access, would not be considered final unless such person has sought an adjudication or hearing, or otherwise exhausted their administrative remedies at the SBSEF with respect to such matter.

Paragraph (c) of Proposed Rule 835 would provide that the notice required under Rule 835(a) must include the name of the member or the associated person and last known address, as reflected in the SBSEF's records, of the member or associated person, as well as the name of the person, committee, or other organizational unit of the SBSEF that initiated the disciplinary action or access restriction. In the case of a final disciplinary action, the notice would be required to include a description of the acts or practices, or omissions to act, upon which the sanction is based, including, as appropriate, the specific rules that the SBSEF has found to have been violated; a statement describing the respondent's answer to the charges; and a statement of the sanction imposed and the reasons for such sanction. In the case of a denial or conditioning of membership or a denial or limitation of access, the notice would be required to include: the financial or operating difficulty of the prospective member or member (as the case may be) upon which the SBSEF determined that the prospective member or member could not be permitted to do, or continue to do, business with safety to investors, creditors, other members, or the SBSEF; the pertinent failure to meet qualification requirements or other prerequisites for membership or access and the basis upon which the SBSEF determined that the person concerned could not be permitted to have membership or access with safety to investors, creditors, other members, or the SBSEF; or the default of any delivery of funds or securities to a clearing agency by the member. Finally, the notice would be required to include the effective date of such final disciplinary action, denials or conditioning of membership, or denial or limitation of access, as well as any other information that the SBSEF may deem relevant.

The Commission received no comments on Proposed Rule 835. Because the language of paragraphs (b)(1)(i) and (b)(2) should more clearly state that certain actions by an SBSEF shall not be ''final'' unless the affected person has exhausted their administrative remedies at the SBSEF, the Commission is modifying the phrase ''person has sought an adjudication or hearing, or otherwise exhausted their administrative remedies'' in both paragraphs (b)(1)(i) and (b)(2) so that it now reads simply, ''person has exhausted their administrative remedies,'' and is adopting Rule 835 as modified.

X. Amendments to Existing Rule 3a1–1 Under the Sea—Exemptions From the Definition of ''Exchange''

An entity that meets the definition of ''security-based swap execution facility'' would also likely meet the definition of ''exchange'' set forth in section 3(a)(1) of

[659] 17 CFR 240.19b–4.

[660] 15 U.S.C. 78c–4(d)(2).

[661] As discussed above, *see supra* section VI.B.7, Proposed Rule 819(g)(13)(ii) would permit an SBSEF to adopt a summary fine schedule for violations of rules relating to the failure to timely submit accurate records required for clearing or verifying each day's transactions, which may be summarily imposed against persons within the SBSEF's jurisdiction for violating such rules. Furthermore, an SBSEF's summary fine schedule could allow for warning letters to be issued for first-time violations or violators. If adopted, a summary fine schedule would be required by Proposed Rule 819(g)(13)(ii) to provide for progressively larger fines for recurring violations. A summary fine schedule, if an SBSEF elects to adopt one, would have to be part of the SBSEF's rules, and thus would need to be submitted to the Commission. *See* Proposed Rule 819(g)(13)(ii).

the SEA [662] and the interpretation of that definition set forth in Rule 3b–16 thereunder.[663] Thus, absent an exemption, an entity needing to register with the Commission as an SBSEF would also likely need to register with the Commission as a national securities exchange.[664] The Commission has previously stated that it ''believes that Congress specifically provided a comprehensive regulatory framework for SBSEFs in the [SEA], as amended by the Dodd Frank Act, and therefore that such entities that are registered as SBSEFs should not also be required to register and be regulated as national securities exchanges.'' [665]

Therefore, the Commission proposed to exercise its authority under section 36(a)(1) of the SEA [666] to exempt an SBSEF from the definition of ''exchange''—and thus the obligation to register as a national securities exchange—if it provides a market place solely for the trading of SBS (and no securities other than SBS) and has registered with the Commission as an SBSEF. To effect this exemption, the Commission proposed to amend Rule 3a1–1 under the SEA [667] by adding new paragraph (a)(4).

The proposed amendment would add new paragraph (a)(4) to existing Rule 3a1–1 to provide that an organization, association, or group of persons that has registered with the Commission as an SBSEF pursuant to Rule 803 and provides a market place for no securities other than SBS is exempt from the definition of ''exchange'' under section 3(a)(1) of the SEA, and thus would not be subject to the requirement in section 5 of the SEA to register as a national securities exchange or obtain a low-volume exemption.[668]

In addition, the Commission proposed new paragraph (a)(5) to existing Rule 3a1–1 under the SEA, which would provide that an organization, association, or group of persons shall be exempt from the definition of the term ''exchange'' if that organization, association, or group of persons has registered with the Commission as a clearing agency pursuant to section 17A of the SEA and limits its exchange functions to operation of a trading session that is designed to further the accuracy of end-of-day valuations.[669] As noted above, this provision would codify a series of exemptions that the Commission has granted over several years to SBS clearing agencies that operate ''forced trading'' sessions.[670] As part of the clearing and risk management processes, an SBS clearing agency must establish an end-of-day valuation for any SBS in which any of its members has a cleared position. Certain SBS clearing agencies utilize a valuation mechanism whereby they require clearing members to submit indicative settlement prices for SBS products, and, to provide an incentive for accurate submissions, the clearing agency can require those members to trade at those quoted prices. The precise means by which the clearing agency matches quotes from different clearing members could cause the clearing agency to fall within the definition of ''exchange'' in section 3(a)(1) of the SEA. The Commission has previously found that it was necessary or appropriate in the public interest and consistent with the protection of investors to exempt clearing agencies that engage in this activity from the definition of ''exchange,'' [671] and the Commission proposed to codify this exemption.[672]

Finally, the Commission proposed to amend the introductory language of paragraph (b) of Rule 3a1–1 to cover only paragraphs (a)(1) through (a)(3), not paragraph (a) as a whole.[673] The changed language is designed to clarify that the revocation provisions would not apply to organizations, associations, or groups of persons who fall within amended Rule 3a1–1(a)(4) or (a)(5). Thus, even if a registered SBSEF were to become a substantial market, Rule 3a1–1(b), as proposed to be amended, would not afford a basis for the Commission to revoke an SBSEF's exemption from the definition of ''exchange'' under Rule 3a1–1(a)(4), which would force the SBSEF to register as a national securities exchange (to avoid being an unregistered exchange).

The Commission received two comment letters regarding the proposed amendments to Rule 3a1–1.[674] One commenter does not support an exemption for clearing agencies from the definition of exchange, stating that the exemption would create a loophole.[675] However, the limited scope of the exemption—which applies solely to trades that a clearing agency requires its members to undertake in support of the accuracy of the clearing agency's end-of-day valuation process—is sufficiently narrow to prevent use of the exemption as a loophole allowing clearing agencies to act as, or on behalf of exchanges, without sufficient public reporting. The language of new paragraph (a)(5) of Rule 3a1–1, however, should more precisely reflect that the Commission is codifying exemptive relief that was provided with respect to trading sessions to support end-of-day valuations of SBS,[676] and the Commission is therefore modifying paragraph (a)(5) to add the words ''of

[662] 15 U.S.C. 78c(a)(1).

[663] 17 CFR 240.3b–16. *See also supra* section III.A (discussing Rule 803 and the requirements and procedures for registration, including the overlap between the definitions of ''exchange'' and ''security-based swap execution facility''). *See also infra* note 678 and accompanying text (discussing the Commission's proposed amendments to Rule 3b–16).

[664] *See* § 3D(a)(1) of the SEA, 15 U.S.C. 78c–4(a)(1) (''No person may operate a facility for the trading or processing of security-based swaps, unless the facility is registered as a security-based swap execution facility or as a national securities exchange under this section'').

[665] 2011 SBSEF Proposal, *supra* note 6, 76 FR at 10958.

[666] 15 U.S.C. 78mm(a)(1).

[667] 17 CFR 240.3a1–1.

[668] An SBSEF that fails to comply with the condition to the exemption provided under paragraph (a)(4) of Rule 3a1–1 would no longer qualify for the exemption and might thus be operating as an unregistered exchange under the section 5 of the SEA. 15 U.S.C. 78e. Section 5 also generally provides that a broker or dealer may not use any facility of an exchange to effect or report any transaction in a security unless that exchange is registered as a national securities exchange or is exempt from registration by reason of the limited volume of transactions effected on the exchange. Brokers and dealers who are members of a registered SBSEF would not be in violation of section 5 by effecting or reporting any SBS transactions on that SBSEF, because an SBSEF that qualifies for the exemption under Rule 3a1–1(a)(4) would not be an exchange within the meaning of section 5.

[669] As discussed above, *see supra* note 37 and accompanying text, such a trading session is also referred to as a ''forced-trading session.''

[670] *See supra* note 37; Proposing Release, *supra* note 1, 87 FR at 28878.

[671] *See id.*

[672] *See* Proposing Release, *supra* note 1, 87 FR at 28878. This exemption would cover only the forced-trading session of an SBS clearing agency; any other exchange activity that a clearing agency might engage in could remain subject to the SEA provisions and the Commission's rules thereunder applying to national securities exchanges or alternative trading systems.

[673] Specifically, the Commission proposed to amend the introductory language of existing paragraph (b) of Rule 3a1–1, which states: ''Notwithstanding paragraph (a) of this rule, an organization, association, or group of persons shall not be exempt under this rule from the definition of 'exchange' if . . . .'' Paragraph (b) then sets out procedural and substantive criteria for the Commission to revoke an exemption under paragraph (a) of Rule 3a1–1 if an exchange's share of the market in any one of the specified classes of securities exceeds a defined threshold.

[674] *See* Keeney Letter, *supra* note 95; ISDA–SIFMA Letter, *supra* note 18, at 17.

[675] *See* Keeney Letter, *supra* note 95 (stating that the exemption would permit clearing agencies to ''do the bidding of exchanges'' while being exempt from reporting requirements).

[676] *See* Proposing Release, *supra* note 1, 87 FR at 28932 (''This exemption would cover only the forced-trading session of an SBS clearing agency; any other exchange activity that a clearing agency might engage in could remain subject to the SEA provisions and the Commission's rules thereunder applying to exchanges.'').

security-based swaps'' at the end of the paragraph.

Another commenter supports the proposed amendments and also addresses another Commission rulemaking related to the definition of ''exchange.''[677] The Commission has separately proposed certain amendments to Rule 3b–16, a rule which defines certain terms used in the statutory definition of ''exchange'' under section 3(a)(1) of the SEA.[678] The commenter states that the Commission should exempt from the definition of ''exchange'' any market place that solely trades SBS, whether or not that market place is registered as an SBSEF.[679] This commenter states that the Commission has ''proposed to expand Rule 3b–16 substantially'' and that this proposal, if adopted, would ''reverse the previous relationship between the 'exchange' definition (as interpreted in Rule 3b–16) and the SBSEF definition.''[680] This commenter states that an organization that makes available certain methods for parties to interact regarding SBS might fall within the expanded definition of exchange but outside the definition of SBSEF and therefore be required to register as an exchange because SBSEF registration would be unavailable.[681]

The Commission does not agree with the commenter's request to extend the Rule 3a1–1 exemption from the ''exchange'' definition to any entity that provides a market place for no securities other than SBS, regardless of whether they are registered as an SBSEF.

The purpose of the exemption under Rule 3a1–1(a)(4) is not to universally exempt from the definition of ''exchange'' all entities that provide a market place for no securities other than SBS. Rather, given that Congress has provided a regulatory framework for SBSEFs through the Dodd Frank Act, the exemption is narrowly designed to avoid burdening registered SBSEFs with a second regulatory framework—namely, registration as national securities exchanges. Further, creating that commenter's suggested exemption in Rule 3a1–1(a) would create a regulatory gap in which some entities that meet the definition of exchange are registered neither as national securities exchanges nor as SBSEFs. The language of new paragraph (a)(4) of Rule 3a1–1, however, should more closely track the language and scope of section 3(a)(1) of the SEA, which uses the term ''market place or facilities,'' rather than the term ''market place,''[682] and the Commission is therefore modifying proposed paragraph (a)(4) of Rule 3a1–1 to replace the term ''market place'' with the term ''market place or facilities.''

Accordingly, for the reasons discussed above, the Commission is adopting the amendments to Rule 3a1–1 with the modifications to paragraphs (a)(4) and (a)(5) discussed above and with minor technical modifications.[683]

XI. Rule 15a–12—SBSEFs as Registered Brokers; Relief From Certain Broker Requirements

An SBSEF, by facilitating the execution of SBS between persons, also is engaged in the business of effecting transactions in securities for the account of others and therefore meets the SEA definition of ''broker.''[684] Absent an exception or exemption, an SBSEF—in addition to being subject to the registration and regulatory requirements for SBSEFs—would also be required to register with the Commission as a broker pursuant to sections 15(a) and 15(b) of the SEA[685] and would be subject to all regulatory requirements applicable to brokers.[686] For example, brokers and dealers must comply with a number of rules that govern their conduct, including those relating to customer confirmations and disclosure of credit terms in margin transactions.[687]

The Commission proposed new Rule 15a–12 under the SEA, which would deem registration with the Commission as an SBSEF to also constitute registration as a broker, and which would exempt a registered SBSEF from many broker requirements in light of the SBSEF regulatory regime to which it would also be subject. The accommodation provided in Rule 15a–12, however, would not be available to an SBSEF that engages in other types of brokerage activity.

Paragraph (a) of Proposed Rule 15a–12 would define the term ''SBSEF–B'' to mean an SBSEF that does not engage in any securities activity other than facilitating the trading of SBS on or through the SBSEF. Thus, an SBSEF that acts as agent to SBS counterparties or that acts in a discretionary manner with respect to the execution of SBS transactions, could not avail itself of Rule 15a–12. Also, if an inter-dealer broker elects not to separate its inter-dealer broker functions from its SBSEF (by, for example, housing them in separate legal entities), and instead chooses to operate the SBSEF in the same legal entity as the inter-dealer broker, the entity could avail itself of Rule 15a–12 because it would not be an SBSEF–B under the rule.

Paragraph (b) of Proposed Rule 15a–12 would provide that an SBSEF–B, if it registered as an SBSEF pursuant to Rule 803, would be deemed also to have registered with the Commission pursuant to sections 15(a) and (b) of the SEA.[688]

Paragraphs (c) and (d) of Proposed Rule 15a–12 would set out the scope of broker requirements from which an SBSEF–B is exempt and which broker requirements would continue to apply. Paragraph (c) would provide that an SBSEF–B would be exempt from any provision of the SEA or the Commission's rules thereunder applicable to brokers that by its terms requires, prohibits, restricts, limits, conditions, or affects the activities of a broker, unless such provision specifies

[677] *See* ISDA–SIFMA Letter, *supra* note 18, at 17.

[678] *See* Amendments Regarding the Definition of ''Exchange'' and Alternative Trading Systems (ATSs) That Trade U.S. Treasury and Agency Securities, National Market System (NMS) Stocks, and Other Securities, SEA Release No. 94062 (Jan. 26, 2022), 87 FR 15496 (Mar. 18, 2022) (File No. S7–02–22) (''Rule 3b–16 Proposal''). *See also* Reopening of Comment Periods for ''Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews'' and ''Amendments Regarding the Definition of 'Exchange' and Alternative Trading Systems (ATSs) That Trade U.S. Treasury and Agency Securities, National Market System (NMS) Stocks, and Other Securities,'' SEA Release No. 94868 (May 9, 2022), 87 FR 29059 (May 12, 2022) (S7–02–22); Supplemental Information and Reopening of Comment Period for Amendments Regarding the Definition of ''Exchange,'' SEA Release No. 97309 (Apr. 14, 2023), 88 FR 29448 (May 5, 2023) (File No. S7–02–22).

[679] *See* ISDA–SIFMA Letter, *supra* note 18, at 17.

[680] *Id.*

[681] *See id.*

[682] *See* 15 U.S.C. 78c(a)(1).

[683] *See supra* note 32.

[684] *See* SEA section 3(a)(4), 15 U.S.C. 78c(a)(4).

[685] 15 U.S.C. 78*o*(a) and 78*o*(b). Section 15(a)(1) generally provides that, absent an exception or exemption, a broker or dealer that uses the mails or any means of interstate commerce to effect transactions in, or to induce or attempt to induce the purchase or sale of, any security must register with the Commission. Section 15(b) generally provides the manner of registration of brokers and dealers and other requirements applicable to registered brokers and dealers.

[686] As discussed in note 47, *supra,* a person that is acting as a broker solely because it is acting as an SBSEF is currently exempt from the requirement to register with the Commission as a broker and the Commission's rules under the SEA that apply to brokers. This exemption will expire upon the earliest compliance date for the Commission's final rules regarding SBSEF registration.

[687] *See* 17 CFR 240.10b–10 and 240.10b–16.

[688] The Commission's proposal would not have exempted SBSEFs from registration as brokers. Rather, given the registration and regulatory requirements that were being proposed for SBSEFs through Regulation SE, the Commission proposed for such SBSEFs to be deemed registered as brokers so as to prevent subjecting those entities to a second, separate registration process as well as duplicative additional regulatory requirements. As discussed in the Proposing Release, an additional layer of registration processes and duplicative requirements would not be appropriate or necessary. *See* Proposing Release, *supra* note 1, 87 FR 28933.

that it applies to an SBSEF. Paragraph (d) of Proposed Rule 15a–12 would provide that, notwithstanding paragraph (c), an SBSEF–B is still subject to section 15(b)(4),[689] section 15(b)(6),[690] and section 17(b) of the SEA.[691]

Finally, paragraph (e) of Proposed Rule 15a–12 would exempt an SBSEF–B from the Securities Investor Protection Act (''SIPA'').[692] SIPA established the Securities Investor Protection Corporation (''SIPC''), which oversees the liquidation of member firms that close when a member firm is bankrupt or in financial trouble and customer assets are missing.[693] SIPC protection is funded by assessments made on member firms.[694]

Section 2 of SIPA [695] states that, unless otherwise provided, the SEA shall apply as if SIPA constituted an amendment to, and was included as a section of, the SEA. An SBSEF–B, by definition, would operate only as an SBSEF. It would not be equitable to require an SBSEF–B to become a member of SIPC and pay SIPC assessments, because the SBSEF–B would not have brokerage customers and would not hold any customer funds or securities. Accordingly, under section 36(a)(1) of the SEA,[696] the Commission finds that it is necessary or appropriate in the public interest, and is consistent with the protection of investors, to exempt SBSEF–Bs from any requirement under SIPA, including the requirement to pay assessments to the SIPC insurance fund. The Commission is codifying this exemption as Rule 15a–12(e).

The Commission received no comments on Proposed Rule 15a–12 and is adopting Rule 15a–12 as proposed, with minor technical modifications,[697] for the reasons stated in the Proposing Release.

XII. Termination of Temporary Exemptions

As discussed above and in the Proposing Release, after issuing the 2011 SBSEF Proposal,[698] the Commission granted the Temporary SBSEF Exemptions.[699] In relevant part, Temporary SBSEF Exemptions have:

(1) Allowed an entity that trades SBS and is not currently registered as a national securities exchange, or that cannot yet register as an SBSEF because final rules for such registration have not yet been adopted, to continue trading SBS during this temporary period without registering as a national securities exchange or SBSEF; [700]

(2) Exempted national securities exchanges (to the extent that they also operate an SBSEF and use the same electronic trade execution system for listing and executing trades of SBS on or through the exchange and the facility) from the requirement to identify whether electronic trading of those SBS is taking place on or through the national securities exchange or the SBSEF; [701]

(3) Exempted any person, other than a clearing agency acting as a central counterparty in security-based swaps, that, solely due to its activities relating to security-based swaps, would fall within the definition of exchange and thus be required to register as an exchange from the requirement to register as a national securities exchange in sections 5 and 6 of the Exchange Act; [702]

(4) Permitted brokers and dealers to effect transactions in SBS on an exchange that is operating without registering as a national securities exchange in reliance on the exemption described above; [703]

(5) Exempted SBSEFs from the broker registration requirements of section 15(a)(1) of the SEA; [704] and

(6) Exempted any SBS contract entered into on or after July 16, 2011, from being void or considered voidable by reason of section 29 of the SEA [705] because any person that is a party to the SBS contract violated a provision of the Exchange Act that was amended or added by subtitle B of Title VII of the Dodd Frank Act and for which the Commission has taken the view that compliance will be triggered by registration of a person or by adoption of final rules by the Commission, or for which the Commission has provided an exception or exemptive relief herein, until such date as the Commission specifies.[706]

In the Temporary SBSEF Exemptions, the Commission specified that the exemptive relief would expire ''on the earliest compliance date set forth in any of the final rules regarding registration of SBSEFs,'' [707] or in the case of the relief regarding section 29 of the SEA, ''until such date as the Commission specifies.'' [708]

Additionally, in 2020, the Commission adopted Rule 17Ad–24 under the SEA [709] to exempt from the definition of ''clearing agency'' in section 3(a)(23) of the SEA [710] certain entities, including a registered SBSEF, that would be deemed to be a clearing agency solely by reason of (a) functions performed by such institution as part of customary dealing activities or providing facilities for comparison of data respecting the terms of settlement of securities transactions effected on such registered SBSEF, respectively; or (b) acting on behalf of a clearing agency or participant therein in connection with the furnishing by the clearing agency of services to its participants or the use of services of the clearing agency by its participants.[711] In adopting the rule, the Commission explained that an entity performing such functions that triggers the requirement to register as a clearing agency—but that is not yet registered with the Commission as an SBSEF—could rely on a temporary exemption from the requirement to register as a clearing agency that the Commission issued in 2011.[712] In the Proposing Release, the Commission sought public comment on whether it should ''sunset'' the 2011 Clearing Agency Exemption and stated that it

[689] 15 U.S.C. 78*o*(b)(4).

[690] 15 U.S.C. 78*o*(b)(6).

[691] 15 U.S.C. 78q(b).

[692] 15 U.S.C. 78aaa, *et seq.*

[693] *See https://www.sipc.org/about-sipc/sipc-mission* (''In a liquidation under the Securities Investor Protection Act, SIPC and the court-appointed Trustee work to return customers' securities and cash as quickly as possible. Within limits, SIPC expedites the return of missing customer property by protecting each customer up to $500,000 for securities and cash (including a $250,000 limit for cash only).'').

[694] *See* 15 U.S.C. 78ddd(d).

[695] 15 U.S.C. 78bbb.

[696] 15 U.S.C. 78mm(a)(1) (giving the Commission exemptive authority, including the ability to exempt any person or classes of persons from any provision of the SEA or any rules thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors).

[697] *See supra* note 32.

[698] *See supra* note 6.

[699] *See supra* notes 45–47 and accompanying text.

[700] *See* June 2011 Exemptive Order, *supra* note 46, 76 FR at 36293 (granting temporary exemptive relief from SEA section 3D(a)(1), 15 U.S.C. 78c–4(a)(1)).

[701] *See id.* at 36293 (granting temporary exemptive relief from SEA section 3D, 15 U.S.C. 78c–4).

[702] *See* July 2011 Exemptive Order, *supra* note 46, 76 FR at 39934.

[703] *See id.*

[704] *See id.; see also* Requirements for Security-Based Swap Dealers, Major Security-Based Swap Participants, and Broker-Dealers; Capital Rule for Certain Security-Based Swap Dealers, SEA Release No. 87005 (Sept. 19, 2019), 84 FR 68550, 68602 (Dec. 16, 2019) (''Recordkeeping and Reporting Adopting Release'').

[705] 15 U.S.C. 78cc(b).

[706] *See* June 2011 Exemptive Order, *supra* note 46, 76 FR at 36305–06.

[707] *See id.* at 36293; July 2011 Exemptive Order, *supra* note 46, 76 FR at 39934.

[708] *See* June 2011 Exemptive Order, *supra* note 46, 76 FR at 36306.

[709] 17 CFR 240.17Ad–24.

[710] 15 U.S.C. 78c(a)(23).

[711] *See* SEA Release No. 90667 (Dec. 16, 2020), 86 FR 7637 (Feb. 1, 2021).

[712] *See id.,* 86 FR at 7650; SEA Release No. 64796 (July 1, 2011), 76 FR 39963, 39964 (July 7, 2011) (''2011 Clearing Agency Exemption'').

preliminarily believed that, if it adopted a framework for the registration of SBSEFs, the 2011 Clearing Agency Exemption would no longer be necessary because entities carrying out the functions of SBSEFs would be able to register with the Commission as such, thereby falling within the exemption from the definition of ''clearing agency'' in existing Rule 17Ad–24.[713]

The Commission received no comment regarding the sunsetting of past exemptive relief for entities operating as SBSEFs. Upon the effectiveness of Regulation SE, the exemptive relief described above would no longer be necessary, because SBSEFs will be able to register with the Commission and will be subject to regulatory obligations under Regulation SE. Therefore, the Commission is sunsetting the exemptive relief consistent with the compliance schedule for Regulation SE.[714] Thus, the exemptive relief described above will terminate 180 days after the Effective Date of Regulation SE, which will be 60 days after the date of publication in the **Federal Register**, except that (1) with respect to an SBSEF that has filed an application to register with the Commission on Form SBSEF within 180 days of the Effective Date of Regulation SE, as well as trading of SBS on such an SBSEF, the relief will terminate 240 days after the Effective Date of Regulation SE; and (2) with respect to an SBSEF that filed an application to register on Form SBSEF within 180 days after the Effective Date of Regulation SE and whose application on Form SBSEF is complete for purposes of Rule 803(b)(5) (having responded to requests by the Commission's staff for revisions or amendments) within 240 days after the effective date, as well as trading of SBS on such an SBSEF, the exemptive relief will terminate 30 days after the Commission acts to approve or deny the SBSEF's application on Form SBSEF. Specifically with respect to the exemptive relief providing that any SBS contract entered into on or after July 16, 2011, will not be void or considered voidable by reason of section 29 of the SEA [715] because any person that is a party to the SBS contract violated a provision of the Exchange Act that was amended or added by subtitle B of Title VII of the Dodd Frank Act and for which the Commission has taken the view that compliance will be triggered by registration of a person or by adoption of final rules by the Commission, or for which the Commission has provided an exception or exemptive relief herein, this exemptive relief will continue to apply to SBS entered into between July 16, 2011, and the date 30 days after the Commission acts to approve the first SBSEF registration.

For any entity currently relying on the 2011 Clearing Agency Exemption that becomes required to register as a clearing agency, the exemptive relief will terminate 180 days after the Effective Date of Regulation SE, which will be 60 days after the date of publication in the **Federal Register**, except that (1) with respect to an entity that has filed an application to register as a clearing agency with the Commission on Form CA–1 within 180 days of the Effective Date of Regulation SE, the relief will terminate 240 days after the Effective Date of Regulation SE; and (2) with respect to an entity that has filed an application on Form CA–1 within 180 days after the Effective Date of Regulation SE and whose application on Form CA–1 is complete (having responded to requests by the Commission's staff for revisions or amendments) within 240 days after the effective date, the exemptive relief will terminate 30 days after the Commission acts to approve or disapprove the application on Form CA–1.

XIII. Electronic Filings Under Regulation SE

A. Use of Electronic Filing Systems and Structured Data

Various provisions of proposed Regulation SE would have required registered SBSEFs (or SBSEF applicants) to file specified information electronically with the Commission using the EDGAR system in Inline XBRL, a structured, machine-readable data language.[716] These provisions include:

- Rule 803(b)(1)(i) and (b)(3), regarding filings of, and amendments to, a Form SBSEF application.
- Rules 803(e) and 803(f), regarding requests to withdraw or vacate an application for registration.
- Rule 804(a)(1), regarding filings for listing products for trading by certification.
- Rule 805(a)(1), regarding filings for voluntary submission of new products for Commission review and approval.
- Rule 806(a)(1), regarding filings for voluntary submission of rules for Commission review and approval.
- Rule 807(a)(1), regarding filings for self-certification of rules.
- Rule 807(d), regarding filings of weekly notifications to the Commission of rules and rule amendments that were not required to be certified.
- Rule 829(g)(6), regarding submission to the Commission of reports related to financial resources and related documentation.
- Rule 831(j)(2), regarding submission to the Commission of the annual compliance report of SBSEF's CCO.

In addition to including these requirements in each of the rules listed above, the Commission proposed to amend Rule 405 of Regulation S–T to reflect these requirements.[717] The Commission received comments specifically regarding the proposed methods and formats of electronic filing in Regulation SE discussed above.[718] One commenter states that if certain entities report a portion of needed data to one regulator (CFTC) and the rest of the data to a different regulator (SEC), data consumers will be required to extract data from two different datasets to provide a complete picture. The commenter states that if data reported to the CFTC is in PDF or HTML format, and data reported to the SEC is in machine-readable (XBRL) format, this will increase the complexity of data access.[719] Another commenter does not believe that EDGAR is the appropriate system for these filings. The commenter believes that requiring the use of EDGAR will require most filers to retain a third-party vendor and incur substantial costs and may have the potential to deter market participants from entering this space, noting that a more appropriate alternative filing process, the Commission's Electronic Form Filing System (EFFS), a secure, web-based electronic filing application used to process filings from SROs and SCI entities, is already available, and its use would harmonize the filing approach with SBS exchanges, and more broadly with the approach taken by the CFTC. Alternatively, the

[713] *See* Proposing Release, *supra* note 1, 87 FR at 28934.

[714] *See infra* section XVI (discussing compliance schedule).

[715] 15 U.S.C. 78cc(b).

[716] The structured data requirements are generally consistent with objectives of the recently enacted Financial Data Transparency Act (''FDTA''), which directs the Commission and other financial regulators of data standards for collections of information. Such data standards would need to meet specified criteria relating to openness and machine-readability and promote interoperability of financial regulatory data across members of the Financial Stability Oversight Council. *See* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Public Law 117–263, tit. LVIII, 136 Stat. 2395, 3421–39 (Dec. 23, 2022).

[717] *See* Proposing Release, *supra* note 1, 87 FR at 28872, 28972–73.

[718] *See* Letter from Campbell Pryde, President and CEO, XBRL US, to Secretary, Commission, at 2 (June 10, 2022) (''XBRL US Letter''); Bloomberg Letter, *supra* note 18, at 20–21.

[719] *See* XBRL US Letter, *supra* note 718, at 2.

commenter encourages the Commission to adopt the process used by the CFTC, which permits filings (including initial registration filings, quarterly financial filings and rulebook filings) to be made via a dedicated portal in PDF form.[720] As discussed in further detail below, taking into account comments received, the Commission is requiring SBSEFs to submit the information related to rule and product filings under Rules 804 to 807 of Regulation SE in unstructured format via EFFS in order to alleviate compliance burdens on SBSEFs.

The Commission has considered the comments received on the provisions regarding electronic filing in Regulation SE discussed above and is adopting Inline XBRL and EDGAR requirements for some, but not all, of the disclosures that Regulation SE will require. Specifically, Regulation SE will require SBSEFs to file the information under the following rules electronically via EDGAR using Inline XBRL:

- Rule 829, regarding submission to the Commission of reports related to financial resources and related documentation.
- Rule 831, regarding submission to the Commission of the annual compliance report of the SBSEF's CCO.
- Exhibits C through F to Form SBSEF, regarding governing board fitness standards and composition; organizational structure; personnel qualifications; and staffing requirements, respectively.
- Exhibits H through L to Form SBSEF, regarding material pending legal proceedings; financial information (except for any copies of agreements filed with the exhibit); affiliate financial information; dues, fees, and other charges for services; and compliance with Core Principles, respectively.
- Exhibit P through S to Form SBSEF, regarding disciplinary and enforcement protocols; operation of trading systems or platforms; rules prohibiting specific trade practices; and the maintenance of trading data, respectively.

For these specific disclosures, the Commission is adopting as proposed the requirement that they be made through EDGAR using Inline XBRL and is adopting the amendments to Rule 405 as proposed, with minor technical modifications.[721]

For certain other disclosures required under Regulation SE, in a change from the proposal, the Commission is requiring the use of a custom XML data language rather than Inline XBRL. Specifically, Regulation SE will require SBSEFs to file the following information electronically via EDGAR using custom XML:

- Rules 803(e) and 803(f), regarding requests for withdrawal or vacation applications.
- The Form SBSEF Cover Sheet.
- Exhibit A to Form SBSEF, regarding the SBSEF's ownership information (except for any copies of agreements filed along with the Exhibit).
- Exhibit B to Form SBSEF, regarding the officers, directors, and other control persons of the SBSEF.
- Exhibit G to Form SBSEF, regarding organizational documents (except for copies of organizational documents filed with the Exhibit).
- Exhibit M to Form SBSEF, regarding rules and technical manuals (except for copies of rules and technical manuals filed with the Exhibit).
- Exhibit N to Form SBSEF, regarding agreements and contracts (except for copies of agreements and contracts).
- Exhibit T to Form SBSEF, regarding clearing agencies.[722]

The Commission is requiring some disclosures to be structured in Inline XBRL, and other disclosures to be structured in custom XML, because Inline XBRL is well-suited for certain types of content—such as financial statements and extended narrative discussions—whereas other types of content can be readily captured using custom XML data languages that yield smaller file sizes than Inline XBRL and thus facilitate more streamlined data processing. Such custom XML languages also enable EDGAR to generate fillable web forms that will permit SBSEFs to input disclosures into form fields rather than encode their disclosures in custom XML themselves, thus likely easing compliance burdens on SBSEFs.

Certain Form SBSEF exhibits also include requirements to attach copies of existing documents, such as copies of by-laws, written agreements, and compliance manuals. The Commission is requiring SBSEFs to file these copies of documents as unstructured PDF attachments to the otherwise structured Form SBSEF filing.[723] Requiring SBSEFs to retroactively structure such existing documents, which were prepared for purposes outside of fulfilling the Commission's disclosure requirements, could impose compliance burdens on SBSEFs that may not be justified in light of the commensurate informational benefits associated with having such documents in structured form. The specific requirements to include these attached copies are included in the following provisions of Regulation SE:

- Exhibit A to Form SBSEF (specifically, copies of agreements through which persons may control or direct the management or policies of the SBSEF).
- Exhibit G to Form SBSEF (specifically, copies of the SBSEF's organizational documents).
- Exhibit I to Form SBSEF (specifically, copies of agreements supporting the SBSEF's conclusions regarding the liquidity of its financial assets).
- Exhibit M to Form SBSEF (specifically, copies of the SBSEF's rules, technical manuals, guides, or other instructions).
- Exhibit N to Form SBSEF (specifically, copies of agreements or contracts that enable the SBSEF's compliance with Core Principles).
- Exhibit O to Form SBSEF (specifically, copies of the SBSEF's compliance manual).

To implement the reduced scope of Inline XBRL requirements for Form SBSEF compared to the proposed rules, the Commission is making changes to the rule text for Form SBSEF, Rule 803 of Regulation SE, and Rule 405 of Regulation S–T. In the Registration Instructions to Form SBSEF, rather than requiring the disclosures on Form SBSEF to be provided as an Interactive Data File in accordance with Rule 405 of Regulation S–T as proposed, the final rule text lists a subset of Form SBSEF Exhibits that are to be provided as an Interactive Data File in accordance with Rule 405 of Regulation S–T, and clarifies that the Interactive Data File requirement does not extend to copies of existing documents.[724] In Rule 803 of

[720] *See* Bloomberg Letter, *supra* note 18, at 20–21.

[721] The Commission is, in light of its renumbering of the provisions relating to Form SBSEF, *see supra* section III.B, and because Form SBSEF will not appear in the Code of Federal Regulations, replacing ''17 CFR 249.2001 of this chapter'' with ''referenced in 17 CFR 249.1701 of this chapter.''

[722] In addition to the custom XML exhibits to Form SBSEF that will be submitted via EDGAR, the Commission is also adopting as proposed the requirement in Rule 825 of Regulation SE that SBSEFs post Daily Market Data Reports on their websites using a custom XML schema and a PDF renderer, both of which the Commission will make available on its website. *See supra* section VI.H.

[723] In addition to these copies of existing documents, the Commission is requiring Exhibit U to Form SBSEF, which includes any information in the application that is subject to a confidential treatment request, to be filed as an unstructured PDF attachment. The confidential information that an applicant includes on Exhibit U could be responsive to disclosure requirements set forth in multiple other Form SBSEF Exhibits (potentially spanning multiple different data languages or formats). As a result, implementing technical validations on the structuring of the information on Exhibit U would not be technically feasible.

[724] *See* Registration Instructions to Form SBSEF, referenced in 17 CFR 249.1701. Rule 405 of Regulation S–T sets forth the requirements for

Regulation SE, rather than requiring SBSEF applicants to file Form SBSEF as an Interactive Data File in accordance with Rule 405 of Regulation S–T as proposed, the final rule text requires SBSEF applicants to file the information specified in the Registration Instructions to Form SBSEF (*i.e.,* the listed Exhibits) as an Interactive Data File in accordance with Rule 405 of Regulation S–T.[725] In Rule 405 of Regulation S–T, the final rule text omits references to subparagraphs of Rule 803 that were included within the scope of the proposed rule text, while retaining the references to information specified in the Registration Instructions to Form SBSEF.[726]

Requiring use of EDGAR and structured data languages for certain disclosures under Regulation SE has benefits. Requiring SBSEFs to make required certain filings via EDGAR will provide the Commission and the public with a centralized, publicly accessible electronic database for SBSEF-provided data in the form that is most accessible and useful to regulators, market participants, and the public alike. The use of EDGAR also enables technical validation of the disclosures, thus potentially reducing the incidence of non-discretionary errors (*e.g.,* the inclusion of text for a disclosure that should contain only numbers) in those Regulation SE disclosures that are filed via EDGAR. Moreover, requiring structured data languages for many of the reported disclosures will make those disclosures more easily available and accessible to, and reusable by, market participants and the Commission for retrieval, aggregation, and comparison across different SBSEFs and time periods, as compared to an unstructured PDF, HTML, or ASCII format requirement for those disclosures.[727] Permitting all Regulation SE disclosures to be filed entirely in PDF, HTML, or ASCII format, while perhaps simpler for the SBSEF making the filings, would reduce the accessibility of information in the filings to the Commission and to market participants who will access these filings through EDGAR. Further, harmonizing with the CFTC in this regard by permitting all Regulation SE filings to be made entirely in PDF format, as the CFTC does, would not carry comparable benefits to harmonization of other aspects of Regulation SE. The benefits of using EDGAR and structured data highlighted above justify the potential inconvenience to registrants, as well as to data users, of having to access two separate databases to extract information regarding SEC-regulated SBSEFs and CFTC-regulated SEFs.

As discussed above, in a change from the proposal, the Commission is requiring SBSEFs to provide the rule and product filings required under Rules 804 through 807and 816 of Regulation SE through EFFS in an unstructured format, rather than providing them through EDGAR in Inline XBRL. While the information in SBSEF rule and product filings will not be machine-readable, the absence of structuring requirements for rule and product filings under Regulation SE (which aligns with the current rule and product filing process for SROs) [728] will help contain compliance burdens for SBSEFs, because SBSEFs will not be subject to compliance costs associated with structuring those filings.[729] In light of the significant volume of other machine-readable data regarding SBSEFs that will be available to the market and data users under Regulation SE, this requirement having a lower compliance burden justifies the lack of machine-readability for the information in rule and product filings required under Rules 804 through 807 and 816 of Regulation SE.

To implement the change from the proposed Inline XBRL and EDGAR filing requirement to the final unstructured format and EFFS requirement for rule and product filings, the Commission is modifying the rule text for Rules 804 through 807 of Regulation SE, the Security-Based Swap Execution Facility Cover Sheet that the Commission is adopting as § 249.1702, and Rule 405 of Regulation S–T. For Rules 804 through 807, the final rule text specifies that SBSEFs must file the rule and product filings through the EFFS system, rather than through the EDGAR system as an Interactive Data File in accordance with Rule 405 of Regulation S–T as proposed.[730] The Commission is not making analogous changes to Rule 816 of Regulation SE, because Rule 816 instructs SBSEFs to follow the procedures under Rule 806 or 807 of Regulation SE.[731] For the Security-Based Swap Execution Facility Cover Sheet, the final rule text specifies that SBSEFs must file the cover sheet using the EFFS system, rather than using the EDGAR system in accordance with Rule 405 of Regulation S–T as proposed.[732] In Rule 405 of Regulation S–T, the final rule text omits references to subparagraphs of Rules 804 through 807 and the Security-Based Swap Execution Facility Cover Sheet that were included within the scope of the proposed rule text.[733]

B. Use of Identifiers

As discussed above, the Commission is adopting, as § 249.1702, a submission cover sheet and instructions that an SBSEF must use for filings submitted pursuant to Rules 804 through 807 and 816.

Paragraph (a) of the submission cover sheet instructions provides that a properly completed submission cover sheet must accompany all rule and product submissions submitted electronically to the Commission by an SBSEF.[734] Per paragraph (a), a properly completed submission cover sheet would include, among other things, the name and platform ID of the SBSEF.[735] Currently, LEIs issued through the GLEIS are the only allowable platform IDs that may be used by registered SBSEFs.[736]

The Commission received comments on the use of LEIs, as well as the potential use of other identifiers in filings to the Commission under Regulation SE.[737] One commenter supports the Commission's effort to include the LEI for identifying SBSEFs, stating that the Commission's decision to include the LEI creates consistency and transparency for the identification

Interactive Data File submissions. Rule 405(b) of Regulation SE sets forth the content to be included within the Interactive Data File, and Rule 405(a)(3) of Regulation S–T specifies Inline XBRL as the data language to be used for Interactive Data File submissions. In a technical change from the proposed rule text, the Commission is expanding the group of entities listed within Rule 405(a)(3) of Regulation S–T to add electronic filers subject to Regulation SE, reflecting the addition of electronic filers subject to Regulation SE to Rule 405(b) of Regulation S–T in the proposed and final rule text.

[725] *See* Rule 803(b)(1)(i) of Regulation SE. We have made conforming changes to Rules 803(b)(3), (e), and (f) to narrow the proposed Inline XBRL requirements for Form SBSEF amendments, withdrawal requests, and vacation requests. *See* Rules 803(b)(3), 803(e), and 803(f) of Regulation SE.

[726] *See* the introductory text, subparagraphs (a)(2), (a)(4), and (b)(5)(ii), and Note 1 to Rule 405 of Regulation S–T.

[727] *See* Securities Act Release No. 10514 (June 28, 2018), 83 FR 40846, 40847 (Aug. 16, 2018). Inline XBRL allows filers to embed XBRL data directly into an HTML document, eliminating the need to tag a copy of the information in a separate XBRL exhibit. *See id.,* 83 FR at 40851.

[728] *See supra* note 139.

[729] *See infra* section XVII.C.3(f).

[730] *See* Rules 804(a)(1), 805(a)(1), 806(a)(1), 807(a)(1), and 807(d)(1) of Regulation SE.

[731] *See* Rule 816(a)(1) of Regulation SE.

[732] *See* Instruction (a) to the Security-Based Swap Execution Facility Sheet adopted as § 249.1702.

[733] *See* the introductory text, subparagraphs (a)(2), (a)(4), and (b)(5)(ii), and Note 1 to Rule 405 of Regulation S–T.

[734] *See supra* section IV.E.

[735] *See supra* note 140.

[736] *Id.*

[737] *See* Letter from Stephan Wolf, CEO, Global Legal Entity Identifier Foundation, at 1–2 (June 10, 2022) (''GLEIF Letter'') at 1–2; Bloomberg Letter, *supra* note 18, at 11–12.

of execution facilities, while also enabling information sharing across agencies.[738] The commenter points out that the LEI is the only global standard for legal entity identification and argues that by implementing the LEI more comprehensively the Commission would set forth a consistent identification scheme highlighted by the LEI. The commenter also supports the inclusion of the Unique Product Identifier (''UPI''), which is also an International Organization for Standardization (''ISO'') standard, as well as the Financial Instrument Global Identifier (''FIGI''), an adopted U.S. standard, arguing that open, non-proprietary data standards, which are established by voluntary standard bodies, facilitate the open exchange of information for regulators.[739]

Another commenter agrees that standard identifiers such as LEI, FIGI, and UPI should be included in an SBSEF's other reporting obligations under Regulation SE. In particular, this commenter highlights a number of the potential benefits of FIGI, a unique, publicly available identifier that covers financial instruments across asset classes that arise, expire, and change on a daily basis. The commenter states that it developed FIGI to help solve licensing challenges and shortcomings in data organizations and governance that persist in the current regionally based security identifier numbering approaches. The commenter states that one of the benefits of FIGI is that it enables interoperability between other identification systems and does not force the use of a single identification system, which could lower costs when interacting between legacy systems, which may depend upon a single identifier, and newer systems, which typically have a more modern architecture. As a general matter, the commenter believes that firms should be permitted to choose among identifiers and have the flexibility to adopt, integrate, or switch to other identifiers as appropriate. According to the commenter, this would allow firms to orient decisions around reducing costs of integration or realizing added benefits that offset any such integration cost concerns.[740]

The Commission has considered the comments received on the provisions regarding LEIs and other identifiers. The Commission is adopting the submission cover sheet and instructions as proposed because LEIs issued through the GLEIS are currently the only allowable platform IDs that may be used by registered SBSEFs, and as such it is appropriate and acceptable for them to be used on the submission cover sheet. With respect to other identifiers discussed by the commenters (*i.e.,* UPI and FIGI), as well as other identifiers that may be under development globally by various entities, because they are not currently allowable IDs, it would not be appropriate or acceptable for them to be used on the submission cover sheet.

XIV. Amendments to Commission's Rules of Practice for Appeals of SBSEF Actions

As noted above,[741] SEA Core Principle 2 directs an SBSEF to exercise regulatory powers over its market.[742] Under Rule 819 of Regulation SE, an SBSEF could take a variety of disciplinary actions against a member that is found to violate the SBSEF's rules, including fining the member, limiting the member's access, or barring the member entirely.[743] SEA Core Principle 2 also requires an SBSEF to establish rules governing access to its market.[744] An SBSEF could apply those rules in such a way as to limit a person's access to the SBSEF or to deny access entirely without due process. Recognizing these concerns, in the Proposing Release, the Commission proposed a number of amendments to its Rules of Practice to allow for appeals for final disciplinary actions taken by an SBSEF, for denials or conditionings of membership, and for limitations or denials of access, noting that the CFTC has similar procedures with respect to SEFs.[745]

The Commission did not receive any comments on these proposed amendments to its Rules of Practice. General principles of due process necessitate an appeals procedure for SBSEF members aggrieved by disciplinary action taken by an SBSEF. Therefore, the Commission is adopting the amendments to its Rules of Practice as proposed, as detailed below, with a minor modification to Rule 442.

A. Amendment to Rule 101

Existing Rule 101 of the Commission's Rules of Practice[746] sets out definitions for several terms used in the Rules of Practice. In particular, existing Rule 101(a)(9) defines ''proceeding'' with respect to applications of review of actions by a variety of entities that are subject to the Commission's jurisdiction. The Commission proposed a new paragraph (a)(9)(ix) of Rule 101 that provides that an application for a review of a determination (such as a final disciplinary action or a limitation or denial of access to any service) by an SBSEF would be a ''proceeding'' and thereby trigger the applicability of the Rules of Practice.

The Commission received no comment on the proposed amendment to Rule 101 and is adopting this amendment to Rule 101 as proposed.

B. Amendment to Rule 202

Existing Rule 202 of the Commission's Rules of Practice[747] permits a party in certain proceedings before the Commission to make a motion to specify certain procedures with respect to such proceeding. Rule 202(a) excludes certain types of proceedings, including enforcement or disciplinary proceedings, proceedings to review a determination by an SRO, and proceedings to review a determination of the Public Company Accounting Oversight Board (''PCAOB''). Because the Commission proposed new Rules 442 and 443, which set out specific procedures with respect to proceedings to review a determination of an SBSEF,[748] the Commission proposed to revise Rule 202(a) to add these SBSEF-related proceedings to the list of exclusions.

The Commission received no comment on the proposed amendment to Rule 202 and is adopting this amendment to Rule 202 as proposed.

C. Amendment to Rule 210

Existing Rule 210 of the Commission's Rules of Practice[749] sets out Commission rules with respect to parties, limited participants, and *amici curiae* in various proceedings before the Commission. Paragraph (a)(1) of Rule

[738] *See* GLEIF Letter, *supra* note 737, at 1.

[739] *See id.* at 1–2.

[740] *See* Bloomberg Letter, *supra* note 18, at 11–12.

[741] *See supra* section VI.B.

[742] *See, e.g.,* 15 U.S.C. 78c–4(d)(2)(A) (directing an SBSEF to ''establish and *enforce* compliance'' with its rules) (emphasis added); 15 U.S.C. 78c–4(d)(2)(C) (directing an SBSEF to ''establish and *enforce* trading, trade processing, and participation rules that will *deter abuses and have the capacity to detect, investigate, and enforce those rules*'') (emphasis added).

[743] *See supra* section VI.B. *See also* Rule 819(c)(3) (relating to limitations on access, including suspensions and permanent bars); Rule 819(g) (relating to disciplinary procedures and sanctions).

[744] *See* 15 U.S.C. 78c–4(d)(2)(A)(ii) (directing an SBSEF to establish and enforce compliance with any rule that imposes any limitation on access to the facility); 15 U.S.C. 78c–4(d)(2)(B)(i) (requiring an SBSEF to provide market participants with impartial access to the market).

[745] *See* Proposing Release, *supra* note 1, 87 FR at 18935–37; *See also* part 9 of the CFTC's rules (Rules Relating to Review of Exchange Disciplinary, Access Denial or Other Adverse Actions). For purposes of part 9, the term ''exchange'' includes a SEF.

[746] 17 CFR 201.101.

[747] 17 CFR 201.202.

[748] *See infra* sections XIV.E and F.

[749] 17 CFR 201.210.

210 states that persons shall not be granted leave to become a party or non-party participant on a limited basis in an enforcement or disciplinary proceeding, a proceeding to review a determination by an SRO, or a proceeding to review a determination by the PCAOB, except as authorized by paragraph (c) of Rule 210 (which permits limited instances in which persons may participate for Commission disciplinary and enforcement proceedings). Because the Commission proposed new Rules 442 and 443, which set out specific procedures with respect to proceedings to review a determination of an SBSEF,[750] the Commission proposed to revise Rule 210 to exclude proceedings to review a determination by an SBSEF among the types of proceedings from which persons may be granted leave to become a party or a non-party participant on a limited basis.

The Commission received no comment on the proposed amendment to Rule 210 and is adopting this amendment to Rule 210 as proposed.

D. Amendment to Rule 401

The Commission proposed to amend existing Rule 401 of its Rules of Practice by adding a new paragraph (f). Paragraph (f)(1) would permit any person aggrieved by a stay of action by an SBSEF entered in accordance with Rule 442(c) to make a motion to lift the stay. The Commission could also, at any time, on its own motion determine whether to lift the automatic stay. Paragraph (f)(2) would provide that the Commission may lift a stay summarily, without notice and opportunity for hearing. Finally, paragraph (f)(3) would provide that the Commission may expedite consideration of a motion to lift a stay of action by an SBSEF, consistent with the Commission's other responsibilities. Where consideration is expedited, persons opposing the lifting of the stay could file a statement in opposition within two days of service of the motion requesting lifting of the stay unless the Commission, by written order, specifies a different period.

It is appropriate to allow persons affected by certain stays of action by an SBSEF the opportunity to make a motion to request the lifting of the stay. As discussed below, pursuant to Rule 442, an aggrieved person can file an application for review with the Commission with respect to a final disciplinary action, a final action with respect to a denial or conditioning of membership, or a final action with respect to a denial or limitation of access. The filing of such an application would operate as a stay of the SBSEF's determination, and because of this automatic stay procedure, an aggrieved person or the SBSEF itself should be afforded a mechanism by which it could request the Commission to lift the stay, in addition to the Commission's ability under Rule 401(f)(2) to lift a stay summarily, without notice and opportunity of hearing.

The Commission received no comment on Proposed Rule 401(f) and is adopting Rule 401(f) as proposed.

E. Rule 442—Right to Appeal

Proposed Rule 442 would establish the right to an appeal to the Commission of certain final actions taken by an SBSEF and would set out certain procedural matters relating to any such appeal. Paragraph (a) of Rule 442 provides that an application for review by the Commission may be filed by any person who is aggrieved by a determination of an SBSEF with respect to any: (1) final disciplinary action, as defined in Rule 835(b)(1); (2) final action with respect to a denial or conditioning of membership, as defined in Rule 835(b)(2); or (3) final action with respect to a denial or limitation of access to any service offered by the SBSEF, as defined in Rule 835(b)(2).

Paragraph (b) of Rule 442 sets forth the procedure in such cases. Specifically, an aggrieved person can file an application for review with the Commission (pursuant to existing Rule 151) within 30 days after the notice filed by the SBSEF with the Commission pursuant to Rule 835 is received by the aggrieved person, and must serve the application on the SBSEF at the same time.[751] The Commission is modifying the text of Rule 442(b) from the proposal to clarify that the 30-day period for filing an application for review will not be extended absent a showing of extraordinary circumstances and that Rule 442(b) will be the exclusive remedy for seeking an extension of the 30-day period. Strict compliance with filing deadlines facilitates finality and encourages parties to act timely in seeking review.

Paragraph (c) of Rule 442 provides that filing an application for review with the Commission pursuant to Rule 835(b) would operate as a stay of the SBSEF's determination, unless the Commission otherwise orders either pursuant to a motion filed in accordance with Rule 401(f) or upon its own motion.[752]

It is appropriate for the filing of an application for review to operate as an automatic stay of the SBSEF's determination, because that determination could have the effect of significantly or even permanently damaging an aggrieved person's business while the Commission was conducting a review, which could take substantial time.[753] In addition, the Commission proposed in Rule 401(f) a procedure whereby a person aggrieved by such stay, including the SBSEF, can request that the Commission lift the stay.[754] The rules also contain certain requirements relating to certification of the record and service of the index.[755] Specifically, within 14 days after receipt of an application for review, an SBSEF would be required to certify and file with the Commission one unredacted copy of the record upon which it took the complained-of action. The SBSEF would be required to file electronically with the Commission one copy of an index of the record and serve one copy of the index on each party, subject to the requirements in Rule 442(d)(2) relating to sensitive personal information; if applicable, these filings would have to be certified that they have complied with the requirements relating to sensitive personal information. These requirements are appropriate to ensure that sensitive personal information is not improperly or inadvertently disseminated by an SBSEF as part of its filing of the record relating to the appeal review.

[750] *See infra* sections XIV.E and F.

[751] Such an application would be required to identify the SBSEF's determination complained of, set forth in summary form a statement of alleged errors in the action and supporting reasons therefor, and state an address where the applicant can be served. The application would be expected not to exceed two pages in length, and the notice of appearance required by § 201.102(d) would have to accompany the application if the applicant is to be represented by a representative. Any exception to an action not supported in an opening brief that complies with § 201.450(b) could, at the discretion of the Commission, be deemed to have been waived by the applicant.

[752] 17 CFR 201.442(c).

[753] The Commission received one comment describing the ability of persons aggrieved by certain actions by an SBSEF to apply for Commission review as ''some kind of mandatory arbitration process, overseen by a self governing regulatory body,'' and stating that this would not help retail investors. *See* Kevin Letter, *supra* note 95. The review of SBSEF action under Rule 442 would not be arbitration by a self-governing regulatory body but instead review by the Federal agency tasked by Congress with regulating SBSEFs. Further, only ECPs would be eligible to trade SBS on an SBSEF, and any offer or sale of SBS to ''retail investors'' would have to be effected on a national securities exchange. *See* SEA section 6(*l*), 15 U.S.C. 78f(*l*) (''It shall be unlawful for any person to effect a transaction in a security-based swap with or for a person that is not an eligible contract participant, unless such transaction is effected on a national securities exchange . . . .'').

[754] *See supra* section XIV.D.

[755] 17 CFR 201.442(d) and (e).

The Commission received no comment on Proposed Rule 442 and is adopting Rule 442 as proposed, with the modification to Rule 442(b) described above.

F. Rule 443—Sua sponte Review by Commission

New Rule 443 [756] provides that the Commission, on its own initiative, can order review of any determination by an SBSEF (which would include a final disciplinary action, a final action with respect to a denial or conditioning of membership, or a final action with respect to a denial or limitation of access to any services) that could be subject to an application for review pursuant to Rule 442(a) within 40 days after the SBSEF filed notice thereof.

Rule 443 further provides that the Commission can, at any time before issuing its decision, raise or consider any matter that it deems material, whether or not raised by the parties. If it does so, the Commission must, under Rule 443, give notice to the parties and an opportunity for supplemental briefing with respect to issues not briefed by the parties, where the Commission believes that such briefing could significantly aid the decisional process. It is appropriate that the Commission have the ability to review any determination filed by an SBSEF that could be subject to an application for review under Rule 442(a), even without an appeal of that determination by an aggrieved party, should the Commission believe that further consideration is warranted. Therefore, the rule provides the Commission authority to obtain additional information through supplemental briefings, as needed.

The Commission received no comment on Proposed Rule 443 and is adopting Rule 443 as proposed.

G. Amendment to Rule 450

Existing Rule 450 of the Commission's Rules of Practice [757] sets out requirements for briefs filed with the Commission. Rule 450(a) sets out a briefing schedule, and paragraph (a)(2) provides that the briefing schedule order shall be issued within 21 days, or such longer time as provided by the Commission, of receipt by the Commission of various types of appeals. The Commission proposed to amend Rule 450 by adding a new paragraph (a)(2)(iv) providing that the 21 days would be triggered by ''[r]eceipt by the Commission of an Index to the record of a determination by a security-based swap execution facility filed pursuant to § 201.442(d).''

The Commission received no comment on the proposed amendment to Rule 450 and is adopting this amendment to Rule 450 as proposed.

H. Amendment to Rule 460

Existing Rule 460 of the Commission's Rules of Practice [758] states that the Commission shall determine each matter on the basis of the record. Rule 460(a) defines the contents of the record with respect to various types of action. The Commission proposed a new paragraph (a)(4) of Rule 460, which states that, in a proceeding for a final decision before the Commission reviewing a determination of an SBSEF, the record shall consist of: (i) the record certified by the SBSEF pursuant to § 201.442(d); (ii) any application for review; and (iii) any submissions, moving papers, and briefs filed on appeal or review.

The Commission received no comment on the proposed amendment to Rule 460 and is adopting this amendment to Rule 460 as proposed.

XV. Amendments to Delegations of Authority in Rule 30–3 and Rule 30–14

In connection with the adoption of Regulation SE, the Commission is revising its rules delegating authority to the Director of the Division of Trading and Markets (''TM Division Director'') and to the General Counsel in order to delegate authority to take actions necessary to carry out the rules under Regulation SE and to facilitate the operation of the regulatory structure created in Regulation SE.[759] These revisions are intended to conserve Commission resources and increase the effectiveness and efficiency of the Commission's process for handling certain processes required by Regulation SE and for resolving appeals of SBSEF final actions.[760] Congress has authorized such delegation by Public Law 87–592, 76 Stat. 394, 15 U.S.C. 78d–1(a), which provides that the Commission ''shall have the authority to delegate, by published order or rule, any of its functions to . . . an employee or employee board, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business or matter.''

The Commission finds, in accordance with the Administrative Procedure Act (''APA''), that these amendments to the delegations of authority relate solely to agency organization, procedure, or practice.[761] Accordingly, the APA's provisions regarding notice of rulemaking and opportunity for public comment are not applicable to these rules. These rules do not substantially affect the rights or obligations of non-agency parties and pertain to increasing efficiency of internal Commission operations. For the same reasons, the provisions of the Small Business Regulatory Enforcement Fairness Act are not applicable to these rules.[762] Additionally, the provisions of the Regulatory Flexibility Act,[763] which apply only when notice and comment are required by the APA or other law, are not applicable to these rules.[764] The amendments to these rules do not contain any collection of information requirements as defined by the Paperwork Reduction Act of 1995.[765] To the extent that these rules relate to agency information collections during the conduct of administrative proceedings, they are exempt from review under the PRA. Further, because these amendments impose no new burdens on private parties, the amendments will not have any impact on competition for purposes of section 23(a)(2) of the Exchange Act.[766]

Accordingly, the Commission is amending its rules, by adding new paragraphs (95)–(102) to Rule 30–3, to delegate authority to the Division Director to perform certain actions necessitated by Regulation SE. The Commission is also amending paragraphs (4), (5), (7), and (8) of Rule 30–14 (17 CFR 200.30–14) to delegate authority to the General Counsel to perform certain actions in connection with Commission review proceedings of SBSEF actions. Under these delegations, the Division Director or the General Counsel, as applicable, (or, under his or her direction, such person or persons as might be designated from time to time by the Chairman of the Commission [767]) is authorized to perform the actions discussed below. Notwithstanding these

[756] 17 CFR 201.443.

[757] 17 CFR 201.450.

[758] 17 CFR 201.460.

[759] 17 CFR 200.30–3.

[760] In the Proposing Release, the Commission stated that it ''may address delegations of its authority in the adopting release for Regulation SE.'' Proposing Release, *supra* note 1, 87 FR at 28877.

[761] 5 U.S.C. 553(b)(3)(A).

[762] *See* 5 U.S.C. 804(3)(C) (the term ''rule'' does not include ''any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties'').

[763] 5 U.S.C. 60 *et seq.*

[764] *See* 5 U.S.C. 601(2).

[765] *See* 5 CFR 1320.3.

[766] 15 U.S.C. 78w(a)(2).

[767] *See* 17 CFR 200.30–3 and 17 CFR 200.30–14 (sub-delegation language applicable as a result of the addition of subparagraphs related to Regulation SE to the existing rules).

delegations, the Division Director or the General Counsel, as applicable, may submit any matter he or she believes appropriate to the Commission.[768] Furthermore, any action taken by the Division Director or the General Counsel, as applicable, pursuant to delegated authority would be subject to Commission review as provided by Rules 430 and 431 of the Commission's Rules of Practice, 17 CFR 201.430–201.431 and 15 U.S.C. 78d–1(b).

A. Delegated Authority Related to SBSEF Registration and Form SBSEF

With respect to certain Commission actions related to the registration process for SBSEFs and the review of Form SBSEF under Rule 803 and Rule 808, the Division Director has delegated authority: to publish notice on the Commission's website of a completed Form SBSEF and make available on the Commission's website certain specified parts of a Form SBSEF; to notify the applicant that its application is incomplete; to request from the applicant additional information and documentation necessary; to notify the applicant that its application is materially incomplete and to specify the deficiencies in the application, for purposes of staying the 180-day period for Commission review of the Form SBSEF; and to issue an order vacating the SBSEF's registration and to send a copy of the related request and order of vacation to all other SBSEFs, SBS exchanges, and registered clearing agencies that clear security-based swaps.[769]

B. Delegated Authority Related to New Products Proposed by an SBSEF

With respect to certain Commission actions related to self-certification of new products by an SBSEF under Rule 804, the Division Director has delegated authority: to stay for a period of up to 90 days the effectiveness of a security-based swap execution facility's self-certification of a new product; to publish notice on the Commission's website of a 30-day period for public comment; and to withdraw the stay or notify the security-based swap execution facility that the Commission objects to the proposed certification.[770]

With respect to certain Commission actions related to voluntary submission of new products by an SBSEF under Rule 805, the Division Director has delegated authority: to notify the submitting SBSEF that a submission for a new product does not comply with paragraph (a) of Rule 805; to make the SBSEF's submission publicly available on the Commission's website; to extend by an additional 45 days the period for consideration of a new product voluntarily submitted by an SBSEF if the product raises novel or complex issues that require additional time to analyze, and to notify the SBSEF of the same; to issue an extension of such longer period as to which the SBSEF agrees in writing; to approve a proposed new product and provide notice of the approval to the SBSEF; to notify the SBSEF that the Commission will not, or is unable to, approve the product, and to specify the nature of the issues raised and the specific provision of the SEA or the Commission's rules thereunder, that the product violates, appears to violate, or potentially violates but which cannot be ascertained from the submission.[771]

C. Delegated Authority Related to New Rules or Rule Amendments Proposed by an SBSEF

With respect to certain Commission actions related to proposed rules or rule amendments proposed by an SBSEF under Rule 806, the Division Director will have delegated authority: to notify the submitting SBSEF that a submission for a new rule or rule amendment does not comply with paragraph (a) of Rule 806; to make the SBSEF's submission publicly available on the Commission's website; to extend by an additional 45 days the period for consideration of a proposed rule or rule amendment voluntarily submitted by an SBSEF if the proposed rule or rule amendment raises novel or complex issues that require additional time to review or is of major economic significance, the submission is incomplete, or the requester does not respond completely to the Commission questions in a timely manner, and to notify the SBSEF of the same; to issue an extension of such longer period as to which the SBSEF agrees in writing; to approve a proposed rule or rule amendment and provide notice of the approval to the SBSEF; to notify the SBSEF that the Commission will not, or is unable to, approve the new rule or rule amendment, and to specify the nature of the issues raised and the specific provisions of the SEA or the Commission's rules thereunder, including the form or content requirements of Rule 806, with which the new rule or rule amendment is inconsistent or appears to be inconsistent; and to approve a proposed rule or a rule amendment, including changes to terms and conditions of a product, on an expedited basis under such conditions as shall be specified in the written notification.[772]

In addition, the Division Director has delegated authority to undertake certain Commission actions related to proposed rules or rule amendments self-certified by an SBSEF under Rule 807. Specifically, the Division Director has delegated authority: to make publicly available on the Commission's website a security-based swap execution facility's filing of new rules and rule amendments pursuant to the self-certification procedures of Rule 807; to stay for a period of up to 90 days the effectiveness of an SBSEF's self-certification of a new rule or rule amendment; to publish notice on the Commission's website of a 30-day period for public comment; and to withdraw the stay or notify the security-based swap execution facility that the Commission objects to the proposed certification.[773]

D. Delegated Authority Related To Request for Joint Interpretation

With respect to a request by an SBSEF, the Commission, or the CFTC, for a joint interpretation of whether a proposed product is a swap, security-based swap, or mixed swap under existing SEA Rule 3a68–2, as contemplated by Rule 809, the Division Director has delegated authority to provide written notice to an SBSEF of a stay or tolling pending issuance of a joint interpretation.[774]

E. Delegated Authority Related to SBSEF Submissions Contemplated by Rule 811

With respect to information relating to SBSEF compliance under Rule 811, the Division Director has delegated authority: to request pursuant to Rule 811(a) that an SBSEF file with the Commission information related to its business as a security-based swap execution facility, and to specify the form, manner, and timeframe for the filing; to request pursuant to Rule 811(b) that an SBSEF file with the Commission a written demonstration that it is in compliance with one or more Core Principles or with its other obligations under the SEA or the Commission's rules thereunder and to specify the form, manner, and timeframe for such a filing; to specify, pursuant to Rule 811(c)(2), the form and manner of the notification required pursuant to Rule 811(c)(1) by an SBSEF of any

[768] 17 CFR 200.30–3(l) and 17 CFR 200.30–14(l).

[769] *See* 17 CFR 200.30–3(a)(95), as adopted herein.

[770] *See* 17 CFR 200.30–3(a)(96), as adopted herein.

[771] *See* 17 CFR 200.30–3(a)(97), as adopted herein.

[772] *See* 17 CFR 200.30–3(a)(98), as adopted herein.

[773] *See* 17 CFR 200.30–3(a)(99), as adopted herein.

[774] *See* 17 CFR 200.30–3(a)(100), as adopted herein.

transaction involving the direct or indirect transfer of 50 percent or more of the equity interest in the security-based swap execution facility, and to request supporting documentation of the transaction; to specify the form and manner of the certification required pursuant to Rule 811(c)(4) that an SBSEF meets all of the requirements of section 3D of the SEA and the Commission rules thereunder; and to specify the form and manner of the submission by an SBSEF of documents filed in any material legal proceeding to which the security-based swap execution facility is a party or its property or assets is subject, as specified in Rule 811(d)(1), or in any material legal proceeding instituted against any officer, director, or other official of the SBSEF from conduct in such person's capacity as an official of the SBSEF, as specified in Rule 811(d)(2), and to request further documents.[775]

F. Delegated Authority Related to Information Sharing

With respect to certain Commission actions related to information sharing under Rule 822, the Division Director has delegated authority to require that an SBSEF provide information in its possession to the Commission and to specify the form and manner of that provision, and to require an SBSEF share information with other regulatory organizations, data repositories, and third-party data reporting services as necessary and appropriate to fulfill the SBSEF's regulatory and reporting responsibilities.[776]

G. Delegated Authority Related to Commission Review Proceedings

With respect to Commission review proceedings for final disciplinary actions taken by an SBSEF, for denials or conditionings of membership, and for limitations or denials of access, the General Counsel has delegated authority: to determine that an application for review has been abandoned and then to issue an order dismissing the application; to determine applications to stay Commission orders pending appeal of those orders to the federal courts and to determine application to vacate such stays; to grant or deny requests for oral argument before the Commission; and to determine whether to lift the automatic stay of a disciplinary sanction imposed by an SBSEF.[777]

XVI. Compliance Schedule

In the Proposing Release, the Commission stated that it intended to include a compliance schedule along with any final rules, and it sought public comment to assist it in developing an appropriate compliance schedule.[778] The Commission received several comments.

One commenter agrees that SEF operators can leverage their experience with SEF registration and operation in order to comply with any final SBSEF rules, but states that creating and maintaining a new platform, regardless of any similarities to existing systems, will inevitably require substantial time and resources to ensure operational, technical, and regulatory compliance. This commenter suggests that the Commission provide a compliance timeline of at least 12 months following the effective date of any final rules.[779]

Another commenter states that, while substantial harmonization should lower compliance and operations costs by allowing SBSEFs and market participants to use their existing procedures and systems, it is still important to allow sufficient lead time for potential SBSEFs and market participants to come into compliance with the new regulatory framework. The commenter states that existing SEFs will need to make certain technological changes to their platform to conform to the new rules and that additional time will be required for testing, finalizing a new rulebook, and putting in place the requisite agreements with SBSEF clients. This commenter states that the Commission should set a compliance date that is at least 18 months from the date of effectiveness of any final rule.[780]

One commenter states that, absent a phased-in implementation approach, the SBS market could suffer from significant disruptions. Therefore, this commenter states, the Commission should provide ''phased-in compliance'' with the required methods of execution, whereby a MAT SBS product may be executed on an SBSEF via any method of execution until such time as it is determined through notice and comment that an appropriate level of liquidity exists to enable an order book or RFQ-to-3 system. This commenter states that, when considering the lack of liquidity in SBS products, pre-trade price transparency via the proposed RFQ-to-3 requirement could negatively affect liquidity provision for end-users because, if clients are required to show their hand to three liquidity providers, it may lead to information leakage and an inability to hedge their risks through SBS markets. This is particularly so, the commenter says, because there are only a relatively small number of active dealers for many SBS products.[781]

This commenter further states that an RFQ-to-3 requirement would also be problematic for SBS equities, where current execution processes are very different from their swaps counterpart, and where common trading practices and counterparty exchanges would not be possible on an RFQ-to-3 or order book system. The commenter states that it has compared the credit swaps activity that occurred on-venue in 2012 (before the CFTC trade execution requirement became effective) with the credit SBS activity that occurs on venue today. The commenter reports that the result is that 48.2% of AMRS CDX trading client volume was on-venue in 2012, while only 4.9% of AMRS SNCDS trading client volume occurred on-venue in 2022 (up to the date of the commenter's letter). The commenter states that this shows that the swaps market was much more ready for the implementation of the trade execution requirement than the credit SBS market is today.[782]

The Commission agrees that some period of time will be required for would-be SBSEFs not only to register with the Commission, but also to create a new platform; put in place policies, procedures, and arrangements to ensure operational, technical and regulatory compliance; establish its own rules; and put in place the requisite agreements with SBSEF clients. The Commission does not agree, however, with the comment that a separate, ''phased-in'' compliance schedule should be put in place for the required methods of execution and that the Commission should engage in future notice and comment before applying the required methods of execution to SBS that have been made available to trade. First, no SBS are currently subject to a clearing determination, so it would not be possible for any SBSEF to make an SBS available to trade and subject it to the required methods of execution. Second, as discussed above, before an SBS becomes subject to the trade execution requirement, the Commission would have had multiple opportunities to consider the trading characteristics of the SBS.[783] Even after the Commission has made a clearing determination with

[775] *See* 17 CFR 200.30–3(a)(101), as adopted herein.

[776] *See* 17 CFR 200.30–3(a)(102), as adopted herein.

[777] *See* 17 CFR 200.30–14(4) through (5) and (7) through (8), as adopted herein.

[778] *See* Proposing Release, *supra* note 1, 87 FR at 28937.

[779] *See* Tradeweb Letter, *supra* note 18, at 6–7.

[780] *See* Bloomberg Letter, *supra* note 18, at 21.

[781] *See* ISDA–SIFMA Letter, *supra* note 18, at 6.

[782] *See id.*

[783] *See supra* notes 181–185 and accompanying text.

respect to an SBS, to make that SBS ''available to trade,'' an SBSEF would, under Rule 816(a)(1), have to make a filing with the Commission under Rule 806 or Rule 807—both of which would allow the Commission to find that a filing was not consistent with the requirements of the SEA or Regulation SE.[784] This filing would, under Rule 816(b), have to address, as appropriate, a number of relevant factors, including whether there are ready and willing buyers and sellers; the frequency or size of transactions; the trading volume; the number and types of market participants; the bid/ask spread; and the usual number of resting firm or indicative bids and offers. And a national securities exchange that wished to make an SBS ''available to trade'' would have to file a rule change under Rule 19b–4,[785] and that proposed rule change would be subject to Commission review for compliance with the requirements of the SEA. Therefore, the Commission is not adopting a separate, ''phased-in'' compliance schedule for the required methods of execution.

Further, with respect to commenters who proposed specific timeframes for implementation (*e.g.,* 12 months or 18 months), the Commission's proposed compliance schedule is better designed to facilitate timely and achievable implementation of Regulation SE because it reflects that the entities that are likely to register as SBSEFs have been accustomed to operating SBS trading platforms pursuant to exemptive relief granted by the Commission.[786] Thus, it is appropriate to provide these entities with a reasonable period of time—through a compliance schedule tied to the completion of the steps required for registration as an SBSEF—to come into compliance with the requirements of Regulation SE. Further, because most, if not all, entities that seek to register as SBSEFs will be CFTC-registered SEFs—and because the Commission has sought to harmonize both the registration form and exhibits for SBSEFs and the substance of the rules applicable to SBSEFs with the CFTC regulations applicable to SEFs—the entities seeking to register as SBSEFs will be able to complete the each of the steps necessary for registration in the allotted periods.

Therefore, the Commission is adopting the following compliance schedule for Regulation SE. The SBSEF rules shall become effective 60 days after the date of publication in the **Federal Register** (''Effective Date'').

Once Regulation SE has become effective, any entity that meets the definition of SBSEF may file an application to register with the Commission on Form SBSEF at any time after the Effective Date.[787] As discussed above,[788] the Temporary SBSEF Exemptions will expire 180 days after the Effective Date for any entity that has not filed an application to register with the Commission on Form SBSEF. Thus, an entity that meets the definition of SBSEF and engages in such activities but fails to submit an application on Form SBSEF by 180 days after the Effective Date would be in violation of the registration requirement of Rule 803. For an entity that has submitted an application on Form SBSEF by 180 days after the Effective Date, the exemptive relief relating to SBSEF registration would expire 240 days after the Effective Date, except with respect to an entity whose application on Form SBSEF is *complete* (having responded to requests by the Commission's staff for revisions or amendments) within 240 days of the Effective Date. An entity that has submitted an application within 180 days of the Effective Date and whose application is complete within 240 days of the Effective Date will continue to benefit from the exemption from registration until 30 days after the Commission acts to approve or disapprove the application on Form SBSEF.

XVII. Economic Analysis

A. Introduction

To increase the transparency and oversight of the OTC derivatives market,[789] Title VII of the Dodd-Frank Act requires the Commission to undertake a number of rulemakings to implement the regulatory framework for SBS that is set forth in the legislation, including among other things, (1) the registration and regulation [790] of SBSEFs; and (2) mitigating conflicts of interest with respect to SBSEFs, SBS exchanges, and SBS clearing agencies. To satisfy these statutory mandates, the Commission is adopting Regulation SE and associated forms under section 3D of the SEA that would create a regime for the registration and regulation of SBSEFs and address other issues relating to SBS execution generally.[791] One of the rules being adopted as part of Regulation SE, Rule 834, implements section 765 of the Dodd-Frank Act, which is intended to mitigate conflicts of interest at SBSEFs and SBS exchanges. Other rules being adopted as part of Regulation SE address the cross-border application of the SEA's trading venue registration requirements and the trade execution requirement for SBS.

In addition, the Commission is amending existing Rule 3a1–1 under the SEA to exempt, from the SEA definition of ''exchange,'' registered SBSEFs that provide a market place for no securities other than SBS, and certain registered clearing agencies. The Commission is also adopting new Rule 15a–12 under the SEA that, while affirming that an SBSEF also would be a broker under the SEA, would exempt a registered SBSEF from certain broker requirements. The Commission is also adopting certain new rules and amendments to its Rules of Practice to allow persons who are aggrieved by certain actions by an SBSEF to apply for review by the Commission.

Currently, SBS trade in the OTC market, rather than on regulated trading venues. The existing market for SBS is opaque, with little, if any, pre-trade transparency. With limited transparency, the information asymmetry between liquidity providers (*i.e.,* SBS dealers) and end users could be significant. Specifically, liquidity providers may observe information about the trading process (*e.g.,* trading interest, quotes, order flows, and trades) that end users typically cannot observe. The SBS market also is decentralized such that market participants incur search costs to locate other market participants in order to trade.

While the SBS market is decentralized, it also is interconnected and global in scope.[792] SBS dealers can have hundreds of counterparties, consisting of end users and other SBS dealers. Trading venues may serve hundreds of end user and SBS dealer participants. SBS transactions arranged, negotiated, or executed by personnel located in the U.S. may involve wholly foreign counterparties. Furthermore, U.S. persons may choose to trade SBSs on foreign venues, which are subject to

[784] *See supra* sections IV.A and B.

[785] 17 CFR 240.19b–4.

[786] *See supra* section XII.

[787] Once Regulation SE has become effective, applications for exemptions under Rule 833 may also be submitted. *See supra* section VII.B (discussing cross-border exemptions for foreign trading venues and relating to the trade execution requirement).

[788] *See supra* section XII (discussing the rescission of exemptive relief).

[789] *See* Public Law 111–203 Preamble.

[790] The regulation of SBSEFs includes, among other things, requiring SBSEFs to comply with the Core Principles set forth in section 3D(d) of the SEA. *See supra* section VI.

[791] Among other things, the Commission is adopting Form SBSEF for persons seeking to register with the Commission as an SBSEF and a submission cover sheet and instructions to be used in rule and product filings made by SBSEFs.

[792] *See* also section VII.A *supra* and XVII.B.2 *infra* (discussing the global nature of the SBS market).

OTC derivatives regulations imposed by local regulatory authorities.

The adopted rules and amendments will affect SBSEFs, SBS exchanges, foreign SBS trading venues, and ECPs (*i.e.,* SBS dealers and end users).[793] In addition, the adopted rules and amendments will affect entities that act as third-party service providers to SBSEFs.

The Commission is mindful of the economic effects, including the costs and benefits, of the adopted rules and amendments. Section 3(f) of the SEA, 15 U.S.C. 78c(f), directs the Commission, when engaging in rulemaking where it is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. In addition, section 23(a)(2) of the SEA, 15 U.S.C. 78w(a)(2), requires the Commission, when making rules under the SEA, to consider the impact that the rules would have on competition, and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the SEA.

The analysis below addresses the likely economic effects of the adopted rules and amendments, including their anticipated and estimated benefits and costs and their likely effects on efficiency, competition, and capital formation. The Commission also discusses the potential economic effects of certain alternatives to the approaches taken in this release. The Commission received a number of comments related to various aspects of the economic analysis in the Proposing Release. The Commission has considered and responds to these comments in the sections that follow.

B. Economic Baseline

1. Existing Regulatory Framework

The economic analysis appropriately considers existing regulatory requirements, including recently adopted rules, as part of its economic baseline against which the costs and benefits of the adopted rules and amendments are measured.[794] The analysis includes provisions of the SEA, as amended by the Dodd-Frank Act, that currently govern the SBS market, and rules adopted by the Commission thereunder, including in the Intermediary Definitions Adopting Release,[795] the Cross-Border Adopting Release,[796] the SDR Rules and Core Principles Adopting Release,[797] the Regulation SBSR Adopting Release I,[798] the Registration Adopting Release,[799] the ANE Adopting Release,[800] the Business Conduct Adopting Release,[801] the Trade Acknowledgement and Verification Adopting Release,[802] the Regulation SBSR Adopting Release II,[803] the Rule of Practice 194 Adopting Release,[804] the Capital, Margin, and Segregation Adopting Release,[805] the Recordkeeping and Reporting Adopting Release,[806] the Risk Mitigation Adopting Release,[807] the Cross-Border Amendments Adopting Release,[808] and the Clearing Exemption Adopting Release.[809] The baseline also includes the Temporary SBSEF Exemptions[810] and the CFTC rules that apply to CFTC-registered SEFs.

2. Security-Based Swap Data, Market Participants, Dealing Structures, Levels of Security-Based Swap Trading Activity, and Market Participant Domiciles

Final SBS Entity registration rules have been adopted and compliance was required as of November 1, 2021.[811] As of September 28, 2023, there were 51 entities registered with the Commission as SBS dealers, and no entity registered as a major SBS participant.[812] One commenter asserts that not all registered SBS dealers are consistently active in trading SBS. Trading activity in the SBS markets tends to be more concentrated among a subset of such registered SBS

[793] Only ECPs are eligible to trade on an SBSEF, and retail investors would have access to an SBS only after an SBS exchange has filed a proposed rule change with the Commission under Rule 19b–4, 17 CFR 240.19b–4, to amend its rules to permit the listing of a registered SBS, with that proposed rule change being published for public comment. *See supra* note 103.

[794] *See, e.g., Nasdaq* v. *SEC,* 34 F.4th 1105, 1111–15 (D.C. Cir. 2022). This approach also follows SEC staff guidance on economic analysis for rulemaking. *See* Staff's ''Current Guidance on Economic Analysis in SEC Rulemaking'' (Mar. 16, 2012), *available at https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf* (''The economic consequences of proposed rules (potential costs and benefits including effects on efficiency, competition, and capital formation) should be measured against a baseline, which is the best assessment of how the world would look in the absence of the proposed action.''); *Id.* at 7 (''The baseline includes both the economic attributes of the relevant market and the existing regulatory structure.''). The best assessment of how the world would look in the absence of the proposed or final action typically does not include recently proposed actions, because doing so would improperly assume the adoption of those proposed actions.

[795] *See* Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant'' and ''Eligible Contract Participant,'' SEA Release No. 66868 (Apr. 27, 2012), 77 FR 30596 (May 23, 2012) (''Intermediary Definitions Adopting Release'').

[796] *See* Application of ''Security-Based Swap Dealer'' and ''Major Security-Based Swap Participant'' Definitions to Cross-Border Security-Based Swap Activities, SEA Release No. 72472 (June 25, 2014), 79 FR 47278 (Aug. 12, 2014) (''Cross-Border Adopting Release'').

[797] *See* Security-Based Swap Data Repository Registration, Duties, and Core Principles, SEA Release No. 74246 (Feb. 11, 2015), 80 FR 14438 (Mar. 19, 2015) (''SDR Rules and Core Principles Adopting Release'').

[798] *See* Regulation SBSR Adopting Release I, *supra* note 140.

[799] *See* Registration Process for Security-Based Swap Dealers and Major Security-Based Swap Participants, SEA Release No. 75611 (Aug. 5, 2015), 80 FR 48964 (Aug. 14, 2015) (''Registration Adopting Release'').

[800] *See* Security-Based Swap Transactions Connected with a Non-U.S. Person's Dealing Activity That Are Arranged, Negotiated, or Executed By Personnel Located in a U.S. Branch or Office or in a U.S. Branch or Office of an Agent; Security-Based Swap Dealer De Minimis Exception, SEA Release No. 77104 (Feb. 10, 2016), 81 FR 8598 (Feb. 19, 2016) (''ANE Adopting Release'').

[801] *See* Business Conduct Standards Release, *supra* note 101.

[802] *See* Trade Acknowledgment and Verification of Security-Based Swap Transactions, SEA Release No. 78011 (June 8, 2016), 81 FR 39808 (June 17, 2016) (''Trade Acknowledgment and Verification Adopting Release'').

[803] *See* Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, SEA Release No. 78321 (July 14, 2016), 81 FR 53546 (Aug. 12, 2016) (''Regulation SBSR Adopting Release II'').

[804] *See* Applications by Security-Based Swap Dealers or Major Security-Based Swap Participants for Statutorily Disqualified Associated Persons To Effect or Be Involved in Effecting Security-Based Swaps, SEA Release No. 84858 (Dec. 19, 2018), 84 FR 4906 (Feb. 19, 2019) (''Rule of Practice 194 Adopting Release'').

[805] *See* Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital and Segregation Requirements for Broker-Dealers, SEA Release No. 86175 (June 21, 2019), 84 FR 43872 (Aug. 22, 2019) (''Capital, Margin, and Segregation Adopting Release'').

[806] *See* Recordkeeping and Reporting Adopting Release, *supra* note 704.

[807] *See* Risk Mitigation Techniques for Uncleared Security-Based Swaps, SEA Release No. 87782 (Dec. 18, 2019), 85 FR 6359 (Feb. 4, 2020) (''Risk Mitigation Adopting Release'').

[808] *See* Cross-Border Application of Certain Security-Based Swap Requirements, SEA Release No. 87780 (Dec. 18, 2019), 85 FR 6270 (Feb. 4, 2020) (''Cross-Border Amendments Adopting Release'').

[809] *See* Exemption from the Definition of ''Clearing Agency'' for Certain Activities of Security-Based Swap Dealers and Security-Based Swap Execution Facilities, SEA Release No. 90667 (Dec. 16, 2020), 86 FR 7637 (Feb. 1, 2021) (''Clearing Exemption Adopting Release'').

[810] *See supra* section III and note 46.

[811] *See* Key Dates for Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants, *available at https://www.sec.gov/page/key-dates-registration-security-based-swap-dealers-and-major-security-based-swap-participants.*

[812] *See* List of Registered Security-Based Swap Dealers and Major Security-Based Swap Participants, *available at https://www.sec.gov/files/list-sbsds-msbsps-9-28-2023-locked-final.xlsx* (providing the list of registered SBS dealers and major SBS participants that was updated as of Sept. 28, 2023).

dealers, which increases liquidity concerns in these markets.[813]

Market participants such as SBS dealers and major SBS participants were required to report security-based swap transactions to registered security-based swap data repositories (''SBSDRs'') pursuant to Regulation SBSR beginning on November 8, 2021.[814]

The Commission uses information reported pursuant to Regulation SBSR to two registered SBSDRs—Depository Trust & Clearing Corporation Data Repository (''DDR'') and ICE Trade Vault (''ITV'')—to describe the baseline.[815] Table 1 shows that U.S. security-based swaps market activity is split across three asset classes: credit, equity, and interest rate.[816] Based on information reported to DDR, as of November 25, 2022, there were approximately 523,000, 3.4 million, and 5,700 active security-based swaps in the credit, equity, and interest rate asset classes, respectively. The gross notional amounts outstanding in the credit, equity, and interest rate asset classes were respectively, approximately $2.8, $3.6, and $0.18 trillion.[817] Based on information reported to ITV, as of November 25, 2022, there were approximately 155,000 active credit security-based swaps with gross notional amount outstanding of approximately $1.9 trillion.

Table 1 also shows that U.S. SBS market participants trade a variety of security-based swaps in each of the three asset classes. Based on information reported to DDR, as of November 25, 2022, for active credit security-based swaps, single-name corporate CDS constitute the largest product type, with approximately 364,000 active CDS and $1.6 trillion gross notional amount outstanding. The second largest active credit security-based swaps product type consists of single-name sovereign CDS, with approximately 94,000 active CDS and $0.9 trillion gross notional amount outstanding.

For active equity security-based swaps, equity portfolio swaps constitute the largest product type, with approximately 2.3 million active equity portfolio swaps and $1.7 trillion gross notional amount outstanding. The second largest active equity security-based swaps product type consists of equity swaps, with approximately 492,000 active equity swaps and $1.2 trillion gross notional amount outstanding.[818]

In the interest rate asset class, exotics constitute the largest product type, with approximately $0.1 trillion gross notional amount and 4,400 active exotic swaps outstanding.

Based on information reported to ITV, as of November 25, 2022, active credit security-based swaps fall into two product types. Single-name corporate CDS constitute the largest product type, with approximately 135,000 active CDS and $1.3 trillion gross notional amount outstanding. The second largest active credit security-based swaps product type consists of single-name sovereign CDS, with approximately 20,000 active CDS and $0.5 trillion gross notional amount outstanding.

TABLE 1—GROSS NOTIONAL AMOUNT AND ACTIVE SECURITY-BASED SWAPS OUTSTANDING ON NOV. 25, 2022, CATEGORIZED BY ASSET CLASS AND PRODUCT CLASSIFICATION [a]

SBSDR	Asset class	Product type	Gross notional amount outstanding (millions of USD)	Active security-based swap count
DDR	Credit	Index	44,407	2,992
		Single-Name: Corporate	1,556,315	364,465
		Single-Name: Sovereign	900,072	93,807
		Total Return Swap [b]	156,849	49,867
		Other [c]	122,970	12,081
		Total	2,780,613	523,212
	Equity	Portfolio Swap	1,688,672	2,266,706
		Swap	1,183,279	491,508
		Contract For Difference	398,952	642,965
		Option	6,915	1,281
		Forward	5,663	1,393

[813] *See* ISDA–SIFMA Letter, *supra* note 18, at 2 n.5.

[814] *See* SEC Approves Registration of First Security-Based Swap Data Repository; Sets the First Compliance Date for Regulation SBSR, *available at https://www.sec.gov/news/press-release/2021-80.*

[815] DDR operates as a registered SBSDR for security-based swap transactions in the credit, equity, and interest rate derivatives asset classes. ITV operates as a registered SBSDR for security-based swap transactions in the credit derivatives asset class. *See* Security-Based Swap Data Repositories; DTCC Data Repository (U.S.) LLC; Order Approving Application for Registration as a Security-Based Swap Data Repository, Exchange Act Release No. 91798 (May 7, 2021), 86 FR 26115 (May 12, 2021); Security-Based Swap Data Repositories; ICE Trade Vault, LLC; Order Approving Application for Registration as a Security-Based Swap Data Repository, Exchange Act Release No. 92189 (June 16, 2021), 86 FR 32703 (June 22, 2021). The statistics presented herein are based on the Report on Security-Based Swaps Pursuant to section 13(m)(2) of the Securities Exchange Act of 1934, that the Commission issued on Mar. 20, 2023 and is available at *https://www.sec.gov/files/report-security-based-swaps-032023.pdf* (''SBS Report'').

[816] In this release, interest-rate security-based swaps refer to non-CDS debt security-based swaps, which are primarily total return swaps that replicate the payoff of a bond or a narrow index of bonds, where the buyer usually pays either a fixed or floating benchmark rate to the seller in exchange for the total return of the bond or the narrow index of bonds. These swaps are a subset of over-the-counter derivatives in the interest-rate asset class.

[817] Active security-based swaps are those that have been neither terminated nor reached their scheduled maturity and are therefore open positions as of Nov. 25, 2022. Gross notional amount outstanding represents the total outstanding notional value of active, market-facing security-based swaps on Nov. 25, 2022. Security-based swaps are considered to be ''market-facing'' when they are executed at arms-length between third parties. While a reporting party is only required to report a transaction to one SBSDR—either DDR or ITV—some uncleared security-based swaps in DDR also appear in ITV. As of Nov. 25, 2022, there were 605 active credit security-based swaps in ITV that were reported as uncleared (0.4% of the 154,903 active credit security-based swaps in ITV). The 605 active credit security-based swaps had a gross notional outstanding of $4.73 billion (0.3% of the approximately $1,900 billion gross notional outstanding of all active credit security-based swaps in ITV). These statistics provide an upper bound of the overlap between ITV and DDR and indicate that the overlap is very limited in scope. *See* SBS Report, *supra* note 815, at 4, 10.

[818] An equity swap references a single underlier while an equity portfolio swap involves a portfolio wrapper under which multiple swaps can be traded with operational efficiency. *See* ISDA, *Central Clearing in the Equity Derivatives Market: An ISDA Study* (June 2014) at 10, *available at https://www.isda.org/a/6PDDE/central-clearing-in-the-eqd-market-final.pdf;* ISDA Taxonomy 2.0—Finalized, ISDA.org (Sept. 4, 2019), *available at https://www.isda.org/a/o1MTE/ISDA-Taxonomy_EQ-CR-FX-IR_v2.0__3-_September_2019-FINAL.xls.*

TABLE 1—GROSS NOTIONAL AMOUNT AND ACTIVE SECURITY-BASED SWAPS OUTSTANDING ON NOV. 25, 2022, CATEGORIZED BY ASSET CLASS AND PRODUCT CLASSIFICATION [a]—Continued

SBSDR	Asset class	Product type	Gross notional amount outstanding (millions of USD)	Active security-based swap count
		Other [d]	330,136	41,115
		Total	3,613,617	3,444,968
	Interest Rate	Exotic	153,306	4,419
		Forward	23,818	1,164
		Other [e]	868	122
		Total	177,992	5,705
ITV	Credit	Single-Name: Corporate	1,348,002	134,741
		Single-Name: Sovereign	544,414	20,162
		Total	1,892,416	154,903

[a] For cleared security-based swaps in DDR, this table incorporates only one of the two security-based swaps that result from the clearing process. For ITV, this table incorporates all of the cleared security-based swaps.
[b] As a general matter, total return swaps include non-CDS debt-based security swaps, equity-based security swaps, and mixed swaps. Counterparties in the total return swaps market use the contracts to obtain exposure, usually leveraged, to the total economic performance of a security or index and benefit from not having to own the security itself. Market participants, such as mutual funds, hedge funds, and endowments, use total return swaps to obtain exposure in markets where they would face difficulties purchasing or selling the underlying security (*e.g.,* a market participant may find it difficult to buy a foreign company's security or locate a security to sell short) while taking advantage of the capital efficiencies of not holding the security in their inventories.
[c] Includes the following products reported to SBSDRs: exotic, index tranche, swaptions, and other single-name (*e.g.,* asset-backed, loan, and municipal security-based swaps).
[d] "Other" is a category in the DDR Equity Product ID field. All Product ID categories are listed in the table.
[e] Includes the following products reported to SBSDRs: inflation, debt option, and cross-currency.

Table 2 shows that both SBS Entities and non-SBS Entities participate in all three asset classes in the U.S. security-based swap market. Based on information reported to DDR, as of November 25, 2022, SBS Entities and non-SBS Entities had, respectively, entered into approximately 813,000 and 234,000 active credit security-based swaps.[819] The gross notional amounts outstanding of the active credit security-based swaps held by SBS Entities and non-SBS Entities were, respectively, approximately $4.4 and $1.2 trillion.

In the equity asset class, SBS Entities and non-SBS Entities had, respectively, entered into approximately 4.0 million and 2.9 million active equity security-based swaps. The gross notional amounts outstanding of the active equity security-based swaps held by SBS Entities and non-SBS Entities were, respectively, approximately $4.5 and $2.7 trillion.

In the interest rate asset class, SBS Entities and non-SBS Entities had, respectively, entered into approximately 6,200 and 5,200 active interest rate security-based swaps. The gross notional amounts outstanding of the active interest rate security-based swaps held by SBS Entities and non-SBS Entities were, respectively, approximately $0.2 and $0.1 trillion.

Based on information reported to ITV, as of November 25, 2022, SBS Entities and non-SBS Entities had, respectively, entered into approximately 123,000 and 33,000 active credit security-based swaps. The gross notional amounts outstanding of the active credit security-based swaps held by SBS Entities and non-SBS Entities were, respectively, approximately $1.6 and $0.3 trillion.

TABLE 2—GROSS NOTIONAL AMOUNT AND ACTIVE SECURITY-BASED SWAPS OUTSTANDING ON NOV. 25, 2022, CATEGORIZED BY ASSET CLASS AND REGISTRANT TYPE [a]

SBSDR	Asset class	Registrant type	Gross notional amount outstanding (millions of USD)	Active security-based swap count
DDR	Credit	Total	5,561,226	1,046,424
		SBS Entities	4,403,130	812,647
		Other	1,158,096	233,777
	Equity	Total	7,227,234	6,889,936
		SBS Entities	4,490,592	4,013,393
		Other	2,736,642	2,876,543
	Interest Rate	Total	355,984	11,410
		SBS Entities	210,663	6,214
		Other	145,321	5,196
ITV	Credit	Total	1,897,249	155,578
		SBS Entities	1,632,251	122,831

[819] For cleared security-based swaps where at least one counterparty is an SBS Entity, Table 2 reflects the security-based swaps entered into by each of the original counterparties, but does not include the positions of the clearing agencies themselves. For uncleared security-based swaps, Table 2 reflects the security-based swaps entered into by each of the original counterparties. *See* SBS Report, *supra* note 815, at 5.

TABLE 2—GROSS NOTIONAL AMOUNT AND ACTIVE SECURITY-BASED SWAPS OUTSTANDING ON NOV. 25, 2022, CATEGORIZED BY ASSET CLASS AND REGISTRANT TYPE [a]—Continued

SBSDR	Asset class	Registrant type	Gross notional amount outstanding (millions of USD)	Active security-based swap count
		Other	264,998	32,747

[a] For cleared security-based swaps where at least one counterparty is an SBS Entity, Table 2 reflects the security-based swaps entered into by each of the original counterparties, but does not include the positions of the clearing agencies themselves. For uncleared security-based swaps, Table 2 reflects the security-based swaps entered into by each of the original counterparties.

In addition to information reported to registered SBSDRs, the Commission also uses nonpublic data from the DTCC Derivatives Repository Limited Trade Information Warehouse (''DTCC–TIW'') to describe the baseline, specifically the single-name CDS market. DTCC–TIW provided data regarding the activity of market participants in the single-name CDS market during the period from November 2006 to September 2022.[820] The Commission acknowledges that limitations in the data constrain the extent to which it is possible to quantitatively characterize the security-based swap market.[821]

Firms that act as SBS dealers [822] play a central role in the single-name CDS market. Based on an analysis of single-name CDS data in DTCC–TIW in the 12-month period from October 2021 to September 2022, accounts of registered SBS dealer firms intermediated transactions with a gross notional amount of approximately $1.7 trillion, with approximately 66% of the gross notional intermediated by the top five SBS dealer accounts.

These SBS dealers transact with hundreds or thousands of counterparties. One SBS dealer (when accounts are sorted by number of counterparties) transacted with over a thousand counterparty accounts, consisting of both other SBS dealers and non-SBS dealers. The next 13% of SBS dealers each transacted with 500 to 1,000 counterparty accounts; the following 21% of SBS dealers each transacted with 100 to 500 counterparty accounts; and 64% of SBS dealers each transacted security-based swaps with fewer than 100 counterparty accounts in the 12-month period from October 2021 to September 2022. The median number of counterparty accounts across SBS dealers is 18 (the mean is approximately 172). Non-SBS dealer counterparties transacted almost exclusively with these SBS dealers. The median non-SBS dealer counterparty transacted with one SBS dealer account (with an average of approximately 1.8 SBS dealer accounts) in the 12-month period from October 2021 to September 2022.

Non-SBS dealer single-name CDS market participants include, but are not limited to, investment companies, pension funds, private funds, sovereign entities, and industrial companies. The Commission observes that most users of CDS that are not SBS dealers do not engage in trading directly, but trade through banks, investment advisers, or other types of firms, which are collectively referred to as transacting agents, consistent with DTCC–TIW terminology.[823] Based on an analysis of DTCC–TIW data, there were 2,397 transacting agents that engaged directly in trading between November 2006 and September 2022.[824]

As shown in Table 3 below, approximately 79% of these transacting agents were identified as investment advisers, of which approximately 40% (about 32% of all transacting agents) were registered as investment advisers under the Investment Advisers Act.[825] Although investment advisers were the vast majority of transacting agents, the transactions they executed account for only 15% of all single-name CDS trading activity reported to DTCC–TIW, measured by number of transaction-sides (each transaction has two transaction sides, *i.e.,* two transaction counterparties). The vast majority of transactions (81.3%) measured by number of transaction-sides were executed by ISDA-recognized SBS dealers.

[820] DTCC–TIW provided weekly positions and monthly transaction files for single-name and index-based CDS that had been received voluntarily from market participants. These data cover all positions and transactions where one of the counterparties is a U.S. entity or the reference entity is a U.S. entity, with status as a U.S. entity determined by DTCC–TIW. In DTCC–TIW, the Commission observes end of week CDS positions for all U.S. entities, foreign counterparties to a U.S. entity, or foreign counterparties trading a CDS referencing a U.S. underlying entity. The DTCC–TIW data have limitations. The data do not address two foreign counterparties with CDS referencing foreign underlying entities. In addition, the DTCC–TIW data do not provide any intra-weekly CDS position information, nor any information on the underlying security holdings of reference entities. The Commission had used DTCC–TIW data in prior rulemakings, most recently in Prohibition Against Fraud, Manipulation, or Deception in Connection with Security-Based Swaps; Prohibitions Against Undue Influence over Chief Compliance Officers, SEA Release No. 97656 (June 7, 2023), 88 FR 42546 (June 30, 2023).

[821] *See supra* note 820 (discussing DTCC–TIW data limitations). The Commission also relies on qualitative information regarding market structure and evolving market practices provided by commenters and the knowledge and expertise of Commission staff.

[822] Dealers are generally persons engaged in the business of buying and selling securities for their own account, through a broker or otherwise. 15 U.S.C. 78c(a)(5). SEA Rule 3a71–1 defines the term security-based swap dealer. 17 CFR 240.3a71–1.

[823] Transacting agents participate directly in the single-name CDS market, without relying on an intermediary, on behalf of their principals. For example, a university endowment may hold a position in a single-name CDS that is established by an investment adviser that transacts on the endowment's behalf. In this case, the university endowment is a principal that uses the investment adviser as its transacting agent.

[824] These 2,397 transacting agents, which are presented in more detail in Table 3 below, include all DTCC-defined ''firms'' shown in DTCC–TIW as transaction counterparties that report at least one transaction to DTCC–TIW as of Sep. 2022. The staff in the Division of Economic and Risk Analysis classified these transacting agents by matching names, automatically or manually, to third-party databases. *See, e.g.,* ANE Adopting Release, 81 FR 8602, at n.43. Manual classification was based in part on searches of the EDGAR and Bloomberg databases, the SEC's Investment Adviser Public Disclosure database (*available at https://adviserinfo.sec.gov/*), and a firm's public website or the public website of the account represented by a firm. The staff also matched names using International Swaps and Derivatives Association (ISDA) protocol adherence letters available on the ISDA website. *See* ISDA, Small Bang Protocol List of Adhering Parties, *available at https://www.isda.org/traditional-protocol/small-bang-protocol/adhering-parties/;* ISDA, Small Bang Protocol List of Adhering Parties, *https://www.isda.org/traditional-protocol/big-bang-protocol/adhering-parties/.*

[825] *See* 15 U.S.C. 80b–1 through 80b–21. The staff in the Division of Economic and Risk Analysis determined whether an entity is an SEC registered investment adviser using the Investment Adviser Public Disclosure website. *See supra* note 824.

TABLE 3—THE NUMBER OF TRANSACTING AGENTS BY COUNTERPARTY TYPE AND THE FRACTION OF TOTAL TRADING ACTIVITY, FROM NOV. 2006 THROUGH SEP. 2022, REPRESENTED BY EACH COUNTERPARTY TYPE

Transacting agents	Number	Percent	Transaction share (percent)
Investment Advisers	1,891	78.9	15.0
—SEC registered	*762*	*31.8*	*10.0*
Banks (non-ISDA-recognized SBS dealers)	279	11.6	3.3
Pension Funds	31	1.3	0.1
Insurance Companies	49	2.0	0.2
ISDA-Recognized SBS Dealers [a]	17	0.7	81.3
Other [b]	130	5.4	0.2
Total	2,397	100.0	100

[a] For the purpose of this analysis, the ISDA-recognized SBS dealers are those identified by ISDA as belonging to the G14 or G16 dealer group during the period. *See, e.g.,* ISDA, 2010 ISDA Operations Benchmarking Survey (2010), *available at https://www.isda.org/a/5eiDE/isda-operations-survey-2010.pdf.*

[b] This category excludes clearing counterparties (CCPs). Same-day cleared trades are recorded in the DTCC dataset as two clearing legs, each between a CCP (ICE Clear Credit, ICE Clear Europe, and LCH.Clearnet) and the original counterparty in the underlying trade. As these are not price-forming trades, the counts in the last column of the table are adjusted to reflect the original counterparties, excluding a CCP. Though original counterparties cannot be paired up to same-day cleared trades, to adjust for same-day clearing each leg against the CCP is counted as one half of a transaction and the notional amount of the trade is halved as well.

Principal holders of CDS risk exposure are represented by ''accounts'' in DTCC–TIW.[826] The staff's analysis of these accounts in DTCC–TIW shows that the 2,397 transacting agents classified in Table 3 represent 16,061 principal risk holders. Table 4 below classifies these principal risk holders by their counterparty type and whether they are represented by a registered or unregistered investment adviser.[827] For instance, banks in Table 3 allocated transactions across 375 accounts, of which 35 were represented by investment advisers. In the remaining instances, banks traded for their own accounts. Meanwhile, ISDA-recognized SBS dealers in Table 3 allocated transactions across 104 accounts. Private funds are the largest type of account holders that the Commission was able to classify.[828]

TABLE 4—THE NUMBER AND PERCENTAGE OF ACCOUNT HOLDERS—BY TYPE—WHO PARTICIPATE IN THE SBS MARKET THROUGH A REGISTERED INVESTMENT ADVISER, AN UNREGISTERED INVESTMENT ADVISER, OR DIRECTLY AS A TRANSACTING AGENT, FROM NOV. 2006 THROUGH SEP. 2022

Account holders by type	Number	Represented by a registered investment adviser		Represented by an unregistered investment adviser		Participant is a transacting agent [a]	
			(percent)		(percent)		(percent)
Private Funds	4,816	2,486	52	2,271	47	59	1
DFA Special Entities	1,631	1,565	96	44	3	22	1
Registered Investment Companies	1,454	1,367	94	83	6	4	0
Banks (non-ISDA-recognized SBS dealers)	375	26	7	9	2	340	91
Insurance Companies	356	219	62	49	14	88	25
ISDA-Recognized SBS Dealers	104	0	0	0	0	104	100
Foreign Sovereigns	98	71	72	7	7	20	20
Non-Financial Corporations	129	96	74	10	8	23	18
Finance Companies	62	46	74	0	0	16	26
Other/Unclassified	7,036	4,262	61	2,477	35	297	4
All	16,061	10,138	63	4,950	31	973	6

[a] This column reflects the number of participants who are also trading for their own accounts.

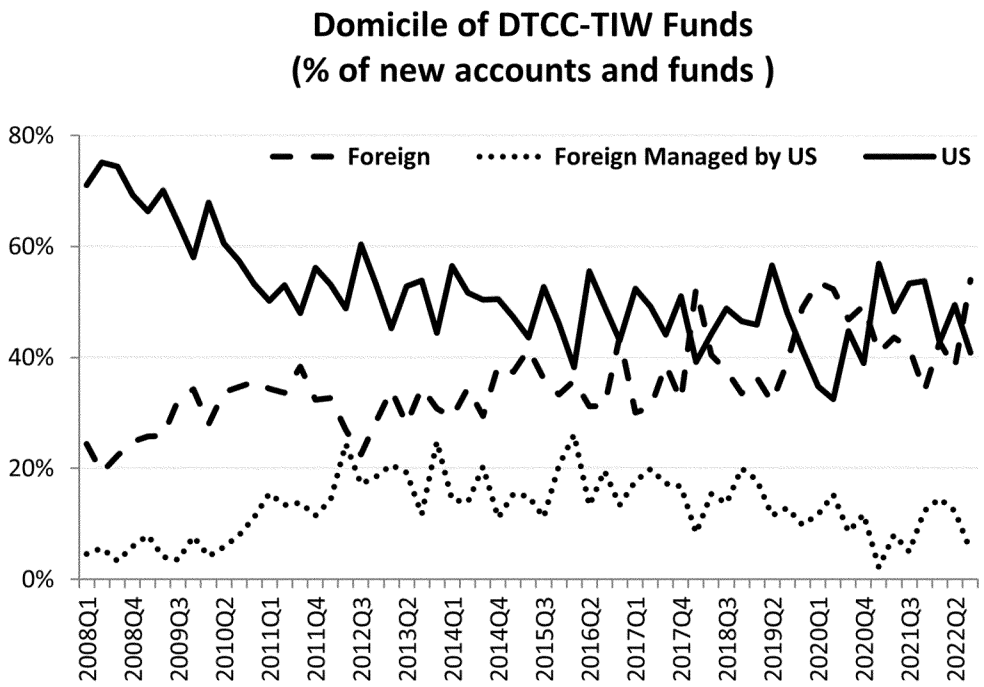
As depicted in Figure 1 below, domiciles of new accounts participating in the single-name CDS market have shifted over time. It is unclear whether these shifts represent changes in the types of participants active in this market, changes in reporting, or changes in transaction volumes in CDS referencing particular underliers. For example, the percentage of new entrants that are foreign accounts increased from 24.4% in the first quarter of 2008 to approximately 53% in the third quarter of 2022, which might reflect an increase in participation by foreign account holders in the single-name CDS market, though the total number of new entrants that are foreign accounts decreased from

[826] ''Accounts'' as defined in the DTCC–TIW context are not equivalent to ''accounts'' in the definition of ''U.S. person'' in SEA Rule 3a71–3(a)(4)(i)(C). They also do not necessarily represent separate legal persons. One entity or legal person might have multiple accounts. For example, a bank may have one DTCC–TIW account for its U.S. headquarters and one DTCC–TIW account for one of its foreign branches.

[827] Unregistered investment advisers include all investment advisers not registered under the Investment Advisers Act and might include investment advisers registered with a state or a foreign authority, as well as investment advisers that are exempt reporting advisers under section 203(*l*) or 203(m) of the Investment Advisers Act.

[828] Most of the funds that could not be classified appear to be private funds. For the purposes of this discussion, ''private fund'' encompasses various unregistered investment vehicles, including hedge funds, private equity funds, and venture capital funds. There remain over almost 7,000 DTCC–TIW accounts unclassified by type. Although unclassified, Commission staff manually reviewed each account to verify that it was not likely to be a special entity under SEA Rule 15Fh–2(d) and instead was likely to be an entity such as a corporation, an insurance company, or a bank.

112 in the first quarter of 2008 to 62 in the third quarter of 2022.[829] Additionally, the percentage of the subset of new entrants that are foreign accounts managed by U.S. persons increased from 4.6% in the first quarter of 2008 to 5.2% in the third quarter of 2022, and the absolute number changed from 21 to 6, which also might reflect more specifically the flexibility with which market participants can restructure their market participation in response to regulatory intervention, competitive pressures, and other incentives.[830] At the same time, apparent changes in the percentage of new accounts with foreign domiciles might also reflect improvements in reporting by market participants to DTCC–TIW, an increase in the percentage of transactions between U.S. and non-U.S. counterparties, and/or increased transactions in single-name CDS on U.S. reference entities by foreign persons.[831]



SOURCE: DTCC – TIW. "US" refers to the percentage of new accounts with a domicile in the United States. "Foreign" refers to the percentage of new accounts with a domicile outside the United States and not managed or affiliated with a U.S. entity. "Foreign Managed by US" refers collectively to the percentage of new accounts outside the United States that are managed by a U.S. person, new accounts outside the United States for a foreign branch of a U.S. person, and new accounts outside the United States for a foreign subsidiary of a U.S. person.[a] Unique new accounts are aggregated each quarter and percentages are computed on a quarterly basis from Jan. 2008 through Nov. 2022.

[a] New accounts outside the United States for a foreign subsidiary of a U.S. person would likely only be subject to the trade execution requirement, should it be in force for single-name CDS, if the U.S. parent provided a guarantee. As such, not all of the "Foreign Managed by US" accounts in this figure would be subject to the trade execution requirement, should it be in force for single-name CDS.

Figure 2 below describes the percentage of global, notional transaction volume in North American corporate single-name CDS reported to DTCC–TIW between January 2011 and September 2022, separated by whether transactions are between two ISDA-recognized SBS dealers (''interdealer transactions'') or whether a transaction has at least one non-SBS dealer counterparty. Figure 2 also shows that the portion of the notional volume of North American corporate single-name CDS represented by interdealer transactions has remained fairly constant through 2015, before falling from approximately 68% in 2015 to under 40% in 2022. This change corresponds to the availability of clearing to non-SBS dealers. Interdealer transactions continue to represent a significant fraction of trading activity, even as notional volume has declined over the past 12 years,[832] from just

[829] These estimates were calculated by Commission staff using DTCC–TIW data.

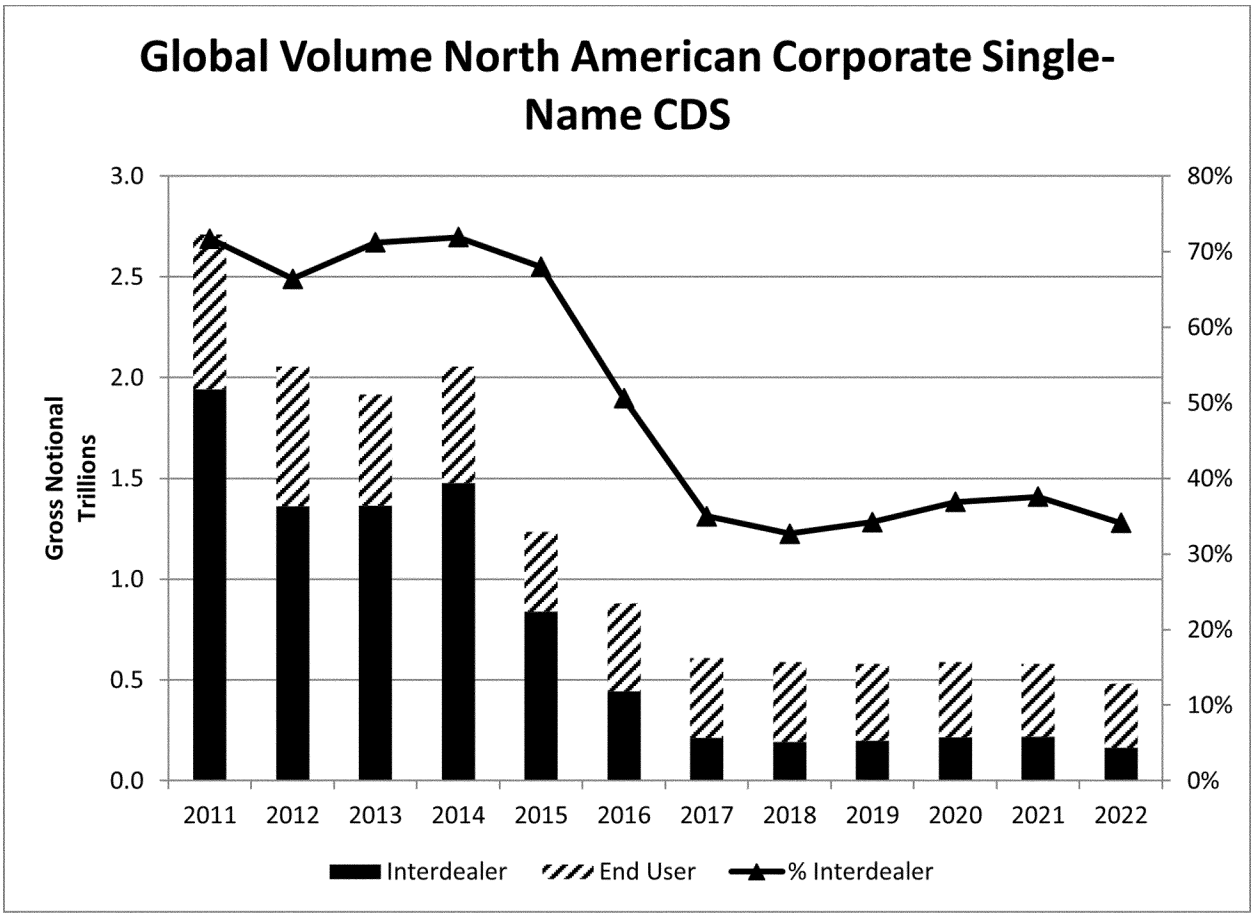
[830] *See* Charles Levinson, *U.S. banks moved billions in trades beyond the CFTC's reach,* Reuters (Aug. 21, 2015) (retrieved from Factiva database).

The estimates of 21 and 6 were calculated by Commission staff using DTCC–TIW data.

[831] *See supra* note 820 (discussing the single-name CDS transactions that are in the DTCC–TIW data).

[832] The start of this decline predates the enactment of the Dodd-Frank Act and the proposal of rules thereunder.

under $2 trillion in 2011 to less than $500 billion in 2022.



SOURCE: DTCC CDS – TIW. Global, notional trading volume in North American corporate single-name CDS by calendar year and the fraction of volume that is interdealer. These statistics were calculated using data from the entire calendar year for 2011 through 2021. For 2022, these statistics were calculated using data from Jan. 2022 to Sep. 2022. Same-day cleared trades are assumed to be either interdealer or between an SBS dealer and an end user (transactions between two end users are rare in both cleared and uncleared trading).

The high level of interdealer trading activity reflects the central position of a small number of SBS dealers, each of which intermediates trades with many hundreds of counterparties. While the Commission is unable to quantify the current level of trading costs for single-name CDS, these SBS dealers appear to enjoy market power as a result of their small number and the large proportion of order flow that they intermediate.

As shown in Figure 3 below, half of the trading activity in North American corporate single-name CDS was between counterparties domiciled in the United States and counterparties domiciled abroad. Using the self-reported registered office location of the DTCC–TIW accounts as a proxy for domicile, the Commission estimates that only 13% of the global transaction volume by notional volume between January 2008 and September 2022 was between two U.S.-domiciled counterparties, compared to 50% entered into between one U.S.-domiciled counterparty and a foreign-domiciled counterparty, and 37% entered into between two foreign-domiciled counterparties.[833]

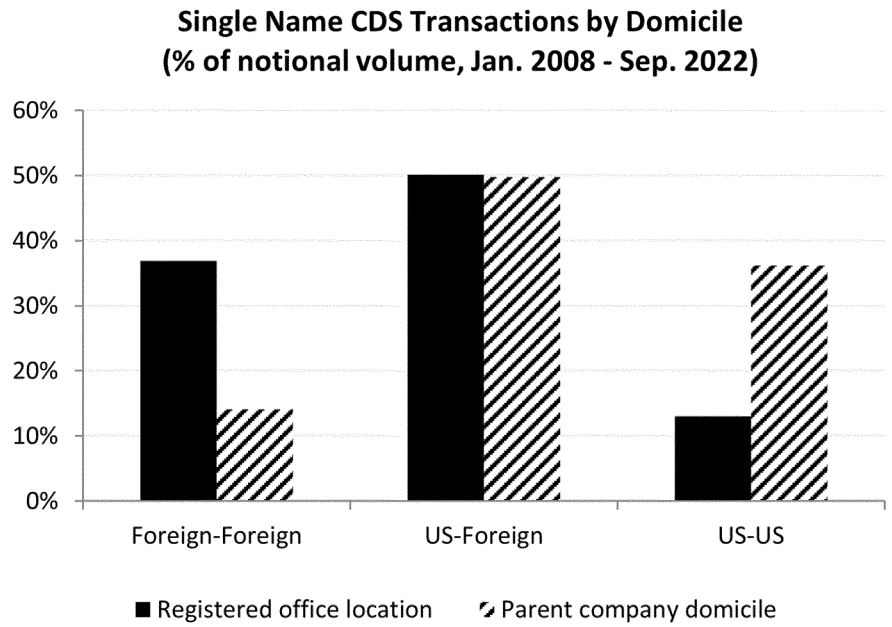
If the Commission instead considers the number of cross-border transactions from the perspective of the domicile of the corporate group (*e.g.,* by classifying a foreign bank branch or foreign subsidiary of a U.S. entity as domiciled in the United States), the percentages shift significantly. Under this approach, the fraction of transactions entered into between two U.S.-domiciled counterparties increases to 36% and remains at 50% for transactions entered into between a U.S.-domiciled counterparty and a foreign-domiciled counterparty.[834] By contrast, the proportion of activity between two foreign-domiciled counterparties drops from 37% to 14%. This change in

[833] For purposes of this discussion, the Commission has assumed that the registered office location reflects the place of domicile for the fund or account, but this domicile does not necessarily correspond to the location of an entity's sales or trading desk. *See* ANE Adopting Release, 81 FR at 8607 n.83.

[834] These estimates do not indicate the fraction of North American corporate single-name CDS transactions that would be subject to the trade execution requirement, if it were in force for such transactions. In particular, if the trade execution requirement were in force for North American corporate single-name CDS, a foreign subsidiary of a U.S. entity transacting in such CDS would only be subject to the trade execution requirement if the U.S. parent provides a guarantee to the foreign subsidiary.

respective shares based on different classifications suggests that the activity of foreign subsidiaries of U.S. firms and foreign branches of U.S. banks accounts for a higher percentage of SBS activity than U.S. subsidiaries of foreign firms and U.S. branches of foreign banks. It also demonstrates that financial groups based in the United States are involved in an overwhelming majority (approximately 86%) of all reported transactions in North American corporate single-name CDS.

Financial groups based in the United States are also involved in a majority of interdealer transactions in North American corporate single-name CDS. Of the transactions on North American corporate single-name CDS between two ISDA-recognized SBS dealers and their branches or affiliates over the 12-month period from October 2021 to September 2022, 80.7% of transaction notional volume involved at least one account of an entity with a U.S. parent.[835] In addition, a majority of North American corporate single-name CDS transactions occur in the interdealer market or between SBS dealers and foreign non-SBS dealers, with the remaining portion of the market consisting of transactions between SBS dealers and U.S.-person non-SBS dealers. Specifically, 86% of North American corporate single-name CDS transactions involved either two ISDA-recognized SBS dealers or an ISDA-recognized SBS dealer and a foreign non-SBS dealer. Approximately 14% of such transactions involved an ISDA-recognized SBS dealer and a U.S.-person non-SBS dealer.



SOURCE: DTCC CDS – TIW. The fraction of notional volume in North American corporate single-name CDS between (1) two U.S.-domiciled accounts, (2) one U.S.-domiciled account and one non-U.S.-domiciled account, and (3) two non-U.S.-domiciled accounts, computed from Jan. 2008 through Sep. 2022.

3. Other Markets and Regulatory Frameworks

The numerous financial markets are integrated, often attracting the same market participants that trade across corporate bond, swap, and SBS markets, among others.[836] This is notwithstanding the fact that the SBS market is a small fraction of the swap market[837] and the single-name CDS market, which falls under SEC jurisdiction, is slightly smaller than the index CDS market, which falls under CFTC jurisdiction.[838] For example, persons who register as SBS dealers and major SBS participants are likely also to be engaged in swap activity. In part, this overlap reflects the relationship between single-name CDS contracts, which are SBS, and index CDS contracts, which may be swaps or SBS. A single-name CDS contract covers default events for a single reference entity or reference security. Index CDS contracts and related products make payouts contingent on the default of index components and allow participants in these instruments to gain exposure to the credit risk of the basket of reference entities that comprise the index, which is a function of the credit risk of the index components. A default event for a reference entity that is an

[835] Since the Commission is unable to pair up the same-day cleared trades, this 80.7% estimate is based on bilateral trades that were not same-day cleared in the 12-month period from Oct. 2021 to Sept. 2022.

[836] *See* Rule 194 Proposing Release, 80 FR at 51711.

[837] *See* ISDA–SIFMA Letter, *supra* note 18, at 2 (agreeing with the Commission's statement in the Proposing Release that the SBS market is a small fraction of the swap market).

[838] As of Nov. 25, 2022, the SBS market had a gross notional amount outstanding of approximately $8.5 trillion (*see supra* section I and section XVII.B.2, Table 1), while the swap market (comprising, for purposes of this discussion, swaps in the interest rate, credit, and foreign-exchange asset classes) had a gross notional amount outstanding of approximately $352 trillion. *See supra* section I. The gross notional amount outstanding in single-name CDS (both corporate and sovereign) was approximately $4.3 trillion (*see supra* section XVII.B.2, Table 1), while the gross notional amount outstanding in index CDS (including index CDS tranches) was approximately $4.5 trillion. Data on gross notional amount outstanding in index CDS is from CFTC Swaps Report, *available at https://www.cftc.gov/MarketReports/SwapsReports/L3Grossexp.html* (accessed on Sept. 27, 2023).

index component will result in payoffs on both single-name CDS written on the reference entity and index CDS written on indices that contain the reference entity. Because of this relationship between the payoffs of single-name CDS and index CDS products, the prices of these products depend upon one another,[839] creating hedging opportunities across these markets.

These hedging opportunities mean that participants that are active in one market are likely to be active in the other. Commission staff analysis of approximately 3,829 DTCC–TIW accounts that participated in the market for single-name CDS in the 12-month period from October 2021 to September 2022 revealed that approximately 2,836 of those accounts, or 74%, also participated in the market for index CDS. Of the accounts that participated in both markets, data regarding transactions in these 12 months suggest that, conditional on an account transacting in notional volume of index CDS in the top third of accounts, the probability of the same account landing in the top third of accounts in terms of single-name CDS notional volume is approximately 53%; by contrast, the probability of the same account landing in the bottom third of accounts in terms of single-name CDS notional volume is only 12%. As a result of cross-market participation, informational efficiency, pricing, and liquidity may spill over across markets.[840]

Of the 51 registered SBS dealers, 44 are dually registered with the CFTC as swap dealers and are therefore subject to CFTC requirements for entities registered with the CFTC as swap dealers. Further, of the 51 registered SBS dealers, 30 have a prudential regulator.

4. Number of Entities That Likely Will Register as SBSEFs

Entities that will seek to register with the Commission as SBSEFs are likely to be SEFs that are active in the index CDS market. Three commenters are generally supportive of this belief, stating that the entities most likely to register as SBSEFs are those that are already registered with the CFTC as SEFs.[841] No commenters express disagreement with this belief. Currently, 24 SEFs are registered with the CFTC.[842] Of these SEFs, seven list index CDS for trading.[843] If these SEFs were to list single-name CDS or other SBS for trading, they would be required to register as SBSEFs with the Commission. In 2022, index CDS volume on U.S. SEFs was distributed as follows: one SEF had the largest share of index CDS volume (in notional amount) at $10.6 trillion (68%); one SEF had the second largest share at $3.4 trillion (22%); and the remaining 10% of volume was shared among four other SEFs.[844] The number of SBSEF registrants most likely falls between two and seven, but there is uncertainty around the upper end of this estimate. The likely number of SBSEF registrants is five.

5. SBS Trading on Platforms

By analyzing SBS transactions reported to registered SBSDRs,[845] the Commission has estimated the extent of SBS trading on platforms. Of the new transactions in credit SBS executed between November 8, 2021, and December 2, 2022, 14,163 were executed on platforms (2% of all new transactions in credit SBS). During the same period, 329 new transactions in equity SBS were executed on platforms (less than 0.01% of all new transactions in equity SBS), while one new transaction in interest rate SBS was executed on a platform (0.01% of all new transactions in interest rate SBS). These observations suggest that the vast majority of SBS trading continues to be conducted bilaterally in the OTC market.

The Commission identified 18 platforms on which new SBS transactions were executed between November 8, 2021, and December 2, 2022. Of these 18 platforms, 14 are foreign SBS trading venues and four are U.S. SBS trading venues. Of the four U.S. SBS trading venues, two are CFTC-registered SEFs and two are affiliated with CFTC-registered SEFs. Of the new transactions in credit SBS executed between November 8, 2021, and December 2, 2022, 710 were executed on non-U.S. platforms and involved at least one counterparty that is a U.S. person or a non-U.S. person whose performance under the SBS is guaranteed by a U.S. person (0.1% of all new transactions in credit SBS). During the same period, 241 new transactions in equity SBS were executed on a non-U.S. platform and involved at least one counterparty that is a U.S. person or a non-U.S. person whose performance under the SBS is guaranteed by a U.S. person (less than 0.01% of all new transactions in equity SBS transactions).[846]

One commenter states that only a minority of SEFs currently offer trading in SBS and SEFs that do offer trading in SBS estimate that they have approximately 50 or fewer trades per day in SBS.[847] As discussed earlier, the Commission identified two CFTC-registered SEFs on which new SBS

[839] ''Correlation'' typically refers to linear relationships between variables; ''dependence'' captures a broader set of relationships that may be more appropriate for certain swaps and SBS. *See, e.g.,* George Casella & Roger L. Berger, Statistical Inference 171 (2nd ed. 2002).

[840] *See* Business Conduct Standards Release, *supra* note 101, 81 FR at 30108; Christopher L. Culp, Andria van der Merwe, & Bettina J. Starkle, *Single-name Credit Default Swaps: A Review of the Empirical Academic Literature* 71–85 (ISDA Study, Sept. 2016), *available at https://www.isda.org/a/KSiDE/single-name-cdsliterature-review-culp-van-der-merwe-staerkleisda.pdf;* Patrick Augustin, Marti G. Subrahmanyam, Dragon Y. Tang, & Sarah Q. Wang, Credit Default Swaps: Past, Present, and Future, 8 Ann. Rev. Fin. Econ. 175 (2016).

[841] *See* ICE Letter, *supra* note 18, at 1–2; ICI Letter, *supra* note 18, at 1; Tradeweb Letter, *supra* note 18, at 1–2.

[842] *See* CFTC, Swap Execution Facilities (registered) (retrieved June 28, 2023), *available at https://www.cftc.gov/IndustryOversight/IndustryFilings/SwapExecutionFacilities?Status=Registered&Date_From=&Date_To=&Show_All=0.*

[843] For purposes of this discussion, options on index CDS and index CDS tranches are included as part of index CDS. For SEFs that list index CDS for trading, *see* BGC Derivative Markets, L.P. Contract Specifications (Oct. 31, 2022), *available at http://www.bgcsef.com/wp-content/uploads/2022/11/BGC-SEF-Contract-Specifications_10-31-22.pdf;* Bloomberg SEF LLC Rulebook (Dec. 5, 2022), *available at https://assets.bbhub.io/professional/sites/10/BSEF-Effective-Rulebook.pdf;* GFI Swaps Exchange: Products & Contract Specifications, GFI Group, *available at http://www.gfigroup.com/markets/gfi-sef/products/;* ICE Swap Trade, LLC, *Swap Execution Facility Rulebook Version: 2.42* (effective May 8, 2023), *available at https://www.theice.com/publicdocs/swap_trade/Rulebook.pdf;* TW SEF LLC, *Swap Execution Facility Rules* (effective Jan. 6, 2023), *available at https://www.tradeweb.com/48ceb9/globalassets/our-businesses/market-regulation/sef-rulebook-jan-2023/tw-sef-rulebook-1.6.23.pdf;* Tradition SEF, *Appendix B to Tradition SEF Rulebook: Credit Product Listing, available at https://www.traditionsef.com/assets/regulatory/Rulebook-Appendix-B-TSEF-Rulebook-6-02-2023.pdf;* tpSEF Inc., *tpSEF Inc. Rulebook Appendix B: tpSEF Inc. Swap Specifications* (effective Mar. 7, 2023), *available at https://www.tullettprebon.com/swap_execution_facility/documents/tpSEF%20-%20Rulebook%20-%20Appendix%20B%20-%20Swap%20Specifications.pdf?2023411.*

[844] Index CDS volume traded on SEFs is from Futures Industry Association's SEF Tracker. *See SEF Tracker Historical Volume,* FIA, *available at https://www.fia.org/monthly-volume.*

[845] The estimates presented in this section differ from those presented in the Proposing Release, *supra* note 1, 87 FR at 28946, because of a number of reasons. First, staff from the Division of Economic and Risk Analysis derived the estimates presented herein using reports of SBS transactions executed between Nov. 8, 2021, and Dec. 2, 2022, whereas in the Proposing Release, the staff used reports of SBS transactions executed between Nov. 8, 2021, and Feb. 28, 2022. Second, the staff implemented additional filters to the reports of SBS transactions to (1) more accurately identify and exclude from the analysis those SBS transactions that arise from the allocation of an executed bunched order; (2) exclude potentially erroneous reports (*e.g.,* SBS transactions with extremely large or small notional amount or SBS transactions with improperly sequenced timestamps); (3) identify the current version of a given report; and (4) exclude duplicate reports.

[846] The one new transaction in interest rate SBS, discussed earlier in this section, was executed on a U.S. platform.

[847] *See* ISDA–SIFMA Letter, *supra* note 18, at 2.

transactions were executed between November 8, 2021, and December 2, 2022. During this period, one CFTC-registered SEF had on average 2.4 new SBS transactions executed per day, while the other CFTC-registered SEF had on average 2.8 new SBS transactions executed per day. These estimates are broadly consistent with the commenter's estimate.

6. Global Regulatory Efforts

In 2009, the G20 leaders—whose membership includes the United States, 18 other countries, and the European Union—addressed global improvements in the OTC derivatives market. They expressed their view on a variety of issues relating to OTC derivatives contracts.[848] In subsequent summits, the G20 leaders have returned to OTC derivatives regulatory reform and reaffirmed their goal of completing such reform.[849]

Foreign legislative and regulatory efforts have generally focused on five areas: (1) moving standardized OTC derivatives onto organized trading platforms; (2) requiring central clearing of OTC derivatives; (3) requiring post-trade reporting of transaction data to trade repositories; (4) establishing or enhancing capital requirements for non-centrally cleared OTC derivatives transactions; and (5) establishing or enhancing margin and other risk mitigation requirements for non-centrally cleared OTC derivatives transactions. The rules being adopted in this release concern the registration and regulation of SBSEFs, a type of organized trading platform.

As of the end of 2022, platform trading requirements were in force in 12 foreign jurisdictions while seven jurisdictions were in the process of proposing legislation or rules to implement platform trading requirements.[850] Eight foreign jurisdictions have made determinations with respect to the specific OTC derivatives that are required to be traded on platforms.[851]

7. Trading Models

Unlike the markets for cash equity securities and listed options, the market for SBS currently is characterized by bilateral negotiation in the OTC swap market; is largely decentralized; has many non-standardized instruments; and has many SBS that are not centrally cleared. The lack of uniform rules concerning the trading of SBS and the one-to-one nature of trade negotiation in SBS has resulted in different models for the trading of these securities, ranging from bilateral negotiations carried out over the telephone, to RFQ systems (*e.g.,* single-dealer and multi-dealer RFQ platforms), request-for-stream protocol, and limit order books outside the United States, as more fully described below. The use of electronic media to execute transactions in SBS varies greatly across trading models, with some models being highly electronic whereas others rely almost exclusively on non-electronic means such as the telephone. The reasons for use of, or lack of use of, electronic media vary from such factors as user preference to limitations in the existing infrastructure of certain trading platforms. The description below of the ways in which SBS may be traded is based in part on discussions with market participants and incorporates comments received on the Proposing Release.

The Commission uses the term ''bilateral negotiation'' to refer to the model whereby one party uses the telephone, email, or other communications to contact directly a potential counterparty to negotiate an SBS transaction. Once the terms are agreed, the SBS transaction is executed and the terms are memorialized.[852] In a bilateral negotiation, there might be no pre-trade or post-trade transparency available to the market because only the two parties to the transaction are aware of the terms of the negotiation and the final terms of the agreement. Further, no terms of the proposed transaction are firm until the transaction is executed. However, reputational costs generally serve as a deterrent to either party's failing to honor any quoted terms. Dealer-to-customer bilateral negotiation currently is used for all SBS asset classes, and particularly for trading in less liquid SBS, in situations where the parties prefer a privately negotiated transaction, such as for a large notional transaction, or in other circumstances in which it is not cost-effective for a party to the trade to use one of the execution methods described below.

One commenter elaborates on this model of trading, focusing specifically on dealer-to-client trading in the SBS market.[853] According to this commenter, at the moment, dealer-to-client trading in security-based swaps is largely opaque and fragmented, with most executions arising out of one-to-one private negotiations. When engaging with clients, liquidity providers typically provide ''indicative'' quotes (as opposed to firm binding quotes), inviting interested clients to follow-up bilaterally in order to obtain an executable price for a specific instrument.[854] Given that these executable prices are often only then honored at that exact moment in time, clients are unable to effectively put liquidity providers in competition and have little to no pre-trade transparency regarding other available prices in the market.[855] Instead clients face the choice of either accepting the first executable price received or starting over with a new one-to-one negotiation, where pricing could move against the client as its trading interest is sequentially disclosed to additional market participant.[856] The commenter states that this opaque and fragmented execution process impairs client access to best execution by denying clients the ability to effectively compare and evaluate the quality of prices.[857]

Another model for the trading of SBS is the RFQ system. An RFQ system typically allows market participants to obtain quotes for a particular SBS by simultaneously sending messages to one or more potential respondents (SBS

[848] *See* G20, *Leaders' Statement: The Pittsburgh Summit* (Sept. 24–25, 2009) at para. 13.

[849] *See, e.g.,* G20, Osaka Summit Declaration (June 28–29, 2019) at para. 19; Rome Summit Declaration (Oct. 30–31, 2021) at para. 40.

[850] Apart from the 12 foreign jurisdictions, the United States is considered to have platform trading requirements in place based on the CFTC's implementation of platform trading requirements. *See* FSB, *OTC Derivatives Market Reforms: Implementation Progress in 2022* Tables 1 & K (Nov. 7, 2022), *available at https://www.fsb.org/wp-content/uploads/P071122.pdf* (describing progress made towards implementing platform trading requirements in 2022) and FSB, *OTC Derivatives Market Reforms: 2019 Progress Report on Implementation* Table A (Oct. 15, 2019), *available at https://www.fsb.org/2019/10/otc-derivatives-market-reforms-2019-progress-report-on-implementation/* (discussing the CFTC's implementation of platform trading requirements).

[851] These jurisdictions are China (bond forwards; certain currency forwards, options, and swaps); the European Union (certain index CDS and certain IRS denominated in Euro); India (certain overnight index swaps); Indonesia (equity and commodity derivative products); Japan (selected Yen-denominated IRS); Mexico (certain Peso-denominated IRS); Singapore (certain IRS denominated in Euro, U.S. dollar, and British pound); and United Kingdom (certain index CDS and certain IRS denominated in Euro and certain IRS denominated in British pound). *See* FSB, *2019 Progress Report* (Table R); FSB, *Implementation Progress in 2022* (footnote 12), *supra* note 850, and Financial Conduct Authority, *Register of derivatives subject to the trading obligation under article 28 of UK MiFIR* (July 24, 2023), *available at https://register.fca.org.uk/servlet/servlet.FileDownload?file=0150X000006gbbG.* In its 2022 report, *see supra* note 850, the FSB noted no change in status in the implementation of platform trading requirements since its 2019 report.

[852] *See, e.g.,* Trade Acknowledgement and Verification Adopting Release, *supra* note 802, 81 FR at 39809.

[853] *See* Citadel Letter, *supra* note 18, at 8.

[854] *Id.*

[855] *Id.*

[856] *Id.*

[857] *Id.*

dealers).[858] The initiating participant is typically required to provide information related to the request in a message, which may include the name of the initiating participant, SBS identifier, side, and size. SBS dealers that observe the initiating participant's request have the option to respond to the request with a price quote.[859] These respondents are often, though not always, pre-selected. The initiating participant can then select among the respondents by either accepting one of multiple responses or rejecting all responses, usually within a ''good for'' time period. After the initiating participant and a respondent agree on the terms of the trade, the trade will then proceed to post-trade processing.

RFQ systems provide a certain degree of pre-trade transparency in that the initiating participant can observe the quotes it receives (if any) in response to its RFQ. The number of quotes received depends, in part, on the number of respondents that are invited to participate in the RFQ. As the Commission discussed elsewhere, several factors may influence the number of respondents that are invited to participate in an RFQ.[860] First, the RFQ system itself may limit the total number of respondents that can be selected for a single RFQ, typically to five counterparties. This limitation may encourage SBS dealers to respond to RFQs, since it reduces the number of other SBS dealers they would compete with in any give request session. Second, the initiating participant may have an incentive to limit the degree of information leakage. If the trade the initiating participant is seeking to complete with the help of the RFQ is not completely filled in that one session, and other participants know this, quotes the initiating participant receives elsewhere may be affected, including in subsequent RFQ sessions. Third, respondents and initiators both have an incentive to limit price impact because of the expense it will add to the offsetting trade that must follow. Specifically, an SBS dealer who takes a position to fill a customer order through an RFQ will often subsequently offset that position in the interdealer market. If a large number of SBS dealers are invited to participate in an RFQ, this would lead to widespread knowledge that the SBS dealer with the winning bid will now try to offset that position, which could impact the prices available to that dealer in the interdealer market.

Two commenters describe the ''request-for-stream'' trading protocol, which allows liquidity providers to stream firm prices on trading platforms such as those run by SEFs.[861] These firm prices are not required to be communicated to clients sending an RFQ on these trading platforms.

A fourth model for the trading of SBS is a limit order book system or similar system, which the Commission understands is not yet in operation for the trading of SBS in the United States.[862] Today, securities and futures exchanges in the United States display a limit order book in which firm bids and offers are posted for all participants to see, with the identity of the parties withheld until a transaction occurs.[863] Bids and offers are then matched based on price-time priority or other established parameters and trades are executed accordingly. The quotes on a limit order book system are firm. In general, a limit order book system also provides greater pre-trade transparency than the models described above, because participants can view bids and offers before placing their bids and offers. However, broadly communicating trading interest, particularly about a large trade, might increase hedging costs, and thus costs to investors, as reflected in the prices from the SBS dealers. The system can also provide post-trade transparency, to the extent that participants can see the terms of executed transactions.

The models described above represent broadly the types of trading of SBS in the OTC market today. These examples may not represent every method in existence today, but the discussion above is intended to give an overview of the models without providing the nuances of each particular type.

C. Benefits and Costs

The Commission's consideration of the benefits and costs of the adopted rules and amendments takes into account the connection between the trade execution requirement and the mandatory clearing requirement mandated by Congress. Specifically, the Dodd-Frank Act amended the SEA to require, among other things, the following with respect to SBS transactions: (1) transactions in SBS must be cleared through a clearing agency if they are required to be cleared;[864] and (2) if the SBS is subject to the clearing requirement, the transaction must be executed on an exchange or on an SBSEF registered under section 3D of the SEA or an SBSEF exempt from registration under section 3D(e) of the SEA, unless no SBSEF or exchange makes such SBS available for trading or the SBS is subject to the clearing exception in section 3C(g) of the SEA.[865] The benefits and costs associated with the trade execution requirement will not materialize unless and until the Commission makes mandatory clearing determinations, *i.e.,* determining what SBS transactions must be cleared by a clearing agency.

The general approach to finalizing requirements relating to SBS execution could mitigate costs associated with the adopted rules and amendments. As discussed in section I, the Commission's approach is to harmonize as closely as practicable with analogous CFTC rules for SEFs, unless a reason exists to do otherwise in a particular area. Based on the Commission's belief that SBSEF registrants likely would be registered SEFs that have established systems and policies and procedures to comply with CFTC rules, the Commission's general approach potentially will result in compliance costs for registered SBSEFs that are lower than compliance costs that would have resulted had the Commission chosen not to harmonize its approach as closely as practicable

[858] *See* Lynn Riggs, Esen Onur, David Reiffen, and Haoxiang Zhu, *Swap Trading After Dodd-Frank: Evidence from Index CDS,* 137 J. Financial Economics 857 (2020) (finding that, in the index CDS market, an initiating participant is more likely to send RFQs to its relationship dealers, *i.e.,* its clearing members or dealers with whom it has traded more actively in the recent past).

[859] *See id.* (finding that, in the index CDS market, a dealer's response rate to an RFQ declines with the number of dealers included in the RFQ).

[860] *See* Amendments to Exchange Act Rule 3b–16 Regarding the Definition of ''Exchange''; Regulation ATS for ATSs That Trade U.S. Government Securities, NMS Stocks, and Other Securities; Regulation SCI for ATSs That Trade U.S. Treasury Securities and Agency Securities SEA Release No. 94062 (Jan. 26, 2022), 87 FR 15496 (Mar. 18, 2022) (''ATS–G Proposal''), section VIII.B.1.a therein.

[861] *See* Citadel Letter, *supra* note 18, at 13; MFA Letter, *supra* note 18, at 8. *See* also *supra* section V.E.1(b)(iii). *See* also Lynn Riggs, Esen Onur, David Reiffen, and Haoxiang Zhu, *Swap Trading After Dodd-Frank: Evidence from Index CDS,* 137 J. Financial Economics 857 (2020) (documenting that this trading protocol—also referred to as ''request for streaming''—is one of the trading protocols used in the trading of index CDS on SEFs).

[862] With respect to swaps traded on CFTC-registered SEFs, CFTC regulation § 37.9(a) provides that Required Transactions that are not block trades must generally be executed via an order book or RFQ system. CFTC regulations §§ 37.9(d) and (e) contain exceptions to the § 37.9(a) execution requirements for certain package transactions and error trades, respectively. *See supra* section V.E.

[863] Under CFTC rules applicable to the swaps markets, § 37.9(f) prohibits the practice of post-trade name give-up for swaps that are executed, pre-arranged, or pre-negotiated anonymously on or pursuant to the rules of a SEF and intended to be cleared, subject to an exception related to certain package transactions. *See supra* section V.E (discussing Rule 815).

[864] *See* Public Law 111–203, 763(a) (adding section 3C(a)(1) of the SEA).

[865] *See id. See also* Public Law 111–203, 761(a) (adding section 3(a)(77) of the SEA to define the term ''security-based swap execution facility'').

with analogous CFTC rules for SEFs.[866] Several commenters state that the Commission's general approach would mitigate costs for registered SBSEFs and SBS market participants.[867]

In assessing the economic impact of the adopted rules and amendments, the Commission considers the broader costs and benefits associated with the application of the adopted rules and amendments, including the costs and benefits of applying the substantive Title VII requirements to the trading of SBS.[868] The Commission's analysis also considers ''assessment'' costs—*i.e.,* those that arise from current and future market participants expending resources to assess how they will be affected by Regulation SE, and could incur expenses in making this assessment even if they ultimately are not subject to rules for which they made an assessment.

Many of the benefits and costs discussed below are difficult to quantify. These benefits and costs would depend on how potential SBSEFs and their prospective members respond to the adopted rules and amendments. If potential SBSEFs perceive the costs associated with operating registered SBSEFs to be high, such that few or no entities come forward to register as SBSEFs, there could be no triggering of the trade execution requirement, which depends on MAT determinations made by registered SBSEFs (or exchanges). Under this scenario, the future state of the SBS market likely will not differ from the current baseline and the potential costs and benefits discussed below will not materialize. An alternative scenario is that prospective SBSEFs perceive the costs associated with operating registered SBSEFs to be high but nevertheless register as SBSEFs because they expect to be able to pass on such costs to their members to help maintain the commercial viability of operating a registered SBSEF. MAT determinations by registered SBSEFs will move trading of the products covered by the determinations onto SBSEFs, which can generate benefits and costs associated with increased pre-trade transparency, in addition to benefits and costs associated with the operation of regulated markets. A third possibility is that entities come forward to register as SBSEFs because they perceive the associated costs of operating SBSEFs to be low in light of the close harmonization of Regulation SE with analogous CFTC SEF rules. If these registered SBSEFs do not make MAT determinations and thus do not trigger the trade execution requirement, the benefits and costs associated with increased pre-trade transparency likely will not arise. If SBSEF trading is limited because of an absence of MAT determinations, the benefits and costs associated with the operation of regulated markets potentially will be limited as well. A fourth possibility is that entities do come forward to register as SBSEFs because they perceive the associated costs of operating SBSEFs to be low and these registered SBSEFs make MAT determinations and trigger the trade execution requirement. Under this scenario, the benefits and costs associated with increased pre-trade transparency and regulated markets likely will arise. The Commission does not have the data to determine which of the above possibilities will prevail following the adoption of the rules and amendments considered herein.

The Commission has attempted to quantify economic effects where possible, but much of the discussion of economic effects is necessarily qualitative.

1. Overarching Benefits of the Rules and Amendments

Broadly, the Commission anticipates that the new rules and amendments may bring several overarching benefits to the SBS market.

Improved Transparency. The final rules would enable the Commission to obtain information about SBSEFs, thereby facilitating the Commission's oversight of these entities.[869]

In addition, the requirements relating to pre-trade transparency would increase pre-trade transparency in the market for SBS.[870] Increased pre-trade price transparency should allow an increased number of market participants to better see the trading interest of other market participants prior to trading, which should lead to increased price competition among market participants.[871] The requirements with respect to pre-trade price transparency should lead to more efficient pricing in the SBS market.[872]

Evidence from the swap market suggests that an increase in pre-trade transparency is associated with improved liquidity and reduced transaction costs.[873] The Commission is not aware of any difference between the swap market and the SBS market that would cause the empirical findings regarding the impact of pre-trade price transparency on liquidity and transaction costs not to carry over into the SBS market, when implemented. The Commission is mindful that, under certain circumstances, pre-trade price transparency could also discourage the provision of liquidity by some market participants.[874] However, having two

[866] In section XVIII *infra,* for purposes of the PRA, the Commission estimates burdens applicable to a stand-alone SBSEF. However, the Commission anticipates that most if not all SBSEFs will be dually registered with the CFTC as SEFs, and thus will already be complying with relevant CFTC rules that have analogs to rules contained within Regulation SE. Therefore, the Commission's burden estimates may be larger for stand-alone SBSEF than may exist in practice, considering the effect of overlapping CFTC rules.

[867] *See* Bloomberg Letter, *supra* note 18, at 2, 10, 18; ICE Letter, *supra* note 18, at 2; ISDA–SIFMA Letter, *supra* note 18, at 2; SIFMA AMG Letter, *supra* note 18, at 5; Tradeweb Letter, *supra* note 18, at 1–2.

[868] In certain prior Title VII releases, the Commission had referred to such costs and benefits as programmatic costs and benefits. *See, e.g.,* Regulation SBSR Adopting Release I, *supra* note 140.

[869] For example, Rule 826, among other things, requires an SBSEF to maintain records of its business activities (including a complete audit trail) for a period of five years and report to the Commission such information as the Commission determines to be necessary or appropriate for performing the duties of the Commission under the SEA. *See infra* this section for a discussion of how Regulation SE would provide the means for the Commission to gain better insight into and oversight of SBSEFs and the SBS market.

[870] Rules 803(a)(2) and (3) require an SBSEF to offer, at a minimum, an order book for SBS trading, subject to certain exceptions related to package transactions. Rule 815(a) requires SBS transactions subject to the trade execution requirement to be executed using either an order book or via an RFQ-to-3 system. Rule 816 sets forth the process by which an SBSEF would subject an SBS to the trade execution requirement. Rule 817 informs market participants of the date on which the trade execution requirement for a particular SBS commences. Rule 832 describes those cross-border SBS transactions that would be subject to the trade execution requirement.

[871] *See, e.g.,* Ananth Madhavan, *Market Microstructure: A Practitioner's Guide,* 58 Fin. Analysts J., at 38 (2002) (nondisclosure of pre-trade price information benefits dealers by reducing price competition).

[872] *See, e.g.,* Ekkehart Boehmer, *et al., Lifting the Veil: An Analysis of Pre-trade Transparency at the NYSE,* 60 J. Fin. 783 (2005) (greater pre-trade price transparency leads to more efficient pricing).

[873] *See* Evangelos Benos, Richard Payne, and Michalis Vasios, *Centralized Trading, Transparency, and Interest Rate Swap Market Liquidity: Evidence from the Implementation of the Dodd-Frank Act,* 55 J. Fin. and Quantitative Analysis 159 (2020) (finding, among other things, that imposition of the CFTC's trade execution requirement improved the liquidity of IRS that were subject to the requirement, and that the liquidity improvement was associated with more intense competition between swap dealers); Y.C. Loon and Zhaodong (Ken) Zhong, *Does Dodd-Frank Affect OTC Transaction Costs and Liquidity? Evidence from Real-Time CDS Trade Reports,* 119 J. Fin. Econ. 645 (2016) (finding that index CDS transactions executed on SEFs have lower transaction costs and improved liquidity than index CDS transactions executed bilaterally).

[874] *See, e.g.,* Ananth Madhavan, *et al., Should Securities Markets Be Transparent?,* 8 J. Fin. Markets 265 (2005) (finding that an increase in pre-trade price transparency leads to lower liquidity and higher execution costs, because limit-order traders are reluctant to submit orders given that their orders essentially represent free options to other traders).

execution methods for Required Transactions (limit order book and RFQ-to-3) would provide market participants with flexibility in the degree of pre-trade transparency they wish to employ. Using RFQ-to-3, a market participant could choose to reveal its trading interest to no more than three market participants; using a limit order book, the market participant would reveal its trading interest to all other market participants that have access to the same limit order book, which may exceed three market participants. The flexibility in the degree of pre-trade transparency should diminish potential concerns associated with the exposure of pre-trade trading interest.

Two commenters agree that the proposal would increase transparency in the SBS market.[875] One of these commenters believes that the introduction of multilateral trading protocols would increase pre-trade transparency and competition, which should improve liquidity conditions, reduce transaction costs, and facilitate execution quality analysis, as clients will be able to put liquidity providers in direct competition.[876]

One commenter believes that proposed Rule 819(c) would help ensure that investment advisers to regulated funds will be able to participate on SBSEFs, accessing the pricing and other market information that may be available on SBSEF, which would increase transparency in the derivatives market.[877] The Commission agrees that Rule 819(c), by requiring an SBSEF to provide any ECP with impartial access to its market(s) and market services, would help ensure that ECPs, including investment advisers, are able to access pricing and other market information on SBSEFs thereby increasing transparency in the SBS market.

Improved oversight of trading. Regulation SE requires, among other things, that SBSEFs maintain an audit trail and automated trade surveillance system; conduct real-time market monitoring; establish and enforce rules for information collection; and comply with reporting and recordkeeping requirements.[878] These requirements are designed to provide an SBSEF with sufficient information to oversee trading on its market, including detecting and deterring abusive trading practices. Additionally, an SBSEF shall permit trading only in SBS that are not readily susceptible to manipulation[879] and adopt rules that are reasonably designed to allow the SBSEF to intervene as necessary to maintain markets with fair and orderly trading and to prevent or address manipulation or disruptive trading practices.[880]

This framework could enhance investor protection and increase confidence in a well-regulated market among SBS market participants, which could in turn make them more willing to increase their participation or entice new participants. An increase in participation in the SBS market would, all else being equal, benefit the SBS market as a whole. Further, to the extent that market participants utilize SBS to better manage their risk with respect to a position in underlying securities or assets, their participation in the SBS market could impact their willingness to participate in the underlying asset markets. Thus, Regulation SE could benefit the securities markets overall by encouraging a more efficient, and potentially higher, level of capital investment.

Improved access and competition. Currently, the SBS market is dominated by a small group of SBS dealers.[881] A mandatory clearing determination by the Commission, followed by a MAT determination by one or more SBSEFs or exchanges, should help foster greater competition in the trading of SBS by promoting greater order interaction and increasing access to and participation on SBSEFs. The final rules provide a framework for allowing a number of trading venues to register as SBSEFs and thus more effectively compete for business in SBS. Furthermore, Rule 827 is designed to promote competition generally by prohibiting an SBSEF from adopting any rules or taking any actions that unreasonably restrain trade or imposing any material anticompetitive burden on trading or clearing.

Rule 819(c), among other things, requires an SBSEF to provide any ECP with impartial access to its market(s) and market services. Rule 819(c)(4), Rule 819(g)(14), along with the new rules and amendments to the Commission's Rules of Practice allow persons who are aggrieved by a final disciplinary action, a final action with respect to a denial or conditioning of membership, or a final action with respect to a denial or limitation of access by an SBSEF to file an application for review by the Commission in a timely manner.[882] These rules and amendments are designed to improve access to, foster confidence in, and provide for the oversight of SBSEF functions by creating a procedure for making appeals to the Commission.

Taken together, these rules and amendments should foster greater access to SBSEFs by SBS market participants, which in turn could promote greater participation by liquidity providers on SBSEFs. Increased participation on SBSEFs could increase competition in liquidity provision and lower trading costs, which may lead to increased participation in the SBS market. One commenter agrees that Rule 819(c), in particular, would increase competition in the SBS market. The commenter further states that the rule would increase liquidity, efficiency, and fairness in the SBS market.[883] The Commission agrees that Rule 819(c), together with the other rules described earlier, could increase competition in the SBS market, specifically competition in liquidity provision as discussed above. To the extent that increased competition in liquidity provision lowers bid-offer spreads and transaction costs, liquidity and efficiency in the SBS market would increase. Rule 819(c), by requiring an SBSEF to provide any ECP with impartial access to its market(s) and market services, would help ensure that all ECPs will receive the same treatment with respect to access to the SBSEF's market(s) and market services and thus help to increase fairness in the SBS market.

Two commenters believe that Proposed Rule 815(f), which is designed to prohibit post-trade name give up for an SBS that is executed anonymously on an SBSEF and intended to be cleared, would increase participation on SBSEFs and in turn increase competition, liquidity, and efficiency.[884] One of these commenters also believes the proposed rule would increase fairness in the SBS markets.[885]

Rules 815(f) and 815(g) could generate such beneficial effects. The practice of post-trade name give-up increases the risk of information leakage and can

[875] *See* Bloomberg Letter, *supra* note 18, at 1; Citadel Letter, *supra* note 18, at 8.

[876] *See* Citadel Letter, *supra* note 18, at 8.

[877] *See* ICI Letter, *supra* note 18, at 11 n.6.

[878] *See* Rules 819, 821, 822, and 826.

[879] *See* Rule 820.

[880] *See* Rule 824(b)(1).

[881] *See supra* section XVII.B.2.

[882] *See* Rules 819(c)(4) and 819(g)(14); Rules 442 and 443; amendments to Rules 101, 202, 210, 401, 450, and 460. Rule 442(b), among other things, clarifies that the 30-day period for filing an application for review will not be extended absent a showing of extraordinary circumstances, which is intended to encourage parties to act timely in seeking review.

[883] *See* ICI Letter, *supra* note 18, at 2.

[884] *See id.;* SIFMA AMG Letter, *supra* note 18, at 11.

[885] *See* ICI Letter, *supra* note 18, at 2.

deter participation by liquidity seekers on SBSEFs. By prohibiting such a practice for an SBS that is executed anonymously on an SBSEF and intended to be cleared, Rule 815(f) would reduce the risk of information leakage and encourage more liquidity seekers to participate on SBSEFs. Further, by helping to protect the anonymity of market participants, Rule 815(f) could encourage a more diverse set of market participants to transact in anonymous order books.

Rule 815(g) specifies that SBSEFs shall establish and enforce rules that provide that a security-based swap that is intended to be cleared at the time of the transaction, but is not accepted for clearing at a registered clearing agency, shall be void *ab initio.* The rule would ensure that a trade that is rejected for clearing would not become a bilateral transaction, in which case the counterparties would have to divulge their identities. As such, the rule would reduce the risk of information leakage and protect the anonymity of market participants for SBS that is executed anonymously and intended to be cleared, but is nonetheless rejected for clearing. This in turn could increase participation on SBSEFs by liquidity seekers and those wishing to transact in anonymous order books, similar to Rule 815(f).

Increased participation by liquidity seekers on SBSEFs could in turn increase participation by liquidity providers and promote competition in liquidity provision. Greater participation in anonymous order books also could promote competition in liquidity provision if erstwhile liquidity seekers choose to provide liquidity in competition with SBS dealers in these order books. To the extent that increased competition in liquidity provision lowers bid-offer spreads and transaction costs, liquidity and efficiency in the SBS market would increase.

By helping to protect the anonymity of those that transact in anonymous order books, the rule would deprive SBS dealers of a means of deterring access to and participation in such order books by buy-side market participants.[886] Thus, Rule 815(g) could help promote a level playing field by ensuring that both buy-side market participants and dealers can participate in these order books.

Regulation SE would promote competition among entities that act as third-party service providers to SBSEFs. Rule 819(c) would, among other things, require an SBSEF to provide any independent software vendor with impartial access to its market(s) and market services. The rule would provide a level playing field to software vendors with respect to access to SBSEFs and promote competition among these vendors as they vie for an SBSEF's business. Rule 819(e) would permit an SBSEF to contract with a registered futures association, a DCM, a national securities exchange, a national securities association, or another SBSEF for the provision of services to assist in complying with the SEA and Commission rules thereunder, as approved by the Commission. By permitting an SBSEF to choose from a range of regulatory services providers, Rule 819(e) could promote competition among regulatory services providers. To the extent that increased competition among independent software vendors and regulatory services providers incentivizes them to offer cheaper, higher quality services to SBSEFs thereby lowering their costs, market participants that are SBSEF members could benefit to the extent the SBSEFs pass on the cost savings in the form of lower fees to their members. Lower fees for SBSEF members would help reduce the overall costs of trading on SBSEFs and increase the efficiency of SBS trading.

Improved Commission oversight. One of the goals of the Dodd-Frank Act is to increase regulatory oversight of SBS trading relative to the existing OTC SBS market.[887] Regulation SE would provide the means for the Commission to gain better insight into and oversight of SBSEFs and the SBS market by, among other things, allowing the Commission to review new rules, rule amendments, and product listings by SBSEFs[888] and to obtain other relevant information from SBSEFs.[889]

Additionally, Rule 826(b) requires every SBSEF to keep full, complete, and systematic records of all activities relating to its business with respect to SBS. In addition, Rule 819(f) requires an SBSEF to capture and retain a full audit trail of activity on its facility. The records required to be kept by an SBSEF would help the Commission to determine whether an SBSEF is operating in compliance with the SEA and the Commission's rules thereunder. The audit trail data required to be captured and retained would facilitate the ability of the SBSEF and the Commission to carry out their respective obligations under the SEA, by facilitating the detection of abusive or manipulative trading activity, allowing reconstructions of activity on the SBSEF, and generally understanding the causes of both specific trading events and general market activity.

Furthermore, Rule 835 requires an SBSEF to provide the Commission notice of a final disciplinary action, a final action with respect to a denial or conditioning of membership, or a final action with respect to a denial or limitation of access, which facilitates the Commission's review of the SBSEF's disciplinary process and exercise of its regulatory powers, providing the Commission an additional tool to carry out its oversight responsibilities. Rule 813 provides for Commission oversight of SBSEFs in their use of information collected for regulatory purposes and is designed to deter the misappropriation or misuse of such information. Rule 824(c) requires an SBSEF to, among other things, promptly notify the Commission of its exercise of emergency authority and provide information related to the use of that authority. The registration requirements and related Form SBSEF, and the CCO's annual compliance report, which are further discussed below, would also help the Commission with its oversight responsibilities.

Improved automation. To comply with Regulation SE's requirements relating to recordkeeping and surveillance, an SBSEF potentially would need to invest in and develop automated technology systems to store, monitor, and communicate a variety of trading data, including orders, RFQs, RFQ responses, and quotations.[890] The final rules should promote increased automation in the SBS market, although CFTC-registered SEFs that plan to register as SBSEFs are already deploying automated systems that could be supplemented to support an SBS business. In addition, the automation and systems development associated with the regulation of SBSEFs could provide SBS market participants with new platforms and tools to execute and process transactions in SBS more rapidly and at a lower expense per transaction. Such increased efficiency could enable members of the SBSEF to handle increased volumes of SBS with greater efficiency and timeliness.

2. Benefits Associated With Specific Rules

In addition to the broad benefits that the Commission anticipates as a result of the rules and amendments adopted in

[886] *See* Citadel Letter, *supra* note 18, at 11 (stating that PTNGU, by revealing counterparty identities, can be used as a policing mechanism by dealers to deter buy-side access and participation).

[887] *See* Public Law 111–203, Preamble.

[888] *See* Rules 804, 805, 806, and 807.

[889] *See* Rule 811.

[890] *See* Rules 819(d)(4) and 826.

this release, individual rules could bring particular benefits to the SBS market.[891] These include the following:

Registration requirements and Form SBSEF. SBSEF registration is required under the Dodd-Frank Act.[892] Rule 818(a) incorporates the requirement under the Dodd-Frank Act that an SBSEF, in order to be registered and maintain registration, must comply with the Core Principles in section 3D(d) of the SEA and the Commission's rules thereunder. The registration process described in Rule 803 implements this statutory requirement and assists the Commission in overseeing and regulating the SBS market. The information to be provided on Form SBSEF is designed to enable the Commission to assess whether an applicant has the capacity and the means to perform the duties of an SBSEF and to comply with the Core Principles and other requirements imposed on SBSEFs. Rule 803 is closely modelled on analogous CFTC registration requirements for SEFs. The choice to align the Commission's registration requirements for SBSEFs with the CFTC's requirements for SEFs is designed to achieve the abovementioned benefits while imposing only marginal costs on SBSEF registrants, who likely are SEFs. Finally, Rule 814(a) helps provide regulatory certainty for an entity that operates both an exchange and an SBSEF by clarifying that such an entity is required to separately register the two facilities pursuant to section 6 of the SEA and Rule 803, respectively.

Exemptions (Rule 833, Rule 816(e), amendments to Rule 3a1–1, and Rule 15a–12). Rule 833 is designed to preserve access to foreign markets by ''covered persons'' (as defined in Rule 832). As discussed in section XVII.B.2, an analysis of SBS transaction data indicates that certain trades executed on foreign SBS trading venues involve at least one counterparty that is a covered person. Absent the rule, these trading venues might elect to avoid having members that are covered persons if those venues do not wish to register with the Commission in some capacity (such as an exchange or SBSEF). In addition, covered persons will not be permitted to execute SBS that are subject to the trade execution requirement on these venues if the venues do not register with the Commission in some capacity (such as an exchange or SBSEF) or obtain an appropriate exemption. This would limit access to foreign SBS trading venues by covered persons, potentially making it harder for them to locate counterparties and obtain liquidity for SBS that trade on those venues. This in turn could increase their trading costs because they might spend more time and effort to locate counterparties or because they have less bargaining power relative to the remaining pool of potential counterparties with which they could trade. To the extent that a foreign SBS trading venue can obtain a Rule 833(a) exemption, it could continue to provide members that are covered persons with access to and liquidity on its market. Furthermore, a Rule 833(b) exemption would allow covered persons to continue accessing foreign SBS trading venues to execute SBS that are subject to the SEA's trade execution requirement.

Currently, all trading venues that trade SBS—whether domestic or foreign—are exempt from having to register as a national securities exchange or SBSEF on account of the SBS trading business. This exemption expires when the Commission's rules for registering and regulating SBSEFs come into force.[893] Thus, removal of the existing exemption restores the *status quo ante,* where the SEA itself, as amended by the Dodd-Frank Act, requires entities meeting the definition of ''security-based swap execution facility'' or ''exchange'' and falling within the territorial jurisdiction of the SEA to register with the Commission. By offering foreign SBS trading venues the possibility of an exemption from the definitions of ''security-based swap execution facility'' and ''exchange'' as well as from section 3D(a)(1) of the SEA, Rule 833(a) allows foreign SBS trading venues to operate in conditions similar to the current baseline (if the Commission ultimately grants an exemption under Rule 833(a)).

Paragraph (a)(4) of Rule 3a1–1 provides that an entity that has registered with the Commission as an SBSEF and provides a market place for no securities other than SBS will not fall within the definition of ''exchange'' and thus will not be subject to the requirement in section 5 of the SEA to register as a national securities exchange (or obtain a low-volume exemption). The benefit of the amendment is to clarify to prospective SBSEF applicants that, if they register with the Commission as SBSEFs, they will not face duplicative registration and regulatory requirements as exchanges. In addition, paragraph (a)(5) of Rule 3a1–1 codifies a series of exemptions that the Commission has granted over several years to SBS clearing agencies that operate ''forced trading'' sessions to support end-of-day valuations of SBS. Because the amendment is intended to codify existing exemptions, any associated economic effects would be minimal.

New Rule 15a–12 is designed to minimize overlapping compliance burdens for SBSEFs, which are also brokers under the SEA, that restrict their activity to engaging in the business of operating an SBSEF (and no other broker activities). Absent the rule, such SBSEFs (defined as ''SBSEF–Bs'' for purposes of Rule 15a–12) will need to register as SBSEFs and be subject to the SBSEF regulatory regime, in addition to registering as brokers and being subject to the broker regulatory regime. Rule 15a–12 allows an SBSEF–B to satisfy the requirement to register as a broker by registering as an SBSEF under Rule 803 and exempts an SBSEF–B from SIPA and other broker requirements, except for sections 15(b)(4), 15(b)(6), and 17(b) of the SEA. As a result of the rule, SBSEF–Bs could avoid incurring duplicative and unnecessary compliance burdens. Each SBSEF–B could save an estimated $345,826 in initial broker registration costs[894] and $62,878 in annual ongoing costs of meeting broker registration requirements.[895] In deriving these estimates, the Commission assumes that the activities an SBSEF–B performs to register and maintain registration as a broker do not overlap with those that it performs to register and maintain registration as an SBSEF–B. If there is an overlap in such activities, the estimated cost savings could be smaller. Each SBSEF–B could save an estimated $821 in ongoing costs associated with satisfying broker minimum capital

[891] Unless otherwise stated, quantified benefits in this section are adjusted for CPI inflation using data published by the Bureau of Labor Statistics. *See* CPI Inflation Calculator, U.S. Bureau of Labor Statistics, *available at https://www.bls.gov/data/inflation_calculator.htm.*

[892] *See* SEA section 3D(a)(1), 15 U.S.C. 78c–4(a)(1).

[893] *See supra* section III.

[894] The Commission previously estimated that an entity would incur costs of $301,400 to register as a broker-dealer and become a member of a national securities association. *See* Cross-Border Amendments Adopting Release, 85 FR at 6312. Adjusted for inflation through Dec. 2022, these costs are $345,826.

[895] The Commission previously estimated that an entity would incur ongoing annual costs of $54,800 to maintain broker-dealer registration and membership of a national securities association. *See* Cross-Border Amendments Adopting Release, 85 FR 6312. Adjusted for inflation through Dec. 2022, these costs are $62,878. The estimation of ongoing annual costs is based on the assumption that the entity would use existing staff to perform the functions of the registered broker-dealer and would not incur incremental costs to hire new staff. To the extent that the entity chooses to hire new staff, the ongoing annual costs would likely be higher.

requirements.[896] The estimated aggregate initial and annual ongoing savings are $1,729,130 and $318,495, respectively.[897]

Rule and product filings. Rules 806 and 807 set forth alternative filing processes for a new rule or rule amendment of a registered SBSEF, and Rules 804 and 805 set forth alternative filing processes for an SBSEF to file an SBS product that it wishes to list. Rule 810 would address new product filings by an entity that has applied for SBSEF registration but has not yet been registered, or by a dormant SBSEF seeking reinstatement of its registration. The self-certification processes of Rules 804 and 807 require SBSEFs to include a certification that the product, rule, or rule amendment, as the case may be, complies with the SEA and Commission rules thereunder.[898] The information to be provided by the SBSEF under Rules 804, 805, and 810 will further the ability of the Commission to obtain information regarding SBS that an SBSEF intends to list on its market. The rules will assist the Commission in overseeing and regulating the trading of SBS and to help ensure that SBSEFs operate in compliance with the SEA.

In addition, Rule 806(a)(5), which requires an SBSEF to explain the anticipated benefits and potential anticompetitive effects on market participants of a proposed new rule or rule amendment, potentially could help foster a competitive SBS market because it could prompt SBSEFs to consider the positive as well as negative aspects of their proposed rules or rule amendments with respect to competition. Rule 808 is designed to facilitate the public's ability to obtain information from SBSEF applications as well as rule and product filings. Rule 808(a) specifies the parts of an SBSEF application that the Commission shall make publicly available unless confidential treatment is obtained pursuant to SEA Rule 24b–2. Rule 808(b) provides that the Commission shall make an SBSEF's rule and product filings publicly available unless confidential treatment is obtained pursuant to SEA Rule 24b–2. Rule 808(c) provides that the terms and conditions of a product submitted to the Commission pursuant to any of Rules 804 through 807 shall be made publicly available at the time of submission unless confidential treatment is obtained pursuant to SEA Rule 24b–2.

Rule 809 provides a mechanism for the staying of a product certification or the tolling of a review period for a filing by an SBSEF relating to a product while the appropriate jurisdictional classification of that product is determined. The rule is designed to provide regulatory certainty for SBSEFs and market participants who may be interested in trading products whose classification as an SBS subject to SEC jurisdiction or a swap subject to CFTC jurisdiction is unclear. In particular, Rule 809 would help ensure that determinations regarding whether the SEC or CFTC appropriately has jurisdiction over a product are made before the product is traded.

The Commission's election to model Rules 804 through 810 closely on analogous rules in part 40 of the CFTC's rules that apply to SEFs (and other registered entities) is designed to promote efficiency. Utilizing the same processes for rule and product filings, with which dually registered SEF/SBSEFs are familiar, would impose only minimal burdens on such entities while obtaining the similar regulatory benefits as the CFTC rules. In some cases, where a new rule or rule amendment affects both the swap and SBS business of a dually registered entity, the same or a very similar filing could be made to each of the CFTC and SEC, in lieu of having to make different filings to support the same rule change.

Chief Compliance Officer. Rule 831, among other things, requires the CCO of an SBSEF to submit an annual compliance report to the Commission. The report will assist the Commission in carrying out its oversight of the SBSEFs and the SBS market by providing the Commission with information about the compliance activities of SBSEFs. Furthermore, by requiring an SBSEF to designate an individual as the CCO and making the CCO responsible for ensuring compliance with the SEA and the Commission's rules thereunder, Rule 831 would promote regulatory compliance on SBSEFs and the SBS market generally.[899] This in turn would further the goal of moving SBS trading away from opaque and unregulated OTC markets and onto transparent and regulated markets by promoting effective regulation of the latter.

Conflicts of Interest. Rule 831, among other things, requires the CCO to resolve material conflicts of interest that may arise in consultation with the governing board or the senior officers of the SBSEF.[900] Rule 828(a) requires an SBSEF to establish and enforce rules to minimize conflicts of interest in its decision-making process and establish a process for resolving the conflicts of interest. Rule 828(b) would require an SBSEF to comply with the requirements of Rule 834, which is designed to implement section 765 of the Dodd-Frank Act with respect to SBSEFs and SBS exchanges. Rule 834, among other things, imposes a 20% cap on the voting interest held by an individual member of an SBSEF or SBS exchange, mitigates conflicts of interest in the disciplinary process of an SBSEF or SBS exchange, sets forth certain minimum requirements for the composition of the governing board of an SBSEF or SBS exchange, sets forth reporting requirements related to governing board elections, and addresses the avoidance of conflicts of interest in the execution of regulatory functions by an SBSEF or SBS exchange.[901]

The rules would mitigate conflicts of interest between an SBSEF or SBS exchange and its members as discussed in section VIII. Relative to the bilateral OTC SBS market, SBSEFs and SBS exchanges promote competition between liquidity providers, potentially forcing them to lower their prices for supplying liquidity (*e.g.,* narrowing bid-ask spread) and reducing their profits from liquidity provision. However, if SBS dealers or major SBS participants were able to restrict access to such venues by, for example, exercising their voting interest in an SBSEF or SBS exchange, they could stifle competition in SBSEFs and SBS exchanges and preserve their profits from liquidity provision. Regulation SE, by mitigating such conflicts of interest could help ensure access to SBSEFs and SBS exchanges and in turn increase competition in liquidity provision and lower transaction costs. Rules 834(e), (f), and (g) also may promote good governance at SBSEFs and SBS exchanges. To the extent that improved

[896] Absent the rule, an SBSEF–B would comply with the minimum net capital requirement of $5,000 for a registered broker-dealer because it would not receive, owe, or hold customer funds or securities; carry customer accounts; and engage in certain other activities. *See* Rule 15c3–1(a)(2)(vi) under the SEA, 17 CFR 240.15c3–1(a)(2)(vi). The Commission estimates the cost of capital using the annual stock returns on a value-weighted portfolio of financial stocks from 1988 to 2022 (*see* Kenneth French, 48 Industry Portfolios, *available at http://mba.tuck.dartmouth.edu/pages/faculty/ken.french/ftp/48_Industry_Portfolios_CSV.zip* (accessed on May 18, 2023). These returns were averaged to arrive at an estimate of 16.41%. The cost of capital = 16.41% × $5,000 = $820.50 or approximately $821.

[897] The Commission estimates the number of SBSEF–Bs as the number of entities that likely will register as SBSEFs. *See supra* section XVII.B.4. Aggregate initial savings = $345,826 × 5 (number of SBSEF–Bs) = $1,729,130. Aggregate annual ongoing savings = ($62,878 + $821) × 5 (number of SBSEFs) = $318,495.

[898] *See* Rules 804(a)(3)(iv) and 807(a)(6)(iv).

[899] The SBSEF remains responsible for establishing and administering required policies and procedures. *See supra* section VI.N.

[900] *See* Rules 831(a)(2)(iii) and (h)(2).

[901] *See* Rules 834(b) to (g).

governance result in more effective oversight by SBSEFs and SBS exchanges of their markets, market participants may benefit. These benefits could be limited to the extent that prospective SBSEFs and SBS exchanges already have rules in place that comply with the rules.

Structured Data Requirements. Rule 825(c)(3) requires an SBSEF to publish a Daily Market Data Report on its website without charge or usage restrictions and in a downloadable and machine-readable format using the most recent version of the associated XML schema and PDF renderer as published on the Commission's website.[902] Requiring the Daily Market Data Report to be provided in a structured, machine-readable data language (using a Commission-created XML schema) will facilitate the use of the price, trading volume, and other trading data on the report by end users such as SBS market participants and market observers. By including a structured data requirement, the information in the report will be made available in a consistent and openly accessible manner that will allow for automatic processing by software applications, thus enabling search capabilities and statistical and comparative analyses across SBSEFs and date ranges.[903] This will ensure that SBS market participants and market observers seeking to use the data will not have to spend time manually collecting and entering the data into a format that allows for analysis.

One commenter stated that using custom XML rather than Inline XBRL ''would essentially require re-creating what XBRL already offers'' and that the use of custom XML ''would result in added costs for all stakeholders, reduced efficiencies in adapting to changes, and the inability to commingle datasets.'' [904] The Daily Market Data Report, which includes the trade count, the total notional amount traded, and the opening and closing price, is well-suited for custom XML as the information would easily fit within a table and the use of custom XML would make the file size of the document smaller than would be the case with Inline XBRL, which helps to reduce operating system overhead. Posting the Daily Market Data Report would not impose significant costs to prospective and actual SBSEFs due to the limited extent and complexity of the required data points to be reported, and because SBSEFs are already required to use structured data to fulfill their reporting requirements under Regulation SBSR [905] and therefore would have relevant systems in place to structure and publicly disseminate other SBS trading information.[906] While the use of custom XML will make it more difficult for data users to aggregate and compare the data points on the Daily Market Data Report with data points in other Inline XBRL datasets in an efficient manner, the streamlined schema and reduced file size justify that drawback.

Regulation SE requires SBSEFs to file disclosures required under various provisions in the EDGAR system using structured (machine-readable) data languages.[907] Requiring a centralized filing location and a machine-readable data language for these disclosures will facilitate access, retrieval, analysis, and comparison of the disclosed information across different SBSEFs and time periods by the Commission and the public, thus potentially augmenting the informational benefits of the various disclosure requirements discussed herein. Also, because EDGAR provides basic technical validation capabilities, the use of EDGAR could reduce the incidence of technical errors (*e.g.,* letters instead of numbers in a field requiring only numbers) and thereby improve the quality of the structured disclosures.

The structured data requirements under Regulation SE will facilitate access to the structured information in the filings, enabling Commission staff to perform more efficient retrieval, aggregation, and comparison across different SBSEFs and time periods, as compared to an unstructured PDF, HTML, or ASCII format requirement. The functionality enabled by a machine-readable data requirement will allow staff to better utilize the structured information in Regulation SE filings to ensure compliance with the SEA and rules and regulations thereunder applicable to SBSEFs (*e.g.,* by enabling efficient staff identification of material changes to compliance policies or material non-compliance matters to gauge the soundness of SBSEF compliance programs), thus ultimately furthering the Commission's mission of maintaining fair, orderly, and efficient markets.

In a change from the proposal, Regulation SE will require some of the structured disclosures to be filed in custom XML rather than Inline XBRL.[908] Because both custom XML and Inline XBRL are structured data languages that result in machine-readable disclosures, the aforementioned benefits would apply in both cases. Inline XBRL specifically provides the ability to tag detailed facts within narrative text blocks, and is thus well-suited to accommodate many disclosures required under proposed Regulation SE, several of which require extended narrative discussions (*e.g.,* the chief compliance officer's report required under Rule 831).[909] In addition, certain required disclosures consist of financial information (*e.g.,* the financial statements of the SBSEF required under Exhibit I to Form SBSEF), and Inline XBRL is designed specifically for the accurate capture and communication of financial information, among other uses. A benefit specific to custom XML disclosures is that EDGAR can create fillable web forms allowing SBSEFs, at their option, to input their disclosures manually and have EDGAR convert them into the specific custom XML data language, removing the need for SBSEFs to structure the disclosures in the custom XML data language themselves. This added flexibility may ease compliance burdens for any SBSEFs that choose to use the fillable web form.

One commenter noted that an Inline XBRL requirement for the proposed disclosures would allow financial identification and textual data in both a human- and machine-readable format consistently in a fashion that would allow Form SBSEF data to be commingled with other SEC-reported datasets.[910] While we generally agree that Inline XBRL provides such benefits

[902] *See* Rule 825(c)(3).

[903] In addition, the associated PDF renderer will provide users with a human-readable document for those who prefer to review manually individual reports, while still providing a uniform presentation.

[904] *See* XBRL US Letter, *supra* note 718, at 2.

[905] *See* 17 CFR 242.907(a)(2) (requiring information to be submitted to SDRs in an ''open-source structured data format that is widely used by participants'').

[906] *See infra* section XVII.C.3 for a discussion of the specific content of the Daily Market Data Report and how it differs from the SBS transaction reports disseminated under Regulation SBSR.

[907] This includes the documents required under: Rule 803(b)(1)(i) and (3) (filings of, and amendments to, specified exhibits in a Form SBSEF application); Rules 803(e) and 803(f) (requests to withdraw or vacate an application for registration); Rule 829(g)(6) (submission to the Commission of reports related to financial resources and related documentation); and Rule 831(j)(2) (submission to the Commission of the annual compliance report of the SBSEF's CCO). *See supra* section XIII.A.

[908] The custom XML requirements apply to information required under Rules 803(e) and (f) regarding withdrawal or vacation applications; the Form SBSEF Cover Sheet; and Exhibits A, B, G, M, N, and T to Form SBSEF. The Inline XBRL requirements apply to information required under Rules 829 and 831 regarding financial resources reports and CCO compliance reports, respectively; and Exhibits C through F, H through L, and P through S to Form SBSEF. *See supra* section XIII.A. *See also supra* notes 724–726 and accompanying text (discussing the final rule text revisions that implement the reduced scope of Inline XBRL requirements for Form SBSEF).

[909] *See* Rule 831.

[910] *See* XBRL US Letter, *supra* note 718, at 2.

related to data use, the greater compliance flexibility afforded by custom XML merits using custom XML for the specified disclosures.

In another change from the proposal, where Regulation SE requires copies of existing documents (*e.g.,* copies of manuals, contracts, organizational documents) to be attached to filings, those copies will be filed as unstructured PDF attachments.[911] The absence of structuring requirements for these documents will further reduce compliance burdens on SBSEFs, and although the content of those copies will not be machine-readable, we do not believe the informational benefits associated with having such documents in structured form would be significant enough to merit requiring SBSEFs to retroactively structure such existing documents. In addition, filings related to new SBSEF rules and products under Rules 804 through 807 and 816 will be filed as unstructured documents through the EFFS system rather than through EDGAR. As noted by one commenter, the absence of structuring requirements for these filings will similarly reduce compliance burdens on SBSEFs.[912]

3. Costs

Although Regulation SE would benefit the SBS market, the Commission recognizes that Regulation SE also would entail certain costs.[913] Some costs are difficult to precisely quantify and are discussed below. The Commission is mindful that any rules it may adopt with respect to SBSEFs under the Dodd-Frank Act may impact the incentives of market participants with respect to where and how they trade SBS. If the rules adopted by the Commission are, or are perceived to be, too costly for trading venues to comply with, fewer entities than expected may seek to register as SBSEFs, which would not further the goal of moving a greater percentage of SBS trading from opaque and unregulated OTC markets to transparent and regulated trading venues. In addition, if the rules for trading on an SBSEF are perceived as too burdensome by market participants, SBS trading may continue in the OTC market absent a mandatory clearing determination and a triggering of the mandatory trade execution requirement, thus frustrating the goals of the Dodd-Frank Act.[914] Even if the trade execution requirement is triggered for an SBS, market participants that wish to avoid being subject to the requirement may do so by strategically choosing the location of the desk executing a trade in that SBS.[915] At the same time, if the rules relating to SBSEFs are too lenient, they may have little or no impact on the market structure and surveillance of the SBS market relative to the *status quo,* which could result in the loss of many of the benefits discussed above and fail to achieve the goals of the Dodd-Frank Act.

In addition, SBS traded on SBSEFs may be perceived to be subject to increased costs, monetary and otherwise. For example, the requirements related to pre-trade transparency could cause market participants to reveal valuable economic information regarding their trading interest more broadly than they may believe would be economically prudent and could discourage participation in the SBS market. An additional impact of pre-trade transparency is perceived costs associated with front-running, if customers or SBS dealers are required to show their trading interest before a trade is executed. These potential costs of pre-trade transparency may change market participants' trading strategies, which could result in them working more orders or finding ways to attempt to hide their interest.[916] These potential costs would likely vary based on the notional size of the SBS transaction and, in particular, would likely be greater for market participants engaging in SBS trades of a larger notional size.[917] If market participants view Regulation SE as too burdensome with respect to pre-trade transparency, SBS dealers may be less willing to supply liquidity for SBS that trade on SBSEFs or exchanges, thus adversely affecting liquidity and competition. However, such effects could be mitigated by Rules 815(d)(2) and Rules 815(d)(3) that provide an exception for certain package transactions that allows for flexible methods of execution for what would be otherwise Required Transactions.[918]

On the other hand, if the requirements with respect to pre-trade transparency bring about only a marginal increase in pre-trade transparency, the result could be that there would be no substantive change from the *status quo,* including no benefits of alleviating informational asymmetries, increasing price competition, and supplying better executions beyond the changes in response to the other requirements of the Dodd-Frank Act. This actual impact would depend on the degree of pre-trade transparency required and the characteristics of the trading market. The rules are intended to provide for greater pre-trade transparency than currently exists without requiring pre-trade transparency in a manner that would cause participants to avoid providing liquidity on SBSEFs.

There would be transaction costs, such as fees and connectivity costs, that trading counterparties would incur in executing or trading SBS subject to the trade execution requirement on SBSEFs. Likewise, although unregulated trading venues exist in today's OTC derivatives market, the Commission does not have information regarding what, if any, fees and connectivity costs are associated with transacting on these unregulated trading venues. In the Proposing Release, the Commission invited comment on the likely fees and costs associated with transacting on SBSEFs as well as fees and costs associated with transacting on unregulated trading venues that exist in today's OTC derivatives market. Commenters did not provide estimates of likely fees and costs associated with transacting on SBSEFs or fees and costs associated with transacting on unregulated trading venues.

As discussed in section XVII.B, prospective SBSEF registrants are likely

[911] This includes attached copies of existing documents required under Exhibits A, G, I, M, N, and O to Form SBSEF. *See supra* section XIII.A. *See also supra* notes 724–726 and accompanying text (discussing the final rule text revisions that implement the reduced scope of Inline XBRL requirements for Form SBSEF).

[912] *See* Bloomberg Letter, *supra* note 18, at 20. *See also supra* notes 730–733 (discussing the final rule text revisions that implement the requirement for SBSEFs to file rule and product filings in unstructured format using the EFFS system).

[913] Unless otherwise stated, quantified costs in this section are adjusted for CPI inflation using data published by the Bureau of Labor Statistics. *See CPI Inflation Calculator,* U.S. Bureau of Labor Statistics, *available at https://www.bls.gov/data/inflation_calculator.htm.*

[914] *See supra* section XVII.C (noting that the benefits and costs associated with the trade execution requirement would not materialize unless and until the Commission makes a mandatory clearing determination).

[915] *See* Citadel Letter, *supra* note 18, at 16.

[916] *See, e.g.,* Ananth Madhavan, *Market Microstructure: A Survey,* J. of Fin. Markets, Vol. 3 (2000).

[917] The potential costs associated with SBS trades of a larger notional size could be affected by a definition of ''block trade'' that includes a block trade threshold that market participants could rely on for the exception from the Required Transaction requirement in Rule 815(a)(2). As discussed in section V.E.1(c)(i), *supra,* a block-trade exception for SBSs subject to the trade-execution requirement, provided that ''block trade'' is appropriately defined for those SBSs, can help ensure that large trades are not significantly more difficult and costly to execute because of the risks posed by information leakage and the potential for adverse price movement, which could significantly impair liquidity in the markets for those SBSs.

[918] *See* Rule 815(d)(2) and Rule 815(d)(3). Neither an SBS that is intended to be cleared (even if it is not required to be cleared) nor a swap subject to a CFTC trade execution requirement would create an exception from required methods of execution for a Required Transaction that is part of the same package.

to be CFTC-registered SEFs that are active in the index CDS market. Because the final rules are harmonized as closely as practicable with analogous CFTC rules for SEFs, unless a reason exists to do otherwise in a particular area, much of the systems, policies, and procedures that are used to support SEF trading also could be used to support SBSEF trading. The prospective SBSEF registrants likely would incur marginal costs associated with listing SBS products on their venues [919] and making limited changes to their systems, policies, and procedures to comply with SEC rules that differ slightly from analogous CFTC rules. The Commission estimates the one-time costs associated with such changes to systems, policies, and procedures would range between $26,393 and $1,583,550 per SBSEF and between $131,965 and $7,917,750 in the aggregate, depending on the changes needed. These cost ranges reflect significant uncertainties about the extent of changes that different registrants might need. The annual ongoing costs of maintaining the technology (*e.g.,* ensuring any necessary technological updates and improvements are made) and applying the technology to ongoing compliance requirements are estimated to be in the range of $1,055,700 to $2,111,400 per SBSEF and in the range of $5,278,500 to $10,557,000 in the aggregate.[920]

Several commenters agree that the Commission's general approach to finalizing requirements relating to SBS execution would mitigate costs for registered SBSEFs.[921]

One commenter is concerned that Rule 816 as proposed would permit SBSEFs to make an SBS available to trade even absent objective evidence of a sufficiently liquid trading market.[922] According to the commenter, requiring SBS with insufficient liquidity to be traded via an order book or an RFQ system would raise a significant risk of revealing investment advisers' sensitive portfolio management strategies.[923] Such information leakage could lead to front-running of funds' trades and to other abusive trading practices that would negatively affect the pricing of SBS and of other related instruments, resulting in higher investment costs for investment advisers' clients, including funds and their investors.[924] The Commission agrees that an inappropriate MAT determination such as the one described by the commenter could result in higher investment costs for investment advisers' clients by increasing the risk of information leakage, front-running, and other abusive trading practices. Regulation SE as adopted would address concerns related to inappropriate MAT determinations. As discussed in section V.F.2, the Commission will have the opportunity to review all SBSEF MAT determinations, whether they are self-certified or voluntarily filed for Commission approval, to consider whether those determinations are adequately supported by evidence and consistent with the SEA and the rules thereunder, including the six factors to be considered for MAT determinations under Rule 816(b).[925] In the absence of such evidence, the Commission can decline to approve or can stay and then object to a MAT petition, which will ultimately allow the Commission to prevent an inappropriate MAT determination from taking effect.

One commenter states that requiring a fund to disclose its trading interest in an SBS of a large notional size to multiple participants—via an order book or an RFQ system—would enable opportunistic market participants to piece together information about the fund's holdings or investment strategy and lead to front-running of those potential trades.[926] The Commission agrees that requiring a fund to disclose its trading interest in an SBS of a large notional size to multiple participants via an order book or an RFQ system could impose costs associated with information leakage and front-running. However, these costs have to be considered in light of the benefits of increased pre-trade transparency: increased price competition, increased price efficiency, improved liquidity, and reduced transaction costs.[927] By adopting two execution methods for Required Transactions (limit order book and RFQ-to-3), market participants have flexibility in the degree of pre-trade transparency they wish to employ, which should diminish potential concerns associated with the exposure of pre-trade trading interest. Further, a market participant that wishes to engage in Permitted Transactions of a large notional size can choose any method of execution that is offered by an SBSEF and is not restricted to using a limit order book or RFQ-to-3. For these transactions, any costs associated with information leakage and front-running likely would not be different from those costs that would prevail under the baseline.

One commenter states that Proposed Rule 834 would have the effect of prohibiting certain SBSEF participants from having common ownership and control as the SBSEF. The commenter is concerned that the proposed rule would prevent prospective SBSEFs that are CFTC-registered SEFs from onboarding their affiliated introducing brokers because doing so would exceed the ownership and voting caps set forth in Proposed Rule 834(b).[928] Another commenter is concerned that the rule's 20% ownership cap would limit access to capital and act as barriers to entry for SBSEF and SBS exchanges.[929] Observing that the CFTC did not adopt rules analogous to Proposed Rule 834, the commenters suggest that the proposed rule, if adopted, would be a fundamental departure from the CFTC's rules, minimizing many of the other

[919] *See infra* section XVII.C.3(c) (discussing the costs that these entities might incur to list SBS products).

[920] In the Proposing Release, the Commission estimated that the one-time costs associated with changes to systems, policies, and procedures would range between $25,000 and $1.5 million per SBSEF, depending on the changes needed. The Commission estimated the annual ongoing costs to be between $1 million and $2 million. *See* Proposing Release, *supra note* 1, 87 FR at 28953. Adjusting for inflation in 2022, the Commission now estimates that the one-time costs associated with changes to systems, policies, and procedures would range between $25,000 × 1.0557 (CPI inflation adjustment for 2022) = $26,392.50 or approximately $26,393 and $1.5 million × 1.0557 (CPI inflation adjustment for 2022) = $1,583,550 per SBSEF, depending on the changes needed. In the aggregate, the one-time costs associated with changes to systems, policies, and procedures would range between $26,393 × 5 SBSEFs = $131,965 and $1,583,550 × 5 SBSEFs = $7,917,750, depending on the changes needed. Adjusting for inflation in 2022, the Commission now estimates the annual ongoing costs per SBSEF to be between $1 million × 1.0557 (CPI inflation adjustment for 2022) = $1,055,700 and $2 million × 1.0557 (CPI inflation adjustment for 2022) = $2,111,400. In the aggregate, the annual ongoing costs would be between $1,055,700 × 5 SBSEFs = $5,278,500 and $2,111,400 × 5 SBSEFs = $10,557,000. One commenter states that any potential differences between SEC rules and analogous CFTC rules would require SBSEF registrants to devote resources toward assessing the potential gaps and consequences of regulatory divergence. *See* Bloomberg Letter, *supra* note 18, at 10. Such costs would be part of the one-time costs associated with changes to systems, policies, and procedures. It is possible that SBSEF registrants might incur additional costs toward assessing the potential gaps and consequences of regulatory divergence. In that case, the one-time costs associated with changes to systems, policies, and procedures could be higher than the Commission's estimates.

[921] *See supra* section XVII.C and note 867.

[922] *See* ICI Letter, *supra* note 18, at 5.

[923] *See id.* at 6.

[924] *Id.*

[925] These six factors are: (1) whether there are ready and willing buyers and sellers; (2) the frequency or size of transactions; (3) the trading volume; (4) the number and types of market participants; (5) the bid/ask spread; or (6) the usual number of resting firm or indicative bids and offers. *See* Rule 816(b).

[926] *See* ICI Letter, *supra* note 18, at 11.

[927] *See supra* section XVII.C.1 (discussing the benefits of increased pre-trade transparency).

[928] *See* WMBAA Letter, *supra* note 18, at 2.

[929] *See* SIFMA AMG Letter, *supra* note 18, at 12.

benefits of a harmonized regime, and thwart efforts to smoothly implement Regulation SE.[930] One commenter further states that some CFTC registered SEFs, which are prospective SBSEFs, might have to review their ownership and governance structure and, possibly, amend their organization.[931]

In response to these concerns, the Commission is adopting Rule 834(b)(3), which provides an exemption from the ownership and voting caps for an SBSEFs that has mitigated the potential conflict of interest with respect to compliance with the rules of the SBSEF by entering into an agreement with a registered futures association or a national securities association for the provision of regulatory services that encompass, at a minimum, real-time monitoring under Rule 819(d)(5) and investigations and investigation reports under Rule 819(d)(6). This exemption should address concerns regarding certain SBSEF participants not being able to have common ownership and control as the SBSEF (provided these appropriate conditions are met); the onboarding of affiliated introducing brokers by certain prospective SBSEFs; access to capital and entry barriers; and potential disruption or delays to the implementation of Regulation SE.

With respect to the Daily Market Data Report required by Proposed Rule 825, one commenter states that the Daily Market Data Report would require inappropriate and detrimental disclosures that would undermine the Commission's goal of fostering a competitive and efficient market for SBS trading. This commenter states that there are significant differences in the information required to be reported under the SEC and CFTC regimes. The commenter states that Proposed Rule 825(c)(1) increases the burden on SBSEFs compared to SEFs by requiring additional information regarding sale and offer prices, as well as qualitative descriptions of certain data that are reported.[932]

This commenter further states that the Commission's proposal does not address why the CFTC's approach would not be acceptable in the context of SBSEFs and does not justify the increased operational costs to SBSEFs (which will ultimately be passed on to members). The commenter also states that the Commission has not considered the costs and potential for duplicative requirements in the context of Regulation SBSR reporting requirements. The commenter concludes that, in sum, the Daily Market Data Report is overly granular and duplicative, is unnecessary for transparency purposes, and could negatively impact the market and market participants. The commenter states that the Commission should therefore remove the Daily Market Data Report in favor of harmonizing with the analogous CFTC rules and that, if the Commission does not eliminate the Daily Market Data Report requirement altogether, it should adopt additional masking protections for trades, specifically with respect to block trades. Failure to do so, the commenter states, would cause inappropriate and detrimental disclosures and would ''negate the benefits that the rule purports to achieve by exempting block trades from clearing [sic] requirements.'' [933]

As discussed in Section IV.H, many of the reporting requirements of the Daily Market Data Report under Proposed Rule 825 are closely aligned with the data required to be disclosed on a daily basis by SEFs under § 16.01 of the CFTC's rule. Further, the Commission is modifying Proposed Rule 825 to resolve the two differences between the proposed Daily Market Data Report and the existing CFTC reporting scheme under § 16.01: (1) that the Daily Market Data Report would include the number of block trades executed; [934] and (2) that the Daily Market Data Report would be posted on the SBSEF's website no later than *the beginning of trading* on the next business day,[935] while the information required by § 16.01 must be made public no later than the next business day.[936]

Rule 825(c)(1), as adopted, does not require the disclosure of the number of block trades.[937] Further, Rule 825(c)(4), as adopted, requires the publication of the Daily Market Data Report ''as soon as reasonably practicable on the next business day after the day to which the information pertains, but in no event later than 7 a.m. on the next business day.'' With these modifications, the data called for by Rule 825(c)(1) is consistent with the required daily disclosures for SEFs. These modifications should help address concerns regarding increased burden on SBSEFs compared to SEFs, increased operational costs to SBSEFs, the Daily Market Data Report being overly granular, and negative impact on the market and market participants. The fact that Rule 825(c)(1), as adopted, does not require the disclosure of the number of block trades would obviate the need to adopt masking protections for block trades and address the commenter's concern about inappropriate and detrimental disclosures that would adversely affect competition and efficiency in the SBS market. To the extent that the disclosure of the number of block trades prompts market prices to move against the dealers that facilitated such block trades thereby raising their hedging costs, dealers could raise the price of liquidity provision (*e.g.,* by widening the bid-ask spread) charged to market participants, increase transaction costs, and reduce the efficiency of SBS trading. To the extent that the cost of transacting block trades increases, market participants may choose to exit the SBS market and trade alternative securities. This in turn could reduce participation and competition in the SBS market. Rule 825(c)(1), by not requiring the disclosure of the number of block trades, should mitigate these potential adverse effects on competition and efficiency in the SBS market.

With respect to the concern that the Daily Market Data Report is duplicative of Regulation SBSR and unnecessary for transparency purposes, the former performs a function that is different from the reporting and public dissemination of SBS transactions required by Regulation SBSR.[938] The Daily Market Data Report would consolidate trading information by venue and provide useful summary information about SBS trading on an SBSEF for all market participants without requiring them to incur costs to collect, process, and aggregate information from individual reports of SBS transactions that are executed on an SBSEF and publicly disseminated pursuant to Regulation SBSR. In addition, the Daily Market Data Report provides information regarding trading on an SBSEF that is not available in the SBS transaction reports that are publicly disseminated pursuant to Regulation SBSR. Among other things, the Daily Market Data Report would provide the

[930] *See id.;* WMBAA Letter, *supra* note 18, at 3.

[931] *See* WMBAA Letter, *supra* note 18, at 3.

[932] *See* MFA Letter, *supra* note 18, at 13.

[933] *See id.* Regulation SE does not address any exemption from clearing requirements.

[934] *See* Proposed Rule 825(c)(1)(iii).

[935] *See* Proposed Rule 825(c)(4).

[936] *See* 17 CFR 16.01(e). The Commission views the requirement to keep each Daily Market Data Report on an SBSEF's website for one year, *see* Proposed Rule 825(c)(5), as a small additional burden for an SBSEF and does not view it as a significant departure from harmonization with the CFTC's SEF regime.

[937] The Commission is also, pursuant to its determination not to adopt a definition of ''block trade'' at this time, deleting the words ''including block trades but'' from the text of paragraph (c)(i) and (ii) of Rule 825, and is adding the words ''after such time as the Commission adopts a definition of 'block trade' '' to paragraph (c)(iii) of Rule 825 (formerly paragraph (c)(iv) of Proposed Rule 825) which will have no effect on the requirement as compared to the proposed rule. *See supra* section VI.H.

[938] *See* 17 CFR 242.900 *et seq.*

opening and closing price; the price that is used for settlement purposes, if different from the closing price; the lowest price of a sale or offer, whichever is lower; the highest price of a sale or bid, whichever is higher; the method used by the SBSEF in determining nominal prices and settlement prices; and a description of the manner in which discretion is used to determine the opening and/or closing ranges or the settlement prices.[939] Further, because the transaction reports for credit SBS are permitted to be capped at a notional volume of $5 million,[940] market participants would be unable to glean the information provided by the Daily Market Data Report—which would publish daily total notional volumes based on uncapped transaction amounts—from the individual reports of SBS transactions under Regulation SBSR. Thus, the Daily Market Data Report would provide market participants, at little to no cost, with information about pricing and trading volume for SBS on SBSEFs that goes beyond the information that could be obtained from SBS transaction reports that are publicly disseminated pursuant to Regulation SBSR.

Several commenters are concerned that Proposed Rule 832(b)(3), which would apply the trade execution requirement to ANE transactions, could create complexities,[941] prompt market participants and platforms to develop costly infrastructure to avoid engaging in ANE transactions,[942] confuse market participants and platforms and reduce market participation.[943] One commenter asks the Commission to be mindful of whether CFTC-registered SEFs would be forced to change their rules in order comply with the new proposed SBSEF rules.[944] With respect to the concern that CFTC-registered SEFs might be forced to change their rules because of the Commission's ANE approach for SBSEFs, foreign trading venues that have already received exemptive relief from the CFTC for swaps trading where robust regulatory regimes may exist with requirements comparable to those applicable to SBS transactions in the United States might seek and obtain exemptive relief under Rule 833(b). If exempted under Rule 833(b), trading of SBS on such foreign trading venues would not require CFTC-registered SEFs to change their rules.[945] Similarly, for SBS transactions that the Commission exempts from the trade execution requirement based on an application submitted under Rule 833(b), the concerns expressed by commenters regarding complexities and costs would no longer be applicable. The effect of such exemptions would likely result in SBS transactions in foreign jurisdictions with what may be considered robust regulatory regimes to be exempt from the Commission's trade execution requirement and, in practice, have similar treatment of transactions on applicable foreign trading venues as the CFTC. This should address concerns about confusion among market participants and platforms in foreign jurisdictions; the regulatory certainty provided by the exemptions should help to mitigate any adverse effects on market participation and obviate the need to develop costly infrastructure to avoid engaging in ANE transactions.

Several commenters are concerned that many foreign SBS trading venues would not be able to obtain a Rule 833(b) exemption because they believe the rule would require foreign jurisdictions to require RFQ-to-3 and order book methods of execution, while hardly any foreign jurisdictions have identical requirements, with some jurisdictions not requiring SBS to be traded on an organized trading venue.[946] These commenters believe that the inability of foreign trading venues to obtain a Rule 833(b) exemption would result in various negative consequences: increased costs; disruption and fragmentation of the SBS markets; reduced liquidity and participation in the SBS markets; impaired risk transfer, risk management, and price formation; and increased systemic risk.[947]

The Commission acknowledges the concerns raised by commenters, which appear to emanate from commenters' interpretation—and misunderstanding—of what would be required in order to receive a Rule 833(b) exemption. Specifically, several commenters interpret the rule and the Commission's discussion of the rule in the Proposing Release to mean that a foreign SBS trading venue must have RFQ-to-3 and an order book for Required Transactions in order for transactions on that venue to qualify for a Rule 833(b) exemption.[948] As discussed in Section VII.B, the proposed rule would not require foreign SBS trading venues to have RFQ-to-3 and an order book in order for the Commission to consider their SBS executions for an exemption under Rule 833(b). Neither the text of Rule 833(b) nor the Commission's description of Rule 833(b) states that a limit order book or an RFQ-to-3 system is required to receive a Rule 833(b) exemption.[949] There may be foreign SBS trading venues—many of which have already received exemptive relief from the CFTC for swaps trading [950]—that may be appropriate candidates for exemptive relief, that are subject to what may be considered robust regulatory regimes for SBS trading. With respect to such foreign SBS trading venues, the Commission encourages market participants to submit a request for exemptive relief under final Rule 833(b) if they seek to be exempt from the Commission's trade execution requirement for their SBS transactions. This discussion should address concerns about the potential unavailability of a Rule 833(b) exemption to SBS foreign trading venues and the negative consequences that could arise if SBS foreign trading venues are unable to obtain a Rule 833(b) exemption.

We detail below cost estimates for specifics parts of the adopted rules. Many of these cost estimates are based on the PRA estimates of costs and burdens from section XVIII.[951]

(a) Registration Requirements for SBSEFs and Form SBSEF

The registration provisions would impose costs on entities that seek registration as SBSEFs. The Commission estimates that initial filings on Form SBSEF by prospective SBSEFs seeking to register with the Commission

[939] *See* Rules 825(c)(1)(iv) through (vi) and 825(c)(2).

[940] *See* 2019 Cross-Border Adopting Release, *supra* note 218, 85 FR at 6347 (providing no-action relief with respect to Rule 902 of Regulation SBSR, 17 CFR 242.902, for reports of credit SBS transaction disseminated with a capped size of $5 million).

[941] *See* SIFMA AMG Letter, *supra* note 18, at 11.

[942] *See* ISDA–SIFMA Letter, *supra* note 18, at 12.

[943] *See* Tradeweb Letter, *supra* note 18, at 4–5.

[944] *See* SIFMA AMG Letter, *supra* note 18, at 11.

[945] *See supra* notes 624–627 and accompanying text.

[946] *See supra* note 599; Bloomberg Letter, *supra* note 18, at 6, 19; ICE Letter, *supra* note 18, at 4; ISDA–SIFMA Letter, *supra* note 18, at 14; Tradeweb Letter, *supra* note 18, at 6.

[947] *See supra* note 602–607 and accompanying text.

[948] *See supra* notes 597–599 and accompanying text.

[949] In the Proposing Release, the Commission stated its preliminary belief that ''the use of single-dealer platforms to discharge any mandatory trading execution requirement'' would not meet the proposed rule's requirements. *See* Proposing Release, *supra* note 1, 87 FR at 28925.

[950] *See supra* note 626.

[951] In section XVIII *infra,* for purposes of the PRA, the Commission estimates burdens applicable to a stand-alone SBSEF. However, most if not all SBSEFs will be dually registered with the CFTC as SEFs and thus will already be complying with relevant CFTC rules that have analogs to rules in Regulation SE. Therefore, the Commission's burden estimates are greater for stand-alone SBSEFs than may actually take place for those already registered with the CFTCs because of the effect of the CFTC's corresponding rules.

pursuant to Rule 803 would result in aggregate initial costs of $100,300 for prospective SBSEFs.[952]

(b) Ongoing Compliance With Other Requirements That Are Similar to the Remainder of Part 37

As discussed in section XVIII.D.2.b, the Commission estimates the aggregate annual paperwork burden for SBSEFs to comply with all of the SBSEF rules that have analogs in part 37 to be 1935 hours.[953] These burdens are estimated to impose aggregate ongoing annual costs of $131,580 on SBSEFs.[954]

(c) Rule and Product Filing Processes for SBSEFs

The Commission estimates that the aggregate ongoing annual costs incurred by all SBSEFs to prepare and submit rule and product filings under Rules 804, 805, 806, and 807 (including the cover sheet) would be $33,000.[955]

(d) Rules 809, 811, 819, 826, 829, 833, 834, and 835

The Commission estimates the aggregate ongoing annual costs incurred by SBSEFs to comply with Rule 809 would be $604.[956]

The Commission estimates the aggregate ongoing annual costs incurred by SBSEFs to comply with requests for documents or information pursuant to Rule 811(d) would be $88.[957]

The Commission estimates the aggregate ongoing annual costs incurred by SBSEFs to comply with Rule 819(i) would be $27,142.[958]

The Commission estimates the aggregate ongoing annual costs incurred by SBSEFs to comply with Rule 819(j) would be $1,208.[959]

The Commission estimates the aggregate ongoing annual costs incurred by SBSEFs to update information required by Rule 826(f) would be $162.[960] The Commission estimates that interested parties would incur aggregate one-time costs of $115,920 in the first year and $77,280 in each subsequent year to submit exemption requests under one or both paragraphs of Rule 833.[961]

The Commission estimates that SBSEFs and SBS exchanges would incur aggregate one-time costs of $50,880 associated with drafting and implementing rules to comply with Rules 834(b) and (c).[962]

The Commission estimates that SBSEFs and SBS exchanges would incur aggregate ongoing annual costs of $680 to comply with Rules 834(d), 834(e), and 834(f).[963]

The Commission estimates that SBSEFs and SBS exchanges would incur aggregate one-time costs of $1,088 to comply with Rule 834(g).[964]

The Commission estimates that SBSEFs would incur aggregate ongoing annual costs of $21,735 to comply with Rule 835.[965]

SBSEFs likely would incur costs to comply with the financial resources requirement of Rule 829(b). Assuming that SBSEFs satisfy this requirement by holding financial resources in the form of their own capital pursuant to Rule 829(c)(1), the Commission estimates that SBSEFs would incur an aggregate annual cost of capital of $35,436.[966]

[952] $100,300 = 1,475 burden hours × $68/hour blended hourly rate. The $68/hour blended hourly rate is the $59/hour blended hourly rate computed by the CFTC and adjusted for CPI inflation through Dec. 2022. The CFTC used the blended hourly wage to estimate PRA costs associated with part 37. *See infra* section XVIII.D.2(a); OMB, Supporting Statement for New and Revised Information Collections: Core Principles and Other Requirements for Swap Execution Facilities, OMB Control Number 3038–0074, Attachment A (July 7, 2021), *available at https://omb.report/icr/202107-3038-004/doc/113431800.pdf.*

[953] *See infra* section XVIII.D.2(b). This estimate excludes the paperwork burdens associated with registration requirements for SBSEFs and Form SBSEF and provisions of certain rules to be discussed subsequently.

[954] $131,580 = 1,935 burden hours × $68/hour blended hourly rate. *See supra* note 952 (derivation of the $68/hour blended hourly rate).

[955] $33,000 = 300 hours × $110/hour blended hourly rate. The $110/hour blended hourly rate is the $96.26/hour blended hourly rate computed by the CFTC and adjusted for CPI inflation through Dec. 2022. The CFTC used the blended hourly rate to estimate PRA costs associated with part 40. *See infra* section XVIII.D.3(a); OMB, Supporting Statement for Information Collection Renewal: OMB Control Number 3038–0093, Attachment A (July 10, 2020), *available at https://omb.report/icr/202005-3038-001/doc/101274002.pdf.* The platform ID requirement on the submission cover sheet would not impose burdens for obtaining a platform ID, because an SBSEF (whether registered or exempt) is already required under Rule 903(a) of Regulation SBSR to obtain an LEI to identify itself as its platform ID. *See supra* section IV.E and n.140.

[956] $604 = 1.25 hours × $483/hour national hourly rate for an attorney. The per-hour figure for an attorney is from SIFMA's Management and Professional Earnings in the Securities Industry—2013, as modified by Commission staff to adjust for inflation (through Dec. 2022) and to account for an 1,800-hour work-year, and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead. *See infra* section XVIII.D.3(b)(ii); Supporting Statement for the Paperwork Reduction Act New Information Collection Submission for Rule 3a68–2 (Interpretation of Swaps, Security-Based Swaps, and Mixed Swaps) and Rule 3a68–4(c) (Process for Determining Regulatory Treatment for Mixed Swaps), OMB Control Number 3235–0685, Supporting Statement A (Dec. 23, 2021), *available at https://omb.report/icr/202112-3235-018/doc/117438500.pdf.*

[957] $88 = 1.25 hour × $70/hour hourly rate for a financial manager. The $70/hour hourly rate is the $65/hour hourly rate computed by the CFTC and adjusted for CPI inflation through Dec. 2022. The CFTC used the hourly rate to estimate PRA costs associated with part 1.6. *See infra* section XVIII.D.4(a); OMB, Supporting Statement for New and Revised Information Collections: OMB Control Number 3038–0033 (Oct. 29, 2021), *available at https://omb.report/icr/202110-3038-001/doc/115991000.pdf.*

[958] $27,142 = 399.15 hours × $68/hour blended hourly rate. The burdens associated with this rule are not different from burdens associated with rules that have part 37 analogs. Thus, it would be appropriate to apply the $68/hour blended hourly rate to estimate the paperwork related costs associated with this rule. *See infra* section XVIII.D.4(c). *See also supra* note 952 (derivation of the $68/hour blended hourly rate).

[959] $1,208 = 2.5 hours × $483/hour national hourly rate for an attorney. *See infra* section XVIII.D.4. *See also supra* note 956 (derivation of the national hourly rate for an attorney).

[960] $162 = 2 hours × $81/hour national hourly rate for a compliance clerk. *See infra* section XVIII.D.4(f). The per-hour figure for a compliance clerk is from SIFMA's Office Salaries in the Securities Industry—2013, as modified by Commission staff to adjust for inflation (through Dec. 2022) and to account for an 1,800-hour work-year, and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead.

[961] First year costs: $115,920 = 240 hours × $483/hour national hourly rate for an attorney. Costs in each subsequent year: $77,280 = 160 hours × $483/hour national hourly rate for an attorney. *See infra* section XVIII.D.5(a). *See also supra* note 956 (derivation of the national hourly rate for an attorney).

[962] $50,880 = 120 hours × $424/hour national hourly rate for a compliance attorney. The estimate of 120 burden hours is based on the Commission's estimate that five SBSEFs and three SBS exchanges will incur paperwork burdens associated with Rules 834(b) and (c). *See infra* section XVIII.D.4(g). The per-hour figure for a compliance attorney is from SIFMA's Management and Professional Earnings in the Securities Industry—2013, as modified by Commission staff to adjust for inflation (through Dec. 2022) and to account for an 1,800-hour work-year, and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead.

[963] $680 = 10 hours × $68/hour blended hourly rate. Further, the costs incurred by SBSEFs = 5 (number of SBSEFs) × 1.25 hours per SBSEF × $68/hour blended hourly rate = $425. The burdens associated with this rule are not different from burdens associated with rules that have part 37 analogs. Thus, it is appropriate to apply the $68/hour blended hourly rate to estimate the paperwork related costs associated with this rule. *See infra* section XVIII.D.4(g). *See also supra* note 952 (derivation of the $68/hour blended hourly rate).

[964] $1,088 = 16 hours × $68/hour blended hourly rate. The burdens associated with this rule are not different from burdens associated with rules that have part 37 analogs. Thus, it is appropriate to apply the $68/hour blended hourly rate to estimate the paperwork related costs associated with this rule. *See infra* section XVIII.D.4(g). *See also supra* note 952 (derivation of the $68/hour blended hourly rate).

[965] $21,735 = 45 hours × $483/hour national hourly rate for an attorney. *See infra* section XVIII.D.5(b). *See also supra* note 956 (derivation of the national hourly rate for an attorney).

[966] The Commission estimates the financial resources that SBSEFs would need to hold pursuant to Rule 829(b) as their projected operating costs. *See* Rule 829(b). Further, the Commission estimates SBSEFs' projected operating costs as the sum of the aggregate ongoing annual costs incurred by SBSEFs to comply with Regulation SE. Thus, SBSEFs' estimated projected operating costs = $131,580 (ongoing compliance with other requirements that are similar to the remainder of part 37) + $33,000 (rule and product filing processes by SBSEFs) + $604 (Rule 809) + $88 (Rule 811(d)) + $27,142 (Rule 819(i)) + $1,208 (Rule 819(j)) + $162 (Rule 826(f))

Continued

SBSEFs could lower this cost if their capital consists of financial assets that generate a return that would serve to offset the cost of capital. However, this cost mitigation is potentially limited by Rule 829(d), which would require an SBSEF to include among the financial resources it holds a certain amount of unencumbered, liquid financial assets (*i.e.,* cash and/or highly liquid securities),[967] that tend to generate little or no return.

(e) Assessment Costs

The Commission estimates that 86 entities likely would incur assessment costs as a result of Rule 832, based on a staff analysis of counterparties to U.S. single-name CDS for the 12-month period from October 2021 to September 2022. Such costs would be related primarily to the identification of the counterparty status and origination location of the transaction to determine whether the trade execution requirement would apply. Market participants would request representations from their transaction counterparties to determine the U.S.-person status of their counterparties. In addition, if the transaction is guaranteed by a U.S. person, the guarantee would be part of the trading documentation and, therefore, the existence of the guarantee would be a readily ascertainable fact. Similarly, market participants would be able to rely on their counterparties' representations as to whether a transaction is arranged, negotiated, or executed by a person within the United States. Therefore, the assessment costs associated with Rule 832 should be limited to the costs of establishing a compliance policy and procedure of requesting and collecting representations from trading counterparties and maintaining the collected representations as part of the market participants' recordkeeping procedures. Such assessment costs would be approximately $19,320 per entity.[968] Requesting and collecting representations would be part of the standardized transaction process reflected in the policies and procedures regarding SBS transactions and trading practices and should not result in separate assessment costs.

The Commission also considers the likelihood that market participants could implement systems to keep track of counterparty status for purposes of future trading of SBS that are similar to, if not the same as, the systems implemented by market participants for purposes of assessing SBS dealer or major SBS participant status. Implementation of such a system would involve one-time programming costs of $15,758 per entity.[969] Therefore, the Commission estimates the total one-time costs per entity associated with Rule 832 could be $35,078 and the aggregate one-time costs could be $3,016,708.[970] To the extent that market participants have incurred costs relating to similar or the same assessments with respect to counterparty status and transaction location for other Title VII requirements, their assessment costs with respect to Rule 832 may be less.

(f) Structured Data and Electronic Filing Costs

As mentioned previously, the Commission will require many of the disclosures required under Regulation SE to be provided via EDGAR in a structured data language. SBSEFs will likely incur limited costs to comply with the proposed requirement in Rule 825(c)(3) to publish Daily Market Data Reports using the most recent versions of the associated XML schema and PDF renderer as published on the Commission's website. Because SBSEFs are required to use structured data to fulfill their reporting requirements under Regulation SBSR, the compliance cost associated with the Rule 825(c)(3) requirement will be limited to the cost prospective SBSEF registrants will incur to update their systems to incorporate the Commission's XML schema for Daily Market Data Reports.[971] Such costs are included among the costs for prospective SBSEF registrants in making limited changes to their systems, policies, and procedures to comply with proposed SEC rules that differ slightly from analogous CFTC rules, as discussed in further detail above.[972]

With respect to the Inline XBRL requirements for various disclosures required under Regulation SE, SBSEFs will incur initial Inline XBRL implementation costs (such as the cost of training in-house staff to prepare filings in Inline XBRL, and the cost to license Inline XBRL filing preparation software from vendors) and ongoing Inline XBRL compliance burdens that will result from the tagging requirements, because prospective SBSEF registrants are not currently subject to Inline XBRL requirements. The custom XML requirements under Regulation SE will not impose these costs on SBSEFs, because SBSEFs will have the option of complying with those requirements by completing a fillable web form rather than structuring the disclosures in custom XML themselves. Also, as discussed in greater detail below, the Inline XBRL implementation costs could be mitigated to some extent, because six of the seven SEFs that list index CDS for trading (*i.e.,* the pool of likely SBSEF applicants) have parent or affiliate entities that make filings in Inline XBRL, which raises the

+ $425 (Rules 834(d), (e), and (f)) + $21,735 (Rule 835) = $215,943. Thus, the Commission estimates that SBSEFs would hold $215,943 in the form of their own capital to comply with Rule 829(b). The Commission estimates SBSEFs' cost of capital to be 16.41%. *See supra* note 896 (describing how the cost of capital is estimated). SBSEFs' aggregate annual cost of capital = $215,943 × 16.41% = $35,436. The Commission acknowledges that there is uncertainty associated with this estimate. The estimate does not account for the fact that SBSEFs may use reasonable discretion in determining the methodologies used to calculate projected operating costs and wind down costs, pursuant to Rule 829(e). Depending on how SBSEFs exercise this reasonable discretion, the resulting methodologies could yield projected operating costs and in turn, required financial resources, that may be higher or lower than the Commission's estimate.

[967] The CFTC's experience overseeing SEFs would appear to support the belief that SBSEFs would hold unencumbered, liquid financial assets rather than obtain a line of credit to comply with Rule 829(d). In a previous rulemaking, the CFTC noted that most SEFs satisfy the liquidity requirement of § 37.1303 (the analog of Rule 829(d)) through maintaining liquid assets rather than obtaining a line of credit. *See* CFTC, *Swap Execution Facilities,* 86 FR 9224, 9242 n.247 (Feb. 11, 2021) (''2021 SEF Amendments Adopting Release'').

[968] $19,320 = 40 hours × $483/hour national hourly rate for an attorney. This estimate is based on an estimated 40 hours of in-house legal or compliance staff's time to establish a procedure of requesting and collecting representations from trading counterparties, taking into account that such representations may be built into a form of standardized trading documentation. *See supra* note 956 (derivation of the national hourly rate for an attorney).

[969] This is based on an estimate of the time required for a programmer analyst to modify the software to track the covered person status of a counterparty, including consultation with internal personnel, and an estimate of the time such personnel would require to ensure that these modifications conformed to the definition of ''covered person'' (as defined in Rule 832). $15,758 = (2 hours × $424/hour national hourly rate for a compliance attorney) + (4 hours × $360/hour national hourly rate for a compliance manager) + (40 hours × $280/hour national hourly rate for a programmer analyst) + (4 hours × $266/hour national hourly rate for a senior internal auditor) + (2 hours × $603/hour rate for a Chief Financial Officer). The per-hour figures for compliance attorney, compliance manager, programmer analyst, and senior internal auditor are from SIFMA's Management & Professional Earnings in the Securities Industry—2013, as modified by Commission staff to adjust for inflation (through Dec. 2022) and to account for an 1,800-hour work-year, and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead. The hourly rate for a Chief Financial Officer is the $473 hourly rate for the same position used in the Cross-Border Adopting Release (*see* 78 FR 31140 n.1425) and adjusted for inflation through Dec. 2022.

[970] Total one-time costs per entity = $19,320 (compliance policy and procedure) + $15,758 (systems) = $35,078. Aggregate one-time costs = 86 entities × $35,078 = $3,016,708.

[971] *See* 17 CFR 242.907(a)(2) (requiring information to be submitted to SDRs in an ''open-source structured data format that is widely used by participants'').

[972] *See supra* note 920 and accompanying text.

possibility that some (if not most) SBSEFs might be able to take advantage of the knowledge of Inline XBRL possessed by their parent or affiliate entities.

Further, the compliance costs associated with the structured data requirements, as adjusted for inflation, will likely decrease over time. SBSEFs will likely comply with structuring requirements more efficiently after gaining experience over repeated filings, though such an effect will likely be diminished for affected entities that already have experience structuring similar data in other documents. Third-party vendors of structured data compliance software or services may decrease the prices of their products over time; the XBRL compliance costs reported in the 2018 AICPA survey of smaller operating companies reflect such a trend, as they represented a 45% decline in average cost and a 69% decline in median cost from 2014.[973]

In addition to costs associated with structured data requirements, because prospective SBSEF registrants are not currently subject to EDGAR requirements, hey will incur a one-time compliance burden of submitting a Form ID as required by Rule 10(b) of Regulation S–T.[974] The aforementioned costs are included among the costs for prospective SBSEF registrants in making limited changes to their systems, policies, and procedures to comply with proposed SEC rules that differ slightly from analogous CFTC rules, as discussed in further detail above.[975]

As noted above, we are requiring SBSEFs to submit rule and product filings in unstructured format using EFFS, rather than structuring the filings and submitting them via EDGAR.[976] As a result of this change from the proposal, SBSEFs will not incur the compliance costs associated with applying Inline XBRL tags to their rule and product filings. We agree with one commenter who noted that an Inline XBRL requirement would cause SBSEFs to incur related compliance costs, although we do not agree that such costs would be so substantial as to serve as a potential market entry deterrent, or would create an unlevel playing field whereby national securities exchanges would have a competitive advantage over SBSEFs due to these discrepant costs. Rather, we are requiring rule and product filings to be filed through EFFS in unstructured format, because we believe the alleviation of compliance burdens resulting from the absence of a structuring requirement merits the lesser volume of machine-readable data, especially in light of the significant volume of structured SBSEF data available pursuant to other Regulation SE provisions.

D. Effects on Efficiency, Competition, and Capital Formation

The new rules and amendments would likely affect competition, capital formation, and efficiency in various ways discussed below.

1. Competition

As discussed earlier, currently, the SBS market is dominated by a small group of SBS dealers.[977] A mandatory clearing determination by the Commission, followed by a MAT determination by one or more SBSEFs, should help foster greater competition in the trading of SBS by promoting greater order interaction and increasing participation on SBSEFs. The final rules provide a framework for allowing a number of trading venues to register as SBSEFs and thus more effectively compete for business in SBS. Furthermore, Rule 827 is designed to promote competition generally by prohibiting an SBSEF from adopting any rules or taking any actions that unreasonably restrain trade or impose any material anticompetitive burden on trading or clearing. Additionally, rules that improve access to SBSEFs by market participants (*e.g.,* Rule 819(c)) could increase participation and competition in liquidity provision in the SBS market.[978] Rules that improve regulatory oversight, market integrity, and market predictability on SBSEFs and rules that reduce the risk of trading disruption on SBSEFs likely would increase market participants' confidence in the soundness of SBSEFs.[979] To the extent that greater confidence in the soundness of SBSEFs increases participation by liquidity providers on SBSEFs, competition in liquidity provision could increase. To the extent that increased competition in liquidity provision reduces the price of liquidity provision (*e.g.,* bid-ask spread), market participants could benefit in terms of lower transaction costs.

Rules 815(f) and 815(g), by reducing the risk of information leakage and protecting market participants' anonymity for an SBS that is anonymously executed on an SBSEF and intended to be cleared, could increase participation on SBSEFs. This in turn could increase competition in liquidity provision, liquidity, and efficiency in the SBS market.[980]

Rule 806(a)(5), which requires an SBSEF to explain the anticipated benefits and potential anticompetitive effects on market participants of a proposed new rule or rule amendment, potentially could help foster a competitive SBS market because it could prompt SBSEFs to consider the positive as well as negative aspects of their proposed rules or rule amendments with respect to competition.[981]

As discussed earlier, Rules 819(c) and 819(e) would promote competition among entities that act as third-party service providers to SBSEFs. To the extent that increased competition among third-party service providers incentivizes them to offer cheaper, higher quality services to SBSEFs thereby lowering their costs, market participants that are SBSEF members could benefit if the SBSEFs pass on the cost savings in the form of lower fees to their members.[982] Lower fees for SBSEF members would help reduce the overall costs of trading on SBSEFs and increase the efficiency of SBS trading.

2. Capital Formation

Regulation SE could promote capital formation by helping to improve regulatory oversight, market integrity, and market predictability. Regulation SE requires, among other things, that SBSEFs maintain an audit trail and automated trade surveillance system; conduct real-time market monitoring; establish and enforce rules for information collection; and comply with reporting and recordkeeping requirements. These requirements are designed to provide an SBSEF with sufficient information to oversee trading on its market, including detecting and

[973] AICPA, XBRL Costs for Small Companies Have Declined 45% since 2014 (2018), *available at https://us.aicpa.org/content/dam/aicpa/interestareas/frc/accountingfinancialreporting/xbrl/downloadabledocuments/xbrl-costs-for-small-companies.pdf.* This survey was limited to operating companies, and was conducted before the transition from XBRL to Inline XBRL and the implementation of cover page tagging requirements for periodic reports.

[974] *See* 17 CFR 232.10(b).

[975] *See supra* note 920 and accompanying text.

[976] *See supra* section XVII.C.2.

[977] *See supra* section XVII.B.2.

[978] *See supra* sections XVII.C.1 (discussing improved access and competition as an overarching benefit of the rules and amendments) and XVII.C.2 (discussing how rules that mitigate conflicts of interest between an SBSEF or SBS exchange and its members could help ensure access to SBSEFs and SBS exchanges and in turn increase competition in liquidity provision and lower transaction costs).

[979] *See infra* section XVII.D.2.

[980] *See supra* section XVII.C.1 (discussing improved access and competition as an overarching benefit).

[981] *See supra* section XVII.C.2 (discussing benefits associated with rule and product filings).

[982] *See supra* section XVII.C.1 (discussing improved access and competition as an overarching benefit).

deterring abusive trading practices.[983] The audit trail and recordkeeping and reporting requirements, by providing the Commission access to information about SBSEFs, will increase the Commission's ability to assess risks in the SBS market and to oversee the market, which all else being equal should reduce the amount of risky or abusive behavior in the SBS market.[984] Further, Rule 831, the requirements relating to the CCO, would promote regulatory compliance on SBSEFs and the SBS market generally.[985] In addition, Regulation SE provides for various safeguards to help promote market integrity, including Rule 819(c) relating to impartial access to the SBSEF[986] and Rule 830 relating to systems safeguards. Rule 812(a) would help to improve predictability in the market by providing that a transaction entered into on or pursuant to the rules of an SBSEF shall not be void, voidable, subject to rescission, otherwise invalidated, or rendered unenforceable as a result of a violation by the SBSEF of the provisions of section 3D of the SEA or the Commission's rules thereunder. Any resulting increase in regulatory oversight, market integrity, and market predictability likely would increase market participants' confidence in the soundness of SBSEFs, which in turn could spill over into increased confidence in the soundness of the SBS market more broadly. Such increased confidence could lead to the greater use of SBS, particularly those traded on SBSEFs, by corporate entities to hedge their business risks and investors to hedge their portfolio risks with respect to positions in underlying securities. To the extent that corporate entities can improve their hedging efficiency with SBS, they may divert resources from precautionary savings into productive assets, thereby promoting capital formation. To the extent that investors can improve their hedging efficiency with SBS, they may be more willing to invest in the underlying securities, which should facilitate capital raising and formation by issuers. Therefore, the adopted rules would help encourage capital formation.

Also, by reducing the risk of trading disruptions on SBSEFs, Rules 829 and 830 could increase market participants' confidence in the soundness of SBSEFs, which in turn could lead to the greater use of SBS traded on SBSEFs thereby promoting capital formation as discussed above.

3. Efficiency

The general approach of harmonizing as closely as practicable with analogous CFTC rules for SEFs, unless a reason exists to do otherwise in a particular area, likely will generate cost efficiencies and reduced burdens for SBSEF registrants that likely would be registered SEFs that have established systems and policies and procedures to comply with CFTC rules.[987] Further, increased competition among third-party service providers, as a result of Rules 819(c) and 819(e), could lower SBSEFs' costs and bring about greater efficiency in their operation and SBS trading.[988]

The automation and systems development associated with the regulation of SBSEFs could provide SBS market participants with new platforms and tools to execute and process transactions in SBS more rapidly and at a lower expense per transaction. Such increased efficiency could enable members of the SBSEF to handle increased volumes of SBS with greater efficiency and timeliness.[989]

The requirements with respect to pre-trade price transparency could lead to more efficient pricing in the SBS market. The rules are designed to increase pre-trade price transparency for SBS, which should aid market participants in evaluating current market prices for SBS, thereby furthering more efficient price discovery. Increased pre-trade price transparency, coupled with increased competition in liquidity provision as discussed above,[990] could decrease the spread in quoted prices and lead to higher efficiency in the trading of SBS.

The Commission recognizes the possibility that pre-trade price transparency could cause market participants to reveal more information about trading interest than they believe would be economically desirable. If market participants consider that pre-trade price transparency requirements are too burdensome and choose not to participate in the market, market efficiency could be reduced insofar as these market participants forgo any potential economic benefits that may have resulted from transacting in the SBS market. However, several factors mitigate such concerns. First, pursuant to Rule 815(c)(2), an SBSEF may offer any execution method for Permitted Transactions. Thus, a market participant engaging in a Permitted Transaction may choose to use an execution method that reveals the desired, or at least preferred, amount of information about trading interest. Second, pursuant to Rule 815(a)(2), an SBSEF will be required to offer two execution methods for Required Transactions (limit order book and RFQ-to-3). Thus, market participants have flexibility in the degree of pre-trade transparency they wish to employ, which should attenuate potential concerns associated with revealing too much information about trading interest.[991] Rules 829 and 830 may reduce the risk of trading disruptions on SBSEFs that may otherwise prevent market participants from impounding information into SBS prices through market activity (*e.g.,* order submission), and thus could improve the price efficiency in the SBS market.

E. Reasonable Alternatives

The Commission considered a number of alternatives when finalizing the rules and amendments in this release.

1. Abbreviated Registration Procedures for CFTC-Registered SEFs

Several commenters suggest that the Commission provide abbreviated registration procedures for CFTC-registered SEFs either by using the Commission's exemptive authority to provide a streamlined registration process for such applicants[992] or by permitting such applicants to register utilizing their current documentation filed pursuant to the requirements of Form SEF with an accompanying addendum reflecting only those changes necessary to fulfill the specific requirements of proposed Regulation

[983] *See* Rules 819, 821, 822, 826 and *supra* section XVII.C.1 (discussing improved oversight of trading by SBSEFs as an overarching benefit of the rules and amendments).

[984] *See supra* section XVII.C.1 (discussing improved Commission oversight as an overarching benefit of the rules and amendments).

[985] *See supra* section XVII.C.2 (discussing the benefits associated with Rule 831).

[986] *See supra* note 978.

[987] For example, the Commission's election to model Rules 804 through 810 closely on analogous rules in part 40 of the CFTC's rules that apply to SEFs (and other registered entities) would impose minimal burdens on dually registered SEF/SBSEFs while obtaining similar regulatory benefits as the CFTC rules. In some cases, where a new rule or rule amendment affects both the swap and SBS business of a dually registered entity, the same or a very similar filing could be made to each of the CFTC and SEC, in lieu of having to make different filings to support the same rule change. *See supra* section XVII.C.2 (discussing the benefits associated with rule and product filings).

[988] *See supra* section XVII.D.1.

[989] *See supra* section XVII.C.1 (discussing improved automation as an overarching benefit of the rules and amendments).

[990] *See supra* section XVII.D.1.

[991] *See supra* section XVII.C.1 (discussing the different degrees of pre-trade transparency associated with limit order book and RFQ-to-3).

[992] *See* SIFMA AMG Letter, *supra* note 18, at 5; Bloomberg Letter, *supra* note 18, at 11; WMBAA Letter, *supra* note 18, at 3; ICE Letter, *supra* note 18, at 5.

SE, in lieu of filing a new Form SBSEF.[993] Some of these commenters believe that a streamlined registration process would ease the burden of new requirements imposed on potential dual-registrants, be more efficient, lower registration costs, encourage the entry of market participants, and expedite the establishment and operation of SBSEFs.[994] The Commission acknowledges that the alternative could potentially have such beneficial effects. However, the adopted approach is preferable to the alternative. As a general matter, the SBSEF registration process is intended for all applicants. While entities that will seek to register as SBSEFs are likely to be CFTC-registered SEFs,[995] the registration process should nevertheless address the possibility that some applicants might not be CFTC-registered SEFs. Requiring all applicants to follow the same registration process will provide a level playing field for all applicants by avoiding conferring a competitive advantage on applicants that are CFTC-registered SEFs. This in turn may encourage the entry of additional market participants. As discussed in section III.A.2., the adopted approach supports consistency in the review by the Commission and its staff of applications for registration of SBSEFs and avoids introducing bias or prejudice into the Commission's review. Such consistency could in turn increase the efficiency of the review process and help expedite the establishment and operation of SBSEFs.

2. Shorten Review Period for Self-Certified Product Listing

In connection with the ten-business-day review period under Proposed Rule 804(a)(2), two commenters recommend a shorter review period of one business day to harmonize with the CFTC's approach.[996] Alternatively, one of the commenters suggests a two-business-day review period.[997] According to these commenters, a shorter review period will allow market operators to meet participants' demands to transact on regulated platforms in a reasonable period of time; accommodate participants' needs to hedge risk in a timely manner; and increase the competitive benefit and innovation incentive to SBSEFs to develop new products by making it less attractive for other SBSEFs to list ''look alike'' products. In finalizing Rule 804(a)(2), the Commission has considered the trade-off between the benefits of a shorter review period as described by the commenters and the benefits of having sufficient time to review a new product filing and to issue a stay if warranted. The ten-business-day review period set forth in final Rule 804(a)(2) strikes an appropriate balance between these sets of benefits. To the extent that the ten-business-day review period limits market operators' ability to meet participants' demands to transact on regulated platforms in a reasonable period of time, that limitation is appropriate in light of the benefits of having sufficient time to review a new product filing and to issue a stay if warranted. While a shorter review period may accommodate market participants' need to hedge risk in a timely manner, these market participants also could hedge their risk during the ten-business-day review period, albeit in the OTC SBS market. The Commission does not believe the additional hedging benefit, if any, associated with a shorter review period is sufficient to justify adopting this alternative. Rule 804 may not necessarily limit the competitive benefit and innovation incentive to SBSEFs to develop new products. SBSEFs that wish to list ''look alike'' products also will face a ten-business-day review period if they list such products pursuant to Rule 804.[998] Thus, such SBSEFs will lag behind the SBSEF that first lists a given SBS, which could capture a significant portion, if not most, of the revenues associated with the trading of that product. Even if the 10-day review period were to reduce the first-to-market competitive advantage of an SBSEF that first lists a given SBS, the extent of such an advantage may vary considerably based on other factors in the SBSEF market. Ultimately, the need for the Commission to have sufficient time to review a new product before it is listed and thereby help ensure it meets regulatory requirements aimed to protect investors and support fair and efficient markets justifies this potential competitive effect. Accordingly, the adopted approach is preferable to the alternative.

3. Incorporate CFTC's Impartial Access Requirement Guidance

Several commenters urge the Commission to incorporate the CFTC's impartial access requirement guidance with respect to access to SBSEFs into the text of Rule 819. According to these commenters, such an alternative would provide market participants with guidance and clarity regarding how Proposed Rule 819(c) will be interpreted and applied in practice. The commenters believe that the alternative would increase competition, transparency, and liquidity in the SBS markets; lower transaction costs through increased competition; and result in greater market-led innovation in the SBS markets.[999] The Commission acknowledges that the alternative could have beneficial effects on competition, transaction costs, transparency, liquidity, and innovation as the commenters asserts. However, the alternative raises several concerns. First, if, in the future, the CFTC's impartial access requirement guidance were to be modified, the regulatory regime for SEFs might differ from that for SBSEFs. This in turn could limit harmonization with the CFTC's regulatory regime and potentially increase compliance burdens for market participants if they have to comply with different requirements for SEFs and SBSEFs.

Second, as discussed in section VI.B.3 above, efforts to undermine the principle of impartial access may take myriad forms over time. It is preferable to emphasize the principle of impartial access in the rule text as an affirmative requirement with which to comply. The adopted approach would incentivize SBSEFs to constantly review their practices to ensure compliance with the principle of impartial access. The Commission also considered the alternative of incorporating into the text of Rule 819 a non-exclusive list of the means that may violate the principle of impartial access. This alternative would raise the same concerns discussed above.

The adopted approach may nevertheless generate the beneficial effects suggested by the commenters. Rule 819(c) is broad enough to permit market participants to use the same practices that they are using pursuant to the CFTC guidance. Consistent with the Commission's belief that prospective SBSEF registrants are likely to be CFTC-registered SEFs that are active in the index CDS market,[1000] prospective SBSEF registrants likely will use the systems, policies, and procedures that were created to comply with the CFTC

[993] *See* ICE Letter, *supra* note 18, at 5.

[994] *See* SIFMA AMG Letter, *supra* note 18, at 5; Bloomberg Letter, *supra* note 18, at 11; WMBAA Letter, *supra* note 18, at 3.

[995] *See supra* section XVII.B.4.

[996] *See* WMBAA Letter, *supra* note 18, at 4; ICE Letter, *supra* note 18, at 2.

[997] *See* WMBAA Letter, *supra* note 18, at 4.

[998] In this context, SBSEFs that wish to list products expeditiously likely will not choose to list them pursuant to Rule 805, which requires a 45-day review period that could be extended for an additional 45 days. *See* Rules 805(c) and (d).

[999] *See* Bloomberg Letter, *supra* note 18, at 3, 16; Citadel Letter, *supra* note 18, at 6–7; MFA Letter, *supra* note 18, at 2, 9–11; SIFMA AMG Letter, *supra* note 18, at 4.

[1000] *See supra* section XVII.B.

guidance to comply with Rule 819(c) in order to limit their compliance burdens. The Commission is adopting Rule 815(g), which specifies that SBSEFs shall establish and enforce rules that provide that a security-based swap that is intended to be cleared at the time of the transaction, but is not accepted for clearing at a registered clearing agency, shall be void *ab initio.* This rule would obviate the need for breakage agreements for SBS that are intended to be cleared, one of the items prohibited by the CFTC's guidance.[1001] As discussed in section XVII.C, Regulation SE may bring several benefits to the SBS market including, among other things, increased competition,[1002] transparency, and liquidity; reduced transaction costs; [1003] and market innovation in the form of new platforms and tools to execute and process SBS transactions more efficiently.[1004] In light of the above, the adopted approach is preferable to the alternative.

4. Harmonize With CFTC's STP Requirements

In connection with Proposed Rule 823, several commenters recommend that the Commission harmonize with CFTC's STP requirements by establishing STP standards, incorporating relevant CFTC guidance, and prohibiting breakage agreements for SBS that are intended to be cleared.[1005] The commenters suggest the alternative could reduce market, credit, and operational risks; facilitate hedging activity; avoid complexity and costs; increase competition; promote trading on SBSEFs and electronic trading; and increase transparency, liquidity, and fairness in the SBS markets.[1006] The Commission acknowledges that the alternative could have beneficial effects as suggested by the commenters. However, the alternative raises several concerns. First, if, in the future, the CFTC's staff guidance were to be modified, the regulatory regime for SEFs might differ from that for SBSEFs. This in turn could limit harmonization with the CFTC's regulatory regime and potentially increase compliance burdens for market participants if they have to comply with different requirements for SEFs and SBSEFs. Second, the timeframes for a clearinghouse to accept or reject a trade for clearing set forth in the CFTC staff guidance could become outdated with advances in technology.[1007] If that were to occur, changing those timeframes would be more difficult if they were included as part of Regulation SE, or even as Commission guidance included as part of this release. Any delays in changing those timeframes could mean that market participants would not be able to benefit from any reductions in market, credit, and operational risks associated with the technological advances that render obsolete the timeframes set forth in the CFTC staff guidance.

The adopted approach may nevertheless generate the beneficial effects suggested by the commenters. As discussed in section VI.F.3, Rule 823(c) is broad enough to permit market participants to use the same practices that they are using pursuant to the CFTC guidance. Consistent with the Commission's belief that prospective SBSEF registrants are likely to be CFTC-registered SEFs that are active in the index CDS market,[1008] prospective SBSEF registrants likely will use the systems, policies, and procedures that were created to comply with the CFTC guidance to comply with Rule 823(c) in order to limit their compliance burdens. Further, to comply with the impartial access requirements of Rule 819(c), registered SBSEFs would, among other things, avoid acts that purposefully delay clearing submission in order to favor certain market participants over others. Lastly, the Commission is adopting Rule 815(g), which specifies that SBSEFs shall establish and enforce rules that provide that a security-based swap that is intended to be cleared at the time of the transaction, but is not accepted for clearing at a registered clearing agency, shall be void *ab initio.* This rule would obviate the need for breakage agreements for SBS that are intended to be cleared. Accordingly, the adopted approach is preferable to the alternative.

5. No Block Trade Exception

In finalizing Regulation SE, the Commission considered the alternative of not adopting a block trade exception from the Required Transaction requirement in Rule 815(a)(2) for credit SBS. This alternative could extend the benefits of increased pre-trade transparency [1009] to SBS transactions of a larger notional size. However, this alternative would deviate from the CFTC's approach to block trades and thus reduce harmonization with the CFTC regime for swaps. In addition, as one commenter expressed, under this alternative, market participants would have difficulty executing, or would be unable to execute, large bona fide trades, since they would be required to do so only through the order book. This would increase the cost of trading and hedging, the commenter says, which could reduce participation in certain markets, resulting in less liquidity and increased volatility.[1010] This commenter asserts that exempting block trades from order book and RFQ execution requirements is critical to the functioning of the SBS markets, particularly to execute large trades without affecting price.[1011] Another commenter states that the proposed exception for block trades would provide flexibility for market participants executing SBS transactions of a significantly large size and mitigate the risks of information leakage and impairment of market liquidity.[1012] Another commenter agrees with the Proposing Release's assessment that the block exception to the required methods of execution balances the promotion of price competition and all-to-all trading against the potential costs to the market participants who wish to trade large orders, the importance of which they note is more acute in the SBS market, which is a smaller and less liquid market than the swap market.[1013]

The Commission agrees with commenters that a block-trade exception is appropriate for credit SBS, not only to maintain harmonization with the CFTC regime for swaps but also to

[1001] *See* Division of Clearing and Risk, Division of Market Oversight and Division of Swap Dealer and Intermediary Oversight Guidance on Application of Certain Commission Regulations to Swap Execution Facilities, CFTC (Nov. 14, 2013), n.3, *available at https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/dmostaffguidance111413.pdf.*

[1002] *See supra* sections XVII.C.1 (discussing improved access and competition as an overarching benefit of the rules and amendments) and XVII.D.1 (discussing how the new rules and amendments would likely affect competition).

[1003] *See supra* section XVII.C.1 (discussing improved transparency, increased liquidity, and reduced transaction costs as overarching benefits of the rules and amendments).

[1004] *See supra* section XVII.C.1 (discussing improved automation as an overarching benefit of the rules and amendments).

[1005] *See* Citadel Letter, *supra* note 18, at 6; MFA Letter, *supra* note 18, at 11–12; SIFMA AMG Letter, *supra* note 18, at 9.

[1006] *See* Citadel Letter, *supra* note 18, at 5; MFA Letter, *supra* note 18, at 12; SIFMA AMG Letter, *supra* note 18, at 9.

[1007] CFTC staff guidance on STP states that ''[derivatives clearing organizations] clearing swaps that are executed competitively on or subject to the rules of a . . . SEF and are accepting or rejecting trades within 10 seconds after submission are compliant with the timing standard of Regulation 39.12(b)(7).'' *See* CFTC 2013 STP Guidance, supra note *273.*

[1008] *See supra* section XVII.B.

[1009] *See supra* section XVII.C.1 (discussing that increased pre-trade transparency could increase price competition and price efficiency; improve liquidity; reduce transaction costs; and facilitate execution quality analysis).

[1010] *See* MFA Letter, *supra* note 18, at 5–6.

[1011] *Id.*

[1012] *See* ICI Letter, *supra* note 18, at 10.

[1013] *See* Bloomberg Letter, *supra* note 18, at 14.

facilitate trading of credit SBS. This approach, which is consistent with the approach of the CFTC for swaps, will be especially important in the smaller, less liquid credit SBS markets if and when a clearing determination has been made for one or more SBS. A block-trade exception for credit SBSs subject to the trade-execution requirement, provided that ''block trade'' is appropriately defined for those SBSs, can help ensure that large trades are not significantly more difficult and costly to execute because of the risks posed by information leakage and the potential for adverse price movement, which could significantly impair liquidity in the markets for those SBSs.

Accordingly, the adopted approach is preferable to the alternative.

6. Adopting Proposed Block Trade Definition Now

In finalizing Regulation SE, the Commission considered the alternative of adopting the proposed definition of ''block trade'' under Rule 802. For the third prong of the ''block trade'' definition, the Commission proposed that the SBS be based on a single credit instrument (or issuer of credit instruments) or a narrow-based index of credit instruments (or issuers of credit instruments) having a notional size of $5 million or greater.[1014]

As discussed earlier,[1015] a number of commenters raise concerns that the proposed $5 million block-trade threshold for all credit SBSs would not be sufficiently tailored to the unique and varying trading and risk characteristics of the full range of credit SBS, creating the potential for the adverse market risks that commenters point out may arise from having a one-size-fits-all block threshold.

As discussed above, the Commission acknowledges these commenters' concerns. Further, unless and until the Commission has made a mandatory clearing determination regarding an SBS, it is not necessary to define a block-trade threshold for SBS, and it would be appropriate for the Commission to identify a block-trade threshold in the future after considering credit SBS transaction data and credit SBS markets at that time. In addition, the Commission agrees with commenters that additional consideration of credit SBS transaction data would help the Commission determine the appropriate block-trade threshold for credit SBS products, including whether different thresholds should apply to different types or groups of SBS. The Commission also agrees with commenters that the credit SBS markets are likely to evolve over time and that analysis of market data continues to be an important aspect of setting appropriate thresholds for both block trades and credit SBS public trade reporting.[1016]

Therefore, as discussed above, the Commission is not adopting the proposed definition of ''block trade'' under Proposed Rule 802, or any other block-trade threshold. Instead, Rule 802 will include a note that a definition of ''block trade'' has not yet been adopted. This would allow the Commission to identify a block-trade threshold in the future after considering credit SBS transaction data and the evolution of the credit SBS markets. In light of the above, the adopted approach is preferable to the alternative.

7. Block Trade Definition for Equity SBS

In finalizing Regulation SE, the Commission considered the alternative of adopting a definition of ''block trade'' applicable to equity SBS. One commenter suggests that the alternative would facilitate timely and efficient executions of equity SBS thereby supporting risk management activities, encourage the use of equity SBS for legitimate business purposes, including hedging, and facilitate capital formation.[1017] Another commenter argues that the alternative would avoid information leakage regarding a market participant's investment strategies.[1018]

The Commission acknowledges that the alternative could have beneficial effects as suggested by the commenters. However, as discussed in section V.E.1(c)(iii), an inappropriate block trade threshold for equity SBSs could create incentives for market participants to trade equity SBS over cash equities, listed equity options, and equity swaps. The Commission is concerned, in particular, that a shift in trading activity away from cash equities and listed equity options towards equity SBS could generate several adverse effects. First, such a shift in trading activity could reduce participation in the cash equities and listed equity options markets, including participation by liquidity providers. Reduced participation by liquidity providers could reduce competition in liquidity provision in these markets, which in turn could increase trading costs and decrease liquidity. Trading in these markets could become less efficient because of increased trading costs and decreased liquidity. Second, to the extent that trading becomes more costly in the cash equities and listed equity options markets, trading in these markets could be reduced, which could impede the incorporation of new information into the prices of cash equities and listed equity options through trading. This in turn could reduce price efficiency in the cash equities and listed equity options markets. Third, decreased liquidity in the cash equities market could raise the cost of capital for cash equities,[1019] which in turn could discourage firms from issuing cash equity securities to finance investment projects and reduce capital formation.

The adopted approach may nevertheless generate the beneficial effects suggested by the commenters. Regulation SE would increase pre-trade price transparency and competition in liquidity provision, which could decrease the spread in quoted prices and lead to higher efficiency in the trading of SBS.[1020] In addition, the automation and systems development associated with the regulation of SBSEFs could provide SBS market participants with new platforms and tools to execute and process transactions in SBS more rapidly and at a lower expense per transaction. Such increased efficiency could enable members of the SBSEF to handle increased volumes of SBS with greater efficiency and timeliness.[1021] Further, increased competition among third-party service providers, as a result of Rules 819(c) and 819(e), could lower SBSEFs' costs and bring about greater efficiency in their operation and SBS trading.[1022]

As discussed in section XVII.D.2, Regulation SE could improve regulatory oversight, market integrity, and market predictability, which could lead to the greater use of SBS (including equity SBS) and promote capital formation.

[1014] *See* Proposing Release, *supra* note 1, 87 FR at 28896.

[1015] *See supra* section V.E.1(c)(ii) and Citadel Letter, *supra* note 18, at 9; ICI Letter, *supra* note 18, at 10–12; MFA Letter, *supra* note 18, at 5–8; SIFMA AMG Letter, *supra* note 18, at 10; ISDA–SIFMA Letter, *supra* note 18, at 7–9.

[1016] *See supra* note 219.

[1017] See MFA Letter, supra note 18, at 6–7.

[1018] *See* ICI Letter, *supra* note 18, at 12–13.

[1019] *See, e.g.,* Viral V. Acharya and Lasse Heje Pedersen, *Asset Pricing With Liquidity Risk,* 77 J. Fin. Econ. 375 (2005) and Yakov Amihud, *Illiquidity and Stock Returns: Cross-Section and Time-Series Effects,* 5 J. Fin. Markets 31 (2002) (suggesting that the expected return of a stock, or cash equity security, increases as its liquidity decreases. To the extent that a cash equity security's expected return measures the cost of capital associated with cash equity financing, the cited research suggests that when a cash equity security's liquidity decreases, its cost of capital may increase.).

[1020] *See supra* section XVII.D.3.

[1021] *Id.*

[1022] *Id.*

Also, by reducing the risk of trading disruptions on SBSEFs, Rules 829 and 830 could increase market participants' confidence in the soundness of SBSEFs, which in turn could lead to the greater use of SBS traded on SBSEFs thereby promoting capital formation.[1023]

Regulation SE would address concerns about information leakage in various ways. First, pursuant to Rule 815(c)(2), an SBSEF may offer any execution method for Permitted Transactions. Thus, a market participant engaging in a Permitted Transaction (*e.g.,* a large trade in equity SBS) may choose to use an execution method that reveals the desired, or at least preferred, amount of information about trading interest. Second, pursuant to Rule 815(a)(2), an SBSEF will be required to offer two execution methods for Required Transactions (limit order book and RFQ-to-3). Thus, market participants have flexibility in the degree of pre-trade transparency they wish to employ, which should attenuate potential concerns associated with revealing too much information about trading interest.[1024]

In addition, until the Commission has made a clearing determination with respect to equity SBS, equity SBS will be able to trade OTC, just as their underlying cash equities can trade OTC. Moreover, before making a clearing determination for an equity SBS—which would create the circumstances in which equity SBS might be MAT and therefore subject to the trade-execution requirement—the Commission would have the opportunity to solicit and consider additional public comment on the effect of such a determination, including comment with respect to the concerns commenters have raised to date regarding, among other things, timely and efficient executions, hedging, and capital formation.

In light of the above, the adopted approach is preferable to the alternative.

8. Alternatives to Rule 833

In finalizing Rule 833, the Commission considered alternative approaches suggested by commenters. Four commenters suggest that the Commission grant automatic exemptions for foreign trading venues that are currently exempt under the CFTC's rules.[1025] One commenter suggests the Commission grant an exemption from the trade execution requirement if the SBS transaction at issue is subject to mandatory trading in another jurisdiction.[1026]

With respect to these alternatives, the Commission is concerned that granting automatic exemptions would not afford the Commission the opportunity to appropriately consider the relevant facts and circumstances in support of a finding that an exemption is necessary or appropriate in the public interest and consistent with the protection of investors. Further, to the extent that there are certain CFTC exempt foreign trading venues that do not intend to offer trading in SBS, it is unclear how the Commission's granting of an automatic exemption to these venues would benefit market participants that wish to trade SBS on regulated platforms. In light of the above, the adopted approach is preferable to these alternatives.

9. Alternatives From Proposal

The Commission also considered certain alternatives discussed in the Proposing Release: (1) not harmonizing Regulation SE with analogous CFTC rules; (2) harmonizing the third prong of the definition of ''block trade'' with the third prong of the CFTC definition of ''block trade''; (3) requiring SBSEFs to submit the information in the Daily Market Data Report directly to the Commission; (4) requiring an exemption order under Rule 833(a) to apply to a foreign trading venue only if it traded SBS and no other types of securities; (5) applying the revocation provisions of Rule 3a1–1(b) to SBSEFs and clearing agencies that are covered by paragraphs (a)(4) and (a)(5), respectively of Rule 3a1–1; and (6) not exempting SBSEF-Bs from section 17(a) of the SEA.[1027] With respect to the alternative of not harmonizing Regulation SE with analogous CFTC rules, commenters generally agreed with the Commission's approach vis-à-vis this alternative. The Commission did not receive comments addressing the other alternatives and continues to believe that its approach with respect to these alternatives is appropriate, and believes the rules as adopted are preferable to these alternatives.

10. Structured Disclosure Alternative

The Commission also considered the alternative of requiring, as proposed, Inline XBRL for all SBSEF filings other than Daily Market Data Reports under Rule 825. However, limiting the scope of Inline XBRL requirements under Regulation SE will ease compliance burdens for SBSEFs while maintaining a significant level of machine-readability for SBSEF data available to market participants and public data users as well as Commission staff. Some of the disclosures proposed with Inline XBRL structuring will still be structured in the final rule, but with a custom XML requirement rather than an Inline XBRL requirement. This will allow SBSEFs to, at their option, input those disclosures into fillable web forms rather than structure the disclosures in the custom XML data language themselves, thereby providing greater flexibility to SBSEFs and potentially easing compliance burdens. For copies of existing documents attached to Form SBSEF, and for rule and product filings that were proposed with an Inline XBRL requirement will instead be filed in unstructured formats. Given the reduced compliance burdens on SBSEFs resulting from a more limited scope of Inline XBRL requirements, the adopted rules are preferable to the alternative.[1028]

XVIII. Paperwork Reduction Act

Certain provisions of the rules in Regulation SE contain new ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[1029] The Commission published a notice requesting comment on these collections [1030] and submitted the proposed collection of information to the Office of Management and Budget (''OMB'') for review in accordance with 44 U.S.C. 3507 and 5 CFR 1320.11. The title of the new collection of information is Regulation SE, and OMB Control Number 3235–0793 has been assigned. As adopted, Regulation SE creates a regime for the registration and regulation of SBSEFs and addresses other issues relating to SBS execution.

In addition, the Commission is amending Rule 3a1–1 under the SEA to exempt a registered SBSEF from the statutory definition of ''exchange.'' Furthermore, the Commission is adopting new Rule 15a–12 under the SEA that, while affirming that an SBSEF would also be a broker under the SEA, would exempt a registered SBSEF from certain broker requirements under the SEA.

Regulation SE includes rules regarding the registration of a prospective SBSEF on Form SBSEF, the

[1023] *See supra* section XVII.D.2.

[1024] *See supra* sections XVII.D.3 and XVII.C.1 (discussing the different degrees of pre-trade transparency associated with limit order book and RFQ-to-3).

[1025] *See* Bloomberg Letter, *supra* note 18, at 7, 18; ICE Letter, *supra* note 18, at 5; ISDA–SIFMA Letter, *supra* note 18, at 15; Tradeweb Letter, *supra* note 18, at 6.

[1026] ISDA–SIFMA Letter, *supra* note 18, at 15.

[1027] *See* Proposing Release, *supra* note 1, 87 FR at 28956–57.

[1028] *See supra* section XVII.C.3(f).

[1029] 44 U.S.C. 3501 *et seq.*

[1030] *See* Proposing Release, 87 FR at 28958–69.

filing of new or amended rules or new products with the Commission, and rules implementing the Core Principles for SBSEFs under section 3D(d) of the SEA.[1031] 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.

A. Summary of Collection of Information

The rules and rule amendments contained in Regulation SE include a collection of information within the meaning of the PRA for SBSEFs that are required to comply with Regulation SE and file a Form SBSEF with the Commission for registration as an SBSEF and, among other things, submit certain filings to the Commission pursuant to Rules 804–807 with respect to new products and proposed rule changes. In addition, Rule 833 includes a collection of information within the meaning of the PRA for persons that wish to seek an exemption order under that rule, and Rule 834 includes a collection of information within the meaning of the PRA for SBS exchanges (in addition to SBSEFs). The Commission generally is adopting Regulation SE as proposed, except for certain sections that have been modified in response to comments received. The modified Rules that have associated paperwork burdens are Rules 804, 815, 819, 825, and 834. Each of these modifications and their impact on the paperwork burden are described in more detail below.

Many of the rules that constitute Regulation SE are modeled after analogous CFTC rules, with only minor edits to reflect differences between the statutory regimes of the two agencies. Entities that are most likely to register with the Commission as SBSEFs are those already registered with the CFTC as SEFs. Such entities have made substantial investments in systems, policies, and procedures to comply with and adapt to the regulatory system developed by the CFTC. Harmonization will allow these dually registered entities to utilize their existing systems, policies, and procedures to comply with the Commission's SBSEF rules, and SEF members would likely face only marginal additional burdens to trade SBS as well as swaps on those SEF/SBSEFs. In light of these factors, the Commission has based many of its paperwork burden estimates on CFTC burden estimates calculated for analogous CFTC rules.

The CFTC estimated PRA burdens by aggregating the burdens produced by a group of related rules, as explained more fully in section XX(D) below. In most cases, the Commission has modeled its methodology, assumptions, and calculations on those used by the CFTC with respect to its SEF regulations, while making adjustments that reflect differences between the scale of the market for swaps relative to the market for SBS—for example, the estimated number of SBSEFs, number of SBS market participants, and number of SBS transactions—as necessary. The Commission received no comments on its proposed PRA methodology, assumptions, calculations, and estimates, and such an approach continues to be appropriate. As noted above, almost all of the burden estimates are based on CFTC estimates that have been approved by OMB. The CFTC estimates that serve as the basis for the Commission's estimates have not changed since the Proposing Release has been published, with the exception of one estimate for Rule 811(d). Consequently, the Commission continues to estimate the burdens as those set forth in the Proposing Release, except for one adjustment to match a subsequent adjustment in the CFTC estimate relevant to Rule 811(d). As explained in more detail below, for rules that have been modified that contain associated paperwork burdens, the modifications do not result in any change in paperwork burden.

The following is a summary of the rules contained in Regulation SE.[1032] The paperwork burdens associated with each rule in Regulation SE are discussed in section XX(D) below.

Rule No. and title	Overview of rule	Paperwork burden created?
800—Scope	States that the provisions of this section shall apply to every SBSEF that is registered or is applying to become registered as an SBSEF under section 3D of the SEA.	No.
801—Applicable provisions	Requires an SBSEF to comply with all applicable Commission rules, including any related definitions and cross-referenced sections.	No.
802—Definitions	Definitions	No.
803—Requirements and procedures for registration	Sets out a process for registering with the Commission as an SBSEF, including the submission of Form SBSEF.	Yes.
804—Listing products for trading by certification	Procedures by which an SBSEF, via self-certification, may list a product for trading.	Yes.[a]
805—Voluntary submission of new products for Commission review and approval.	Procedures for voluntary submission of new products for Commission review and approval.	Yes.
806—Voluntary submission of rules for Commission review and approval.	Procedures for voluntary submission of new rules or rule amendments for Commission review and approval.	Yes.

[1031] 15 U.S.C. 78c–4(d). As adopted, Regulation SE contains 36 separately designated rules (800 to 835, inclusive), which (if adopted) would be located in 17 CFR 242; a Form SBSEF (with instructions); and a submission cover sheet (with instructions). If adopted, the form and the submission cover sheet would be located in 17 CFR 249.

[1032] *See supra* section II.A (discussing Rule 800); section II.B (discussing Rule 801); section II.C (discussing Rule 802); section III.A (discussing the registration provisions contained in Rule 803); section III.B (discussing Form SBSEF); section IV.A (discussing Rule 804); section IV.B (discussing Rule 805); section IV.C (discussing Rule 806); section IV.D (discussing Rule 807); section IV.GIV.F (discussing Rule 808); section IV.G (discussing Rule 809); section IV.H (discussing Rule 810); section V.A (discussing Rule 811); section V.B (discussing Rule 812); section V.C (discussing Rule 813); section V.D (discussing Rule 814); section V.E (discussing Rule 815); section V.F (discussing Rule 816); section V.G (discussing Rule 817); section VI.A (discussing Rule 818); section VI.B (discussing Rule 819); section VI.C (discussing Rule 820); section VI.D (discussing Rule 821); section VI.E (discussing Rule 822); section VI.F (discussing Rule 823); section VI.G (discussing Rule 824); section VI.H (discussing Rule 825); section VI.I (discussing Rule 826); section VI.J (discussing Rule 827); section VI.K (discussing Rule 828); section VI.L (discussing Rule 829); section VI.M (discussing Rule 830); section VI.N (discussing Rule 831); section VII.A (discussing Rule 832); section VII.B (discussing Rule 833); section VIII (discussing Rule 834); section IX (discussing the notice required by Rule 835); section X (discussing amendments to Rule 3a1–1); section XI (discussing proposed Rule 15a–12); section XIV (discussing new rules and amendments to the Commission's Rules of Practice).

Rule No. and title	Overview of rule	Paperwork burden created?
807—Self-certification of rules	Procedures by which an SBSEF can implement a new rule or rule amendment via self-certification.	Yes.
808—Availability of public information	Sets out the information that will be made public with respect to applications to become an SBSEF as well as filings relating to rules and products.	No.
809—Staying of certification and tolling of review period pending jurisdictional determination.	Provides for a stay of a product certification or tolling of a review period for a product where it is unclear whether the product should be classified as an SBS under the jurisdiction of the SEC or a swap under the jurisdiction of the CFTC pending the issuance of a joint interpretation by the SEC and CFTC clarifying which agency has jurisdiction over the product.	Yes.
810—Product filings by SBSEFs that are not yet registered and by dormant SBSEFs.	Provides that an applicant for registration as an SBSEF may submit for Commission review and approval an SBS's terms and conditions or rules prior to listing the product as part of its application for registration.	Yes.
811—Information relating to SBSEF compliance	Provides that an SBSEF shall submit information to the Commission that the Commission requests, including demonstrations that the SBSEF is in compliance with one or more Core Principles, notification of a transfer 50% or more of the equity interest in the SBSEF, and information about pending legal proceedings.	Yes.
812—Enforceability	Provides that a transaction entered into on or pursuant to the rules of an SBSEF shall not be void, voidable, subject to rescission, otherwise invalidated, or rendered unenforceable because of a violation by the SBSEF of section 3D of the SEA or the Commission's rules thereunder; also requires an SBSEF to provide each counterparty to a transaction on the SBSEF with a written record of all the terms of the transaction that were agreed to on the SBSEF.	Yes.
813—Prohibited use of data collected for regulatory purposes	Provides that an SBSEF shall not use for business or marketing purposes any proprietary data or personal information that it collects or receives, from or on behalf of any person, for the purpose of fulfilling its regulatory obligations, without such person's consent; also requires the SBSEF not to condition access to its markets on such consent and provide that the SBSEF may, where necessary for regulatory purposes, share such data or information with other registered SBSEFs or exchanges.	No.
814—Entity operating both a national securities exchange and SBSEF.	Provides that an entity that intends to operate both a national securities exchange and an SBSEF shall separately register the two facilities pursuant to section 6 of the SEA and Rule 803, respectively; also provides that a national securities exchange shall, to the extent that the exchange also operates an SBSEF and uses the same electronic trade execution system, identify whether electronic trading of SBS is taking place on or through the national securities exchange or the SBSEF.	No.
815—Methods of execution for Required and Permitted Transactions.	Provides that a Required Transaction must be executed on an SBSEF through an order book or RFQ system, whereas a Permitted Transaction can be executed in any manner; also requires an SBSEF to maintain rules and procedures that facilitate the resolution of error trades and that an SBSEF shall not generally disclose the identity of a counterparty to an SBS that is executed anonymously and intended to be cleared.	Yes.
816—Trade execution requirement and exemptions therefrom	Sets out a process and standards for an SBSEF to MAT an SBS; also establishes certain exemptions from the trade execution requirement.	Yes.
817—Trade execution compliance schedule	Provides that an SBS transaction shall be required to be executed on an SBS exchange or SBSEF upon the later of a determination by the Commission that the SBS is required to be cleared and 30 days after a MAT determination submission or certification for that SBS is approved or certified, respectively.	No.
818—Core Principle 1 (Compliance with Core Principles)	Requires a registered SBSEF to comply with the SEA's Core Principles for SBSEFs.	Yes.

Rule No. and title	Overview of rule	Paperwork burden created?
819—Core Principle 2 (Compliance with rules)	Requires a registered SBSEF to establish, comply with, and enforce its own rules—including rules regarding market access; rules governing trading, trade processing, and participation that will deter abuses; rules governing the operation of the SBSEF; and rules to capture and retain an audit trail—and have the capacity to detect, investigate, and enforce those rules; also requires an SBSEF to establish rules that generally prohibit employees from trading any covered interest or disclosing any material, non-public information obtained as a result of their employment by the SBSEF; also requires an SBSEF to maintain in effect rules that render a person ineligible to serve on the SBSEF's disciplinary committees, arbitration panels, oversight panels, or governing board who has been found to have committed enumerated offenses.	Yes.
820—Core Principle 3 (SBS not readily susceptible to manipulation).	Requires an SBSEF to permit trading only in SBS that are not readily susceptible to manipulation.	Yes.
821—Core Principle 4 (Monitoring of trading and trade processing).	Requires an SBSEF to establish and enforce rules detailing trading and trade processing procedures, and to monitor trading and market activity to prevent manipulation, price distortion, and delivery or settlement disruptions; also requires an SBSEF to demonstrate that it has access to sufficient information to assess whether trading on its market or in the underlying assets or indexes is being used to affect prices on its market.	Yes.
822—Core Principle 5 (Ability to obtain information)	Requires an SBSEF to establish and enforce rules that would allow it to obtain any information necessary to comply with section 3D of the SEA and to provide that information to the Commission on request.	Yes.
823—Core Principle 6 (Financial integrity of transactions)	Requires an SBSEF to establish and enforce rules for ensuring the financial integrity of SBS on its facility, including the clearance and settlement of the SBS; also requires that SBS that are required to be cleared shall be cleared by a registered clearing agency (or a clearing agency that has obtained an exemption from clearing agency registration to provide central counterparty services for SBS), that the SBSEF provide for minimum financial standards for its members, and that the SBSEF monitor its members for compliance with those standards.	Yes.
824—Core Principle 7 (Emergency authority)	Requires an SBSEF to adopt rules to provide for the exercise of emergency authority, in order for the SBSEF to maintain fair and orderly trading and prevent or address manipulation or disruptive trading practices.	Yes.
825—Core Principle 8 (Timely publication of trading information).	Requires an SBSEF to make public timely information on price, trading volume, and other trading data on SBS transactions, as required by Regulation SBSR, and to publish on its website a Daily Market Data Report.	Yes.
826—Core Principle 9 (Recordkeeping and reporting)	Sets forth recordkeeping and reporting obligations for SBSEFs and requires an SBSEF to maintain, for a period of five years and in a form and manner acceptable to the Commission, records of all activities relating to the business of the facility, including a complete audit trail,.	Yes.
827—Core Principle 10 (Antitrust considerations)	Provides that, unless necessary or appropriate to achieve the purposes of the SEA, an SBSEF shall not adopt any rules or take any actions that result in any unreasonable restraint of trade or impose any material anticompetitive burden on trading or clearing.	No.
828—Core Principle 11 (Conflicts of interest)	Requires an SBSEF to establish and enforce rules to minimize conflicts of interest in its decision-making process and to establish a process for resolving such conflicts.	Yes.
829—Core Principle 12 (Financial resources)	Requires an SBSEF to have adequate financial, operational, and managerial resources to discharge its responsibilities; would also set forth the standards used to calculate the adequacy of such resources and require certain reports to the Commission.	Yes.

Rule No. and title	Overview of rule	Paperwork burden created?
830—Core Principle 13 (System safeguards)	Requires an SBSEF to establish and maintain a program of automated systems and risk analysis to identify and minimize sources of operational risk, through the development of appropriate controls and procedures; would also require an SBSEF to establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery; conduct periodic tests to verify those resources are sufficient; and notify the Commission promptly of any cyber incidents and material planned changes to the SBSEF's systems safeguards.	Yes.
831—Core Principle 14 (Designation of CCO)	Requires an SBSEF to designate a CCO and set forth regulatory and reporting obligations for the CCO.	Yes.
832—Cross-border mandatory trade execution	Explains when the SEA's trade execution requirement applies to a cross-border SBS transaction.	No.
833—Cross-border exemptions	Provides for a process by which the Commission, upon making the requisite findings, could grant exemptions from the SEA definitions of ''exchange,'' ''security-based swap execution facility,'' and ''broker'' and exempt cross-border SBS from the SEA's trade execution requirement.	Yes.
834—Mitigation of conflicts of interest of SBSEFs and SBS exchanges.	Provides that each SBSEF and SBS exchange must create and maintain rules to mitigate conflicts of interest between SBSEFs and SBS exchanges and their members, including by prohibiting members from owning 20% or more of the voting securities of an SBSEF or SBS exchange (with certain exceptions), and from exercising disproportionate influence in disciplinary proceedings; would also require each SBSEF and SBS exchange to submit to the Commission after every governing board election a list of each governing board's members, the groups they represent, and how the composition of the board complies with the requirements of Rule 834.	Yes.
835—Notice to Commission by SBSEF of final disciplinary action or denial or limitation of access.	Provides that, if an SBSEF issues a final disciplinary action against a member, denies or conditions membership, or denies or limits access of a person to any services offered by the SBSEF, the SBSEF shall file a notice of such action with the Commission within 30 days and serve a copy on the affected person.	Yes.
3a1–1—proposed amendments	Exempts from the SEA definition of ''exchange'' a registered SBSEF that provides a market place for no securities other than SBS, and an entity that has registered with the Commission as a clearing agency and limits its exchange functions to operation of a trading session that is designed to further the accuracy of end-of-day valuations.	No.
15a–12—Exemption for certain SBSEFs from certain broker requirements.	Exempts a registered SBSEF from certain broker requirements while affirming that an SBSEF is a broker under the SEA.	No.
Rules and amendments to the Commission's Rules of Practice	New rules and amendments to the Rules of Practice to allow persons who are aggrieved by a final disciplinary action, a denial or conditioning of membership, or a denial or limitation of access by an SBSEF to seek an application for review by the Commission.	No **.
Amendments to Delegations of Authority in Rules 30–3 and 30–14.	Amendments to Commission's rules delegating authority to the Division Director and to the General Counsel in order to delegate authority to take actions necessary to carry out the rules under Regulation SE and to facilitate the operation of the regulatory structure created in Regulation SE.	No **.

** The Commission finds, in accordance with section 553(b)(3)(A) of the Administrative Procedure Act (''APA''), 5 U.S.C. 553(b)(3)(A), that the revisions to the Commission's Rules of Practice, as well as the amendments to the Commission's delegations of authority to the Director of Trading and Markets pursuant to 17 CFR 200.30–3 and to the General Counsel pursuant to 17 CFR 200.30–14, relate solely to agency organization, procedure, or practice. They are therefore not subject to the provisions of the APA requiring notice, opportunity for public comment, and publication. To the extent that these rules relate to agency information collections during the conduct of administrative proceedings, they are exempt from review under the PRA. Notwithstanding this finding, the Commission published certain proposed changes to the Commission's Rules of Practice for notice and comment in the Proposing Release but received no specific comments pertaining to them. *See supra* section XIV.

B. Proposed Use of Information

1. Registration Requirements and Form SBSEF

Regulation SE imposes various requirements relating to SBSEF registration, which are set forth in Rule 803.[1033]

[1033] *See, e.g.,* Proposed Rule 803(b)(1) (requiring an entity that wishes to register with the Commission as an SBSEF to submit a Form SBSEF).

The information collected pursuant to these adopted rules will enhance the ability of the Commission to determine whether to approve the registration of an entity as an SBSEF; to monitor and oversee SBSEFs; to determine whether

SBSEFs initially comply, and continue to operate in compliance, with the SEA, including the Core Principles applicable to SBSEFs; to carry out its statutorily mandated oversight functions; and to maintain accurate and updated information regarding SBSEFs. Because the registration information will be publicly available, except to the extent that a request for confidential treatment is granted, it could also be useful to an SBSEF's members, other market participants, other regulators, and the public generally.

2. Requirements for SBSEFs To Establish Rules

Various provisions of Regulation SE require SBSEFs to establish certain rules, policies, and procedures to comply with applicable requirements of the SEA and the Commission's rules thereunder.[1034] The rules also will help an SBSEF's members to understand and comply with the rules of the SBSEF.

3. Reporting Requirements for SBSEFs

Various provisions of Regulation SE require SBSEFs and certain other persons to submit reports or provide specified information.[1035] This information will generally be used by the Commission in its oversight of SBSEFs and the SBS markets; certain of the information to be collected could be used by market participants to confirm their SBS transactions.

4. Recordkeeping Required Under Regulation SE

Regulation SE requires an SBSEF to keep specified records.[1036] The audit trail information required to be maintained under Regulation SE will aid the SBSEF in detecting and deterring fraudulent and manipulative acts with respect to trading on its market, as well as help the SBSEF to fulfill the statutory requirement in Core Principle 4 that an SBSEF monitor trading in SBS, including through comprehensive and accurate trade reconstructions. In addition, Commission access to these records will provide a valuable tool to help the Commission carry out its oversight responsibility over SBSEFs and the SBS markets in general.

5. Timely Publication of Trading Information Requirement for SBSEFs

Regulation SE imposes certain publication burdens on SBSEFs in Rule 825.[1037]

The requirement contained in Rule 825 that an SBSEF have the capacity to electronically capture, transmit, and disseminate information on price, trading volume, and other trading data on all SBS executed on or through the SBSEF will assist the SBSEF in carrying out its regulatory responsibilities under the SEA and enable the SBSEF to comply with reasonable requests to provide information to others. Furthermore, Rule 825 requires an SBSEF to publish a Daily Market Data Report that is designed to provide market observers with a daily snapshot of market activity on the SBSEF.

6. Rule Filing and Product Filing Processes for SBSEFs

Regulation SE establishes various filing requirements applicable to SBSEFs. Rules 804 and 805 provide mechanisms for an SBSEF to submit filings for new products that it seeks to list either through a self-certification process or by voluntarily requesting Commission approval, respectively. Rules 806 and 807 require an SBSEF to submit new rule or rule amendments either through a self-certification process or by voluntarily requesting Commission approval, respectively.

Rule 808 addresses the public availability of certain information in an application to register as an SBSEF and SBSEF filings made under the self-certification procedures or pursuant to Commission review and approval. Rule 809 establishes procedures for addressing a situation where an SBSEF wishes to list a product and it is unclear whether that product is an SBS or swap (*i.e.,* whether it properly falls under the jurisdiction of the SEC or the CFTC). Rule 810 provides that an applicant for registration as an SBSEF may submit for Commission review and approval an SBS's terms and conditions or rules prior to listing the product as part of its application for registration.

The information collected under Rules 804 and 805 will help the Commission assess whether an SBS listed by an SBSEF complies with relevant provisions of the SEA. In addition, this information will assist the Commission in overseeing the SBSEF's compliance with its regulatory obligations generally and to learn about developments in the SBS product market. Rules 804 and 805 also provide a mechanism whereby market participants, other SBSEFs, other regulators, and the public generally could learn what products an SBSEF intends to list and to obtain information regarding such products.

The information collected under Rules 806 and 807 will help the Commission assess whether a new rule or rule amendment of an SBSEF complies with relevant provisions of the SEA and assist the Commission in overseeing the SBSEF's compliance with its regulatory obligations generally. Rules 806 and 807 also provide a mechanism whereby an SBSEF's members (and prospective members) could learn what new rules or rule amendments the SBSEF intends to apply in its market.

The information collected under Rules 809 and 810 will help the Commission assess an SBSEF's compliance with relevant provisions of the SEA and assist the Commission in overseeing the SBSEF's compliance with its regulatory obligations. This information also will be useful to the SBSEF's members, because they would be subject to such new or amended rules or products and thus would have an interest in learning about those rules or products. Other market participants, other SBSEFs, and other regulators, as well as the public generally, may find information about proposed new or amended rules or products useful.

7. Requirements Relating to the CCO

Regulation SE includes Rule 831 that would set out requirements relating to an SBSEF's CCO.

The information that will be collected under Rule 831 will help ensure compliance by SBSEFs with relevant provisions of the SEA and assist the Commission in overseeing SBSEFs generally. The Commission could use the annual compliance report to help it evaluate whether an SBSEF is carrying out its statutorily mandated regulatory obligations and, among other things, to discern the scope of any denials of access or refusals to grant access by the SBSEF and to obtain information on the status of the SBSEF's regulatory compliance program. The SBSEF's fourth-quarter financial report will provide the Commission with important information on the financial health of the SBSEF.

[1034] *See, e.g.,* Proposed Rule 819(a)(2) (requiring an SBSEF to establish and enforce trading, trade processing, and participation rules).

[1035] *See, e.g.,* Proposed Rule 829 (requiring an SBSEF, quarterly or upon Commission request, to provide the Commission a report that includes the amount of financial resources necessary to meet the requirements of Rule 829).

[1036] *See* Proposed Rule 826 (requiring an SBSEF to maintain records of all activities relating to the business of the facility, including a complete audit trail, and to report information to the Commission upon request).

[1037] *See* Proposed Rule 825 (requiring an SBSEF to make publicly available a ''Daily Market Data Report'').

8. Surveillance Systems Requirements for SBSEFs

The rules that require an SBSEF to maintain surveillance systems and to monitor trading [1038] are designed to promote compliance by an SBSEF with its obligations under the SEA to oversee trading on its market, and to prevent manipulation and other unlawful activity or disruption of its market.

C. Respondents

The respondents subject to the collection of information burdens associated with Regulation SE are: (1) SBSEFs (and entities wishing to register with the Commission as SBSEFs); (2) in the case of Rule 833, persons that seek an exemption order under that rule; and (3) in the case of Rule 834, SBS exchanges.

Currently there are no registered SBSEFs. Based on the number of SEFs registered with the CFTC that trade index CDS (the closest analog to single-name CDS, which is likely to be the product most frequently traded on SEC-registered SBSEFs), as well as general industry information, the Commission preliminarily estimated that five entities will seek to register as SBSEFs and thus become subject to the collection of information requirements of these rules.[1039] The Commission did not receive comments about its estimate of the number of SBSEF registrants, and its initial estimate continues to be reasonable.

The Commission preliminarily estimated that three persons would request exemption orders under one or both paragraphs of Rule 833.[1040] The CFTC has granted three exemptions similar to those contemplated by Rule 833,[1041] which suggests that the number of jurisdictions having organized trading venues for swap and SBS products that overlap with products traded on similar venues in the United States is not large. The Commission did not receive comments about its estimate of the number of persons requesting exemption orders under Rule 833, and its initial estimate continues to be reasonable.

The Commission preliminarily estimated that three entities will operate as SBS exchanges.[1042] These are likely to be existing national securities exchanges that, in the future, seek to list SBS and thereby become SBS exchanges. The Commission did not receive comments about its estimate of the number of SBS exchanges, and its initial estimate continues to be reasonable.

The Commission considered whether any provision of proposed Regulation SE would impose any burdens (as defined in the PRA) on SBSEF members but received no comments on this point and continues to estimate that the provisions of Regulation SE would not impose PRA burdens on SBSEF members.

D. Total Annual Reporting and Recordkeeping Burden

1. Overview

The CFTC, based on its experience in developing rules for SEFs and regulating the SEF market, has over the years developed, refined, and received approval from OMB for paperwork burden hours estimates, both for SEF rules directly as well as for ancillary rules on which various rules in Regulation SE are modeled.[1043] Those estimates are presented in the form of aggregate totals for compliance with:

- *Part 37 of the CFTC regulations* regarding initial registration requirements applicable to SEFs;
- *Part 37* regarding other requirements applicable to SEFs, including the statutory Core Principles;
- *Part 40 of the CFTC regulations* regarding requirements applicable to SEFs (and other CFTC-registered entities); and
- *17 CFR 1.60(a), 1.60(c), 1.60(e), 36.1, 1.59, 1.63, 1.67, 15.05, 1.37(c), 1.64, and 1.69* regarding requirements applicable to SEFs (and other CFTC-registered entities).

The rules applicable to SBSEFs are, with limited exceptions discussed above, substantively similar to those applicable to SEFs. Therefore, the Commission is basing its estimates for the paperwork burdens for SBSEFs on the CFTC's paperwork burden calculations for analogous rules that apply to SEFs, which have been approved by OMB.[1044] However, in certain cases, the paperwork burdens estimated by the CFTC are scaled down for SBSEFs to account for the likelihood that there will be fewer SBSEFs than SEFs and that the SBS business of dually registered SEF/SBSEFs is likely to be smaller than the swap business.

Although there are minor differences between the CFTC rules and the Commission rules being adopted, the Commission does not need to

[1038] *See, e.g.,* Proposed Rule 819(d)(3) (requiring an SBSEF to establish and maintain sufficient compliance staff and resources to ensure that it can conduct effective audit trail reviews, trade practice surveillance, market surveillance, and real-time market monitoring).

[1039] *See* Proposing Release, *supra* note 1, 87 FR at 28963.

[1040] *Id.* The Commission anticipates that such persons could include foreign SBS trading venues, foreign authorities that license and regulate those trading venues, or covered persons (as defined in Rule 832) who are members of such trading venues.

[1041] *See also supra* note 626 (discussing a CFTC staff no-action letter addressing certain UK swap trading facilities).

[1042] *See* Proposing Release, *supra* note 1, 87 FR at 28963.

[1043] *See* Core Principles and Other Requirements for Swap Execution Facilities (May 17, 2013), 78 FR 33476, 33548–49 (June 4, 2013) (Final Rule PRA for CFTC part 37); Swap Execution Facility Requirements (Nov. 27, 2020), 85 FR 82313, 82324 (Dec. 18, 2020) (Final Rule PRA for 17 CFR 36.1); Core Principles and Other Requirements for Swap Execution Facilities: OMB Control Number 3038–0074 Supporting Statements (last updated July 26, 2021), *available at https://omb.report/omb/3038-0074* (PRA Supporting Statements for CFTC Core Principles for SEFs, 17 CFR 36.1); Provisions Common to Registered Entities (July 19, 2011), 76 FR 44776, 44789–90 (July 27, 2011) (Final Rule PRA for CFTC part 40); part 40, Provisions Common to Registered Entities: OMB Control Number 3038–0093 Supporting Statements (last updated Feb. 4, 2021), *available at https://omb.report/omb/3038-0093* (PRA Supporting Statements for CFTC part 40, 17 CFR 36.1); Notification of Pending Legal Proceedings: OMB Control Number 3038–0033 Supporting Statements (last updated Oct. 29, 2021), *available at https://omb.report/omb/3038-0033* (PRA Supporting Statements for 17 CFR 1.60(a), (c), and (e)); Adaptation of Regulations To Incorporate Swaps (Oct. 16, 2012), 77 FR 66288, 66306–08 (Nov. 2, 2012) (Final Rule PRA for 17 CFR 1.59 and 1.37(c)); Recordkeeping (May 23, 2017), 82 FR 24479, 24485 (May 30, 2017) (Final Rule PRA for 17 CFR 1.31); Adaptation of Regulations to Incorporate Swaps-Exclusion of Utility Operations-Related Swaps with Utility Special Entities from De Minimis Threshold: OMB Control Number 3038–0090 Supporting Statements (last updated July 1, 2020), *available at https://omb.report/omb/3038-0090* (PRA Supporting Statements for 17 CFR 1.31, 1.37(c), 1.59, and 1.67); Service on Self-Regulatory Organization Governing Boards or Committees by Persons with Disciplinary Histories (Feb. 27, 1990), 55 FR 7884, 7890 (Mar. 6, 1990) (Final Rule PRA for 17 CFR 1.63); Final Rule and Rule Amendments Concerning Composition of Various Self-Regulatory Organization Governing Boards and Major Disciplinary Committees (June 29, 1993), 58 FR 37644, 37653 (July 13, 1993) (Final Rule PRA for§ 1.64); Voting by Interested Members of Self-Regulatory Organization Governing Boards and Committees (Dec. 23, 1998), 64 FR 16, 22 (Jan. 4, 1999) (Final Rule PRA for 17 CFR 1.69); Rules Pertaining to Contract Markets and Their Members: OMB Control Number 3038–0022 Supporting Statements (last updated Dec. 21, 2010), *available at https://omb.report/omb/3038-0022* (PRA Supporting Statements for 17 CFR 1.63, 1.64, and 1.69); Swap Data Recordkeeping and Reporting Requirements (Dec. 20, 2011), 77 FR 2136, 2171–76 (Jan. 13, 2012) (Final Rule PRA for 17 CFR 45.2); Swap Data Recordkeeping and Reporting Requirements: OMB Control Number 3038–0096 Supporting Statements (last updated Mar. 16, 2021), *available at https://omb.report/omb/3038-0096* (PRA Supporting Statements for 17 CFR 45.2); Repeal of the Exempt Commercial Market and Exempt Board of Trade Exemptions (Sept. 28, 2015), 80 FR 59575, 59576 (Oct. 2, 2015) (Final Rule PRA for 17 CFR 15.05).

[1044] Rule 835, which requires SBSEFs to file with the Commission notices of final disciplinary actions and denials and limitations of access, is not based on a CFTC rule but rather on an existing Commission rule that imposes a similar filing requirement on SROs. Therefore, the Commission is utilizing the burden estimates in its rulemaking for SROs to estimate the burdens of this rule for SBSEFs.

substantially deviate from the CFTC's estimates of aggregated burden hours for compliance (beyond scaling back the CFTC's estimates to account for the smaller number of SBSEFs, and the smaller size of the SBS market relative to the swaps market). These minor differences between the CFTC's existing rules for SEFs and the Commission's rules for SBSEFs are prompted, in some cases, by minor differences between the statutory provisions that apply to SEFs under the CEA and the statutory provisions that apply to SBSEFs under the SEA, and, in other cases, by differences between the swaps market and SBS market. In either case, however, the Commission anticipates that the burdens on SBSEFs would be substantially similar to the burdens set out in the CFTC estimates, which serve as the basis for the Commission's estimates.[1045] Furthermore, basing the burden estimates for SBSEFs on the CFTC's estimates for SEFs would be more accurate than using burden hours estimates for any other entity that the Commission currently regulates (*e.g.,* national securities exchanges) because SBSEFs share many more similarities with SEFs than they do with any other SEC-registered entities.

The Commission anticipates that most if not all entities that seek to register with the Commission as SBSEFs will also register, or will already be registered, with the CFTC as SEFs. With a few exceptions, the rules being adopted by the Commission are adapted from existing rules of the CFTC. With these rules, the Commission intends to obtain comparable regulatory benefits as the CFTC rules while imposing only marginal additional burdens on SEF/SBSEFs. However, for purposes of its PRA analysis, the Commission will estimate the burdens as if a respondent were subject only to the Commission's rules.[1046]

The burden hours discussed below represent annual/ongoing burdens, with three exceptions that represent initial, one-time burdens: registration burdens for SBSEFs under Rule 803, exemption requests regarding foreign SBS trading venues under Rule 833, and certain rules under Rules 834(b) and (c).

The Commission requested comments on its entire proposed approach to estimating burden hours and received no comment.[1047] The Commission continues to estimate the burdens at the levels set forth in the Proposing Release. Therefore, for any provision that the Commission is adopting as proposed, it is not changing its preliminary estimate, except in one instance to account for an update in an estimate by the CFTC that the Commission is using to base its burden estimates.[1048] For any provision that the Commission is modifying from the proposal, as discussed in more detail below, the Commission estimates that the modification would result in no change in the burden estimate compared to the proposal.

2. Aggregate Burdens for Rules Modeled After CFTC Part 37 Rules

(a) Registration Requirements for SBSEFs and Form SBSEF

A submission by an entity wishing to register with the Commission as an SBSEF would be required to be made on Form SBSEF, pursuant to Rule 803, on a one-time basis. The Commission estimates that five entities initially would seek to register with the Commission as SBSEFs. The Commission estimates the burdens of Rule 803 and Form SBSEF to be per respondent and aggregate of 295 and 1,475 hours, respectively. These entities would incur initial, one-time burdens, because once an entity is registered as an SBSEF, its registration obligations are complete. The Commission's estimate regarding the initial burden that an entity would incur to file a Form SBSEF is informed by the estimates made by the CFTC for the completion of Form SEF and compliance with § 37.3 of the CFTC regulations (which governs registration of SEFs). Form SBSEF requests almost exactly the same information as required by Form SEF, and Rule 803 is substantially similar to § 37.3. The CFTC has estimated that the initial compliance burden associated with its registration requirements in § 37.3 and Form SEF to be 295 hours per SEF applicant.[1049] For purposes of calculating burden hours, the CFTC considered the entire SEF application process to constitute a single information collection; the Commission is utilizing the same approach for SBSEFs. SBSEFs would likely prepare Form SBSEF internally.

(b) Ongoing Compliance With Other Requirements That Are Similar to the Remainder of Part 37

The Commission estimates the aggregate ongoing annual hour burden for compliance with all of the SBSEF rules that have analogs in part 37 to be 1,935 hours.[1050] The CFTC has estimated that the compliance burden for all of the sections of part 37 combined, other than the initial burden of 295 hours per SEF for registration-related compliance discussed above, to be an ongoing annual burden of 387 hours per SEF.[1051] With the exception of § 37.600, which implements a CEA Core Principle for SEFs relating to position limits that is not present in the SEA, every other section of part 37 has an analog in proposed Regulation SE that is substantively similar.[1052] Therefore, the aggregate CFTC estimate of 387 hours per SEF per year serves as a reasonable estimate for the annual hourly burden on each SBSEF.

As noted above, the Commission is adopting Rule 815 and 819 as proposed, except that it is: (1) removing the proposed definition of a ''Block Trade'', a term used in Rule 815, from Rule 802 and reserving that definition; (2) modifying Rule 815(d)(2) and (d)(3) to

[1045] When the CFTC adopted the SEF rules in 2013, the CFTC took a similar approach to burden hours estimation. The CFTC relied on the aggregate burden hours for three types of entities that it regulated (DCMs, derivatives transaction execution facilities, and certain exempt commercial markets) and applied those burden hours to SEFs unadjusted, even though there are differences between the regulations that govern SEFs and those that govern the other entities. The CFTC noted that those entities, like SEFs, were subject to certain statutory Core Principles and rules thereunder, and that, despite variations in the applicable regulations, it was still appropriate to use the average aggregate burden number for those entities as the estimate for SEFs without adjustment. *See* CFTC, *Core Principles and Other Requirements for Swap Execution Facilities,* 78 FR at 33548–51.

[1046] However, there may be instances in which a rule would require an SBSEF to generate the same paperwork that is already being created pursuant to a CFTC rule. In such cases, compliance with the existing CFTC requirement would satisfy the SEC requirement, and in reality there would be few or de minimis burdens imposed on dually registered SEF/SBSEFs.

[1047] *See* Proposing Release, *supra* note 1, 87 FR at 28969.

[1048] As discussed below, the Commission has revised its burden estimate for Rule 811(d) due to a corresponding revision by the CFTC of its analogous rule.

[1049] *See* OMB, Supporting Statement for New and Revised Information Collections: Core Principles and Other Requirements for Swap Execution Facilities, OMB Control Number 3038–0074, Attachment A (July 7, 2021), *available at https://omb.report/icr/202107-3038-004/doc/113431800.pdf.*

[1050] 1,935 hours = 387 hours (annual burden per respondent) × 5 (number of respondents).

[1051] *See* OMB, Supporting Statement for New and Revised Information Collections, OMB Control Number 3038–0074, at 8 (estimating that on a net basis the total burden hours imposed on each SEF will be 387 hours).

[1052] As discussed previously, the Commission proposed to incorporate portions of the CFTC guidance into certain rules in Regulation SE. The Commission is now adopting those portions of the CFTC guidance as proposed into the rules of Regulation SE. The CFTC guidance clarifies portions of its rules by suggesting means for compliance and does not fundamentally alter those rules. When the CFTC adopted this guidance into its regulations, it did not alter its burden hours estimate. *See, e.g.,* 2021 SEF Amendments Adopting Release. Therefore, no adjustments to the CFTC estimates, on which the Commission is basing its own estimates, would be appropriate despite adapting that guidance into the Commission's rules.

narrow the scope of the package-transaction exception to the method of execution requirements of Rule 815; (3) adding section (g) to Rule 815 to specify that a security-based swap that is intended to be cleared at the time of the transaction, but is not accepted for clearing at a registered clearing agency, shall be void *ab initio;* (4) amending Rule 819(e) to permit SBSEFs to contract with DCMs for the provision of services to assist in complying with the SEA and Commission rules thereunder, as approved by the Commission; (5) adding sections (c)(4) and (g)(14) to Rule 819 to address Commission review of: (i) denial or limitation of access to any service or denial or conditioning of membership by an SBSEF and (ii) disciplinary sanctions imposed by an SB SEF; and (6) removing certain mentions of block trades in various places throughout Rule 819 because as mentioned above, a definition of that term has not been adopted. Although these changes may have a practical impact on respondents' SBS trading activity, the Commission estimates that they do not increase or decrease the burden hours for compliance with the Core Principles that are similar to the remainder of part 37. The changes simply: (1) make modifications to accommodate reserving the definition for a block trade; (2) narrow the scope of an exception relating to package-transactions; (3) automatically declare trades intended to be cleared but not accepted for clearing to be void *ab initio;* (4) permit SBSEFs to contract with DCMs for certain services; and (5) address Commission review of certain actions taken by SBSEFs. None of these changes requires additional record-keeping or reporting burdens (or results in a decrease in record-keeping and reporting obligations). Therefore, the Commission estimates that the per-respondent or aggregate totals of 387 hours and 1,935 hours, respectively.

In addition, the Commission is modifying Rule 825 to make changes to what type of information is required to be submitted in and timing of publication of the daily market data report and to remove certain mentions of block trades because that term will not be defined in Regulation SE at this time. Rule 825 will not require the disclosure of the number of block trades and will require publication of the report as soon as reasonably practicable on the next business day but no later than 7 a.m. (rather than before the beginning of trading) and several mentions of block trades in Rule 825(c) have been removed. Not requiring the disclosure of the number of block trades will have a negligible impact on the reporting burden of preparing the daily market data report. Rule 825 requires the report to contain numerous items. The Commission estimates that eliminating block trades from one of the required items (trade count) will reduce the hours burden for compiling the report by a negligible amount. Similarly, changing the timing of the publication of the report will have no impact on burden hours. The Commission estimates that it will not require a greater or fewer number of hours to compile the report as a result of the change in timing for publication as it is the same report that is being compiled. Therefore, the Commission continues to estimate a per-respondent and aggregate totals of 387 hours and 1,935 hours, respectively.

As discussed in more detail below, certain SBSEF rules being adopted in Regulation SE are derived from other parts of the CFTC's rules (*e.g.,* part 40) and the burdens for those rules will be based on the appropriate burden hours of the corresponding CFTC part. For reference, the following table lists all sections of part 37 and the corresponding SBSEF rule. Please see above for more detailed descriptions of a particular SBSEF rule.

CFTC part 37 section (387 aggregate burden hours per SEF not including § 37.3 (registration)	Topic	Analogous SBSEF Rule # (387 aggregate burden hours per SBSEF not including Rule 803 (registration) and certain other rules not modeled on part 37 rules (discussed separately in the following sections)
37.1	Scope	800.
37.2	Applicable provisions	801.
37.4	Procedures for listing products	810.
37.5	Compliance	811.
37.6	Enforceability	812.
37.7	Prohibited use of data	813.
37.8	Entities operating as SEFs and DCMs	814.
37.9	Methods of execution	815.
37.10	Process to make swaps available for trade	816.
37.11	Reserved section	not applicable.
37.12	Trade execution compliance schedule	817.
37.100	CP 1 (compliance with Core Principles)	818 (CP1).
37.200 through 37.206	CP 2 (compliance with rules)	819 (CP2).
37.300 through 37.301	CP 3 (manipulation)	820 (CP3).
37.400 through 37.408	CP 4 (monitoring of trading and trade processing)	821 (CP4).
37.500 through 37.504	CP 5 (ability to obtain information)	822 (CP5).
37.600 through 37.601	CP 6 (position limits)	no equivalent requirement in the SEA; CP numbering diverges after this point.
37.700 through 37.703	CP 7 (financial integrity of transactions)	823 (CP6).
37.800 through 37.801	CP 8 (emergency authority)	824 (CP7).
37.900 through 37.901	CP 9 (publication of trading information)	825 (CP 8).
37.1000 through 37.1001	CP 10 (recordkeeping and reporting)	826 (CP 9).
37.1100 through 37.1101	CP 11 (anti-trust)	827 (CP10).
37.1200	CP 12 (conflicts of interest)	828 (CP 11).
37.1300 through 37.1307	CP 13 (financial resources)	829 (CP 12).
37.1400 through 37.1401	CP 14 (system safeguards)	830 (CP 13).
37.1500 through 1501	CP 15 (CCO)	831 (CP 14).
Appendix A (Form SEF)	Form SEF	Form SBSEF [a].
Appendix B	Guidance relating to Core Principles	guidance incorporated throughout rules 818 through 831.

[a] The burdens of registering using Form SBSEF are discussed in the previous section.

3. Aggregate Burdens for Rules Modeled on CFTC Part 40 Rules

A number of rules contained in Regulation SE are modeled on rules in part 40 of the CFTC's rules, including §§ 40.2 (Listing products for trading by certification), 40.3 (Voluntary submission of new products for Commission review and approval), 40.5 (Voluntary submission of rules for Commission review and approval), and 40.6 (Self-certification of rules). The Commission is adopting Rules 804, 805, 806, and 807—which are closely modeled on §§ 40.2, 40.3, 40.5, and 40.6, respectively—in order to harmonize with the procedures that the CFTC applies to SEFs with respect to establishing new rules and listing products. In addition, Rule 808 is modeled after § 40.8 and provides that certain information in a Form SBSEF application or a rule or product filing would be made publicly available, unless confidential treatment is obtained pursuant to Rule 24b–2. Rule 809 is loosely modeled after § 40.12 and sets forth a mechanism for a tolling of the period for consideration of a product pending the issuance by the SEC and the CFTC of joint interpretation clarifying which agency has jurisdiction over the product.

(a) Rule and Product Filing Processes for SBSEFs

Rules 804 and 805 require an SBSEF to submit filings for new products that it seeks to list. Under Rules 806 and 807, an SBSEF is required to submit rule filings for new rules or rule amendments, including changes to a product's terms or conditions. The Commission's estimate regarding the burdens that an SBSEF would incur to comply with the rule and product filing processes in Rules 804, 805, 806, and 807 is informed by the estimates made by the CFTC for compliance with §§ 40.2, 40.3, 40.5, and 40.6, the burden hours for which have been approved by OMB.[1053] The Commission is estimating a total of five SBSEF respondents. The Commission estimates that the aggregate ongoing annual hourly burden for all SBSEFs to prepare and submit rule and product filings under Rules 804, 805, 806, and 807 (including the cover sheet[1054]) would be 300 hours.

Based on the CFTC's experience with SEFs, the Commission estimates that on average an SBSEF would incur an ongoing annual burden of 2 hours of work per rule or product filing. Although the CFTC estimated an average of 100 responses per year per respondent,[1055] an estimate of 30 responses is appropriate given the more limited scope of the SBS market, as opposed to the swaps market. This would result in a total estimated ongoing annual burden of 60 hours per respondent[1056] and 300 hours for all the respondents annually.[1057]

As noted above, the Commission is stating in this release that, where a respondent is seeking to list a new category of product of which there would be multiple specific products based on different underlying securities, separate submissions under Rule 804 with respect to each underlying security would not be required, but the submission made would have to address why each of the included underlying securities meets the relevant standards required by Regulation SE. ''Blanket'' certifications—*e.g.,* a single submission for all equity total return security-based swaps to be listed—would not meet the requirements of Rule 804. This flexibility does not result in any increase or decrease in estimated burden hours. Any time savings from the ability to combine submissions under Rule 804 is likely to be substantially, if not fully, offset by the burden of drafting the explanation of why each of the included underlying securities meets the relevant standards required by Regulation SE. Therefore, the changes do not increase or decrease the burden hours for compliance with the rules pertaining to new product filings under Rules 804 and 805. Indeed, as described above, the per-respondent estimate for the requirements related to the rule and product filing processes of 60 hours was an estimate informed by the CFTC's similar provisions and was meant to encompass the combined burdens that an SBSEF would incur to comply with the rule and product filing processes in Rules 804, 805, 806, and 807. Therefore, the Commission continues to estimate the per-respondent and aggregate totals to be 60 hours and 300 hours, respectively.

(b) Burdens Related to Rules Modeled After Other Part 40 Rules

(i) Rule 802

Certain definitions contained in Rule 802 are modeled after provisions of part 40. These definitions do not result in any paperwork burden.

(ii) Rule 809

Rule 809 is loosely modeled on § 40.12 of the CFTC's rules and would apply when an SBSEF wishes to list a product and it is unclear whether the product should be classified as an SBS subject to the jurisdiction of the SEC or a swap subject to the jurisdiction of the CFTC. Rule 809 provides that a product certification made by an SBSEF pursuant to Rule 804 shall be stayed, or the review period for a product that has been submitted for Commission approval by an SBSEF pursuant to Rule 805 shall be tolled, upon a request, made pursuant to Rule 3a68–2 under the SEA[1058] by the SBSEF, the SEC, or the CFTC, for a joint interpretation of whether the product is a swap, SBS, or mixed swap.

Rule 809 itself does not include a process for determining whether the SEC or CFTC has jurisdiction over a product. Rule 809 would enable the SEC to stay or toll the product filing while the SEC and CFTC consider a joint interpretation under existing SEA Rule 3a68–2, the burden hours of which have already been approved by OMB.[1059] The only burden imposed on an SBSEF under Rule 809 would be checking a box on the submission cover sheet when the SBSEF intends to request a joint interpretation from the Commission and the CFTC pursuant to SEA Rule 3a68–2.[1060] The Commission estimates that

[1053] *See* 75 FR 67282 (Nov. 2, 2010) (CFTC proposal to amend 17 CFR 40.2 through 40.5); OMB, Supporting Statement for Information Collection Renewal: OMB Control Number 3038–0093, Attachment A (July 10, 2020), *available at https://omb.report/icr/202005-3038-001/doc/101274002.pdf* (noting the estimated average number of hours to burden hours report is 2 hours, and the number of annual responses from each entity is 100).

[1054] Each of the filings that is required by Rules 804 through 807 would have to include a submission cover sheet that is modeled on the cover sheet and instructions used by SEFs in conjunction with analogous filings with the CFTC, with the submitting entity checking the appropriate box to indicate which type of the filing it is making. Any burden hours attributable to a respondent completing this cover sheet, which is an integral part of the filing, are not estimated separately from the paperwork burden of the substantive filing. Instead, they are contained within the aggregate burden hours estimate for rule and product filings pursuant to Rules 804 through 807, which are based upon the CFTC's estimates. *See supra* note 1053.

[1055] *See supra* note 1053.

[1056] 60 hours = 30 (number of responses per year per respondent) × 2 hours (burden per response).

[1057] 300 hours = 60 hours (annual burden per respondent pursuant to Rules 804, 805, 806, and 807) × 5 (number of respondents).

[1058] 17 CFR 240.3a68–2.

[1059] OMB recently approved an extension without change of the collection for Rule 3a68–2. *See* Supporting Statement for the Paperwork Reduction Act New Information Collection Submission for Rule 3a68–2 (Interpretation of Swaps, Security-Based Swaps, and Mixed Swaps) and Rule 3a68–4(c) (Process for Determining Regulatory Treatment for Mixed Swaps), OMB Control Number 3235–0685, Supporting Statement A (Dec. 23, 2021), *available at https://omb.report/icr/202112-3235-018/doc/117438500.pdf.*

[1060] *See supra* section IV.E.

each such request would impose a burden of 0.25 hours. Furthermore, the Commission estimates that each SBSEF would make one such request per year.[1061] Accordingly, the aggregate ongoing annual burden for all SBSEFs to comply with Rule 809 would be 1.25 hours.[1062] This work, should it be required, is likely to be conducted internally.

4. Aggregate Burdens for Rules Modeled After CFTC Rules Other Than Parts 37 and 40

Adopted rules similar to rules of the CFTC other than part 37 and part 40 are Rules 811(d), 816(e), 819(h), 819(i), 819(j), 819(k), 826(f), and 834. These rules generate various categories of burdens for SBSEFs or market participants.

(a) Rule 811(d)

Section 1.60 of the CFTC's rules requires a SEF to provide the CFTC with copies of any legal proceeding to which it is a party, or to which its property or assets is subject.

Paragraph (d) of Rule 811 adapts paragraphs (a), (c), and (e) of § 1.60 to apply to SBSEFs. Paragraph (d)(1) requires an SBSEF to provide the Commission a copy of the complaint, any dispositive or partially dispositive decision, any notice of appeal filed concerning such decision, and such further documents as the Commission may thereafter request filed in any material legal proceeding to which the SBSEF is a party or to which its property or assets are subject. Paragraph (d)(2) requires an SBSEF to provide notices of similar actions against any officer, director, or other official of the SBSEF from conduct in such person's capacity as an official of the SBSEF alleging violations of certain enumerated actions.

The Commission estimates that an SBSEF would provide the information required by Rule 811(d) once per year, and that each submission would take 0.25 hours. Thus, the Commission estimates that the aggregate ongoing annual burden for all SBSEFs to comply with requests for documents or information pursuant to Rule 811(d) would be 1.25 hours.[1063] The Commission is basing its estimate on the CFTC estimate included in its submission to OMB for § 1.60 of the CFTC's rules, for which the CFTC estimated that each of the 97 entities to which the rule applies makes, on average, one submission of documents to the Commission per year. The CFTC further estimated that the time required to prepare one submission is approximately 0.25 hour, totaling 24.25 hours (97 × 0.25) annually.[1064]

For PRA purposes, it is reasonable to apply the CFTC's approach to Rule 811(d).[1065] This work, should it be required, is likely to be conducted internally.

(b) Rule 819(h)

Paragraph (h) of Rule 819 generally prohibits persons who are employees of an SBSEF, or who otherwise might have access to confidential information because of their role with the SBSEF, from improperly utilizing that information. Rule 819(h) is modeled on § 1.59 of the CFTC's rules. The Commission does not estimate that this rule would result in a paperwork burden.

(c) Rule 819(i)

Paragraph (i) of Rule 819 bars persons with specified disciplinary histories from serving on the governing board or committees of an SBSEF and impose certain other duties on the SBSEF associated with that fundamental requirement. Rule 819(i) is modeled on § 1.63 of the CFTC's rules.

The Commission estimates that an SBSEF would provide the information required by Rule 819(i) once per year, and that each submission would take 79.83 hours. Thus, the Commission estimates that the aggregate ongoing annual burden for all SBSEFs to comply with Rule 819(i) would be 399.15 hours.[1066] The Commission is basing this estimate on the estimate the CFTC included in its submission to OMB for its adoption of § 1.63, where the CFTC estimated that each respondent would make, on average, one such submission to the CFTC per year. The CFTC further estimated that the time required to prepare one submission is approximately 79.83 hours.[1067]

For PRA purposes, it is reasonable to apply the CFTC's approach to Rule 819(i), and this work is likely to be conducted internally.

(d) Rule 819(j)

Paragraph (j) of Rule 819 is modeled on § 1.67 of the CFTC's rules. Rule 819(j)(1) provides that, upon any final disciplinary action in which an SBSEF finds that a member has committed a rule violation that involved a transaction for a customer, whether executed or not, and that resulted in financial harm to the customer, the SBSEF must promptly provide written notice of the disciplinary action to the member.

The Commission estimates that an SBSEF would need 0.5 hours to prepare a notice and provide it to a member. This estimate is based on a previous Commission estimate for the time that it would take to prepare and submit a simple notice.[1068] The Commission estimates that these notices would occur once per year at each SBSEF, resulting in an aggregate ongoing annual burden to comply with Rule 819(j) of 2.5 hours.[1069] This work, should it be required, is likely to be conducted internally.

(e) Rule 819(k)

Paragraph (k) of Rule 819 requires non-U.S. persons who trade on an SBSEF to have an agent for service process, which could be an agent of its own choosing or, by default, the SBSEF.

[1061] The establishment of a registration regime and listing procedures for SBSEFs could affect the distribution, but likely not the total number, of requests for joint interpretations under Rule 3a68–2 of the SEA. SBS products may be developed in the bilateral market before they are listed on SBSEFs, and there are incentives to resolving jurisdictional issues before they can develop traction in the market. Accordingly, requests for a joint interpretation under Rule 3a68–2 could occur before such products are listed by an SBSEF, and such requests are already considered in the approved PRA burden estimates for Rule 3a68–2.

[1062] 1.25 hours = 1 (number of responses per year per respondent) × 0.25 hours (burden per response) × 5 (number of respondents).

[1063] 1 (number of responses per year per respondent) × 0.25 hours (burden per response) × 5 (number of respondents) = 1.25 hour.

[1064] *See* OMB, Supporting Statement for New and Revised Information Collections: OMB Control Number 3038–0033 (Oct. 29, 2021), *available at https://omb.report/icr/202110-3038-001/doc/115991000.pdf.*

[1065] In its preliminary estimates, the Commission based its burden hour calculations upon CFTC 2018 submission to OMB. The Commission is now updating the numbers to reflect numbers from the 2021 submission to OMB. The result is the per response burden has increased from .2 hours to .25 hours. *See* OMB, Supporting Statement for New and Revised Information Collections: OMB Control Number 3038–0033 (Oct. 29, 2021), *available at https://omb.report/icr/202110-3038-001/doc/115991000.pdf.*

[1066] 1 (number of responses per year per respondent) × 79.83 hours (burden per response) × 5 (number of respondents) = 399.15 hours.

[1067] *See* CFTC, *Service on Self-Regulatory Organization Governing Boards or Committees by Persons with Disciplinary Histories* (Feb. 27, 1990), 55 FR 7884, 7890 (Mar. 6, 1990) (final rule PRA for § 1.63).

[1068] Rule 819(j) does not address any of the requirements or process concerning taking final disciplinary actions; it merely requires that a notice be provided. A provision of Regulation SCI, Rule 1000(b)(4)(i), also requires providing a simple notice and the Commission estimated that it would take 0.5 hours to prepare and such a notice. *See Regulation Systems Compliance and Integrity; Final Rule,* SEA Release No. 73639 (Nov. 19, 2014), 79 FR 72251, 72381 (Dec. 5, 2014).

[1069] 2.5 hours (0.5 hours of in-house counsel time) × (1 responses per year) × (5 respondents). The once per year estimate is based on a previous CFTC estimate included in its submission to OMB for § 1.67 along with other rules.

Rule 819(k) is modeled on provisions of § 15.05 of the CFTC's rules that apply to SEFs. The Commission does not estimate that this rule would result in a paperwork burden.

(f) Rule 826(f)

Rule 826(f) is modeled on § 1.37(c) and requires an SBSEF to keep a record in permanent form, which shall show the true name, address, and principal occupation or business of any non-U.S. member that executes transactions on the SBSEF and must, upon request, provide to the Commission information regarding the name of any person guaranteeing such transactions or exercising any control over the trading of such non-U.S. member.

The Commission estimates that each SBSEF would need to update information required by Rule 826(f) once per year and that each submission would take 0.4 hours. Thus, the Commission estimates that the aggregate ongoing annual burden for all SBSEFs to comply with requests for documents or information pursuant to Rule 826(f) would be 2 hours.[1070] The Commission is basing its estimate on the estimate included by the CFTC in its submission to OMB regarding § 1.37(c), where the CFTC estimated that it would take a SEF 0.4 hours to prepare each record in accordance with § 1.37(c).

For PRA purposes, it is reasonable to apply the CFTC's approach to Rule 826(f). This work, should it be required, is likely to be conducted internally.

(g) Rule 834

Rule 834 of Regulation SE implements section 765 of the Dodd-Frank Act with respect to SBSEFs and SBS exchanges and, in addition, adapt certain CFTC rules that are designed to mitigate conflicts of interest at SEFs (and other CFTC-registered entities). Rule 834 provides that each SBSEF and SBS exchange must create and maintain rules to mitigate conflicts of interest between SBSEFs and SBS exchanges and their members, including by prohibiting members from owning 20% or more of the voting rights of an SBSEF or SBS exchange and from exercising disproportionate influence in disciplinary proceedings. Rule 834 also requires each SBSEF and SBS exchange to submit to the Commission after every governing board election a list of each governing board's members, the groups they represent, and how the composition of the board complies with the requirements of Rule 834. Establishing such rules and submitting such lists to the Commission would result in a paperwork burden for SBSEFs and SBS exchanges.

The Commission estimates that Rules 834(b) and (c) together would have an initial, one-time paperwork burden of 15 hours per entity associated with drafting and implementing any such rules, for an aggregate one-time paperwork burden of 120 hours.[1071] Rules 834(b) and (c) are substantially similar to Proposed Rule 702(c) of Regulation MC.[1072] In its PRA analysis for Proposed Rule 702(c), the Commission estimated that there would be a one-time paperwork burden of 15 hours per entity associated with drafting and implementation of any such rules by each SBSEF or SBS exchange.[1073] While the Commission is modifying Rule 834(b) to provide an exception to the 20% restriction mentioned above to SBSEFs that have entered into an agreement with a registered futures association or a national securities association for the provision of certain specified regulatory services, the Commission does not estimate that this exception would result in a change in burden hours for compliance with Rule 834(b). The modification does not affect the information collection under this rule, as it does not involve any record keeping, reporting, or third-party disclosure obligations. Therefore, the Commission is not altering its estimate of 15 hours per entity for Rule 834(b).[1074]

Additionally, the Commission estimates that Rule 834(d), Rule 834(e), and Rule 834(f), combined, would result in an aggregate ongoing annual paperwork burden of 10 hours.[1075] Rules 834(d), (e), and (f) are substantially similar to Proposed Rule 702(h) in Regulation MC in 2010 [1076] and CFTC § 1.64(c)(4), CFTC § 1.64(b), and CFTC § 1.64(d), respectively. The Commission is basing its estimate on the CFTC's estimate that Rules 1.41(d),[1077] 1.63, 1.64, and 1.67 would result in an average annual paperwork burden of 1.25 hours per response that was included in its submission to OMB.[1078]

The Commission estimates that Rule 834(g) would have an aggregate ongoing annual burden of 16 hours.[1079] Rule 834(g) is substantially similar to § 1.69 of the CFTC's rules, and the Commission is basing its estimate on the CFTC's estimate for § 1.69 of 2 hours per response that was included in its submission to OMB.[1080]

The Commission does not estimate that Rule 834(h) would result in a paperwork burden not already included in the above estimates. Rule 834(h) incorporates into a single rule the requirements for an SBSEF to file rules to comply with Rule 834. As it has already described the paperwork burdens of Rules 834(b) through (g), the Commission does not estimate that Rule 834(h) would result in a separate paperwork burden not already included above. Thus, the total aggregate ongoing annual burden is estimated at 26 hours.[1081]

5. Miscellaneous Burdens

(a) Rule 833

Rule 833 describes how exemptions could be obtained for foreign SBS trading venues from the SEA definitions of ''exchange,'' ''security-based swap execution facility,'' and ''broker'' and how SBS executed on a foreign trading venue could become exempt from the SEA's trade execution requirement. Based on the CFTC's experience in the SEF market,[1082] the Commission estimates that there would be three requests for an exemption order under either or both paragraphs (a) and (b) of Rule 833 in the first year and two requests in each subsequent year; and that each submission would require an initial, one-time burden of 80 hours. Once an exemption has been granted to an applicant, no further action would be required. The Commission estimates the burden to submit an exemption request under one or both paragraphs of Rule 833 would be 240 hours in the first

[1070] 1 (number of responses per year per respondent) × 0.40 hours (burden per response) × 5 (number of respondents) = 2 hours.

[1071] 1 (number of responses per respondent) × 15 hours (burden per response) × 8 (5 SBSEFs + 3 SBS exchanges) = 120 hours. Rule 834(a) contains defined terms and would not result in a paperwork burden.

[1072] Regulation MC Proposal, *supra* note 21, 75 FR at 65916.

[1073] *Id.*

[1074] *See supra* section VIII.B for discussion of the 20% restriction.

[1075] 10 hours = 1 (number of responses per respondent) × 1.25 hours (burden per response) × 8 (number of SBSEF + SBS exchange respondents).

[1076] Regulation MC Proposal, *supra* note 21, 75 FR at 65932.

[1077] While § 1.41(d) created an exemption from the requirements of section 5a(a)(12)(A) of the CEA for contract market rules not related to terms and conditions, the CFTC did not break out the portion of the burden hours for which this amendment is responsible. Therefore, to be conservative, the Commission is including it in its estimate for the burden hours of Rules 834(d), (e), and (f).

[1078] *See* 58 FR 37644, 37653.

[1079] 16 hours = 1 (number of responses per respondent) × 2 hours (burden per response) × 8 (number of SBSEF + SBS exchange respondents).

[1080] *See* 64 FR at 16, 22.

[1081] 26 hours = 10 hours (from the second sentence of Rules 834(d), 834(e), and 834(f)) + 16 hours (from Rule 834(g)) + 0 hours (from Rule 834(h).

[1082] *See supra* text accompanying note 1041.

year[1083] and 160 hours in each subsequent year.[1084]

(b) Rule 835

Rule 835 provides that, if an SBSEF issues a final disciplinary action against a member, takes final action with respect to a denial or conditioning membership, or takes final action with respect to a denial or limitation of access of a person to any services offered by the SBSEF, the SBSEF shall file a notice of such action with the Commission within 30 days and serve a copy on the affected person.

The Commission estimates that it would take 0.5 hours to prepare this notice and provide it to the Commission and the affected person. This estimate is based on a previous Commission estimate for the time that it would take to prepare and submit a simple notice.[1085] The Commission estimates that it would take an additional 0.25 hours to create and serve a copy of that notice on the affected person. The Commission estimates that these notices would occur once per month at each SBSEF, resulting in an aggregate annual burden to comply with Rule 835 of 45 hours.[1086] This work, should it be required, is likely to be conducted internally.

6. Total Paperwork Burden Under Proposed Regulation SE

Based on the foregoing, the Commission estimates that the total one-time burden for all SBSEFs, persons that seek an exemption order under Rule 833, and SBS exchanges combined pursuant to the requirements under Regulation SE is equal to 1,995 hours. The Commission estimates that annual ongoing burden for all SBSEFs, persons that seek an exemption order under Rule 833, and SBS exchanges combined pursuant to the requirements under Regulation SE is equal to 2,712.15 hours.

SUMMARY OF AGGREGATE BURDEN HOURS

Rule or provision	Burden hours per respondent	One-time or ongoing	Respondents	Total hours
Registration (Rule 803, Form SBSEF)	295	One-Time	5	1,475
Rules modeled on CFTC part 37 (other than registration)	387	Ongoing	5	1,935
Rule and product filing processes (Rules 804 through 807).	60	Ongoing	5	300
809	0.25	Ongoing	5	1.25
811(d)	0.25	Ongoing	5	1.25
819(i)	79.83	Ongoing	5	399.15
819(j)	0.5	Ongoing	5	2.5
826(f)	0.4	Ongoing	5	2
833	80	One-Time	[a] 3 and 2	240 and 160
834(b) through (c)	15	One-Time	8	120
834(d) through (g)	3.25	Ongoing	8	26
835	9	Ongoing	5	45

[a] Three respondents in the first year and then two each subsequent year.

E. Collection of Information is Mandatory

The collections of information imposed on SBSEFs throughout Regulation SE is mandatory for registered SBSEFs. The collection of information with respect to Rule 833 is mandatory for persons that seek an exemption order under Rule 833. The collection of information with respect to Rule 834 is mandatory for SBS exchanges.

F. Responses to Collection of Information Will Not Be Confidential

The collection of information required under Regulation SE would generally not be kept confidential, unless confidential treatment is requested and granted by the Commission pursuant to Rule 24b–2 under the SEA.

G. Retention Period of Recordkeeping Requirements

Although recordkeeping and retention requirements have not yet been established for SBSEFs, the Commission is authorized to adopt such rules under section 3D of the SEA. Rule 826 under Regulation SE implements section 3D(d)(9) of the SEA to require an SBSEF to maintain records, for a minimum of five years, of all activities relating to the business of the SBSEF, including a complete audit trail.

XIX. Regulatory Flexibility Certification

The Regulatory Flexibility Act (''RFA'')[1087] requires Federal agencies, in promulgating rules, to consider the impact of those rules on small entities. Section 603(a) of the Administrative Procedure Act,[1088] as amended by the RFA, generally requires the Commission to undertake a final regulatory flexibility analysis of rules it is adopting, unless the Commission certifies that the rules would not have a significant impact on a substantial number of ''small entities.''[1089] Section 605(b) of the RFA states that this requirement shall not apply to any proposed rule or proposed rule amendment which, if adopted,

[1083] 240 hours (80 hours of in-house counsel time) × (3 respondents).

[1084] 160 hours (80 hours of in-house counsel time) × (2 respondents). This estimate is informed by Rule 908(c) of the Commission's Regulation SBSR, which sets forth the requirements surrounding requests under which regulatory reporting and public dissemination of SBS transactions can be satisfied by complying with the rules of a foreign jurisdiction rather than the parallel rules applicable in the United States. The materials necessary to support such a request under Rule 908(c) are broadly similar to the materials necessary to support a request for an exemption order under one or both paragraphs of Rule 833. The Commission estimated that the burden of a request under Rule 908(c) would be 80 hours of in-house counsel time; therefore, the Commission estimates that burden for submitting documents and information in support of a request for an exemption order under Rule 833 would be the same.

[1085] A provision of Regulation SCI, Rule 1000(b)(4)(i), also requires providing a simple notice and the Commission estimated that it would take 0.5 hours to prepare and such a notice. *See Regulation Systems Compliance and Integrity; Final Rule,* SEA Release No. 73639 (Nov. 19, 2014), 79 FR 72251, 72381 (Dec. 5, 2014).

[1086] 45 hours (0.75 hours of in-house counsel time) × (12 responses per year) × (5 respondents).

[1087] 5 U.S.C. 601 *et seq.*

[1088] 5 U.S.C. 603(a).

[1089] Although section 601(b) of the RFA defines the term ''small entity,'' the statute permits agencies to formulate their own definitions. The Commission has adopted definitions for the term ''small entity'' for the purposes of Commission rulemaking in accordance with the RFA. Those definitions, as relevant to this rulemaking, are set forth in Rule 0–10 under the SEA, 17 CFR 240.0–10. *See* SEA Release No. 18452 (Jan. 28, 1982), 47 FR 5215 (Feb. 4, 1982) (File No. AS–305).

would not have a significant economic impact on a substantial number of small entities.[1090] In the Proposing Release, the Commission certified, pursuant to section 605(b) of the RFA, that that the proposed rules, form, and cover sheet under Regulation SE and the related rules and rule amendments, if adopted, would not have a significant economic impact on a substantial number of small entities for purposes of the RFA.[1091] The Commission solicited but did not receive any comments on the certification as it related to the entities impacted by Regulation SE. The Commission's analysis of the existing information relating to entities subject to Regulation SE, for purposes of the RFA, is discussed below.

A. SBSEFs

Most of Regulation SE, and the related rules and rule amendments, apply to registered SBSEFs (or entities that are seeking to register with the Commission as SBSEFs). In the Dodd-Frank Act, Congress defined SBSEFs as a new type of trading venue for SBS and mandated the registration of these entities. Based on its understanding of the market, and review of and consultation with industry sources, the Commission estimates that five entities will seek to register as SBSEFs and thus would be subject to Regulation SE and the related rules and rule amendments.

For purposes of Commission rulemaking in connection with the FRFA, a small entity includes: (1) when used with reference to an ''issuer'' or a ''person,'' other than an investment company, an ''issuer'' or ''person'' that, on the last day of its most recent fiscal year, had total assets of $5 million or less; [1092] or (2) a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Rule 17a–5(d) under the SEA,[1093] or, if not required to file such statements, a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the last business day of the preceding fiscal year (or in the time that it has been in business, if shorter); and is not affiliated with any person (other than a natural person) that is not a small business or small organization.[1094] Under the standards adopted by the Small Business Administration (''SBA''), entities in financial investments and related activities [1095] are considered small entities if they have $41.5 million or less in annual receipts.

Most, if not all, SBSEFs would be large business entities or subsidiaries of large business entities, and that every SBSEF (or its parent entity) would have assets in excess of $5 million (or in the case of a broker-dealer, total capital of less than $500,000) and annual receipts in excess of $41,500,000. Therefore, for purposes of the RFA none of the potential SBSEFs would be considered small entities.

B. Persons Requesting an Exemption Order Pursuant to Rule 833

Rule 833 describes how foreign SBS trading venues could become exempt from the SEA definitions of ''exchange,'' ''security-based swap execution facility,'' and ''broker'' and how SBS executed on a foreign trading venue could become exempt from the SEA's trade execution requirement. Based on the fact that the CFTC has granted similar exemptions with respect to three foreign jurisdictions,[1096] the Commission estimates that there would be three requests under one or both paragraphs of Rule 833 in the first year and two in each subsequent year. These requests would likely be submitted by foreign SBS trading venues, foreign authorities that license and regulate those trading venues, or covered persons (as defined in Rule 832) who are members of such trading venues.

Based on the Commission's existing information about the SBS market, the Commission estimates that for purposes of the FRFA no person likely to request an exemption order pursuant to Rule 833 would be considered a small entity. The Commission estimates that most, if not all, of the persons requesting exemptions would be large business entities or subsidiaries of large business entities, and on its own, or through its parent entity, would have assets in excess of $5 million (or in the case of a broker-dealer, total capital of less than $500,000) and annual receipts in excess of $41,500,000. Therefore, the Commission estimates that for purposes of the RFA they would not be considered small entities.

C. SBS Exchanges

Certain rules under Regulation SE apply to SBS exchanges. Currently, there are no SBS exchanges. However, the Commission estimates that there could be up to three entities that would be considered SBS exchanges and would thus be subject to certain requirements of Regulation SE.

For purposes of Commission rulemaking in connection with the RFA, a small entity includes, when used with reference to an exchange, an exchange that has been exempted from the reporting requirements of Rule 601 of Regulation NMS [1097] and is not affiliated with any person (other than a natural person) that is not a small business or small organization.[1098] Under the standards adopted by the SBA, entities involved in financial investments and related activities [1099] are considered small entities if they have $41.5 million or less in annual receipts.

Based on these definitions and the Commission's existing information about national securities exchanges, for purposes of the RFA the entities likely to be considered SBS exchanges would not be considered small entities. Under the standard requiring exemption from the reporting requirements of Rule 601 under the SEA, none of the exchanges subject to Regulation SE is a ''small entity'' for the purposes of the RFA. In addition, the Commission estimates that any SBS exchange would have annual receipts in excess of $41,500,000. Therefore, for purposes of the RFA, no potential SBS exchange would be considered small entities.

D. Certification

For the foregoing reasons, the Commission certifies, pursuant to section 605(b) of Title 5 of the U.S. Code, that the rules, form, and cover sheet under Regulation SE and the related rules and rule amendments will not have a significant economic impact on a substantial number of small entities.

XX. Other Matters

If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other

[1090] *See* 5 U.S.C. 605(b).

[1091] *See* Proposing Release, *supra* note 1, 87 FR at 28969–70.

[1092] *See* 17 CFR 240.0–10(a).

[1093] 17 CFR 240.17a–5(d).

[1094] *See* 17 CFR 240.0–10(c).

[1095] These entities would include firms involved in investment banking and securities dealing; securities brokerage; commodity contracts dealing; commodity contracts brokerage; securities and commodity exchanges; portfolio management; investment advice; trust, fiduciary and custody activities; miscellaneous intermediation; and miscellaneous financial investment activities. *See* SBA's Table of Small Business Size Standards, Subsector 523.

[1096] *See supra* text accompanying note 1041.

[1097] 17 CFR 242.601.

[1098] *See* 17 CFR 240.0–10(e).

[1099] These entities would include firms involved in investment banking and securities dealing, securities brokerage, commodity contracts dealing, commodity contracts brokerage, securities and commodity exchanges, miscellaneous intermediation, portfolio management, investment advice, trust, fiduciary and custody activities, and miscellaneous financial investment activities. *See* SBA's Table of Small Business Size Standards, Subsector 523.

provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

Pursuant to the Congressional Review Act,[1100] the Office of Information and Regulatory Affairs has designated these rules as not a ''major rule'' as defined by 5 U.S.C. 804(2).

Statutory Authority

Pursuant to the SEA (particularly sections 3(b), 3C, 3D, and 36 thereof, 15 U.S.C. 78c, 78c–3, 78c–4, and 78mm, respectively) and the Dodd-Frank Act (particularly section 765 thereof, 15 U.S.C. 8343), the Commission is amending §§ 201.101, 201.202, 201.210, 201.401, 201.450, 201.460, 232.405, and 240.3a1–1 of chapter II of title 17 of the Code of Federal Regulations and is adopting new §§ 201.442, 201.443, 240.15a–12, and 242.800 through 242.835, as set forth below.

List of Subjects

17 CFR Part 200

Organization; Conduct and Ethics; and Information and Requests.

17 CFR Part 201

Administrative practice and procedure.

17 CFR Part 232

Administrative practice and procedure, Confidential business information, Incorporation by reference, Reporting and recordkeeping requirements, Securities.

17 CFR Part 240

Brokers, Dealers, Registration, Securities.

17 CFR 242 and 249

Brokers, Security-based swap execution facilities, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Commission is amending title 17, chapter II of the Code of the Federal Regulations as follows:

PART 200—ORGANIZATION; CONDUCT AND ETHICS; INFORMATION AND REQUESTS

■ 1. The authority citation for part 200 continues to read as follows:

Authority: 5 U.S.C. 552, 552a, 552b, and 557; 11 U.S.C. 901 and 1109(a); 15 U.S.C. 77c, 77e, 77f, 77g, 77h, 77j, 77*o,* 77q, 77s, 77u, 77z–3, 77ggg(a), 77hhh, 77sss, 77uuu, 78b, 78c(b), 78d, 78d–1, 78d–2, 78e, 78f, 78g, 78h, 78i, 78k, 78k–1, 78*l,* 78m, 78n, 78*o,* 78*o*–4, 78q, 78q–1, 78w, 78t–1, 78u, 78w, 78*ll*(d), 78mm, 78eee, 80a–8, 80a–20, 80a–24, 80a–29, 80a–37, 80a–41, 80a–44(a), 80a–44(b), 80b–3, 80b–4, 80b–5, 80b–9, 80b–10(a), 80b–11, 7202, and 7211 *et seq.;* 29 U.S.C. 794; 44 U.S.C. 3506 and 3507; Reorganization Plan No. 10 of 1950 (15 U.S.C. 78d); sec. 8G, Pub. L. 95–452, 92 Stat. 1101 (5 U.S.C. App.); sec. 913, Pub. L. 111–203, 124 Stat. 1376, 1827; sec. 3(a), Pub. L. 114–185, 130 Stat. 538; E.O. 11222, 30 FR 6469, 3 CFR, 1964–1965 Comp., p. 36; E.O. 12356, 47 FR 14874, 3 CFR, 1982 Comp., p. 166; E.O. 12600, 52 FR 23781, 3 CFR, 1987 Comp., p. 235; Information Security Oversight Office Directive No. 1, 47 FR 27836; and 5 CFR 735.104 and 5 CFR parts 2634 and 2635, unless otherwise noted.

Subpart A—Organization and Program Management

■ 2. Amend § 200.30–3 by adding paragraphs (a)(95) through (102) to read as follows:

§ 200.30–3 Delegation of authority to Director of Division of Trading and Markets.

* * * * *

(a) * * *

(95) Pursuant to §§ 242.803 and 242.808(a) and (b) of this chapter (Rules 803 and 808(a) and (b)):

(i) To publish notice on the Commission's website of a completed application (''Form SBSEF''), to register as a security-based swap execution facility;

(ii) To make available on the Commission's website certain specified parts of a Form SBSEF;

(iii) To notify the applicant that its application is incomplete and will not be deemed to have been submitted for purposes of the Commission's review;

(iv) To request from the applicant any additional information and documentation necessary to review an application;

(v) To notify the applicant that its application is materially incomplete and to specify the deficiencies in the application, for purposes of staying the 180-day period for Commission review of the Form SBSEF; and

(vi) Upon receipt of a request submitted in good form by a security-based swap execution facility for vacation of its registration, to issue an order vacating the security-based swap execution facility's registration and to send a copy of the request and its order to all other security-based swap execution facilities, national securities exchanges that trade security-based swaps, and registered clearing agencies that clear security-based swaps.

(96) Pursuant to §§ 242.804(c)(1) and (2) and 242.808(b) of this chapter:

(i) To make publicly available on the Commission's website a security-based swap execution facility's filing of new products pursuant to the self-certification procedures of § 242.804 of this chapter;

(ii) To stay for a period of up to 90 days the effectiveness of a security-based swap execution facility's self-certification of a new product;

(iii) To publish notice on the Commission's website of a 30-day period for public comment; and

(iv) To withdraw the stay or notify the security-based swap execution facility that the Commission objects to the proposed certification.

(97) Pursuant to §§ 242.805(b) through (e) and 242.808(b) of this chapter:

(i) To make publicly available on the Commission's website a security-based swap execution facility's filing of new products for Commission review and approval pursuant to § 242.805 of this chapter (Rule 805);

(ii) To notify the submitting security-based swap execution facility that a submission for a new product does not comply with paragraph (a) of § 242.805 of this chapter (Rule 805);

(iii) To extend by an additional 45 days the period for consideration of a new product voluntarily submitted by a security-based swap execution facility to the Commission for approval, if the product raises novel or complex issues that require additional time to analyze, and to notify the security-based swap execution facility of the extension within the initial 45-day review period and briefly describe the nature of the specific issue(s) for which additional time for review is required;

(iv) To extend the period for consideration of a new product voluntarily submitted by a security-based swap execution facility to the Commission for approval by such longer period as to which the security-based swap execution facility agrees in writing;

(v) To approve a proposed new product and provide notice of the approval to the security-based swap execution facility;

(vi) To notify the security-based swap execution facility that the Commission will not, or is unable to, approve the product, and to specify the nature of the issues raised and the specific provision of the Act or the Commission's rules thereunder, including the form or content requirements § 242.805(a) of this chapter, that the product violates, appears to violate, or potentially violates but which cannot be ascertained from the submission.

(98) Pursuant to §§ 242.806(b) through (e) and 242.808(b) of this chapter:

(i) To make publicly available on the Commission's website a security-based

[1100] 5 U.S.C. 801 *et seq.*

swap execution facility's filing of new rules and rule amendments for Commission review and approval pursuant to § 242.806(a) of this chapter;

(ii) To notify the submitting security-based swap execution facility that a submission for a new rule or rule amendment does not comply with § 242.806(a) of this chapter;

(iii) To extend by an additional 45 days the period for consideration of a new rule or rule amendment voluntarily submitted by a security-based swap execution facility to the Commission, if the proposed rule or rule amendment raises novel or complex issues that require additional time to review or is of major economic significance, the submission is incomplete, or the requester does not respond completely to the Commission questions in a timely manner, and to notify the security-based swap execution facility of the extension within the initial 45-day review period and briefly describe the nature of the specific issue(s) for which additional time for review is required;

(iv) To extend the period for consideration of a new rule amendment voluntarily submitted by a security-based swap execution facility to the Commission for approval by such longer period as to which the security-based swap execution facility agrees in writing;

(v) To approve a proposed rule or rule amendment and provide notice of the approval to the security-based swap execution facility;

(vi) To notify a security-based swap execution facility that the Commission will not, or is unable to, approve the new rule or rule amendment and to specify the nature of the issues raised and the specific provision of the Act or the Commission's rules thereunder, including the form or content requirements of this section, with which the new rule or rule amendment is inconsistent or appears to be inconsistent with the Act or the Commission's rules thereunder, including the form or content requirements of Rule 806, with which the new rule or rule amendment is inconsistent or appears to be inconsistent; and

(vii) To approve a proposed rule or a rule amendment, including changes to terms and conditions of a product, on an expedited basis under such conditions as shall be specified in the written notification.

(99) Pursuant to §§ 242.807(c) and 242.808(b) of this chapter:

(i) To make publicly available on the Commission's website a security-based swap execution facility's filing of new rules and rule amendments pursuant to the self-certification procedures of § 242.807 of this chapter;

(ii) To stay for a period of up to 90 days the effectiveness of a security-based swap execution facility's self-certification of a new rule or rule amendment;

(iii) To publish notice on the Commission's website of a 30-day period for public comment; and

(iv) To withdraw the stay or notify the security-based swap execution facility that the Commission objects to the proposed certification.

(100) Pursuant to §§ 242.809 of this chapter, to provide written notice to a security-based swap execution facility of a stay or tolling pending issuance of a joint interpretation upon request for a joint interpretation of whether a proposed product is a swap, security-based swap, or mixed swap made pursuant to § 240.3a68–2 of this chapter by the security-based swap execution facility, the Commission, or the Commodity Futures Trading Commission.

(101) Pursuant to § 242.811 of this chapter:

(i) To request pursuant § 242.811(a) of this chapter that a security-based swap execution facility file with the Commission information related to its business as a security-based swap execution facility, and to specify the form, manner, and timeframe for the filing by the security-based swap execution facility;

(ii) To request pursuant to § 242.811(b) of this chapter that a security-based swap execution facility file with the Commission a written demonstration, containing supporting data, information, and documents, that it is in compliance with one or more Core Principles or with its other obligations under the Act or the Commission's rules thereunder, to specify the Core Principles and other obligations under the Act or the Commission's rules that the security-based swap execution facility's filing must address, and to specify the form, manner, and timeframe for the security-based swap execution facility's filing;

(iii) To specify, pursuant to § 242.811(c)(2) of this chapter, the form and manner of the notification required pursuant to § 242.811(c)(1) of this chapter by a security-based swap execution facility of any transaction involving the direct or indirect transfer of 50 percent or more of the equity interest in the security-based swap execution facility, and to request supporting documentation of the transaction;

(iv) To specify the form and manner of the certification required pursuant to § 242.811(c)(4) of this chapter; and

(v) To specify the form and manner of the submission by a security-based swap execution facility of documents filed in any material legal proceeding to which the security-based swap execution facility is a party or its property or assets is subject, as specified in § 242.811(d)(1) of this chapter, or in any material legal proceeding instituted against any officer, director, or other official of the security-based swap execution facility from conduct in such person's capacity as an official of the security-based swap execution facility, as specified in § 242.811(d)(2) of this chapter, and to request further documents.

(102) Pursuant to § 242.822 of this chapter (Rule 822), to require that a security-based swap execution provide information in its possession to the Commission and to specify the form and manner of that provision, and to require a security-based swap execution facility to share information with other regulation organizations, data repositories, and third-party data reporting services as necessary and appropriate to fulfill the security-based swap execution facility's regulatory and reporting responsibilities.

* * * * *

■ 3. Amend § 200.30–14 by revising paragraphs (h)(4), (h)(5), (h)(7), and (h)(8) to read as follows:

§ 200.30–14 Delegation of authority to the General Counsel.

* * * * *

(h) * * *

(4) With respect to proceedings conducted under sections 19(d), (e), and (f) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(d), (e), and (f), Title I of the Sarbanes–Oxley Act of 2002, 15 U.S.C. 7211–7219, and § 201.442 of this chapter (Rule 442 of the Commission's Rules of Practice) to determine that an application for review under any of those sections has been abandoned, under the provisions of'§ 201.420, § 201.440, or § 201.442 of this chapter (Rule 420, Rule 440, or Rule 442 of the Commission's Rules of Practice), or otherwise, and accordingly to issue an order dismissing the application.

(5) With respect to proceedings conducted pursuant to the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.,* the Investment Company Act of 1940, 15 U.S.C. 80a–1 *et seq.,* the Investment Advisers Act of 1940, 15 U.S.C. 80b–1 *et seq.,* the provisions of § 201.102(e) or § 201.442 of this chapter (Rule 102(e) or Rule 442 of the Commission's Rules of Practice), and

Title I of the Sarbanes–Oxley Act of 2002, 15 U.S.C. 7211–7219, to determine applications to stay Commission orders pending appeal of those orders to the federal courts and to determine application to vacate such stays.

* * * * *

(7) In connection with Commission review of actions taken by self-regulatory organizations pursuant to sections 19(d), (e), and (f) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(d), (e), and (f), by the Public Company Accounting Oversight Board pursuant to Title I of the Sarbanes–Oxley Act of 2002, 15 U.S.C. 7211–7219, or by a security-based swap execution facility pursuant to § 201.442 of this chapter (Rule 442 of the Commission's Rules of Practice) to grant or deny requests for oral argument in accordance with the provisions of § 201.451 of this chapter (Rule 451 of the Commission's Rules of Practice).

(8) In connection with Commission review of actions taken by the Public Company Accounting Oversight Board pursuant to Title I of the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7211–7219, or by a security-based swap execution facility pursuant to § 201.442 of this chapter (Rule 442 of the Commission's Rules of Practice), to determine whether to lift the automatic stay of a disciplinary sanction.

* * * * *

PART 201—RULES OF PRACTICE

■ 4. The general authority citation for part 201 continues to read as follows:

Authority: 15 U.S.C. 77s, 77sss, 78w, 78x, 80a–37, and 80b–11; 5 U.S.C. 504(c)(1).

* * * * *

Subpart D—Rules of Practice

■ 5. The authority citation subpart D is revised to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77h–1, 77j, 77s, 77u, 77sss, 78c(b), 78d–1, 78d–2, 78*l*, 78m, 78n, 78*o*(d), 78*o*–3, 78*o*–10(b)(6), 78s, 78u–2, 78u–3, 78v, 78w, 80a–8, 80a–9, 80a–37, 80a–38, 80a–39, 80a–40, 80a–41, 80a–44, 80b–3, 80b–9, 80b–11, 80b–12, 7202, 7215, and 7217.

■ 6. Amend § 201.101 by adding paragraph (a)(9)(ix) to read as follows:

§ 201.101 Definitions.

(a) * * *

(9) * * *

(ix) By the filing, pursuant to § 201.442, of an application for review of a determination of a security-based swap execution facility;

* * * * *

■ 7. Amend § 201.202 by revising paragraph (a) to read as follows:

§ 201.202 Specification of procedures by parties in certain proceedings.

(a) *Motion to specify procedures.* In any proceeding other than an enforcement or disciplinary proceeding, a proceeding to review a determination by a self-regulatory organization pursuant to §§ 201.420 and 201.421, a proceeding to review a determination of the Board pursuant to §§ 201.440 and 201.441, or a proceeding to review a determination by a security-based swap execution facility pursuant to §§ 201.442 and 201.443, a party may, at any time up to 20 days prior to the start of a hearing, make a motion to specify the procedures necessary or appropriate for the proceeding with particular reference to:

(1) Whether there should be an initial decision by a hearing officer;

(2) Whether any interested division of the Commission may assist in the preparation of the Commission's decision; and

(3) Whether there should be a 30-day waiting period between the issuance of the Commission's order and the date it is to become effective.

* * * * *

■ 8. Amend § 201.210 by revising the paragraph (a) heading, (a)(1), paragraph (b) heading, (b)(1), and paragraph (c) introductory text to read as follows:

§ 201.210 Parties, limited participants and amici curiae.

(a) *Parties in an enforcement or disciplinary proceeding, a proceeding to review a self- regulatory organization determination, a proceeding to review a Board determination, or a proceeding to review a determination by a security-based swap execution facility.* (1) *Generally.* No person shall be granted leave to become a party or a non-party participant on a limited basis in an enforcement or disciplinary proceeding, a proceeding to review a determination by a self- regulatory organization pursuant to §§ 201.420 and 201.421, a proceeding to review a determination by the Board pursuant to §§ 201.440 and 201.441, or a proceeding to review a determination by a security-based swap execution facility pursuant to §§ 201.442 and 201.443, except as authorized by paragraph (c) of this section.

* * * * *

(b) *Intervention as party.* (1) *Generally.* In any proceeding, other than an enforcement proceeding, a disciplinary proceeding, a proceeding to review a self-regulatory determination, a proceeding to review a Board determination, or a proceeding to review a security-based swap execution facility determination, any person may seek leave to intervene as a party by filing a motion setting forth the person's interest in the proceeding. No person, however, shall be admitted as a party to a proceeding by intervention unless it is determined that leave to participate pursuant to paragraph (c) of this section would be inadequate for the protection of the person's interests. In a proceeding under the Investment Company Act of 1940, any representative of interested security holders, or any other person whose participation in the proceeding may be in the public interest or for the protection of investors, may be admitted as a party upon the filing of a written motion setting forth the person's interest in the proceeding.

* * * * *

(c) *Leave to participate on a limited basis.* In any proceeding, other than an enforcement proceeding, a disciplinary proceeding, a proceeding to review a self-regulatory determination, a proceeding to review a Board determination, or a proceeding to review a security-based swap execution facility determination, any person may seek leave to participate on a limited basis as a non-party participant as any matter affecting the person's interests:

* * * * *

■ 9. Amend § 201.401 by adding paragraph (f) to read as follows:

§ 201.401 Consideration of stays.

* * * * *

(f) *Lifting of stay of action by a security-based swap execution facility.* (1) *Availability.* Any person aggrieved by a stay of action by a security-based swap execution facility entered in accordance with § 201.442(c) may make a motion to lift the stay. The Commission may, at any time, on its own motion determine whether to lift the automatic stay.

(2) *Summary action.* The Commission may lift a stay summarily, without notice and opportunity for hearing.

(3) *Expedited consideration.* The Commission may expedite consideration of a motion to lift a stay of action by a security-based swap execution facility, consistent with the Commission's other responsibilities. Where consideration is expedited, persons opposing the lifting of the stay may file a statement in opposition within two days of service of the motion requesting lifting of the stay unless the Commission, by written order, shall specify a different period.

■ 10. Add § 201.442 to read as follows:

§ 201.442 Appeal of determination by security-based swap execution facility.

(a) *Application for review; when available.* An application for review by the Commission may be filed by any person who is aggrieved by a determination of a security-based swap execution facility with respect to any:

(1) Final disciplinary action, as defined in § 240.835(b)(1) of this chapter;

(2) Final action with respect to a denial or conditioning of membership, as defined in § 240.835(b)(2) of this chapter; or

(3) Final action with respect to a denial or limitation of access to any service offered by the security-based swap execution facility, as defined in § 240.835(b)(2) of this chapter.

(b) *Procedure.* An aggrieved person may file an application for review with the Commission pursuant to § 201.151 within 30 days after the notice filed with the Commission pursuant to § 242.835 of this chapter by the security-based swap execution facility of the determination is received by the aggrieved person. The Commission will not extend this 30-day period, absent a showing of extraordinary circumstances. This section is the exclusive remedy for seeking an extension of the 30-day period. The aggrieved person shall serve the application on the security-based swap execution facility at the same time. The application shall identify the determination complained of, set forth in summary form a statement of alleged errors in the action and supporting reasons therefor, and state an address where the applicant can be served. The application should not exceed two pages in length. If the applicant will be represented by a representative, the application shall be accompanied by the notice of appearance required by § 201.102(d). Any exception to an action not supported in an opening brief that complies with § 201.450(b) may, at the discretion of the Commission, be deemed to have been waived by the applicant.

(c) *Stay of determination.* Filing an application for review with the Commission pursuant to paragraph (b) of this section operates as a stay of the security-based swap execution facility's determination, unless the Commission otherwise orders either pursuant to a motion filed in accordance with § 201.401(f) or upon its own motion.

(d) *Certification of the record; service of the index.* Within 14 days after receipt of an application for review, the security-based swap execution facility shall certify and file electronically in the form and manner specified by the Office of the Secretary one unredacted copy of the record upon which it took the complained-of action.

(1) The security-based swap execution facility shall file electronically with the Commission one copy of an index of such record in the form and manner specified by the Commission and shall serve one copy of the index on each party. If such index contains any sensitive personal information, as defined in paragraph (d)(2) of this section, the security-based swap execution facility also shall file electronically with the Commission one redacted copy of such index, subject to the requirements of paragraph (d)(2) of this section.

(2) *Sensitive personal information* includes a Social Security number, taxpayer identification number, financial account number, credit card or debit card number, passport number, driver's license number, State-issued identification number, home address (other than city and State), telephone number, date of birth (other than year), names and initials of minor children, as well as any unnecessary health information identifiable by individual, such as an individual's medical records. Sensitive personal information shall not be included in, and must be redacted or omitted from, all filings.

(i) *Exceptions.* The following information may be included and is not required to be redacted from filings:

(A) The last four digits of a financial account number, credit card or debit card number, passport number, driver's license number, and State-issued identification number;

(B) Home addresses and telephone numbers of parties and persons filing documents with the Commission; and

(C) Business telephone numbers.

(ii) [Reserved]

(e) *Certification.* Any filing made pursuant to this section, other than the record upon which the action complained of was taken, must include a certification that any information described in paragraph (d)(2) of this section has been omitted or redacted from the filing.

■ 11. Add § 201.443 to read as follows:

§ 201.443 Commission consideration of security-based swap execution facility determinations.

(a) *Commission review other than pursuant to an application for review.* The Commission may, on its own initiative, order review of any determination by a security-based swap execution facility that could be subject to an application for review pursuant to § 201.442(a) within 40 days after the security-based swap execution facility provided notice to the Commission thereof.

(b) *Supplemental briefing.* The Commission may at any time before issuing its decision raise or consider any matter that it deems material, whether or not raised by the parties. The Commission will give notice to the parties and an opportunity for supplemental briefing with respect to issues not briefed by the parties where the Commission believes that such briefing could significantly aid the decisional process.

■ 12. Amend § 201.450, by:

■ a. Redesignating paragraphs (a)(2)(iv) and (a)(2)(v) as paragraphs (a)(2)(v) and (a)(2)(vi); and

■ b. Adding new paragraph (a)(2)(iv).

The addition reads as follows:

§ 201.450 Briefs filed with the Commission.

(a) * * *

(2) * * *

(iv) Receipt by the Commission of an index to the record of a determination by a security-based swap execution facility filed pursuant to § 201.442(d).

* * * * *

■ 13. Amend § 201.460 by adding paragraph (a)(4) to read as follows:

§ 201.460 Record before the Commission.

* * * * *

(a) * * *

(4) In a proceeding for final decision before the Commission reviewing a determination of a security-based swap execution facility, the record shall consist of:

(i) The record certified pursuant to § 201.442(d) by the security-based swap execution facility;

(ii) Any application for review; and

(iii) Any submissions, moving papers, and briefs filed on appeal or review.

* * * * *

PART 232—REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

■ 14. The general authority citation for part 232 continues to read as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s(a), 77z–3, 77sss(a), 78c(b), 78*l*, 78m, 78n, 78*o*(d), 78w(a), 78*ll*, 80a–6(c), 80a–8, 80a–29, 80a–30, 80a–37, 80b–4, 80b–6a, 80b–10, 80b–11, 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 15. Amend § 232.405 by:

■ a. Revising the introductory text, paragraphs (a)(2), (a)(3)(i) introductory text, (a)(3)(ii), (a)(4), and (b)(5) introductory text;

■ b. Adding paragraph (b)(5)(ii); and

■ c. Revising Note 1 to § 232.405.

The revisions and addition read as follows:

§ 232.405 Interactive Data File submissions.

This section applies to electronic filers that submit Interactive Data Files. Section 229.601(b)(101) of this chapter (Item 601(b)(101) of Regulation S–K), General Instruction F of § 249.311 (Form 11–K), paragraph (101) of Part II—Information Not Required to be Delivered to Offerees or Purchasers of Form F–10 (§ 239.40 of this chapter), § 240.13a–21 of this chapter (Rule 13a–21 under the Exchange Act), paragraph 101 of the Instructions as to Exhibits of Form 20–F (§ 249.220f of this chapter), paragraph B.(15) of the General Instructions to Form 40–F (§ 249.240f of this chapter), paragraph C.(6) of the General Instructions to Form 6–K (§ 249.306 of this chapter), § 240.17Ad–27(d) of this chapter (Rule 17Ad–27(d) under the Exchange Act), Note D.5 of § 240.14a–101 of this chapter (Rule 14a–101 under the Exchange Act), Item 1 of § 240.14c–101 of this chapter (Rule 14c–101 under the Exchange Act), General Instruction I of § 249.333 of this chapter (Form F–SR), General Instruction C.3.(g) of Form N–1A (§§ 239.15A and 274.11A of this chapter), General Instruction I of Form N–2 (§§ 239.14 and 274.11a–1 of this chapter), General Instruction C.3.(h) of Form N–3 (§§ 239.17a and 274.11b of this chapter), General Instruction C.3.(h) of Form N–4 (§§ 239.17b and 274.11c of this chapter), General Instruction C.3.(h) of Form N–6 (§§ 239.17c and 274.11d of this chapter), General Instruction 2.(*l*) of Form N–8B–2 (§ 274.12 of this chapter), General Instruction 5 of Form S–6 (§ 239.16 of this chapter), General Instruction C.4 of Form N–CSR (§§ 249.331 and 274.128 of this chapter), §§ 242.829 and 831 of this chapter (Rules 829 and 831 of Regulation SE), and the Registration Instructions to Form SBSEF (§ 249.1701 of this chapter) specify when electronic filers are required or permitted to submit an Interactive Data File (§ 232.11), as further described in note 1 to this section. This section imposes content, format, and submission requirements for an Interactive Data File, but does not change the substantive content requirements for the financial and other disclosures in the Related Official Filing (§ 232.11).

(a) * * *

(2) Be submitted only by an electronic filer either required or permitted to submit an Interactive Data File as specified by § 229.601(b)(101) of this chapter (Item 601(b)(101) of Regulation S–K), Instruction F of Form 11–K (§ 249.311 of this chapter), paragraph (101) of Part II—Information Not Required to be Delivered to Offerees or Purchasers of Form F–10 (§ 239.40 of this chapter), § 240.13a–21 of this chapter (Rule 13a–21 under the Exchange Act), paragraph 101 of the Instructions as to Exhibits of Form 20–F (§ 249.220f of this chapter), paragraph B.(15) of the General Instructions to Form 40–F (§ 249.240f of this chapter), paragraph C.(6) of the General Instructions to Form 6–K (§ 249.306 of this chapter), § 240.17Ad–27(d) of this chapter (Rule 17Ad–27(d) under the Exchange Act), Note D.5 of § 240.14a–101 of this chapter (Rule 14a–101 under the Exchange Act), Item 1 of § 240.14c–101 of this chapter (Rule 14c–101 under the Exchange Act), General Instruction I to Form F–SR (§ 249.333 of this chapter), General Instruction C.3.(g) of Form N–1A (§§ 239.15A and 274.11A of this chapter), General Instruction I of Form N–2 (§§ 239.14 and 274.11a–1 of this chapter), General Instruction C.3.(h) of Form N–3 (§§ 239.17a and 274.11b of this chapter), General Instruction C.3.(h) of Form N–4 (§§ 239.17b and 274.11c of this chapter), General Instruction C.3.(h) of Form N–6 (§§ 239.17c and 274.11d of this chapter), General Instruction 2.(*l*) of Form N–8B–2 (§ 274.12 of this chapter), General Instruction 5 of Form S–6 (§ 239.16 of this chapter), General Instruction C.4 of Form N–CSR (§§ 249.331 and 274.128 of this chapter), §§ 242.829 and 242.831 of this chapter (Rules 829 and 831 of Regulation SE), and the Registration Instructions to Form SBSEF (§ 249.1701 of this chapter), as applicable;

* * * * *

(3) * * *

(i) If the electronic filer is not a management investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a *et seq.*), a separate account as defined in section 2(a)(14) of the Securities Act (15 U.S.C. 77b(a)(14)) registered under the Investment Company Act of 1940, a business development company as defined in section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(48)), a unit investment trust as defined in Section 4(2) of the Investment Company Act of 1940 (15 U.S.C. 80a–4), or a clearing agency that provides a central matching service, or is subject to §§ 242.800 through 242.835 (Regulation SE), and is not within one of the categories specified in paragraph (f)(1)(i) of this section, as partly embedded into a filing with the remainder simultaneously submitted as an exhibit to:

* * * * *

(ii) If the electronic filer is a management investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a *et seq.*), a separate account (as defined in section 2(a)(14) of the Securities Act (15 U.S.C. 77b(a)(14)) registered under the Investment Company Act of 1940, a business development company as defined in section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(48)), a unit investment trust as defined in Section 4(2) of the Investment Company Act of 1940 (15 U.S.C. 80a–4), or a clearing agency that provides a central matching service, or is subject to §§ 242.800 through 242.835 (Regulation SE), and is not within one of the categories specified in paragraph (f)(1)(ii) of this section, as partly embedded into a filing with the remainder simultaneously submitted as an exhibit to a filing that contains the disclosure this section requires to be tagged; and

(4) Be submitted in accordance with the EDGAR Filer Manual and, as applicable, Item 601(b)(101) of § 229.601(b)(101) of this chapter (Regulation S–K), General Instruction F of Form 11–K (§ 249.311 of this chapter), paragraph (101) of Part II—Information Not Required to be Delivered to Offerees or Purchasers of Form F–10 (§ 239.40 of this chapter), § 240.13a–21 of this chapter (Rule 13a–21 under the Exchange Act), paragraph 101 of the Instructions as to Exhibits of Form 20–F (§ 249.220f of this chapter), paragraph B.(15) of the General Instructions to Form 40–F (§ 249.240f of this chapter), paragraph C.(6) of the General Instructions to Form 6–K (§ 249.306 of this chapter), § 240.17Ad–27(d) of this chapter (Rule 17Ad–27(d) under the Exchange Act), Note D.5 of § 240.14a–101 of this chapter (Rule 14a–101 under the Exchange Act), Item 1 of § 240.14c–101 of this chapter (Rule 14c–101 under the Exchange Act), General Instruction I to Form F–SR (§ 249.333 of this chapter), General Instruction C.3.(g) of Form N–1A (§§ 239.15A and 274.11A of this chapter), General Instruction I of Form N–2 (§§ 239.14 and 274.11a–1 of this chapter), General Instruction C.3.(h) of Form N–3 (§§ 239.17a and 274.11b of this chapter), General Instruction C.3.(h) of Form N–4 (§§ 239.17b and 274.11c of this chapter), General Instruction C.3.(h) of Form N–6 (§§ 239.17c and 274.11d of this chapter), Instruction 2.(*l*) of Form N–8B–2 (§ 274.12 of this chapter); General Instruction 5 of Form S–6 (§ 239.16 of this chapter); General Instruction C.4 of Form N–CSR (§§ 249.331 and 274.128 of this chapter), §§ 242.829 and 831 of this chapter

(Rules 829 and 831 of Regulation SE), and the Registration Instructions to Form SBSEF (§ 249.1701 of this chapter), as applicable.

(b) * * *

(5) If the electronic filer is a clearing agency that provides a central matching service, or is subject to §§ 242.800 through 242.835 (Regulation SE), an Interactive Data File must consist only of a complete set of information for all corresponding data in the Related Official Filing, no more and no less, as follows:

* * * * *

(ii) For electronic filers subject to Regulation SE, the content of documents required to be filed electronically under §§ 242.829 and 242.831 of this chapter (Rules 829 and 831 of Regulation SE); and the Registration Instructions to § 249.1701 of this chapter (Form SBSEF), as applicable.

* * * * *

Note 1 to § 232.405: Section 229.601(b)(101) of this chapter (Item 601(b)(101) of Regulation S–K) specifies the circumstances under which an Interactive Data File must be submitted and the circumstances under which it is permitted to be submitted, with respect to § 239.11 of this chapter (Form S–1), § 239.13 of this chapter (Form S–3), § 239.25 of this chapter (Form S–4), § 239.18 of this chapter (Form S–11), § 239.31 of this chapter (Form F–1), § 239.33 of this chapter (Form F–3), § 239.34 of this chapter (Form F–4), § 249.310 of this chapter (Form 10–K), § 249.308a of this chapter (Form 10–Q), and § 249.308 of this chapter (Form 8–K). General Instruction F of § 249.311 of this chapter (Form 11–K) specifies the circumstances under which an Interactive Data File must be submitted, and the circumstances under which it is permitted to be submitted, with respect to Form 11–K. Paragraph (101) of Part II—Information not Required to be Delivered to Offerees or Purchasers of § 239.40 of this chapter (Form F–10) specifies the circumstances under which an Interactive Data File must be submitted and the circumstances under which it is permitted to be submitted, with respect to Form F–10. Paragraph 101 of the Instructions as to Exhibits of § 249.220f of this chapter (Form 20–F) specifies the circumstances under which an Interactive Data File must be submitted and the circumstances under which it is permitted to be submitted, with respect to Form 20–F. Paragraph B.(15) of the General Instructions to § 249.240f of this chapter (Form 40–F) and Paragraph C.(6) of the General Instructions to § 249.306 of this chapter (Form 6–K) specify the circumstances under which an Interactive Data File must be submitted and the circumstances under which it is permitted to be submitted, with respect to § 249.240f of this chapter (Form 40–F) and § 249.306 of this chapter (Form 6–K). Section 240.17Ad–27(d) of this chapter (Rule 17Ad–27(d) under the Exchange Act) specifies the circumstances under which an Interactive Data File must be submitted with respect the reports required under Rule 17Ad–27. Note D.5 of § 240.14a–101 of this chapter (Schedule 14A) and Item 1 of § 240.14c–101 of this chapter (Schedule 14C) specify the circumstances under which an Interactive Data File must be submitted with respect to Schedules 14A and 14C. Section 240.13a–21 of this chapter (Rule 13a–21 under the Exchange Act) and General Instruction I to § 249.333 of this chapter (Form F–SR) specify the circumstances under which an Interactive Data File must be submitted, with respect to Form F–SR. §§ 242.829 and 242.831 of this chapter (Rules 829 and 831 of Regulation SE) and the Registration Instructions to § 249.1701 of this chapter (Form SBSEF), as applicable, specify the circumstances under which an Interactive Data File must be submitted with respect to filings made under Regulation SE.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 16. The general authority citation for part 240 continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78j–4, 78k, 78k–1, 78*l,* 78m, 78n, 78n–1, 78*o,* 78*o*–4, 78*o*–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78dd, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, 7201 *et seq.,* and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; and Pub. L. 111–203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112–106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

■ 17. Amend § 240.3a1–1 by:

■ a. Removing the word ''or'' from the end of paragraph (a)(2);

■ b. Removing the period from the end of paragraph (a)(3) and adding a semicolon in its place;

■ c. Adding paragraphs (a)(4) and (5); and

■ d. Revising paragraph (b) introductory text.

The additions and revisions read as follows:

§ 240.3a1–1 Exemption from the definition of ''Exchange'' under section 3(a)(1) of the Act.

* * * * *

(a) * * *

(4) Has registered with the Commission as a security-based swap execution facility pursuant § 242.803 of this chapter and provides a market place or facilities for no securities other than security-based swaps; or

(5) Has registered with the Commission as a clearing agency pursuant to section 17A of the Act (15 U.S.C. 78q–1) and limits its exchange functions to operation of a trading session that is designed to further the accuracy of end-of-day valuations of security-based swaps.

(b) Notwithstanding paragraphs (a)(1) through (3) of this section, an organization, association, or group of persons shall not be exempt under this section from the definition of ''exchange,'' if:

* * * * *

■ 18. Add § 240.15a–12 to read as follows:

§ 240.15a–12 Exemption for certain security-based swap execution facilities from certain broker requirements.

(a) For purposes of this section, an *SBSEF–B* means a security-based swap execution facility that does not engage in any securities activity other than facilitating the trading of security-based swaps on or through the security-based swap execution facility.

(b) An SBSEF–B that registers with the Commission pursuant to § 242.803 of this chapter shall be deemed also to have registered with the Commission pursuant to sections 15(a) and (b) of the Act (15 U.S.C. 78*o*(a)(1) and (b)).

(c) Except as provided in paragraph (d) of this section, an SBSEF–B shall be exempt from any provision of the Act or the Commission's rules thereunder applicable to brokers that, by its terms, requires, prohibits, restricts, limits, conditions, or affects the activities of a broker, unless such provision specifies that it applies to a security-based swap execution facility.

(d) Notwithstanding paragraph (c) of this section, the following provisions of the Act and the Commission's rules thereunder shall apply to an SBSEF–B:

(1) Section 15(b)(4) of the Act (15 U.S.C. 78*o*(b)(4));

(2) Section 15(b)(6) of the Act (15 U.S.C. 78*o*(b)(6)); and

(3) Section 17(b) of the Act (15 U.S.C. 78q(b)).

(e) An SBSEF–B shall be exempt from the Securities Investor Protection Act.

PART 242—REGULATIONS M, SHO, ATS, AC, NMS, SE, AND SBSR, AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

■ 19. The authority citation for part 242 is revised to read as follows:

Authority: 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78c–4, 78g(c)(2), 78i(a), 78j, 78k–1(c), 78*l,* 78m, 78n, 78*o*(b), 78*o*(c), 78*o*(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd–1, 78mm, 80a–23, 80a–29, 80a–37, and 8343.

■ 20. The heading for part 242 is revised to read as set forth above.

■ 21. Add §§ 242.800 through 242.835 to read as follows:

Regulation SE—Registration and Regulation of Security-Based Swap Execution Facilities

Sec.

* * * * *

242.800 Scope.
242.801 Applicable provisions.
242.802 Definitions.
242.803 Requirements and procedures for registration.
242.804 Listing products for trading by certification.
242.805 Voluntary submission of new products for Commission review and approval.
242.806 Voluntary submission of rules for Commission review and approval.
242.807 Self-certification of rules.
242.808 Availability of public information.
242.809 Stay of certification and tolling of review period pending jurisdictional determination.
242.810 Product filings by security-based swap execution facilities that are not yet registered and by dormant security-based swap execution facilities.
242.811 Information relating to security-based swap execution facility compliance.
242.812 Enforceability.
242.813 Prohibited use of data collected for regulation purposes.
242.814 Entity operating both a national securities exchange and security-based swap execution facility.
242.815 Methods of execution for Required and Permitted Transactions.
242.816 Trade execution requirement and exemptions therefrom.
242.817 Trade execution compliance schedule.
242.818 Core Principle 1—Compliance with core principles.
242.819 Core Principle 2—Compliance with rules.
242.820 Core Principle 3—Security-based swaps not readily susceptible to manipulation.
242.821 Core Principle 4—Monitoring of trading and trade processing.
242.822 Core Principle 5—Ability to obtain information.
242.823 Core Principle 6—Financial integrity of transactions.
242.824 Core Principle 7—Emergency authority.
242.825 Core Principle 8—Timely publication of trading information.
242.826 Core Principle 9—Recordkeeping and reporting.
242.827 Core Principle 10—Antitrust considerations.
242.828 Core Principle 11—Conflicts of interest.
242.829 Core Principle 12—Financial resources.
242.830 Core Principle 13—System safeguards.
242.831 Core Principle 14—Designation of chief compliance officers.
242.832 Application of the trade execution requirement to cross-border security-based swap transactions.
242.833 Cross-border exemptions.
242.834 Mitigation of conflicts of interest of security-based swap execution facilities and certain exchanges.
242.835 Notice to Commission by security-based swap execution facility of final disciplinary action or denial or limitation of access.

§ 242.800 Scope.

The provisions of §§ 242.800 through 242.835 shall apply to every security-based swap execution facility that is registered or is applying to become registered as a security-based swap execution facility under section 3D of the Securities Exchange Act (''Act'').

§ 242.801 Applicable provisions.

A security-based swap execution facility shall comply with the requirements of §§ 242.800 through 242.835 and all other applicable Commission rules, including any related definitions and cross- referenced sections.

§ 242.802 Definitions.

The following terms, and any other terms defined within §§ 242.800 through 242.835, are defined as follows solely for purposes of §§ 242.800 through 242.835:

Business day means the intraday period of time starting at 8:15 a.m. and ending at 4:45 p.m. eastern standard time or eastern daylight saving time, whichever is currently in effect in Washington, DC, on all days except Saturdays, Sundays, and Federal holidays in Washington, DC.

Committee member means a member, or functional equivalent thereof, of any committee of a security-based swap execution facility.

Correcting trade means a trade executed and submitted for clearing to a registered clearing agency with the same terms and conditions as an error trade other than any corrections to any operational or clerical error and the time of execution.

Disciplinary committee means any person or committee of persons, or any subcommittee thereof, that is authorized by a security-based swap execution facility or SBS exchange to issue disciplinary charges, to conduct disciplinary proceedings, to settle disciplinary charges, to impose disciplinary sanctions, or to hear appeals thereof in cases involving any violation of the rules of the security-based swap execution facility or SBS exchange, except those cases where the person or committee is authorized summarily to impose minor penalties for violating rules regarding decorum, attire, the timely submission of accurate records for clearing or verifying each day's transactions, or other similar activities.

Dormant product means:

(1) Any security-based swap listed on security-based swap execution facility that has no open interest and in which no trading has occurred for a period of 12 complete calendar months following a certification to, or approval by, the Commission; provided, however, that no security-based swap initially and originally certified to, or approved by, the Commission within the preceding 36 complete calendar months shall be considered to be a dormant product;

(2) Any security-based swap of a dormant security-based swap execution facility; or

(3) Any security-based swap not otherwise a dormant product that a security-based swap execution facility self-declares through certification to be a dormant product.

Dormant rule means:

(1) Any rule of a security-based swap execution facility which remains unimplemented for 12 consecutive calendar months following a certification with, or an approval by, the Commission; or

(2) Any rule or rule amendment of a dormant security-based swap execution facility.

Dormant security-based swap execution facility means a security-based swap execution facility on which no trading has occurred for the previous 12 consecutive calendar months; provided, however, that no security-based swap execution facility shall be considered to be a dormant security-based swap execution facility if its initial and original Commission order of registration was issued within the preceding 36 consecutive calendar months.

Electronic trading facility means a trading facility that operates by means of an electronic or telecommunications network and maintains an automated audit trail of bids, offers, and the matching orders or the execution of transactions on the facility.

Emergency means any occurrence or circumstance that, in the opinion of the governing board of a security-based swap execution facility, or a person or persons duly authorized to issue such an opinion on behalf of the governing board of the security-based swap execution facility under circumstances and pursuant to procedures that are specified by rule, requires immediate action and threatens or may threaten such things as the fair and orderly trading in, or the liquidation of or delivery pursuant to, any security-based swaps, including:

(1) Any manipulative or attempted manipulative activity;

(2) Any actual, attempted, or threatened corner, squeeze, congestion, or undue concentration of positions;

(3) Any circumstances which may materially affect the performance of security-based swaps or transactions, including failure of the payment system or the bankruptcy or insolvency of any market participant;

(4) Any action taken by any governmental body, or any other security-based swap execution facility, market, or facility which may have a direct impact on trading or clearing and settlement; and

(5) Any other circumstance which may have a severe, adverse effect upon the functioning of the security-based swap execution facility.

Employee means any person hired or otherwise employed on a salaried or contract basis by a security-based swap execution facility, but does not include:

(1) Any governing board member compensated by the security-based swap execution facility solely for governing board activities; or

(2) Any committee member compensated by a security-based swap execution facility solely for committee activities; or

(3) Any consultant hired by a security-based swap execution facility.

Error trade means any trade executed on or subject to the rules of a security-based swap execution facility that contains an operational or clerical error.

Governing board means the board of directors of a security-based swap execution facility, or for a security-based swap execution facility whose organizational structure does not include a board of directors, a body performing a function similar to a board of directors.

Governing board member means a member, or functional equivalent thereof, of the governing board of a security-based swap execution facility.

Member, with respect to a national securities exchange, has the same meaning as in section 3(a)(3) of the Act. *Member,* with respect to a security-based swap execution facility, means an individual, association, partnership, corporation, or trust owning or holding a membership in, admitted to membership representation on, or having trading privileges on the security-based swap execution facility.

Non-U.S. member means a member of a security-based swap execution facility that is not a U.S. person.

Offsetting trade means a trade executed and submitted for clearing to a registered clearing agency with terms and conditions that economically reverse an error trade that was accepted for clearing.

Order book means an electronic trading facility, a trading facility, or a trading system or platform in which all market participants in the trading system or platform have the ability to enter multiple bids and offers, observe or receive bids and offers entered by other market participants, and transact on such bids and offers.

Oversight panel means any panel, or any subcommittee thereof, authorized by a security-based swap execution facility or security-based swap exchange (''SBS exchange'') to recommend or establish policies or procedures with respect to the surveillance, compliance, rule enforcement, or disciplinary responsibilities of the security-based swap execution facility or SBS exchange.

Records has the meaning as in section 3(a)(37) of the Act (15 U.S.C. 78c(a)(37)).

Rule means any constitutional provision, article of incorporation, bylaw, rule, regulation, resolution, interpretation, stated policy, advisory, terms and conditions, trading protocol, agreement, or instrument corresponding thereto, including those that authorize a response or establish standards for responding to a specific emergency, and any amendment or addition thereto or repeal thereof, made or issued by a security-based swap execution facility or by the governing board thereof or any committee thereof, in whatever form adopted.

SBS exchange means a national securities exchange that posts or makes available for trading security-based swaps.

Security-based swap execution facility has the same meaning as in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77)) but does not include an entity that is registered with the Commission as a clearing agency pursuant to section 17A of the Act (15 U.S.C. 78q–1) and limits its security-based swap execution facility functions to operation of a trading session that is designed to further the accuracy of end-of-day valuations.

Senior officer means the chief executive officer or other equivalent officer of a security-based swap execution facility.

Terms and conditions means any definition of the trading unit or the specific asset underlying a security-based swap, description of the payments to be exchanged under a security-based swap, specification of cash settlement or delivery standards and procedures, and establishment of buyers' and sellers' rights and obligations under the security-based swap. Terms and conditions of a security-based swap include provisions relating to the following:

(1) Identification of the major group, category, type, or class in which the security-based swap falls (such as a credit or equity security-based swap) and of any further sub-group, category, type, or class that further describes the security-based swap;

(2) Notional amounts, quantity standards, or other unit size characteristics;

(3) Any applicable premiums or discounts for delivery of a non-par product;

(4) Trading hours and the listing of security-based swaps;

(5) Pricing basis for establishing the payment obligations under, and mark-to-market value of, the security-based swap including, as applicable, the accrual start dates, termination, or maturity dates, and, for each leg of the security-based swap, the initial cash flow components, spreads, and points, and the relevant indexes, prices, rates, coupons, or other price reference measures;

(6) Any price limits, trading halts, or circuit breaker provisions, and procedures for the establishment of daily settlement prices;

(7) Payment and reset frequency, day count conventions, business calendars, and accrual features;

(8) If physical delivery applies, delivery standards and procedures, including fees related to delivery or the delivery process, alternatives to delivery, and applicable penalties or sanctions for failure to perform;

(9) If cash-settled, the definition, composition, calculation, and revision of the cash settlement price, and the settlement currency;

(10) Payment or collection of option premiums or margins;

(11) Option exercise price, if it is constant, and method for calculating the exercise price, if it is variable;

(12) Threshold prices for an option, the existence of which is contingent upon those prices;

(13) Any restrictions or requirements for exercising an option; and

(14) Life cycle events.

Trading facility. (1) *In general.* The term *trading facility* means a person or group of persons that constitutes, maintains, or provides a physical or electronic facility or system in which multiple participants have the ability to execute or trade agreements, contracts, or transactions:

(i) By accepting bids or offers made by other participants that are open to multiple participants in the facility or system; or

(ii) Through the interaction of multiple bids or multiple offers within a system with a pre- determined non-discretionary automated trade matching and execution algorithm.

(2) *Exclusions.* (i) The term *trading facility* does not include:

(A) A person or group of persons solely because the person or group of persons constitutes, maintains, or provides an electronic facility or system that enables participants to negotiate the terms of and enter into bilateral transactions as a result of communications exchanged by the parties and not from interaction of multiple bids and multiple offers within a predetermined, nondiscretionary automated trade matching and execution algorithm;

(B) A government securities dealer or government securities broker, to the extent that the dealer or broker executes or trades agreements, contracts, or transactions in government securities, or assists persons in communicating about, negotiating, entering into, executing, or trading an agreement, contract, or transaction in government securities (as the terms *government securities dealer, government securities broker,* and *government securities* are defined in section 3(a) of the Act); or

(C) A facility on which bids and offers, and acceptances of bids and offers effected on the facility, are not binding.

(ii) Any person, group of persons, dealer, broker, or facility described in paragraphs (2)(i)(A) through (C) of this definition of trading facility is excluded from the meaning of the term ''trading facility'' without any prior specific approval, certification, or other action by the Commission.

(3) *Special rule.* A person or group of persons that would not otherwise constitute a trading facility shall not be considered to be a trading facility solely as a result of the submission to a registered clearing agency of transactions executed on or through the person or group of persons.

U.S. person has the same meaning as in § 240.3a71–3(a)(4) of this chapter.

Note 1 to § 242.802. The Commission has not yet adopted a definition of ''block trade.''

§ 242.803 Requirements and procedures for registration.

(a) *Requirements for registration.* (1) Any person operating a facility that offers a trading system or platform in which more than one market participant has the ability to execute or trade security-based swaps with more than one other market participant on the system or platform shall register the facility as a security-based swap execution facility under this section or as a national securities exchange pursuant to section 6 of the Act.

(2) A security-based swap execution facility shall, at a minimum, offer an order book.

(3) A security-based swap execution facility is not required to provide an order book under this section for transactions defined in § 242.815(d)(2), (3), and (4) except that a security-based swap execution facility must provide an order book under this section for Required Transactions that are components of transactions defined in § 242.815(d)(2), (3), and (4) when such Required Transactions are not executed as components of transactions defined in § 242.815(d)(2), (3), and (4).

(b) *Procedures for full registration.* (1) *Request to register.* An entity requesting registration as a security-based swap execution facility shall:

(i) File electronically a complete Form SBSEF (referenced in § 249.1701), or any successor forms, and all information and documentation described in such forms with the Commission using the EDGAR system and, for the information specified in the Registration Instructions to Form SBSEF, as an Interactive Data File in accordance with § 232.405 of this chapter; and

(ii) Provide to the Commission, upon the Commission's request, any additional information and documentation necessary to review an application.

(2) *Request for confidential treatment.* (i) An applicant requesting registration as a security-based swap execution facility shall identify with particularity any information in the application that will be subject to a request for confidential treatment pursuant to § 240.24b–2 of this chapter.

(ii) As set forth in § 242.808, certain information provided in an application shall be made publicly available.

(3) *Amendment of application prior to full registration.* An applicant amending a pending application for registration as a security-based swap execution facility or requesting an amendment to an order of registration shall file an amended application electronically with the Commission using the EDGAR system and, for the information specified in the Registration Instructions to Form SBSEF, as an Interactive Data File in accordance with § 232.405 of this chapter.

(4) *Effect of incomplete application.* If an application is incomplete pursuant to paragraph (b)(1) of this section, the Commission shall notify the applicant that its application will not be deemed to have been submitted for purposes of the Commission's review.

(5) *Commission review period.* The Commission shall approve or deny an application for registration as a security-based swap execution facility within 180 days of the filing of the application. If the Commission notifies the person that its application is materially incomplete and specifies the deficiencies in the application, the running of the 180-day period shall be stayed from the time of such notification until the application is resubmitted in completed form, *provided* that the Commission shall have not less than 60 days to approve or deny the application from the time the application is resubmitted in completed form.

(6) *Commission determination.* (i) The Commission shall issue an order granting registration upon a Commission determination, in its own discretion, that the applicant has demonstrated compliance with the Act and the Commission's rules applicable to security-based swap execution facilities. If deemed appropriate, the Commission may issue an order granting registration subject to conditions.

(ii) The Commission may issue an order denying registration upon a Commission determination, in its own discretion, that the applicant has not demonstrated compliance with the Act and the Commission's rules applicable to security-based swap execution facilities. If the Commission denies an application, it shall specify the grounds for the denial.

(c) *Reinstatement of dormant registration.* A dormant security-based swap execution facility may reinstate its registration under the procedures of paragraph (b) of this section. The applicant may rely upon previously submitted materials if such materials accurately describe the dormant security-based swap execution facility's conditions at the time that it applies for reinstatement of its registration.

(d) *Request for transfer of registration.* (1) A security-based swap execution facility seeking to transfer its registration from its current legal entity to a new legal entity as a result of a corporate change shall file a request for approval to transfer such registration with the Commission in the form and manner specified by the Commission.

(2) A request for transfer of registration shall be filed no later than three months prior to the anticipated corporate change; or in the event that the security-based swap execution facility could not have known of the anticipated change three months prior

to the anticipated change, as soon as it knows of such change.

(3) The request for transfer of registration shall include the following:

(i) The underlying agreement that governs the corporate change;

(ii) A description of the corporate change, including the reason for the change and its impact on the security-based swap execution facility, including its governance and operations, and its impact on the rights and obligations of members;

(iii) A discussion of the transferee's ability to comply with the Act, including the core principles applicable to security-based swap execution facilities and the Commission's rules thereunder;

(iv) The governing documents of the transferee, including, but not limited to, articles of incorporation and bylaws;

(v) The transferee's rules marked to show changes from the current rules of the security-based swap execution facility;

(vi) A representation by the transferee that it:

(A) Will be the surviving entity and successor-in-interest to the transferor security-based swap execution facility and will retain and assume, without limitation, all of the assets and liabilities of the transferor;

(B) Will assume responsibility for complying with all applicable provisions of the Act and the Commission's rules thereunder;

(C) Will assume, maintain, and enforce all rules implementing and complying with the core principles applicable to security-based swap execution facilities, including the adoption of the transferor's rulebook, as amended in the request, and that any such amendments will be submitted to the Commission pursuant to § 242.806 or § 242.807;

(D) Will comply with all regulatory responsibilities except if otherwise indicated in the request, and will maintain and enforce all regulatory programs; and

(E) Will notify members of all changes to the transferor's rulebook prior to the transfer and will further notify members of the concurrent transfer of the registration to the transferee upon Commission approval and issuance of an order permitting this transfer.

(vii) A representation by the transferee that upon the transfer:

(A) It will assume responsibility for and maintain compliance with core principles for all security-based swaps previously made available for trading through the transferor, whether by certification or approval; and

(B) None of the proposed rule changes will affect the rights and obligations of any member.

(4) Upon review of a request for transfer of registration, the Commission, as soon as practicable, shall issue an order either approving or denying the request.

(e) *Request for withdrawal of application for registration.* An applicant for registration as a security-based swap execution facility may withdraw its application submitted pursuant to paragraph (b) of this section by filing a withdrawal request electronically with the Commission using the EDGAR system. Withdrawal of an application for registration shall not affect any action taken or to be taken by the Commission based upon actions, activities, or events occurring during the time that the application was pending with the Commission.

(f) *Request for vacation of registration.* A security-based swap execution facility may request that its registration be vacated by filing a vacation request electronically with the Commission using the EDGAR system at least 90 days prior to the date that the vacation is requested to take effect. Upon receipt of such request, the Commission shall promptly order the vacation to be effective upon the date named in the request and send a copy of the request and its order to all other security-based swap execution facilities, SBS exchanges, and registered clearing agencies that clear security-based swaps. Vacation of registration shall not affect any action taken or to be taken by the Commission based upon actions, activities, or events occurring during the time that the security-based swap execution facility was registered by the Commission. From and after the date upon which the vacation became effective the said security-based swap execution facility can thereafter be registered again by applying to the Commission in the manner provided in paragraph (b) of this section for an original application.

§ 242.804 Listing products for trading by certification.

(a) *General.* A security-based swap execution facility must comply with the submission requirements of this section prior to listing a product for trading that has not been approved under § 242.805 or that remains a dormant product subsequent to being submitted under this section or approved under § 242.805. A submission shall comply with the following conditions:

(1) The security-based swap execution facility has filed its submission electronically with the Commission using the EFFS system;

(2) The Commission has received the submission by the open of business on the business day that is 10 business days preceding the product's listing; and

(3) The submission includes:

(i) A copy of the submission cover sheet in accordance with the instructions therein;

(ii) A copy of the product's rules, including all rules related to its terms and conditions;

(iii) The intended listing date;

(iv) A certification by the security-based swap execution facility that the product to be listed complies with the Act and the Commission's rules thereunder;

(v) A concise explanation and analysis of the product and its compliance with applicable provisions of the Act, including core principles, and the Commission's rules thereunder. This explanation and analysis shall either be accompanied by the documentation relied upon to establish the basis for compliance with applicable law, or incorporate information contained in such documentation, with appropriate citations to data sources;

(vi) A certification that the security-based swap execution facility posted a notice of pending product certification with the Commission and a copy of the submission, concurrent with the filing of a submission with the Commission, on the security-based swap execution facility's website. Information that the security-based swap execution facility seeks to keep confidential may be redacted from the documents published on the security-based swap execution's website but must be republished consistent with any determination made pursuant to § 240.24b–2 of this chapter; and

(vii) A request for confidential treatment, if appropriate, as permitted under § 240.24b–2 of this chapter.

(b) *Additional information.* If requested by Commission staff, a security-based swap execution facility shall provide any additional evidence, information, or data that demonstrates that the security-based swap meets, initially or on a continuing basis, the requirements of the Act or the Commission's rules or policies thereunder.

(c) *Stay of certification of product.* (1) *General.* The Commission may stay the certification of a product submitted pursuant to paragraph (a) of this section by issuing a notification informing the security-based swap execution facility that the Commission is staying the certification of the product on the

grounds that the product presents novel or complex issues that require additional time to analyze, the product is accompanied by an inadequate explanation, or the product is potentially inconsistent with the Act or the Commission's rules thereunder. The Commission will have an additional 90 days from the date of the notification to conduct the review.

(2) *Public comment.* The Commission shall provide a 30-day comment period within the 90-day period in which the stay is in effect, as described in paragraph (c)(1) of this section. The Commission shall publish a notice of the 30-day comment period on the Commission's website. Comments from the public shall be submitted as specified in that notice.

(3) *Expiration of a stay of certification of product.* A product subject to a stay pursuant to this paragraph shall become effective, pursuant to the certification, at the expiration of the 90-day review period described in paragraph (c)(1) of this section, unless the Commission withdraws the stay prior to that time, or the Commission notifies the security-based swap execution facility during the 90-day time period that it objects to the proposed certification on the grounds that the product is inconsistent with the Act or the Commission's rules.

§ 242.805 Voluntary submission of new products for Commission review and approval.

(a) *Request for approval.* A security-based swap execution facility may request that the Commission approve a new or dormant product prior to listing the product for trading, or if a product was initially submitted under § 242.804, subsequent to listing the product for trading. A submission requesting approval shall:

(1) Be filed electronically with the Commission using the EFFS system;

(2) Include a copy of the submission cover sheet in accordance with the instructions therein;

(3) Include a copy of the rules that set forth the security-based swap's terms and conditions;

(4) Include an explanation and analysis of the product and its compliance with applicable provisions of the Act, including the core principles and the Commission's rules thereunder. This explanation and analysis shall either be accompanied by the documentation relied upon to establish the basis for compliance with the applicable law, or incorporate information contained in such documentation, with appropriate citations to data sources;

(5) Describe any agreements or contracts entered into with other parties that enable the security-based swap execution facility to carry out its responsibilities;

(6) Include, if appropriate, a request for confidential treatment as permitted under § 240.24b–2 of this chapter;

(7) Certify that the security-based swap execution facility posted a notice of its request for Commission approval of the new product and a copy of the submission, concurrent with the filing of a submission with the Commission, on the security-based swap execution facility's website. Information that the security-based swap execution facility seeks to keep confidential may be redacted from the documents published on the security-based swap execution facility's website but must be republished consistent with any determination made pursuant to § 240.24b–2 of this chapter; and

(8) Include, if requested by Commission staff, additional evidence, information, or data demonstrating that the security-based swap meets, initially or on a continuing basis, the requirements of the Act, or other requirement for registration under the Act, or the Commission's rules or policies thereunder. The security-based swap execution facility shall submit the requested information by the open of business on the date that is two business days from the date of request by Commission staff, or at the conclusion of such extended period agreed to by Commission staff after timely receipt of a written request from the security-based swap execution facility.

(b) *Standard for review and approval.* The Commission shall approve a new product unless the terms and conditions of the product violate the Act or the Commission's rules thereunder.

(c) *Forty-five-day review.* A product submitted for Commission approval under this paragraph shall be deemed approved by the Commission 45 days after receipt by the Commission, or at the conclusion of an extended period as provided under paragraph (d) of this section, unless notified otherwise within the applicable period, if:

(1) The submission complies with the requirements of paragraph (a) of this section; and

(2) The submitting security-based swap execution facility does not amend the terms or conditions of the product or supplement the request for approval, except as requested by the Commission or for correction of typographical errors, renumbering, or other non-substantive revisions, during that period. Any voluntary, substantive amendment by the security-based swap execution facility will be treated as a new submission under this section.

(d) *Extension of time.* The Commission may extend the 45-day review period in paragraph (c) of this section for:

(1) An additional 45 days, if the product raises novel or complex issues that require additional time to analyze, in which case the Commission shall notify the security-based swap execution facility within the initial 45-day review period and shall briefly describe the nature of the specific issue(s) for which additional time for review is required; or

(2) Any extended review period to which the security-based swap execution facility agrees in writing.

(e) *Notice of non-approval.* The Commission, at any time during its review under this section, may notify the security-based swap execution facility that it will not, or is unable to, approve the product. This notification will briefly specify the nature of the issues raised and the specific provision of the Act or the Commission's rules thereunder, including the form or content requirements of paragraph (a) of this section, that the product violates, appears to violate, or potentially violates but which cannot be ascertained from the submission.

(f) *Effect of non-approval.* (1) Notification to a security-based swap execution facility under paragraph (e) of this section of the Commission's determination not to approve a product does not prejudice the security-based swap execution facility from subsequently submitting a revised version of the product for Commission approval, or from submitting the product as initially proposed pursuant to a supplemented submission.

(2) Notification to a security-based swap execution facility under paragraph (e) of this section of the Commission's refusal to approve a product shall be presumptive evidence that the security-based swap execution facility may not truthfully certify under § 242.804 that the same, or substantially the same, product does not violate the Act or the Commission's rules thereunder.

§ 242.806 Voluntary submission of rules for Commission review and approval.

(a) *Request for approval of rules.* A security-based swap execution facility may request that the Commission approve a new rule, rule amendment, or dormant rule prior to implementation of the rule, or if the request was initially submitted under § 242.806 or § 242.807, subsequent to implementation of the rule. A request for approval shall:

(1) Be filed electronically with the Commission using the EFFS system;

(2) Include a copy of the submission cover sheet in accordance with the instructions therein;

(3) Set forth the text of the rule or rule amendment (in the case of a rule amendment, deletions and additions must be indicated);

(4) Describe the proposed effective date of the rule or rule amendment and any action taken or anticipated to be taken to adopt the proposed rule by the security-based swap execution facility or by its governing board or by any committee thereof, and cite the rules of the security-based swap execution facility that authorize the adoption of the proposed rule;

(5) Provide an explanation and analysis of the operation, purpose, and effect of the proposed rule or rule amendment and its compliance with applicable provisions of the Act, including the core principles relating to security-based swap execution facilities and the Commission's rules thereunder and, as applicable, a description of the anticipated benefits to market participants or others, any potential anticompetitive effects on market participants or others, and how the rule fits into the security-based swap execution facility's framework of regulation;

(6) Certify that the security-based swap execution facility posted a notice of the pending rule with the Commission and a copy of the submission, concurrent with the filing of a submission with the Commission, on the security-based swap execution facility's website. Information that the security-based swap execution facility seeks to keep confidential may be redacted from the documents published on the security-based swap execution facility's website but must be republished consistent with any determination made pursuant to § 240.24b–2 of this chapter;

(7) Provide additional information which may be beneficial to the Commission in analyzing the new rule or rule amendment. If a proposed rule affects, directly or indirectly, the application of any other rule of the security-based swap execution facility, the pertinent text of any such rule must be set forth and the anticipated effect described;

(8) Provide a brief explanation of any substantive opposing views expressed to the security-based swap execution facility by governing board or committee members, members of the security-based swap execution facility, or market participants that were not incorporated into the rule, or a statement that no such opposing views were expressed; and

(9) As appropriate, include a request for confidential treatment as permitted under § 240.24b–2 of this chapter.

(b) *Standard for review and approval.* The Commission shall approve a new rule or rule amendment unless the rule or rule amendment is inconsistent with the Act or the Commission's rules thereunder.

(c) *Forty-five-day review.* A rule or rule amendment submitted for Commission approval under paragraph (a) of this section shall be deemed approved by the Commission 45 days after receipt by the Commission, or at the conclusion of such extended period as provided under paragraph (d) of this section, unless the security-based swap execution facility is notified otherwise within the applicable period, if:

(1) The submission complies with the requirements of paragraph (a) of this section;

(2) The security-based swap execution facility does not amend the proposed rule or supplement the submission, except as requested by the Commission, during the pendency of the review period, other than for correction of typographical errors, renumbering, or other non- substantive revisions. Any amendment or supplementation not requested by the Commission will be treated as the submission of a new filing under this section.

(d) *Extension of time for review.* The Commission may further extend the review period in paragraph (c) of this section for:

(1) An additional 45 days, if the proposed rule or rule amendment raises novel or complex issues that require additional time for review or is of major economic significance, the submission is incomplete, or the requestor does not respond completely to Commission questions in a timely manner, in which case the Commission shall notify the submitting security-based swap execution facility within the initial 45-day review period and shall briefly describe the nature of the specific issues for which additional time for review shall be required; or

(2) Any period, beyond the additional 45 days provided in paragraph (d)(1) of this section, to which the security-based swap execution facility agrees in writing.

(e) *Notice of non-approval.* Any time during its review under this section, the Commission may notify the security-based swap execution facility that it will not, or is unable to, approve the new rule or rule amendment. This notification will briefly specify the nature of the issues raised and the specific provision of the Act or the Commission's rules thereunder, including the form or content requirements of this section, with which the new rule or rule amendment is inconsistent or appears to be inconsistent with the Act or the Commission's rules thereunder.

(f) *Effect of non-approval.* (1) Notification to a security-based swap execution facility under paragraph (e) of this section does not prevent the security-based swap execution facility from subsequently submitting a revised version of the proposed rule or rule amendment for Commission review and approval or from submitting the new rule or rule amendment as initially proposed in a supplemented submission. The revised submission will be reviewed without prejudice.

(2) Notification to a security-based swap execution facility under paragraph (e) of this section of the Commission's determination not to approve a proposed rule or rule amendment shall be presumptive evidence that the security-based swap execution facility may not truthfully certify the same, or substantially the same, proposed rule or rule amendment under § 242.807(a).

(g) *Expedited approval.* Notwithstanding the provisions of paragraph (c) of this section, changes to a proposed rule or a rule amendment, including changes to terms and conditions of a product that are consistent with the Act and the Commission's rules thereunder, may be approved by the Commission at such time and under such conditions as the Commission shall specify in the written notification; provided, however, that the Commission may, at any time, alter or revoke the applicability of such a notice to any particular product or rule amendment.

§ 242.807 Self-certification of rules.

(a) *Required certification.* A security-based swap execution facility shall comply with the following conditions prior to implementing any rule—other than a rule delisting or withdrawing the certification of a product with no open interest and submitted in compliance with paragraphs (a)(1), (2), and (6) of this section—that has not obtained Commission approval under § 242.806, or that remains a dormant rule subsequent to being submitted under this section or approved under § 242.806.

(1) The security-based swap execution facility has filed its submission electronically with the Commission using the EFFS system.

(2) The security-based swap execution facility has provided a certification that

it posted a notice of pending certification with the Commission and a copy of the submission, concurrent with the filing of a submission with the Commission, on the security-based swap execution facility's website. Information that the security-based swap execution facility seeks to keep confidential may be redacted from the documents published on the security-based swap execution facility's website, but it must be republished consistent with any determination made pursuant to § 240.24b–2 of this chapter.

(3) The Commission has received the submission not later than the open of business on the business day that is 10 business days prior to the security-based swap execution facility's implementation of the rule or rule amendment.

(4) The Commission has not stayed the submission pursuant to § 242.807(c).

(5) A new rule or rule amendment that establishes standards for responding to an emergency shall be submitted pursuant to § 242.807(a). A rule or rule amendment implemented under procedures of the governing board to respond to an emergency shall, if practicable, be filed with the Commission prior to implementation or, if not practicable, be filed with the Commission at the earliest possible time after implementation, but in no event more than 24 hours after implementation. Any such submission shall be subject to the certification and stay provisions of paragraphs (b) and (c) of this section.

(6) The rule submission shall include:

(i) A copy of the submission cover sheet in accordance with the instructions therein (in the case of a rule or rule amendment that responds to an emergency, ''Emergency Rule Certification'' should be noted in the description section of the submission cover sheet);

(ii) The text of the rule (in the case of a rule amendment, deletions and additions must be indicated);

(iii) The date of intended implementation;

(iv) A certification by the security-based swap execution facility that the rule complies with the Act and the Commission's rules thereunder;

(v) A concise explanation and analysis of the operation, purpose, and effect of the proposed rule or rule amendment and its compliance with applicable provisions of the Act, including core principles relating to security-based swap execution facilities and the Commission's rules thereunder;

(vi) A brief explanation of any substantive opposing views expressed to the security-based swap execution facility by governing board or committee members, members of the security-based swap execution facility, or market participants, that were not incorporated into the rule, or a statement that no such opposing views were expressed; and

(vii) As appropriate, a request for confidential treatment pursuant to the procedures provided in § 240.24b–2 of this chapter.

(7) The security-based swap execution facility shall provide, if requested by Commission staff, additional evidence, information, or data that may be beneficial to the Commission in conducting a due diligence assessment of the filing and the security-based swap execution facility's compliance with any of the requirements of the Act or the Commission's rules or policies thereunder.

(b) *Review by the Commission.* The Commission shall have 10 business days to review the new rule or rule amendment before the new rule or rule amendment is deemed certified and can be made effective, unless the Commission notifies the security-based swap execution facility during the 10-business-day review period that it intends to issue a stay of the certification under paragraph (c) of this section.

(c) *Stay.* (1) *Stay of certification of new rule or rule amendment.* The Commission may stay the certification of a new rule or rule amendment submitted pursuant to paragraph (a) of this section by issuing a notification informing the security-based swap execution facility that the Commission is staying the certification of the rule or rule amendment on the grounds that the rule or rule amendment presents novel or complex issues that require additional time to analyze, the rule or rule amendment is accompanied by an inadequate explanation, or the rule or rule amendment is potentially inconsistent with the Act or the Commission's rules thereunder. The Commission will have an additional 90 days from the date of the notification to conduct the review.

(2) *Public comment.* The Commission shall provide a 30-day comment period within the 90-day period in which the stay is in effect, as described in paragraph (c)(1) of this section. The Commission shall publish a notice of the 30-day comment period on the Commission website. Comments from the public shall be submitted as specified in that notice.

(3) *Expiration of a stay of certification of new rule or rule amendment.* A new rule or rule amendment subject to a stay pursuant to this paragraph shall become effective, pursuant to the certification, at the expiration of the 90-day review period described in paragraph (c)(1) of this section, unless the Commission withdraws the stay prior to that time, or the Commission notifies the security-based swap execution facility during the 90-day time period that it objects to the proposed certification on the grounds that the proposed rule or rule amendment is inconsistent with the Act or the Commission's rules thereunder.

(d) *Notification of rule amendments.* Notwithstanding the rule certification requirement of paragraph (a) of this section, a security-based swap execution facility may place the following rules or rule amendments into effect without certification to the Commission if the following conditions are met:

(1) The security-based swap execution facility provides to the Commission at least weekly a summary notice of all rule amendments made effective pursuant to this paragraph during the preceding week. Such notice must be labeled ''Weekly Notification of Rule Amendments'' and need not be filed for weeks during which no such actions have been taken. One copy of each such submission shall be furnished electronically using the EFFS system; and

(2) The rule governs:

(i) *Non-substantive revisions.* Corrections of typographical errors, renumbering, periodic routine updates to identifying information about the security-based swap execution facility, and other such non-substantive revisions of a product's terms and conditions that have no effect on the economic characteristics of the product;

(ii) *Fees.* Fees or fee changes, other than fees or fee changes associated with market making or trading incentive programs, that:

(A) Total $1.00 or more per contract, and

(B) Are established by an independent third party or are unrelated to delivery, trading, clearing, or dispute resolution.

(iii) *Survey lists.* Changes to lists of banks, brokers, dealers, or other entities that provide price or cash market information to an independent third party and that are incorporated by reference as product terms;

(iv) *Approved brands.* Changes in lists of approved brands or markings pursuant to previously certified or Commission approved standards or criteria;

(v) *Trading months.* The initial listing of trading months, which may qualify for implementation without notice pursuant to paragraph (d)(3)(ii)(F) of this section, within the currently established cycle of trading months; or

(vi) *Minimum tick.* Reductions in the minimum price fluctuation (or ''tick'').

(3) *Notification of rule amendments not required.* Notwithstanding the rule certification requirements of paragraph (a) of this section, a security-based swap execution facility may place the following rules or rule amendments into effect without certification or notice to the Commission if the following conditions are met:

(i) The security-based swap execution facility maintains documentation regarding all changes to rules; and

(ii) The rule governs:

(A) *Transfer of membership or ownership.* Procedures and forms for the purchase, sale, or transfer of membership or ownership, but not including qualifications for membership or ownership, any right or obligation of membership or ownership, or dues or assessments;

(B) *Administrative procedures.* The organization and administrative procedures of a security-based swap execution facility's governing bodies such as a governing board, officers, and committees, but not voting requirements, governing board, or committee composition requirements or procedures, decision-making procedures, use or disclosure of material non-public information gained through the performance of official duties, or requirements relating to conflicts of interest;

(C) *Administration.* The routine daily administration, direction, and control of employees, requirements relating to gratuity and similar funds, but not guaranty, reserves, or similar funds; declaration of holidays; and changes to facilities housing the market, trading floor, or trading area;

(D) *Standards of decorum.* Standards of decorum or attire or similar provisions relating to admission to the floor, badges, or visitors, but not the establishment of penalties for violations of such rules;

(E) *Fees.* Fees or fee changes, other than fees or fee changes associated with market making or trading incentive programs, that:

(*1*) Are less than $1.00; or

(*2*) Relate to matters such as dues, badges, telecommunication services, booth space, real-time quotations, historical information, publications, software licenses, or other matters that are administrative in nature; and

(F) *Trading months.* The initial listing of trading months which are within the currently established cycle of trading months.

§ 242.808 Availability of public information.

(a) The Commission shall make publicly available on its website the following parts of an application to register as a security-based swap execution facility, unless confidential treatment is obtained pursuant to § 240.24b–2 of this chapter:

(1) Transmittal letter and first page of the application cover sheet;

(2) Exhibit C;

(3) Exhibit G;

(4) Exhibit L; and

(5) Exhibit M.

(b) The Commission shall make publicly available on its website, unless confidential treatment is obtained pursuant to § 240.24b–2 of this chapter, a security-based swap execution facility's filing of new products pursuant to the self-certification procedures of § 242.804, new products for Commission review and approval pursuant to § 242.805, new rules and rule amendments for Commission review and approval pursuant to § 242.806, and new rules and rule amendments pursuant to the self-certification procedures of § 242.807.

(c) The terms and conditions of a product submitted to the Commission pursuant to § 242.804, 242.805, 242.806, or 242.807 shall be made publicly available at the time of submission unless confidential treatment is obtained pursuant to § 240.24b–2 of this chapter.

§ 242.809 Staying of certification and tolling of review period pending jurisdictional determination.

(a) A product certification made by a security-based swap execution facility pursuant to § 242.804 shall be stayed, or the review period for a product that has been submitted for Commission approval by a security-based swap execution facility pursuant to § 242.805 shall be tolled, upon request for a joint interpretation of whether the product is a swap, security-based swap, or mixed swap made pursuant to § 240.3a68–2 of this chapter by the security-based swap execution facility, the Commission, or the Commodity Futures Trading Commission.

(b) The Commission shall provide the security-based swap execution facility with a written notice of the stay or tolling pending issuance of a joint interpretation.

(c) The stay shall be withdrawn, or the approval review period shall resume, if a joint interpretation finding that the Commission has jurisdiction over the product is issued.

§ 242.810 Product filings by security-based swap execution facilities that are not yet registered and by dormant security-based swap execution facilities.

(a) An applicant for registration as a security-based swap execution facility may submit a security-based swap's terms and conditions prior to listing the product as part of its application for registration.

(b) Any security-based swap terms and conditions or rules submitted as part of a security-based swap execution facility's application for registration shall be considered for approval by the Commission at the time the Commission issues the security-based swap execution facility's order of registration.

(c) After the Commission issues the order of registration, the security-based swap execution facility shall submit a security-based swap's terms and conditions, including amendments to such terms and conditions, new rules, or rule amendments pursuant to the procedures in §§ 242.804, 242.805, 242.806, and 242.807.

(d) Any security-based swap terms and conditions or rules submitted as part of an application to reinstate the registration of a dormant security-based swap execution facility shall be considered for approval by the Commission at the time the Commission approves the reinstatement of registration of the dormant security-based swap execution facility.

§ 242.811 Information relating to security-based swap execution facility compliance.

(a) *Request for information.* Upon the Commission's request, a security-based swap execution facility shall file with the Commission information related to its business as a security-based swap execution facility in the form and manner, and within the timeframe, specified by the Commission.

(b) *Demonstration of compliance.* Upon the Commission's request, a security-based swap execution facility shall file with the Commission a written demonstration, containing supporting data, information, and documents, that it is in compliance with one or more core principles or with its other obligations under the Act or the Commission's rules thereunder, as the Commission specifies in its request. The security-based swap execution facility shall file such written demonstration in the form and manner, and within the timeframe, specified by the Commission.

(c) *Equity interest transfer.* (1) *Equity interest transfer notification.* A security-based swap execution facility shall file with the Commission a notification of any transaction involving the direct or

indirect transfer of 50 percent or more of the equity interest in the security-based swap execution facility. The Commission may, upon receiving such notification, request supporting documentation of the transaction.

(2) *Timing of notification.* The equity interest transfer notice described in paragraph (c)(1) of this section shall be filed with the Commission in a form and manner specified by the Commission at the earliest possible time, but in no event later than the open of business 10 business days following the date upon which the security-based swap execution facility enters into a firm obligation to transfer the equity interest.

(3) *Rule filing.* Notwithstanding the foregoing, if any aspect of an equity interest transfer described in paragraph (c)(1) of this section requires a security-based swap execution facility to file a rule, the security-based swap execution facility shall comply with the applicable rule filing requirements of § 242.806 or § 242.807.

(4) *Certification.* Upon an equity interest transfer described in paragraph (c)(1) of this section, the security-based swap execution facility shall file with the Commission, in a form and manner specified by the Commission, a certification that the security-based swap execution facility meets all of the requirements of section 3D of the Act and the Commission rules thereunder, no later than two business days following the date on which the equity interest of 50 percent or more was acquired.

(d) *Pending legal proceedings.* (1) A security-based swap execution facility shall submit to the Commission a copy of the complaint, any dispositive or partially dispositive decision, any notice of appeal filed concerning such decision, and such further documents as the Commission may thereafter request filed in any material legal proceeding to which the security-based swap execution facility is a party or its property or assets is subject.

(2) A security-based swap execution facility shall submit to the Commission a copy of the complaint, any dispositive or partially dispositive decision, any notice of appeal filed concerning such decision, and such further documents as the Commission may thereafter request filed in any material legal proceeding instituted against any officer, director, or other official of the security-based swap execution facility from conduct in such person's capacity as an official of the security-based swap execution facility and alleging violations of:

(i) The Act or any rule, regulation, or order under the Act;

(ii) The constitution, bylaws, or rules of the security-based swap execution facility; or

(iii) The applicable provisions of State law relating to the duties of officers, directors, or other officials of business organizations.

(3) All documents required by this paragraph (d) to be submitted to the Commission shall be submitted electronically in a form and manner specified by the Commission within 10 days after the initiation of the legal proceedings to which they relate, after the date of issuance, or after receipt by the security-based swap execution facility of the notice of appeal, as the case may be.

(4) For purposes of this paragraph (d), a ''material legal proceeding'' includes but is not limited to actions involving alleged violations of the Act or the Commission rules thereunder. However, a legal proceeding is not ''material'' for the purposes of this rule if the proceeding is not in a Federal or State court or if the Commission is a party.

§ 242.812 Enforceability.

(a) A transaction entered into on or pursuant to the rules of a security-based swap execution facility shall not be void, voidable, subject to rescission, otherwise invalidated, or rendered unenforceable as a result of a violation by the security-based swap execution facility of the provisions of section 3D of the Act or the Commission's rules thereunder.

(b) A security-based swap execution facility shall, as soon as technologically practicable after the time of execution of a transaction entered into on or pursuant to the rules of the facility, provide a written record to each counterparty of all of the terms of the transaction that were agreed to on the facility, which shall legally supersede any previous agreement regarding such terms.

§ 242.813 Prohibited use of data collected for regulatory purposes.

A security-based swap execution facility shall not use for business or marketing purposes any proprietary data or personal information it collects or receives, from or on behalf of any person, for the purpose of fulfilling its regulatory obligations; provided, however, that a security-based swap execution facility may use such data or information for business or marketing purposes if the person from whom it collects or receives such data or information clearly consents to the security-based swap execution facility's use of such data or information in such manner. A security-based swap execution facility shall not condition access to its market(s) or market services on a person's consent to the security-based swap execution facility's use of proprietary data or personal information for business or marketing purposes. A security-based swap execution facility, where necessary for regulatory purposes, may share such data or information with one or more security-based swap execution facilities or national securities exchanges registered with the Commission.

§ 242.814 Entity operating both a national securities exchange and security-based swap execution facility.

(a) An entity that intends to operate both a national securities exchange and a security-based swap execution facility shall separately register the two facilities pursuant to section 6 of the Act and § 242.803, respectively.

(b) A national securities exchange shall, to the extent that the exchange also operates a security-based swap execution facility and uses the same electronic trade execution system for listing and executing trades of security-based swaps on or through the exchange and the facility, identify whether electronic trading of such security-based swaps is taking place on or through the national securities exchange or the security-based swap execution facility.

§ 242.815 Methods of execution for Required and Permitted Transactions.

(a) *Execution methods for Required Transactions.* (1) *Required Transaction* means any transaction involving a security-based swap that is subject to the trade execution requirement in section 3C(h) of the Act.

(2) *Execution methods.* (i) Each Required Transaction that is not a block trade shall be executed on a security-based swap execution facility in accordance with one of the following methods of execution, except as provided in paragraph (d) or (e) of this section:

(A) An order book; or

(B) A request-for-quote system that operates in conjunction with an order book.

(ii) In providing either one of the execution methods set forth in paragraph (a)(2)(i)(A) or (B) of this section, a security-based swap execution facility may for purposes of execution and communication use any means of interstate commerce, including, but not limited to, the mail, internet, email, and telephone, provided that the chosen execution method satisfies the requirements for order books in § 242.802 of this chapter or in paragraph (a)(3) of this section for request-for-quote systems.

(3) *Request-for-quote system* means a trading system or platform in which a market participant transmits a request for a quote to buy or sell a specific instrument to no less than three market participants in the trading system or platform, to which all such market participants may respond. The three market participants shall not be affiliates of or controlled by the requester and shall not be affiliates of or controlled by each other. A security-based swap execution facility that offers a request-for-quote system in connection with Required Transactions shall provide the following functionality:

(i) At the same time that the requester receives the first responsive bid or offer, the security-based swap execution facility shall communicate to the requester any firm bid or offer pertaining to the same instrument resting on any of the security-based swap execution facility's order books;

(ii) The security-based swap execution facility shall provide the requester with the ability to execute against such firm resting bids or offers along with any responsive orders; and

(iii) The security-based swap execution facility shall ensure that its trading protocols provide each of its market participants with equal priority in receiving requests for quotes and in transmitting and displaying for execution responsive orders.

(b) *Time delay requirement for Required Transactions on an order book.* (1) *Time delay requirement.* With regard to Required Transactions, a security-based swap execution facility shall require that a broker or dealer who seeks to either execute against its customer's order or execute two of its customers' orders against each other through the security-based swap execution facility's order book, following some form of pre-arrangement or pre-negotiation of such orders, be subject to at least a 15-second time delay between the entry of those two orders into the order book, such that one side of the potential transaction is disclosed and made available to other market participants before the second side of the potential transaction, whether for the broker's or dealer's own account or for a second customer, is submitted for execution.

(2) *Adjustment of time delay requirement.* A security-based swap execution facility may adjust the time period of the 15-second time delay requirement described in paragraph (b)(1) of this section, based upon a security-based swap's liquidity or other product-specific considerations; however, the time delay shall be set for a sufficient period of time so that an order is exposed to the market and other market participants have a meaningful opportunity to execute against such order.

(c) *Execution methods for Permitted Transactions.* (1) *Permitted Transaction* means any transaction not involving a security-based swap that is subject to the trade execution requirement in section 3C(h) of the Act.

(2) *Execution methods.* A security-based swap execution facility may offer any method of execution for each Permitted Transaction.

(d) *Exceptions to required methods of execution for package transactions.* (1) For purposes of this paragraph, a package transaction consists of two or more component transactions executed between two or more counterparties where:

(i) At least one component transaction is a Required Transaction;

(ii) Execution of each component transaction is contingent upon the execution of all other component transactions; and

(iii) The component transactions are priced or quoted together as one economic transaction with simultaneous or near-simultaneous execution of all components.

(2) A Required Transaction that is executed as a component of a package transaction that includes a component security-based swap that is subject exclusively to the Commission's jurisdiction, but is not subject to the clearing requirement under section 3C of the Act and is not intended to be cleared, may be executed on a security-based swap execution facility in accordance with paragraph (c)(2) of this section as if it were a Permitted Transaction;

(3) A Required Transaction that is executed as a component of a package transaction that includes a component that is not a security-based swap may be executed on a security-based swap execution facility in accordance with paragraph (c)(2) of this section as if it were a Permitted Transaction. This provision shall not apply to:

(i) A Required Transaction that is executed as a component of a package transaction in which all other non-security-based swap components are U.S. Treasury securities;

(ii) A Required Transaction that is executed as a component of a package transaction in which all other non-security-based swap components are contracts for the purchase or sale of a commodity for future delivery;

(iii) A Required Transaction that is executed as a component of a package transaction in which all other non-security-based swap components are agency mortgage-backed securities;

(iv) A Required Transaction that is executed as a component of a package transaction that includes a component transaction that is the issuance of a bond in a primary market; and

(v) A Required Transaction that is executed as a component of a package transaction in which all other non-security-based swap components are swaps that are subject to a trade execution requirement under 17 CFR 37.9.

(4) A Required Transaction that is executed as a component of a package transaction that includes a component security-based swap that is not exclusively subject to the Commission's jurisdiction may be executed on a security-based swap in accordance with paragraph (c)(2) of this section as if it were a Permitted Transaction.

(e) *Resolution of operational and clerical error trades.* (1) A security-based swap execution facility shall maintain rules and procedures that facilitate the resolution of error trades. Such rules shall be fair, transparent, and consistent; allow for timely resolution; require members to provide prompt notice of an error trade—and, as applicable, offsetting and correcting trades—to the security-based swap execution facility; and permit members to:

(i) Execute a correcting trade, in accordance with paragraph (c)(2) of this section, regardless of whether it is a Required or Permitted Transaction, for an error trade that has been rejected from clearing as soon as technologically practicable, but no later than one hour after a registered clearing agency provides notice of the rejection; or

(ii) Execute an offsetting trade and a correcting trade, in accordance with paragraph (c)(2) of this section, regardless of whether it is a Required or Permitted Transaction, for an error trade that was accepted for clearing as soon as technologically practicable, but no later than three days after the error trade was accepted for clearing at a registered clearing agency.

(2) If a correcting trade is rejected from clearing, then the security-based swap execution facility shall not allow the counterparties to execute another correcting trade.

(f) *Counterparty anonymity.* (1) Except as otherwise required under the Act or the Commission's rules thereunder, a security-based swap execution facility shall not directly or indirectly, including through a third-party service provider, disclose the identity of a counterparty to a security-based swap that is executed

anonymously and intended to be cleared.

(2) A security-based swap execution facility shall establish and enforce rules that prohibit any person from directly or indirectly, including through a third-party service provider, disclosing the identity of a counterparty to a security-based swap that is executed anonymously and intended to be cleared.

(3) For purposes of paragraphs (f)(1) and (2) of this section, ''executed anonymously'' shall include a security-based swap that is pre-arranged or pre-negotiated anonymously, including by a member of the security-based swap execution facility.

(4) For a package transaction that includes a component transaction that is not a security-based swap intended to be cleared, disclosing the identity of a counterparty shall not violate paragraphs (f)(1) or (2) of this section. For purposes of this paragraph (f), a ''package transaction'' consists of two or more component transactions executed between two or more counterparties where:

(i) Execution of each component transaction is contingent upon the execution of all other component transactions; and

(ii) The component transactions are priced or quoted together as one economic transaction with simultaneous or near-simultaneous execution of all components.

(g) *Transactions not accepted for clearing.* A security-based swap execution facility shall establish and enforce rules that provide that a security-based swap that is intended to be cleared at the time of the transaction, but is not accepted for clearing at a registered clearing agency, shall be void *ab initio.*

§ 242.816 Trade execution requirement and exemptions therefrom.

(a) General. (1) *Required submission.* A security-based swap execution facility that makes a security-based swap available to trade in accordance with paragraph (b) of this section, shall submit to the Commission its determination with respect to such security-based swap as a rule, pursuant to the procedures under § 242.806 or § 242.807.

(2) *Listing requirement.* A security-based swap execution facility that makes a security-based swap available to trade must demonstrate that it lists or offers that security-based swap for trading on its trading system or platform.

(b) *Factors to consider.* To make a security-based swap available to trade for purposes of section 3C(h) of the Act, a security-based swap execution facility shall consider, as appropriate, the following factors with respect to such security-based swap:

(1) Whether there are ready and willing buyers and sellers;

(2) The frequency or size of transactions;

(3) The trading volume;

(4) The number and types of market participants;

(5) The bid/ask spread; or

(6) The usual number of resting firm or indicative bids and offers.

(c) *Applicability.* Upon a determination that a security-based swap is available to trade on a security-based swap execution facility or national securities exchange, all other security-based swap execution facilities and SBS exchanges shall comply with the requirements of section 3C(h) of the Act in listing or offering such security-based swap for trading.

(d) *Removal.* The Commission may issue a determination that a security-based swap is no longer available to trade upon determining that no security-based swap execution facility or SBS exchange lists such security-based swap for trading.

(e) *Exemptions to trade execution requirement.* (1) A security-based swap transaction that is executed as a component of a package transaction that also includes a component transaction that is the issuance of a bond in a primary market is exempt from the trade execution requirement in section 3C(h) of the Act. For purposes of paragraph (e) of this section, a package transaction consists of two or more component transactions executed between two or more counterparties where:

(i) At least one component transaction is subject to the trade execution requirement in section 3C(h) of the Act;

(ii) Execution of each component transaction is contingent upon the execution of all other component transactions; and

(iii) The component transactions are priced or quoted together as one economic transaction with simultaneous or near-simultaneous execution of all components.

(2) Section 3C(h) of the Act does not apply to a security-based swap transaction that qualifies for an exception under section 3C(g) of the Act, or any exemption from the clearing requirement that is granted by the Commission, for which the associated requirements are met.

(3)(i) Section 3C(h) of the Act does not apply to a security-based swap transaction that is executed between counterparties that qualify as ''eligible affiliate counterparties,'' as defined below.

(ii) For purposes of this paragraph (e)(3), counterparties will be ''eligible affiliate counterparties'' if:

(A) One counterparty, directly or indirectly, holds a majority ownership interest in the other counterparty, and the counterparty that holds the majority interest in the other counterparty reports its financial statements on a consolidated basis under Generally Accepted Accounting Principles or International Financial Reporting Standards, and such consolidated financial statements include the financial results of the majority-owned counterparty; or

(B) A third party, directly or indirectly, holds a majority ownership interest in both counterparties, and the third party reports its financial statements on a consolidated basis under Generally Accepted Accounting Principles or International Financial Reporting Standards, and such consolidated financial statements include the financial results of both of the counterparties.

(iii) For purposes of this paragraph (e)(3), a counterparty or third party directly or indirectly holds a majority ownership interest if it directly or indirectly holds a majority of the equity securities of an entity, or the right to receive upon dissolution, or the contribution of, a majority of the capital of a partnership.

§ 242.817 Trade execution compliance schedule.

(a) A security-based swap transaction shall be subject to the requirements of section 3C(h) of the Act upon the later of:

(1) A determination by the Commission that the security-based swap is required to be cleared as set forth in section 3C(a) or any later compliance date that the Commission may establish as a term or condition of such determination or following a stay and review of such determination pursuant to section 3C(c) of the Act and § 240.3Ca–1 of this chapter thereunder; and

(2) Thirty days after the available-to-trade determination submission or certification for that security-based swap is, respectively, deemed approved under § 242.806 or deemed certified under § 242.807.

(b) Nothing in this section shall prohibit any counterparty from complying voluntarily with the requirements of section 3C(h) of the Act sooner than as provided in paragraph (a) of this section.

§ 242.818 Core Principle 1—Compliance with core principles.

(a) *In general.* To be registered, and maintain registration, as a security-based swap execution facility, the security-based swap execution facility shall comply with the core principles described in section 3D of the Act, and any requirement that the Commission may impose by rule or regulation.

(b) *Reasonable discretion of security-based swap execution facility.* Unless otherwise determined by the Commission, by rule or regulation, a security-based swap execution facility described in paragraph (a) of this section shall have reasonable discretion in establishing the manner in which it complies with the core principles described in section 3D of the Act.

§ 242.819 Core Principle 2—Compliance with rules.

(a) *General.* A security-based swap execution facility shall:

(1) Establish and enforce compliance with any rule established by such security-based swap execution facility, including the terms and conditions of the security-based swaps traded or processed on or through the facility, and any limitation on access to the facility;

(2) Establish and enforce trading, trade processing, and participation rules that will deter abuses and have the capacity to detect, investigate, and enforce those rules, including means to provide market participants with impartial access to the market and to capture information that may be used in establishing whether rule violations have occurred; and

(3) Establish rules governing the operation of the facility, including rules specifying trading procedures to be used in entering and executing orders traded or posted on the facility.

(b) *Operation of security-based swap execution facility and compliance with rules.* (1) A security-based swap execution facility shall establish rules governing the operation of the security-based swap execution facility, including, but not limited to, rules specifying trading procedures to be followed by members when entering and executing orders traded or posted on the security-based swap execution facility.

(2) A security-based swap execution facility shall establish and impartially enforce compliance with the rules of the security-based swap execution facility, including, but not limited to:

(i) The terms and conditions of any security-based swaps traded or processed on or through the security-based swap execution facility;

(ii) Access to the security-based swap execution facility;

(iii) Trade practice rules;

(iv) Audit trail requirements;

(v) Disciplinary rules; and

(vi) Mandatory trading requirements.

(c) *Access requirements.* (1) *Impartial access to markets and market services.* A security-based swap execution facility shall provide any eligible contract participant and any independent software vendor with impartial access to its market(s) and market services, including any indicative quote screens or any similar pricing data displays, provided that the facility has:

(i) Criteria governing such access that are impartial, transparent, and applied in a fair and non-discriminatory manner;

(ii) Procedures whereby eligible contract participants provide the security-based swap execution facility with written or electronic confirmation of their status as eligible contract participants, as defined by the Act and Commission rules thereunder, prior to obtaining access; and

(iii) Comparable fee structures for eligible contract participants and independent software vendors receiving comparable access to, or services from, the security-based swap execution facility.

(2) *Jurisdiction.* Prior to granting any eligible contract participant access to its facilities, a security-based swap execution facility shall require that the eligible contract participant consent to its jurisdiction.

(3) *Limitations on access.* A security-based swap execution facility shall establish and impartially enforce rules governing any decision to allow, deny, suspend, or permanently bar an eligible contract participant's access to the security-based swap execution facility, including when a decision is made as part of a disciplinary or emergency action taken by the security-based swap execution facility.

(4) *Commission review with respect to a denial or limitation of access to any service or a denial or conditioning of membership.* (i) *In general.* An application for review by the Commission may be filed by any person who is aggrieved by a determination of a security-based swap execution facility with respect to any final action with respect to a denial or limitation of access to any service offered by the security-based swap execution facility or any final action with respect to a denial or conditioning of membership, as defined in § 242.835(b)(2) of this chapter (Rule 835(b)(2)), in accordance with § 201.442 of this chapter (Rule of Practice 442).

(ii) *Standard to govern Commission review.* In reviewing such a determination, if the Commission finds that the specific grounds on which such denial, limitation, or conditioning is based exist in fact, that such denial, limitation, or conditioning is in accordance with the rules of the security-based swap execution facility, and that such rules are, and were applied in a manner, consistent with the purposes of the Exchange Act, the Commission, by order, shall dismiss the proceeding. If the Commission does not make any such finding or if it finds that such denial, limitation, or conditioning imposes any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act, the Commission, by order, shall set aside the action of the security-based swap execution facility and require it to admit such person to membership or participation or grant such person access to services offered by the security-based swap execution facility.

(d) *Rule enforcement program.* A security-based swap execution facility shall establish and enforce trading, trade processing, and participation rules that will deter abuses and it shall have the capacity to detect, investigate, and enforce those rules.

(1) *Abusive trading practices prohibited.* A security-based swap execution facility shall prohibit abusive trading practices on its markets by members. A security-based swap execution facility that permits intermediation shall prohibit customer-related abuses including, but not limited to, trading ahead of customer orders, trading against customer orders, accommodation trading, and improper cross trading. Specific trading practices that shall be prohibited include front-running, wash trading, pre-arranged trading (except for transactions approved by or certified to the Commission pursuant § 242.806 or § 242.807, respectively), fraudulent trading, money passes, and any other trading practices that a security-based swap execution facility deems to be abusive. A security-based swap execution facility shall also prohibit any other manipulative or disruptive trading practices prohibited by the Act or by the Commission pursuant to Commission regulation.

(2) *Capacity to detect and investigate rule violations.* A security-based swap execution facility shall have arrangements and resources for effective enforcement of its rules. Such arrangements shall include the authority to collect information and documents on both a routine and non-routine basis, including the authority to examine

books and records kept by the security-based swap execution facility's members and by persons under investigation. A security-based swap execution facility's arrangements and resources shall also facilitate the direct supervision of the market and the analysis of data collected to determine whether a rule violation has occurred.

(3) *Compliance staff and resources.* A security-based swap execution facility shall establish and maintain sufficient compliance staff and resources to ensure that it can conduct effective audit trail reviews, trade practice surveillance, market surveillance, and real-time market monitoring. The security-based swap execution facility's compliance staff shall also be sufficient to address unusual market or trading events as they arise, and to conduct and complete investigations in a timely manner, as set forth in paragraph (d)(6) of this section.

(4) *Automated trade surveillance system.* A security-based swap execution facility shall maintain an automated trade surveillance system capable of detecting potential trade practice violations. The automated trade surveillance system shall load and process daily orders and trades no later than 24 hours after the completion of the trading day. The automated trade surveillance system shall have the capability to detect and flag specific trade execution patterns and trade anomalies; compute, retain, and compare trading statistics; reconstruct the sequence of market activity; perform market analyses; and support system users to perform in-depth analyses and ad hoc queries of trade-related data.

(5) *Real-time market monitoring.* A security-based swap execution facility shall conduct real-time market monitoring of all trading activity on its system(s) or platform(s) to identify any market or system anomalies. A security-based swap execution facility shall have the authority to adjust trade prices or cancel trades when necessary to mitigate market disrupting events caused by malfunctions in its system(s) or platform(s) or errors in orders submitted by members. Any trade price adjustments or trade cancellations shall be transparent to the market and subject to standards that are clear, fair, and publicly available.

(6) *Investigations and investigation reports.* (i) *Procedures.* A security-based swap execution facility shall establish and maintain procedures that require its compliance staff to conduct investigations of possible rule violations. An investigation shall be commenced upon the receipt of a request from Commission staff or upon the discovery or receipt of information by the security-based swap execution facility that indicates a reasonable basis for finding that a violation may have occurred or will occur.

(ii) *Timeliness.* Each compliance staff investigation shall be completed in a timely manner. Absent mitigating factors, a timely manner is no later than 12 months after the date that an investigation is opened. Mitigating factors that may reasonably justify an investigation taking longer than 12 months to complete include the complexity of the investigation, the number of firms or individuals involved as potential wrongdoers, the number of potential violations to be investigated, and the volume of documents and data to be examined and analyzed by compliance staff.

(iii) *Investigation reports when a reasonable basis exists for finding a violation.* Compliance staff shall submit a written investigation report for disciplinary action in every instance in which compliance staff determines from surveillance or from an investigation that a reasonable basis exists for finding a rule violation. The investigation report shall include the reason the investigation was initiated; a summary of the complaint, if any; the relevant facts; compliance staff's analysis and conclusions; and a recommendation as to whether disciplinary action should be pursued.

(iv) *Investigation reports when no reasonable basis exists for finding a violation.* If after conducting an investigation, compliance staff determines that no reasonable basis exists for finding a rule violation, it shall prepare a written report including the reason the investigation was initiated; a summary of the complaint, if any; the relevant facts; and compliance staff's analysis and conclusions.

(v) *Warning letters.* The rules of a security-based swap execution facility may authorize its compliance staff to issue a warning letter to a person or entity under investigation or to recommend that a disciplinary panel take such an action. No more than one warning letter may be issued to the same person or entity found to have committed the same rule violation within a rolling 12-month period.

(e) *Regulatory services provided by a third party.* (1) *Use of regulatory service provider permitted.* A security-based swap execution facility may choose to contract with a registered futures association (under section 17 of the Commodity Exchange Act), a board of trade designated as a contract market (under section 5 of the Commodity Exchange Act), a national securities exchange, a national securities association, or another security-based swap execution facility (each a ''regulatory service provider''), for the provision of services to assist in complying with the Act and Commission rules thereunder, as approved by the Commission. A security-based swap execution facility that chooses to contract with a regulatory service provider shall ensure that such provider has the capacity and resources necessary to provide timely and effective regulatory services, including adequate staff and automated surveillance systems. A security-based swap execution facility shall at all times remain responsible for the performance of any regulatory services received, for compliance with the security-based swap execution facility's obligations under the Act and Commission rules thereunder, and for the regulatory service provider's performance on its behalf.

(2) *Duty to supervise regulatory service provider.* A security-based swap execution facility that elects to use the service of a regulatory service provider shall retain sufficient compliance staff to supervise the quality and effectiveness of the regulatory services provided on its behalf. Compliance staff of the security-based swap execution facility shall hold regular meetings with the regulatory service provider to discuss ongoing investigations, trading patterns, market participants, and any other matters of regulatory concern. A security-based swap execution facility shall also conduct periodic reviews of the adequacy and effectiveness of services provided on its behalf. Such reviews shall be documented carefully and made available to the Commission upon request.

(3) *Regulatory decisions required from the security-based swap execution facility.* A security-based swap execution facility that elects to use the service of a regulatory service provider shall retain exclusive authority in all substantive decisions made by its regulatory service provider, including, but not limited to, decisions involving the cancellation of trades, the issuance of disciplinary charges against members, and denials of access to the trading platform for disciplinary reasons. A security-based swap execution facility shall document any instances where its actions differ from those recommended by its regulatory service provider, including the reasons for the course of action recommended by the regulatory service provider and the reasons why the security-based swap execution facility chose a different course of action.

(f) *Audit trail.* A security-based swap execution facility shall establish procedures to capture and retain information that may be used in establishing whether rule violations have occurred.

(1) *Audit trail required.* A security-based swap execution facility shall capture and retain all audit trail data necessary to detect, investigate, and prevent customer and market abuses. Such data shall be sufficient to reconstruct all indications of interest, requests for quotes, orders, and trades within a reasonable period of time and to provide evidence of any violations of the rules of the security-based swap execution facility. An acceptable audit trail shall also permit the security-based swap execution facility to track a customer order from the time of receipt through execution on the security-based swap execution facility.

(2) *Elements of an acceptable audit trail program.* (i) *Original source documents.* A security-based swap execution facility's audit trail shall include original source documents. Original source documents include unalterable, sequentially identified records on which trade execution information is originally recorded, whether recorded manually or electronically. Records for customer orders (whether filled, unfilled, or cancelled, each of which shall be retained or electronically captured) shall reflect the terms of the order, an account identifier that relates back to the account's owner(s), the time of order entry, and the time of trade execution. A security-based swap execution facility shall require that all orders, indications of interest, and requests for quotes be immediately captured in the audit trail.

(ii) *Transaction history database.* A security-based swap execution facility's audit trail program shall include an electronic transaction history database. An adequate transaction history database shall include a history of all indications of interest, requests for quotes, orders, and trades entered into a security-based swap execution facility's trading system or platform, including all order modifications and cancellations. An adequate transaction history database shall also include:

(A) All data that are input into the trade entry or matching system for the transaction to match and clear;

(B) The customer type indicator code; and

(C) Timing and sequencing data adequate to reconstruct trading.

(iii) *Electronic analysis capability.* A security-based swap execution facility's audit trail program shall include electronic analysis capability with respect to all audit trail data in the transaction history database. Such electronic analysis capability shall ensure that the security-based swap execution facility has the ability to reconstruct indications of interest, requests for quotes, orders, and trades, and identify possible trading violations with respect to both customer and market abuse.

(iv) *Safe-storage capability.* A security-based swap execution facility's audit trail program shall include the capability to safely store all audit trail data retained in its transaction history database. Such safe-storage capability shall include the capability to store all data in the database in a manner that protects it from unauthorized alteration, as well as from accidental erasure or other loss. Data shall be retained in accordance with the recordkeeping requirements of § 242.826 (Core Principle 9).

(3) *Enforcement of audit trail requirements.* (i) *Annual audit trail and recordkeeping reviews.* A security-based swap execution facility shall enforce its audit trail and recordkeeping requirements through at least annual reviews of all members and persons and firms subject to the security-based swap execution facility's recordkeeping rules to verify their compliance with the security-based swap execution facility's audit trail and recordkeeping requirements. Such reviews shall include, but are not limited to, reviews of randomly selected samples of front-end audit trail data for order routing systems; a review of the process by which user identifications are assigned and user identification records are maintained; a review of usage patterns associated with user identifications to monitor for violations of user identification rules; and reviews of account numbers and customer type indicator codes in trade records to test for accuracy and improper use.

(ii) *Enforcement program required.* A security-based swap execution facility shall establish a program for effective enforcement of its audit trail and recordkeeping requirements. An effective program shall identify members, persons, and firms subject to the security-based swap execution facility's recordkeeping rules that have failed to maintain high levels of compliance with such requirements, and impose meaningful sanctions when deficiencies are found. Sanctions shall be sufficient to deter recidivist behavior. No more than one warning letter shall be issued to the same person or entity found to have committed the same violation of audit trail or recordkeeping requirements within a rolling 12-month period.

(g) *Disciplinary procedures and sanctions.* A security-based swap execution facility shall establish trading, trade processing, and participation rules that will deter abuses and have the capacity to enforce such rules through prompt and effective disciplinary action, including suspension or expulsion of members that violate the rules of the security-based swap execution facility.

(1) *Enforcement staff.* (i) A security-based swap execution facility shall establish and maintain sufficient enforcement staff and resources to effectively and promptly prosecute possible rule violations within the disciplinary jurisdiction of the security-based swap execution facility.

(ii) The enforcement staff of a security-based swap execution facility shall not include members or other persons whose interests conflict with their enforcement duties.

(iii) A member of the enforcement staff shall not operate under the direction or control of any person or persons with trading privileges at the security-based swap execution facility.

(iv) The enforcement staff of a security-based swap execution facility may operate as part of the security-based swap execution facility's compliance department.

(2) *Disciplinary panels.* A security-based swap execution facility shall establish one or more disciplinary panels that are authorized to fulfill their obligations under the rules of this section. Disciplinary panels shall meet the composition requirements of § 242.834(d), and shall not include any members of the security-based swap execution facility's compliance staff or any person involved in adjudicating any other stage of the same proceeding.

(3) *Notice of charges.* If compliance staff authorized by a security-based swap execution facility or disciplinary panel thereof determines that a reasonable basis exists for finding a violation and adjudication is warranted, it shall direct that the person or entity alleged to have committed the violation be served with a notice of charges. A notice of charges shall adequately state the acts, conduct, or practices in which the respondent is alleged to have engaged; state the rule or rules alleged to have been violated (or about to be violated); advise the respondent that it is entitled, upon request, to a hearing on the charges; and prescribe the period within which a hearing on the charges may be requested. If the rules of the security-based swap execution facility so provide, a notice may also advise:

(i) That failure to request a hearing within the period prescribed in the notice, except for good cause, may be deemed a waiver of the right to a hearing; and

(ii) That failure to answer or to deny expressly a charge may be deemed to be an admission of such charge.

(4) *Right to representation.* Upon being served with a notice of charges, a respondent shall have the right to be represented by legal counsel or any other representative of its choosing in all succeeding stages of the disciplinary process, except by any member of the security-based swap execution facility's governing board or disciplinary panel, any employee of the security-based swap execution facility, or any person substantially related to the underlying investigations, such as a material witness or respondent.

(5) *Answer to charges.* A respondent shall be given a reasonable period of time to file an answer to a notice of charges. The rules of a security-based swap execution facility governing the requirements and timeliness of a respondent's answer to a notice of charges shall be fair, equitable, and publicly available.

(6) *Admission or failure to deny charges.* The rules of a security-based swap execution facility may provide that, if a respondent admits or fails to deny any of the charges, a disciplinary panel may find that the violations alleged in the notice of charges for which the respondent admitted or failed to deny any of the charges have been committed. If the security-based swap execution facility's rules so provide, then:

(i) The disciplinary panel may impose a sanction for each violation found to have been committed;

(ii) The disciplinary panel shall promptly notify the respondent in writing of any sanction to be imposed and shall advise the respondent that the respondent may request a hearing on such sanction within the period of time, which shall be stated in the notice; and

(iii) The rules of a security-based swap execution facility may provide that, if a respondent fails to request a hearing within the period of time stated in the notice, the respondent will be deemed to have accepted the sanction.

(7) *Denial of charges and right to hearing.* Where a respondent has requested a hearing on a charge that is denied, or on a sanction set by the disciplinary panel, the respondent shall be given an opportunity for a hearing in accordance with the rules of the security-based swap execution facility.

(8) *Settlement offers.* (i) The rules of a security-based swap execution facility may permit a respondent to submit a written offer of settlement at any time after an investigation report is completed. The disciplinary panel presiding over the matter may accept the offer of settlement, but may not alter the terms of a settlement offer unless the respondent agrees.

(ii) The rules of a security-based swap execution facility may provide that, in its discretion, a disciplinary panel may permit the respondent to accept a sanction without either admitting or denying the rule violations upon which the sanction is based.

(iii) If an offer of settlement is accepted, the panel accepting the offer shall issue a written decision specifying the rule violations it has reason to believe were committed, including the basis or reasons for the panel's conclusions, and any sanction to be imposed, which shall include full customer restitution where customer harm is demonstrated, except where the amount of restitution or to whom it should be provided cannot be reasonably determined. If an offer of settlement is accepted without the agreement of the enforcement staff, the decision shall adequately support the disciplinary panel's acceptance of the settlement. Where applicable, the decision shall also include a statement that the respondent has accepted the sanctions imposed without either admitting or denying the rule violations.

(iv) The respondent may withdraw its offer of settlement at any time before final acceptance by a disciplinary panel. If an offer is withdrawn after submission, or is rejected by a disciplinary panel, the respondent shall not be deemed to have made any admissions by reason of the offer of settlement and shall not be otherwise prejudiced by having submitted the offer of settlement.

(9) *Hearings.* A security-based swap execution facility shall adopt rules that provide for the following minimum requirements for any hearing:

(i) The hearing shall be fair, shall be conducted before members of the disciplinary panel, and shall be promptly convened after reasonable notice to the respondent. A security-based swap execution facility need not apply the formal rules of evidence for a hearing; nevertheless, the procedures for the hearing may not be so informal as to deny a fair hearing;

(ii) No member of the disciplinary panel for the hearing may have a financial, personal, or other direct interest in the matter under consideration;

(iii) In advance of the hearing, the respondent shall be entitled to examine all books, documents, or other evidence in the possession or under the control of the security-based swap execution facility. The security-based swap execution facility may withhold documents that are privileged or constitute attorney work product; were prepared by an employee of the security-based swap execution facility but will not be offered in evidence in the disciplinary proceedings; may disclose a technique or guideline used in examinations, investigations, or enforcement proceedings; or disclose the identity of a confidential source;

(iv) The security-based swap execution facility's enforcement and compliance staffs shall be parties to the hearing, and the enforcement staff shall present their case on those charges and sanctions that are the subject of the hearing;

(v) The respondent shall be entitled to appear personally at the hearing, to cross-examine any persons appearing as witnesses at the hearing, to call witnesses, and to present such evidence as may be relevant to the charges;

(vi) The security-based swap execution facility shall require persons within its jurisdiction who are called as witnesses to participate in the hearing and produce evidence. The security-based swap execution facility shall make reasonable efforts to secure the presence of all other persons called as witnesses whose testimony would be relevant. The rules of a security-based swap execution facility may provide that a sanction may be summarily imposed upon any person within its jurisdiction whose actions impede the progress of a hearing; and

(vii) If the respondent has requested a hearing, a copy of the hearing shall be made and shall become a part of the record of the proceeding. The record shall not be required to be transcribed unless:

(A) The transcript is requested by Commission staff or the respondent;

(B) The decision is appealed pursuant to the rules of the security-based swap execution facility; or

(C) The decision is reviewed by the Commission pursuant to § 201.442 of this chapter. In all other instances, a summary record of a hearing is permitted.

(10) *Decisions.* Promptly following a hearing conducted in accordance with the rules of the security-based swap execution facility, the disciplinary panel shall render a written decision based upon the weight of the evidence contained in the record of the proceeding and shall provide a copy to the respondent. The decision shall include:

(i) The notice of charges or a summary of the charges;

(ii) The answer, if any, or a summary of the answer;

(iii) A summary of the evidence produced at the hearing or, where appropriate, incorporation by reference of the investigation report;

(iv) A statement of findings and conclusions with respect to each charge and a complete explanation of the evidentiary and other basis for such findings and conclusions with respect to each charge;

(v) An indication of each specific rule that the respondent was found to have violated; and

(vi) A declaration of all sanctions imposed against the respondent, including the basis for such sanctions and the effective date of such sanctions.

(11) *Emergency disciplinary actions.* (i) A security-based swap execution facility may impose a sanction, including suspension, or take other summary action against a person or entity subject to its jurisdiction upon a reasonable belief that such immediate action is necessary to protect the best interest of the market place.

(ii) Any emergency disciplinary action shall be taken in accordance with a security-based swap execution facility's procedures that provide for the following:

(A) If practicable, a respondent should be served with a notice before the action is taken, or otherwise at the earliest possible opportunity. The notice shall state the action, briefly state the reasons for the action, and state the effective time and date, and the duration of the action.

(B) The respondent shall have the right to be represented by legal counsel or any other representative of its choosing in all proceedings subsequent to the emergency action taken. The respondent shall be given the opportunity for a hearing as soon as reasonably practicable and the hearing shall be conducted before the disciplinary panel pursuant to the rules of the security-based swap execution facility.

(C) Promptly following the hearing, the security-based swap execution facility shall render a written decision based upon the weight of the evidence contained in the record of the proceeding and shall provide a copy to the respondent. The decision shall include a description of the summary action taken; the reasons for the summary action; a summary of the evidence produced at the hearing; a statement of findings and conclusions; a determination that the summary action should be affirmed, modified, or reversed; and a declaration of any action to be taken pursuant to the determination, and the effective date and duration of such action.

(12) *Right to appeal.* The rules of a security-based swap execution facility may permit the parties to a proceeding to appeal promptly an adverse decision of a disciplinary panel in all or in certain classes of cases. Such rules may require a party's notice of appeal to be in writing and to specify the findings, conclusions, or sanctions to which objection are taken. If the rules of a security-based swap execution facility permit appeals, then both the respondent and the enforcement staff shall have the opportunity to appeal and:

(i) The security-based swap execution facility shall establish an appellate panel that is authorized to hear appeals. The rules of the security-based swap execution facility may provide that the appellate panel may, on its own initiative, order review of a decision by a disciplinary panel within a reasonable period of time after the decision has been rendered;

(ii) The composition of the appellate panel shall be consistent with § 242.834(d) and shall not include any members of the security-based swap execution facility's compliance staff or any person involved in adjudicating any other stage of the same proceeding. The rules of a security-based swap execution facility shall provide for the appeal proceeding to be conducted before all of the members of the appellate panel or a panel thereof;

(iii) Except for good cause shown, the appeal or review shall be conducted solely on the record before the disciplinary panel, the written exceptions filed by the parties, and the oral or written arguments of the parties; and

(iv) Promptly following the appeal or review proceeding, the appellate panel shall issue a written decision and shall provide a copy to the respondent. The decision issued by the appellate panel shall adhere to all the requirements of paragraph (g)(10) of this section to the extent that a different conclusion is reached from that issued by the disciplinary panel.

(13) *Disciplinary sanctions.* (i) *In general.* All disciplinary sanctions imposed by a security-based swap execution facility or its disciplinary panels shall be commensurate with the violations committed and shall be clearly sufficient to deter recidivism or similar violations by other members. All disciplinary sanctions, including sanctions imposed pursuant to an accepted settlement offer, shall take into account the respondent's disciplinary history. In the event of demonstrated customer harm, any disciplinary sanction shall also include full customer restitution, except where the amount of restitution or to whom it should be provided cannot be reasonably determined.

(ii) *Summary fines for violations of rules regarding timely submission of records.* A security-based swap execution facility may adopt a summary fine schedule for violations of rules relating to the failure to timely submit accurate records required for clearing or verifying each day's transactions. A security-based swap execution facility may permit its compliance staff, or a designated panel of security-based swap execution facility officials, to summarily impose minor sanctions against persons within the security-based swap execution facility's jurisdiction for violating such rules. A security-based swap execution facility's summary fine schedule may allow for warning letters to be issued for first-time violations or violators. If adopted, a summary fine schedule shall provide for progressively larger fines for recurring violations.

(14) *Commission review of a disciplinary sanction.* (i) *In general.* An application for review by the Commission may be filed by any person who is aggrieved by a determination of a security-based swap facility with respect to any final disciplinary action, as defined in § 242.835(b)(1) of this chapter (Rule 835(b)(1)), in accordance with § 201.442 of this chapter (Rule of Practice 442).

(ii) *Standard to govern Commission review.* (A) In reviewing such a determination, if the Commission finds that such person has engaged in such acts or practices, or has omitted such acts, as the security-based swap execution facility has found him to have engaged in or omitted, that such acts or practices, or omissions to act, are in violation of the Exchange Act, the rules or regulations thereunder, or the rules of the security-based swap execution facility, and that such provisions are, and were applied in a manner, consistent with the purposes of Exchange Act, the Commission, by order, shall so declare and, as appropriate, affirm the sanction imposed by the security-based swap execution facility, modify the sanction in accordance with paragraph (C) of this subsection, or remand to the security-based swap execution facility for further proceedings; or

(B) if the Commission does not make any such finding it shall, by order, set aside the sanction imposed by the security-based swap execution facility

and, if appropriate, remand to the security-based swap execution facility for further proceedings.

(C) If the Commission, having due regard for the public interest and the protection of investors, finds that a sanction imposed by a security-based swap execution facility upon such person imposes any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act or is excessive or oppressive, the Commission may cancel, reduce, or require the remission of such sanction.

(h) *Activities of security-based swap execution facility's employees, governing board members, committee members, and consultants.* (1) *Definitions.* The following definitions shall apply only in this paragraph (h):

(i) *Covered interest,* with respect to a security-based swap execution facility, means:

(A) A security-based swap that trades on the security-based swap execution facility;

(B) A security of an issuer that has issued a security that underlies a security-based swap that is listed on that facility; or

(C) A derivative based on a security that falls within paragraph (h)(1)(i)(B) of this section.

(ii) *Pooled investment vehicle* means an investment company registered under the Investment Company Act of 1940 in which no covered interest constitutes more than 10 percent of the investment company's assets.

(2) *Required rules.* A security-based swap execution facility must maintain in effect rules which have been submitted to the Commission pursuant to § 242.806 or § 242.807 that, at a minimum, prohibit an employee of the security-based swap execution facility from:

(i) Trading, directly or indirectly, any covered interest; and

(ii) Disclosing to any other person any material, non-public information which such employee obtains as a result of their employment at the security-based swap execution facility, where such employee has or should have a reasonable expectation that the information disclosed may assist another person in trading any covered interest; provided, however, that such rules shall not prohibit disclosures made in the course of an employee's duties, or disclosures made to another security-based swap execution facility, court of competent jurisdiction, or representative of any agency or department of the Federal or State government acting in their official capacity.

(3) *Possible exemptions.* A security-based swap execution facility may adopt rules, which must be submitted to the Commission pursuant to § 242.806 or § 242.807, which set forth circumstances under which exemptions from the trading prohibition contained in paragraph (h)(2)(i) of this section may be granted; such exemptions are to be administered by the security-based swap execution facility on a case-by-case basis. Specifically, such circumstances may include:

(i) Participation by an employee in a pooled investment vehicle where the employee has no direct or indirect control with respect to transactions executed for or on behalf of such vehicle;

(ii) Trading by an employee in a derivative based on a pooled investment vehicle that falls within paragraph (h)(3)(i) of this section;

(iii) Trading by an employee in a derivative based on an index in which no covered interest constitutes more than 10 percent of the index; and

(iv) Trading by an employee under circumstances enumerated by the security-based swap execution facility in rules which the security-based swap execution facility determines are not contrary to applicable law, the public interest, or just and equitable principles of trade.

(4) *Prohibited conduct.* (i) No employee, governing board member, committee member, or consultant of a security-based swap execution facility shall:

(A) Trade for such person's own account, or for or on behalf of any other account, in any covered interest on the basis of any material, non-public information obtained through special access related to the performance of such person's official duties as an employee, governing board member, committee member, or consultant; or

(B) Disclose for any purpose inconsistent with the performance of such person's official duties as an employee, governing board member, committee member, or consultant any material, non-public information obtained through special access related to the performance of such duties.

(ii) No person shall trade for such person's own account, or for or on behalf of any other account, in any covered interest on the basis of any material, non-public information that such person knows was obtained in violation of this paragraph (h)(4) from an employee, governing board member, committee member, or consultant.

(i) *Service on security-based swap execution facility governing boards or committees by persons with disciplinary histories.* (1) A security-based swap execution facility shall maintain in effect rules which have been submitted to the Commission pursuant to § 242.806 or § 242.807 that render a person ineligible to serve on its disciplinary committees, arbitration panels, oversight panels, or governing board who:

(i) Was found within the prior three years by a final decision of a security-based swap execution facility, a self-regulatory organization, an administrative law judge, a court of competent jurisdiction, or the Commission to have committed a disciplinary offense;

(ii) Entered into a settlement agreement with a security-based swap execution facility, a court of competent jurisdiction, or the Commission within the prior three years in which any of the findings or, in the absence of such findings, any of the acts charged included a disciplinary offense;

(iii) Currently is suspended from trading on any security-based swap execution facility, is suspended or expelled from membership with a self-regulatory organization, is serving any sentence of probation, or owes any portion of a fine imposed pursuant to:

(A) A finding by a final decision of a security-based swap execution facility, a self-regulatory organization, an administrative law judge, a court of competent jurisdiction, or the Commission that such person committed a disciplinary offense; or

(B) A settlement agreement with a security-based swap execution facility, a court of competent jurisdiction, or the Commission in which any of the findings or, in the absence of such findings, any of the acts charged included a disciplinary offense;

(iv) Currently is subject to an agreement with the Commission, a security-based swap execution facility, or a self-regulatory organization not to apply for registration with the Commission or membership in any self-regulatory organization;

(v) Currently is subject to or has had imposed on him or her within the prior three years a Commission registration revocation or suspension in any capacity for any reason, or has been convicted within the prior three years of any felony; or

(vi) Currently is subject to a denial, suspension, or disqualification from serving on a disciplinary committee, arbitration panel, or governing board of any security-based swap execution facility or self-regulatory organization.

(2) No person may serve on a disciplinary committee, arbitration panel, oversight panel or governing

board of a security-based swap execution facility if such person is subject to any of the conditions listed in paragraphs (i)(1)(i) through (vi) of this section.

(3) A security-based swap execution facility shall submit to the Commission a schedule listing all those rule violations which constitute disciplinary offenses and, to the extent necessary to reflect revisions, shall submit an amended schedule within 30 days of the end of each calendar year. A security-based swap execution facility shall maintain and keep current the schedule required by this section, and post the schedule on the security-based swap execution facility's website so that it is in a public place designed to provide notice to members and otherwise ensure its availability to the general public.

(4) A security-based swap execution facility shall submit to the Commission within 30 days of the end of each calendar year a certified list of any persons who have been removed from its disciplinary committees, arbitration panels, oversight panels, or governing board pursuant to the requirements of this section during the prior year.

(5) Whenever a security-based swap execution facility finds by final decision that a person has committed a disciplinary offense and such finding makes such person ineligible to serve on that security-based swap execution facility's disciplinary committees, arbitration panels, oversight panels, or governing board, the security-based swap execution facility shall inform the Commission of that finding and the length of the ineligibility in a form and manner specified by the Commission.

(6) For purposes of this paragraph:

(i) *Arbitration panel* means any person or panel empowered by a security-based swap execution facility to arbitrate disputes involving the security-based swap execution facility's members or their customers.

(ii) *Disciplinary offense* means:

(A) Any violation of the rules of a security-based swap execution facility, except a violation resulting in fines aggregating to less than $5,000 within a calendar year involving:

(*1*) Decorum or attire;

(*2*) Financial requirements; or

(*3*) Reporting or recordkeeping;

(B) Any rule violation which involves fraud, deceit, or conversion or results in a suspension or expulsion;

(C) Any violation of the Act or the Commission's rules thereunder; or

(D) Any failure to exercise supervisory responsibility when such failure is itself a violation of either the rules of the security-based swap execution facility, the Act, or the Commission's rules thereunder.

(E) A disciplinary offense must arise out of a proceeding or action which is brought by a security-based swap execution facility, the Commission, any Federal or State agency, or other governmental body.

(iii) *Final decision* means:

(A) A decision of a security-based swap execution facility which cannot be further appealed within the security-based swap execution facility, is not subject to the stay of the Commission or a court of competent jurisdiction, and has not been reversed by the Commission or any court of competent jurisdiction; or

(B) Any decision by an administrative law judge, a court of competent jurisdiction, or the Commission which has not been stayed or reversed.

(j) *Notification of final disciplinary action involving financial harm to a customer.*

(1) Upon any final disciplinary action in which a security-based swap execution facility finds that a member has committed a rule violation that involved a transaction for a customer, whether executed or not, and that resulted in financial harm to the customer:

(i) The security-based swap execution facility shall promptly provide written notice of the disciplinary action to the member; and

(ii) The security-based swap execution facility shall have established a rule pursuant to § 242.806 or § 242.807 that requires a member that receives such a notice to promptly provide written notice of the disciplinary action to the customer, as disclosed on the member's books and records.

(2) A written notice required by paragraph (j)(1) of this section must include the principal facts of the disciplinary action and a statement that the security-based swap execution facility has found that the member has committed a rule violation that involved a transaction for the customer, whether executed or not, and that resulted in financial harm to the customer.

(3) Solely for purposes of this paragraph (j):

(i) *Customer* means a person that utilizes an agent in connection with trading on a security-based swap execution facility.

(ii) *Final disciplinary action* means any decision by or settlement with a security-based swap execution facility in a disciplinary matter which cannot be further appealed at the security-based swap execution facility, is not subject to the stay of the Commission or a court of competent jurisdiction, and has not been reversed by the Commission or any court of competent jurisdiction.

(k) *Designation of agent for non-U.S. member.* (1) A security-based swap execution facility that admits a non-U.S. person as a member shall be deemed to be the agent of the non-U.S. member with respect to any security-based swaps executed by the non-U.S. member. Service or delivery of any communication issued by or on behalf of the Commission to the security-based swap execution facility shall constitute valid and effective service upon the non-U.S. member. The security-based swap execution facility which has been served with, or to which there has been delivered, a communication issued by or on behalf of the Commission to a non-U.S. member shall transmit the communication promptly and in a manner which is reasonable under the circumstances, or in a manner specified by the Commission in the communication, to the non-U.S. member.

(2) It shall be unlawful for a security-based swap execution facility to permit a non-U.S. member to execute security-based swaps on the facility unless the security-based swap execution facility prior thereto informs the non-U.S. member in writing of the requirements of this section.

(3) The requirements of paragraphs (k)(1) and (2) of this section shall not apply if the non-U.S. member has duly executed and maintains in effect a written agency agreement in compliance with this paragraph with a person domiciled in the United States and has provided a copy of the agreement to the security-based swap execution facility prior to effecting any transaction on the security-based swap execution facility. This agreement must authorize the person domiciled in the United States to serve as the agent of the non-U.S. member for purposes of accepting delivery and service of all communications issued by or on behalf of the Commission to the non-U.S. member and must provide an address in the United States where the agent will accept delivery and service of communications from the Commission. This agreement must be filed with the Commission by the security-based swap execution facility prior to permitting the non-U.S. member to effect any transactions in security-based swaps. Such agreements shall be filed in a manner specified by the Commission.

(4) A non-U.S. member shall notify the Commission immediately if the written agency agreement is terminated, revoked, or is otherwise no longer in effect. If the security-based swap execution facility knows or should

know that the agreement has expired, been terminated, or is no longer in effect, the security-based swap execution facility shall notify the Commission immediately.

§ 242.820 Core Principle 3—Security-based swaps not readily susceptible to manipulation.

The security-based swap execution facility shall permit trading only in security-based swaps that are not readily susceptible to manipulation.

§ 242.821 Core Principle 4—Monitoring of trading and trade processing.

(a) *General.* The security-based swap execution facility shall:

(1) Establish and enforce rules or terms and conditions defining, or specifications detailing:

(i) Trading procedures to be used in entering and executing orders traded on or through the facilities of the security-based swap execution facility; and

(ii) Procedures for trade processing of security-based swaps on or through the facilities of the security-based swap execution facility; and

(2) Monitor trading in security-based swaps to prevent manipulation, price distortion, and disruptions of the delivery or cash settlement process through surveillance, compliance, and disciplinary practices and procedures, including methods for conducting real-time monitoring of trading and comprehensive and accurate trade reconstructions.

(b) *Market oversight obligations.* A security-based swap execution facility shall:

(1) Collect and evaluate data on its members' market activity on an ongoing basis in order to detect and prevent manipulation, price distortions, and, where possible, disruptions of the physical-delivery or cash-settlement process;

(2) Monitor and evaluate general market data in order to detect and prevent manipulative activity that would result in the failure of the market price to reflect the normal forces of supply and demand;

(3) Demonstrate an effective program for conducting real-time monitoring of trading for the purpose of detecting and resolving abnormalities. A security-based swap execution facility shall employ automated alerts to detect abnormal price movements and unusual trading volumes in real time and instances or threats of manipulation, price distortion, and disruptions on at least a T + 1 basis. The T + 1 detection and analysis should incorporate any additional data that becomes available on a T + 1 basis, including the trade reconstruction data;

(4) Demonstrate the ability to comprehensively and accurately reconstruct daily trading activity for the purpose of detecting instances or threats of manipulation, price distortion, and disruptions; and

(5) Have rules in place that allow it to intervene to prevent or reduce market disruptions. Once a threatened or actual disruption is detected, the security-based swap execution facility shall take steps to prevent the market disruption or reduce its severity.

(c) *Monitoring of physical-delivery security-based swaps.* For physical-delivery security-based swaps, the security-based swap execution facility shall demonstrate that it:

(1) Monitors a security-based swap's terms and conditions as they relate to the underlying asset market; and

(2) Monitors the availability of the supply of the asset specified by the delivery requirements of the security-based swap.

(d) *Additional requirements for cash-settled security-based swaps.* (1) For cash-settled security-based swaps, the security-based swap execution facility shall demonstrate that it monitors the pricing of the reference price used to determine cash flows or settlement.

(2) For cash-settled security-based swaps listed on the security-based swap execution facility where the reference price is formulated and computed by the security-based swap execution facility, the security-based swap execution facility shall demonstrate that it monitors the continued appropriateness of its methodology for deriving that price and shall promptly amend any methodologies that result, or are likely to result, in manipulation, price distortions, or market disruptions, or impose new methodologies to resolve the threat of disruptions or distortions.

(3) For cash-settled security-based swaps listed on the security-based swap execution facility where the reference price relies on a third-party index or instrument, including an index or instrument traded on another venue, the security-based swap execution facility shall demonstrate that it monitors for pricing abnormalities in the index or instrument used to calculate the reference price and shall conduct due diligence to ensure that the reference price is not susceptible to manipulation.

(e) *Ability to obtain information.* (1) A security-based swap execution facility shall demonstrate that it has access to sufficient information to assess whether trading in security-based swaps listed on its market, in the index or instrument used as a reference price, or in the underlying asset for its listed security-based swaps is being used to affect prices on its market. The security-based swap execution facility shall demonstrate that it can obtain position and trading information directly from members that conduct substantial trading on its facility or through an information-sharing agreement with other venues or a third-party regulatory service provider. If the position and trading information is not available directly from its members but is available through information-sharing agreements with other trading venues or a third-party regulatory service provider, the security-based swap execution facility should cooperate in such information-sharing agreements.

(2) A security-based swap execution facility shall have rules that require its members to keep records of their trading, including records of their activity in the underlying asset, and related derivatives markets, and make such records available, upon request, to the security-based swap execution facility or, if applicable, to its regulatory service provider and the Commission. The security-based swap execution facility may limit the application of this requirement to only those members that conduct substantial trading on its facility.

(f) *Risk controls for trading.* A security-based swap execution facility shall establish and maintain risk control mechanisms to prevent and reduce the potential risk of market disruptions, including, but not limited to, market restrictions that pause or halt trading under market conditions prescribed by the security-based swap execution facility. Such risk control mechanisms shall be designed to avoid market disruptions without unduly interfering with that market's price discovery function. The security-based swap execution facility may choose from among controls that include: pre-trade limits on order size, price collars or bands around the current price, message throttles, daily price limits, and intraday position limits related to financial risk to the clearing member, or design other types of controls, as well as clear error-trade and order-cancellation policies. Within the specific array of controls that are selected, the security-based swap execution facility shall set the parameters for those controls, so that the specific parameters are reasonably likely to serve the purpose of preventing market disruptions and price distortions.

(g) *Trade reconstruction.* A security-based swap execution facility shall have the ability to comprehensively and accurately reconstruct all trading on its facility. All audit-trail data and reconstructions shall be made available

to the Commission in a form, manner, and time that is acceptable to the Commission.

(h) *Regulatory service provider.* A security-based swap execution facility shall comply with the rules in this section through a dedicated regulatory department or by contracting with a regulatory service provider pursuant to § 242.819(e).

§ 242.822 Core Principle 5—Ability to obtain information.

(a) *General.* The security-based swap execution facility shall:

(1) Establish and enforce rules that will allow the facility to obtain any necessary information to perform any of the functions described in section 3D of the Act;

(2) Provide the information to the Commission on request; and

(3) Have the capacity to carry out such international information-sharing agreements as the Commission may require.

(b) *Establish and enforce rules.* A security-based swap execution facility shall establish and enforce rules that will allow the security-based swap execution facility to have the ability and authority to obtain sufficient information to allow it to fully perform its operational, risk management, governance, and regulatory functions and any requirements under this section, including the capacity to carry out international information-sharing agreements as the Commission may require.

(c) *Collection of information.* A security-based swap execution facility shall have rules that allow it to collect information on a routine basis, allow for the collection of non-routine data from its members, and allow for its examination of books and records kept by members on its facility.

(d) *Provide information to the Commission.* A security-based swap execution facility shall provide information in its possession to the Commission upon request, in a form and manner specified by the Commission.

(e) *Information-sharing agreements.* A security-based swap execution facility shall share information with other regulatory organizations, data repositories, and third-party data reporting services as required by the Commission or as otherwise necessary and appropriate to fulfill its regulatory and reporting responsibilities. Appropriate information-sharing agreements can be established with such entities, or the Commission can act in conjunction with the security-based swap execution facility to carry out such information sharing.

§ 242.823 Core Principle 6—Financial integrity of transactions.

(a) *General.* The security-based swap execution facility shall establish and enforce rules and procedures for ensuring the financial integrity of security-based swaps entered on or through the facilities of the security-based swap execution facility, including the clearance and settlement of security-based swaps pursuant to section 3C(a)(1) of the Act.

(b) *Required clearing.* Transactions executed on or through the security-based swap execution facility that are required to be cleared under section 3C(a)(1) of the Act or are voluntarily cleared by the counterparties shall be cleared through a registered clearing agency or a clearing agency that has obtained an exemption from clearing agency registration to provide central counterparty services for security-based swaps.

(c) *General financial integrity.* A security-based swap execution facility shall provide for the financial integrity of its transactions:

(1) By establishing minimum financial standards for its members, which shall, at a minimum, require that each member qualify as an eligible contract participant;

(2) For transactions cleared by a registered clearing agency:

(i) By ensuring that the security-based swap execution facility has the capacity to route transactions to the registered clearing agency in a manner acceptable to the clearing agency for purposes of clearing; and

(ii) By coordinating with each registered clearing agency to which it submits transactions for clearing, in the development of rules and procedures to facilitate prompt and efficient transaction processing.

(d) *Monitoring for financial soundness.* A security-based swap execution facility shall monitor its members to ensure that they continue to qualify as eligible contract participants.

§ 242.824 Core Principle 7—Emergency authority.

(a) The security-based swap execution facility shall adopt rules to provide for the exercise of emergency authority, in consultation or cooperation with the Commission, as is necessary and appropriate, including the authority to liquidate or transfer open positions in any security-based swap or to suspend or curtail trading in a security-based swap.

(b) To comply with this core principle, a security-based swap execution facility shall adopt rules that are reasonably designed to:

(1) Allow the security-based swap execution facility to intervene as necessary to maintain markets with fair and orderly trading and to prevent or address manipulation or disruptive trading practices, whether the need for intervention arises exclusively from the security-based swap execution facility's market or as part of a coordinated, cross-market intervention;

(2) Have the flexibility and independence to address market emergencies in an effective and timely manner consistent with the nature of the emergency, as long as all such actions taken by the security-based swap execution facility are made in good faith to protect the integrity of the markets;

(3) Take market actions as may be directed by the Commission, including, in situations where a security-based swap is traded on more than one platform, emergency action to liquidate or transfer open interest as directed, or agreed to, by the Commission or the Commission's staff;

(4) Include procedures and guidelines for decision-making and implementation of emergency intervention that avoid conflicts of interest;

(5) Include alternate lines of communication and approval procedures to address emergencies associated with real-time events; and

(6) Allow the security-based swap execution facility, to address perceived market threats, to impose or modify position limits, impose or modify price limits, impose or modify intraday market restrictions, impose special margin requirements, order the liquidation or transfer of open positions in any contract, order the fixing of a settlement price, extend or shorten the expiration date or the trading hours, suspend or curtail trading in any contract, transfer customer contracts and the margin, or alter any contract's settlement terms or conditions, or, if applicable, provide for the carrying out of such actions through its agreements with its third-party provider of clearing or regulatory services.

(c) A security-based swap execution facility shall promptly notify the Commission of its exercise of emergency authority, explaining its decision-making process, the reasons for using its emergency authority, and how conflicts of interest were minimized, including the extent to which the security-based swap execution facility considered the effect of its emergency action on the underlying markets and on markets that are linked or referenced to the contracts traded on its facility, including similar

markets on other trading venues. Information on all regulatory actions carried out pursuant to a security-based swap execution facility's emergency authority shall be included in a timely submission of a certified rule pursuant to § 242.807.

§ 242.825 Core Principle 8—Timely publication of trading information.

(a)(1) The security-based swap execution facility shall make public timely information on price, trading volume, and other trading data on security-based swaps to the extent prescribed by the Commission.

(2) The security-based swap execution facility shall be required to have the capacity to electronically capture and transmit and disseminate trade information with respect to transactions executed on or through the facility.

(b) A security-based swap execution facility shall report security-based swap transaction data as required by §§ 242.900 through 242.909 (Regulation SBSR).

(c) A security-based swap execution facility shall make available a ''Daily Market Data Report'' containing the information required in paragraphs (c)(1) and (2) of this section in a manner and timeframe required by this section.

(1) *Contents.* The Daily Market Data Report of a security-based swap execution facility for a business day shall contain the following information for each tenor of each security-based swap traded on that security-based swap execution facility during that business day:

(i) The trade count (excluding error trades, correcting trades, and offsetting trades);

(ii) The total notional amount traded (excluding error trades, correcting trades, and offsetting trades);

(iii) The total notional amount of block trades, after such time as the Commission adopts a definition of ''block trade'' in § 242.802 of this chapter (Rule 802);

(iv) The opening and closing price;

(v) The price that is used for settlement purposes, if different from the closing price; and

(vi) The lowest price of a sale or offer, whichever is lower, and the highest price of a sale or bid, whichever is higher, that the security-based swap execution facility reasonably determines accurately reflects market conditions. Bids and offers vacated or withdrawn shall not be used in making this determination. A bid is vacated if followed by a higher bid or price and an offer is vacated if followed by a lower offer or price.

(2) *Additional information.* A security-based swap execution facility must record the following information with respect to security-based swaps on that reporting market:

(i) The method used by the security-based swap execution facility in determining nominal prices and settlement prices; and

(ii) If discretion is used by the security-based swap execution facility in determining the opening and/or closing ranges or the settlement prices, an explanation that certain discretion may be employed by the security-based swap execution facility and a description of the manner in which that discretion may be employed. Discretionary authority must be noted explicitly in each case in which it is applied (for example, by use of an asterisk or footnote).

(3) *Form of publication.* A security-based swap execution facility shall publicly post the Daily Market Data Report on its website:

(i) In a downloadable and machine-readable format using the most recent versions of the associated XML schema and PDF renderer as published on the Commission's website;

(ii) Without fees or other charges;

(iii) Without any encumbrances on access or usage restrictions; and

(iv) Without requiring a user to agree to any terms before being allowed to view or download the Daily Market Data Report, such as by waiving any requirements of this paragraph (c)(3). Any such waiver agreed to by a user shall be null and void.

(4) *Timing of publication.* A security-based swap execution facility shall publish the Daily Market Data Report on its website as soon as reasonably practicable on the next business day after the day to which the information pertains, but in no event later than 7 a.m. on the next business day.

(5) *Duration.* A security-based swap execution facility shall keep each Daily Market Data Report available on its website in the same location as all other Daily Market Data Reports for no less than one year after the date of first publication.

§ 242.826 Core Principle 9—Recordkeeping and reporting.

(a) *In general.* (1) A security-based swap execution facility shall:

(i) Maintain records of all activities relating to the business of the facility, including a complete audit trail, in a form and manner acceptable to the Commission for a period of five years; and

(ii) Report to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines to be necessary or appropriate for the Commission to perform the duties of the Commission under the Act.

(2) The Commission shall adopt data collection and reporting requirements for security-based swap execution facilities that are comparable to corresponding requirements for clearing agencies and security-based swap data repositories.

(b) *Required records.* A security-based swap execution facility shall keep full, complete, and systematic records, together with all pertinent data and memoranda, of all activities relating to its business with respect to security-based swaps. Such records shall include, without limitation, the audit trail information required under § 242.819(f) and all other records that a security-based swap execution facility is required to create or obtain under §§ 242.800 through 242.835 (Regulation SE).

(c) *Duration of retention.* (1) A security-based swap execution facility shall keep records of any security-based swap from the date of execution until the termination, maturity, expiration, transfer, assignment, or novation date of the transaction, and for a period of not less than five years, the first two years in an easily accessible place, after such date.

(2) A security-based swap execution facility shall keep each record other than the records described in paragraph (c)(1) of this section for a period of not less than five years, the first two years in an easily accessible place, from the date on which the record was created.

(d) *Record retention.* (1) A security-based swap execution facility shall retain all records in a form and manner that ensures the authenticity and reliability of such records in accordance with the Act and the Commission's rules thereunder.

(2) A security-based swap execution facility shall, upon request of any representative of the Commission, promptly furnish to the representative legible, true, complete, and current copies of any records required to be kept and preserved pursuant to this section.

(3)(i) An electronic record shall be retained in a form and manner that allows for prompt production at the request of any representative of the Commission.

(ii) A security-based swap execution facility maintaining electronic records shall establish appropriate systems and controls that ensure the authenticity and reliability of electronic records, including, without limitation:

(A) Systems that maintain the security, signature, and data as necessary to ensure the authenticity of

the information contained in electronic records and to monitor compliance with the Act and the Commission's rules thereunder;

(B) Systems that ensure that the security-based swap execution facility is able to produce electronic records in accordance with this section, and ensure the availability of such electronic records in the event of an emergency or other disruption of the security-based swap execution facility's electronic record retention systems; and

(C) The creation and maintenance of an up-to-date inventory that identifies and describes each system that maintains information necessary for accessing or producing electronic records.

(e) *Record examination.* All records required to be kept by a security-based swap execution facility pursuant to this section are subject to examination by any representative of the Commission pursuant to section 17(b) of the Act (15 U.S.C. 78q).

(f) *Records of non-U.S. members.* A security-based swap execution facility shall keep a record in permanent form, which shall show the true name, address, and principal occupation or business of any non-U.S. member that executes transactions on the facility. Upon request, the security-based swap execution facility shall provide to the Commission information regarding the name of any person guaranteeing such transactions or exercising any control over the trading of such non-U.S. member.

§ 242.827 Core Principle 10—Antitrust considerations.

Unless necessary or appropriate to achieve the purposes of the Act, the security-based swap execution facility shall not:

(a) Adopt any rules or take any actions that result in any unreasonable restraint of trade; or

(b) Impose any material anticompetitive burden on trading or clearing.

§ 242.828 Core Principle 11—Conflicts of interest.

(a) The security-based swap execution facility shall:

(1) Establish and enforce rules to minimize conflicts of interest in its decision-making process; and

(2) Establish a process for resolving the conflicts of interest.

(b) A security-based swap execution facility shall comply with the requirements of § 242.834.

§ 242.829 Core Principle 12—Financial resources.

(a) *In general.* (1) The security-based swap execution facility shall have adequate financial, operational, and managerial resources to discharge each responsibility of the security-based swap execution facility, as determined by the Commission.

(2) The financial resources of a security-based swap execution facility shall be considered to be adequate if the value of the financial resources:

(i) Enables the organization to meet its financial obligations to its members notwithstanding a default by a member creating the largest financial exposure for that organization in extreme but plausible market conditions; and

(ii) Exceeds the total amount that would enable the security-based swap execution facility to cover the operating costs of the security-based swap execution facility for a one-year period, as calculated on a rolling basis.

(b) *General requirements.* A security-based swap execution facility shall maintain financial resources on an ongoing basis that are adequate to enable it to comply with the core principles set forth in section 3D of the Act and any applicable Commission rules. Financial resources shall be considered adequate if their value exceeds the total amount that would enable the security-based swap execution facility to cover its projected operating costs necessary for the security-based swap execution facility to comply with section 3D of the Act and applicable Commission rules for a one-year period, as calculated on a rolling basis pursuant to paragraph (e) of this section.

(c) *Types of financial resources.* Financial resources available to satisfy the requirements of this section may include:

(1) The security-based swap execution facility's own capital, meaning its assets minus its liabilities calculated in accordance with generally accepted accounting principles in the United States; and

(2) Any other financial resource deemed acceptable by the Commission.

(d) *Liquidity of financial resources.* The financial resources allocated by a security-based swap execution facility to meet the ongoing requirements of paragraph (b) of this section shall include unencumbered, liquid financial assets (*i.e.,* cash and/or highly liquid securities) equal to at least the greater of three months of projected operating costs, as calculated on a rolling basis, or the projected costs needed to wind down the security-based swap execution facility's operations, in each case as determined under paragraph (e) of this section. If a security-based swap execution facility lacks sufficient unencumbered, liquid financial assets to satisfy its obligations under this section, the security-based swap execution facility may satisfy this requirement by obtaining a committed line of credit or similar facility in an amount at least equal to such deficiency.

(e) *Computation of costs to meet financial resources requirement.* (1) A security-based swap execution facility shall, each fiscal quarter, make a reasonable calculation of its projected operating costs and wind-down costs in order to determine its applicable obligations under this section. The security-based swap execution facility shall have reasonable discretion in determining the methodologies used to compute such amounts.

(i) *Calculation of projected operating costs.* A security-based swap execution facility's calculation of its projected operating costs shall be deemed reasonable if it includes all expenses necessary for the security-based swap execution facility to comply with the core principles set forth in section 3D of the Act and any applicable Commission rules, and if the calculation is based on the security-based swap execution facility's current level of business and business model, taking into account any projected modification to its business model (*e.g.,* the addition or subtraction of business lines or operations or other changes), and any projected increase or decrease in its level of business over the next 12 months. A security-based swap execution facility may exclude the following expenses (''excludable expenses'') from its projected operating cost calculations:

(A) Costs attributable solely to sales, marketing, business development, product development, or recruitment and any related travel, entertainment, event, or conference costs;

(B) Compensation and related taxes and benefits for personnel who are not necessary to ensure that the security-based swap execution facility is able to comply with the core principles set forth in section 3D of the Act and any applicable Commission rules;

(C) Costs for acquiring and defending patents and trademarks for security-based swap execution facility products and related intellectual property;

(D) Magazine, newspaper, and online periodical subscription fees;

(E) Tax preparation and audit fees;

(F) The variable commissions that a voice-based security-based swap execution facility may pay to its trading specialists, calculated as a percentage of transaction revenue generated by the

voice-based security-based swap execution facility; and

(G) Any non-cash costs, including depreciation and amortization.

(ii) *Prorated expenses.* A security-based swap execution facility's calculation of its projected operating costs shall be deemed reasonable if an expense is prorated and the security-based swap execution facility:

(A) Maintains sufficient documentation that reasonably shows the extent to which an expense is partially attributable to an excludable expense;

(B) Identifies any prorated expense in the financial reports that it submits to the Commission pursuant to paragraph (g) of this section; and

(C) Sufficiently explains why it prorated any expense. Common allocation methodologies that may be used include actual use, headcount, or square footage. A security-based swap execution facility may provide documentation, such as copies of service agreements, other legal documents, firm policies, audit statements, or allocation methodologies to support its determination to prorate an expense.

(iii) *Expenses allocated among affiliates.* A security-based swap execution facility's calculation of its projected operating costs shall be deemed reasonable if it prorates any shared expense that the security-based swap execution facility pays for, but only to the extent that such shared expense is attributable to an affiliate and for which the security-based swap execution facility is reimbursed. To prorate a shared expense, the security-based swap execution facility shall:

(A) Maintain sufficient documentation that reasonably shows the extent to which the shared expense is attributable to and paid for by the security-based swap execution facility and/or affiliated entity. The security-based swap execution facility may provide documentation, such as copies of service agreements, other legal documents, firm policies, audit statements, or allocation methodologies, that reasonably shows how expenses are attributable to, and paid for by, the security-based swap execution facility and/or its affiliated entities to support its determination to prorate an expense;

(B) Identify any shared expense in the financial reports that it submits to the Commission pursuant to paragraph (g) of this section; and

(C) Sufficiently explain why it prorated the shared expense.

(2) Notwithstanding any provision of paragraph (e)(1) of this section, the Commission may review the methodologies and require changes as appropriate.

(f) *Valuation of financial resources.* No less than each fiscal quarter, a security-based swap execution facility shall compute the current market value of each financial resource used to meet its obligations under this section. Reductions in value to reflect market and credit risk (''haircuts'') shall be applied as appropriate.

(g) *Reporting to the Commission.* (1) Each fiscal quarter, or at any time upon Commission request, a security-based swap execution facility shall provide a report to the Commission that includes:

(i) The amount of financial resources necessary to meet the requirements of this section, computed in accordance with the requirements of paragraph (e) of this section, and the market value of each available financial resource, computed in accordance with the requirements of paragraph (f) of this section; and

(ii) Financial statements, including the balance sheet, income statement, and statement of cash flows of the security-based swap execution facility.

(A) The financial statements shall be prepared in accordance with generally accepted accounting principles in the United States, prepared in English, and denominated in U.S. dollars.

(B) The financial statements of a security-based swap execution facility that is not domiciled in the United States, and is not otherwise required to prepare financial statements in accordance with generally accepted accounting principles in the United States, may satisfy the requirement in paragraph (g)(1)(ii)(A) of this section if such financial statements are prepared in accordance with either International Financial Reporting Standards issued by the International Accounting Standards Board, or a comparable international standard as the Commission may otherwise accept in its discretion.

(2) The calculations required by this paragraph (g) shall be made as of the last business day of the security-based swap execution facility's applicable fiscal quarter.

(3) With each report required under paragraph (g) of this section, the security-based swap execution facility shall also provide the Commission with sufficient documentation explaining the methodology used to compute its financial requirements under this section. Such documentation shall:

(i) Allow the Commission to reliably determine, without additional requests for information, that the security-based swap execution facility has made reasonable calculations pursuant to paragraph (e) of this section; and

(ii) Include, at a minimum:

(A) A total list of all expenses, without any exclusion;

(B) All expenses and the corresponding amounts, if any, that the security-based swap execution facility excluded or prorated when determining its operating costs, calculated on a rolling basis, required under this section, and the basis for any determination to exclude or prorate any such expenses;

(C) Documentation demonstrating the existence of any committed line of credit or similar facility relied upon for the purpose of meeting the requirements of this section (*e.g.,* copies of agreements establishing or amending a credit facility or similar facility); and

(D) All costs that a security-based swap execution facility would incur to wind down its operations, the projected amount of time for any such wind-down period, and the basis of its determination for the estimation of its costs and timing.

(4) The reports and supporting documentation required by this section shall be filed not later than 40 calendar days after the end of the security-based swap execution facility's first three fiscal quarters, and not later than 90 calendar days after the end of the security-based swap execution facility's fourth fiscal quarter, or at such later time as the Commission may permit, in its discretion, upon request by the security-based swap execution facility.

(5) A security-based swap execution facility shall provide notice to the Commission no later than 48 hours after it knows or reasonably should know that it no longer meets its obligations under paragraphs (b) and (d) of this section.

(6) A security-based swap execution facility shall provide the report and documentation required by this section to the Commission electronically using the EDGAR system as an Interactive Data File in accordance with § 232.405 of this chapter.

§ 242.830 Core Principle 13—System safeguards.

(a) *In general.* The security-based swap execution facility shall:

(1) Establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk, through the development of appropriate controls and procedures, and automated systems, that:

(i) Are reliable and secure; and

(ii) Have adequate scalable capacity;

(2) Establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allow for:

(i) The timely recovery and resumption of operations; and

(ii) The fulfillment of the responsibilities and obligations of the security-based swap execution facility; and

(3) Periodically conduct tests to verify that the backup resources of the security-based swap execution facility are sufficient to ensure continued:

(i) Order processing and trade matching;

(ii) Price reporting;

(iii) Market surveillance; and

(iv) Maintenance of a comprehensive and accurate audit trail.

(b) *Requirements.* (1) A security-based swap execution facility's program of risk analysis and oversight with respect to its operations and automated systems shall address each of the following categories of risk analysis and oversight:

(i) *Enterprise risk management and governance.* This category includes, but is not limited to: Assessment, mitigation, and monitoring of security and technology risk; security and technology capital planning and investment; governing board and management oversight of technology and security; information technology audit and controls assessments; remediation of deficiencies; and any other elements of enterprise risk management and governance included in generally accepted best practices.

(ii) *Information security.* This category includes, but is not limited to, controls relating to: Access to systems and data (including least privilege, separation of duties, account monitoring, and control); user and device identification and authentication; security awareness training; audit log maintenance, monitoring, and analysis; media protection; personnel security and screening; automated system and communications protection (including network port control, boundary defenses, and encryption); system and information integrity (including malware defenses and software integrity monitoring); vulnerability management; penetration testing; security incident response and management; and any other elements of information security included in generally accepted best practices.

(iii) *Business continuity-disaster recovery planning and resources.* This category includes, but is not limited to: Regular, periodic testing and review of business continuity-disaster recovery capabilities; the controls and capabilities described in paragraphs (b)(3) and (10) of this section; and any other elements of business continuity-disaster recovery planning and resources included in generally accepted best practices.

(iv) *Capacity and performance planning.* This category includes, but is not limited to: Controls for monitoring the security-based swap execution facility's systems to ensure adequate scalable capacity (including testing, monitoring, and analysis of current and projected future capacity and performance, and of possible capacity degradation due to planned automated system changes); and any other elements of capacity and performance planning included in generally accepted best practices.

(v) *Systems operations.* This category includes, but is not limited to: System maintenance; configuration management (including baseline configuration, configuration change and patch management, least functionality, and inventory of authorized and unauthorized devices and software); event and problem response and management; and any other elements of system operations included in generally accepted best practices.

(vi) *Systems development and quality assurance.* This category includes, but is not limited to: Requirements development; pre-production and regression testing; change management procedures and approvals; outsourcing and vendor management; training in secure coding practices; and any other elements of systems development and quality assurance included in generally accepted best practices.

(vii) *Physical security and environmental controls.* This category includes, but is not limited to: Physical access and monitoring; power, telecommunication, and environmental controls; fire protection; and any other elements of physical security and environmental controls included in generally accepted best practices.

(2) In addressing the categories of risk analysis and oversight required under paragraph (b)(1) of this section, a security-based swap execution facility shall follow generally accepted standards and best practices with respect to the development, operation, reliability, security, and capacity of automated systems.

(3) A security-based swap execution facility shall maintain a business continuity-disaster recovery plan and business continuity-disaster recovery resources, emergency procedures, and back-up facilities sufficient to enable timely recovery and resumption of its operations and resumption of its ongoing fulfillment of its responsibilities and obligations as a security-based swap execution facility following any disruption of its operations. Such responsibilities and obligations include, without limitation: Order processing and trade matching; transmission of matched orders to a registered clearing agency for clearing, where appropriate; price reporting; market surveillance; and maintenance of a comprehensive audit trail. A security-based swap execution facility's business continuity-disaster recovery plan and resources generally should enable resumption of trading and clearing of security-based swaps executed on or pursuant to the rules of the security-based swap execution facility during the next business day following the disruption. A security-based swap execution facility shall update its business continuity-disaster recovery plan and emergency procedures at a frequency determined by an appropriate risk analysis, but at a minimum no less frequently than annually.

(4) A security-based swap execution facility satisfies the requirement to be able to resume its operations and resume its ongoing fulfillment of its responsibilities and obligations during the next business day following any disruption of its operations by maintaining either:

(i) Infrastructure and personnel resources of its own that are sufficient to ensure timely recovery and resumption of its operations and resumption of its ongoing fulfillment of its responsibilities and obligations as a security-based swap execution facility following any disruption of its operations; or

(ii) Contractual arrangements with other security-based swap execution facilities or disaster recovery service providers, as appropriate, that are sufficient to ensure continued trading and clearing of security-based swaps executed on the security-based swap execution facility, and ongoing fulfillment of all of the security-based swap execution facility's responsibilities and obligations with respect to such security-based swaps, in the event that a disruption renders the security-based swap execution facility temporarily or permanently unable to satisfy this requirement on its own behalf.

(5) A security-based swap execution facility shall notify Commission staff promptly of all:

(i) Electronic trading halts and material system malfunctions;

(ii) Cyber-security incidents or targeted threats that actually or potentially jeopardize automated system operation, reliability, security, or capacity; and

(iii) Activations of the security-based swap execution facility's business continuity-disaster recovery plan.

(6) A security-based swap execution facility shall provide Commission staff timely advance notice of all material:

(i) Planned changes to automated systems that may impact the reliability, security, or adequate scalable capacity of such systems; and

(ii) Planned changes to the security-based swap execution facility's program of risk analysis and oversight.

(7) As part of a security-based swap execution facility's obligation to produce books and records in accordance with § 242.826 (Core Principle 9), the security-based swap execution facility shall provide to the Commission the following system-safeguards-related books and records, promptly upon the request of any Commission representative:

(i) Current copies of its business continuity-disaster recovery plans and other emergency procedures;

(ii) All assessments of its operational risks or system safeguards-related controls;

(iii) All reports concerning system safeguards testing and assessment required by this chapter, whether performed by independent contractors or by employees of the security-based swap execution facility; and

(iv) All other books and records requested by Commission staff in connection with Commission oversight of system safeguards pursuant to the Act or Commission rules, or in connection with Commission maintenance of a current profile of the security-based swap execution facility's automated systems.

(v) Nothing in paragraph (b)(7) of this section shall be interpreted as reducing or limiting in any way a security-based swap execution facility's obligation to comply with § 242.826 (Core Principle 9).

(8) A security-based swap execution facility shall conduct regular, periodic, objective testing and review of its automated systems to ensure that they are reliable, secure, and have adequate scalable capacity. A security-based swap execution facility shall also conduct regular, periodic testing and review of its business continuity-disaster recovery capabilities. Such testing and review shall include, without limitation, all of the types of testing set forth in this paragraph (b)(8).

(i) *Definitions.* As used in this paragraph (b)(8):

Controls means the safeguards or countermeasures employed by the security-based swap execution facility to protect the reliability, security, or capacity of its automated systems or the confidentiality, integrity, and availability of its data and information, and to enable the security-based swap execution facility to fulfill its statutory and regulatory responsibilities.

Controls testing means assessment of the security-based swap execution facility's controls to determine whether such controls are implemented correctly, are operating as intended, and are enabling the security-based swap execution facility to meet the requirements of this section.

Enterprise technology risk assessment means a written assessment that includes, but is not limited to, an analysis of threats and vulnerabilities in the context of mitigating controls. An enterprise technology risk assessment identifies, estimates, and prioritizes risks to security-based swap execution facility operations or assets, or to market participants, individuals, or other entities, resulting from impairment of the confidentiality, integrity, and availability of data and information or the reliability, security, or capacity of automated systems.

External penetration testing means attempts to penetrate the security-based swap execution facility's automated systems from outside the systems' boundaries to identify and exploit vulnerabilities. Methods of conducting external penetration testing include, but are not limited to, methods for circumventing the security features of an automated system.

Internal penetration testing means attempts to penetrate the security-based swap execution facility's automated systems from inside the systems' boundaries, to identify and exploit vulnerabilities. Methods of conducting internal penetration testing include, but are not limited to, methods for circumventing the security features of an automated system.

Security incident means a cybersecurity or physical security event that actually jeopardizes or has a significant likelihood of jeopardizing automated system operation, reliability, security, or capacity, or the availability, confidentiality or integrity of data.

Security incident response plan means a written plan documenting the security-based swap execution facility's policies, controls, procedures, and resources for identifying, responding to, mitigating, and recovering from security incidents, and the roles and responsibilities of its management, staff, and independent contractors in responding to security incidents. A security incident response plan may be a separate document or a business continuity-disaster recovery plan section or appendix dedicated to security incident response.

Security incident response plan testing means testing of a security-based swap execution facility's security incident response plan to determine the plan's effectiveness, identify its potential weaknesses or deficiencies, enable regular plan updating and improvement, and maintain organizational preparedness and resiliency with respect to security incidents. Methods of conducting security incident response plan testing may include, but are not limited to, checklist completion, walk-through or table-top exercises, simulations, and comprehensive exercises.

Vulnerability testing means testing of a security-based swap execution facility's automated systems to determine what information may be discoverable through a reconnaissance analysis of those systems and what vulnerabilities may be present on those systems.

(ii) *Vulnerability testing.* A security-based swap execution facility shall conduct vulnerability testing of a scope sufficient to satisfy the requirements set forth in paragraph (b)(10) of this section.

(A) A security-based swap execution facility shall conduct such vulnerability testing at a frequency determined by an appropriate risk analysis.

(B) Such vulnerability testing shall include automated vulnerability scanning, which shall follow generally accepted best practices.

(C) A security-based swap execution facility shall conduct vulnerability testing by engaging independent contractors or by using employees of the security-based swap execution facility who are not responsible for development or operation of the systems or capabilities being tested.

(iii) *External penetration testing.* A security-based swap execution facility shall conduct external penetration testing of a scope sufficient to satisfy the requirements set forth in paragraph (b)(10) of this section.

(A) A security-based swap execution facility shall conduct such external penetration testing at a frequency determined by an appropriate risk analysis.

(B) A security-based swap execution facility shall conduct external penetration testing by engaging independent contractors or by using employees of the security-based swap execution facility who are not responsible for development or operation of the systems or capabilities being tested.

(iv) *Internal penetration testing.* A security-based swap execution facility shall conduct internal penetration testing of a scope sufficient to satisfy the

requirements set forth in paragraph (b)(10) of this section.

(A) A security-based swap execution facility shall conduct such internal penetration testing at a frequency determined by an appropriate risk analysis.

(B) A security-based swap execution facility shall conduct internal penetration testing by engaging independent contractors, or by using employees of the security-based swap execution facility who are not responsible for development or operation of the systems or capabilities being tested.

(v) *Controls testing.* A security-based swap execution facility shall conduct controls testing of a scope sufficient to satisfy the requirements set forth in paragraph (b)(10) of this section.

(A) A security-based swap execution facility shall conduct controls testing, which includes testing of each control included in its program of risk analysis and oversight, at a frequency determined by an appropriate risk analysis. Such testing may be conducted on a rolling basis.

(B) A security-based swap execution facility shall conduct controls testing by engaging independent contractors or by using employees of the security-based swap execution facility who are not responsible for development or operation of the systems or capabilities being tested.

(vi) *Security incident response plan testing.* A security-based swap execution facility shall conduct security incident response plan testing sufficient to satisfy the requirements set forth in paragraph (b)(10) of this section.

(A) A security-based swap execution facility shall conduct such security incident response plan testing at a frequency determined by an appropriate risk analysis.

(B) A security-based swap execution facility's security incident response plan shall include, without limitation, the security-based swap execution facility's definition and classification of security incidents, its policies and procedures for reporting security incidents and for internal and external communication and information sharing regarding security incidents, and the hand-off and escalation points in its security incident response process.

(C) A security-based swap execution facility may coordinate its security incident response plan testing with other testing required by this section or with testing of its other business continuity-disaster recovery and crisis management plans.

(D) A security-based swap execution facility may conduct security incident response plan testing by engaging independent contractors or by using employees of the security-based swap execution facility.

(vii) *Enterprise technology risk assessment.* A security-based swap execution facility shall conduct enterprise technology risk assessment of a scope sufficient to satisfy the requirements set forth in paragraph (b)(10) of this section.

(A) A security-based swap execution facility shall conduct enterprise technology risk assessment at a frequency determined by an appropriate risk analysis. A security-based swap execution facility that has conducted an enterprise technology risk assessment that complies with this section may conduct subsequent assessments by updating the previous assessment.

(B) A security-based swap execution facility may conduct enterprise technology risk assessments by using independent contractors or employees of the security-based swap execution facility who are not responsible for development or operation of the systems or capabilities being assessed.

(9) To the extent practicable, a security-based swap execution facility shall:

(i) Coordinate its business continuity-disaster recovery plan with those of its members that it depends upon to provide liquidity, in a manner adequate to enable effective resumption of activity in its markets following a disruption causing activation of the security-based swap execution facility's business continuity-disaster recovery plan;

(ii) Initiate and coordinate periodic, synchronized testing of its business continuity- disaster recovery plan with those of members that it depends upon to provide liquidity; and

(iii) Ensure that its business continuity-disaster recovery plan takes into account the business continuity-disaster recovery plans of its telecommunications, power, water, and other essential service providers.

(10) The scope for all system safeguards testing and assessment required by this section shall be broad enough to include the testing of automated systems and controls that the security-based swap execution facility's required program of risk analysis and oversight and its current cybersecurity threat analysis indicate is necessary to identify risks and vulnerabilities that could enable an intruder or unauthorized user or insider to:

(i) Interfere with the security-based swap execution facility's operations or with fulfillment of its statutory and regulatory responsibilities;

(ii) Impair or degrade the reliability, security, or adequate scalable capacity of the security-based swap execution facility's automated systems;

(iii) Add to, delete, modify, exfiltrate, or compromise the integrity of any data related to the security-based swap execution facility's regulated activities; or

(iv) Undertake any other unauthorized action affecting the security-based swap execution facility's regulated activities or the hardware or software used in connection with those activities.

(11) Both the senior management and the governing board of a security-based swap execution facility shall receive and review reports setting forth the results of the testing and assessment required by this section. A security-based swap execution facility shall establish and follow appropriate procedures for the remediation of issues identified through such review, as provided in paragraph (b)(12) of this section, and for evaluation of the effectiveness of testing and assessment protocols.

(12) A security-based swap execution facility shall identify and document the vulnerabilities and deficiencies in its systems revealed by the testing and assessment required by this section. The security-based swap execution facility shall conduct and document an appropriate analysis of the risks presented by such vulnerabilities and deficiencies, to determine and document whether to remediate or accept the associated risk. When the security-based swap execution facility determines to remediate a vulnerability or deficiency, it must remediate in a timely manner given the nature and magnitude of the associated risk.

§ 242.831 Core Principle 14—Designation of chief compliance officer.

(a)(1) *In general.* Each security-based swap execution facility shall designate an individual to serve as a chief compliance officer.

(2) *Duties.* The chief compliance officer shall:

(i) Report directly to the board or to the senior officer of the facility;

(ii) Review compliance with the core principles in this subsection;

(iii) In consultation with the board of the facility, a body performing a function similar to that of a board, or the senior officer of the facility, resolve any conflicts of interest that may arise;

(iv) Be responsible for establishing and administering the policies and procedures required to be established pursuant to this section;

(v) Ensure compliance with the Act and the rules and regulations issued

under the Act, including rules prescribed by the Commission pursuant to section 3D of the Act;

(vi) Establish procedures for the remediation of noncompliance issues found during compliance office reviews, look backs, internal or external audit findings, self-reported errors, or through validated complaints; and

(vii) Establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

(3) *Annual reports.* (i) *In general.* In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of:

(A) The compliance of the security-based swap execution facility with the Act; and

(B) The policies and procedures, including the code of ethics and conflict of interest policies, of the security-based swap execution facility.

(ii) [Reserved]

(4) *Requirements.* The chief compliance officer shall:

(i) Submit each report described in paragraph (a)(3) of this section with the appropriate financial report of the security-based swap execution facility that is required to be submitted to the Commission pursuant to this section; and

(ii) Include in the report a certification that, under penalty of law, the report is accurate and complete.

(b) *Authority of chief compliance officer.* (1) The position of chief compliance officer shall carry with it the authority and resources to develop, in consultation with the governing board or senior officer, the policies and procedures of the security-based swap execution facility and enforce such policies and procedures to fulfill the duties set forth for chief compliance officers in the Act and the Commission's rules thereunder.

(2) The chief compliance officer shall have supervisory authority over all staff acting at the direction of the chief compliance officer.

(c) *Qualifications of chief compliance officer.* (1) The individual designated to serve as chief compliance officer shall have the background and skills appropriate for fulfilling the responsibilities of the position.

(2) No individual that would be disqualified from serving on a security-based swap execution facility's governing board or committees pursuant to the criteria set forth in § 242.819(i) may serve as a chief compliance officer.

(3) In determining whether the background and skills of a potential chief compliance officer are appropriate for fulfilling the responsibilities of the role of the chief compliance officer, a security-based swap execution facility has the discretion to base its determination on the totality of the qualifications of the potential chief compliance officer, including, but not limited to, compliance experience, related career experience, training, potential conflicts of interest, and any other relevant factors to the position.

(d) *Appointment and removal of chief compliance officer.* (1) Only the governing board or the senior officer may appoint or remove the chief compliance officer.

(2) The security-based swap execution facility shall notify the Commission within two business days of the appointment or removal, whether interim or permanent, of a chief compliance officer.

(e) *Compensation of the chief compliance officer.* The governing board or the senior officer shall approve the compensation of the chief compliance officer.

(f) *Annual meeting with the chief compliance officer.* The chief compliance officer shall meet with the governing board or senior officer of the security-based swap execution facility at least annually.

(g) *Information requested of the chief compliance officer.* The chief compliance officer shall provide any information regarding the regulatory program of the security-based swap execution facility as requested by the governing board or the senior officer.

(h) *Duties of chief compliance officer.* The duties of the chief compliance officer shall include, but are not limited to, the following:

(1) Overseeing and reviewing compliance of the security-based swap execution facility with section 3D of the Act and the Commission rules thereunder;

(2) Taking reasonable steps, in consultation with the governing board or the senior officer of the security-based swap execution facility, to resolve any material conflicts of interest that may arise, including, but not limited to:

(i) Conflicts between business considerations and compliance requirements;

(ii) Conflicts between business considerations and the requirement that the security-based swap execution facility provide fair, open, and impartial access as set forth in § 242.819(c); and

(iii) Conflicts between a security-based swap execution facility's management and members of the governing board;

(3) Establishing and administering written policies and procedures reasonably designed to prevent violations of the Act and the rules of the Commission;

(4) Taking reasonable steps to ensure compliance with the Act and the rules of the Commission;

(5) Establishing procedures reasonably designed to handle, respond, remediate, retest, and resolve noncompliance issues identified by the chief compliance officer through any means, including any compliance office review, look-back, internal or external audit finding, self-reported error, or validated complaint;

(6) Establishing and administering a compliance manual designed to promote compliance with the applicable laws, rules, and regulations and a written code of ethics for the security-based swap execution facility designed to prevent ethical violations and to promote honesty and ethical conduct by personnel of the security-based swap execution facility;

(7) Supervising the regulatory program of the security-based swap execution facility with respect to trade practice surveillance; market surveillance; real-time market monitoring; compliance with audit trail requirements; enforcement and disciplinary proceedings; audits, examinations, and other regulatory responsibilities (including taking reasonable steps to ensure compliance with, if applicable, financial integrity, financial reporting, sales practice, recordkeeping, and other requirements); and

(8) Supervising the effectiveness and sufficiency of any regulatory services provided to the security-based swap execution facility by a regulatory service provider in accordance with § 242.819(e).

(i) *Preparation of annual compliance report.* The chief compliance officer shall, not less than annually, prepare and sign an annual compliance report that covers the prior fiscal year. The report shall, at a minimum, contain:

(1) A description and self-assessment of the effectiveness of the written policies and procedures of the security-based swap execution facility, including the code of ethics and conflict of interest policies, to reasonably ensure compliance with the Act and applicable Commission rules;

(2) Any material changes made to compliance policies and procedures during the coverage period for the report and any areas of improvement or recommended changes to the compliance program;

(3) A description of the financial, managerial, and operational resources set aside for compliance with the Act and applicable Commission rules;

(4) Any material non-compliance matters identified and an explanation of the corresponding action taken to resolve such non-compliance matters; and

(5) A certification by the chief compliance officer that, to the best of their knowledge and reasonable belief, and under penalty of law, the annual compliance report is accurate and complete in all material respects.

(j) *Submission of annual compliance report and related matters.* (1) *Furnishing the annual compliance report prior to submission to the Commission.* Prior to submission to the Commission, the chief compliance officer shall provide the annual compliance report for review to the governing board or, in the absence of a governing board, to the senior officer. Members of the governing board and the senior officer shall not require the chief compliance officer to make any changes to the report.

(2) *Submission of annual compliance report to the Commission.* The annual compliance report shall be submitted electronically to the Commission using the EDGAR system as an Interactive Data File in accordance with § 232.405 of this chapter not later than 90 calendar days after the end of the security-based swap execution facility's fiscal year. The security-based swap execution facility shall concurrently file the annual compliance report with the fourth-quarter financial report pursuant to § 242.829(g).

(3) *Amendments to annual compliance report.* (i) Promptly upon discovery of any material error or omission made in a previously filed annual compliance report, the chief compliance officer shall file an amendment with the Commission to correct the material error or omission. The chief compliance officer shall submit the amended annual compliance report to the governing board, or in the absence of a governing board, to the senior officer, pursuant to paragraph (j)(1) of this section.

(ii) An amendment shall contain the certification required under paragraph (i)(5) of this section.

(4) *Request for extension.* A security-based swap execution facility may request an extension of time to file its annual compliance report from the Commission. Reasonable and valid requests for extensions of the filing deadline may be granted at the discretion of the Commission.

(k) *Recordkeeping.* A security-based swap execution facility shall maintain all records demonstrating compliance with the duties of the chief compliance officer and the preparation and submission of annual compliance reports consistent with § 242.826 (Core Principle 9).

§ 242.832 Application of the trade execution requirement to cross-border security-based swap transactions.

(a) The trade execution requirement set forth in section 3C(h) of the Act shall not apply in connection with a security-based swap unless at least one counterparty to the security-based swap is a ''covered person'' as defined in paragraph (b) of this section.

(b) A ''covered person'' means, with respect to a particular security-based swap, any person that is:

(1) A U.S. person;

(2) A non-U.S. person whose performance under a security-based swap is guaranteed by a U.S. person; or

(3) A non-U.S. person who, in connection with its security-based swap dealing activity, uses U.S. personnel located in a U.S. branch or office, or personnel of an agent of such non-U.S. person located in a U.S. branch or office, to arrange, negotiate, or execute a transaction.

§ 242.833 Cross-border exemptions.

(a) *Exemptions for foreign trading venues for security-based swaps.* An application for an order for exemptive relief under section 36(a)(1) of the Act (15 U.S.C. 78mm(a)(1)) relating to the registration status under the Act of a foreign trading venue for security-based swaps that has one or more members who are covered persons, as defined in § 242.832, with respect to security-based swaps transacted on that venue may state that the application also is submitted pursuant to this paragraph (a). In such case, the Commission will consider the submission as an application to exempt the foreign trading venue, with respect to its providing a market place for security-based swaps, from:

(1) The definition of ''exchange'' in section 3(a)(1) of the Act (15 U.S.C. 78c(a)(1));

(2) The definition of ''security-based swap execution facility'' in section 3(a)(77) of the Act (15 U.S.C. 78c(a)(77));

(3) The definition of ''broker'' in section 3(a)(4) of the Act (15 U.S.C. 78c(a)(4)); and

(4) Section 3D(a)(1) of the Act (15 U.S.C. 78c–4(a)(1)).

(b) *Exemptions relating to the trade execution requirement.* (1) An application for an order for exemptive relief under section 36(a)(1) of the Act (15 U.S.C. 78mm(a)(1)) relating to the application of the trade execution requirement in section 3C(h) of the Act (15 U.S.C. 78c–3(h)) to security-based swaps executed on a foreign trading venue, may state that the application also is submitted pursuant to this paragraph (b).

(2) When considering an application under section 36 of the Act (15 U.S.C. 78mm) and this paragraph (b), the Commission may consider:

(i) The extent to which the security-based swaps traded in the foreign jurisdiction covered by the request are subject to a trade execution requirement comparable to that in section 3C(h) of the Act (15 U.S.C. 78c–3(h)) and the Commission's rules thereunder;

(ii) The extent to which trading venues in the foreign jurisdiction covered by the request are subject to regulation and supervision comparable to that under the Act, including section 3D of the Act (15 U.S.C. 78c–4), and the Commission's rules thereunder;

(iii) Whether the foreign trading venue or venues where covered persons, as defined in § 242.832, intend to trade security-based swaps have received an exemption order contemplated by paragraph (a) of this section; and

(iv) Any other factor that the Commission believes is relevant for assessing whether the exemption is in the public interest and consistent with the protection of investors.

§ 242.834 Mitigation of conflicts of interest of security-based swap execution facilities and certain exchanges.

(a) *Definitions.* For purposes of this section:

Family relationship of a person means the person's spouse, former spouse, parent, stepparent, child, stepchild, sibling, stepbrother, stepsister, grandparent, grandchild, uncle, aunt, nephew, niece, or in-law.

Major disciplinary committee means a committee of persons who are authorized by a security-based swap execution facility to conduct disciplinary hearings, to settle disciplinary charges, to impose disciplinary sanctions, or to hear appeals thereof in cases involving any violation of the rules of the security-based swap execution facility except those which:

(i) Are related to decorum or attire, financial requirements, or reporting or recordkeeping; and

(ii) Do not involve fraud, deceit, or conversion.

Member's affiliated firm is a firm in which the member is a principal or an employee.

Named party in interest means a person or entity that is identified by name as a subject of any matter being considered by a governing board, disciplinary committee, or oversight panel.

Significant action includes any of the following types of actions or rule changes by a security-based swap execution facility or SBS exchange that can be implemented without the Commission's prior approval:

(i) Any actions or rule changes which address an emergency; and

(ii) Any changes in margin levels that are designed to respond to extraordinary market conditions such as an actual or attempted corner, squeeze, congestion, or undue concentration of positions, or that otherwise are likely to have a substantial effect on prices in any contract traded or cleared at such security-based swap execution facility or SBS exchange; but does not include any rule not submitted for prior Commission approval because such rule is unrelated to the terms and conditions of any security-based swap traded at such security-based swap execution facility or SBS exchange.

(b) *Ownership and voting limitations.* Each security-based swap execution facility and SBS exchange shall not permit any of its members, either alone or together with any officer, principal, or employee of the member, to:

(1) Own, directly or indirectly, 20 percent or more of any class of voting securities or of other voting interest in the security-based swap execution facility or SBS exchange; or

(2) Directly or indirectly vote, cause the voting of, or give any consent or proxy with respect to the voting of, any interest that exceeds 20 percent of the voting power of any class of securities or of other ownership interest in the security-based swap execution facility or SBS exchange.

(3) The ownership and voting limitations in paragraphs (b)(1) and (2) of this section shall not apply to an SBSEF that has, pursuant to § 242.819(e), entered into an agreement with a registered futures association or a national securities association for the provision of regulatory services that encompass, at a minimum, real-time market monitoring under § 242.819(d)(5) and investigations and investigation reports under § 242.819(d)(6).

(c) *Enforcement of limitations.* The rules of each security-based swap execution facility and SBS exchange must be reasonably designed, and have an effective mechanism, to:

(1) Deny effect to the portion of any voting interest held by a member in excess of the limitations in paragraph (b) of this section;

(2) Compel a member who possesses a voting interest in excess of the limitations in paragraph (b) of this section to divest enough of that voting interest to come within those limitations; and

(3) Obtain information relating to its ownership and voting interests owned or controlled, directly or indirectly, by its members.

(d) *Disciplinary committees and hearing panels.* Each security-based swap execution facility and SBS exchange shall ensure that its disciplinary processes preclude any member, or group or class of its members, from dominating or exercising disproportionate influence on the disciplinary process. Each major disciplinary committee or hearing panel thereof shall include sufficient different groups or classes of its members so as to ensure fairness and to prevent special treatment or preference for any person or member in the conduct of the responsibilities of the committee or panel.

(e) *Governing board composition.* Each security-based swap execution facility and SBS exchange shall ensure that:

(1) Twenty percent or more of the persons who are eligible to vote routinely on matters being considered by the governing board (excluding those members who are eligible to vote only in the case of a tie vote by the governing board) are:

(i) Knowledgeable of security-based swap trading or financial regulation, or otherwise capable of contributing to governing board deliberations;

(ii) Not members of the security-based swap execution facility or SBS exchange;

(iii) Not salaried employees of the security-based swap execution facility or SBS exchange;

(iv) Not primarily performing services for the security-based swap execution facility or SBS exchange in a capacity other than as a member of the governing board; and

(v) Not officers, principals, or employees of a firm which holds a membership at the security-based swap execution facility or SBS exchange, either in its own name or through an employee on behalf of the firm; and

(2) The membership of the governing board includes a diversity of groups or classes of its members. The security-based swap execution facility or SBS exchange must be able to demonstrate that the board membership fairly represents the diversity of interests at such security-based swap execution facility or SBS exchange and is otherwise consistent with the composition requirements of this section.

(f) *Providing information about the board to the Commission.* Each security-based swap execution facility and SBS exchange shall submit to the Commission, within 30 days after each governing board election, a list of the governing board's members, the groups or classes of its members that they represent, and how the composition of the governing board otherwise meets the requirements of this section.

(g) *Voting by interested members of governing boards and various committees of security-based swap execution facilities and SBS exchanges.* (1) *Rules required.* Each security-based swap execution facility and SBS exchange shall maintain in effect rules to address the avoidance of conflicts of interest in the execution of its regulatory functions. Such rules must provide for the following:

(i) *Relationship with named party in interest.* (A) *Nature of relationship.* A member of a governing board, disciplinary committee, or oversight panel of a security-based swap execution facility or SBS exchange must abstain from such body's deliberations and voting on any matter involving a named party in interest where such member:

(*1*) Is a named party in interest;

(*2*) Is an employer, employee, or fellow employee of a named party in interest;

(*3*) Has any other significant, ongoing business relationship with a named party in interest, not including relationships limited to executing security-based swaps opposite of each other or to clearing security-based swaps through the same clearing member; or

(*4*) Has a family relationship with a named party in interest.

(B) *Disclosure of relationship.* Prior to the consideration of any matter involving a named party in interest, each member of a governing board, disciplinary committee, or oversight panel of a security-based swap execution facility or SBS exchange must disclose to the appropriate staff of the security-based swap execution facility or SBS exchange whether they have one of the relationships listed in paragraph (g)(1)(i)(A) of this section with a named party in interest.

(C) *Procedure for determination.* Each security-based swap execution facility and SBS exchange must establish procedures for determining whether any member of its governing board, disciplinary committees, or oversight

committees is subject to a conflicts restriction in any matter involving a named party in interest. Taking into consideration the exigency of the committee action, such determinations should be based upon:

(*1*) Information provided by the member pursuant to paragraph (g)(1)(i)(B) of this section; and

(*2*) Any other source of information that is held by and reasonably available to the security-based swap execution facility or SBS exchange.

(ii) *Financial interest in a significant action.* (A) *Nature of interest.* A member of the governing board, disciplinary committee, or oversight panel of a security-based swap execution facility or SBS exchange must abstain from such body's deliberations and voting on any significant action if the member knowingly has a direct and substantial financial interest in the result of the vote based upon either exchange or non-exchange positions that could reasonably be expected to be affected by the action.

(B) *Disclosure of interest.* Prior to the consideration of any significant action, each member of a governing board, disciplinary committee, or oversight panel of a security-based swap execution facility or SBS exchange must disclose to the appropriate staff of the security-based swap execution facility or SBS exchange the position information referred to in paragraph (g)(1)(ii)(C) of this section that is known to them. This requirement does not apply to members who choose to abstain from deliberations and voting on the subject significant action.

(C) *Procedure for determination.* Each security-based swap execution facility and SBS exchange must establish procedures for determining whether any member of its governing board, disciplinary committees, or oversight committees is subject to a conflicts restriction under this section in any significant action. Such determination must include a review of any positions, whether maintained at that security-based swap execution facility, SBS exchange, or elsewhere, held in the member's personal accounts or the proprietary accounts of the member's affiliated firm that the security-based swap execution facility or SBS exchange reasonably expects could be affected by the significant action.

(D) *Bases for determination.* Taking into consideration the exigency of the significant action, such determinations should be based upon:

(*1*) Information provided by the member with respect to positions pursuant to paragraph (f)(2)(ii)(B) of this section; and

(*2*) Any other source of information that is held by and reasonably available to the security-based swap execution facility or SBS exchange.

(iii) *Participation in deliberations.* (A) Under the rules required by this section, a governing board, disciplinary committee, or oversight panel of a security-based swap execution facility or SBS exchange may permit a member to participate in deliberations prior to a vote on a significant action for which they otherwise would be required to abstain, pursuant to paragraph (g)(1)(ii) of this section, if such participation would be consistent with the public interest and the member recuses from voting on such action.

(B) In making a determination as to whether to permit a member to participate in deliberations on a significant action for which they otherwise would be required to abstain, the deliberating body shall consider the following factors:

(*1*) Whether the member's participation in deliberations is necessary for the deliberating body to achieve a quorum in the matter; and

(*2*) Whether the member has unique or special expertise, knowledge, or experience in the matter under consideration.

(C) Prior to any determination pursuant to paragraph (g)(1)(iii)(A) of this section, the deliberating body must fully consider the position information which is the basis for the member's direct and substantial financial interest in the result of a vote on a significant action pursuant to paragraph (g)(1)(ii) of this section.

(iv) *Documentation of determination.* The governing boards, disciplinary committees, and oversight panels of each security-based swap execution facility and SBS exchange must reflect in their minutes or otherwise document that the conflicts determination procedures required by this section have been followed. Such records also must include:

(A) The names of all members who attended the meeting in person or who otherwise were present by electronic means;

(B) The name of any members who voluntarily recused themselves or were required to abstain from deliberations and/or voting on a matter and the reason for the recusal or abstention, if stated; and

(C) Information on the position information that was reviewed for each member.

(h) *Rules required.* (1) A security-based swap execution facility shall maintain in effect rules to comply with this section that have been submitted to the Commission pursuant to § 242.806 or § 242.807.

(2) An SBS exchange shall maintain in effect rules to comply with this section that have been submitted to the Commission pursuant to § 240.19b-4 of this chapter.

§ 242.835 Notice to Commission by security-based swap execution facility of final disciplinary action or denial or limitation of access.

(a) If a security-based swap execution facility issues a final disciplinary action against a member, or takes final action with respect to a denial or conditioning membership, or takes final action with respect to a denial or limitation of access of a person to any services offered by the security-based swap execution facility, the security-based swap execution facility shall file a notice of such action with the Commission within 30 days and serve a copy on the affected person.

(b) For purposes of paragraph (a) of this section:

(1) A disciplinary action shall not be considered ''final'' unless:

(i) The affected person has exhausted their administrative remedies at the security-based swap execution facility; and

(ii) The disciplinary action is not a summary action permitted under § 242.819(g)(13)(ii).

(2) A disposition of a matter with respect to a *denial or conditioning of membership,* or a *denial or limitation of access* shall not be considered ''final'' unless such person has exhausted their administrative remedies at the security-based swap execution facility with respect to such matter.

(c) A notice required by paragraph (a) of this section shall provide the following information:

(1) The name of the member and its last known address, as reflected in the security-based swap execution facility's records;

(2) The name of the person, committee, or other organizational unit of the security-based swap execution facility that initiated the disciplinary action or access restriction;

(3) In the case of a final disciplinary action:

(i) A description of the acts or practices, or omissions to act, upon which the sanction is based, including, as appropriate, the specific rules that the security-based swap execution facility has found to have been violated;

(ii) A statement describing the respondent's answer to the charges; and

(iii) A statement of the sanction imposed and the reasons therefor;

(4) In the case of a final action with respect to a denial or conditioning of

membership, or a denial or limitation of access:

(i) The financial or operating difficulty of the member or prospective member (as the case may be) upon which the security-based swap execution facility determined that the member or prospective member could not be permitted to do, or continue to do, business with safety to investors, creditors, other members, or the security-based swap execution facility;

(ii) The pertinent failure to meet qualification requirements or other prerequisites for membership or access and the basis upon which the security-based swap execution facility determined that the person concerned could not be permitted to have membership or access with safety to investors, creditors, other members, or the security-based swap execution facility; or

(iii) The default of any delivery of funds or securities to a clearing agency by the member;

(5) The effective date of the final disciplinary action, or final action with respect to a denial or conditioning of membership, or a denial or limitation of access; and

(6) Any other information that the security-based swap execution facility may deem relevant.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 22. The general authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.;* 12 U.S.C. 5461 *et seq.;* 18 U.S.C. 1350; Sec. 953(b), Pub. L. 111–203, 124 Stat. 1904; Sec. 102(a)(3), Pub. L. 112–106, 126 Stat. 309 (2012); Sec. 107, Pub. L. 112–106, 126 Stat. 313 (2012), Sec. 72001, Pub. L. 114–94, 129 Stat. 1312 (2015), and secs. 2 and 3, Pub. L. 116–222, 134 Stat. 1063 (2020), unless otherwise noted.

* * * * *

■ 23. Add subpart R to read as follows:

Subpart R—Forms for Registration of, and Filings by, Security-Based Swap Execution Facilities

Sec.
249.1701 Form SBSEF.
249.1702 Security-Based Swap Execution Facility Cover Sheet.

§ 249.1701 Form SBSEF, for application for registration as a security-based swap execution facility or to amend such application or registration.

This form shall be used for application for registration as a security-based swap execution facility, pursuant to section 3D of the Securities Exchange Act of 1934 (15 U.S.C. 78c–4) and § 242.803 of this chapter, or to amend such application or registration.

§ 249.1702 Submission cover sheet, for rule and product submissions.

This submission cover sheet shall be used by registered security-based swap execution facilities for making submissions pursuant to §§ 242.804 through 242.807, 242.809, and 242.816).

■ 24. Add Form SBSEF (referenced in § 249.1701).

Note: Form SBSEF is attached as Appendix A to this document. Form SBSEF will not appear in the Code of Federal Regulations.

■ 25. Add Security-Based Swap Execution Facility Submission Cover Sheet (referenced in § 249.1702).

Note: Security-Based Swap Execution Facility Submission Cover Sheet is attached as Appendix B to this document. The Security-Based Swap Execution Facility Submission Cover Sheet will not appear in the Code of Federal Regulations.

By the Commission.

Dated: November 2, 2023.

J. Matthew DeLesDernier,

Deputy Secretary.

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendix A—Form SBSEF

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

FORM SBSEF

SECURITY-BASED SWAP EXECUTION FACILITY APPLICATION FOR REGISTRATION (and AMENDMENT TO APPLICATION)

REGISTRATION INSTRUCTIONS

Intentional misstatements or omissions of material fact may constitute Federal criminal violations or grounds for disqualification from registration.

DEFINITIONS

All terms used in this Form SBSEF—which includes instructions, a Cover Sheet, and required Exhibits—shall have the same meaning as in Regulation SE (17 CFR 242.800 *et seq*.) promulgated under section 3D of the Securities Exchange Act (the "Act") by the Securities and Exchange Commission ("Commission").

The term "Applicant" shall include any person submitting an application for registration as a security-based swap execution facility under section 3D of the Act and Regulation SE thereunder, and any person who is amending a pending application.

GENERAL INSTRUCTIONS

1. This Form SBSEF shall be filed with the Commission by any person applying to register with the Commission as a security-based swap execution facility. Upon the filing of an application for registration in accordance with the instructions provided herein, the Commission will publish notice of the filing and afford interested persons an opportunity to submit written data, views, and arguments concerning such application. No application for registration shall be effective unless the Commission, by order, grants such registration.

2. Individuals' names, except the executing signature, shall be given in full (Last Name, First Name, Middle Name).

3. Signatures on all copies of the Form SBSEF filed with the Commission may be executed electronically. If this Form SBSEF is filed by a corporation, it shall be signed in the name of the corporation by a principal officer duly authorized; if filed by a limited liability company, it shall be signed in the name of the limited liability company by a manager or member duly authorized to sign on the limited liability company's behalf; if filed by a partnership, it shall be signed in the name of the partnership by a general partner duly authorized; if filed by an unincorporated organization or association which is not a partnership, it shall be signed in the name of such organization or association by the managing agent (i.e., a duly authorized person who directs or manages, or who participates in the directing or managing of, its affairs).

4. If this Form SBSEF is being filed as an application for registration, all applicable items must be answered in full. If any item is inapplicable, indicate by "none," "not applicable," or "N/A," as appropriate. If this Form SBSEF is being filed as an amendment to an application for registration, only the coversheet and the amended exhibits need to be filed in full.

5. Under section 3D of the Act and the Commission's rules thereunder, the Commission is authorized to solicit the information required to be supplied by this Form SBSEF from any Applicant seeking registration as a security-based swap execution facility. Disclosure by the Applicant of the information specified on this Form SBSEF is mandatory prior to the start of the processing of an application for registration as a security-based swap execution facility. The information provided in this Form SBSEF will be used for the principal purpose of determining whether the Commission should grant or deny registration to an Applicant. The Commission may determine that additional information is required from the Applicant in order to process its application. **A Form SBSEF which is not prepared and executed in compliance with applicable requirements and instructions may be returned as not acceptable for filing. Acceptance of this Form SBSEF, however, shall not constitute a finding that the Form SBSEF has been filed as required or that the information submitted is true, current, or complete**.

6. Except in cases where confidential treatment is requested by the Applicant and granted by the Commission, information supplied on this Form SBSEF will be included routinely in the public files of the Commission and will be available for inspection by any interested person.

APPLICATION AMENDMENTS

1. An Applicant may amend a pending application for registration as a security-based swap execution facility to correct, update, or supplement its initial submission.

2. When filing this Form SBSEF for purposes of amending a pending application, an Applicant shall re-file the Cover Sheet, amended if necessary and including an executing signature, and attach thereto revised Exhibits or other materials marked to show changes, as applicable. The submission of an amendment represents that the remaining items and Exhibits that are not amended remain true, current, and complete as previously filed.

MANNER OF FILING

This Form SBSEF must be filed electronically using the Commission's Electronic Data Gathering, Analysis, and Retrieval ("EDGAR") system. The disclosures required to be included in the following exhibits to Form SBSEF must be provided as an Interactive Data File in accordance with Rule 405 of Regulation S-T (17 CFR 232.405). This requirement does not extend to copies of existing documents:

(1) Exhibit C;
(2) Exhibit D;
(3) Exhibit E;
(4) Exhibit F;
(5) Exhibit H;
(6) Exhibit I (except for any copies of agreements included with the exhibit);
(7) Exhibit J;
(8) Exhibit K;
(9) Exhibit L;
(10) Exhibit P;
(11) Exhibit Q;
(12) Exhibit R; and
(13) Exhibit S.

SECURITIES EXCHANGE COMMISSION

FORM SBSEF

SECURITY-BASED SWAP EXECUTION FACILITY

APPLICATION OR AMENDMENT TO APPLICATION FOR REGISTRATION

COVER SHEET

_____

Exact name of Applicant as specified in charter

_____

Address of principal executive offices

☐ If this is an **APPLICATION** for registration, complete in full and check here.

☐ If this is an **AMENDMENT** to an application, list all items that are amended and check here.

_____

_____

_____

_____

GENERAL INFORMATION

1. Name under which the business of the security-based swap execution facility is or will be conducted, if different from name specified above (include acronyms, if any):

_____

2. If name of security-based swap execution facility is being amended, state previous security-based swap execution facility name:

_____

3. Contact information, including mailing address if different from address specified above:

_____

Number and Street

_____

City State Country Zip Code

_____

Main Phone Number Fax (if applicable)

_____

Website URL Email Address

4. List of principal office(s) and address(es) where security-based swap execution facility activities are/will be conducted:

Office	**Address**
_____	_____
_____	_____
_____	_____

5. If the Applicant is a successor to a previously registered security-based swap execution facility, please complete the following:

a. Date of succession

_____

b. Full name and address of predecessor registrant

_____
Name

_____
Number and Street

_____
City State Country Zip Code

_____
Main Phone Number Website URL

BUSINESS ORGANIZATION

6. Applicant is a:

☐ Corporation
☐ Partnership
☐ Limited Liability Company
☐ Other form of organization (specify) _____

7. Date of incorporation or formation:_____

8. State of incorporation or jurisdiction of organization:_____

9. The Applicant agrees and consents that the notice of any proceeding before the Commission in connection with this application may be given by sending such notice by certified mail to the person named below at the address given.

_____
Print Name and Title

_____
Name of Applicant

_____
Number and Street

_____
City State Zip Code

SIGNATURES

10. The Applicant has duly caused this application or amendment to be signed on its behalf by the undersigned, hereunto duly authorized, this _____ day of _____, 20_____. The Applicant and the undersigned represent hereby that all information contained herein is true, current, and complete. It is understood that all required items and Exhibits are considered integral parts of this Form SBSEF and that the submission of any amendment represents that all unamended items and Exhibits remain true, current, and complete as previously filed.

_____
Name of Applicant

_____
Signature of Duly Authorized Person

_____
Print Name and Title of Signatory

SECURITIES AND EXCHANGE COMMISSION

FORM SBSEF

SECURITY-BASED SWAP EXECUTION FACILITY APPLICATION OR AMENDMENT TO APPLICATION FOR REGISTRATION

EXHIBITS INSTRUCTIONS

The following Exhibits must be filed with the Commission by an Applicant applying for registration as a security-based swap execution facility, or by a registered security-based swap execution facility amending its registration, pursuant to section 3D of the Act and the Commission's rules thereunder. The Exhibits must be labeled according to the items specified in this Form SBSEF.

The application must include a Table of Contents listing each Exhibit required by this Form SBSEF and indicating which, if any, Exhibits are inapplicable. For any Exhibit that is inapplicable, next to the Exhibit letter specify "none," "not applicable," or "N/A," as appropriate.

If the Applicant is a newly formed enterprise and does not have the financial statements required pursuant to Items 9 and 10 (Exhibits I and J) of this Form SBSEF, the Applicant should provide *pro forma* financial statements for the most recent six months or since inception, whichever is less.

LIST OF EXHIBITS

EXHIBITS – BUSINESS ORGANIZATION

1. Attach as **Exhibit A,** the name of any person who owns ten percent (10%) or more of the Applicant's stock or who, either directly or indirectly, through agreement or otherwise, in any other manner, may control or direct the management or policies of the Applicant.

   Provide as part of Exhibit A the full name and address of each such person and attach a copy of the agreement or, if there is none written, describe the agreement or basis upon which such person exercises or may exercise such control or direction.

2. Attach as **Exhibit B,** a list of the present officers, directors, governors (and, in the case of an Applicant that is not a corporation, the members of all standing committees, grouped by committee), or persons performing functions similar to any of the foregoing, of the security-based swap execution facility or of any entity that performs the regulatory activities of the Applicant, indicating for each:

   a. Name
   b. Title
   c. Dates of commencement and termination of present term of office or position
   d. Length of time each present officer, director, or governor has held the same office or position

e. Brief account of the business experience of each officer and director over the last five years
f. Any other business affiliations in the derivatives and securities industry
g. For directors, list any committees on which they serve and any compensation received by virtue of their directorship
h. Whether the person has been subject to a disciplinary action of any type noted in § 242.819(i) of Regulation SE and, if so, describe.

3. Attach as **Exhibit C,** a narrative that sets forth the fitness standards for the governing board and its composition.

4. Attach as **Exhibit D,** a narrative or graphic description of the organizational structure of the Applicant. Include a list of all affiliates of the Applicant and indicate the general nature of the affiliation. If the security-based swap execution facility activities of the Applicant are or will be conducted primarily by a division, subdivision, or other separate entity within the Applicant, describe the relationship of such entity within the overall organizational structure and attach as Exhibit D a description only as it applies to the division, subdivision, or separate entity, as applicable. Additionally, state any jurisdictions in which the Applicant or any affiliated entity is doing business, and its registration status in that jurisdiction, including pending registrations (e.g., jurisdiction, regulator, registration category, date of registration). Provide the address for legal service of process for each jurisdiction, which cannot be a post office box.

5. Attach as **Exhibit E,** a description of the personnel qualifications for each category of professional employees employed by the Applicant or the division, subdivision, or other separate entity within the Applicant, as described in Item 4.

6. Attach as **Exhibit F,** an analysis of staffing requirements necessary to carry out the operations of the Applicant as a security-based swap execution facility and the name and qualifications of each key staff person.

7. Attach as **Exhibit G,** a copy of the constitution; articles of incorporation, formation, or association, with all amendments thereto; partnership or limited liability agreements; and existing by-laws, operating agreement, rules, or instruments corresponding thereto, of the Applicant. Include any additional governance fitness information not included in Exhibit C. Provide a certificate of good standing dated within one week of the date of this Form SBSEF.

8. Attach as **Exhibit H,** a brief description of any material pending legal proceeding(s), other than ordinary and routine litigation incidental to the business, to which the Applicant or any of its affiliates is a party or to which any of its or their property is the subject. For each such proceeding, include the name of the court or agency where the proceeding is pending, the date instituted, the principal parties involved, a description of the factual basis alleged to underlie the proceeding, and the relief sought. Include similar information as to any proceeding known to be contemplated by a governmental agency.

EXHIBITS—FINANCIAL INFORMATION

9. Attach as **Exhibit I:**

a. (i) Balance sheet; (ii) Statement of income and expenses; (iii) Statement of cash flows; and (iv) Statement of sources and application of revenues and all notes or

schedules thereto, as of the most recent fiscal year of the Applicant, or of its parent company, if applicable. If a balance sheet and any statement(s) certified by an independent public accountant are available, that balance sheet and statement(s) should be submitted as Exhibit I.

b. Provide a narrative of how the value of the financial resources of the Applicant is at least equal to a total amount that would enable the Applicant to cover its operating costs for a period of at least one year, calculated on a rolling basis, and whether such financial resources include unencumbered, liquid financial assets (i.e., cash and/or highly liquid securities) equal to at least six months' operating costs.

c. Attach copies of any agreements establishing or amending a credit facility, insurance coverage, or other arrangement evidencing or otherwise supporting the Applicant's conclusions regarding the liquidity of its financial assets.

d. Representations regarding sources and estimates for future ongoing operational resources.

10. Attach as **Exhibit J,** a balance sheet and an income and expense statement for each affiliate of the security-based swap execution facility that also engages in security-based swap execution facility activities or is a national securities exchange as of the end of the most recent fiscal year of each such affiliate.

11. Attach as **Exhibit K,** the following:

a. A complete list of all dues, fees, and other charges imposed, or to be imposed, by or on behalf of the Applicant for its security-based swap execution facility services that are provided on an exclusive basis and identify the service or services provided for each such due, fee, or other charge.

b. A description of the basis and methods used in determining the level and structure of the dues, fees, and other charges listed in paragraph (a) of this item.

c. If the Applicant differentiates, or proposes to differentiate, among its members in the amount of any dues, fees, or other charges imposed for the same or similar exclusive services, describe and indicate the amount of each differential. In addition, identify and describe any differences in the cost of providing such services and any other factors that account for such differentiations.

EXHIBITS—COMPLIANCE

12. Attach as **Exhibit L,** a narrative and any other form of documentation that may be provided under other Exhibits herein, that describes the manner in which the Applicant is able to comply with each Core Principle. Such documentation must include a regulatory compliance chart setting forth each Core Principle and providing citations to the Applicant's relevant rules, policies, and procedures that address each Core Principle. To the extent that the application raises issues that are novel or for which compliance with a Core Principle is not self-evident, include an explanation of how that item and the application satisfy the Core Principles.

13. Attach as **Exhibit M,** a copy of the Applicant's rules and any technical manuals, other guides, or instructions for members, including minimum financial standards for members. Include rules on publication of daily trading information with regards to the requirements of Regulation SBSR (§§ 242.900 through 242.909). The Applicant should include an explanation and any other form of documentation that the Applicant thinks will be helpful to its explanation, demonstrating how its rules, technical manuals, other guides, or instructions for members or minimum financial standards for members, as provided in this Exhibit M, help support the security-based swap execution facility's compliance with the Core Principles.

14. Attach as **Exhibit N,** executed or executable copies of any agreements or contracts entered into or to be entered into by the Applicant, including third-party regulatory service provider or member or user agreements that enable or empower the Applicant to comply with applicable Core Principles. Identify: (1) the services that will be provided; and (2) the Core Principles addressed by such agreement.

15. Attach as **Exhibit O,** a copy of any compliance manual and any other document that describes with specificity the manner in which the Applicant will conduct trade practice, market, and financial surveillance.

16. Attach as **Exhibit P,** a description of the Applicant's disciplinary and enforcement protocols, tools, and procedures and, if applicable, the arrangements for alternative dispute resolution.

17. Attach as **Exhibit Q,** an explanation regarding the operation of the Applicant's trading system(s) or platform(s) and the manner in which the system(s) or platform(s) satisfy any Commission rules, interpretations, or guidelines regarding a security-based swap execution facility's execution methods, including the minimum trading functionality requirement in § 242.803 of the Commission's regulations. This explanation should include, as applicable, the following:

    a. For trading systems or platforms that enable members to engage in transactions through an order book:
        (1) How the trading system or platform displays all orders and trades in an electronic or other form, and the timeliness in which the trading system or platform does so;
        (2) How all market participants have the ability to see and have the ability to transact on all bids and offers; and
        (3) An explanation of the trade matching algorithm, if applicable, and examples of how that algorithm works in various trading scenarios involving various types of orders.

    b. For trading systems or platforms that enable members to engage in transactions through a request-for-quote system:
        (1) How a member transmits a request for a quote to buy or sell a specific instrument to no less than three market participants in the trading system or platform, to which all members may respond;
        (2) How resting bids or offers from the Applicant's Order Book are communicated to the requester; and
        (3) How a requester may transact on resting bids or offers along with the responsive orders.

c. How the timing delay described under § 242.815(b) of Regulation SE is incorporated into the trading system or platform.

18. Attach as **Exhibit R,** a list of rules prohibiting specific trade practices.

19. Attach as **Exhibit S,** a discussion of how trading data will be maintained by the security-based swap execution facility.

20. Attach as **Exhibit T,** a list with the name(s) of the clearing agency(ies) that will clear the Applicant's trades, and a representation that clearing members of that organization will be guaranteeing such trades.

21. Attach as **Exhibit U,** any information (described with particularity) included in the application that will be subject to a request for confidential treatment pursuant to Securities Exchange Act Rule 24b-2, 17 CFR 240.24b-2.

APPENDIX B—Cover Sheet and Instructions for Rule and Product Submissions

SECURITY-BASED SWAP EXECUTION FACILITY

SUBMISSION COVER SHEET

IMPORTANT: Check box if Confidential Treatment is requested ☐

Name of Security-Based Swap Execution Facility:_____

Platform ID of Security-Based Swap Execution Facility: _____

Filing Date (mm/dd/yy): _____

Filing Description (See Instructions):_____

SPECIFY FILING TYPE Please note only ONE choice allowed per Submission.

Rules and Rule Amendments (except where relating to product terms and conditions – see below)

☐ Self-Certification Rule 807(a)
☐ Approval Rule 806(a)
☐ Notification Rule 807(d)

Rule Numbers: _____

New Product Please note only ONE product per Submission.
☐ Self-Certification Rule 804(a)
☐ Approval Rule 805(a)

Official Product Name: _____

Please check the following box if you intend to submit a request for a joint interpretation from the Commission and the Commodity Futures Trading Commission regarding whether the new product is a swap, security-based swap, or mixed swap pursuant to Rule 3a68-2 under the Securities Exchange Act: ☐

Product Terms and Conditions (product-related Rules and Rule Amendments)

☐ Certification Rule 807(a)
☐ Certification – Made Available to Trade Determination Rule 816(a)
☐ Delisting (No Open Interest) Rule 807(a)
☐ Approval Rule 806(a)
☐ Approval – Made Available to Trade Determination Rule 816(a)
☐ Notification Rule 807(d)

Official Name(s) of Product(s) Affected:_____

Rule Numbers: _____

Submission Cover Sheet and Instructions for Rule and Product Filings

(a) A properly completed submission cover sheet shall accompany all rule and product submissions submitted electronically to the Commission by a security-based swap execution facility using the EFFS system. A properly completed submission cover sheet shall include all of the following:

(1) *Organization*. The name of the security-based swap execution facility filing the submission.

(2) *Date*. The date of the filing.

(3) *Type of Filing*. An indication as to whether the filing is a new rule, rule amendment, or new product. The security-based swap execution facility should check the appropriate box to indicate the applicable category under that heading.

(4) *Rule Numbers*. For rule filings, the rule number(s) being adopted or modified in the case of rule amendment filings.

(5) *Description*. For rule or rule amendment filings, a description of the new rule or rule amendment, including a discussion of its expected impact on the security-based swap execution facility, its members, and the overall market. The narrative should describe the substance of the submission with enough specificity to characterize all material aspects of the filing.

(b) *Other Requirements*. A submission shall comply with all applicable filing requirements for proposed rules, rule amendments, or products. The filing of the submission cover sheet does not obviate the security-based swap execution facility's responsibility to comply with applicable filing requirements (e.g., rules submitted for Commission approval under Rule 806 must be accompanied by an explanation of the purpose and effect of the proposed rule along with a description of any substantive opposing views).

(c) Checking the box marked "confidential treatment requested" on the submission cover sheet does not obviate the submitter's responsibility to comply with all applicable requirements for requesting confidential treatment in Securities Exchange Act Rule 24b-2, 17 CFR 240.24b-2, and will not substitute for notice or full compliance with such requirements.

[FR Doc. 2023–24587 Filed 12–14–23; 8:45 am]

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