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Presidential Documents

Title 3—

The President

Proclamation 10687 of December 15, 2023

Wright Brothers Day, 2023

By the President of the United States of America

A Proclamation

One hundred twenty years ago on the sand dunes of Kitty Hawk, North Carolina, two brothers forever changed the course of history. Wilbur and Orville Wright achieved one of the most transformative technological advancements in the history of humankind: the first-ever sustained, controlled, and powered flight. This Wright Brothers Day, we honor Wilbur and Orville's quintessentially American spirit of innovation and ingenuity, and we celebrate their enduring legacy as pioneers who took our Nation to new heights.

On December 17, 1903, after years of arduous research, meticulous designs, and dangerous trials, Wilbur and Orville launched the Wright Flyer. Twelve seconds and 120 feet later, the brothers had achieved controlled flight. Their feat propelled our Nation forward, accelerating advancements in aeronautics and bringing us closer to unlocking the full potential of humanity. Through their determination and bold vision, the Wright Brothers laid the foundations for some of the greatest technological developments on record—from breaking the sound barrier and stepping foot on the moon to flying a helicopter on Mars and launching deep-space telescopes that are answering some of the fundamental questions of the universe. The legacy of the Wright brothers lives on through the talents and spirits of today's American dreamers and doers.

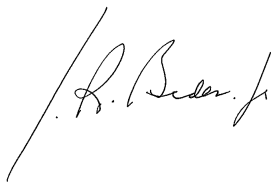
Most of all, Wilbur and Orville's advancement led to a new American innovation: modern air travel. My Administration is committed to preserving and investing in this legacy by enhancing safety and comfort from takeoff to landing. Through the Bipartisan Infrastructure Law, we are improving airport infrastructure across the country—expanding capacity at airport terminals, increasing energy efficiency, and making air travel more accessible for people with disabilities—all while creating good jobs across our Nation.

I have often said that America can be defined in one word: possibilities. This Wright Brothers Day, let us recognize these two courageous brothers from Dayton, Ohio, for reminding us what we can accomplish when we work together to reach our loftiest dreams and tackle our greatest challenges. May we recommit to carrying forward their bold spirit of creativity and cooperation as we forge a better future for all.

The Congress, by a joint resolution approved December 17, 1963, as amended (77 Stat. 402; 36 U.S.C. 143), has designated December 17 of each year as ''Wright Brothers Day'' and has authorized and requested the President to issue annually a proclamation inviting the people of the United States to observe that day with appropriate ceremonies and activities.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, do hereby proclaim December 17, 2023, as Wright Brothers Day.

IN WITNESS WHEREOF, I have hereunto set my hand this fifteenth day of December, in the year of our Lord two thousand twenty-three, and of the Independence of the United States of America the two hundred and forty-eighth.



[FR Doc. 2023–28169
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FEDERAL RESERVE SYSTEM

12 CFR Part 228

[Regulation BB; Docket No. R–1826]

RIN 7100–AG 73

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 345

RIN 3064–AF98

Community Reinvestment Act Regulations Asset-Size Thresholds

AGENCY: Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC).

ACTION: Joint final rule; technical amendment.

SUMMARY: The Board and the FDIC (collectively, the Agencies) are amending their Community Reinvestment Act (CRA) regulations to adjust the asset-size thresholds used to define ''small bank'' and ''intermediate small bank.'' As required by the CRA regulations, the adjustment to the threshold amount is based on the annual percentage change in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI–W).

DATES: Effective January 1, 2024.

FOR FURTHER INFORMATION CONTACT:

Board: Amal S. Patel, Senior Counsel, (202) 912–7879, Division of Consumer and Community Affairs; or Sumeet Shroff, Counsel, (202) 973–5085, Legal Division, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551. For users of Telecommunications Device for the Deaf (TDD) and TTY–TRS, please call 711 from any telephone, anywhere in the United States.

FDIC: Patience R. Singleton, Senior Policy Analyst, Supervisory Policy Branch, Division of Depositor and Consumer Protection, (202) 898–6859, *psingleton@fdic.gov;* or Sherry A. Betancourt, Counsel, (202) 898–6560, *sbetancourt@fdic.gov,* or Alys V. Brown, Senior Attorney, (202), 898–3565, *alybrown@fdic.gov,* Legal Division, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

Background and Description of the Joint Final Rule

The Agencies' CRA regulations establish CRA performance standards for small and intermediate small banks. The CRA regulations define small and intermediate small banks by reference to asset-size criteria expressed in dollar amounts, and they further require the Agencies to publish annual adjustments to these dollar figures based on the year-to-year change in the average of the CPI–W, not seasonally adjusted, for each 12-month period ending in November, with rounding to the nearest million. 12 CFR 228.12(u)(2) and 345.12(u)(2). This adjustment formula was first adopted for CRA purposes by the Board, the Office of the Comptroller of the Currency (OCC), and the FDIC on August 2, 2005, effective September 1, 2005. 70 FR 44256 (Aug. 2, 2005). At that time, the Agencies noted that the CPI–W is also used in connection with other Federal laws, such as the Home Mortgage Disclosure Act. *See* 12 U.S.C. 2808; 12 CFR 1003.2. On March 22, 2007, and effective July 1, 2007, the former Office of Thrift Supervision (OTS), the agency then responsible for regulating savings associations, adopted an annual adjustment formula consistent with that of the other Federal banking agencies in its CRA rule previously set forth at 12 CFR part 563e. 72 FR 13429 (Mar. 22, 2007).

Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),[1] effective July 21, 2011, CRA rulemaking authority for Federal and State savings associations was transferred from the OTS to the OCC, and the OCC subsequently republished, at 12 CFR part 195, the CRA regulations applicable to those institutions.[2] In addition, the Dodd-Frank Act transferred responsibility for supervision of savings and loan holding companies and their non-depository subsidiaries from the OTS to the Board, and the Board subsequently amended its CRA regulation to reflect this transfer of supervisory authority.[3]

The OCC has determined that it will adjust the asset-size criteria for institutions that are subject to OCC-issued CRA regulations, including national banks and Federal and State savings associations, by a means separate from this rulemaking process.

The threshold for small banks was revised most recently in December 2022 and became effective January 1, 2023. 87 FR 78829 (Dec. 23, 2022). The current CRA regulations provide that banks that, as of December 31 of either of the prior two calendar years, had assets of less than $1.503 billion are small banks. Small banks with assets of at least $376 million as of December 31 of both of the prior two calendar years and less than $1.503 billion as of December 31 of either of the prior two calendar years are intermediate small banks. 12 CFR 228.12(u)(1) and 345.12(u)(1). This joint final rule revises these thresholds.

During the 12-month period ending November 2023, the CPI–W increased by 4.06 percent. As a result, the Agencies are revising 12 CFR 228.12(u)(1) and 345.12(u)(1) to make this annual adjustment. Beginning January 1, 2024, banks that, as of December 31 of either of the prior two calendar years, had assets of less than $1.564 billion are small banks. Small banks with assets of at least $391 million as of December 31 of both of the prior two calendar years and less than $1.564 billion as of December 31 of either of the prior two calendar years are intermediate small banks. The Agencies also publish current and historical asset-size thresholds on the website of the Federal Financial Institutions Examination Council at *https://www.ffiec.gov/cra/.*

Administrative Procedure Act and Effective Date

Under 5 U.S.C. 553(b)(B) of the Administrative Procedure Act (APA), an agency may, for good cause, find (and incorporate the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

[1] Public Law 111–203, 124 Stat. 1376 (2010).

[2] *See* OCC interim final rule, 76 FR 48950 (Aug. 9, 2011).

[3] *See* Board interim final rule, 76 FR 56508 (Sept. 13, 2011).

The amendments to the regulations to adjust the asset-size thresholds for small and intermediate small banks result from the application of a formula established by a provision in the respective CRA regulations that the Agencies previously published for comment. *See* 70 FR 12148 (Mar. 11, 2005), 70 FR 44256 (Aug. 2, 2005), 71 FR 67826 (Nov. 24, 2006), and 72 FR 13429 (Mar. 22, 2007). As a result, §§ 228.12(u)(1) and 345.12(u)(1) of the Agencies' respective CRA regulations are amended by adjusting the asset-size thresholds as provided for in §§ 228.12(u)(2) and 345.12(u)(2).

Accordingly, the Agencies' rules provide no discretion as to the computation or timing of the revisions to the asset-size criteria. For this reason, the Agencies have determined that publishing a notice of proposed rulemaking and providing opportunity for public comment are unnecessary.

The effective date of this joint final rule is January 1, 2024. Under 5 U.S.C. 553(d)(3) of the APA, the required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except, among other things, as provided by the agency for good cause found and published with the rule. Because this rule adjusts asset-size thresholds consistent with the procedural requirements of the CRA rules, the Agencies conclude that it is not substantive within the meaning of the APA's delayed effective date provision. Moreover, the Agencies find that there is good cause for dispensing with the delayed effective date requirement, even if it applied, because their current rules already provide notice that the small and intermediate small asset-size thresholds will be adjusted as of December 31 based on 12-month data as of the end of November each year.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) does not apply to a rulemaking when a general notice of proposed rulemaking is not required. 5 U.S.C. 603 and 604. As noted previously, the Agencies have determined that it is unnecessary to publish a general notice of proposed rulemaking for this joint final rule. Accordingly, the RFA's requirements relating to an initial and final regulatory flexibility analysis do not apply.

Paperwork Reduction Act of 1995

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) states that no agency may conduct or sponsor, nor is the respondent required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The Agencies have determined that this final rule does not create any new, or revise any existing, collections of information pursuant to the Paperwork Reduction Act. Consequently, no information collection request will be submitted to the OMB for review.

Riegle Community Development and Regulatory Improvement Act of 1994

Section 302 of the Riegle Community Development and Regulatory Improvement Act of 1994 (RCDRIA) (12 U.S.C. 4802) requires that each Federal banking agency, in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions (IDIs), consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations.[4] In addition, new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on IDIs generally must take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.[5]

Because the final rule does not impose additional reporting, disclosure, or other requirements on IDIs, section 302 of RCDRIA does not apply. Nevertheless, the requirements of section 302 of RCDRIA, and the administrative burdens and benefits of the final rule, were considered as part of the overall rulemaking process.

Congressional Review Act

FDIC

For purposes of Congressional Review Act, the OMB makes a determination as to whether a final rule constitutes a ''major'' rule.[6] If a rule is deemed a ''major rule'' by the OMB, the Congressional Review Act generally provides that the rule may not take effect until at least 60 days following its publication.[7]

The Congressional Review Act defines a ''major rule'' as any rule that the Administrator of the Office of Information and Regulatory Affairs of the OMB finds has resulted in or is likely to result in—(A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.[8] As required by the Congressional Review Act, the FDIC will submit the final rule and other appropriate reports to Congress and the Government Accountability Office for review.

List of Subjects

12 CFR Part 228

Banks, Banking, Community development, Credit, Federal Reserve System, Investments, Reporting and recordkeeping requirements.

12 CFR Part 345

Banks, Banking, Community development, Credit, Investments, Reporting and recordkeeping requirements.

FEDERAL RESERVE SYSTEM

12 CFR Chapter II

For the reasons set forth in the common preamble, the Board of Governors of the Federal Reserve System amends part 228 of chapter II of title 12 of the Code of Federal Regulations as follows:

PART 228—COMMUNITY REINVESTMENT (REGULATION BB)

■ 1. The authority citation for part 228 continues to read as follows:

Authority: 12 U.S.C. 321, 325, 1828(c), 1842, 1843, 1844, and 2901 *et seq.*

■ 2. In § 228.12, revise paragraph (u)(1) to read as follows:

§ 228.12 Definitions.

* * * * *

(u) * * *

(1) *Definition. Small bank* means a bank that, as of December 31 of either of the prior two calendar years, had assets of less than $1.564 billion. *Intermediate small bank* means a small bank with assets of at least $391 million as of December 31 of both of the prior two calendar years and less than $1.564 billion as of December 31 of either of the prior two calendar years.

* * * * *

[4] 12 U.S.C. 4802(a).

[5] 12 U.S.C. 4802(b).

[6] 5 U.S.C. 801 *et seq.*

[7] 5 U.S.C. 801(a)(3).

[8] 5 U.S.C. 804(2).

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Chapter III

Authority and Issuance

For the reasons set forth in the common preamble, the Federal Deposit Insurance Corporation amends part 345 of chapter III of title 12 of the Code of Federal Regulations to read as follows:

PART 345—COMMUNITY REINVESTMENT

■ 3. The authority citation for part 345 continues to read as follows:

Authority: 12 U.S.C. 1814–1817, 1819–1820, 1828, 1831u and 2901–2908, 3103–3104, and 3108(a).

■ 4. Section 345.12 is amended by revising paragraph (u)(1) to read as follows:

§ 345.12 Definitions.

* * * * *

(u) * * *

(1) *Definition. Small bank* means a bank that, as of December 31 of either of the prior two calendar years, had assets of less than $1.564 billion. *Intermediate small bank* means a small bank with assets of at least $391 million as of December 31 of both of the prior two calendar years and less than $1.564 billion as of December 31 of either of the prior two calendar years.

* * * * *

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

Ann E. Misback,

Secretary of the Board.

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on December 13, 2023.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2023–27934 Filed 12–19–23; 8:45 am]

BILLING CODE 6210–01–P; 6714–01–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 744

[Docket No. 231214–0304]

RIN 0694–AJ49

Additions to the Unverified List

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

ACTION: Final rule.

SUMMARY: The Bureau of Industry and Security (BIS) is amending the Export Administration Regulations (EAR) by adding 13 persons to the Unverified List (UVL). The 13 persons are added to the UVL on the basis that BIS was unable to verify their bona fides. All 13 persons are being added under the destination of the People's Republic of China (China).

DATES: *This rule is effective:* December 19, 2023.

FOR FURTHER INFORMATION CONTACT: Kevin J. Kurland, Deputy Assistant Secretary for Export Enforcement, Phone: (202) 482–4255 or by email at *UVLRequest@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

Background

The UVL, found in supplement no. 6 to part 744 of the EAR (15 CFR parts 730–774), contains the names and addresses of foreign persons who are or have been parties to a transaction, as described in § 748.5 of the EAR, involving the export, reexport, or transfer (in-country) of items subject to the EAR. These foreign persons are added to the UVL because BIS or federal officials acting on BIS's behalf were unable to verify their bona fides (*i.e.,* legitimacy and reliability relating to the end-use and end user of items subject to the EAR) through an end-use check. These checks, such as a pre-license check (PLC) or a post-shipment verification (PSV), cannot be completed satisfactorily for reasons outside the U.S. Government's control.

There are a number of reasons why these checks cannot be completed to the satisfaction of the U.S. Government. Section 744.15(c)(1) of the EAR provides illustrative examples of those circumstances, including reasons unrelated to the cooperation of the foreign party subject to the end-use check. Such examples include: (i) During the conduct of an end-use check, the subject of the check is unable to demonstrate the disposition of items subject to the EAR; (ii) The existence or authenticity of the subject of an end-use check cannot be verified (*e.g.,* the subject of the check cannot be located or contacted); (iii) Lack of cooperation by the host government authority prevents an end-use check from being conducted.

BIS's inability to confirm the bona fides of foreign persons subject to end-use checks raises concerns about the suitability of such persons as participants in future exports, reexports, or transfers (in-country) of items subject to the EAR; it also indicates a risk that such items may be diverted to prohibited end uses and/or end users. Under such circumstances, there may not be sufficient information to add the foreign person at issue to the Entity List under § 744.11 of the EAR. Therefore, BIS may add the foreign person to the UVL.

As provided in § 740.2(a)(17) of the EAR, the use of license exceptions for exports, reexports, and transfers (in-country) involving a party or parties to the transaction who are listed on the UVL is suspended. Additionally, under § 744.15(b) of the EAR, there is a requirement for exporters, reexporters, and transferors to obtain (and maintain a record of) a UVL statement from a party or parties to the transaction who are listed on the UVL before proceeding with exports, reexports, and transfers (in-country) to such persons, when the exports, reexports and transfers (in-country) are not subject to a license requirement. Finally, pursuant to § 758.1(b)(8), Electronic Export Information (EEI) must be filed in the Automated Export System (AES) for all exports of tangible items subject to the EAR where any party to the transaction, as described in § 748.5(d) through (f), is listed on the UVL.

Requests for the removal of a UVL entry must be made in accordance with § 744.15(d) of the EAR. Decisions regarding the removal or modification of a UVL entry will be made by the Deputy Assistant Secretary for Export Enforcement, based on a demonstration by the listed person of their bona fides.

Additions to the UVL

This rule adds 13 persons to the UVL by amending supplement no. 6 to part 744 of the EAR to include their names and addresses. BIS is adding these persons pursuant to § 744.15(c) of the EAR. This final rule implements the decision to add the following 13 persons located in China to the UVL:

China

- Beijing Jin Sheng Bo Yue Technology Co., Ltd.;
- Beijing Shengbo Xietong Technology Co., Ltd.;
- Fulian Precision Electronics (Tianjin) Co., Ltd.;
- Guangzhou Xinwei Transportation Co., Ltd.;
- Guangzhou Xinyun Intelligent Technology Co., Ltd.;
- Nanning Fulian Fu Gui Precision Industrial Co., Ltd.;
- Ningbo MOOF Trading Co., Ltd.;
- Plexus (Xiamen) Co., Ltd.;
- PNC Systems (Jiangsu) Co., Ltd.;
- Shenzhen Bozhitongda Technologic Co., Ltd.;
- Shenzhen Jia Li Chuang Tech Development Co., Ltd.;
- Shenzhen Jingelang Co., Ltd.; *and*
- Xi'An Yierda Co., Ltd.

Savings Clause

Shipments (1) that are removed from license exception eligibility or that are now subject to requirements in § 744.15 of the EAR as a result of this regulatory action; (2) that were eligible for export, reexport, or transfer (in-country) without a license before this regulatory action; and (3) that were on dock for loading, on lighter, laden aboard an exporting carrier, or en route aboard a carrier to a port of export, on December 19, 2023, pursuant to actual orders, may proceed to that UVL listed person under the previous license exception eligibility or without a license and pursuant to the export clearance requirements set forth in part 758 of the EAR that applied prior to this person being listed on the UVL, so long as the items have been exported from the United States, reexported or transferred (in-country) before January 18, 2024. Any such items not actually exported, reexported or transferred (in-country) before midnight on January 18, 2024, are subject to the requirements in § 744.15 of the EAR in accordance with this regulation.

Rulemaking Requirements

Executive Order Requirements

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

This rule does not contain policies with Federalism implications as that term is defined under Executive Order 13132.

Paperwork Reduction Act Requirements

Notwithstanding any other provision of law, no person is required to respond to, nor is subject to a penalty for failure to comply with, a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number.

The UVL additions contain collections of information approved by OMB under the following control numbers:

- OMB Control Number 0694–0088—Simple Network Application Process and Multipurpose Application Form
- OMB Control Number 0694–0122—Miscellaneous Licensing Responsibilities and Enforcement
- OMB Control Number 0694–0134—Entity List and Unverified List Requests,
- OMB Control Number 0694–0137—License Exemptions and Exclusions.

BIS believes that the overall increases in burdens and costs will be minimal and will fall within the already approved amounts for these existing collections. Additional information regarding these collections of information—including all background materials—can be found at *https://www.reginfo.gov/public/do/PRAMain* by using the search function to enter either the title of the collection or the OMB Control Number.

Administrative Procedure Act and Regulatory Flexibility Act Requirements

Pursuant to Section 1762 of ECRA (50 U.S.C. 4821), this action is exempt from the Administrative Procedure Act (5 U.S.C. 553) requirements for notice of proposed rulemaking and opportunity for public participation.

Further, no other law requires notice of proposed rulemaking or opportunity for public comment for this interim final rule. Because a notice of proposed rulemaking and an opportunity for public comment are not required under the Administrative Procedure Act or by any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable.

List of Subjects in 15 CFR Part 744

Exports, Reporting and recordkeeping requirements, Terrorism.

Accordingly, part 744 of the Export Administration Regulations (15 CFR parts 730 through 774) is amended as follows:

Part 744—END-USE AND END-USER CONTROLS

■ 1. The authority citation for 15 CFR part 744 continues to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 22 U.S.C. 3201 *et seq.;* 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13099, 63 FR 45167, 3 CFR, 1998 Comp., p. 208; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; Notice of November 8, 2022, 87 FR 68015, 3 CFR, 2022 Comp., p. 563; Notice of September 7, 2023, 88 FR 62439 (September 11, 2023).

■ 2. Supplement no. 6 to part 744 is amended under CHINA, PEOPLE'S REPUBLIC OF, by adding entries, in alphabetical order, for the following entities: ''Beijing Jin Sheng Bo Yue Technology Co., Ltd.'', ''Beijing Shengbo Xietong Technology Co., Ltd.'', ''Fulian Precision Electronics (Tianjin) Co., Ltd.'', ''Guangzhou Xinwei Transportation Co., Ltd.'', ''Guangzhou Xinyun Intelligent Technology Co., Ltd.'', ''Nanning Fulian Fu Gui Precision Industrial Co., Ltd.'', ''Ningbo MOOF Trading Co., Ltd.'', ''Plexus (Xiamen) Co., Ltd.'', ''PNC Systems (Jiangsu) Co., Ltd.'', ''Shenzhen Bozhitongda Technologic Co., Ltd.'', ''Shenzhen Jia Li Chuang Tech Development Co., Ltd.'', ''Shenzhen Jingelang Co., Ltd.'', *and* ''Xi'An Yierda Co., Ltd.'' to read as follows:

Supplement No. 6 to Part 744—Unverified List

Country	Listed person and address	**Federal Register** citation
* *	* * *	* * *
CHINA, PEOPLE'S REPUBLIC OF	* * *	* * *
	Beijing Jin Sheng Bo Yue Technology Co., Ltd., Haidian District, Zhi Chun Road, No. 118, Building A, Third Floor, Beijing, 30110, China.	88 FR [INSERT **FEDERAL REGISTER** PAGE NUMBER], 12/20/2023.

Country	Listed person and address	Federal Register citation
	Beijing Shengbo Xietong Technology Co., Ltd., Building 8, Courtyard 6, Haiying Rd, Science City, Fengtai District, Beijing, 100160, China.	88 FR [INSERT **FEDERAL REGISTER** PAGE NUMBER], 12/20/2023.
	* *	* * *
	Fulian Precision Electronics (Tianjin) Co., Ltd., No. 36, North Street, West Zone, Economic & Technological Development Area, Tianjin, 300462, China.	88 FR [INSERT **FEDERAL REGISTER** PAGE NUMBER], 12/20/2023.
	* *	* * *
	Guangzhou Xinwei Transportation Co., Ltd., Unit 214 Building A1, 9 Konggang Avenue Jiuyi Village, Huadu Town, Huadu District, Guangzhou, Guangdong, 519997, China.	88 FR [INSERT **FEDERAL REGISTER** PAGE NUMBER], 12/20/2023.
	Guangzhou Xinyun Intelligent Technology Co., Ltd., No. 30, Liangtian Baoshui Rd, Liangtian Village, Zhongluotan, Guangzhou, 519997, China.	88 FR [INSERT **FEDERAL REGISTER** PAGE NUMBER], 12/20/2023.
	* *	* * *
	Nanning Fulian Fu Gui Precision Industrial Co., Ltd., B Factories Area, Foxconn Nanning Science and Technology Park, No. 51, Tongle Avenue, Nanning, Guangxi 518000, China.	88 FR [INSERT **FEDERAL REGISTER** PAGE NUMBER], 12/20/2023.
	* *	* * *
	Ningbo MOOF Trading Co., Ltd., Room 312, Bldg 3, Chengxi Xintiandi, No. 799 Jucai Rd, Haishu District, Ningbo, China.	88 FR [INSERT **FEDERAL REGISTER** PAGE NUMBER], 12/20/2023.
	* *	* * *
	Plexus (Xiamen) Co., Ltd., No. 6 Xian Xing 2 Road, Xiang Yu Free Trade Zone, Xiamen, Fujian, China.	88 FR [INSERT **FEDERAL REGISTER** PAGE NUMBER], 12/20/2023.
	PNC Systems (Jiangsu) Co., Ltd., No 500 Linyang Road, Qidong Economic Development Zone, Qidong, 226299, China.	88 FR [INSERT **FEDERAL REGISTER** PAGE NUMBER], 12/20/2023.
	* *	* * *
	Shenzhen Bozhitongda Technologic Co., Ltd., Rm 802, Shanhuju, Shenzhen, Luohu, 518000, China; *and* No. 3018 Shennan Avenue, Huahang Community, Huaqiangbei Street, Futian District, Shenzhen City, China; *and* No. 3407, Century Plaza, Zhonghang Road, Huaqiangbei Street, Futian District, Shenzhen City, China.	88 FR [INSERT **FEDERAL REGISTER** PAGE NUMBER], 12/20/2023.
	Shenzhen Jia Li Chuang Tech Development Co., Ltd., 27/F, Aolinpike 2 Building, Shangbao Rd, Futian District, Shenzhen, Guangdong, 518034, China.	88 FR [INSERT **FEDERAL REGISTER** PAGE NUMBER], 12/20/2023.
	Shenzhen Jingelang Co., Ltd., Rm 401, Plant 18, New 1#, Jinpeng Industrial Park, Xinxue Community, Bantian Str., Longgang District, Shenzhen, Guangdong, 519997, China.	88 FR [INSERT **FEDERAL REGISTER** PAGE NUMBER], 12/20/2023.
	* *	* * *
	Xi'An Yierda Co., Ltd., Lian Hu Qu, Feng He Lu #251, Xin Yuan Center 1316, Xi'An, Sha'an Xi, 710014, China.	88 FR [INSERT **FEDERAL REGISTER** PAGE NUMBER], 12/20/2023.
* *	* * * * * *	*

Thea D. Rozman Kendler,

Assistant Secretary for Export Administration.

[FR Doc. 2023–27928 Filed 12–19–23; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 1000, 1003, and 1006

[FR–6431–N–01]

Regulatory and Administrative Requirement Flexibilities Available to Native American Programs During CY 2024 and CY 2025 to Tribal Grantees To Assist With Recovery and Relief Efforts on Behalf of Families Affected by Presidentially Declared Disasters

AGENCY: Office of Assistant Secretary for Public and Indian Housing, Department of Housing and Urban Development (HUD).

ACTION: Notification of waivers.

SUMMARY: This document advises the public of waivers and flexibilities from HUD requirements for its Indian Housing Block Grant (IHBG), Indian Community Development Block Grant (ICDBG), and Native Hawaiian Housing Block Grant (NHHBG) grantees located in areas that are covered by Presidentially Declared Disasters (PDDs) declared during Calendar Years 2024 and 2025. A PDD is a major disaster or emergency declared under the Robert T. Stafford Disaster Relief and Emergency Assistance Act that activates an array of Federal programs to assist in the response and recovery efforts. When they occur, disasters and their aftermath impose significant barriers and challenges for housing programs to overcome or operate. To provide relief during such challenging times for its IHBG, ICDBG, and NHHBG grantees, HUD is publishing this standing notification of regulatory and administrative requirement flexibilities to assist affected grantees. Instructions are provided below on how to apply for flexibilities. A grantee may request a waiver or flexibility of a HUD requirement not listed in this document and receive an expedited review of the request if the grantee demonstrates that the waiver or flexibility is needed to assist its disaster relief and recovery efforts.

DATES: This document announces the waivers and flexibilities set out within as of January 1, 2024.

FOR FURTHER INFORMATION CONTACT: Hilary Atkin, Office of Native American Programs, Office of Public and Indian Housing, U.S. Department of Housing and Urban Development, 451 Seventh Street SW, Room 4108, Washington, DC 20410–5000, or email *Hilary.C.Atkin@hud.gov,* phone (202)-402–3427.

SUPPLEMENTARY INFORMATION: This document advises the public of waivers and flexibilities from HUD requirements for its Indian Housing Block Grant (IHBG), Indian Community Development Block Grant (ICDBG), and Native Hawaiian Housing Block Grant (NHHBG) grantees located in areas that are covered by Presidentially Declared Disasters (PDDs) declared during Calendar Years 2024 and 2025. Please note that the waivers and flexibilities in this document do not apply to the various COVID-relief related programs administered by the Office of Native American Programs (IHBG–CARES, IHBG–ARP, ICDBG–CARES, ICDBG–ARP, and NHHBG–ARP) because HUD has issued separate waivers and alternative requirements that apply to those programs, as further outlined in the Implementation and Waiver Notices governing those programs.

I. Flexibilities That Are Available to PDD Tribes, Tribally Designated Housing Entities, and the Department of Hawaiian Home Lands for PDDs Declared in CY 2024 and CY 2025

The following is a list of HUD requirement waivers and flexibilities available for IHBG, ICDBG, and NHHBG grantees located within PDD areas. Grantees may use any of the waivers and flexibilities below to assist their communities in addressing challenges and issues that result from a disaster covered by a PDD declared in CY 2024 and 2025.

A. 24 CFR Part 1000 (IHBG)

1. *Total Development Costs* (24 CFR 1000.156, 1000.158, 1000.160, and 1000.162):

The IHBG regulations at 24 CFR part 1000 require that affordable housing under the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA) be of moderate design with a size and with amenities consistent with unassisted housing offered for sale in the Indian tribe's general geographic area to buyers who are at or below the area median income (AMI). To achieve this requirement the recipient must either adopt written standards for its affordable housing programs that reflect the requirement specified or use total development cost (TDC) limits published periodically by HUD that establish the maximum amount of funds (from all sources) that the recipient may use to develop or acquire/rehabilitate affordable housing. The limits provided by the TDC may not, without prior HUD approval, exceed by more than 10 percent the TDC maximum cost for the project. Non-dwelling structures used to support an affordable housing activity must be of a design, size and with features or amenities that are reasonable and necessary to accomplish the purpose intended by the structures.

Disasters may result in disruptions to supply chains, lead to labor and contractor shortages, and result in overall increases in construction costs. Given this possibility of increased costs of resources and the urgency to rehabilitate homes following a PDD, HUD is waiving the TDC regulatory requirements in 24 CFR 1000.156, 1000.158, 1000.160, and 1000.162 relating to limitations on cost or design standards and TDC with respect to dwelling and non-dwelling units developed, acquired, or assisted with IHBG funding. Under this waiver, an IHBG recipient may exceed the current TDC maximum by 20 percent without HUD review or approval (other than notification by the grantee pursuant to the procedures outlined in Section II of this document). The recipient, however, must maintain documentation that indicates the dwelling units and non-dwelling structures developed, acquired, or assisted with this funding will, after the PDD, be for IHBG-eligible families and the design, size, and amenities are moderate and comparable to housing in the area. The TDC limits can be exceeded by more than 20 percent if the recipient receives written approval from HUD Headquarters. This waiver applies to both single-family and multi-family housing, as well as non-dwelling structures.

2. *Income Verification* (24 CFR 1000.128):

24 CFR 1000.128 requires IHBG recipients to verify that a family is income eligible. Families are required to provide documentation to verify this determination, and a recipient is required to maintain that documentation. Families may be required by the IHBG recipient to periodically verify income after initial occupancy, and the recipient is required to maintain documentation.

As families may be displaced during a PDD and may not have access to their income documentation, HUD is waiving § 1000.128, and allowing the following:

(a) IHBG recipients may deviate from their current written admissions and occupancy policies, and may allow less frequent income recertifications; and

(b) IHBG recipients may carry out intake and other tasks necessary to verify income through alternative means if the IHBG recipient chooses to do so, including allowing income self-certification over the phone (with a written record by the IHBG recipient's staff), or through an email with a self-certification form signed by a family.

3. *Assistance to Middle-Income Families Impacted by a Disaster* (24 CFR 1000.104, 1000.106, 1000.108, and 1000.110):

Generally, Section 201 of NAHASDA and the IHBG regulations at 24 CFR 1000.104, 1000.106, 1000.108, and 1000.110 require that IHBG recipients limit assistance to low-income Native American families, with some exceptions for non-low-income families at 80–100 percent AMI, families over 100 percent of AMI, and essential families under section 201(b)(3) of NAHASDA. Section 201(b)(2) and 24 CFR 1000.110 provide that an IHBG recipient may aid a non-low-income family upon a documented determination by the recipient that there is a need for housing for such family that cannot reasonably be met without such assistance. 24 CFR 1000.110(c) provides that a recipient may use up to 10 percent of the amount planned for the Tribal program year for families whose income falls within 80 to 100 percent of AMI without HUD approval. HUD approval is required if a recipient plans to use more than 10 percent of the amount planned for the Tribal program year for such assistance or to provide housing for families with income over 100 percent of AMI. Finally, 24 CFR 1000.110(d) provides that non-low-income families cannot receive the same benefits provided low-income Indian families. The amount of rental assistance, homeownership assistance, and other assistance that non-low-income families may receive will be determined in accordance with the formula provided in that regulation.

Disasters may devastate and displace Native American families in a community of all incomes, make housing uninhabitable, damage community infrastructure, and result in a loss of life and property. IHBG recipients may find it in the public interest to aid non-low-income families that are displaced due to a disaster, including by using IHBG funds to provide such assistance as temporary rental assistance to otherwise ineligible families in IHBG-assisted housing owned or operated by the recipient, housing such families in hotels/motels, and similar facilities, providing such families with necessary relocation assistance, and more. To help alleviate the impact of PDDs on Tribal communities, HUD is waiving 24 CFR 1000.104, 1000.106, 1000.108, and 1000.110 to the extent necessary to allow for the following flexibilities:

(a) IHBG recipients in areas covered by PDDs may exceed the 10 percent cap on serving Native American families whose income falls within 80 to 100 percent of AMI without HUD approval, provided the recipient decides that the families are impacted by the disaster and that there is a need for housing for such family that cannot reasonably be met without such assistance.

(b) IHBG recipients in areas covered by PDDs may provide IHBG assistance to middle-income Native American families whose income is at or below 120 percent of AMI without HUD approval, provided the recipient decides that the families are impacted by the disaster and that there is a need for housing for such family that cannot reasonably be met without such assistance.

In all cases, assistance to these non-low-income families must still comply with limits on assistance specified in 24 CFR 1000.110(d). Additionally, all assistance must be temporary in nature. For instance, such families may receive temporary rental assistance that is time-limited pursuant to the recipient's policies but may not receive permanent tenant-based rental assistance with no specified end date. IHBG recipients must ensure that IHBG assistance provided does not result in a duplication of benefits. For example, IHBG recipients should not pay for costs that are already covered by private insurance or other Federal, State, or Tribal funds or programs. Finally, when providing this assistance, IHBG recipients must also maintain records documenting that all these criteria were met at the time that such assistance was provided.

B. 24 CFR Part 1003 (ICDBG)

1. *Purchasing Equipment* (24 CFR 1003.207(b)(1)(i)):

The purchase of equipment with ICDBG funds is generally ineligible under 24 CFR 1003.207(b)(1)(i), with some exceptions. Given the immediate need for certain equipment to carry out ICDBG-eligible activities related to disaster recovery, such as construction equipment necessary for clearance, construction, rehabilitation, and other recovery efforts in the aftermath of a PDD, HUD is waiving 24 CFR 1003.207(b)(1)(i) and authorizing the use of ICDBG funds for the purchase of equipment necessary to carry out ICDBG-eligible activities that assist with clearance, rehabilitation, construction, and other uses related to housing, public facilities, improvements, and works, and other disaster-recovery related purposes. Equipment must be used for authorized program purposes, and any proceeds from the disposition of equipment will be considered ICDBG program income. HUD may issue further guidance in the future on the disposition of program income after grant closeout.

2. *Emergency Payments for Up to Six Months* (24 CFR 1003.207(b)(4)):

Under 24 CFR 1003.207(b)(4), the general rule is that ICDBG funds may not be used for income payments. For purposes of the ICDBG program, income payments mean a series of subsistence-type grant payments made to an individual or family for items such as food, clothing, housing (rent or mortgage), or utilities. However, ICDBG may be used to make emergency payments over a period of up to three months to the provider of such items or services on behalf of an individual or family.

Low- and moderate-income families impacted by disasters may have an immediate need for short-term rental assistance, mortgage assistance, utility assistance, food, clothing, and similar services.

To provide additional relief to families impacted by disasters, HUD is waiving 24 CFR 1003.207(b)(4) to the extent necessary to allow ICDBG grant funds to be used to provide emergency payments for low- and moderate-income individuals or families impacted by a PDD. These grant funds may be used for items such as food, medicine, clothing, and other necessities, as well as rental, mortgage, and utility assistance, without regard for the three-month limitation in 24 CFR 1003.207(b)(4), but for a period not to exceed six months, unless further approved in writing by HUD on a case-by-case basis.

ICDBG grantees may establish lines of credit with third party providers (*e.g.,* grocery stores) on behalf of specific beneficiary families, provided all expenses can be properly documented and all ICDBG funds used for this purpose are expended on eligible activities. In all cases, ICDBG grantees must ensure that proper documentation is maintained to ensure that all costs incurred are eligible. ICDBG grantees using this waiver flexibility must document, in their policies and procedures, how they will determine the necessary and reasonable amount of assistance to be provided.

C. 24 CFR Part 1006 (NHHBG)

1. *Assistance to Middle-Income Families Impacted by Disaster* (24 CFR 1006.301(a)):

24 CFR 1006.301(a) describes families eligible for NHHBG assistance as low-income Native Hawaiian families who are eligible to reside on the Hawaiian homelands. Section 809(a)(2) of NAHASDA limits assistance for families who are not low-income to homeownership activities, as approved

by HUD, to address a housing need that cannot be reasonably met without that assistance. Section 1006.301(d) requires the Department of Hawaiian Home Lands (DHHL) to have written policies governing eligibility, admission, and occupancy of families for NHHBG-assisted housing.

Disasters may devastate and displace Native Hawaiian families in a community of all incomes, make housing uninhabitable, damage community infrastructure, and result in loss of life and property. DHHL may find it in the public interest to aid non-low-income families that are displaced due to a disaster by using NHHBG funds to provide such assistance as temporary mortgage assistance, temporary rental assistance on or off the Hawaiian home lands, housing such families in hotels, motels, or similar facilities, providing such families with necessary relocation assistance, and more. To help alleviate the impact of PDD on Native Hawaiian communities, HUD is waiving 24 CFR 1006.301(a) to allow DHHL more flexibility to provide NHHBG assistance to families that are middle income (defined as 120 percent of AMI), provided the assistance is for homeownership activities (which may include short-term rental assistance to displaced homeowners), is temporary in nature, and DHHL determines that the families are impacted by the disaster and that there is a need for housing for such family that cannot reasonably be met without such assistance.

Under this waiver, Native Hawaiian families impacted by PDD can automatically be served provided their household income does not exceed 120 percent of AMI, there is no duplication of benefits, and all eligible criteria in this waiver are met. All assistance must be temporary in nature. For instance, such families may receive temporary rental assistance that is time-limited pursuant to DHHL's policies but may not receive permanent tenant-based rental assistance with no specified end date. DHHL must ensure that NHHBG assistance provided does not result in a duplication of benefits. For example, DHHL should not pay for costs that are already covered by private insurance or other Federal or State funds or programs. Further, when providing this assistance, DHHL must maintain records documenting that all these criteria were met at the time that such assistance was provided. HUD encourages DHHL to update its written policies to allow middle-income Native Hawaiian families who are impacted by disasters covered by a PDD to be considered eligible for NHHBG homeownership assistance and include a definition for 'temporary' assistance.

2. *Income Verification* (24 CFR 1006.320):

24 CFR 1006.320 requires DHHL to have written policies regarding tenant and homebuyer selection and criteria related to eligibility for NHHBG assistance. Many families whose homes were damaged or destroyed by the disaster may not have any documentation of income. DHHL may modify its policy and procedures to streamline any income verification and documentation requirements for families impacted by PDDs. This may include allowing income self-certification over the phone (with a written record by the DHHL's staff), or through an email with a self-certification form signed by a family. This waiver applies only to families impacted by PDDs whose income documentation was destroyed or made difficult to access by the disaster.

II. Instructions

To use the waivers or flexibilities, grantees must provide notification in writing, preferably by email, to the Administrator in the *Office of Native American Programs (*ONAP) Area Office serving their area before the grantee anticipates using the waiver or flexibility. Grantees can find their ONAP office at *https://www.hud.gov/program_offices/public_indian_housing/ih/codetalk/onap/map/nationalmap*. The written notification should include the following details:

- Requestor's Tribe/Tribally Designated Housing Entity (TDHE)/DHHL, name, title, and contact information.
- Presidentially declared major disaster area(s) where the waivers will be used.
- Date on which the grantee anticipates the first use of the waiver or flexibility, and its expected duration (which must include a specific end date), and
- A list of the waivers and flexibilities the grantee will use.

III. Exceptions

An IHBG, ICDBG, or NHHBG grantee in a PDD may request an exception of a HUD requirement not listed in Section I of this document. HUD will only consider such exception requests subject to statutory limitations and pursuant to 24 CFR 5.110. HUD will not approve a recipient's request to waive or be granted a flexibility for an existing fair housing or civil rights obligation.

IV. Period of Use for Waivers and Flexibilities

Waivers and flexibilities provided in this document will remain available to grantees provided a grantee is using the waivers or flexibilities in response to a PDD declared in CY 2024 or 2025 or as part of the recovery process effort for such PDD. HUD recommends that grantees clearly document the need for each waiver and flexibility in their records and ensure that a specific time period for which the grantee will use the waivers and flexibilities that the grantee specifies in its written notification to HUD, described in Section II of this document, is reasonably set and ties back to the response and recovery effort. If a grantee finds a need to extend the period for which it will use a waiver or flexibility beyond the end date initially set by the grantee in its initial written notification to aid in its ongoing recovery effort, the grantee should send HUD written notification of its intent to extend the end date. The request must also demonstrate to HUD's satisfaction that the new time period is reasonably set and ties back to the response and recovery effort.

V. Finding of No Significant Impact

A Finding of No Significant Impact (FONSI) with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)).

The FONSI is available for public inspection between 8 a.m. and 5 p.m. Eastern Time weekdays in the Regulations Division, Office of General Counsel, U.S. Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, an advance appointment to review the docket file must be scheduled by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, or who have speech and other communication disabilities may use a relay service to reach the Regulations Division. To learn more about how to make an accessible telephone call, visit the web page for Federal Communications Commission at *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

VI. Paperwork Reduction Act

The information collections referenced in this document have been approved by OMB pursuant to the Paperwork Reduction Act under, OMB Control Number 2577–0292.

Richard J. Monocchio,

Principal Deputy Assistant Secretary for Public and Indian Housing.

[FR Doc. 2023–27724 Filed 12–19–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9979]

RIN 1545–BQ81

Additional Guidance on Low-Income Communities Bonus Credit Program; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final rule; correction and correcting amendments.

SUMMARY: This document contains corrections to Treasury Decision 9979, which was published in the **Federal Register** for Tuesday, August 15, 2023. Treasury Decision 9979 issued final regulations relating to the application of the low-income communities bonus credit program for the energy investment credit established pursuant to the Inflation Reduction Act of 2022.

DATES: These corrections are effective on December 20, 2023, and applicable on August 15, 2023.

FOR FURTHER INFORMATION CONTACT: Whitney Brady at (202) 317–6853 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The final regulations (TD 9979) that are the subject of this correction are under section 48(e) of the Code.

Corrections to Publication

Accordingly, the final regulations (TD 9979) that are the subject of FR Doc. 2023–17078, appearing on page 55506 in the **Federal Register** published on August 15, 2023, are corrected as follows:

1. On page 55519, in the third column, the heading ''VII. Annual Capacity Limitation'' is corrected to read ''*VII. Annual Capacity Limitation*''.

2. On page 55522, in the first column, second full paragraph, the last line is corrected to read, ''applicants in Category 4.''.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Corrections to the Regulations

Accordingly, 26 CFR part 1 is corrected by making the following correcting amendments:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

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

■ **Par. 2.** Section 1.48(e)–1 is amended:

■ a. In the first sentence of paragraph (h)(1) by removing the language ''paragraph (b)'' and adding the language ''paragraph (b)(2)'' in its place.

■ b. By revising the heading for paragraph (h)(2)(ii)(B).

The revision reads as follows:

§ 1.48(e)–1 Low-Income Communities Bonus Credit Program.

* * * * *

(h) * * *

(2) * * *

(ii) * * *

(B) *Partnership.* * * *

* * * * *

Oluwafunmilayo A. Taylor,

Section Chief, Publications & Regulations Section, Associate Chief Counsel, (Procedure and Administration).

[FR Doc. 2023–27933 Filed 12–19–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF JUSTICE

Bureau of Prisons

28 CFR Part 543

[BOP–1180–I]

RIN 1120–AB80

Federal Tort Claims Act—Technical Changes; Correction

AGENCY: Bureau of Prisons, Justice.

ACTION: Correcting amendment.

SUMMARY: In this document, the Bureau of Prisons (Bureau) corrects inadvertent errors and omissions in its regulations caused by errors in the interim final rule titled ''Federal Tort Claims Act—Technical Changes'' published in the **Federal Register** on November 7, 2023.

DATES: This correcting amendment is effective December 20, 2023.

FOR FURTHER INFORMATION CONTACT: Daniel J. Crooks III, Assistant General Counsel/Rules Administrator, at Legislative & Correctional Issues Branch, Office of General Counsel, Bureau of Prisons, 320 First Street NW, Washington, DC 20534 or at (202) 353–4885.

SUPPLEMENTARY INFORMATION:

Need for Correction

On November 7, 2023, the Bureau published an interim final rule (IFR) in the **Federal Register** at 88 FR 76656 that made technical changes to how the Bureau processes Federal Tort Claims Act (FTCA) claims. This document corrects inadvertent errors and omissions in its regulations caused by errors in that rule.

First, this document revises the headings of two paragraphs in § 543.31 to conform with the statement-like form of other paragraph headings we amended in the IFR. Thus, the heading of § 543.31(a) should be changed from ''Who may file a claim?'' to ''Claimant,'' and the heading of § 543.31(b) should be changed from ''Where do I obtain a form for filing a claim?'' to ''Claim form.''

Second, the third instruction of the IFR revised paragraphs (a) through (d) and (f) of § 543.32. Paragraphs (g) and (h) were missing from that instruction, while they were correctly included in the amendatory language. In addition, the heading to paragraph (e) needs to be changed to conform with the declaratory headings of the other paragraphs. Finally, paragraph (i) needs to be deleted because, with the revisions to the other paragraphs, paragraph (i) is redundant.

List of Subjects in 28 CFR Part 543

Prisoners.

Accordingly, 28 CFR part 543 is corrected by making the following correcting amendments:

PART 543—LEGAL MATTERS

■ 1. The authority citation for part 543 continues to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to Offenses committed after that date), 5039; 28 U.S.C. 509, 510, 1346(b), 2671–80; 28 CFR 0.95–0.99, 0.172, 14.1–11.

■ 2. Amend § 543.31 by revising the section heading and the headings for paragraphs (a) and (b) to read as follows:

§ 543.31 Presenting a claim.

(a) *Claimant.* * * *

(b) *Claim form.* * * *

* * * * *

■ 3. Amend § 543.32 by:

■ a. Revising the heading for paragraph (e) and paragraphs (g) and (h); and

■ b. Removing paragraph (i).

The revisions read as follows:

§ 543.32 Processing the claim.

* * * * *

(e) *Central Office review.* * * *

* * * * *

(g) *Acceptance of settlement.* If you accept a settlement, you give up your right to bring a lawsuit against the United States or against any employee of the government whose action or lack of action gave rise to your claim.

(h) *Response timeline.* Generally, you will receive a decision regarding your claim within six months of when you properly present the claim. If you have not received a letter either proposing a settlement or denying your claim within six months after the date your claim was presented, you may assume your claim is denied. You may then proceed to file a lawsuit in the appropriate United States District Court.

Daniel J. Crooks III,

Assistant General Counsel/Rules Administrator, Federal Bureau of Prisons.

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DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Parts 56, 57, and 77

[Docket No. MSHA–2018–0016]

RIN 1219–AB91

Safety Program for Surface Mobile Equipment

AGENCY: Mine Safety and Health Administration (MSHA), Department of Labor.

ACTION: Final rule.

SUMMARY: The Mine Safety and Health Administration (MSHA or the Agency) is requiring that mine operators develop, implement, and update, periodically or when necessary, a written safety program for surface mobile equipment (excluding belt conveyors) at surface mines and surface areas of underground mines. The written safety program must be developed and updated with input from miners and their representatives. The written safety program must include actions mine operators will take to identify hazards and risks to reduce accidents, injuries, and fatalities related to surface mobile equipment. The final rule offers mine operators flexibility to devise a safety program that is appropriate for their specific mining conditions and operations.

DATES:

Effective date: The final rule is effective January 19, 2024.

Compliance date: Compliance with this final rule is not required until July 17, 2024

FOR FURTHER INFORMATION CONTACT: S. Aromie Noe, Director, Office of Standards, Regulations and Variances, MSHA, at *Noe.Song-Ae.A@dol.gov* (email), 202–693–9440 (voice) or 202–693–9441 (facsimile). These are not toll-free numbers.

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I. Introduction

A. Regulatory Authority

This final rule is issued under section 101 of the Federal Mine Safety and Health Act of 1977 (Mine Act), as amended. 30 U.S.C. 811.

B. Background

A variety of mining equipment is used at surface mines or in surface areas of underground mines. Surface mining vehicles can be very large (many can be several stories tall) and are capable of destroying smaller vehicles that cannot be seen by the vehicle operators. Accidents involving mining equipment are a leading cause of fatalities at mines, although fatalities involving powered haulage equipment, a type of mobile equipment, decreased in 2022.[1] [2] To reduce the number of accidents, injuries and fatalities at mines, MSHA implemented several powered haulage initiatives—for example, conducting safety awareness campaigns, providing powered haulage guidance and technical assistance, and disseminating training materials and best-practices information that addresses powered haulage safety. Despite these efforts, in 2023, machinery (mobile) accidents have still accounted for a significant number of mining fatalities.

On July 20, 2021, for example, MSHA hosted a national ''Stand Down for Safety Day'' to focus on powered haulage accidents and vehicle rollovers to help educate miners, save lives, and prevent injuries.[3] On that day, Mine Safety and Health Enforcement (MSHE) and Educational Field and Small Mine Services (EFSMS) staff visited mines to meet with miners and operators to increase awareness of powered haulage hazards and the need to be familiar with and follow mine-safety best practices.

On February 28, 2022, MSHA announced its ''Take Time, Save Lives'' campaign to remind mine operators to train miners and ensure miners can take their time to prevent accidents and injuries and to save lives.[4] As part of the campaign, mines across the country received a poster to display at mine sites with steps operators and miners can take to stay safe, including actions related to working around powered haulage equipment and wearing seat belts.

In addition, over the years, MSHA has developed a wide variety of mine safety and health materials and has made them available on the Agency's website (*http://www.msha.gov*) and mobile app.[5] These materials are intended to assist trainers and mine operators in promoting a safe and healthy environment, and among other topics, they cover safety topics related to mobile equipment at surface mines. For example, MSHA issued Powered Haulage Equipment Guidance in 2021 intended to help prevent accidents associated with working with, on, or

[1] Accidents at mines are classified by MSHA based on the Agency's ''*Accident Investigation Procedures Handbook,*'' which defines 21 categories of mine-related accidents. Most accidents involving mining equipment are classified under one of two MSHA accident categories—powered haulage accidents or machinery accidents—depending on the type of equipment involved. For more information, please see MSHA Accident Investigation Procedures Handbook, December 2020, Appendix 7, Accident Classifications—available at *https:/arlweb.msha.gov/READROOM/HANDBOOK/PH20-I-4.pdf.*

[2] MSHA Fatality Reports, *https://www.msha.gov/data-and-reports/fatality-reports/search?page=2.*

[3] More information on MSHA's ''Stand Down for Safety Day'' can be found on MSHA's website at *https://blog.dol.gov/2021/07/14/stop-powered-haulage-accidents-stay-alert-stay-alive.*

[4] More information on MSHA's ''Take Time, Save Lives'' campaign can be found on MSHA's website at *https://www.msha.gov/take-time-save-lives.*

[5] MSHA's Miner Safety & Health App gives miners and mine operators instant access to information that can help keep them safe and healthy on the job. The app provides important safety alerts, safety and health best practices that apply to their daily work, information on their rights and responsibilities, and the ability to contact MSHA with a question or to report an accident or hazard. The app is available for free on Android and iPhone mobile devices and can also be found at the respective app stores by searching for ''Miner Safety & Health.'' More information can be found on MSHA's website at *https://www.msha.gov/miner-safety-health-application.*

near powered haulage equipment.[6] MSHA also launched an enforcement initiative focused on powered haulage by issuing guidance on preventing accidents and meeting with mine personnel to emphasize best safety practices and training.

In April 2022, to complement the Agency's awareness initiatives, the Agency implemented an Enhanced Enforcement Program to help improve safety and health in the mining industry. As a part of MSHA's regular inspections, this program focuses on task training and hazard training for customer and contract truck drivers and task training for managers and supervisors who perform mining tasks. For example, MSHA inspectors will observe truck drivers and focus on enforcing existing standards necessary to ensure that they perform tasks in a safe manner at mines.

C. Rulemaking History

As part of its overall effort to improve safety in the use of mining equipment, MSHA published a request for information (RFI) on June 26, 2018, entitled *Safety Improvement Technologies for Mobile Equipment at Surface Mines, and for Belt Conveyors at Surface and Underground Mines* (83 FR 29716). The RFI focused on technologies for reducing accidents involving mobile equipment at surface mines and surface areas of underground mines and belt conveyors at surface and underground mines. The RFI requested information on what types of engineering controls are available, how to implement engineering controls, and how these controls could be used on mobile equipment and belt conveyors to reduce accidents, fatalities, and injuries. MSHA sought information on technologies, controls, and training that provide additional protection from accidents related to mobile equipment operation and working near or around belt conveyors.

To encourage additional public participation, the Agency held six stakeholder meetings and one webinar in August and September 2018. The meetings were held in Birmingham, Alabama; Dallas, Texas; Reno, Nevada; Beckley, West Virginia; Albany, New York; and Arlington, Virginia.

Commenters responding to the RFI supported MSHA's focused efforts to improve miner safety related to the operation of mobile equipment at surface mines and in surface areas of underground mines. Some emphasized the use of technologies to achieve this goal, such as the use of new technologies and the use of current technologies (*e.g.,* collision avoidance systems, collision warning systems, and seat belt warning signals used in automobiles). Others supported the importance of non-technological interventions, such as safety programs, to bring about behavioral and cultural changes. Commenters differed in how technological and non-technological interventions should be implemented. Some commenters noted that the application of engineering controls or technologies needs further review by MSHA and the National Institute for Occupational Safety and Health (NIOSH) before any regulatory changes are made. Other commenters suggested that the use of new technologies has the best outcomes when mine operators and their employees partner with other stakeholders such as NIOSH and equipment manufacturers.

In addition, one commenter underscored the importance of safety culture at a workplace. This commenter observed that mine operators who develop and implement safety programs do so with the goal of preventing injuries, fatalities, and the suffering these accidents cause miners, their families, and their communities. The commenter noted that for these mine operators, preventing harm to their miners is more than just compliance with safety requirements; it reflects a culture of safety. According to the commenter, this culture of safety derives from a commitment to a systematic, effective, and comprehensive approach to safety management at mines with the full participation of miners.

On September 9, 2021, MSHA published the proposed rule, *Safety Program for Surface Mobile Equipment* (86 FR 50496). In addition to information gathered from stakeholders who commented on the RFI, MSHA based the proposed rule on best practices and guidance on workplace safety programs.[7] The comment period closed on November 8, 2021. On December 20, 2021, in response to a public request, MSHA reopened the rulemaking record for additional comments, and the Agency held a virtual public hearing on the proposed rule on January 11, 2022 (86 FR 71860). The comment period closed on February 11, 2022.

MSHA's proposed rule addresses hazards related to surface mobile equipment (except belt conveyors) used at surface mines and surface areas of underground mines. Surface mobile equipment in the proposed rule refers to wheeled, skid-mounted, track-mounted, or rail mounted equipment capable of moving or being moved and any powered equipment that transports people, equipment, or materials, excluding belt conveyors, at surface mines and surface areas of underground mines. Examples of this equipment include bulldozers, front-end loaders, skid steers, excavators, draglines, graders, and haul trucks.

The proposed rule would require a written safety program for operators employing six or more miners. The proposed written safety program would list actions that mine operators would take to identify hazards and reduce risks, develop equipment maintenance and repair schedules, evaluate technologies, and train miners. The proposal would provide mine operators with the flexibility to tailor the written safety program to meet the needs of their operations and unique mining conditions. Under the proposal, mine operators would be required to evaluate and update the written safety program whenever necessary to appropriately manage safety risks associated with their surface mobile equipment.

MSHA received comments on the proposed rule from miners, safety associations, mining associations, mining companies, manufacturers, labor unions, and trade associations. (Public comments and supporting documentation submitted were posted on MSHA's website and at *www.regulations.gov,* along with the transcript from the public hearing.) Commenters supported MSHA's efforts to ensure the safety of all miners from powered haulage accidents. After considering the comments, for the reasons discussed further below, MSHA

[6] More information on MSHA's Powered Haulage Safety Initiative can be found on MSHA's website at *https://www.msha.gov/safety-and-health/safety-and-health-initiatives/powered-haulage-safety*. MSHA's guidance on mitigating and preventing powered haulage equipment accidents, entitled ''Powered Haulage Equipment Safety Guidance,'' can be found on MSHA's website at *https://www.msha.gov/sites/default/files/events/Powered%20Haulage%20Guidance.pdf*.

[7] As part of the proposed rule, MSHA reviewed safety program guidance materials from several types of organizations: (1) consensus standards organizations (*e.g.,* American Society of Safety Professionals (ASSP), Occupational Health and Safety Management Systems, ANSI/ASSP Z10–2012 (R2017); and the International Standards Organization (ISO), Occupational Health and Safety Management Systems—Requirements With Guidance for Use (ISO 45001:2018)); (2) industry organizations (*e.g.,* the National Mining Association's CORESafety and Health Management System); and (3) government agencies (*e.g.,* the Department of Transportation, 49 CFR part 270). The Department of Labor's Occupational Safety and Health Administration (OSHA) also has developed recommended practices for developing safety and health programs (*https://www.osha.gov/shpguidelines/*). 86 FR 50498.

is adopting the proposed rule with modifications. MSHA has addressed comments more fully in the next section, Section II, Section-by-Section Analysis, of this preamble.

II. Section-by-Section Analysis

A. Sections 56.23000, 57.23000, and 77.2100—Purpose and Scope

Final §§ 56.23000, 57.23000, and 77.2100 address the purpose and scope of the final rule. Like the proposal, final §§ 56.23000, 57.23000, and 77.2100 state that the purpose of the safety program is to reduce the accidents, injuries, and fatalities related to the operation of surface mobile equipment, promote and support a positive safety culture, and improve miners' safety at the mine. Unlike the proposal, all mine operators are required to develop, implement, and update a written safety program for surface mobile equipment used at surface mines and surface areas of underground mines. The final rule is changed from the proposal to cover operators with five or fewer miners. After reviewing comments and data, the Agency determined that operators of these mines need to develop a written safety program to address surface mobile equipment at their operations to protect their miners. MSHA intends to provide compliance assistance where necessary.

1. Mines Covered by the Proposal—Mines Employing 6 or More Miners

In the proposal, §§ 56.23000, 57.23000, and 77.2100 would require mine operators with six or more miners to develop a written safety program. In the proposed rule, MSHA also requested comment on potentially requiring mines with five or fewer miners to develop a written safety program. *Safety Program: Surface Mobile Equipment,* 86 FR 50,496, 50,500 (Sept. 9, 2021).

Commenters stated that all mine operators, regardless of the number of miners employed, should be required to have a written safety program and that miners at small operations need the same protections as miners at larger operations. Several commenters stated that, regardless of whether a facility employs one miner or one hundred miners, each individual should be protected equally. One commenter stated that even though data may indicate that serious accidents occur less frequently at smaller operations, all miners and operations should still be covered because the hazards involving surface mobile equipment pose a risk for all miners. Several commenters stated that applying the rule to all mines, regardless of the number of miners employed, will minimize confusion, enhance safety practices, and increase consistency across mines and throughout MSHA enforcement. One commenter stated that the Mine Act does not set a threshold for how many miners must be employed at a mine in order for it to be subject to a standard, and as such, operators with five or fewer miners should not be excluded. Several commenters supported MSHA's goal to minimize the burden on small operations, but they did not believe that a mobile equipment safety program will present an undue economic burden on operators with five or fewer miners if MSHA provides clear guidance regarding what is expected.

In response to comments, MSHA reviewed recent data from 2011 to 2020 on fatalities and injuries and accident investigation reports. Based on that review, MSHA determined that the fatality rate for mines with five or fewer miners is greater than that for larger mines. MSHA found that from 2011 to 2020, the average fatality rates (or fatal incidence rate) per 200,000 working hours were as follows: 0.0227 at mines with 5 or fewer employees; 0.0167 at mines with 6 to 20 employees; 0.0103 at mines with 21 to 100 employees, and 0.0079 at mines with more than 100 employees. See Table II–1.

TABLE II–1—FATALITY RATES (OR FATAL INCIDENCE RATES), 2011–2020

	Mine size (based on all mine employees)			
	5 or fewer employees	6 to 20 employees	21 to 100 employees	101 or more employees
Fatalities at Surface Mines and Surface Areas of Underground Mines (10-year total) [1]	25	65	47	44
Hours worked at Surface Mines and Surface Areas of Underground Mines (10-year total in millions) [2]	220.5	776.9	912.6	1,110.6
Fatal Incidence Rate (or Fatality Rate) per 200,000 Working hours [3]	0.0227	0.0167	0.0103	0.0079

[1] Includes fatalities of miners (including contract miners and office workers) that occurred at surface mines and at surface areas of underground mines.

[2] Includes hours worked by miners (excluding contract miners) at surface mines and at surface areas of underground mines. Does not include hours worked at facilities.

[3] (Number of Fatalities × 200,000)/Hours Worked = Fatality Rate.

Note: Table excludes fatalities and work hours reported at facilities.

Based on the analysis and comments, the final rule requires a written safety program for all mines. MSHA agrees with comments that the Mine Act requires that miners' safety and health must be protected no matter how many employees work at the mine. The Agency concludes that applying the final rule to all mines will provide improved safety for all miners.

MSHA will provide compliance assistance through the Agency's EFSMS staff to all mines. MSHA will also encourage state grantees to focus on providing training to address hazards and risks involving surface mobile equipment in small mining operations. In addition, MSHA will provide assistance to small mine operators in the form of additional training materials, education, technical assistance, and work with mining industry stakeholders as it develops materials and templates to assist mine operators. Also, MSHA is implementing a 6-month delayed compliance date from the effective date to provide mine operators, especially small mine operators, sufficient time to identify and acquire, if necessary, the needed resources to comply with this final rule.

2. Belt Conveyors

The proposed rule did not include belt conveyors in the definition of surface mobile equipment. MSHA received comments on whether to include or exclude belt conveyors from the definition of surface mobile equipment and whether belt conveyors should be covered under this rule. Some commenters stated that belt conveyors should be included in the scope of the rule and that a written safety program

should be developed and implemented to include them. One commenter reviewed accident and injury data and stated that many fatalities are associated with belt conveyers. Several commenters stated that technologies and controls exist that can help prevent accidents, for example: devices that can sense a miner's presence in hazardous locations, properly installed machine guards, and properly locked-out and tagged-out machines undergoing maintenance. According to these commenters, MSHA should require a written safety program for belt conveyors just as it is requiring one for mobile and powered haulage equipment.

Several commenters agreed with MSHA's exclusion of belt conveyors from the proposed rule. The commenters stated that belt conveyors should be addressed separately from powered haulage vehicles because they are very different types of equipment and keeping them separate would increase clarity.

Based on the comments, the final rule, like the proposal, excludes belt conveyors from the definition of surface mobile equipment. Belt conveyors present different safety hazards from those associated with surface mobile equipment. Belt conveyors range from a single belt to a series of belts spanning miles. All conveyor systems have inherent dangers while in motion. Belt conveyor accidents predominantly involve entanglements in equipment whereas accidents related to other mobile equipment involve striking, colliding, falling, or overtravel while the equipment is in operation. MSHA continues to believe that the safety issues surrounding the operation of belt conveyors can be better addressed through existing standards (*e.g.,* §§ 56/57.14107 and 56/57.14112 for moving machine parts and construction and maintenance of guards), best practices, and training. As MSHA does with many other types of mining equipment, the Agency provides training resources to help operators and miners that include best practices for working safely around conveyor systems. These best practices are available on the Agency's website at *http://www.msha.gov.*

3. Underground Areas of Underground Mines

MSHA proposed to require a written safety program for surface mobile equipment at surface mines and surface areas of underground mines. Several commenters stated that all areas of underground mines—meaning both surface and underground areas of underground mines—should be included in the scope of the proposed rule. Commenters stated that powered haulage accidents happen in underground areas of underground mines, not just surface areas. This observation, a commenter pointed out, is based on MSHA accident data. One commenter stated that underground mining equipment should be expressly excluded from the proposed rule even if the equipment is operated on surface areas.

Like the proposal, the final rule applies to surface mobile equipment used at surface mines as well as surface areas of underground mines. Surface mobile equipment being used in underground mines and only brought to the surface for maintenance or repair, for example, is not included in the scope of the final rule.

A large amount of surface mobile equipment operates at many surface mines and surface areas of underground mines, which creates common hazards such as striking, collision, and falling. Surface mobile equipment tends to be complex and large in size (compared to mobile equipment used at underground mines), which generates some unique hazards, such as large blind spots for equipment operators. The final rule applies only to surface mobile equipment.

As is the Agency's practice, MSHA will continue to work with operators and miners in underground mines to deliver training and best practice materials to prevent accidents involving mobile equipment in underground areas and to provide safety protections for miners at these mines.

B. Sections 56.23001, 57.23001, and 77.2101—Definitions

Final §§ 56.23001, 57.23001, and 77.2101 continue to define the terms *responsible person* and *surface mobile equipment* in the same way as defined in the proposed rule.

MSHA proposed to define a *responsible person* as a person with authority and responsibility to evaluate and update a written safety program for surface mobile equipment. MSHA believes that designating a person with authority and responsibility to evaluate and update the safety program as necessary will help ensure the successful development and maintenance of a safety program that addresses and reduces the likelihood of surface mobile equipment hazards at a particular mine. This individual should be able to communicate the operator's commitment to safety and the importance of miners' involvement in the program to prevent or mitigate hazards. The responsible person must communicate the goals of the safety program to all miners. The responsible person will need to have the experience and knowledge about mining conditions, including surface mobile equipment, necessary to evaluate and update the written safety program.

MSHA received comments on this definition. Commenters indicated a preference for removing or redefining the term. Some commenters stated that the definition is redundant and should be deleted, and that operators are already required to designate a responsible person for health and safety purposes. Several commenters discussed the similarities between the responsibilities and liability burdens of the mine operator, as compared to the proposed definition of a responsible person. One commenter stated that the definition should be deleted as it serves no purpose.

Other commenters brought up the feasibility of assigning the duties to a single individual. For example, one commenter stated its view that the proposed rule would require a person that has the knowledge to identify hazards on every piece of mobile equipment, the authority to make high-level financial decisions, and the responsibility for any shortfalls in the program. Still other commenters questioned the consequences of assigning the title of ''responsible person'' to a single individual because that individual could become temporarily or permanently unavailable. One commenter stated that MSHA should amend this language to clearly allow for multiple persons to be designated as a responsible person. In the commenter's view, there are many practical reasons to have additional people in this position. For example, if one designee is out sick, on vacation, or leaves the company, there would still be a designated responsible person on-site.

In response to the comments, the final rule requires that each operator designate at least one responsible person to evaluate and update the written safety program. Under the final rule, the operator can designate one person or multiple persons so long as the designated persons have the authority and responsibility to evaluate and update the written safety program.

In addition, the final rule, like the proposed rule, defines *surface mobile equipment* as wheeled, skid-mounted, track-mounted, or rail-mounted equipment capable of moving or being moved, and any powered equipment that transports people, equipment, or materials, excluding belt conveyors, at surface mines and surface areas of underground mines. This definition is

adapted from the current definition in 30 CFR 56.2 and 57.2 for metal and nonmetal mines: mobile equipment means ''wheeled, skid-mounted, track-mounted, or rail-mounted equipment capable of moving or being moved.''

MSHA received comments on the proposed definition of surface mobile equipment. Several commenters requested that MSHA clarify the type of equipment that would meet the proposed definition. One commenter stated that equipment such as push carts, welding carts, cylinder carts, and basic hand trucks would be subject to the proposed rule. The commenter stated that the rationale to include this type of equipment under the definition is unclear. Another commenter stated that certain skid-mounted equipment such as light towers and substations could be covered unintentionally. Another commenter stated that it is unclear whether small boats, portable crushers, dredges, etc., are included.

Several commenters requested further clarification from MSHA on the types of equipment to be included in the definition. Commenters requested that MSHA provide a finite list of equipment that would be included or exempted from the rule. One commenter suggested that MSHA create a supplementary, clarifying guidance document.

After reviewing all the comments, MSHA concludes that the definition in this final rule is sufficiently clear about what types of surface mobile equipment are subject to a written safety program. Surface mobile equipment excludes any manually powered tools, such as wheelbarrows, hand carts, push carts, welding carts, cylinder carts, basic hand trucks, or dollies for the purposes of this written safety program. This definition is consistent with the currently enforced definition in 30 CFR parts 56 and 57.

C. Sections 56.23002, 57.23002, and 77.2102—Written Safety Program

Final §§ 56.23002(a), 57.23002(a), and 77.2102(a), like the proposal, require each mine operator to develop and implement a written safety program no later than 6 months after the effective date of the final rule. Three issues raised by commenters are discussed below.

1. Independent Contractors

Commenters stated that the proposed rule is unclear as to whether or not contractors are subject to the requirements. Some commenters stated that the proposed rule is silent on whether it covers contractor equipment and how such coverage would be implemented in a practical sense, and one commenter said that this silence would lead to enforcement actions against the mine and/or contractors for inconsistencies in how they would comply with the proposed requirements. Several commenters stated that MSHA should clarify how contractor programs should be integrated with operators' on-site safety programs.

Commenters requested that MSHA clarify that contractors are considered operators, and thus would need to have their own written safety program. Several commenters stated that the definition of ''operator'' in section 3(d) of the Mine Act includes ''any independent contractor performing services or construction'' at a mine. 30 U.S.C. 802(d). Several commenters stated that MSHA's regulations at 30 CFR part 45, which sets forth procedural requirements for independent contractors working at mine sites, state that such requirements exist ''to facilitate implementation of MSHA's enforcement policy of holding independent contractors responsible for violations committed by them and their employees.''

Several commenters stated that it would be untenable to require production operators to account for contractor equipment in their own safety programs. According to the commenters, contractors often have their own equipment and specialized knowledge, so that it would be impractical to require the operator to be responsible for the contractors' equipment.

MSHA's intent in the proposed rule was that an operator would mean ''any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine'' as stated in section 3(d) of the Mine Act. To facilitate implementation of MSHA's enforcement policy with respect to certain independent contractors, MSHA published regulations in 30 CFR part 45 related to the responsibility of independent contractors that met the requirements of part 45.

Consistent with MSHA's part 45 regulations and the Agency's longstanding policy regarding independent contractors, this final rule requires operators, including contractors with a part 45 identification number, to develop and implement a written safety program addressing surface mobile equipment. MSHA has a long history and practice of enforcing its standards and regulations against operators and independent contractors and believes that the industry is familiar with and understands this history and practice. Under this final rule, MSHA will treat operators and part 45 independent contractors consistent with the definition in the Mine Act and the Agency's longstanding history and practice.

MSHA expects that a majority of the Part 45 independent contractors will develop and implement their own written safety programs addressing their surface mobile equipment and follow the site-specific requirements, as necessary, in the operators' written safety programs. In some situations, operators may choose to integrate the independent contractors' written safety programs into their programs. No matter what approach is used, MSHA expects that, in all cases, operators and independent contractors will communicate and coordinate with each other, as appropriate, to ensure that miners' safety and health is protected.

Final §§ 56.23002(b), 57.23002(b), and 77.2102(b), similar to the proposal, require each mine operator, within 6 months after the effective date of the final rule, to designate at least one responsible person to evaluate and update the written safety program. As discussed in the definition section, a responsible person is a person with authority and responsibility to evaluate and update a written safety program for surface mobile equipment.

2. Compliance Date

The final rule implements a 6-month delayed compliance date from the effective date. Commenters provided varying suggestions on the proposed effective date. Some commenters suggested that all mine operators should have an additional 6 to 12 months without receiving citations relating to this rule, for a total of up to 18 months delayed effective date. Another commenter suggested a longer time period for only those mines that meet the Small Business Administration's size standards; therefore, a 6-month delay (as proposed) for larger entities and up to an 18-month delay for smaller entities. Some commenters agreed with MSHA's proposal that 6 months from the effective date of the final rule is sufficient time for operators to develop a written safety program.

The final rule includes a delayed compliance date to allow for development and implementation of the written safety program for surface mobile equipment. After considering comments and reviewing data on accidents, injuries, and fatalities involving surface mobile equipment, MSHA determined that 6 months is a reasonable timeframe for the development and implementation of the safety program for all mines, regardless

of size. MSHA believes that the 6-month time frame gives operators sufficient time to develop a meaningful written safety program, with input from miners and their representatives. MSHA has offered and will continue to offer materials and information that operators can use in developing and implementing a written safety program. MSHA will also work with operators, miners, and their representatives as well as other stakeholders in the mining industry (*e.g.,* contractors) to develop written safety program templates, as well as best practices and guidance on the development, implementation, and evaluation of safety programs.

3. Approval of the Written Safety Program

The proposed rule did not require MSHA approval of the operator's written safety program. Commenters provided their views on whether MSHA should require its approval of operators' written safety programs. Several commenters stated that MSHA's approval of the written safety program is necessary, and that not requiring MSHA approval would lead to inconsistent enforcement by MSHA inspectors. One commenter stated that approval by MSHA should be required because the written safety programs that are developed without MSHA's oversight or approval would be, in the commenter's view, based on the operator's convenience, not the miners' health and safety. One commenter stated that MSHA approval of the operator's program is needed before it is implemented to ensure the adequacy of the individual, site-specific program and to ensure that mine operators have the opportunity to be alerted to any possible deficiencies in their program prior to MSHA approval. One commenter stated that MSHA already approves a number of written programs and plans submitted by mine operators, such as roof control plans, ground control plans, and ventilation plans. The commenter further stated that without MSHA oversight, mine operators will have generic programs that will not be mine-specific or include meaningful participation from miners and their representatives.

Other commenters supported MSHA's proposal that required no Agency approval of written safety programs. One commenter stated that they appreciate MSHA proposing to require a written safety program without the Agency's approval, rather than with the Agency's approval. Another commenter agreed that not requiring approval is a wise decision because it would be burdensome for MSHA to approve tens of thousands of programs.

After considering all comments, MSHA has determined that an operator's written safety program will be appropriately reviewed by MSHA during regular inspections. During the inspection, MSHA will review the written safety program to determine if it reflects actions that identify and address surface mobile equipment hazards at mine sites and to verify whether input from miners and their representatives was sought. This approach will also allow the Agency to ensure that the written safety program addresses hazards identified by mine operators and miners. MSHA will also determine whether the written safety program is adequately evaluated and updated. In light of the Agency's inspection presence, MSHA has determined that Agency approval of the written safety program is not needed.

D. Sections 56.23003, 57.23003, and 77.2103—Requirements for Written Safety Program

Like the proposal, final §§ 56.23003(a), 57.23003(a), and 77.2103(a) list general, performance-based requirements for the written safety program. Under this final rule, an operator's safety program must include four types of actions the operators will take to reduce accidents, injuries, and fatalities and to improve miners' safety. As discussed earlier, this and other provisions in the final rule, unlike the proposed rule, clarify the term ''operator'' or ''operators,'' to be consistent with section 3(d) of the Mine Act.

Several commenters stated that the written safety program requirement is redundant with provisions already required in the CFR and does not provide a new or strategic focus that advances mobile equipment safety. These commenters stated that there are existing regulations in part 56 that require mine operators to identify and correct hazards in all work areas and for all equipment, including surface mobile equipment, such as § 56.18002 on the examination of working places and § 56.14100 on safety defects; examination; and correction of records. One commenter stated that the requirements of this section are redundant with the training requirements already set forth in part 46, and another commenter stated these requirements are redundant with training requirements already set forth in part 48. One commenter requested clarification on the specifics of the documentation requirement for the review and collection of this information. For example, what type of information would meet the requirement, how should it be maintained, for how long would it need to be kept, and how would MSHA evaluate it for compliance? Another commenter also requested additional guidance on the types of safety hazards that should be included. One commenter asked how this requirement could be enforced. Finally, one commenter fully supported the inclusion of this requirement.

After reviewing comments and relevant information, MSHA believes that structuring the final rule to include a performance-based requirement to identify and analyze hazards is more appropriate than a prescriptive requirement. The performance-based approach in the final rule allows operators the flexibility to devise and tailor a safety program that is appropriate for their specific and unique mining conditions and operations. These actions could include review of accident data and information on near misses and any operational or maintenance accidents at their mines. For example, under 30 CFR part 50, mine operators are already required to submit a report of each accident, injury, and illness to MSHA within 10 working days after an accident or occupational injury occurs or an occupational illness is diagnosed. Based on such information and data, mine operators will be able to develop a program that more specifically addresses conditions at their mines; mining equipment, work locations, and tasks at their mine site; and measures to eliminate, prevent, or mitigate identified hazards. Regarding the comment asking how this information should be maintained and for how long it would need to be kept, further discussion of records and inspection requirements is located elsewhere in this preamble under §§ 56.23004, 57.23004, and 77.2104.

1. Sections 56.23003(a)(1), 57.23003(a)(1), and 77.2103(a)(1)

Final §§ 56.23003(a)(1), 57.23003(a)(1), and 77.2103(a)(1), like the proposal, require that the written safety program include actions the operator will take to identify and analyze hazards and reduce the resulting risks related to the movement and operation of surface mobile equipment. Operators are required to identify and analyze hazards relevant to surface mobile equipment and to take actions to reduce the site-specific risks so that their written safety programs can be tailored to their unique mining operations and conditions. Actions that mine operators may take include

enhanced administrative controls such as increased use of signage and procedural changes to tasks that remediate identified hazards. Other actions may include visibility studies to identify inherent blind spot areas around mobile equipment and use of visibility enhancing devices such as flags and additional mirrors to minimize these areas. Mine operators may choose to change traffic patterns, implement dispatchers for certain areas of a mine, and limit or prohibit small vehicular or foot traffic in identified high risk areas.

2. Sections 56.23003(a)(2), 57.23003(a)(2), and 77.2103(a)(2)

Final §§ 56.23003(a)(2), 57.23003(a)(2), and 77.2103(a)(2), like the proposal, require that the written safety program include actions the operator will take to develop and maintain procedures and schedules for routine maintenance and non-routine repairs for surface mobile equipment.

Commenters stated that this requirement is redundant when compared to existing part 56 and part 57 regulations. Likewise, another commenter stated that § 77.404 already addresses the requirements that mobile and stationary machinery and equipment be maintained in safe operating conditions. Another commenter stated that §§ 77.1600–77.1607 includes extensive rules that address loading and haulage, including traffic controls, transportation of persons, berms, inspection and maintenance, and operation.

Another commenter expressed a concern about the ambiguity of the requirement, stating that inspectors may be subjective and issue violations for failure to follow manufacturers' recommendations. Several commenters stated that operators should have additional flexibility when it comes to manufacturers' recommendations. In these commenters' view, manufacturers' recommendations for maintenance and repairs are often not reflective of how the equipment is used at a given operation. A commenter noted that recommendations from the manufacturer are a valuable resource for equipment operators and maintenance personnel, but often are designed to avoid legal challenges rather than maximize safe operation. One commenter requested that this requirement for maintenance and repairs apply to the safe operation of the equipment, rather than all maintenance and repairs in general. Another commenter stated that MSHA should make clear that this section does not require any new maintenance or repair procedures, but requires only that the facility's procedures be reflected (or referenced) in a written program.

Under the final rule, MSHA does not intend for operators to develop new maintenance and repair procedures, unless operators do not have these in place already. Operators may decide to modify existing maintenance and repair procedures based upon newly conducted risk assessment findings. The procedures and schedules for maintenance and repairs for surface mobile equipment developed for the written safety program can reflect or reference the operator's existing procedures and schedules.

3. Sections 56.23003(a)(3), 57.23003(a)(3), and 77.2103(a)(3)

Final §§ 56.23003(a)(3), 57.23003(a)(3), and 77.2103(a)(3), like the proposed rule, require that the written safety program include actions the mine operator will take to identify currently available and newly emerging feasible technologies that can enhance safety and evaluate whether to adopt them. Examples of these technologies could include seat belt interlocks that affect equipment operation when a seat belt is not fastened; seatbelt notification systems that alert management when the seatbelts are not worn; collision warning systems and collision avoidance systems that may prevent accidents by alerting equipment operators to hazards located in blind areas; technologies that use Global Positioning Systems to provide equipment operators with information regarding their location when pushing and dumping material; as well as cameras, curvilinear mirrors, and other vision enhancements (86 FR 50500).

Commenters stated that this requirement is ambiguous, burdensome, and redundant, and should be stricken from the rule. Several commenters stated that: the proposal does not appear to require mine operators to implement newly emerging technologies, and, instead, it appears to require evaluations. They further stated that most mine operators likely already evaluate newly emerging technologies to save money and improve safety. Some commenters were concerned that certain terminology in the proposal is subjective. For example, commenters stated that MSHA needs to elaborate on what types of actions operators should take to ''evaluate'' how ''newly emerging feasible technologies'' would ''enhance'' safety. Other commenters stated that there are many areas of concern related to testing and implementing new technologies into existing equipment, potentially creating safety hazards. Another commenter stated that new technologies often have problems when they are initially developed. For example, the commenter noted that when airbags were first released there were issues causing injuries, and thus they had to be redesigned. Another commenter stated that MSHA should make clear that the rule does not require the adoption of any particular technology but is strictly a requirement that the operator have a procedure to identify and evaluate potentially useful new technology.

After considering all comments, the final rule is unchanged from the proposal, and it requires that the operator identify and evaluate currently available and newly emerging feasible technologies that can enhance safety at the mines. MSHA's intent is that operators consider feasible technologies that are capable of being used successfully at that mine. MSHA recognizes the safety benefits of new and emerging technologies related to surface mobile equipment. MSHA believes that operators can typically determine what types of new or existing technologies that they need to enhance safety at their operations. MSHA will offer educational assistance on currently available and newly emerging technologies in a number of ways, including through EFSMS, industry stakeholders, quarterly stakeholder calls and stakeholder meetings, safety and health training workshops (*e.g.,* Training Resources Applied to Mining (TRAM) and Spring Thaw Training Workshops), guidance documents, and Agency website and mobile app resources. Also, as part of the Agency's compliance assistance efforts, MSHA will work with operators and provide information and technical assistance that will help them identify control options and the use of new technologies to prevent accidents and injuries. MSHA will also encourage its state grantees to focus on providing training to address feasible technologies involving surface mobile equipment in mining operations.

4. Sections 56.23003(a)(4), 57.23003(a)(4), and 77.2103(a)(4)

Final §§ 56.23003(a)(4), 57.23003(a)(4), and 77.2103(a)(4), like the proposal, require that the written safety program include actions the operator will take to train miners and other persons at the mine necessary to perform work to identify and address or avoid hazards related to surface mobile equipment.

Several commenters stated that they already comply with part 46 requirements and that this section is another example of regulatory

redundancy and does not provide a new or strategic focus to advance mobile equipment safety. One commenter suggested that MSHA make clear that the mobile equipment program can refer to other sections of regulations relating to mobile equipment and can incorporate these by reference, for example §§ 46.5(b)(2), 46.6(b)(2), and 46.8(c). Another commenter requested that the Agency disambiguate the language, ''other persons at the mine necessary to perform work,'' by providing more precise language. Otherwise, for training purposes, the language effectively would expand the definition of ''miner'' to all employees.

After reviewing the comments, MSHA clarifies that mine operators will only need to integrate existing training provisions, as applicable, into the written safety program. The Agency previously described the intended audience for site-specific hazard awareness training in the final rule for *Training and Retraining of Miners Engaged in Shell Dredging or Employed at Sand, Gravel, Surface Stone, Surface Clay, Colloidal Phosphate, or Surface Limestone Mines* (64 FR 53080, September 30, 1999). In that final rule, MSHA required that ''. . . hazard awareness training be appropriate for the individual who is receiving it and that the breadth and depth of training vary depending on the skills, background, and job duties of the recipient. For example, it may be appropriate to provide hazard awareness training to customer truck drivers by handing out a card to the drivers alerting them to the mine hazards or directing them away from certain areas of the mine site. More extensive hazard awareness training might be needed for an equipment manufacturer's representative who comes onto mine property to service or inspect a piece of mining equipment. Although this individual may not be on mine property for an extended period, the person's exposure to mine hazards may warrant more training. Appropriate hazard awareness training would typically be more comprehensive for contractor employees who fit the definition of 'miner' because they are engaged in mining operations. These employees receive comprehensive training but also need orientation to the mine site and information on the mining operations and mine hazards.'' (64 FR 53128) Similarly, under this final rule, the written safety program must include the actions that the mine operator will take to train miners and other persons at the mine necessary to perform work to identify and address or avoid hazards related to surface mobile equipment.

Under the final rule, mine operators will need to integrate their existing training procedures for miners and other persons at the mine necessary to perform work into their written safety program to address and avoid hazards related to surface mobile equipment.

5. Sections 56.23003(b), 57.23003(b), and 77.2103(b)

Final §§ 56.23003(b), 57.23003(b), and 77.2103(b), similar to the proposal, require the responsible person to evaluate and update the written safety program for the mine at least annually, or as mining conditions or practices change that may adversely affect the health and safety of miners or other persons, as accidents or injuries occur, or as surface mobile equipment changes or modifications are made. The final rule is clarified in two ways. First, the written program must be evaluated and updated ''at least'' annually. This clarification indicates that an annual evaluation and update is the minimum, and more frequent evaluations and updates of the written safety program must be done, if necessary. Second, the final rule specifies that the evaluation and update must be done when changes in the mining conditions or practices ''may adversely affect the health and safety of miners or other persons.'' MSHA acknowledges that not all changes to mining conditions or practices warrant updates to the written safety program. This is similar to MSHA's existing requirements in §§ 56/57.18002 that require for each working place in metal and nonmetal (MNM) mines an examination to be conducted for conditions that may adversely affect safety or health.

One commenter stated that requiring the responsible person to evaluate and update the written safety program is redundant and already covered by part 56 requirements. Other commenters recommended that the proposed language regarding ''surface mobile equipment changes or modifications'' be removed. The commenters believe that any significant changes in equipment are covered under the provision of ''mining practices'' changing. In their view, this deletion would capture the large-scale changes the Agency intended to cover without including small, insignificant changes. These same commenters also recommended removing the term ''injuries'' from the proposal because most powered haulage injuries cannot meaningfully be addressed in a safety program. The commenters stated that, for example, an equipment operator who slams a finger in the door of a pickup truck or pulls a muscle climbing on or off a loader has sustained a powered haulage injury, but they are not the types of injuries that warrant re-evaluation of the program. The commenters stated that ''accidents,'' however, should be retained and that yearly is a reasonable timeframe to reevaluate the program. Other commenters suggested that MSHA revise the requirement to read: ''evaluate and update the written safety program at least annually or whenever necessary to manage safety risks associated with their surface mobile equipment appropriately.''

Except the clarifications described earlier, this requirement is the same as the proposal. As explained in the previous section, MSHA believes that given the type of authority and responsibility, it is a responsible person who must evaluate and update the written safety program. In addition, as stated in the proposal, best practices shown by NIOSH, OSHA, and other safety standards organizations include ongoing evaluations of workplace activities and processes to address safety proactively and to find and fix hazards before injuries and fatalities happen. Moreover, in response to some commenters recommending that the term injuries be removed from the requirements, MSHA believes that the term is still needed because injuries are an indicator of hazards at mines that could result in further injuries and fatalities. The final rule also clarifies that the written safety program must be evaluated and updated when mining conditions and practices change that may adversely affect the health and safety of miners.

6. Sections 56.23003(c), 57.23003(c), and 77.2103(c)

Final §§ 56.23003(c), 57.23003(c), and 77.2103(c) is a provision that requires operators to consult with miners and their representatives in developing and updating the safety program. These requirements are consistent with existing obligations to consult with miners and representatives and MSHA's long-standing recognition that such consultation is vital for ensuring the efficacy of safety programs. Under existing requirements, operators already must (in many cases) provide miners and miners' representatives the opportunity to comment on or otherwise participate in these existing processes. See, *e.g.,* 30 CFR 46.3(g), 48.23(d) and (j)(1), and 56/57.18002. As these existing processes are expected to be referenced in developing and updating the safety program, miners and their representatives similarly should be

consulted in developing and updating the program. In drafting the proposal, MSHA intended that operators would seek input from miners and their representatives in the development and updating of a meaningful safety program, given their existing involvement with most of the component parts of the program. The proposal also provided that the responsible person ''should be able to communicate the operator's commitment to safety and the importance of miners' involvement in the program to prevent or mitigate hazards.'' 86 FR 50500. In addition, commenters requested that miners and their representatives participate in the development of the written safety program. MSHA includes this provision in the final rule to recognize the comments and to be consistent with the Agency's intent in the proposal and with the Mine Act. In drafting the proposal, consistent with the Agency's long-standing practice and section 2(e) of the Mine Act, MSHA intended that miners would be involved in the development and updating of the program, although it was not discussed in the preamble.

The Mine Act provides miners and their representatives a right to participate in various safety and health activities. Some examples are as follows. Section 2(e) provides that ''the operators of [coal or other] mines with the assistance of the miners have the primary responsibility to prevent the existence of [unsafe and unhealthy] conditions and practices in such mines.'' Section 101(c) provides that the representative of miners may petition the Secretary (of Labor) to ''modify the application of any mandatory safety standard to a coal or other mine if the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard . . .'' Section 103(f) provides that miners' representatives ''be given an opportunity to accompany the Secretary or authorized representative during the physical inspection of any coal or other mine . . .'' Section 103(g)(1) provides a representative of miners or a miner in case there is no representative the ''right to obtain an immediate inspection by giving notice to the Secretary or authorized representative'' that a violation of the Mine Act or its standards, or an imminent danger exists. Section 105(c) provides miners and their representatives the right to file a discrimination complaint with MSHA if they believe they have been discharged, discriminated against, or interfered with for complaining of ''an alleged danger or safety or health violation in a coal or other mine''. Further, as stated by the Senate Committee on Human Resources in keeping with a purpose of the Mine Act: ''If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act.'' S. Rep. No. 95–181, 95th Cong., 1st Sess. at 35 (1977).

Based on MSHA's experience and past practice, and consistent with the statutory intent of the Mine Act, miners and their representatives are involved in many aspects of MSHA's enforcement program and standards. MSHA is persuaded by commenters who stated that for safety programs to be successful, there must be active and meaningful participation from miners. The final rule makes explicit that miners provide input in developing and updating the written safety program.

E. Sections 56.23004, 57.23004, and 77.2104—Record and Inspection

Final §§ 56.23004, 57.23004, and 77.2104 is clarified from the proposed provision. Like the proposal, the final rule requires that the operator make available a copy of the written safety program for inspection by authorized representatives of the Secretary, miners, and their representatives. In response to comments and consistent with the Mine Act that the operator, with the assistance of miners, is primarily responsible for safety and health, the final rule clarifies that miners and their representatives will receive, upon request, a copy of the written safety program at no cost.

Several commenters requested that MSHA provide further clarity on the acceptable formats for delivery of the written safety program. One commenter stated that the proposed rule needs to clarify that the written safety program is to be provided at no cost to miners and their representatives. Another commenter stated that this section should indicate that the written program can be maintained and provided electronically.

The final rule allows operators the flexibility to create the written safety program in any electronic or hard copy format, as long as the written safety program includes the information required by the final rule and can be made available for inspection by the Secretary, miners, and their representatives. Consistent with the Agency's longstanding policy, an operator must provide notice to miners by providing an electronic or hard copy of the written safety program to miners and their representatives, at no cost, upon request.

III. Executive Order 12866 (Regulatory Planning and Review), Executive Order 14094 (Modernizing Regulatory Review), and Executive Order 13563 (Improving Regulation and Regulatory Review)

Under Executive Order (E.O.) 12866 (as amended by E.O. 14094), the Office of Management and Budget (OMB)'s Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and review by OMB. 58 FR 51735, 51741 (1993). As amended by E.O. 14094, section 3(f) of E.O. 12866 defines a ''significant regulatory action'' as a regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $200 million or more; or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, territorial, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the E.O. OIRA has determined that this rule is significant under E.O. 12866, and accordingly it has been reviewed by OMB.

E.O. 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. 76 FR 3821 (2011). E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitative values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

MSHA presents the costs and benefits associated with the final rule. MSHA estimated the costs associated with the final rule's requirements by adding the estimated costs of the following. First, the estimated costs include developing

the written safety program document, including the actions the operators will take to follow better safety procedures and practices, by identifying and analyzing hazards, evaluating currently available and emerging technologies, developing and maintaining maintenance and repair schedules and procedures, and training miners and others to identify and address hazards, and including miners in developing and updating the program. Operators must also provide copies of the written safety program to miners and their representatives upon request. MSHA anticipates that the listing of actions operators will take will enhance existing compliance and improve safety regarding several of the existing requirements (such as training, maintenance and repair, workplace exams) that the program must describe. Second, the estimated costs include updating the written safety program at least annually and under certain circumstances, such as when new equipment is brought to the mine or when accidents or changes in mining conditions or practices occur that may adversely affect the safety and health of miners, and providing copies of the written safety program to miners and their representatives upon request. The first component is a one-time, initial compliance costs in the first year, whereas the second component represents the recurring compliance costs for subsequent years.

This section provides a summary of MSHA's cost and benefit estimates of the final rule. This final rule is estimated to have a 10-year total net benefit of $411 million at a 3 percent discount rate, based on estimated 10-year total benefits of $522 million and estimated 10-year total costs of $111 million. At the 3 percent discount rate, the estimated annualized net benefit is $48.2 million (annualized benefits of $61.3 million and annualized costs of $13.0 million). Supporting materials and data that provide additional details on the methodology used to estimate the costs, benefits, and other required analyses of this rule are included in the standalone Final Regulatory Impact Analysis (FRIA), which has been placed in the rule docket (RIN 1219–AB91, Docket ID No. MSHA–2018–0016) at *https://www.regulations.gov* and is posted on MSHA's website at *https://www.msha.gov.*

A. Mining Industry Profile

A total of 12,434 mines in the U.S. reported their working hours in 2021. Over 301,000 workers worked at those mines. Table III–1 shows which types of mines the miners and other workers worked.

TABLE III–1—MINES AND EMPLOYMENT BY SURFACE OR UNDERGROUND LOCATION IN 2021

Commodity	Location	Mines [1]	Miners	Total mine workers [2]	Contract miners	Total contract workers [2]	Total workers [3]
MNM	Surface Including Facilities	11,236	128,156	149,846	60,120	.....	.....
	Underground	235	18,223	20,712	7,047	.....	.....
	Total	11,471	146,379	170,558	67,167	69,433	239,991
Coal	Surface Including Facilities	750	18,294	19,200	11,887	.....	.....
	Underground	213	21,323	21,916	7,664	.....	.....
	Total	963	39,617	41,116	19,551	20,288	61,404
All Mines	Surface Including Facilities	11,986	146,450	169,046	72,007	.....	.....
	Underground	448	39,546	42,628	14,711	.....	.....
	Total	12,434	185,996	211,674	86,718	89,721	301,395

Source: MSHA MSIS Data (reported on MSHA Form 7000–2), Accessed on April 7, 2022.

Notes: All Miners and workers are calculated using employers' headcount reports; some miners and workers may be counted more than once, as they work at more than one mine.

[1] Of the 12,434 mines, 40 did not have any employment in surface areas; they were thus excluded from the analysis.

[2] Total mine workers and total contract workers include both miners and office/administrative workers.

[3] Total workers include total mine workers and total contract workers.

This final rule applies to all operators of surface mines and underground mines with surface areas, including independent contractors working at those mines. As shown, there were 11,986 surface mines and 448 underground mines. Most underground mines have surface areas where miners work. Of all the mines, about 92 percent were metal and nonmetal mines and the rest were coal mines.

B. Costs

Under the final rule, operators are required to develop, implement, and update at least annually and when necessary, a written safety program for surface mobile equipment used at their mines. As defined in this rule, surface mobile equipment refers to wheeled, skid-mounted, track-mounted, or rail-mounted equipment capable of moving or being moved, and any powered equipment that transports people, equipment, or materials, excluding belt conveyors, at surface mines and surface work areas of underground mines.

The required written safety program for surface mobile equipment must include the actions that operators will take to identify and analyze hazards and reduce the resulting risks related to equipment movement and operation. It must also include actions to develop and maintain procedures and schedules for routine maintenance and non-routine repairs. Operators are also required to describe the actions they will take to identify currently available and newly emerging feasible technologies that can enhance safety and evaluate whether to adopt them. Finally, the rule requires operators to describe the actions they will take to train miners and other persons at the mine necessary to perform work to identify and address or avoid hazards related to surface mobile equipment.

Once the written safety program is developed and implemented, a responsible person is required to evaluate and update it for the mine at least annually, or when mining conditions or practices change that may adversely affect the health and safety of miners or other persons, when accidents or injuries occur, or when surface

mobile equipment changes or modifications are made. While the final rule provides operators flexibility to devise a safety program that is appropriate for their specific mining conditions and operations, the final rule also requires operators to solicit input from miners and their representatives as they develop and update the written safety program.

MSHA estimated the costs associated with the final rule's requirements by adding the estimated costs of the following. First, the estimated costs include developing the written safety program document, including the actions the operators will take to identify and analyze hazards, evaluate current and emerging technologies, develop and maintain the maintenance and repair schedules and procedures, train miners and others to identify and address hazards associated with surface mobile equipment. Operators must also provide copies of the written safety program to miners and their representatives upon request. Second, the estimated costs include updating the written safety program at least annually and under certain circumstances, such as when new equipment is brought to the mine or when accidents or changes in mining conditions or practices occur that may adversely affect the safety and health of miners, and, for each update, providing copies of the written safety program to miners and their representatives upon request. The first component is considered to be the one-time, initial compliance costs in the first year, whereas the second component represents the recurring compliance costs for subsequent years. Estimated costs also include providing copies of the written safety program to miners and their representatives upon request.

MSHA calculated these compliance costs based on the estimated time spent by mine employees to develop and update the written safety program, multiplied by their wage rates. MSHA assumed that mine supervisors, safety professionals, and maintenance workers would participate in the creation and updates of the written safety program. MSHA assumed that operators will solicit input from miners and their representatives in developing and maintaining all aspects of the written safety program, and MSHA included the time for their collaboration in its cost estimates.

MSHA further assumed that the time needed to develop and update the written safety program would vary by the number of unique surface mobile equipment units at each mine, which would be related to a mine's production output (*e.g.,* tonnage), and employment size.[8] Based on these factors, MSHA grouped all MNM and coal mines into three categories each and estimated the compliance costs for this final rule by category.[9] MSHA also assumed a majority of independent contractors (75 percent or 4,739) would develop and update a written safety program for surface mobile equipment at mines.[10]

The total compliance cost estimates are shown in Table III–2. The compliance costs for the 10-year period of analysis (*i.e.,* 10-year implementation period) are estimated to be about $126 million (in 2021 dollars) undiscounted, while the 10-year compliance costs discounted at 3 percent and 7 percent are about $111 million and $95 million, respectively. The annualized costs discounted at 3 and 7 percent are $13.0 million and $13.5 million, respectively.

TABLE III–2—YEARLY COMPLIANCE COST ESTIMATES

[Millions of 2021 dollars]

Implementation year	Total compliance costs		
	Discounted at		
	0%	3%	7%
Year 1	$37.0	$36.0	$34.6
Year 2	9.9	9.4	8.7
Year 3	9.9	9.1	8.1
Year 4	9.9	8.8	7.6
Year 5	9.9	8.6	7.1
Year 6	9.9	8.3	6.6
Year 7	9.9	8.1	6.2
Year 8	9.9	7.8	5.8
Year 9	9.9	7.6	5.4
Year 10	9.9	7.4	5.0
10-Year Total	126.4	111.0	95.1
Annualized	12.6	13.0	13.5

Note: Totals may not equal the sum of the components due to rounding.

C. Benefits

This final rule is expected to generate numerous benefits, including reductions in individual injuries and fatalities, fostering of a positive safety culture at the mine, reductions in worker compensation and other insurance premiums, and decreases in down-time (non-production time) due to accidents. Among these benefits, MSHA focused on estimating the number of surface mobile equipment-related fatalities and injuries that could be prevented due to this final rule and the monetized benefits of those fatalities and injuries prevented. MSHA also performed a sensitivity analysis covering different scenarios that would lead to different percentages of fatalities and injuries prevented, and thus to different levels of benefits depending on the assumptions made.

Since the final rule includes all mines, MSHA modified the approach

[8] MSHA used metric tons for the production output as based on the cost estimation chapter of the Society for Mining, Metallurgy, and Exploration Handbook. Stebbins, S.A., and Leinart, J.B. 2011. Cost estimating for surface mines. In SME Mining Engineering Handbook, 3rd ed. Edited by P. Darling.

[9] See Appendix A of the Final Regulatory Impact Analysis for this final rule for a detailed explanation.

[10] Based on its examination of the mining contractors listed in 2021, MSHA estimated that approximately 75 percent of 6,318 part 45 independent contractors would be required under the final rule to develop a safety program because they have surface mobile equipment.

from the proposed rule and used the following analysis to estimate the monetized benefits of fatalities and injuries prevented. MSHA first established a baseline using the fatality and injury data and post-accident investigation reports from the 2011–2020 period. In the proposed rule, MSHA used data for accidents, fatalities, and injuries from the years 2003 to 2018 for mines that employed six or more miners. For the final rule, however, MSHA is using more recent and comprehensive data and detailed information concerning accidents, fatalities, and injuries that occurred between 2011 and 2020 for all mines. The Agency believes the more recent data better reflects current and future circumstances.

To estimate the monetized benefits of fatalities and injuries prevented, MSHA first examined historical fatality and injury data and post-accident investigation reports from the 2011–2020 period. MSHA found that over that 10-year period, there were 113 surface mobile equipment fatalities. MSHA further observed that in the case of 63 (about 56 percent) of the 113 fatalities involving surface mobile equipment, deficiencies in training, hazard identification, or maintenance or any combination of these three factors contributed to the fatality. MSHA also counted 13,753 non-fatal injuries involving surface mobile equipment and 454,076 workdays lost due to those injuries during the 10-year period.

Based on this historical analysis, MSHA projected the numbers of surface mobile equipment fatalities, non-fatal injuries, and lost workdays that would be expected due to deficiencies in training, hazard identification, or maintenance, in the absence of the final rule. MSHA then compared those projected numbers (''baseline'') with the projections of the same types of fatalities, non-fatal injuries, and workdays lost, in the presence of the final rule. The difference between the two was used as the basis for calculating benefits of the final rule. MSHA believes that a safety program that identifies actions operators will take to accomplish the required tasks will reduce fatalities, non-fatal injuries, and lost workdays that would be expected due to deficiencies in training, hazard identification, or maintenance because it will increase compliance with MSHA's existing hazard identification, hazard correction, maintenance, and training requirements.

MSHA projected that in the absence of the final rule, over the next 10 years, there would be 60 fatalities, 7,298 injuries, and 240,954 workdays lost annually due to deficiencies in training, hazard identification, or maintenance related to surface mobile equipment. These projections assume a mining workforce of approximately 253,401 (each working 2,000 hours in a year) each year. MSHA estimated that the final rule would reduce the projected fatalities, injuries, and workdays lost resulting from deficiencies in training, hazard identification, or maintenance by about 75 percent for each year the rule is in effect, beginning in the second year.[11] MSHA then performed a sensitivity analysis with two additional scenarios—a 50 percent reduction and a 25 percent reduction. Table III–3 and Table III–4 present summaries of these results.

TABLE III–3—PROJECTED SURFACE MOBILE EQUIPMENT FATALITIES IN THE ABSENCE OF AND WITH THE FINAL RULE

Implementation year	In the absence of final rule	With final rule		
		Fatalities prevented—projections		
	Projected surface mobile equipment fatalities due to deficiencies in training, hazard identification, or maintenance	Program effectiveness at 75% (expected scenario)	Program effectiveness at 50%	Program effectiveness at 25%
	Baseline			
Year 1 *	6.00	2.2	1.5	0.7
Year 2	6.00	4.5	3.0	1.5
Year 3	6.00	4.5	3.0	1.5
Year 4	6.00	4.5	3.0	1.5
Year 5	6.00	4.5	3.0	1.5
Year 6	6.00	4.5	3.0	1.5
Year 7	6.00	4.5	3.0	1.5
Year 8	6.00	4.5	3.0	1.5
Year 9	6.00	4.5	3.0	1.5
Year 10	6.00	4.5	3.0	1.5
10-Year Total	60.0	42.7	28.5	14.2

Note: Totals may not equal the sum of the components due to rounding.

* Due to delayed compliance in the first year of implementation, MSHA assumes that there will be fewer fatalities prevented in the first year than in each subsequent year. For example, under the expected scenario, MSHA estimates that 4.5 lives will be saved in a full year after implementation, but given the 6-month delayed compliance date, a half of 2.2 lives is assumed to be saved in the first year.

[11] In the first year—because the rule will be effective for only half the year—there would be a 37.5 percent, rather than a 75 percent, reduction.

TABLE III–4—PROJECTED SURFACE MOBILE EQUIPMENT INJURIES IN THE ABSENCE OF AND WITH THE FINAL RULE

Implementation year	In the absence of final rule	With final rule		
		Injuries prevented—projections		
	Projected surface mobile equipment injuries due to deficiencies in training, hazard identification, or maintenance	Program effectiveness at 75% (expected scenario)	Program effectiveness at 50%	Program effectiveness at 25%
	Baseline			
Year 1 *	730	273.7	182.5	91.2
Year 2	730	547.4	364.9	182.5
Year 3	730	547.4	364.9	182.5
Year 4	730	547.4	364.9	182.5
Year 5	730	547.4	364.9	182.5
Year 6	730	547.4	364.9	182.5
Year 7	730	547.4	364.9	182.5
Year 8	730	547.4	364.9	182.5
Year 9	730	547.4	364.9	182.5
Year 10	730	547.4	364.9	182.5
10-Year Total	7,298	5,200	3,467	1,733

Notes: Totals may not equal the sum of the components due to rounding.
* Due to delayed compliance in the first year of implementation, MSHA assumes that there will be fewer injuries prevented in the first year than in each subsequent year.

The monetary value of the reduction in fatalities and injuries related to surface mobile equipment is calculated as follows. First, to develop a monetized benefit estimate of fatality reduction, MSHA used the Value of a Statistical Life (VSL) adopted by other Federal agencies like the Department of Transportation and Department of Homeland Security, and adjusted for the real per-capita Gross Domestic Product (GDP). Second, to estimate the monetized benefit of injury reduction, MSHA used the projected reduction in the number of workdays lost due to injuries, multiplied by the average wage of miners. The monetized benefits of reduced injuries were then calculated by multiplying the total workdays lost due to the injuries and the average wage of miners. Again, MSHA performed a sensitivity analysis with two additional scenarios—a 25 percent reduction and a 50 percent reduction in fatalities and injuries. In the expected scenario, the 10-year monetized benefit totals, in 2021 dollars, are calculated at $522 million at a 3 percent discount rate and $424 million at a 7 percent discount rate.

D. Net Benefits

Table III–5 presents the monetized net benefits for the first 10 years of implementation of the final rule. The 10-year net benefit totals in 2021 dollars are $411 million at a 3 percent discount rate and $329 million at a 7 percent discount rate. An annualized net benefit is estimated at $48.2 million and $46.8 million, respectively, at 3 percent and 7 percent discount rates.

TABLE III–5—MONETIZED NET BENEFITS

[Millions of 2021 dollars]

	Expected scenario			Low net benefit scenario			Lowest net benefit scenario		
	Discounted at			Discounted at			Discounted at		
	0%	3%	7%	0%	3%	7%	0%	3%	7%
10-Year total *	$493	$411	$329	$286	$237	$187	$80	$63	$46
Annualized	49.3	48.2	46.8	28.6	27.8	26.7	8.0	7.4	6.6

Note: Totals may not equal the sum of the components due to rounding.
* MSHA assumed that a full-year worth costs would be incurred, while projecting a half of the full-year monetized benefits in the first year, due to the timing of implementation (6-month delayed compliance).

MSHA believes that the net-benefits of the rule are understandable, because the costs of the safety program are modest relative to the much-higher value of the estimated reduction in fatalities.

IV. Regulatory Flexibility Analysis (RFA) and Small Business Regulatory Enforcement Fairness Act (SBREFA) and Executive Order 13272: Proper Consideration of Small Entities in Agency Rulemaking

MSHA has reviewed the final rule to assess and take appropriate account of its potential impact on small businesses, small governmental jurisdictions, and small organizations. Pursuant to the Regulatory Flexibility Act (RFA) of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), MSHA analyzed the impact of the final rule on small entities. Based on that analysis, MSHA certifies that this final rule does not have a

significant economic impact on a substantial number of small entities. The factual basis for this certification is presented in this section.

A. Definition of Small

Under the RFA, when analyzing the impact of a rule on small entities, MSHA must use the Small Business Administration's (SBA) definition for a small entity or, after consultation with the SBA Office of Advocacy, establish an alternative definition for the mining industry by publishing that definition in the **Federal Register** for notice and comment. The SBA uses North American Industry Classification System (NAICS) codes, generally at the 6-digit NAICS level, to set thresholds for small business sizes for each industry.[12]

B. Factual Basis for Certification

Following SBA guidance on carrying out a threshold analysis, MSHA evaluates the impacts on small entities by comparing the estimated compliance costs of a rule for small entities in the sector affected by the rule to the estimated revenues for the affected sector. When estimated compliance costs are less than 1 percent of the estimated industry revenues, it is generally appropriate to conclude that there is no significant economic impact on a substantial number of small entities. In addition to assessing the overall impact on small entities, MSHA examines data for the NAICS codes that have much higher impact ratios (cost/revenue) than others to ensure that the first-level screening is representative.

As the first step, MSHA identified all small-entity controllers in the mining industry on the basis of the small-entity thresholds. The MNM and coal mining operations affected by the rule fall into two general categories: (1) controllers (parent companies) that own and operate mines, which is the appropriate unit for this RFA analysis (based on SBA guidance),[13] and (2) mining contractors (independent contractors designated under part 45 of 30 CFR), hired by mine operators to work at mines, that operate their own surface mobile equipment. MSHA identified and analyzed the effect of the rule on small-entity controllers of mines and on small-entity mining contractors.

To determine the number of small entities subject to the final rule, MSHA reviewed NAICS, the standard used by Federal statistical agencies in classifying business establishments, as well as information from the SBA Office of Advocacy. MSHA used its data from the MSHA Standardized Information System (MSIS) to identify the responsible party for each mine, as well as the contractors hired to do work on mines. MSHA then combined that information with the size classification information. The two sections below describe MSHA's analysis of controllers and mining contractors, respectively.

Small-entity controllers: In analyzing controllers of mines, MSHA determined that mining operations that fall into 19 NAICS-based industry classifications may be subject to the final rule. These industry categories and their accompanying six-digit NAICS codes are shown in Table IV–1.[14] MSHA then matched the NAICS classifications with SBA small-entity size standards (based on number of employees) to determine the number of small entities within each of the respective NAICS codes. See Table IV–1.

MSHA counted the number of small-entity controllers in each NAICS code, after determining which mines were owned by which controllers. Table IV–1 shows the count of all controllers and a count of small-entity controllers in each NAICS code.[15]

Based on this methodology, MSHA estimated that in 2021, there were a total of 5,879 controllers, and 5,462 of them were small-entity controllers. Many controllers owned one or two mines, while some controllers owned hundreds of mines nationwide (or worldwide).[16]

[12] Small Business Administration, *Table of Size Standards: Effective July 14, 2022. https://www.sba.gov/document/support-table-size-standards.*

[13] A controller is a parent company owning or controlling one or more mines, whereas a mine is an establishment of that parent company. Small entities, subject to requirements of the Regulatory Flexibility Act, are entities that are parent companies only and not establishments. See Small Business Administration, Office of Advocacy, How to Comply with the Regulatory Flexibility Act, August 2017. Sec. 3(d) of the Mine Act defines ''operator'' as ''any owner, lessee, or other person who operates, controls, or supervises a coal or other mine.'' 30 U.S.C. 802(d). Under 30 CFR part 41, an operator must file a legal identity report with MSHA and with this report, MSHA identifies a controller for each mine. 30 U.S.C. 819(d) (each operator shall file the name and address of the ''person who controls or operates the mine.''). In the IRFA, MSHA considered the controller of a mine and then determined whether the mine, not the controller, was a small entity. In the FRFA, consistent with the SBA guidance and the Mine Act, MSHA determines whether a controller is a small entity.

[14] The NAICS classifications used in this analysis are drawn from the latest version of the NAICS, which was effective in July 2022. MSHA also used, in the analysis, an earlier the version of NAICS categories that were effective in August 2019. When developing the analysis, MSHA had begun the work prior to the most current NAICS being effective. The older NAICS categories were still used in the part of the current analysis that estimated revenues. This is because the older categories were still needed in order for MSHA to cross-tabulate (or crosswalk) its data on mines and controllers with Bureau of Census data on revenues by NAICS codes, where these Census data were organized by the same NAICS codes that were in the earlier version. No comparable revenue data, at this writing, had yet been revised to the most recent NAICS categories.

[15] Some controllers own mines with more than one NAICS code if those mines produce different commodities. For this analysis, however, MSHA counted each ''unique'' controller only once. In other words, there is no double-counting of the same controller if a controller produces in more than one NAICS code. It is not uncommon for firms to produce different products falling under more than one six-digit NAICS codes, especially if the firm is large. In any case, no single NAICS code is attributed to any controller that has more than one NAICS code. Rather, the analysis takes all of any one controller's multiple NAICS codes into account without losing any of the information about the NAICS codes. Specifically, that one controller's revenues and employees are partitioned among each of that one controller's production by NAICS code, and then aggregated for that one controller.

[16] The number of controllers and mines examined in this regulatory flexibility analysis are those specifically known to operate in 2021. The year 2021 is the most current year for which complete information were available. Such information about controllers as parent companies might include, for example, knowledge of whether the parent company is a large, multinational corporation, which has bearing on this regulatory flexibility analysis. Because the benefit-cost analysis performed on the proposed rule did not need this kind of detailed information about controllers, it was able to have a broader scope to include data from other years besides 2021, and to include some more data in the year 2021 itself, which it did. As a result, the benefit cost analysis included a larger number of mines (and affected mines) and controllers. The key factor for this regulatory flexibility analysis is the estimated ratio of the regulatory cost per revenue for controllers, as reflected by the most current data. The estimation of this ratio is robustly addressed in MSHA's analysis of the 5,879 controllers in 2021 (which is not impacted by the exclusion of other years in this analysis).

TABLE IV–1—SMALL ENTITIES AFFECTED BY THE FINAL RULE: NUMBER OF CONTROLLERS AND SMALL-ENTITY CONTROLLERS BY NAICS CODE *

NAICS code	Industry description	SBA size standards in maximum number of employees **	Number of all controllers	Number of small-entity controllers
211120	Crude petroleum extraction ***	1,250	4	3
211130	Natural Gas Extraction ***	1,250	1	0
212114	Surface Coal Mining	1,250	282	237
212115	Underground Coal Mining	1,500	122	99
212210	Iron Ore Mining	750	31	26
212220	Gold Ore and Silver Ore Mining	1,500	142	108
212230	Copper, Nickel, Lead, and Zinc Mining	750	45	33
212290	Other Metal Ore Mining	750	29	22
212311	Dimension Stone Mining and Quarrying	500	491	432
212312	Crushed and Broken Limestone Mining and Quarrying	750	820	738
212313	Crushed and Broken Granite Mining and Quarrying	750	182	165
212319	Other Crushed and Broken Stone Mining and Quarrying	500	760	704
212321	Construction Sand and Gravel Mining	500	3,221	2,984
212322	Industrial Sand Mining	500	172	155
212323	Kaolin, Clay, and Ceramic and Refractory Minerals Mining	500	161	143
212390	Other Nonmetallic Mineral Mining and Quarrying	500	151	123
327310	Cement Manufacturing	1,000	74	53
327410	Lime Manufacturing	750	58	49
331313	Primary production of alumina and aluminum	1,300	3	3

* Each mine is assigned only one NAICS (as its major product) but some controllers that own more than one mine own mines that are in different NAICS. Consequently, some controllers have more than one NAICS (when they own mines with different NAICS) and they are therefore counted more than once in this table. See Table _–2 for the distribution of controllers by the NAICS code for which they have the most employees, which will then show only one NAICS code for each controller.

** SBA, effective July 14, 2022.

*** These categories are commonly associated with mines with activities involving crude petroleum or natural gas extraction, but the mines in these categories that are counted here, and included in this analysis, also involve mining operations that would fall under MSHA's jurisdiction. This analysis does not include crude petroleum or natural gas extraction (and the mines that perform them exclusively) since MSHA does not regulate these activities.

Each mine is assigned only one NAICS code, with that code reflecting what that mine produces the most. There are several cases in which more than one mine, owned by the same controller, have different NAICS codes, and as a result that one controller has multiple NAICS codes. For this reason, some controllers are counted more than once in this Table IV–1 (as also explained in a footnote in the table). In particular, of the 5,879 unique controllers identified in 2021, 608 of them each owned multiple mines with different NAICS codes. In theory, this could present an ambiguity as to whether a controller, with more than one NAICS code, should be considered a small entity or not. Since NAICS codes vary by their small-entity thresholds, it is theoretically possible for a controller with more than one NAICS code to be a small entity according to the threshold for one of its NAICS codes, while not being a small entity under the lower threshold that applies to another of its NAICS codes. However, this situation was not found to occur for any of the controllers; all controllers that were determined to be small entities met the conditions for a small entity for each of their NAICS codes.

While some controllers are in more than one mining NAICS code, the distribution of controllers by their most significant NAICS code may also provide useful information about the general structure of the industry. Therefore, MSHA also prepared Table IV–2 to present the distribution of controllers by the one NAICS code under which the largest number of their employees are reported. This table then assigns only one NAICS code for each controller, allowing for a count of controllers by their (mutually exclusive) most significant NAICS code in mining.[17]

TABLE IV–2—SMALL ENTITIES AFFECTED BY THE FINAL RULE: DISTRIBUTION OF CONTROLLERS BY NAICS CATEGORY, WITH ONE NAICS CODE PER CONTROLLER *

NAICS code	Industry description	SBA size standards in maximum number of employees **	Number of all controllers	Number of small-entity controllers
211120	Crude Petroleum Extraction ***	1,250	3	3
211130	Natural Gas Extraction ***	1,250	1	0
212114	Surface Coal Mining	1,250	246	218
212115	Underground Coal Mining	1,500	93	75
212210	Iron Ore Mining	750	19	18

[17] Note that many of the controllers also own operations in other, non-mining industries, and in other mining operations in other nations.

TABLE IV–2—SMALL ENTITIES AFFECTED BY THE FINAL RULE: DISTRIBUTION OF CONTROLLERS BY NAICS CATEGORY, WITH ONE NAICS CODE PER CONTROLLER *—Continued

NAICS code	Industry description	SBA size standards in maximum number of employees **	Number of all controllers	Number of small-entity controllers
212220	Gold Ore and Silver Ore Mining	1,500	98	82
212230	Copper, Nickel, Lead, and Zinc Mining	750	31	25
212290	Other Metal Ore Mining	750	14	12
212311	Dimension Stone Mining and Quarrying	500	415	382
212312	Crushed and Broken Limestone Mining and Quarrying	750	716	675
212313	Crushed and Broken Granite Mining and Quarrying	750	133	130
212319	Other Crushed and Broken Stone Mining and Quarrying	500	617	596
212321	Construction Sand and Gravel Mining	500	3,046	2,839
212322	Industrial Sand Mining	500	120	113
212323	Kaolin, Clay, and Ceramic and Refractory Minerals Mining	500	108	101
212390	Other Nonmetallic Mineral Mining and Quarrying	500	108	95
327310	Cement Manufacturing	1,000	61	49
327410	Lime Manufacturing	750	48	47
331313	Primary production of alumina and aluminum	1,300	2	2
Total			5,879	5,462

* Each controller is assigned the one NAICS code for which it devotes the most employees, based on the employees at its mines and each of its mines being associated with only one NAICS code.

** SBA, effective July 14, 2022.

*** These categories are commonly associated with mines with activities involving crude petroleum or natural gas extraction, but the mines in these categories that are counted here, and included in this analysis, also involve mining operations that would fall under MSHA's jurisdiction. This analysis does not include crude petroleum or natural gas extraction (and the mines that perform them exclusively) since MSHA does not regulate these activities.

MSHA estimated the costs of the rule for small-entity controllers by summing the costs for each of these controller's mines. The estimated cost for each mine was based on the number of miners at that mine, and the mine's industry category. Thus, if two mines belonging to the same controller had different NAICS codes, both of those NAICS codes would be accounted for, and the total cost to the controller would be calculated as the total cost for all of that controller's mines. Similarly, the estimated revenues of controllers were derived as the sum of the revenues of each of their mines, which was, in turn, dependent on the NAICS codes associated with those mines. Thus, all of NAICS codes for all of the mines, and all of the mines under all of the NAICS codes, were accounted for in the estimates of the costs and revenues of controllers.

As shown in Table IV–2, MSHA determined that, in 2021, there were a total of 5,879 controllers, and 5,462 of them were small-entity controllers. These small-entity controllers owned a total of 9,395 mines, out of the 12,529 mines owned by all controllers in 2021. Table IV–3 presents a summary of the main findings regarding small-entity controllers. As shown, MSHA estimated the total cost of the rule to all 5,462 small-entity controllers to be $26.69 million in the first year, and $8.17 million in each subsequent year (in 2021 dollars). Per small entity, this amounted to an average compliance cost of $4,886 in the first year and $1,496 in each year thereafter. MSHA estimated the total revenues of the 5,462 small-entity controllers to be $33,720 million (in 2021 dollars). As a result of these estimates, MSHA found the compliance cost of the final rule to small entities, as a percent of revenues, on average, to be 0.165 percent in the first year, and 0.069 percent in each subsequent year. Among the small-entity controllers examined, the compliance cost as a percent of controllers' revenues ranged from near zero to a maximum of 0.341 percent in the first year, and to a maximum of 0.175 percent in each year thereafter. On the basis of these findings, MSHA determined that the final rule does not have a significant impact on small entities controllers in the mining industry.

TABLE IV–3—MAIN FINDINGS FOR 5,462 SMALL-ENTITY CONTROLLERS

Economic measure	First year	Each subsequent year
Total Compliance Costs (in Millions of 2021 Dollars)	$26.69	$8.17
Total Revenue (in Millions of 2021 Dollars)	$33,720	$33,720
Average Compliance Cost per Small-Entity Controller (in 2021 Dollars)	$4,886	$1,496
Ratio of Total Compliance Cost/Total Revenue (in Percent)	0.079	0.024
Average of the Ratios of Compliance Cost/Revenue (in Percent)	0.165	0.069

Small-entity independent contractors: For its analysis of independent contractors designated under part 45 of 30 CFR, MSHA used MSIS data to first derive a list of all mining contractors in the year 2021. The list contained a total of 6,318 contractors. While these contractors varied greatly in terms of their corresponding NAICS codes, MSHA determined that the most relevant NAICS codes for characterizing the mining contractors were the NAICS

Codes for (1) ''Support Activities for Coal Mining'' (213113), (2) ''Support Activities for Metal Mining'' (213114), and (3) ''Support Activities for Nonmetallic Minerals'' (213115). MSHA did not have data on parent companies of these contractors. However, MSHA analyzed data on enterprises and establishments in these NAICS codes from the Census Bureau, Statistics of U.S. Businesses (SUSB).[18] The SUSB data on entities in these three NAICS codes indicated that the vast majority of contractors (which would be listed separately in MSHA's data) are, themselves, parent companies. Specifically, based on the SUSB data on parent companies and the enterprises that belong to them, MSHA observed that the number of enterprises in these three NAICS codes, on average, exceeded the number of parent companies by only about 9 percent. Therefore, over 91 percent of parent companies that are mining contractors have only one establishment, implying that the vast majority of listed contractors are themselves parent companies, rather than subsidiaries of larger companies. Based on these findings, MSHA assumed in its analysis that the contractors on its list are parent companies.

Based on this assumption that each of the listed mining contractors in 2021 is not a subsidiary of a larger company, MSHA estimated how many of them would be considered small entities under the RFA. To make this determination, MSHA applied the size thresholds for the three NAICS categories for support activities for mining (213113, 213114, and 213115). Small entities in NAICS 213113 (support activities for coal mining) are those with annual revenues below the threshold of $27.5 million in 2022 dollars, while those in NAICS 213114 (support activities for metal mining) and NAICS 213115 (support activities for nonmetallic minerals) have annual revenues of less than $41.0 million and $20.5 million, respectively.[19] In estimating how many contractors are small entities, MSHA conservatively applied the $20.5 million (in 2022 dollars) threshold, so as not to underestimate the number of small entities.[20] MSHA's estimation of the number of small-entity contractors may therefore be an overestimation; however, MSHA still believes it is a close approximation to the number of small-entity contractors that would be determined if more detailed data were available.

From the employment and revenue data in the SUSB tables for the three NAICS Codes for support activities for mines, MSHA estimated that mining support contractors have, on average, revenues of approximately $315,000 (in 2017 dollars) per employee.[21]

MSHA's data on mining contractors included the number of employees working for each contractor. MSHA was able to estimate the revenue of each contractor by multiplying its number of employees by the average revenue per employee of $315,000 from the SUSB data. From these estimates of each contractor's revenue, MSHA estimated that approximately 4,469 contractors out of a total of 4,739 contractors affected by the rule (or about 94.3 percent of those contractors) are potentially small entities, under the threshold of $17.4 million (in 2017 $) in annual revenue.

Table IV–3 presents a summary of the main findings on mining contractors that would be affected by the rule. As shown, MSHA estimated the total cost to all 4,469 potential small-entity contractors of the rule to be $2.69 million in the first year and $0.954 million in each subsequent year. Per small-entity contractor, this amounted to an average cost of $453 in the first year and $212 in each year thereafter. MSHA estimated the total revenues of the 4,469 potential small-entity contractors to be $12,783 million (in 2021 dollars). As a result of these estimates, MSHA found the cost of the final rule to small-entity contractors, as a percent of revenue, to be, on average across the contractors, 0.0211 percent of revenue in the first year and 0.0074 percent of revenue in each subsequent year. On the basis of these findings, MSHA determined that the final rule does not have a significant impact on small-entity-contractors in the mining industry.

TABLE IV–3—MAIN FINDINGS FOR 4,469 SMALL-ENTITY CONTRACTORS

Economic measure	First year	Each subsequent year
Total Compliance Costs (in Millions of 2021 Dollars)	$2.69	$0.95
Total Revenue (in Millions of 2021 Dollars)	$12,783	$12,783
Average Compliance Cost Per Small-Entity Contractor (in 2021 Dollars)	$453	$212
Ratio of Total Compliance Cost/Total Revenue (in Percent)	0.0211	0.0074
Average of the Ratios of Compliance Cost/Revenue (in Percent)	0.0460	0.0212

In conclusion, MSHA determined that the rule does not have a significant effect on either small-entity mining controllers or small-entity mining contractors. MSHA therefore certifies that this final rule does not have a significant economic impact on a substantial number of small entities.

V. Paperwork Reduction Act of 1995

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521) provides for the Federal Government's collection, use, and dissemination of information. The goals of the PRA include minimizing paperwork and reporting burdens and ensuring the maximum possible utility from the information that is collected under 5 CFR part 1320. The PRA requires Federal agencies to obtain approval from OMB before requesting or requiring ''a collection of information'' from the public.

MSHA determined that this final rule creates a new information collection burden for the mining community. However, the final rule does not contain changes that transfer burden from, or add burden to, existing information

[18] Census Bureau, Statistics of U.S. Businesses. *https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html.*

[19] Small Business Administration, *Table of Size Standards: Effective July 14, 2022. https://www.sba.gov/document/support-table-size-standards.*

[20] MSHA translated the threshold of $20.5 million in 2022 dollars to $17.44 million in 2017 dollars based on the Bureau of Economic Analysis' GDP Price Index.

[21] It is important to note that, although, contractor revenues may be close in magnitude to their costs, those costs often far exceed their labor costs, and therefore their revenue per employee would be expected to far exceed their average salaries. Such additional costs, besides labor costs, include the costs of equipment, fuel, overhead, taxes, etc.

collections because the paperwork requirements in this rule are applicable to only the new information collection discussed below. MSHA expects that some mine operators may use existing information collections to help the development or implementation of a written safety program at their mine. For example, under OMB No. 1219–0089, *Safety Defects; Examination, Correction, and Records,* MNM operators record inspections of surface mobile equipment before equipment is placed in operation and when equipment is removed from service to be repaired before use is resumed. Under OMB No. 1219–0083, *Surface Coal Mines Daily Inspection; Certified Person; Reports of Inspection,* coal mine operators record reports of hazardous conditions in active work areas of surface operations along with a description of any corrective actions taken. Some operators may incorporate these existing information collections, if applicable, into their safety program for surface mobile equipment because they have determined the existing information collections would support the safety program's development or implementation. Hence, only new requirements from this final rule will be recorded under this new information collection and there will be no change to existing information collections.

Once OMB completes its review of MSHA's new information collection, the Agency will publish a notice on the new information collection under the Information Collection Review (ICR) 1219–0155. (The regulated community is not required to respond to any collection of information unless it displays a current, valid, OMB control number.)

A. New Information Collection Under ''Safety Program for Surface Mobile Equipment''

Under this final rule, new burdens will apply to operators and independent contractors who are subject to 30 CFR part 45, as discussed below.

Section 56.23003(a) requires operators of surface metal and nonmetal mines to develop, implement, and update a written safety program for surface mobile equipment to reduce the number and rates of accidents, injuries, and fatalities. This subpart applies to all surface mobile equipment at surface metal and nonmetal mines. Such a program will include actions the operator will take to:

(1) Identify and analyze hazards and reduce the resulting risks related to the movement and the operation of surface mobile equipment;

(2) Develop and maintain procedures and schedules for routine maintenance and non-routine repairs for surface mobile equipment;

(3) Identify currently available and newly emerging feasible technologies that enhance safety at the mine and evaluate whether to adopt them; and

(4) Train miners and other persons at the mine necessary to perform work to identify and address or avoid hazards related to surface mobile equipment.

Section 57.23003(a) requires operators of underground metal and nonmetal mines to develop, implement, and update a written safety program for surface mobile equipment to reduce the number and rates of accidents, injuries, and fatalities. This subpart applies to all surface mobile equipment at surface areas of underground metal and nonmetal mines. Such a program will describe actions the operator will take to:

(1) Identify and analyze hazards and reduce the resulting risks related to the movement and the operation of surface mobile equipment;

(2) Develop and maintain procedures and schedules for routine maintenance and non-routine repairs for surface mobile equipment;

(3) Identify currently available and newly emerging feasible technologies that enhance safety at the mine and evaluate whether to adopt them; and

(4) Train miners and other persons at the mine necessary to perform work to identify and address or avoid hazards related to surface mobile equipment.

Section 77.2103(a) requires operators of surface coal mines and surface work areas of underground coal mines to develop, implement, and update a written safety program for surface mobile equipment to reduce the number and rates of accidents, injuries, and fatalities. This subpart applies to all surface mobile equipment at surface coal mines and surface work areas of underground coal mines. Such a program will describe actions the operator will take to:

(1) Identify and analyze hazards and reduce the resulting risks related to the movement and the operation of surface mobile equipment;

(2) Develop and maintain procedures and schedules for routine maintenance and non-routine repairs for surface mobile equipment;

(3) Identify currently available and newly emerging feasible technologies that enhance safety at the mine and evaluate whether to adopt them; and

(4) Train miners and other persons at the mine necessary to perform work to identify and address or avoid hazards related to surface mobile equipment.

In addition, §§ 56.23003(b), 57.23003(b), and 77.2103(b) require evaluation and updates to the written safety program at least annually, or as mining conditions or practices change that may adversely affect the health and safety of miners or other persons, as accidents or injuries occur, or as surface mobile equipment changes or modifications are made.

B. Information Collection Requirements

I. *Type of Review:* New Collection.

OMB Control Number: 1219–0155.

1. *Title:* Safety Program for Surface Mobile Equipment.

2. *Description of the ICR:* This final rule on safety program for surface mobile equipment contains collection of information requirements that will assist miners, operators, and independent contractors in identifying risks to their safety and help reduce injuries and fatalities at mines.

There are provisions of this final rule that have different burden hours, burden costs, and responses each year. Therefore, MSHA shows the estimates of burden hours, burden costs, and responses in three separate years.

3. *Summary of the Collection of Information:*

Sections 56.23003(a), 57.23003(a), 77.2103(a)—Developing and Implementing Written Safety Program

ICR. Final §§ 56.23003(a), 57.23003(a), and 77.2103(a) require operators to develop and implement written safety programs.

Number of respondents. For §§ 56.23003(a), 57.23003(a), and 71.2103(a), the respondents consist of operators and independent contractors owning and using surface mobile equipment since they will be responsible for developing and implementing the written safety program for surface mobile equipment.

MSHA estimates that, based on its 2021 data, a total of 17,133 respondents (12,394 operators and 4,739 part 45 independent contractors) will develop a written safety program for surface mobile equipment in the first year of implementation. MSHA estimated that 12,394 are surface mines and underground mines with surface areas, so the operators of those mines are assumed to comply with this rule. MSHA estimates that some operators may need to update, enhance, or even develop portions of this written safety program to meet current requirements. MSHA estimated that no additional recordkeeping costs will be generated by the activities associated with training because this activity is already being performed during compliance efforts for existing training standards.

Annual number of responses. The estimated average annual number of responses will be 17,133.

Estimated annual burden. The total burden arising from the development of the safety program in the first year of implementation is estimated to be 682,833 hours, which includes 297,687 hours to list the actions the operator will take to conduct the mine-specific hazard analysis and technology evaluation components of the safety program, 383,860 hours for listing the actions operators will take to develop a maintenance schedule for surface mobile equipment as part of the written safety program (if needed), as well as 1,285 hours to make available and copy the written safety program. An average burden per respondent is estimated to be 39.85 hours to develop a written safety program for surface mobile equipment in the first year.

Sections 56.23003(b), 57.23003(b), and 71.2103(b)—Annual Updates to the Written Safety Program

ICR. Final §§ 56.23003(b), 57.23003(b), and 71.2103(b) require the responsible person to evaluate and update the written safety program for the mine at least annually, or as mining conditions or practices change that may adversely affect the health and safety of miners or other persons, as accidents or injuries occur, or as surface mobile equipment changes or modifications are made.

Number of respondents. For §§ 56.23003(b), 57.23003(b), and 71.2103(b), the respondents will consist of all operators and contractors who have developed a written safety program for surface mobile equipment. MSHA estimates that a total of 17,133 mine operators and independent contractors will subsequently update a written safety program for surface mobile equipment in years two and three. The respondents will update at least annually, or as mining conditions or practices change that may adversely affect the health and safety of miners or other persons, as accidents or injuries occur, or as surface mobile equipment changes or modifications are made.

Annual number of responses. The estimated average annual number of responses will be 17,133.

Estimated annual burden. The total burden arising from the annual and other updating of the safety program will be 259,834 hours in the second and third years of implementation, 129,917 hours each year. This annual burden includes updates to the written safety program arising from changing conditions at mine sites, surface mobile equipment unit updates, as well as making available and copying the written safety program. The estimated annual burden per respondent is 7.58 hours.

Besides the development and update of the written safety program, no additional information collection cost is expected. Information collection associated with training requirements in this final rule is covered under existing regulations in 30 CFR parts 46, 48, and 77.

Total Recordkeeping and Documentation Burden for the Safety Program for Surface Mobile Equipment Rule

TABLE V–1—ESTIMATED ANNUAL RECORDKEEPING AND DOCUMENTATION BURDEN

Year	Annual number of respondents	Annual number of responses	Annual burden per respondent	Estimated annual burden (Hours)
Year 1	17,133	17,133	39.85	682,833
Year 2	17,133	17,133	7.58	129,917
Year 3	17,133	17,133	7.58	129,917
3-Year Total	17,133	51,399	55.02	942,666
Annual Average	17,133	17,133	18.34	314,222

The cost estimates of information collection burden are calculated as follows. In the first year, the average burden per respondent for developing a safety program, combining hazard analysis and technology evaluation, identifying actions operators will take to maintain and repair equipment and train miners as well as making available and copying the written safety program, is 39.85 hours for a total of 682,833 burden hours in Year 1. In Years 2 and 3, the average burden per respondent for updating a safety program is 7.58 hours, for a total of 129,917 burden hours in Year 2 and 129,917 burden hours in Year 3.

MSHA determined the hourly wage rates through data from the U.S. Department of Labor, Bureau of Labor Statistics (BLS), Occupational Employment and Wage Statistics (OEWS) published May 2021. Annual Burden Hours are summarized in Table V–2.

TABLE V–2—WAGE AND HOUR BURDENS

Occupation	Loaded hourly wage rate *	Year 1 burden hours	Year 2 burden hours	Year 3 burden hours
Mining Supervisor, MNM	$61.41	241,085.00	103,182.50	103,182.50
Mining Supervisor, Coal	71.79	21,198.80	7,989.28	7,989.28
Maintenance and Mechanic, MNM	42.22	307,802.50	.....	.....
Maintenance and Mechanic, Coal	47.70	33,406.80	.....	.....
Occupational Health & Safety Specialist, MNM	59.06	16,318.40	4,561.34	4,561.34
Occupational Health & Safety Specialist, Coal	68.29	8,422.40	2,354.24	2,354.24
Clerk, MNM	35.58	858.78	858.78	858.78
Clerk, Coal	35.01	70.80	70.80	70.80
Clerk, Contractor	35.45	355.43	355.43	355.43
Mining Supervisor, Contractor	63.70	10,662.75	10,544.28	10,544.28
Maintenance and Mechanic, Contractor	43.43	42,651.00	.....	.....

TABLE V–2—WAGE AND HOUR BURDENS—Continued

Occupation	Loaded hourly wage rate *	Year 1 burden hours	Year 2 burden hours	Year 3 burden hours
Occupational Health & Safety Specialist, Contractor	61.09			
Total (Rounded)		682,833	129,917	129,917

* Loaded hourly wages are mean wages that are increased by a benefits multiplier of 1.488 plus a separate overhead multiplier of 1.01.

The resulting annual burden cost is summarized in Table V–3.

TABLE V–3—SUMMARY OF INFORMATION COLLECTION BURDEN FOR SAFETY PROGRAM FOR SURFACE MOBILE EQUIPMENT

	Year 1	Year 2	Year 3	Annual average
Number of Respondents	17,133	17,133	17,133	17,133
Number of Responses	17,133	17,133	17,133	17,133
Number of Burden Hours (Rounded)	682,833	129,917	129,917	314,222
Respondent or Recordkeeping Costs (Rounded)	$25,700	$25,700	$25,700	$25,700

1. *Affected Public:* Business or other for-profit.

2. *Estimated Number of Respondents:* 17,133 respondents in the first year; 17,133 respondents in the second year; and 17,133 respondents in the third year.

3. *Frequency:* On occasion.

4. *Estimated Number of Responses:* 17,133 responses in the first year; 17,133 responses in the second year; and 17,133 responses in the third year.

5. *Estimated Number of Burden Hours:* 682,833 hours in the first year; 129,917 hours in the second year; and 129,917 hours in the third year.

6. *Estimated Respondent or Recordkeeper Hour Burden Costs:* $25,700 in the first year; $25,700 in the second year; and $25,700 in the third year.

For a detailed summary of the burden hours and related costs by provision, see the FRIA accompanying the final rule. The FRIA includes the estimated costs and assumptions for the paperwork requirements related to this final rule.

MSHA received comments on the information collection requirements contained in the proposed rule (86 FR 50496). These comments are addressed in the Supporting Statement for the information collection requirements for this final rule. The Information Collection Supporting Statement is available at *http://www.reginfo.gov/public/do/PRAMain,* on MSHA's website at *http://www.msha.gov/regs/fedreg/informationcollection/informationcollection.asp,* and at *http://www.regulations.gov.* A copy of the Statement is also available from MSHA by request to S. Aromie Noe at *Noe.Song-Ae.A@dol.gov,* by phone request to 202–693–9440, or by facsimile to 202–693–9441. These are not toll-free numbers.

VI. Other Regulatory Considerations

A. National Environmental Policy Act of 1969

The National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*), requires each Federal agency to consider the environmental effects of final actions and to prepare an Environmental Impact Statement on major actions significantly affecting the quality of the environment. MSHA has reviewed the final rule in accordance with NEPA requirements, the regulations of the Council on Environmental Quality (40 CFR part 1500), and the Department of Labor's NEPA compliance procedures (29 CFR part 11). As a result of this review, MSHA has determined that this final rule will not have a significant environmental impact. Accordingly, MSHA has not conducted an environmental assessment nor provided an environmental impact statement.

B. The Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Act) (2 U.S.C. 1501 *et seq.*) 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 State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million (adjusted annually for inflation) or more in any 1 year. MSHA has reviewed the final rule and has determined that it does not result in such an expenditure. Accordingly, the Unfunded Mandates Reform Act of 1995 requires no further Agency action or analysis.

C. The Treasury and General Government Appropriations Act of 1999: Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 1999 (5 U.S.C. 601 note) requires agencies to assess the impact of Agency action on family well-being. MSHA has determined that the final rule has no effect on family stability or safety, marital commitment, parental rights and authority, or income or poverty of families and children, as defined in the Act. Accordingly, MSHA determines that the final rule does not impact family well-being, as defined in the Act.

D. Congressional Review Act

The Congressional Review Act (5 U.S.C. 801 *et seq.*) allows Congress to review ''major'' rules issued by federal agencies. The Congressional Review Act states that, before a rule may take effect, the agency issuing the rule must submit the rule, and certain related information, to each House of Congress and the Comptroller General. 5 U.S.C. 801(a)(1). The Congressional Review Act defines a major rule as one that has resulted in or is likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, or innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises

in domestic and export markets. 5 U.S.C. 804(2).

Pursuant to the Congressional Review Act, this rule is not a ''major rule,'' as defined by 5 U.S.C. 804(2). However, pursuant to the Congressional Review Act, MSHA will submit a copy of this final rule to both Houses of Congress and to the Comptroller General.

E. Executive Order 12630: Government Actions and Interference With Constitutionally Protected Property Rights

E.O. 12630 requires Federal agencies to ''identify the takings implications of proposed regulatory actions . . . .'' MSHA has determined that the final rule does not include a regulatory or policy action with takings implications. Accordingly, E.O. 12630 requires no further Agency action or analysis.

F. Executive Order 12988: Civil Justice Reform

Section 3 of E.O. 12988 contains requirements for Federal agencies promulgating new regulations or reviewing existing regulations to minimize litigation by eliminating drafting errors and ambiguity, providing a clear legal standard for affected conduct rather than a general standard, promoting simplification, and reducing burden. MSHA has reviewed the final rule and has determined that it meets the applicable standards provided in E.O. 12988 to minimize litigation and undue burden on the Federal court system. Accordingly, the final rule meets the applicable standards provided in E.O. 12988, Civil Justice Reform.

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

E.O. 13045 requires Federal agencies submitting covered regulatory actions to OMB's Office of Information and Regulatory Affairs (OIRA) for review, pursuant to E.O. 12866, to provide OIRA with (1) an evaluation of the environmental health or safety effects that the planned regulation may have on children, and (2) an explanation of why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the agency. In E.O. 13045, ''covered regulatory action'' is defined as rules that may (1) be significant under E.O. 12866, supplemented by E.O. 14094, (*i.e.,* a rulemaking that has an annual effect on the economy of $200 million or more or would adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities), and (2) concern an environmental health risk or safety risk that an agency has reason to believe may disproportionately affect children. Environmental health risks and safety risks refer to risks to health or to safety that are attributable to products or substances that the child is likely to come in to contact with or ingest through air, food, water, soil, or product use or exposure.

This final rule is not subject to E.O. 13045 because it is not significant under section 3(f)(1) of E.O. 12866, and because it does not concern an environmental health risk or safety risk that may disproportionately affect children. This final rule is requiring that operators develop, implement, and update a written safety program for surface mobile equipment (excluding belt conveyors) at surface mines and surface areas of underground mines. The written safety program includes actions operators will take to identify hazards and risks to reduce accidents, injuries, and fatalities related to surface mobile equipment. This rule does not concern risks to health or to safety that are attributable to products or substances that children are likely to come in to contact with or ingest through air, food, water, soil, or product use or exposure. Accordingly, E.O. 13045 requires no further Agency action or analysis.

H. Executive Order 13132: Federalism

MSHA has determined that the final rule does not have federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, E.O. 13132 requires no further Agency action or analysis.

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

MSHA has determined that the final rule does not have tribal implications because it does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Accordingly, E.O. 13175 requires no further Agency action or analysis.

J. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

E.O. 13211 requires agencies to publish a Statement of Energy Effects for ''significant energy actions'' which are agency actions that are ''likely to have a significant adverse effect on the supply, distribution, or use of energy'' including a ''shortfall in supply, price increases, and increased use of foreign supplies.'' MSHA reviewed the final rule for its impact on the production of coal and uranium mining. The final rule results in annualized costs of approximately $12.6 million (in 2021 dollars, undiscounted) to covered surface mines and surface areas of underground mines, though most of these costs will be incurred in MNM mining that does not involve uranium mining (nor coal mining). MSHA therefore determined that such costs do not have any substantive effect on coal and uranium mining. Because the final rule does not result in a significant adverse effect on the supply, distribution, or use of energy, it is not a ''significant energy action.'' Accordingly, E.O. 13211 requires no further Agency action or analysis.

K. Executive Order 13985: Advancing Racial Equity and Support for Underserved Communities Through the Federal Government; Executive Order 14091: Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government

E.O. 13985 provides ''that the Federal Government should pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality.'' E.O. 13985 defines ''equity'' as ''consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.'' To assess the impact of the final rule on equity, MSHA considered two factors: (1) the racial/ethnic distribution in mining in NAICS 212

(which does not include oil and gas extraction) compared to the racial/ethnic distribution of the U.S. workforce (Table VI–1), and (2) the extent to which mining may be concentrated within general mining communities (Table VI–2).

In 2008, NIOSH conducted a survey of mines, which entailed sending a survey packet to 2,321 mining operations to collect a wide range of information, including demographic information on miners. NIOSH's 2012 report, entitled ''National Survey of the Mining Population: Part I: Employees'' reported the findings of this survey.[22] Race and ethnicity information about U.S. mine workers is presented in Table VI–1. Of all mine workers, including miners as well as administrative employees at mines, 93.4 percent of mine workers were white, compared to 80.6 percent of all U.S workers.[23] There were larger percentages of American Indian or Alaska Native and Native Hawaiian or Other Pacific Islander people in the mining industry compared to all U.S. workers, while there were smaller percentages of Asian, Black or African American, and Hispanic/Latino people in the mining industry compared to all U.S. workers.

Section 6 of E.O. 14091 further provides that agencies are ''to create equitable economic opportunity and advance projects that build community wealth'' in rural America. The final rule helps miners in rural areas by improving safety and health at their mines. Table VI–2 shows that there are 22 mining communities, defined as counties where at least 2 percent of the population is working in the mining industry.[24] Although the total population in this table represents only 0.15 percent of the U.S. population, it represents 12.0 percent of all mine workers. The average per capita income in these communities in 2020, $47,977,[25] was lower than the U.S. average, $59,510, representing 80.6 percent of the U.S. average. However, each county's average per capita income varies substantially, ranging from 56.4 percent of the U.S. average to 146.8 percent.

This final rule is requiring that operators develop, implement, and update a written safety program for surface mobile equipment (excluding belt conveyors) at surface mines and surface areas of underground mines. The written safety program includes actions operators will take to identify hazards and risks to reduce accidents, injuries, and fatalities related to surface mobile equipment. MSHA determined that the final rule is consistent with the goals of E.O. 13985 and supports the advancement of equity for all workers at mines, including those who are historically underserved and marginalized.

TABLE VI–1—RACIAL AND ETHNIC DISTRIBUTION OF MINERS *

[2012]

	Number of miners in mining (except oil and gas) (NAICS 212)	As a percent of total miners who self-identified in these categories (latest data for 2008)	Percent of all workers in the United States for comparison (latest data 2012) ****
Ethnicity:			
Hispanic/Latino	26,622	12.1	15.0
Non-Hispanic or Latino	192,839	87.9	85.0
Total	219,461	100.0	100.0
Race: **			
American Indian or Alaska Native ***	4,050	1.9	0.8
Asian	183	0.1	5.4
Black or African American	8,893	4.3	13.0
Native Hawaiian or Other Pacific Islander	634	0.3	0.2
White	194,016	93.4	80.6
Total	207,776	100.0	100.0

* The term ''miners'' includes miners and other workers at mines such as administrative employees.

** Does not include miners who did not self-report in one of these categories. Some of the surveyed miners may not have self-reported in one of these categories if they are affiliated with more than one race, or if they chose not to respond to this survey question.

*** Includes miners who self-identified as an American Indian or Alaskan Native as a single race, not in combination with any other races. No other data on miners in this racial group were available from this source. In other employment statistics often reported on American Indians and Alaska Natives, their population is based on self-reporting as being American Indian or Alaska Native in combination with any other race, which has resulted in the reporting of much higher employment levels. See BLS, *Monthly Labor Review,* ''Alternative Measurements of Indian Country: Understanding Their Implications for Economic, Statistical, and Policy Analysis,'' *https://www.bls.gov/opub/mlr/2021/article/alternative-measurements-of-indian-country.htm.*

**** More recent data from the 2020 Decennial Census were not available in September 2022.

Sources: National Institute for Occupational Safety and Health (NIOSH). 2012a. National Survey of the Mining Population Mining Publication: Part 1: Employees, DHHS (NIOSH) Pub. No. 2012–152, June 2012; U.S. Census Bureau, 2012 American Community Survey (ACS).

[22] National Institute for Occupational Safety and Health (NIOSH), ''National Survey of the Mining Population: Part I: Employees,'' June 2012. *https://www.cdc.gov/niosh/mining/works/coversheet776.html.*

[23] National data on workers by race were not available for the year 2008; comparable data for 2012 are provided for comparison under the assumption that there would not be major differences in distributions between these 2 years.

[24] Although 2 percent may appear to be a small number for identifying a mining community, one might consider that if the average household with one parent working as a miner has five members in total, then approximately 10 percent of households in the area would be directly associated with mining. While 10 percent may also appear small, this refers to the county. There are likely particular areas that have a heavier concentration of mining households.

[25] This is a simple average rather than a weighted average by population.

TABLE VI–2—MINING COUNTIES: COUNTIES IN THE UNITED STATES WITH RELATIVELY HIGH CONCENTRATIONS OF MINERS *

[At least 2 percent of the county population]

Number	County	Number of miners (first quarter 2022)	Population of county (latest data in 2021)	Estimated percent of population who are miners
1	White Pine County, Nevada	1,288	9,182	14.0
2	Pershing County, Nevada	771	6,741	11.4
3	Humboldt County, Nevada	1,549	17,648	8.8
4	Campbell County, Wyoming	3,547	46,401	7.6
5	Winkler County, Texas	513	7,415	6.9
6	Mercer County, North Dakota	555	8,323	6.7
7	Chase County, Kansas	166	2,598	6.4
8	Shoshone County, Idaho	723	13,612	5.3
9	Logan County, West Virginia	1,643	31,909	5.1
10	Sweetwater County, Wyoming	2,050	41,614	4.9
11	Glasscock County, Texas	56	1,149	4.9
12	Livingston County, Kentucky	431	8,959	4.8
13	Buchanan County, Virginia	946	19,816	4.8
14	McDowell County, West Virginia	660	18,363	3.6
15	Big Horn County, Wyoming	413	11,632	3.6
16	Sevier County, Utah	601	21,906	2.7
17	Boone County, West Virginia	582	21,312	2.7
18	Moffat County, Colorado	349	13,185	2.6
19	Nye County, Nevada	1,062	43,946	2.4
20	Raleigh County, West Virginia	1,647	73,771	2.2
21	Wyoming County, West Virginia	456	21,051	2.2
22	Elko County, Nevada	1,090	53,915	2.0
Total		20,963	494,448	4.2
All U.S. Counties		174,387	331,893,745	
Miners in Mining Counties as a Percent of All U.S. Miners.		12.0%		
Population of Mine Counties as a Percent of U.S. Population.			0.15%	

* The term ''miners'' includes miners and other workers at mines such as administrative employees.

Source: Bureau of Labor Statistics (BLS), Quarterly Employment and Wages First Quarter 2022 (2022); Bureau of Economic Analysis, Personal Income by County, Metro, and Other Areas 2020 (2020); U.S. Census Bureau, ''Annual Estimates of the Resident Population for Counties: April 1, 2020, to July 1, 2021 (CO–EST2021–POP).'' *Census.gov.* Accessed DATE. Available at: *https://www.census.gov/data/tables/time-series/demo/popest/2020s-counties-total.html;* U.S. Census Bureau, Quick Facts, available at: *https://www.census.gov/quickfacts/fact/table/US/PST045221* (accessed DATE).

VII. References

American Society of Safety Professionals (ASSP), Occupational Health and Safety Management Systems, ANSI/ASSP Z10–2012, (R2017).

International Standards Organization (ISO), Occupational Health and Safety Management Systems—Requirements With Guidance for Use (ISO 45001:2018).

National Mining Association, CORESafety and Health Management System

U.S Department of Labor, Occupational Safety and Health Administration (OSHA), Recommended Practices for Safety and Health Programs (*https://www.osha.gov/safety-management*).

U.S. Department of Transportation, 49 CFR part 270—System Safety Program.

List of Subjects

30 CFR Parts 56 and 57

Metal and nonmetal mining, Mine safety and health, Surface mining, Mobile equipment safety program, Reporting and recordkeeping requirements, and Underground mining.

30 CFR Part 77

Coal mining, Mine safety and health, Surface mining, Mobile equipment safety program, Reporting and recordkeeping requirements, and Underground mining.

Christopher J. Williamson

Assistant Secretary of Labor for Mine Safety and Health.

For the reasons set out in the preamble, and under the authority of the Federal Mine Safety and Health Act of 1977, as amended by the Mine Improvement and New Emergency Response Act of 2006, chapter I of title 30 of the Code of Federal Regulations is amended as follows:

SUBCHAPTER K—METAL AND NONMETAL MINE SAFETY AND HEALTH

PART 56—SAFETY AND HEALTH STANDARDS—SURFACE METAL AND NONMETAL MINES

■ 1. The authority citation for part 56 continues to read as follows:

Authority: 30 U.S.C. 811.

■ 2. Add subpart T to part 56 to read as follows:

Subpart T—Safety Program for Surface Mobile Equipment

Sec.

§ 56.23000 Purpose and scope.

This subpart requires operators to develop, implement, and update a written safety program for surface mobile equipment to reduce the number and rates of accidents, injuries, and fatalities. This subpart applies to surface mobile equipment at surface metal and nonmetal mines. The purpose of this safety program is to promote and support a positive safety culture and improve miners' safety at the mine.

§ 56.23001 Definitions.

The following definitions apply in this subpart—

Responsible person means a person with authority and responsibility to evaluate and update a written safety program for surface mobile equipment.

Surface mobile equipment means wheeled, skid-mounted, track-mounted, or rail-mounted equipment capable of moving or being moved, and any powered equipment that transports people, equipment, or materials, excluding belt conveyors, at surface metal and nonmetal mines.

§ 56.23002 Written safety program.

(a) Each operator shall develop and implement a written safety program for surface mobile equipment that contains the elements in this subpart, no later than July 17, 2024.

(b) Each operator shall designate at least one responsible person to evaluate and update the written safety program, no later than July 17, 2024.

§ 56.23003 Requirements for written safety program.

(a) The operator shall develop and implement a written safety program that includes actions the operator will take to:

(1) Identify and analyze hazards and reduce the resulting risks related to the movement and the operation of surface mobile equipment;

(2) Develop and maintain procedures and schedules for routine maintenance and non-routine repairs for surface mobile equipment;

(3) Identify currently available and newly emerging feasible technologies that can enhance safety at the mine and evaluate whether to adopt them; and

(4) Train miners and other persons at the mine necessary to perform work to identify and address or avoid hazards related to surface mobile equipment.

(b) The responsible person shall evaluate and update the written safety program at least annually, or as mining conditions or practices change that may adversely affect the health and safety of miners or other persons, as accidents or injuries occur, or as surface mobile equipment changes or modifications are made.

(c) The operator shall solicit input from miners and their representatives in developing and updating the written safety program.

§ 56.23004 Record and inspection.

(a) The operator shall make the written safety program available for inspection by authorized representatives of the Secretary and provide a copy upon request.

(b) The operator shall make the written safety program available for inspection by miners and their representatives and, at no cost, provide a copy upon request.

PART 57—SAFETY AND HEALTH STANDARDS—UNDERGROUND METAL AND NONMETAL MINES

■ 3. The authority citation for part 57 continues to read as follows:

Authority: 30 U.S.C. 811.

■ 4. Add subpart U to part 57 to read as follows:

Subpart U—Safety Program for Surface Mobile Equipment

Sec.

§ 57.23000 Purpose and scope.

This subpart requires operators to develop, implement, and update a written safety program for surface mobile equipment to reduce the number and rates of accidents, injuries, and fatalities. This subpart applies to surface mobile equipment at surface areas of underground metal and nonmetal mines. The purpose of this safety program is to promote and support a positive safety culture and improve miners' safety at the mine.

§ 57.23001 Definitions.

The following definitions apply in this subpart—

Responsible person means a person with authority and responsibility to evaluate and update a written safety program for surface mobile equipment.

Surface mobile equipment means wheeled, skid-mounted, track-mounted, or rail-mounted equipment capable of moving or being moved, and any powered equipment that transports people, equipment, or materials, excluding belt conveyors, at surface areas of underground metal and nonmetal mines.

§ 57.23002 Written safety program.

(a) Each operator shall develop and implement a written safety program for surface mobile equipment that contains the elements in this subpart, no later than July 17, 2024.

(b) Each operator shall designate at least one responsible person to evaluate and update the written safety program, no later than July 17, 2024.

§ 57.23003 Requirements for written safety program.

(a) The operator shall develop and implement a written safety program that includes actions the operator will take to:

(1) Identify and analyze hazards and reduce the resulting risks related to the movement and the operation of surface mobile equipment;

(2) Develop and maintain procedures and schedules for routine maintenance and non-routine repairs for surface mobile equipment;

(3) Identify currently available and newly emerging feasible technologies that can enhance safety at the mine and evaluate whether to adopt them; and

(4) Train miners and other persons at the mine necessary to perform work to identify and address or avoid hazards related to surface mobile equipment.

(b) The responsible person shall evaluate and update the written safety program at least annually, or as mining conditions or practices change that may adversely affect the health and safety of miners or other persons, as accidents or injuries occur, or as surface mobile equipment changes or modifications are made.

(c) The operator shall solicit input from miners and their representatives in developing and updating the written safety program.

§ 57.23004 Record and inspection.

(a) The operator shall make the written safety program available for inspection by authorized representatives of the Secretary and provide a copy upon request.

(b) The operator shall make the written safety program available for inspection by miners and their representatives and, at no cost, provide a copy upon request.

SUBCHAPTER O—COAL MINE SAFETY AND HEALTH

PART 77—MANDATORY SAFETY STANDARDS, SURFACE COAL MINES AND SURFACE WORK AREAS OF UNDERGROUND COAL MINES

■ 5. The authority citation for part 77 continues to read as follows:

Authority: 30 U.S.C. 811.

■ 6. Add subpart V to part 77 to read as follows:

Subpart V—Safety Program for Surface Mobile Equipment

Sec.
77.2100 Purpose and scope.
77.2101 Definitions.
77.2102 Written safety program.
77.2103 Requirements for written safety program.
77.2104 Record and inspection.

§ 77.2100 Purpose and scope.

This subpart requires operators to develop, implement, and update a written safety program for surface mobile equipment to reduce the number and rates of accidents, injuries, and fatalities. This subpart applies to surface mobile equipment at surface coal mines and surface work areas of underground coal mines. The purpose of this safety program is to promote and support a positive safety culture and improve miners' safety at the mine.

§ 77.2101 Definitions.

The following definitions apply in this subpart—

Responsible person means a person with authority and responsibility to evaluate and update a written safety program for surface mobile equipment.

Surface mobile equipment means wheeled, skid-mounted, track-mounted, or rail-mounted equipment capable of moving or being moved, and any powered equipment that transports people, equipment, or materials, excluding belt conveyors, at surface coal mines and surface work areas of underground coal mines.

§ 77.2102 Written safety program.

(a) Each operator shall develop and implement a written safety program for surface mobile equipment that contains the elements in this subpart, no later than July 17, 2024.

(b) Each operator shall designate at least one responsible person to evaluate and update the written safety program, no later than July 17, 2024.

§ 77.2103 Requirements for written safety program.

(a) The operator shall develop and implement a written safety program that includes actions the operator will take to:

(1) Identify and analyze hazards and reduce the resulting risks related to the movement and the operation of surface mobile equipment;

(2) Develop and maintain procedures and schedules for routine maintenance and non-routine repairs for surface mobile equipment;

(3) Identify currently available and newly emerging feasible technologies that can enhance safety at the mine and evaluate whether to adopt them; and

(4) Train miners and other persons at the mine necessary to perform work to identify and address or avoid hazards related to surface mobile equipment.

(b) The responsible person shall evaluate and update the written safety program at least annually, or as mining conditions or practices change that may adversely affect the health and safety of miners or other persons, as accidents or injuries occur, or as surface mobile equipment changes or modifications are made.

(c) The operator shall solicit input from miners and their representatives in developing and updating the written safety program.

§ 77.2104 Record and inspection.

(a) The operator shall make the written safety program available for inspection by authorized representatives of the Secretary and provide a copy upon request.

(b) The operator shall make the written safety program available for inspection by miners and their representatives and, at no cost, provide a copy upon request.

[FR Doc. 2023–27640 Filed 12–19–23; 8:45 am]

BILLING CODE 4520–43–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 3, 100, and 165

[Docket Number USCG–2023–0927]

RIN 1625–AA00

Coast Guard Sector Buffalo; Sector Name Conforming Amendment

AGENCY: Coast Guard, Department of Homeland Security.

ACTION: Final rule.

SUMMARY: This rule makes non-substantive changes to Coast Guard regulations in association with a change in the Coast Guard's internal organization. The purpose of this rule is to reflect that U.S. Coast Guard Sector Buffalo has been renamed U.S. Coast Guard Sector Eastern Great Lakes. These changes will have no substantive effect on the regulated public.

DATES: This rule is effective December 20, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2023–0927 in the search box and click ''Search.'' Next, in the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Lieutenant Commander Bo Ames, Ninth Coast Guard District Legal Office, U.S. Coast Guard; telephone 216–902–6010, email *Bo.J.Ames@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

AOR Area of responsibility
CFR Code of Federal Regulations
COTP Captain of the Port
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
OCMI Officer in Charge of Marine Inspections
OFCO Operating Facility Change Order
SAR Search and rescue
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

For the last several years, the Coast Guard has sought to better align the names of its assets to correspond to the area of responsibility which they serve. Review of the missions and engagements within the eastern Great Lakes region highlighted that ''Sector Buffalo'' alone did not adequately capture the breadth and range of Coast Guard operations and relationships throughout the Eastern Great Lakes. The Coast Guard has approved the name change to U.S. Coast Guard Sector Eastern Great Lakes in order to acknowledge the long-standing commitment to all communities throughout the Eastern Great Lakes and to reaffirm the multi-mission support that the Coast Guard provides to ensure safety at sea and enhanced maritime governance.

The geographic boundaries of Sector Eastern Great Lakes are not changing, and its office is not moving from Buffalo, New York.

We did not publish a notice of proposed rulemaking (NPRM) before this final rule. The Coast Guard finds that this rule is exempt from notice and comment rulemaking requirements under 5 U.S.C. 553(b)(A) because the changes it makes are conforming amendments involving agency organization. The Coast Guard also finds good cause exists under 5 U.S.C. 553(b)(B) for not publishing an NPRM because the changes will have no substantive effect on the public, and notice and comment are therefore unnecessary.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 14 U.S.C. 504(a)(2), as delegated at 33 CFR 1.05–1(h), to issue regulations necessary to implement technical, organizational, and conforming amendments and corrections to rules, regulations, and notices.

Operating Facility Change Order (OFCO) No. 036/23, issued November 6, 2023, changed the official unit name of U.S. Coast Guard Sector Buffalo to U.S. Coast Guard Sector Eastern Great Lakes. See OFCO No. 036/23, which is available in the docket for this rule. The previous name of Sector Buffalo is described and reflected in regulations, which also contain contact details and other references to Sector Buffalo. These conforming amendments update those regulations so that they contain current information.

Under 14 U.S.C. 504(a)(2), the Commandant of the Coast Guard has the authority to establish and prescribe the purpose of Coast Guard Shore establishments. This authority has been delegated to the Chief of the Coast Guard's Office of Regulations and Administrative Law under 33 CFR 1.05–1(h).

IV. Discussion of the Rule

OFCO No. 036/23, issued November 6, 2023, changed the official unit name of U.S. Coast Guard Sector Buffalo to U.S. Coast Guard Sector Eastern Great Lakes. The November 2023 OFCO did not change the area of responsibility (AOR). The AOR of U.S. Coast Guard Sector Eastern Great Lakes is identical to that of what was U.S. Coast Guard Sector Buffalo. All authorities and responsibilities previously assigned to Commander, U.S. Coast Guard Sector Buffalo have been assigned to Commander, U.S. Coast Guard Sector Eastern Great Lakes. Additionally, all authorities that were vested in the Commander, U.S. Coast Guard Sector Buffalo as it pertains to the COTP, the OCMI, the Federal On Scene Coordinator, the Federal Maritime Security Coordinator, and the Search and Rescue Coordinator, have been assigned to Commander, U.S. Coast Guard Sector Eastern Great Lakes. This rule does not change any sector, OCMI, or COTP zone boundary lines, nor does it have any substantive impact on existing regulated navigation area, safety zone, or security zone regulation, or any naval vessel protection zones.

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 rule has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB), and pursuant to OMB guidance is exempt from the requirements of Executive Order 13771.

This regulatory action determination is based on the finding that the name change will have no substantive effect on the public.

B. Impact on Small Entities

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

For the reasons stated in section V.A. above, this rule will not have a significant economic impact on any member of the public, including ''small entities.''

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule consists only of an organizational amendment. It is categorically excluded from further review under paragraph L3 of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1, Implementation of the National Environmental Policy Act.

List of Subjects

33 CFR Part 3

Organizations and functions (Government agencies).

33 CFR Parts 100 and 165

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

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR parts 3, 100, and 165 as follows:

PART 3—COAST GUARD AREAS, DISTRICTS, SECTORS, MARINE INSPECTION ZONES, AND CAPTAIN OF THE PORT ZONES

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

Authority: 14 U.S.C. 501, 504; Public Law 107–296, 116 Stat. 2135; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.3.

■ 2. Revise § 3.45–10 to read as follows:

§ 3.45–10 Sector Eastern Great Lakes Marine Inspection Zone and Captain of the Port Zone.

Sector Eastern Great Lakes' office is located in Buffalo, New York. The boundaries of Sector Eastern Great Lakes' Marine Inspection Zone and Captain of the Port Zone include all navigable waters of the United States and contiguous land areas within the boundaries of an area starting from a point on the international boundary in Lake Erie at latitude 42°19′24″ N, longitude 80°31′10″ W, proceeding southwest along the international boundary to a point at latitude 41°40′36″ N, longitude 82°25′00″ W; thence south to latitude 41°00′00″ N; thence east to longitude 78°54′58″ W; thence north to latitude 42°00′00″ N; thence east to the east bank of the Delaware River at latitude 42°00′00″ N, longitude 75°21′28″ W; thence east to longitude 74°39′00″ W; thence north to the international boundary at a point at latitude 44°59′58″ N, longitude 74°39′00″ W; thence southeast along the international boundary to the starting point.

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 3. The authority citation for part 100 continues to read as follows:

Authority: 46 U.S.C. 70041; 33 CFR 1.05–1.

§ 100.901 [Amended]

■ 4. In § 100.901, remove ''Sector Buffalo, NY'' from table 1 and add, in its place, ''Sector Eastern Great Lakes, NY''.

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

§ 165.911 [Amended]

■ 6. In § 165.911, remove the word ''Buffalo'' and add, in its place, the words ''Eastern Great Lakes''.

§ 165.939 [Amended]

■ 7. In § 165.939, remove the words ''Port Buffalo'' and add, in its place, the words ''Port Eastern Great Lakes''.

Dated: December 15, 2023.

Michael T. Cunningham,

Chief, Office of Regulations and Administrative Law.

[FR Doc. 2023–27943 Filed 12–19–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0965]

RIN 1625–AA00

Safety Zone; Laguna de Lobina, Culebra, Puerto Rico

AGENCY: Coast Guard, Department of Homeland Security (DHS).

ACTION: Temporary interim rule and request for comments.

SUMMARY: The Coast Guard is establishing a temporary safety zone for navigable waters of Laguna de Lobina within a 50-yard radius of Culebra Bridge due to structural damage to the bridge. The safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards created by the damaged bridge. Entry of persons and vessels from into the safety zone is prohibited unless specifically authorized by the Captain of the Port San Juan or a designated representative.

DATES: This temporary interim rule is effective without actual notice from December 20, 2023, through February 12, 2024. For the purposes of enforcement, actual notice will be used from December 14, 2023, until December 20, 2023.

Comments and related material must reach the Coast Guard on or before January 19, 2024.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2023–0965 in the search box and click ''Search.'' Next, in the Document Type column, select ''Supporting & Related Material.'' See section VI of the **SUPPLEMENTARY INFORMATION** for information on public participation and request for comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this rule, call or email Lieutenant Commander Carlos M. Ortega-Perez, Sector San Juan Waterways Management Division, U.S. Coast Guard; telephone 787–729–2380, email *Carlos.M.Ortega-Perez@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because structural damaged is causing the potential collapse of the Culebra Bridge. Due to this situation the Culebra Bridge is temporary closed and immediate action is needed to respond to the potential safety hazards associated with the bridge structural condition. It is impracticable to publish an NPRM because we must establish this safety zone by December 14, 2023. Therefore, we lack sufficient time to provide a reasonable comment period and then to consider those comments before issuing the rule.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable

because immediate action is needed to respond to the potential safety hazards associated with potential collapsing of the Culebra Bridge.

We are soliciting comments on this rulemaking. If we determine that changes to this rulemaking action are necessary, the Coast Guard will consider comments received in a subsequent temporary final rule.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. The Captain of the Port Sector San Juan (COTP) has determined that potential hazards associated with potential collapsing of the Culebra Bridge starting December 14, 2023, will be a safety concern for anyone within a 50-yard radius of bridge. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone while the bridge is being closed.

IV. Discussion of the Rule

This rule establishes a safety zone from December 14, 2023, while the bridge is closed due to structural damage. The safety zone will cover all navigable waters of the Laguna de Lobina within a 50-yard radius of the Culebra Bridge. The duration of the zone is intended to protect personnel, vessels, and the marine environment in these navigable waters while the bridge is closed. No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This rule has not been designated a ''significant regulatory action,'' under section 3(f) of Executive Order 12866, as amended by Executive Order 14094 (Modernizing Regulatory Review). Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on: (1) The safety of personnel, vessels, and the marine environment from potential hazards created by potential collapsing the bridge; (2) although persons and vessels may not enter, transit through, anchor in, or remain within the safety zone without authorization from the COTP or a designated representative they may operate in the surrounding area during the enforcement period.

B. Impact on Small Entities

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

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

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

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone that will prohibit entry within 50-yard radius of the Culebra Bridge. It is categorically excluded from further review under paragraph L60(d) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble. We

seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

G. Protest Activities

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

VI. Public Participation and Request for Comments

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

Submitting comments. We encourage you to submit comments through the Federal Decision-Making Portal at *https://www.regulations.gov.* To do so, go to *https://www.regulations.gov,* type USCG–2023–0965 in the search box and click ''Search.'' Next, look for this document in the Search Results column, and click on it. Then click on the Comment option. If you cannot submit your material by using *https://www.regulations.gov,* call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this rule for alternate instructions.

Viewing material in docket. To view documents mentioned in this rule as being available in the docket, find the docket as described in the previous paragraph, and then select ''Supporting & Related Material'' in the Document Type column. Public comments will also be placed in our online docket and can be viewed by following instructions on the *https://www.regulations.gov.* Frequently Asked Questions web page. Also, if you click on the Dockets tab and then the rule, you should see a ''Subscribe'' option for email alerts. The option will notify you when comments are posted, or a final rule is published.

We review all comments received, but we will only post comments that address the topic of the rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive.

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

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T07–0965 to read as follows:

§ 165.T07–0965 Safety Zone; Culebra Bridge, Puerto Rico.

(a) *Location.* All waters of Laguna de Lobina and Ensenada Honda, from surface to bottom, encompassed by 50-yard radius from Culebra Bridge located at 18°18′07″ N 65°17′59″ W.

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

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

(2) To seek permission to enter, contact the COTP or the COTP's representative by telephone at (787) 289–2041, or a designated representative via VHF–FM radio on channel 16 to request authorization. If authorization is granted, all persons and vessels receiving such authorization must comply with the instructions of the COTP San Juan or a designated representative. Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(3) The Coast Guard will provide notice of the regulated area by Local Notice to Mariners, Broadcast Notice to Mariners via VHF–FM channel 16, or the COTP's designated representative

(d) *Enforcement period.* This section will be enforced from December 14, 2023, until February 12, 2024.

José E. Díaz,

Captain, U.S. Coast Guard, Captain of the Port San Juan.

[FR Doc. 2023–28001 Filed 12–19–23; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R02–OAR–2023–0252; FRL–11034–03–R2]

Approval of Air Quality Implementation Plans; New Jersey; Exemptions To Improve Resiliency, Air Toxics Thresholds, $PM_{2.5}$ and Ammonia Emission Statement Reporting, and $PM_{2.5}$ in Air Permitting; Correction

AGENCY: Environmental Protection Agency.

ACTION: Final rule; correction.

SUMMARY: The Environmental Protection Agency (EPA) is correcting a final rule that appeared in the **Federal Register** on November 28, 2023. The document issues a final rule approving adoptions, repeals, and amendments to the New Jersey State Implementation Plan (SIP), submitted by the New Jersey Department of Environmental Protection (NJDEP) on December 17, 2017, and August 23, 2018, that concern exemptions to improve resiliency during emergency situations, updates to hazardous air pollutant (HAP) reporting thresholds, updates to the certification and submission of emission statements, the addition of Federal New Source Review (NSR) requirements for fine particles ($PM_{2.5}$), and conform administrative penalties to the approved rules and correct inconsistencies throughout the State's SIP. This correction addresses errors in the amendatory instructions published on November 28, 2023.

DATES: This rule is effective on December 28, 2023.

FOR FURTHER INFORMATION CONTACT: Nicholas Ferreira, Air Programs Branch, Environmental Protection Agency, Region 2, 290 Broadway, 25th Floor, New York, New York 10007–1866, (212) 637–3127, or by email at *ferreira.nicholas@epa.gov*.

SUPPLEMENTARY INFORMATION: In FR Doc. 2023–26022, appearing at 88 FR 83036 in the **Federal Register** of Tuesday,

November 28, 2023, the following corrections are made:

§ 52.1570 [Corrected]

■ 1. On page 83038, in the third column, amendment 2.a. for § 52.1570 is corrected to read ''a. Removing the entry for ''Title 7, Chapter 27, Sections 8.1 and 8.2'';''.

■ 2. On page 83038, in the third column, amendment 2.c. for § 52.1570 is corrected to read ''c. Revising the entries for ''Title 7, Chapter 27, Subchapter 16'', ''Title 7, Chapter 27, Subchapter 17'', ''Title 7, Chapter 27, Subchapter 18'', ''Title 7, Chapter 27, Subchapter 19'', ''Title 7, Chapter 27, Subchapter 21'', and ''Title 7, Chapter 27A, Subchapter 3, Section 3.10''.''.

■ 3. On pages 83038–83039, the table in § 52.1570(c) is corrected to read:

§ 52.1570 [Corrected]

(c) * * *

EPA-APPROVED NEW JERSEY STATE REGULATIONS AND LAWS

State citation	Title/subject	State effective date	EPA approval date	Comments
*	* * *	*	*	* * *
Title 7, Chapter 27, Section 8.1.	Definitions	January 16, 2018.	November 28, 2023, 88 FR 83036.	
Title 7, Chapter 27, Section 8.2.	Applicability	June 20, 1994	August 7, 1997, 62 FR 42412.	
*	* * *	*	*	* * *
Title 7, Chapter 27, Subchapter 16.	Control and Prohibition of Air Pollution by Volatile Organic Compounds.	January 16, 2018.	November 28, 2023, 88 FR 83036.	
Title 7, Chapter 27, Subchapter 17.	Control and Prohibition of Air Pollution by Toxic Substances.	January 16, 2018.	November 28, 2023, 88 FR 83036.	
Title 7, Chapter 27, Subchapter 18.	Control and Prohibition of Air Pollution from New or Altered Sources Affecting Ambient Air Quality (Emission Offset Rules).	November 6, 2017.	November 28, 2023, 88 FR 83036.	
Title 7, Chapter 27, Subchapter 19.	Control and Prohibition of Air Pollution by Oxides of Nitrogen.	January 16, 2018.	November 28, 2023, 88 FR 83036.	Subchapter 19 is approved into the SIP except for the following provisions: (1) Phased compliance plan through repowering in section 19.21 that allows for implementation beyond May 1, 1999; and (2) phased compliance plan through the use of innovative control technology in section 19.23 that allows for implementation beyond May 1, 1999.
Title 7, Chapter 27, Subchapter 21.	Emission Statements	January 16, 2018.	November 28, 2023, 88 FR 83036.	Section 7:27–21.3(b)(1) and 7:27–21.3(b)(2) of New Jersey's Emission Statement rule requires facilities to report on the following pollutants to assist the State in air quality planning needs: Hydrochloric acid, hydrazine, methylene chloride, tetrachloroethylene, 1, 1, 1 trichloroethane, carbon dioxide and methane. EPA will not take SIP-related enforcement action on these pollutants.
*	* * *	*	*	* * *
Title 7, Chapter 27A, Subchapter 3, Section 3.10.	Civil Administrative Penalties for Violations of Rules Adopted Pursuant to the Act.	January 16, 2018.	November 28, 2023, 88 FR 83036.	
*	* * *	*	*	* * *

Lisa Garcia,

Regional Administrator, Region 2.

[FR Doc. 2023–27830 Filed 12–19–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2023–0477; FRL–11532–02–R9]

Interim Final Determination To Stay or Defer Sanctions; California; San Joaquin Valley Unified Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interim final determination.

SUMMARY: The Environmental Protection Agency (EPA) is making an interim final determination that the State of California has submitted revisions to the California State Implementation Plan (SIP) that satisfy the requirements under the Clean Air Act (CAA or ''Act'') for nonattainment areas classified as ''Serious'' for the 1997 annual fine particulate matter ($PM_{2.5}$) national ambient air quality standards (NAAQS), and for contingency measures for the 2006 24-hour $PM_{2.5}$ NAAQS and the 2012 annual $PM_{2.5}$ NAAQS, in the San Joaquin Valley (SJV) nonattainment area. This determination is based on a proposed approval, published on July 14, 2023, of SIP revisions addressing the Serious area requirements for the 1997 annual $PM_{2.5}$ NAAQS (except contingency measures) and on proposed approvals, published elsewhere in this issue of the **Federal Register**, of SIP revisions addressing the contingency measure requirements for the 1997 annual $PM_{2.5}$ NAAQS, the 2006 24-hour $PM_{2.5}$ NAAQS, and the 2012 annual $PM_{2.5}$ NAAQS. The effect of this interim final determination is to stay the application of the offset sanction and to defer the application of the highway sanction that were triggered by previous EPA actions that included disapproval of the certain Serious area SIP elements submitted for the San Joaquin Valley for the 1997 annual $PM_{2.5}$ NAAQS (including the contingency measure element), and disapproval of the contingency measure SIP elements for the 2006 24-hour $PM_{2.5}$ NAAQS and the 2012 annual $PM_{2.5}$ NAAQS.

DATES: This interim final determination is effective on December 20, 2023. However, comments will be accepted until January 19, 2024.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R09–OAR–2023–0477 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 Confidential Business Information (CBI) or other information the disclosure of which 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 disabilities who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Rory Mays, Planning and Analysis Branch (AIR–2), Air and Radiation Division, EPA Region IX, 75 Hawthorne Street, San Francisco, CA 94105, (415) 972–3227, or by email at *mays.rory@epa.gov.*

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

Table of Contents

I. Background

On November 26, 2021, the EPA took final action to approve in part and disapprove in part portions of SIP revisions submitted by the California Air Resources Board (CARB) to address CAA requirements for the 1997 annual $PM_{2.5}$ NAAQS in the San Joaquin Valley $PM_{2.5}$ nonattainment area.[1] Specifically, the EPA approved the 2013 base year emissions inventories but disapproved the attainment demonstration and related elements, including the comprehensive precursor demonstration, five percent annual emissions reductions demonstration, best available control measures demonstration, reasonable further progress demonstration, quantitative milestones, contingency measures, and motor vehicle emissions budgets. In our November 26, 2021 action, we determined that while the SIP revisions met the requirements for base year inventories, the SIP revisions did not meet the applicable requirements for the other listed plan elements under title I, part D, of the Act and the EPA's implementing regulations for Serious $PM_{2.5}$ nonattainment areas that are subject to CAA section 189(d). Pursuant to section 179 of the CAA and our regulations at 40 CFR 52.31, this partial disapproval action started an 18-month clock for the application of the offset sanction and a 24-month clock for the application of the highway sanction, beginning on the effective date of our November 26, 2021 action (*i.e.,* December 27, 2021), unless the State submits, and the EPA approves, a SIP revision or revisions that address the deficiencies that formed the basis for the partial disapproval prior to the expiration of the sanctions clocks. Application of the offset sanction has been in effect since June 27, 2023, and the clock for the highway sanction will expire on December 27, 2023.

On November 8, 2021, CARB submitted the ''Attainment Plan Revision for the 1997 Annual $PM_{2.5}$ Standard'' (herein referred to as the ''15 $\mu g/m^3$ SIP Revision'') to amend the previously disapproved SIP revisions and to address all CAA requirements for the 1997 annual $PM_{2.5}$ NAAQS except for contingency measures.[2] On July 14, 2023, the EPA proposed approval of the relevant SIP revisions, including the 15 $\mu g/m^3$ SIP Revision, that address all the applicable requirements for the 1997 annual $PM_{2.5}$ NAAQS in the San Joaquin Valley that had been the subject of our November 26, 2021 final partial disapproval action, except for the contingency measure requirements.[3] On December 5, 2023, the EPA Region IX Regional Administrator signed a final rule taking action to approve the SIP revisions that the EPA had proposed to approve on July 14, 2023.

Also on November 26, 2021, the EPA published a separate final rule to approve in part and disapprove in part portions of SIP revisions submitted by CARB to address CAA requirements for the 2006 24-hour $PM_{2.5}$ NAAQS and the 2012 annual $PM_{2.5}$ NAAQS in the San Joaquin Valley.[4] Specifically, we approved all but the contingency measure element of the SIP revisions as they pertained to the Moderate area plan requirements for the 2012 $PM_{2.5}$ NAAQS, and we disapproved the

[1] 86 FR 67329.

[2] 88 FR 45276, 45278–45279 (July 14, 2023).

[3] 88 FR 45276.

[4] 86 FR 67343 (November 26, 2021).

contingency measure elements for the 2006 24-hour $PM_{2.5}$ NAAQS and the 2012 annual $PM_{2.5}$ NAAQS. Like our final action on the Serious area plan for the 1997 annual $PM_{2.5}$ NAAQS, pursuant to section 179 of the CAA and our regulations at 40 CFR 52.31, our partial disapproval action started an 18-month clock for the application of the offset sanction and a 24-month clock for the application of the highway sanction, beginning on the effective date of our November 26, 2021 action (*i.e.,* December 27, 2021), unless the State submits, and the EPA approves, a SIP revision or revisions that address the deficiencies that formed the basis for the disapproval prior to the expiration of the sanctions clocks. Application of the offset sanction has been in effect since June 27, 2023, and the clock for the highway sanction will expire on December 27, 2023.

On June 8, 2023, CARB submitted SIP revisions (herein referred to as the ''SJV $PM_{2.5}$ Contingency Measure SIP'' and the ''Residential Wood Burning Contingency Measure'') addressing the contingency measure requirements for the 1997 annual $PM_{2.5}$ NAAQS, the 2006 24-hour $PM_{2.5}$ NAAQS, and the 2012 annual $PM_{2.5}$ NAAQS for the San Joaquin Valley. The Residential Wood Burning Contingency Measure would, following a triggering event, expand the residential wood burning curtailment restrictions if certain determinations are made by the EPA. On October 16, 2023, CARB supplemented the SJV $PM_{2.5}$ Contingency Measure SIP with the submission of a second $PM_{2.5}$ contingency measure (referred to herein as the ''Rural Open Areas Contingency Measure'') that would, following a triggering event, expand applicability of certain fugitive dust controls if triggered by a contingency event. In addition, on November 13, 2023, CARB submitted a state-wide contingency measure SIP revision, including provisions for $PM_{2.5}$ contingency measures in the San Joaquin Valley (herein referred to as the ''Smog Check Contingency Measure'') that would, following a triggering event, reduce the model-year vehicle exemption in the State's vehicle inspection and maintenance program (referred to as the ''Smog Check'' program) by one year.

In the Proposed Rules section of this issue of the **Federal Register**, we have proposed approval of the SJV $PM_{2.5}$ Contingency Measure SIP, the Residential Wood Burning Contingency Measure, and the Rural Open Areas Contingency Measure, and, in a separate rulemaking, we have proposed approval of the Smog Check Contingency Measure. Based on our July 14, 2023 proposed approval action with respect to the Serious area SIP elements for the San Joaquin Valley for the 1997 annual $PM_{2.5}$ NAAQS (other than the contingency measure element), and on the proposed approval actions in this issue of the **Federal Register** with respect to the contingency measure SIP and related contingency measures, we are taking this final rulemaking action, effective upon publication, to stay application of the offset sanction and defer application of the highway sanction that were triggered by the EPA's November 26, 2021 disapprovals of the Serious area plan for the 1997 annual $PM_{2.5}$ NAAQS, including the contingency measure element, and the contingency measure elements for the 2006 24-hour $PM_{2.5}$ NAAQS and the 2012 annual $PM_{2.5}$ NAAQS. We are doing so because we find that the submissions of the 15 $\mu g/m^3$ SIP Revision, the SJV $PM_{2.5}$ Contingency Measure SIP, the Residential Wood Burning Contingency Measure, the Rural Open Areas Contingency Measure, and the Smog Check Contingency Measure correct the deficiencies that triggered such sanctions.

The EPA is providing the public with an opportunity to comment on this stay of the offset sanction and deferral of the highway sanction. If comments are submitted that change our assessment, as described in this final determination and in our proposed approvals of the SJV $PM_{2.5}$ Contingency Measure SIP, the Residential Wood Burning Contingency Measure, the Rural Open Areas Contingency Measure, and the Smog Check Contingency Measure, with respect to the deficiencies identified as the basis for our disapprovals of the contingency measure elements, we will take final action proposing to lift this stay of the offset sanction and deferral of the highway sanction under 40 CFR 52.31. If no comments are submitted that change our assessment, then all sanctions and any sanction clocks triggered by our November 26, 2021 final actions will be permanently terminated on the effective date of our final approvals of the SJV $PM_{2.5}$ Contingency Measure SIP, the Residential Wood Burning Contingency Measure, the Rural Open Areas Contingency Measure, and the Smog Check Contingency Measure.

All sanctions and any sanctions clocks associated with the Serious area SIP elements for the 1997 annual $PM_{2.5}$ NAAQS for the San Joaquin Valley (except the contingency measures element) will be permanently terminated on the effective date of the final approval of the 15 $\mu g/m^3$ SIP Revision, which was signed by the EPA Region IX Regional Administrator on December 5, 2023.

II. EPA Action

We are making an interim final determination to stay the application of the offset sanction and to defer the application of the highway sanction associated with our November 26, 2021 disapprovals of certain Serious area plan elements for the 1997 annual $PM_{2.5}$ NAAQS for the San Joaquin Valley (including the contingency measure element) and of the contingency measure elements for the 2006 24-hour $PM_{2.5}$ NAAQS and the 2012 annual $PM_{2.5}$ NAAQS for the San Joaquin Valley. This determination is based on our concurrent proposals to approve the SJV $PM_{2.5}$ Contingency Measure SIP, the Residential Wood Burning Contingency Measure, the Rural Open Areas Contingency Measure, and the Smog Check Contingency Measure, and our July 14, 2023 proposed approval of the 15 $\mu g/m^3$ SIP Revision, which resolve the deficiencies that triggered sanctions under section 179 of the CAA.

Because the EPA has preliminarily determined that the submissions of the 15 $\mu g/m^3$ SIP Revision, the SJV $PM_{2.5}$ Contingency Measure SIP, the Residential Wood Burning Contingency Measure, the Rural Open Areas Contingency Measure, and the Smog Check Contingency Measure, address the deficiencies identified in the November 26, 2021 partial disapproval actions and are fully approvable, relief from sanctions should be provided as quickly as possible. Therefore, the EPA is invoking the good cause exception under the Administrative Procedure Act (APA) in not providing an opportunity for comment before this action takes effect (5 U.S.C. 553(b)(3)). However, by this action, the EPA is providing the public with an opportunity to comment on the EPA's determination after the effective date, and the EPA will consider any comments received in determining whether to reverse such action.

The EPA believes that notice-and-comment rulemaking before the effective date of this action is impracticable and contrary to the public interest. The EPA has reviewed the submissions of the 15 $\mu g/m^3$ SIP Revision, the SJV $PM_{2.5}$ Contingency Measure SIP, Residential Wood Burning Contingency Measure, the Rural Open Areas Contingency Measure, and the Smog Check Contingency Measure and, through its proposed actions, is indicating that it is more likely than not that they correct the deficiencies that were the basis for the actions that started the sanctions clocks. Therefore,

it is not in the public interest to apply sanctions. The EPA believes that it is necessary to use the interim final rulemaking process to stay the application of the offset sanction and defer the application of the highway sanction while we complete our rulemaking process on the approvability of the CARB's submissions of SIP revisions intended to address the Serious area plan elements for the San Joaquin Valley for the 1997 annual $PM_{2.5}$ NAAQS (including contingency measures) and the contingency measure requirements for the 2006 24-hour $PM_{2.5}$ NAAQS and the 2012 annual $PM_{2.5}$ NAAQS. Moreover, with respect to the effective date of this action, the EPA is invoking the good cause exception to the 30-day notice requirement of the APA because the purpose of this document is to relieve a restriction (5 U.S.C. 553(d)(1)).

III. Statutory and Executive Order Reviews

This action stays or defers application of sanctions and imposes no additional requirements.

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

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

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA. This action stays or defers application of sanctions and imposes no new requirements.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. This action stays or defers application of sanctions and imposes no new requirements.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

E. Executive Order 13132: Federalism

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

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

This action does not have tribal implications as specified in Executive Order 13175. This action stays or defers application of sanctions and imposes no new requirements. In addition, this action does not apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. Thus, Executive Order 13175 does not apply to this action.

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

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

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

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

I. National Technology Transfer and Advancement Act

This rulemaking does not involve technical standards.

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

Executive Order 12898 (59 FR 7629, February 16, 1994) directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations (people of color) and low-income populations. The EPA believes that this type of action does not concern human health or environmental conditions and therefore cannot be evaluated with respect to potentially disproportionate and adverse effects on people of color, low-income populations, and/or Indigenous peoples. This action stays or defers application of sanctions in accordance with CAA regulatory provisions and imposes no additional requirements. Although this action does not concern human health or environmental conditions, the EPA identifies and addresses environmental justice concerns by promoting meaningful involvement in this action through providing the public with an opportunity to comment on this stay of the offset sanction and the deferral of the highway sanction as well as the opportunity to comment on our proposed approvals of the submissions of the SJV $PM_{2.5}$ Contingency Measure SIP, Residential Wood Burning Contingency Measure, the Rural Open Areas Contingency Measure, and the Smog Check Contingency Measure in the Proposed Rules section of this **Federal Register**.

K. Congressional Review Act (CRA)

This action is subject to the Congressional Review Act (CRA), and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. The CRA allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and comment rulemaking procedures are impracticable, unnecessary, or contrary to the public interest (5 U.S.C. 808(2)). The EPA has made a good cause finding for this action as discussed in section II of this preamble, including the basis for that finding.

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 20, 2024. Filing a petition for reconsideration by the EPA Administrator of this action does not affect the finality of this action for the purpose of judicial review nor does it extend the time within which petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see CAA section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Ammonia, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Reporting

and recordkeeping requirements, Sulfur dioxide, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: December 12, 2023.

Martha Guzman Aceves,

Regional Administrator, Region IX.

[FR Doc. 2023–27687 Filed 12–19–23; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 217

[Docket No. 231213–0302]

RIN 0648–BK57

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to the U.S. Coast Guard's Alaska Facility Maintenance and Repair Activities

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

ACTION: Final rule; notification of issuance of Letter of Authorization.

SUMMARY: NMFS, upon request from the United States Coast Guard (Coast Guard), hereby issues regulations to govern the unintentional taking of marine mammals incidental to maintenance and repair at facilities in Alaska, over the course of 5 years (2023–2028). These regulations, which allow for the issuance of a Letter of Authorization (LOA) for the incidental take of marine mammals during the described activities and specified timeframes, prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, as well as requirements pertaining to the monitoring and reporting of such taking.

DATES: Effective from March 1, 2024, through February 28, 2029.

ADDRESSES: A copy of the Coast Guard's application and any supporting documents, as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/action/incidental-take-authorization-us-coast-guards-alaska-facility-maintenance-and-repair.* In case of problems accessing these documents, please call the contact listed below.

FOR FURTHER INFORMATION CONTACT: Cara Hotchkin, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Purpose and Need for Regulatory Action

We received an application from the Coast Guard requesting 5-year regulations and authorization to take multiple species of marine mammals. This rule establishes a framework under the authority of the MMPA (16 U.S.C. 1361 *et seq.*) to allow for the authorization of take of marine mammals incidental to the Coast Guard's construction activities related to maintenance and repair at facilities in Alaska.

Legal Authority for the Action

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1371(a)(5)(A)) directs the Secretary of Commerce to allow, upon request, the incidental, but not intentional taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region for up to 5 years if, after notice and public comment, the agency makes certain findings and issues regulations that set forth permissible methods of taking pursuant to that activity and other means of effecting the ''least practicable adverse impact'' on the affected species or stocks and their habitat (see the discussion below in the *Mitigation* section), as well as monitoring and reporting requirements. Section 101(a)(5)(A) of the MMPA and the implementing regulations at 50 CFR part 216, subpart I provide the legal basis for issuing this final rule containing 5-year regulations, and for any subsequent Letters of Authorization (LOAs). As directed by this legal authority, this final rule contains mitigation, monitoring, and reporting requirements.

Summary of Major Provisions Within the Regulations

Following is a summary of the major provisions of this rule regarding Coast Guard construction activities. These measures include:

- Required monitoring of the construction areas to detect the presence of marine mammals before beginning construction activities;
- Shutdown of construction activities under certain circumstances to avoid injury of marine mammals; and
- Soft start for impact pile driving to allow marine mammals the opportunity to leave the area prior to beginning impact pile driving at full power.

Background

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed incidental take authorization may be provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to as ''mitigation''); and requirements pertaining to the mitigation, monitoring, and reporting of the takings are set forth. The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

Summary of Request

On March 15, 2021, NMFS received an application from the Coast Guard requesting authorization for take of marine mammals incidental to construction activities related to maintenance and repair at eight Coast Guard facilities in Alaska. On November 24, 2021 (86 FR 67023), we published a notice of receipt of the Coast Guard's application in the **Federal Register**, requesting comments and information related to the request for 30 days. We received no public comments. Following additional review, we determined the application was adequate and complete on January 19, 2022. On August 12, 2022, the Coast Guard submitted a modification to their application (to include vibratory driving of composite piles as part of the specified activity). This revised application was deemed adequate and complete on August 31, 2022. On April 28, 2023, we published the proposed rule in the **Federal Register** (88 FR 26432), incorporating the changes submitted by the Coast Guard in August 2022, and requested comments and

information from the public. We received no public comments. The regulations in this final rule are valid for 5 years after the initial effective date, and allow for authorization of take of 12 species of marine mammals by Level A and Level B harassment incidental to construction activities related to facility maintenance and repair at 8 sites in Alaska. Neither the Coast Guard nor NMFS expect serious injury or mortality to result from this activity.

Description of the Specified Activity

The Coast Guard plans to conduct construction necessary for maintenance and repair of existing in-water structures at the following eight Coast Guard station facilities in Alaska: Kodiak, Sitka, Ketchikan, Valdez, Cordova, Juneau, Petersburg, and Seward. These repairs will include installation and removal of steel, concrete, and timber piles, involving use of impact and vibratory hammers and Down-The-Hole drilling (DTH) equipment, and removal of piles by cutting, clipping, or vibratory extraction. Maintenance activities may also include underwater power washing. Up to 245 piles will be removed and replaced on a 1-to-1 basis (*i.e.,* total pile numbers at these facilities are expected to remain the same) over the 5-year period of effectiveness for the regulations. Hereafter (unless otherwise specified or detailed) we use the term ''pile driving'' to refer to both pile installation and pile removal. The use of vibratory, DTH, and impact pile driving equipment is expected to produce underwater sound at levels that have the potential to result in harassment of marine mammals.

A more detailed description of the planned construction project is provided in the proposed rule (88 FR 26432, April 28, 2023). Since that time, no changes have been made to the planned activities. Therefore, a detailed description is not provided here. Please refer to the proposed rule (88 FR 26432, April 28, 2023) for the detailed description of the specific planned activities at each facility.

Comments and Responses

The proposed rule to authorize take of marine mammals incidental to construction activities related to maintenance and repair at eight Coast Guard facilities in Alaska (88 FR 26432; April 28, 2023) provided detailed descriptions of Coast Guard's activities, the marine mammal species that may be affected by the activities, and the anticipated effects on marine mammals, and requested public input on the Coast Guard's request for authorization, our analyses, the proposed authorization, and any other aspect of the proposed authorization. The proposed rule requested that interested persons submit relevant information, suggestions, and comments in a 30-day public comment period. NMFS received no substantive public comments on the proposed rule.

Changes From the Proposed Rule

Since the proposed rule was published (88 FR 26432, April 28, 2023), NMFS published the final 2022 Alaska and Pacific Stock Assessment Reports (SAR), available at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region,* which describe revised stock structures under the MMPA for humpback whales and southeast Alaska harbor porpoise (Carretta *et al.,* 2023; Young *et al.,* 2023). In the proposed rule, we explained that, although we typically consider updated peer-reviewed data provided in draft SARs to be the best available science, and use the information accordingly, proposed revisions to stock structures are excepted due to potential changes based on public comments, and it is more appropriate to use the status quo stock structures until the new stock structures are finalized. Therefore, upon finalization of these revised stock structures in the final SARs, we have made appropriate updates in this final rule. This includes updates in the description of the potentially affected stocks (see the *Description of Marine Mammals in the Area of the Specified Activity* section, including table 1), the attribution of take numbers to stock (see the *Estimated Take* section), and the analyses to ensure the necessary determinations are made for the new stocks (see the *Negligible Impact Analysis and Determination* and *Small Numbers* sections).

In table 1, we updated the stock information to reflect the finalized humpback whale and harbor porpoise stock structures. For humpback whale, the Central and Western North Pacific Stocks have been replaced by the Hawai'i and Mexico-North Pacific stocks; for harbor porpoise, the Southeast Alaska stock has been split into the Northern Southeast Alaska Inland Waters, Southern Southeast Alaska Inland Waters, and Yakutat/Southeast Alaska Offshore Waters stocks. New stocks have been updated to include associated ESA/MMPA status, stock abundance data, PBR, and Annual Mortality and Serious Injury data. Updates to stock names have also been carried through in tables 9 through 16, as relevant, and stock ranges have been noted in footnotes on table 13.

NMFS has also made a few minor corrections in this final rule. In Table 7 of the *Estimated Take* section of the proposed rule, the correct reference for the sound source level for impact installation of 24-inch concrete piles is ''Washington State Department of Transportation (WSDOT) (2007)'', not ''WSDOT (2020)''; the correct reference has been included in Table 4 in this final rule. In the regulatory text of this final rule, text relating to Protected Species Observer (PSO) qualifications (§ 217.195 (b)) has been subdivided into § 217.195(b)(1) to § 217.195(b)(5) for clarity. Additionally, the following text was added to § 217.195(e)(1)(ii)(B) ''When possible, the number of strikes for each pile/hole (impact driving, DTH); and, for DTH, the duration of operation for both impulsive and non-impulsive components as well as the strike rate must be included'' for consistency with current guidelines on hydroacoustic data collection.

This final rule also corrects addition errors in two tables in the proposed rule: table 15 (Level B Harassment Take in Each of the Five Years and in Total) and table 19 (Proposed Level A and Level B Harassment Take and Percent of Stock for the Highest Annual Estimated Takes of the Project). In table 15, the total estimated take for minke whale should have been 26, rather than 25. In table 19 (which is Table 16 in this final rule), the total number of takes from the ''harbor porpoise—Gulf of Alaska'' stock should have summed to 200 rather than 245.

This final rule also includes corrections to several typographical errors in the proposed rule at table 16 (Proposed Level B Harassment Take for Each Facility), which is table 13 in this final rule. Footnote indicators from the application were accidentally included in the take numbers for killer whales and Pacific white-sided dolphins at Cordova and Seward, and for Northern fur seals at Seward. Also, in table 16 of the proposed rule, the values for killer whale were incorrectly ordered. While the order of the column headers was ''Kodiak; Sitka; Ketchikan; Seward; Valdez; Cordova; Juneau; Petersburg'', the order of the take estimates presented for killer whales was ''Kodiak; Sitka; Ketchikan; Valdez; Cordova; Juneau; Petersburg; Seward'', resulting in errors for Seward, Valdez, Cordova, Juneau, and Petersburg. These errors impacted the site-specific take calculations and total estimates of take by Level B harassment for these species. The correct take estimates have been carried through and are shown in tables 12, 13,

and 16 of this final rule. All corrections to proposed rule Table 16 resulted in a lower amount of take by Level B harassment than that shown in the proposed rule. Total take by Level B Harassment over the course of the 5-year authorization changed as follows:

- *Killer whales:* proposed: 797; final: 543;
- *Pacific white-sided dolphin:* proposed: 1,379; final: 1,105; and
- *Northern fur seal:* proposed: 181; final: 71.

Description of Marine Mammals in the Area of the Specified Activity

We have reviewed the Coast Guard's LOA application, including the species descriptions that summarize available information regarding status and trends, distribution and habitat preferences, behavior and life history, and auditory capabilities of the potentially affected species, for accuracy and completeness and refer the reader to Sections 3 and 4 of the application, instead of reprinting all of the information here. Additional information regarding population trends and threats may be found in NMFS' SARs (*www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS' website (*www.fisheries.noaa.gov/find-species*).

Table 1 lists all species or stocks for which take is expected and authorized for this action and summarizes information related to the population or stock, including regulatory status under the MMPA and the Endangered Species Act (ESA) and potential biological removal (PBR), where known. PBR, defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population, is considered in concert with known sources of ongoing anthropogenic mortality (as described in NMFS' SARs). While no mortality is anticipated or authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS' stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in the specified geographical regions are assessed in either NMFS' U.S. Alaska SARs or U.S. Pacific SARs. All values presented in table 1 are the most recent available at the time of writing, including in the final 2022 SARs, and are available online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-species-stock.*

TABLE 1—SPECIES LIKELY IMPACTED BY THE SPECIFIED ACTIVITIES

Common name	Scientific name	Stock	ESA/ MMPA status; strategic (Y/N) [1]	Stock abundance (CV, N_{min}, most recent abundance survey) [2]	PBR	Annual M/SI [3]
Order Cetartiodactyla—Cetacea—Superfamily Mysticeti (baleen whales)						
Family Eschrichtiidae:						
Gray whale	*Eschrichtius robustus*	Eastern North Pacific	-, -, N	26,960 (0.05, 25,849, 2016)	801	131
Family Balaenopteridae (rorquals):						
Humpback whale	*Megaptera novaeangliae*	Hawai'i	-, -, N	11,278 (0.56, 7,265, 2020)	127	27.09
		Mexico—North Pacific	T, D, Y	918 (0.217, UNK, 2006)	UND	0.57
Fin whale	*Balaenoptera physalus*	Northeast Pacific	E, D, Y	UND (UND, UND, 2013)	UND	0.6
Minke whale	*Balaenoptera acutorostrata*	Alaska	-, -, N	N/A (N/A, N/A, N/A) [4]	UND	0
Superfamily Odontoceti (toothed whales, dolphins, and porpoises)						
Family Delphinidae:						
Killer whale	*Orcinus orca*	Eastern North Pacific Alaska Resident.	-, -, N	1,920 (N/A, 1,920, 2009)	19	1.3
		Eastern North Pacific Gulf of Alaska, Aleutian Islands, Bearing Sea Transient.	-, -, N	587 (N/A, 587, 2012)	5.9	0.8
		Eastern North Pacific Northern Resident.	-, -, N	302 (N/A, 302, 2018)	2.2	0.2
		AT1 Transient	-, D, Y	7 (N/A, 7, 2019)	0.1	0
		West Coast Transient	-, -, N	349 (N/A, 349, 2018)	3.5	0.4
Pacific white-sided dolphin	*Lagenorhynchus obliquidens*	North Pacific	-, -, N	26,880 (UND, UND, 1990)	UND	0
Family Phocoenidae (porpoises):						
Dall's porpoise [5]	*Phocoenoides dalli*	Alaska	-, -, N	UND (UND, UND, 2015)	UND	37
Harbor porpoise	*Phocoena phocoena*	Northern Southeast Alaska Inland Waters.	-, -, Y	1,619 (0.26, 1,250, 2019)	13	5.6
		Southern Southeast Alaska Inland Waters.	-, -, Y	890 (0.37, 610, 2019)	6.1	7.4
		Yakutat/Southeast Alaska Offshore Waters.	-, -, N	UND (UND, UND, N/A)	UND	22.2
		Gulf of Alaska	-, -, Y	31,046 (0.21, N/A, 1998)	UND	72
Order Carnivora—Superfamily Pinnipedia						
Family Otariidae (eared seals and sea lions):						
California sea lion	*Zalophus californianus*	U.S.	-, -, N	257,606 (N/A, 233,515, 2014)	14,011	>321
Northern fur seal	*Callorhinus ursinus*	Eastern Pacific	-, D, Y	626,618 (0.2, 530,376, 2019)	11,403	373

TABLE 1—SPECIES LIKELY IMPACTED BY THE SPECIFIED ACTIVITIES—Continued

Common name	Scientific name	Stock	ESA/ MMPA status; strategic (Y/N) [1]	Stock abundance (CV, N_{min}, most recent abundance survey) [2]	PBR	Annual M/SI [3]
Steller sea lion	*Eumetopias jubatus*	Eastern	-,-, N	43,201 (N/A, 43,201, 2017) ...	2,592	112
		Western	E, D, Y	52,932 (N/A, 52,932, 2019) ...	318	254
Family Phocidae (earless seals):						
Harbor seal	*Phoca vitulina*	Prince William Sound	-, -, N	44,756 (N/A, 41,776, 2015) ...	1,253	413
		Lynn Canal/Stephens Passage.	-, -, N	13,388 (N/A, 11,867, 2016) ...	214	50
		Sitka/Chatham Straight	-, -, N	13,289 (N/A, 11,883, 2015) ...	356	77
		Clarence Strait	-, -, N	27,659 (N/A, 24,854, 2015) ...	746	40
		South Kodiak	-, -, N	26,448 (N/A, 22,351, 2017) ...	939	127

[1] ESA status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[2] NMFS marine mammal stock assessment reports online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments/.* CV is coefficient of variation; Nmin is the minimum estimate of stock abundance. In some cases, CV is not applicable (N/A). UND indicates data unavailable.

[3] These values, found in NMFS' SARs, represent annual levels of human-caused mortality plus serious injury (M/SI) from all sources combined (*e.g.,* commercial fisheries, ship strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

[4] No population estimates have been made for the number of minke whales in the entire North Pacific. Some information is available on the numbers of minke whales in some areas of Alaska, but in the 2009, 2013, and 2015 offshore surveys, so few minke whales were seen during the surveys that a population estimate for the species in this area could not be determined (Rone *et al.,* 2017). Therefore, this information is N/A (not available).

[5] Previous abundance estimates covering the entire stock's range are no longer considered reliable and the current estimates presented in the SARs and reported here only cover a portion of the stock's range. Therefore, the calculated Nmin and PBR is based on the 2015 survey of only a small portion of the stock's range. PBR is considered to be biased low since it is based on the whole stock whereas the estimate of mortality and serious injury is for the entire stock's range.

A detailed description of the species likely to be affected by the Coast Guard's programmatic maintenance project, including brief introductions to the species and relevant stocks, as well as available information regarding population trends and threats, and information regarding local occurrence, were provided in the proposed rule (88 FR 26432, April 28, 2023). With the exception of humpback whale and harbor porpoise, NMFS is not aware of any changes in the status of these species and stocks; therefore, detailed descriptions are not provided here. Please refer to the proposed rule (88 FR 26432, April 28, 2023) for these descriptions. Please also refer to NMFS' website (*https://www.fisheries.noaa.gov/find-species*) for generalized species accounts.

The 2022 Alaska and Pacific SARs described a revised stock structure for humpback whales which modifies the previous stocks designated under the MMPA to align more closely with the ESA-designated DPSs (Caretta *et al.,* 2023; Young *et al.,* 2023). Specifically, the three previous North Pacific humpback whale stocks (Central and Western North Pacific stocks and a CA/OR/WA stock) were replaced by five stocks, largely corresponding with the ESA-designated DPSs. These include Western North Pacific and Hawai'i stocks and a Central America/Southern Mexico-CA/OR/WA stock (which corresponds with the Central America DPS). The remaining two stocks, corresponding with the Mexico DPS, are the Mainland Mexico-CA/OR/WA and Mexico-North Pacific stocks (Caretta *et al.,* 2023; Young *et al.,* 2023). The former stock is expected to occur along the west coast from California to southern British Columbia, while the latter stock may occur across the Pacific, from northern British Columbia through the Gulf of Alaska and Aleutian Islands/Bering Sea region to Russia.

In the proposed rule, NMFS stated that the Central North Pacific stock of humpback whale was likely to be impacted by USCG's activities. Given the final revised stock structure, NMFS has reanalyzed the potential for take of each stock of humpback whale and determined that the Hawai'i stock and the Mexico-North Pacific stock are likely to be impacted by USCG's activities.

The 2022 Alaska SARs described a revised stock structure for southeast Alaska harbor porpoise, which were split from one stock into three: the Northern Southeast Alaska Inland Waters, Southern Southeast Alaska Inland Waters, and Yakutat/Southeast Alaska Offshore Waters harbor porpoise stocks (Young *et al.,* 2023). This update better aligns harbor porpoise stock structure with genetics, trends in abundance, and information regarding discontinuous distribution trends (Young *et al.,* 2023). Harbor porpoises found near Sitka are assumed to be members of the Yakutat/Southeast Alaska Offshore Waters stock. Harbor porpoises found near Juneau are assumed to be members of the Northern Southeast Alaska Inland Waters stock, while those found near Ketchikan are assumed to be members of the Southern Southeast Alaska Inland Waters stock, based on the geographical range of the stocks. The dividing line between the Northern and Southern Southeast Alaska Inland Waters Stocks is very close to Petersburg; therefore harbor porpoises at this location are assumed to be from both stocks in equal proportions. Please refer to the proposed rule (88 FR 26432, April 28, 2023) for species descriptions. Please also refer to the NMFS' website (*https://www.fisheries.noaa.gov/find-species*) for generalized species accounts, and to the SARs (*https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) for more information about the changes to humpback whale and harbor porpoise stock structures.

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Current data indicate that not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.,* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007) recommended that marine mammals be divided into functional hearing groups based on directly measured or estimated hearing ranges on the basis of available

behavioral response data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data. Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans). Subsequently, NMFS (2016) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65-decibel (dB) threshold from the normalized composite audiograms, with an exception for lower limits for low-frequency cetaceans where the result was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in table 2.

TABLE 2—MARINE MAMMAL HEARING GROUPS

[NMFS, 2018]

Hearing group	Generalized hearing range *
Low-frequency (LF) cetaceans (baleen whales)	7 Hz to 35 kHz.
Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales)	150 Hz to 160 kHz.
High-frequency (HF) cetaceans (true porpoises, *Kogia,* river dolphins, cephalorhynchid, *Lagenorhynchus cruciger* & *L. australis*).	275 Hz to 160 kHz.
Phocid pinnipeds (PW) (underwater) (true seals)	50 Hz to 86 kHz.
Otariid pinnipeds (OW) (underwater) (sea lions and fur seals)	60 Hz to 39 kHz.

* Represents the generalized hearing range for the entire group as a composite (*i.e.,* all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.,* 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.,* 2006; Kastelein *et al.,* 2009; Reichmuth and Holt, 2013). This division between phocid and otariid pinnipeds is now reflected in the updated hearing groups proposed in Southall *et al.* (2019).

For more detail concerning these groups and associated generalized hearing ranges, please see the Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (NMFS, 2018; *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance*) for a review of available information.

Potential Effects of the Specified Activity on Marine Mammals and Their Habitat

This section includes a summary and discussion of the ways that components of the specified activity may impact marine mammals and their habitat. The *Estimated Take* section later in this document includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The *Negligible Impact Analysis and Determination* section considers the content of this section, the *Estimated Take* section, and the *Mitigation* section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and how those impacts on individuals are likely to impact marine mammal species or stocks.

The effects of underwater noise from Coast Guard's construction activities have the potential to result in behavioral harassment of marine mammals in the vicinity of the survey area. The proposed rule (88 FR 26432, April 28, 2023) included a discussion of the effects of anthropogenic noise on marine mammals and the potential effects of underwater noise from pile installation and extraction on marine mammals and their habitat. That information and analysis is not repeated here; please refer to the proposed rule (88 FR 26432, April 28, 2023).

Estimated Take

This section provides an estimate of the number of incidental takes for authorization, which will inform both NMFS' consideration of ''small numbers'' and the negligible impact determination.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines ''harassment'' as: any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes would be by Level A or Level B harassment only, in the form of disruption of behavioral patterns for individual marine mammals resulting from exposure to the acoustic sources. Based on the nature of the activity, no serious injury or mortality is anticipated or authorized for this activity. Below we describe how the take is estimated.

Generally speaking, we estimate take by considering: (1) acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) and the number of days of activities. We note that while these basic factors can contribute to a basic calculation to provide an initial prediction of takes, additional information that can qualitatively inform take estimates is also sometimes available (*e.g.,* previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the take estimate.

Acoustic Thresholds

NMFS recommends the use of acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur permanent threshold shift (PTS) of some degree (equated to Level A harassment).

Level B Harassment—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also

informed to varying degrees by other factors related to the source (*e.g.,* frequency, predictability, duty cycle), the environment (*e.g.,* bathymetry), and the receiving animals (hearing, motivation, experience, demography, behavioral context) and can be difficult to predict (Southall *et al.,* 2007, Ellison *et al.,* 2012). Based on what the available science indicates and the practical need to use a threshold based on a factor that is both predictable and measurable for most activities, NMFS uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS predicts that marine mammals are likely to be behaviorally harassed in a manner we consider Level B harassment when exposed to underwater anthropogenic noise above received levels of 120 dB referenced to 1 micropascal (re 1 µPa) root mean square (rms) for continuous (*e.g.,* vibratory pile-driving, DTH) and above 160 dB re 1 µPa (rms) for non-explosive impulsive, intermittent (*e.g.,* impact driving, DTH) sources.

The Coast Guard's planned activity includes the use of continuous (vibratory, DTH) and impulsive (impact pile driving and DTH) sources, and therefore the 120 and 160 dB re 1 µPa (rms) thresholds, respectively, are applicable.

Level A harassment for non-explosive sources—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0) (Technical Guidance, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). The Coast Guard's planned activity includes the use of impulsive (impact pile driving and DTH) and non-impulsive (vibratory, DTH) sources.

These thresholds are provided in the table below. The references, analysis, and methodology used in the development of the thresholds are described in NMFS 2018 Technical Guidance, which may be accessed at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

TABLE 3—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT

Hearing group	PTS onset acoustic thresholds * (received level)	
	Impulsive	Non-impulsive
Low-Frequency (LF) Cetaceans	*Cell 1:* $L_{pk,flat}$*:* 219 dB; $L_{E,LF,24h}$*:* 183 dB	*Cell 2:* $L_{E,LF,24h}$*:* 199 dB.
Mid-Frequency (MF) Cetaceans	*Cell 3:* $L_{pk,flat}$*:* 230 dB; $L_{E,MF,24h}$*:* 185 dB	*Cell 4:* $L_{E,MF,24h}$*:* 198 dB.
High-Frequency (HF) Cetaceans	*Cell 5:* $L_{pk,flat}$*:* 202 dB; $L_{E,HF,24h}$*:* 155 dB	*Cell 6:* $L_{E,HF,24h}$*:* 173 dB.
Phocid Pinnipeds (PW) (Underwater)	*Cell 7:* $L_{pk,flat}$*:* 218 dB; $L_{E,PW,24h}$*:* 185 dB	*Cell 8:* $L_{E,PW,24h}$*:* 201 dB.
Otariid Pinnipeds (OW) (Underwater)	*Cell 9:* $L_{pk,flat}$*:* 232 dB; $L_{E,OW,24h}$*:* 203 dB	*Cell 10:* $L_{E,OW,24h}$*:* 219 dB.

* Dual metric acoustic thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds should also be considered.

Note: Peak sound pressure (L_{pk}) has a reference value of 1 µPa, and cumulative sound exposure level (L_E) has a reference value of 1µPa^{2}s. In this table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI 2013). However, peak sound pressure is defined by ANSI as incorporating frequency weighting, which is not the intent for the Technical Guidance. Hence, the subscript "flat" is being included to indicate peak sound pressure should be flat weighted or unweighted within the generalized hearing range. The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.,* varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these acoustic thresholds will be exceeded.

Ensonified Area

Here, we describe operational and environmental parameters of the activity that will feed into estimating the area ensonified above the acoustic thresholds, which include source levels and transmission loss coefficient.

The sound field in the project area is the existing background noise plus additional construction noise from the project. Marine mammals are expected to be affected via sound generated by the primary components of the project (*i.e.,* impact pile driving, vibratory pile driving, vibratory pile removal, and DTH).

The actual durations of each installation method vary depending on the type and size of the pile. In order to calculate distances to the Level A harassment and Level B harassment sound thresholds for piles of various sizes and equipment being used in this project, NMFS used acoustic monitoring data from other locations to develop source levels (table 4). Note that piles and holes of differing sizes have different sound source levels (SSL). For simplicity and to be precautionary we analyze the largest pile diameter of each type (*e.g.,* 24-inch (0.61 m) diameter) even though it is possible at some locations in some situations smaller pile diameters may be used or be removed.

TABLE 4—SOUND SOURCE LEVELS

Method and pile type	Sound source level at 10 meters (dB)	Literature source
Timber Vibratory	152 RMS	Greenbusch Group 2018.
24-inch Steel Pipe Vibratory	162 RMS	Laughlin 2010.
Timber Impact	170 RMS, 160 SEL, 180 Pk	CALTRANS 2015.
Composite impact	153 RMS, 145 SEL	CALTRANS 2020.
24-inch Steel Pipe Impact	190 RMS, 177 SEL, 203 Pk	CALTRANS 2015.
24-inch Concrete Impact	170 RMS, 159 SEL, 184 Pk	WSDOT 2007.
DTH Non-impulsive component	167 RMS	Heyvaert & Reyff 2021.

TABLE 4—SOUND SOURCE LEVELS—Continued

Method and pile type	Sound source level at 10 meters (dB)	Literature source
24-inch DTH Impulsive component	159 SEL, 184 dB Pk	Heyvaert & Reyff 2021.

Note: It is assumed that noise levels during pile installation and removal are similar. SEL = single strike sound exposure level; Pk = peak sound level; RMS = root mean square.

Level B Harassment Zones

Transmission loss (*TL*) is the decrease in acoustic intensity as an acoustic pressure wave propagates out from a source. *TL* parameters vary with frequency, temperature, sea conditions, current, source and receiver depth, water depth, water chemistry, and bottom composition and topography. The general formula for underwater *TL* is:

$TL = B \times \mathrm{Log}_{10}\,(R_1/R_2)$,

Where

TL = transmission loss in dB

B = transmission loss coefficient; for practical spreading equals 15

R_1 = the distance of the modeled SPL from the driven pile, and

R_2 = the distance from the driven pile of the initial measurement

The recommended *TL* coefficient for most nearshore environments is the practical spreading value of 15. This value results in an expected propagation environment that would lie between spherical and cylindrical spreading loss conditions, which is the most appropriate assumption for the Coast Guard's planned activity.

Using the practical spreading model, the Coast Guard determined underwater noise would fall below the behavioral effects thresholds of 120 dB rms or 160 dB rms for marine mammals at a maximum radial distances from 46 m for impact driving of timber or concrete piles to 13,594 m for DTH (table 5). These distances determine the maximum Level B harassment zones for the project. It should be noted that, based on the geography of many of the sites, sound will not reach the full distance of the Level B harassment isopleth. Generally, due to interaction with land, only a portion of the possible area is ensonified.

TABLE 5—CALCULATED DISTANCES TO LEVEL B HARASSMENT ISOPLETHS

Method and pile type	Level B isopleth (m)
Timber Vibratory	1,359
24-inch Steel Pipe Vibratory	6,310
Timber Impact	46
Composite Impact	3
24-inch Steel Pipe Impact	1,000
24-inch Concrete Impact	46
DTH	13,594

Level A Harassment Zones

When the NMFS Technical Guidance (2016) was published, in recognition of the fact that ensonified area/volume could be more technically challenging to predict because of the duration component in the new thresholds, we developed a User Spreadsheet that includes tools to help predict a simple isopleth that can be used in conjunction with marine mammal density or occurrence to help predict takes. We note that, because of some of the assumptions included in the methods used for these tools, we anticipate that isopleths produced are typically going to be overestimates of some degree, which may result in some degree of overestimate of take by Level A harassment. However, these tools offer the best way to predict appropriate isopleths when more sophisticated three dimensional modeling methods are not available, and NMFS continues to develop ways to quantitatively refine these tools, and will qualitatively address the output where appropriate. For stationary sources such as pile driving or DTH, NMFS User Spreadsheet predicts the closest distance at which, if a marine mammal remained at that distance the whole duration of the activity, it would not incur PTS.

Inputs used in the User Spreadsheet (table 6), and the resulting isopleths are reported below (table 7). We analyzed scenarios with up to five piles per day to account for maximum possible production rates. Level A harassment thresholds for impulsive sound sources (impact pile driving and DTH) are defined for both the cumulative sound exposure level (SEL_{cum}) and Peak sound pressure level (SPL), with the threshold that results in the largest modeled isopleth for each marine mammal hearing group used to establish the Level A harassment isopleth. In this analysis, Level A harassment isopleths based on SEL_{cum} were always larger than those based on Peak SPL.

TABLE 6—INPUTS OF PILE DRIVING AND DTH ACTIVITY USED IN USER SPREADSHEET

Method and pile type	Weighting factor adjustment	Duration (minutes) or strikes per pile	Piles per day
Timber Vibratory	2.5	50	5
24-inch Steel Pipe Vibratory	2.5	10	5

TABLE 6—INPUTS OF PILE DRIVING AND DTH ACTIVITY USED IN USER SPREADSHEET—Continued

Method and pile type	Weighting factor adjustment	Duration (minutes) or strikes per pile	Piles per day
Timber Impact	2	100	5
Composite Impact	2	120	5
24-inch Steel Pipe Impact	2	400	1
24-inch Concrete Impact	2	184	5
24-inch DTH	2	60	2

Note: Data for all equipment types were for transmission loss of 15*log(r) and distance of source level measurements was 10 meters.

The above input scenarios lead to a Level A harassment isopleth of 0 to 517.1 m, depending on the marine mammal hearing group and scenario (table 7).

TABLE 7—CALCULATED DISTANCES TO LEVEL A HARASSMENT ISOPLETHS (m) DURING PILE INSTALLATION AND REMOVAL FOR EACH HEARING GROUP

Method and pile type	Low frequency	Mid frequency	High frequency	Phocid	Otariid
Timber Vibratory	1.5	0.1	2.2	0.9	0.1
24-inch Steel Pipe Vibratory	7.1	0.6	10.4	4.3	0.3
Timber Impact	18.4	0.7	21.9	9.9	0.7
Composite Impact	2.1	0.1	2.5	1.1	0.1
24-inch Steel Pipe Impact	215.8	7.7	257.1	115.5	8.4
24-inch Concrete Impact	27.7	1	33.0	14.8	1.1
24-inch DTH	434.1	15.4	517.1	232.2	16.9

Note: a minimum 20-m shutdown zone, as proposed by the Coast Guard, will be implemented for all species and activity types to prevent direct injury of marine mammals.

Marine Mammal Occurrence and Take Calculation and Estimation

In this section we provide the information about the presence, density, or group dynamics of marine mammals that will inform the take calculations. Here we describe how the information provided above is brought together to produce a quantitative take estimate.

Available information regarding marine mammal occurrence and abundance in the vicinity of the eight facilities includes monitoring data from the NMFS Alaska Regional Office, prior incidental take authorizations, and ESA consultations on additional projects (table 8). When local density information is not available, data aggregated in the Navy's Marine Mammal Species Density Database (U.S. Navy, 2019, 2020) for the Gulf of Alaska or Northwest Testing and Training areas (table 9) or nearby proxies from the monitoring data are used; whichever gives the most precautionary take estimate was chosen.

Table 8 -- Marine Mammal Occurrence Data (per day) from Prior Projects

Stock	Project Location					
	Ketchikan	Sitka	Seward	Juneau	Valdez	Kodiak
Gray whale	0.067	0.1	NA	NA	NA	NA
Humpback whale	0.571	5	1	4	NA	NA
Minke whale	0.024	1	NA	NA	0.25	NA
Killer whale	0.4	8	NA	NA	NA	NA
Pacific white-sided dolphin	2.86	NA	NA	NA	NA	NA
Dall's porpoise	2	NA	0.25	NA	NA	NA
Harbor porpoise	0.5	5	NA	NA	NA	NA
California sea lion	NA	1	NA	NA	NA	NA
Steller sea lion Eastern	10	15.6	NA	NA	NA	NA
Steller sea lion Western	NA	0.4	2	NA	4.2	0.083
Harbor seal Prince William Sound	NA	NA	NA	NA	48.95	NA
Harbor seal Lynn Canal/Stephens Passage	NA	NA	NA	43	NA	NA
Harbor seal Sitka/Chatham Straight	NA	23	NA	NA	NA	NA
Harbor seal Clarence Strait	12	NA	NA	NA	NA	NA

Note: NA indicates that occurrence data was not used for that species and site combination. Density data for species/site combinations listed as NA in this table are shown in table 12.

TABLE 9—MARINE MAMMAL DENSITIES FROM NAVY DATA

Stock	Southeast Alaska facilities species density (#/km^2) [1 2 3]	Gulf of Alaska/ Prince William Sound facilities species density (#/km^2) [3 4 5]
Gray whale	0.016	0.048
Humpback whale Hawai'i [6]	0.002	0.093
Humpback Whale Mexico–North Pacific [6 7]	N/A	0.093
Fin whale	0.0001	0.068
Minke whale	0.001	0.006
Killer whale (General)	N/A	0.005
Killer whale Resident	0.035	N/A
Killer whale Transient	0.006	N/A
Pacific white-sided dolphin	0.085	0.020
Dall's porpoise	0.121	0.218
Harbor porpoise [6]	0.010	0.455
California sea lion [8]	0.025	0

TABLE 9—MARINE MAMMAL DENSITIES FROM NAVY DATA—Continued

Stock	Southeast Alaska facilities species density (#/km²) [1 2 3]	Gulf of Alaska/ Prince William Sound facilities species density (#/km²) [3 4 5]
Northern fur seal	0.276	0.090
Steller sea lion	0.316	0.068
Harbor seal	1.727	0.169

[1] Facilities including Ketchikan, Sitka, Juneau, and Petersburg.
[2] Southeast Alaska density values generally from Western Behm Canal values reported in U.S. Navy (2020).
[3] Where species density values reported in the U.S. Navy (2020) and U.S. Navy (2021) vary by time of year, the greatest value is presented here as a conservative estimate.
[4] Facilities including Kodiak, Seward, Valdez, and Cordova.
[5] Gulf of Alaska/Prince William Sound species density values generally from inshore or within the 500–1000 m isobath values reported in U.S. Navy (2021).
[6] New stock designations for humpback whales and harbor porpoise were finalized in July 2023 (2022 SARs). The density values listed correspond to the stock alignments in the 2021 and previous SARs.
[7] The range for the Western North Pacific stock of humpback whales from the 2021 and previous SARs did not extend to Southeast Alaska.
[8] U.S. Navy 2020 density values for California sea lion do not include Western Behm Canal and the value used here is from the San Juan Islands, the next closest zone to the project area where a density value is available.

The data on abundance and occurrence from prior projects is derived from the following projects: (1) Kodiak—Protected Species Observer (PSO) monitoring reports from dock repair projects in 2018 and 2020 (NMFS Alaska Region); (2) Sitka—Data are from the Old Sitka Dock project (86 FR 22392, April 28, 2021); (3) Ketchikan—Data are from the Tongass Narrows project (85 FR 673, January 7, 2020) and other projects in preparation in the area; (4) Valdez—Data are from monitoring for an oil spill response in late April and early May 2020 (NMFS Alaska Region); (5) Juneau—Data are from the Erickson Dock project (84 FR 65360, November 27, 2019) and the Juneau Waterfront Improvement Project (85 FR 18562, April 2, 2020); and, (6) Seward—An incidental harassment authorization application for the Seward Passenger Terminal project recently received by NMFS included information resulting from consultation with the Alaska SeaLife Center, the Kenai Fjords National Park Service, local whale watching companies, and scientific literature to estimate the occurrence of marine mammals in Seward.

To quantitatively assess exposure of marine mammals to noise from pile driving and drilling activities when density estimates are most appropriate, we used the density estimate and the annual anticipated number of work days for each activity at each facility to determine the number of animals potentially harassed on any one day of activity. The calculation is:

Exposure estimate = *density* × *harassment area* × *maximum days of activity*

For example, exposure estimates at the Ketchikan site for gray whales were calculated by first finding the product of the SE Alaska species density (0.0155 animals/km²), the ensonified area for the activity (*e.g.,* 1.45 km² for vibratory pile driving of timber piles), for the anticipated number of days for that activity each year (10 days/year). After finding the product for each activity for each year, the values were summed to find the total number of takes for that species across all 5 years. This method was used for all species for which local occurrence data were not available.

When occurrence data from prior projects are the most appropriate data for exposure estimation, we used the occurrence estimate (number/unit of time) and the maximum work days (converted to the appropriate unit of time as needed) per year at each facility to determine the number of animals potentially exposed to an activity. The calculation is:

Exposure estimate = *occurrence/time* × *time of activity*

and these values are then summed across activity/pile types.

When exposure estimates from density data are used for sites with no local occurrence data and the exposure estimate is less than a typical group size, we increase the estimated take based on that group size to account for the possibility a single group entering the project area would exceed authorized take. Table 10 shows the source of data used in exposure estimates.

The size of the Level B harassment zones for each facility and activity are in table 11. Level A harassment take is only authorized for the activities creating the largest Level A harassment zones: DTH and impact driving of steel pipe piles (see Figures 6–2 through Figure 6–9 in the Coast Guard's application), and for species that would be difficult for observers to detect within large, unconfined zones: high frequency cetaceans and phocid pinnipeds. The topography of sites and facilities in Seward, Juneau, Sitka, and Petersburg are restricted such that noise would be confined to a small area or basin, and PSOs would be able to observe any marine mammals approaching the activity are and Level A shutdown zone with enough warning that work could be stopped before a take by Level A harassment would occur. The facilities at the remaining four sites (Kodiak, Ketchikan, Valdez, and Cordova) are less confined, and PSOs may be unable to observe cryptic species at the calculated isopleths. Therefore, we have conservatively authorized small numbers of take by Level A harassment for high frequency cetaceans and phocid pinnipeds at these sites.

Table 10 -- Source of Data Used to Estimate Exposure for Each Species or Stock and Facility

Species/Stock	Kodiak	Sitka	Ketchikan	Seward	Valdez	Cordova	Juneau	Petersburg
Gray whale	N	Sit	Ke	*	*	*	*	*
Humpback whale	N	Sit	Ke	Sew	V	N	J	N
Fin whale	*	*	*	*	N	N	*	*
Minke whale	N	Sit	Ke	N	V	N	Ke	Ke
Killer whale	N	Sit	Ke	G	N	G	Ke	Ke
Pacific white-sided dolphin	N	Ke	Ke	G	G	G	Ke	Ke
Dall's porpoise	N	N	Ke	Sew	N	N	Ke	Ke
Harbor porpoise Northern Southeast Alaska Inland Waters	*	*	*	*	*	*	Ke	Ke
Harbor porpoise Southern Southeast Alaska Inland Waters	*	*	Ke	*	*	*	*	Ke
Harbor porpoise Yakutat/Southeast Alaska Offshore Waters	*	Sit	*	*	*	*	*	*
Harbor porpoise Gulf of Alaska	N	*	*	N	N	N	*	*
California sea lion	*	Sit	*	*	*	*	N	*
Northern fur seal	N	N	*	G	N	N	*	*
Steller sea lion	Ko	Sit	Ke	Sew	V	N	N	Sit
Harbor seal Prince William Sound	*	*	*	V	V	V	*	*
Harbor seal Lynn Canal/Stephens Passage	*	*	*	*	*	*	J	*
Harbor seal Sitka/Chatham Straight	*	Sit	*	*	*	*	*	*
Harbor seal Clarence Strait	*	*	Ke	*	*	*	*	J
Harbor seal South Kodiak	N	*	*	*	*	*	*	*

Abbreviations for source data are: N – Navy density data, Ke – Ketchikan, Sit – Sitka, Sew – Seward, J – Juneau, V – Valdez, Ko – Kodiak, G – estimate rounded up to 1 group, * – Not Applicable (no take).

TABLE 11—LEVEL B HARASSMENT AREAS AT EACH FACILITY (km^2) FOR EACH METHOD AND/OR PILE TYPE

Facility	Timber vibratory	Steel vibratory	Timber impact	Composite [1] impact	Steel impact	DTH
Kodiak	1.3	4.51	0.006	0	1.03	4.51
Sitka	0.87	5.67	0.007	0	0.56	.....
Ketchikan	1.45	7.29	0.004	0	1.06	10.1
Valdez	2.62	40.21	0.007	0	1.43	.....
Cordova	.....	23.42	.....	.....	1.57	.....
Juneau	1.62	NA	0.003	0	NA	.....
Petersburg	1.63	2.89	0.006	0	1.33	.....
Seward	.....	0.24	.....	.....	0.24	.....

[1] Composite Level B harassment zone (3 m) is completely encompassed by the 20 m shutdown zone proposed by Coast Guard.

The calculated Level B harassment takes using the above data for each year are in table 12 and for each facility over the course of the project are in table 13. See tables 6–14 through 6–21 in the application and the supplemental memo (composite piles) for detailed calculations of estimated take for each pile type and activity at each facility. The calculated Level A harassment takes using the above data for each year are in table 14 and for each facility over the course of the five years of the rule are in table 15.

Table 16 summarizes Level A and Level B harassment take authorized for the project as well as the percentage of each stock expected to be taken in the year with the maximum annual takes over the course of the project.

TABLE 12—LEVEL B HARASSMENT TAKE IN EACH OF THE FIVE YEARS AND IN TOTAL

Stock	Year 1	Year 2	Year 3	Year 4	Year 5	Total
Gray whale	8	8	8	8	8	40
Humpback whale *	160	174	164	160	160	818
Fin whale	13	23	13	13	13	75
Minke whale	5	6	5	5	5	[a] 26
Killer whale *	103	[b d] 127	[b c] 107	103	103	[b c d] 543
Pacific white-sided dolphin	215	[b] 233	[c] 227	215	215	[c d] 1,105
Dall's porpoise	114	147	115	114	114	604
Harbor porpoise Northern Southeast Alaska Inland Waters	11	11	11	11	11	55
Harbor Porpoise Southern Southeast Alaska Inland Waters	11	11	11	11	11	55
Harbor porpoise Yakutat/Southeast Alaska Offshore Waters	50	50	50	50	50	250
Harbor porpoise Gulf of Alaska	47	115	48	47	47	304
California sea lion	10	10	10	10	10	50
Northern fur seal	9	23	[d] 21	9	9	[d] 71
Steller sea lion Eastern	425	425	425	425	425	2,125
Steller sea lion Western	24	34	32	24	24	138
Harbor seal Prince William Sound	148	442	344	148	148	1,230
Harbor seal Lynn Canal/Stephens Passage	860	860	860	860	860	4,300
Harbor seal Sitka/Chatham Straight	230	230	230	230	230	1,150
Harbor seal Clarence Strait	412	412	412	412	412	2,060
Harbor seal South Kodiak	17	17	17	17	17	85

* Stocks of killer whales and humpback whales cannot generally be identified in the field so total take is listed at species level only.
[a] Corrected addition error from the proposed rule.
[b] Total number has changed from the proposed rule due to corrections of typographical errors in the proposed rule.
[c] Typographical error in take levels at Cordova corrected from proposed rule.
[d] Typographical error in take levels at Seward corrected from proposed rule.

Table 13 – Total (5-year) Estimated Level B Harassment Take for Each Facility

Species	Stock	Kodiak	Sitka	Ketchikan	Seward	Valdez	Cordova	Juneau	Petersburg
Gray whale	Eastern North Pacific	25	5	10	0	0	0	0	0
Humpback whale	Hawai'i[b]	50	250	60	4	40	14	400	0
	Mexico -North Pacific[c]								
Fin whale	Northeast Pacific	35	0	0	0	30	10	0	0
Minke whale	Alaska	5	0	5	0	5	1	5	5
Killer whale	Alaska Resident[b]	5	400	40	4[h,i]	20[i]	24[h,i]	40[i]	10[i]
	Gulf of Alaska, Aleutian Islands, Bearing Sea Transient[d]								
	Northern Resident[e]								
	West Coast Transient[f]								
	AT1 Transient[g]								
Pacific white-sided dolphin	North Pacific	300	145	285	12[h]	0	18[h]	285	60
Dall's porpoise	Alaska	15	20	200	1	95	33	200	40
Harbor porpoise	Northern Southeast Alaska Inland Waters[j]	0[a]	0[a]	0[a]	0[a]	0[a]	0[a]	50	10

	Southern Southeast Alaska Inland Waters[k]	0[a]	0[a]	50	0[a]	0[a]	0[a]	0[a]	
	Yakutat/ Southeast Alaska Offshore Waters[l]	0	250	0[a]	0[a]	0[a]	0[a]	0[a]	0[a]
	Gulf of Alaska[m]	235	0[a]	0[a]	1	0	68	0[a]	0[a]
California sea lion	United States	0[a]	50	0	0[a]	0[a]	0[a]	0	0[a]
Northern fur seal	Eastern Pacific	0	0	0	12[h]	40	14	5	0[a]
Steller sea lion	Eastern	0[a]	780	1,000	0[a]	0[a]	0[a]	25	320
	Western	35	20	0[a]	8	65	10	0[a]	0[a]
Harbor seal	Prince William Sound	0[a]	0[a]	0[a]	196	735	294	5	0[a]
	Lynn Canal/Stephens Passage	0[a]	0[a]	0[a]	0[a]	0[a]	0[a]	4,300	0[a]
	Sitka/Chatham Straight	0[a]	1,150	0[a]	0[a]	0[a]	0[a]	0[a]	0[a]
	Clarence Strait	0[a]	0[a]	1,200	0[a]	0[a]	0[a]	0[a]	860
	South Kodiak	85	0[a]	0[a]	0[a]	0[a]	0[a]	0[a]	0[a]

a. Stock does not occur in this region, therefore no takes would be authorized (Muto *et al.*, 2022)
b. Stock range overlaps with all 8 locations(Muto *et al.*, 2022, Young *et al.,* 2023)
c. Stock range overlaps with Kodiak, Seward, Valdez, and Cordova (Muto *et al.*, 2021, Young *et al.,* 2023)
d. Stock range overlaps with Kodiak, Sitka, Seward, Valdez, Cordova (Muto *et al.*, 2022)
e. Stock range overlaps with Sitka, Ketchikan, Juneau, and Petersburg (Muto *et al.*, 2022)
f. Stock range overlaps with Seward, Valdez, and Cordova (Muto *et al.*, 2022)
g. No takes of the AT1 stock are expected or proposed for authorization.
h. Typographical error from the proposed rule corrected.
i. Corrected column order of values for killer whale from Seward to Petersburg from the proposed rule.
j. Newly delineated stock range overlaps with Juneau and Petersburg (Young *et al.,* 2023); stock overlaps with Southern Southeast Alaska Inland Waters stock at Petersburg; takes at this location are assumed to be 50% from each stock.
k. Newly delineated stock range overlaps with Ketchikan and Petersburg (Young *et al.*, 2023); stock overlaps with Northern Southeast Alaska Inland Waters stock at Petersburg; takes at this location are assumed to be 50% from each stock.
l. Newly delineated stock range overlaps with Sitka (Young *et al.*, 2023).
m. Stock range overlaps with Kodiak, Seward, and Cordova (Young *et al.*, 2023).

TABLE 14—ESTIMATED LEVEL A HARASSMENT TAKE IN EACH YEAR AND IN TOTAL

Species and stock	Year 1	Year 2	Year 3	Year 4	Year 5	Total
Dall's porpoise Alaska	86	98	86	86	86	442
Harbor porpoise Southern Southeast Alaska Inland Waters	20	20	20	20	20	100
Harbor porpoise Gulf of Alaska	55	85	55	55	55	305
Harbor seal South Kodiak	20	20	20	20	20	100
Harbor seal Clarence Strait	20	20	20	20	20	100

Table 15 – Total (5-year) Estimated Level A Harassment Take for Each Facility

Species and Stock	Kodiak	Ketchikan	Cordova	Valdez
Dall's porpoise Alaska	200	200	12	30
Harbor porpoise Southern Southeast Alaska Inland Waters	0	100	0	0
Harbor porpoise Gulf of Alaska	200	0	30	75
Harbor seal South Kodiak	100	0	0	0
Harbor seal Clarence Strait	0	100	0	0

TABLE 16—ESTIMATED LEVEL A AND LEVEL B HARASSMENT TAKE AND PERCENT OF STOCK FOR THE MAXIMUM ANNUAL ESTIMATED TAKES OF THE PROJECT

Species and stock	Level A	Level B	Total	Percent of stock
Gray whale Eastern North Pacific	0	8	8	0.03
Humpback whale Hawai'i	0	174	174	[a] 1.48
Humpback whale Mexico-North Pacific				[a] 0.76
Fin whale Northeast Pacific	0	23	23	N/A
Minke whale Alaska	0	6	6	N/A
Killer whale Alaska Resident	0	[c] 127	127	[a] 4.55
Killer whale Gulf of Alaska, Aleutian Islands, Bearing Sea Transient				[a] 3.85
Killer whale Northern Resident				[a] 3.23
Killer whale AT1 Transient [b]				[a b] 0
Killer whale West Coast Transient				[a] 3.23
Pacific white-sided dolphin North Pacific	0	[c] 233	233	0.87
Dall's porpoise Alaska	98	147	245	N/A
Harbor porpoise Northern Southeast Alaska Inland Waters	0	11	11	0.68
Harbor porpoise Southern Southeast Alaska Inland Waters	20	11	31	3.48
Harbor porpoise Yakutat/Southeast Alaska Offshore Waters	0	50	50	N/A
Harbor porpoise Gulf of Alaska	85	115	[c] 200	0.64
California sea lion U.S	0	10	10	0.00
Northern fur seal Eastern Pacific	0	[c] 23	23	0.00
Steller sea lion Eastern	0	425	425	0.98
Steller sea lion Western	0	34	34	0.06
Harbor seal Prince William Sound	0	442	442	1.06
Harbor seal Lynn Canal/Stephens Passage	0	860	860	7.25
Harbor seal Sitka/Chatham Straight	0	230	230	1.94
Harbor seal Clarence Strait	20	412	432	1.74
Harbor seal South Kodiak	20	17	37	0.17

[a] Percent of stock impacted for humpback and killer whales was estimated assuming each stock is taken in proportion to its population size at any given facility site from the total take (*e.g.,* for killer whales at Kodiak, the Alaska Resident and Gulf of Alaska stocks are the only stocks present. Of these, the Alaska Resident stock represents approximately 80 percent of the available animals, and GOA represents approximately 20 percent, giving 4 total Alaska Resident killer whale takes over the 5 years, and 1 GOA killer whale take. This division was replicated for each site for all present stocks. Takes were then calculated for each site based on the proportional representation of available stocks. Total takes for each stock are shown as a percentage of the stock size.)

[b] AT1 Transient killer whales have the potential to be present in the Seward, Valdez, and Cordova, however we do not expect any of the seven individuals to approach the project sites, therefore no take is expected to occur for this stock and none is authorized.

[c] Corrected typographical error from the proposed rule.

Mitigation

Under Section 101(a)(5)(A) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses (''least practicable adverse impact''). NMFS does not have a regulatory definition for ''least practicable adverse impact.'' NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, we carefully consider two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat, as well as

subsistence uses. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), and the likelihood of effective implementation (probability implemented as planned); and

(2) The practicability of the measures for applicant implementation, which may consider such things as cost and impact on operations.

The mitigation strategies described below largely follow those required and successfully implemented under previous incidental take authorizations issued in association with similar construction activities. Measurements from similar pile driving events were coupled with practical spreading loss and other relevant information to estimate harassment zones (see *Estimated Take*); these zones were used to develop mitigation measures for DTH and pile driving activities at the eight facilities. Background discussion related to underwater sound concepts and terminology is provided in the section on *Description of Sound Sources,* in the proposed rule (88 FR 26432, April 28, 2023).

The following mitigation measures will be implemented:

- Avoid direct physical interaction with marine mammals during construction activity. If a marine mammal comes within 20 m of such activity, operations must cease and vessels must reduce speed to the minimum level required to maintain steerage and safe working conditions. The Coast Guard has elected to establish a minimum shutdown zone size of 20 m, which is larger than NMFS' typical requirement of a minimum 10 m shutdown zone;
- Conduct training between construction supervisors and crews and the marine mammal monitoring team and relevant Coast Guard staff prior to the start of all DTH drilling, pile driving, cutting or power washing activity and when new personnel join the work, so that responsibilities, communication procedures, monitoring protocols, and operational procedures are clearly understood;
- DTH and pile driving activity must be halted upon observation of either a species for which incidental take is not authorized or a species for which incidental take has been authorized but the authorized number of takes has been met, entering or within the harassment zone;
- The Coast Guard will establish and implement a minimum shutdown zone of 20 m during all DTH, pile driving and removal activity, as well as the larger zones indicated in table 17. The purpose of a shutdown zone is generally to define an area within which shutdown of the activity would occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area). Shutdown zones typically vary based on the activity type and marine mammal hearing group. The Coast Guard has elected to establish a minimum shutdown zone size of 20 m, which is larger than NMFS' typical requirement of a minimum 10 m shutdown zone;
- Employ PSOs and establish monitoring locations as described in the application, any issued LOA and the Marine Mammal Monitoring Plan. The Coast Guard must monitor the project area to the maximum extent possible based on the required number of PSOs, required monitoring locations, and environmental conditions. Anticipated observable zones within the designated monitoring zones shall be identified in the Marine Mammal Monitoring Plan, subject to approval by NMFS. For all DTH and pile driving at least one PSO must be used. The PSO will be stationed as close to the activity as possible;
- The placement of the PSOs during all DTH and pile driving activities will ensure that the entire shutdown zone is visible during pile installation. Should environmental conditions deteriorate such that marine mammals within the entire shutdown zone will not be visible (*e.g.,* fog, heavy rain), pile driving must be delayed until the PSO is confident marine mammals within the shutdown zone could be detected;
- Monitoring must take place from 30 minutes prior to initiation of DTH and pile driving activity through 30 minutes post-completion of DTH and pile driving activity. Pre-start clearance monitoring must be conducted during periods of visibility sufficient for the lead PSO to determine the shutdown zones clear of marine mammals. DTH and pile driving may commence following 30 minutes of observation when the determination is made;
- If DTH or pile driving is delayed or halted due to the presence of a marine mammal, the activity may not commence or resume until either the animal has voluntarily exited and been visually confirmed beyond the shutdown zone or 15 minutes have passed without re-detection of the animal;
- The Coast Guard must use soft start techniques prior to beginning impact pile driving. Soft start requires contractors to provide an initial set of three strikes at reduced energy, followed by a 30-second waiting period, then two subsequent reduced-energy strike sets. A soft start must be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of 30 minutes or longer;
- As described previously, the Coast Guard would adhere to in-water work windows designed for the protection of fishes and marine mammals under other permitting requirements;
- The Coast Guard has volunteered that in-water construction activities will occur only during civil daylight hours; and
- Pile driving activity must be halted upon observation of either a species for which incidental take is not authorized or a species for which incidental take has been authorized but the authorized number of takes has been met, entering or within the largest applicable harassment zone.

TABLE 17—SHUTDOWN ZONES (m) FOR EACH PILE TYPE AND METHOD

Method and pile type	Low frequency cetacean	Mid frequency cetacean	High frequency cetacean	Phocid	Otariid
Timber Vibratory	20	20	20	20	20
24-inch Steel Pipe Vibratory	20	20	20	20	20
Timber Impact	20	20	30	20	20
Composite Impact	20	20	20	20	20
24-inch Steel Pipe Impact	220	20	260	120	20
24-inch Concrete Impact	30	20	40	20	20
24-inch DTH	440	20	520	240	20

Based on our evaluation of the applicant's planned measures, as well as other measures considered by NMFS, NMFS has determined that the mitigation measures provide the means effecting the least practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for subsistence uses.

Monitoring and Reporting

In order to issue an LOA for an activity, Section 101(a)(5)(A) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of the authorized taking. The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the action area. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density).
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.,* age, calving, or feeding areas).
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors.
- How anticipated responses to stressors impact either: (1) long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks.
- Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or important physical components of marine mammal habitat).
- Mitigation and monitoring effectiveness.

Visual Monitoring

- Monitoring must be conducted by qualified, NMFS-approved PSOs, in accordance with the following: PSOs must be independent (*i.e.,* not construction personnel) and have no other assigned tasks during monitoring periods. At least one PSO must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization. Other PSOs may substitute education (degree in biological science or related field), or training for experience. The Coast Guard shall submit PSO curriculum vitae (CVs) for approval by NMFS. PSOs must be approved by NMFS prior to beginning any activity subject to any LOA issued pursuant to this rule.
- PSOs must record all observations of marine mammals as described in any issued LOA and the NMFS-approved Marine Mammal Monitoring Plan, regardless of distance from the pile being driven. PSOs shall document any behavioral reactions in concert with distance from piles being driven or removed;

PSOs must have the following additional qualifications:

- Ability to conduct field observations and collect data according to assigned protocols;
- Experience or training in the field identification of marine mammals, including the identification of behaviors;
- Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;
- Writing skills sufficient to prepare a report of observations including but not limited to the number and species of marine mammals observed; dates and times when in-water construction activities were conducted; dates, times, and reason for implementation of mitigation (or why mitigation was not implemented when required); and marine mammal behavior; and
- Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary;
- The Coast Guard must establish the following monitoring locations. For all pile driving activities, a minimum of one PSO must be assigned to the active pile driving location to monitor the shutdown zones and as much of the Level B harassment zones as possible. Possible monitoring locations are shown in Figures 6–1 through 6–41 of the application and summarized in table 18. The number of PSOs required at each facility is dependent upon the size of the Level B harassment area as well as the topography of the activity site and a PSO's ability to observe the estimated Level A harassment area for the particular activity. Where a team of three or more PSOs is required, a lead observer or monitoring coordinator must be designated. The lead observer must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization.

TABLE 18—SUMMARY OF PROTECTED SPECIES OBSERVER (PSO) COVERAGE AT EACH FACILITY

Facility	Maximum number of PSOs
Kodiak	2
Sitka	5
Ketchikan	5
Valdez	3
Cordova	3
Juneau	3
Petersburg	3
Seward	2

Reporting

A draft marine mammal monitoring report will be submitted to NMFS within 90 days after the completion of pile driving activities, or 60 days prior to a requested date of issuance of any future LOAs for projects at the same location, whichever comes first. The report will include an overall description of work completed, a narrative regarding marine mammal sightings, and associated PSO data sheets. Specifically, the report must include:

- Dates and times (begin and end) of all marine mammal monitoring.
- Construction activities occurring during each daily observation period, including the number and type of piles driven or removed and by what method (*i.e.,* impact or cutting) and the total equipment duration. When possible, the report should include the number of strikes for each pile (impact driving, DTH) and, for DTH, the duration of operation for both impulsive and non-impulsive components as well as the strike rate.
- PSO locations during marine mammal monitoring.
- Environmental conditions during monitoring periods (at beginning and end of PSO shift and whenever conditions change significantly),

including Beaufort sea state and any other relevant weather conditions such as cloud cover, fog, sun glare, and overall visibility to the horizon, and estimated observable distance;

- Upon observation of a marine mammal, the following information: name of PSO who sighted the animal(s), and PSO location and activity at time of sighting; time of sighting; identification of the animal(s) (*e.g.,* genus/species, lowest possible taxonomic level, or unidentified), PSO confidence in identification, and the composition of the group if there is a mix of species; distance and bearing of each marine mammal observed relative to the pile being driven for each sighting (if pile driving was occurring at time of sighting); estimated number of animals (min/max/best estimate); estimated number of animals by cohort (adults, juveniles, neonates, group composition, *etc.*); animal's closest point of approach and estimated time spent within the harassment zone; and description of any marine mammal behavioral observations (*e.g.,* observed behaviors such as feeding or traveling), including an assessment of behavioral responses thought to have resulted from the activity (*e.g.,* no response or changes in behavioral state such as ceasing feeding, changing direction, flushing, or breaching);
- Number of marine mammals detected within the harassment zones, by species; and
- Detailed information about any implementation of any mitigation triggered (*e.g.,* shutdowns and delays), a description of specific actions that ensued, and resulting changes in behavior of the animal(s), if any.

If no comments are received from NMFS within 30 days, the draft final report will constitute the final report. If comments are received, a final report addressing NMFS comments must be submitted within 30 days after receipt of comments.

Reporting Injured or Dead Marine Mammals

In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the Coast Guard must immediately cease the specified activities and report the incident to the NMFS Office of Protected Resources (OPR) (*PR.ITP.MonitoringReports@noaa.gov*) and to the Alaska Regional Stranding Coordinator as soon as feasible. If the death or injury was likely caused by the specified activity, the Coast Guard must immediately cease the specified activities until NMFS is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the LOA and regulations. The Coast Guard must not resume their activities until notified by NMFS. The report must include the following information:

- Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);
- Species identification (if known) or description of the animal(s) involved;
- Condition of the animal(s) (including carcass condition if the animal is dead);
- Observed behaviors of the animal(s), if alive;
- If available, photographs or video footage of the animal(s); and
- General circumstances under which the animal was discovered.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through harassment, NMFS considers other factors, such as the likely nature of any responses (*e.g.,* intensity, duration), the context of any responses (*e.g.,* critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS' implementing regulations (54 FR 40338, September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the environmental baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

DTH and pile driving activities associated with the maintenance projects, as described previously, have the potential to disturb or displace marine mammals. Specifically, the specified activities may result in take, in the form of Level B harassment (behavioral disturbance) only for all species other than the harbor porpoise, harbor seal, and Dall's porpoise from underwater sounds generated from DTH and pile driving. Potential takes could occur if individual marine mammals are present in the ensonified zone when DTH or pile driving is happening.

No serious injury or mortality would be expected even in the absence of the mitigation measures. For all species other than the harbor seal, harbor porpoise and Dall's porpoise, no Level A harassment is anticipated due to the confined nature of the facilities, the ability to position PSOs at stations from which they can observe the entire shutdown zones, and the high visibility of the species expected to be present at each site. Additionally, much of the anticipated activity would involve vibratory driving or installation of small-diameter, non-steel piles, and include measures designed to minimize the possibility of injury. The potential for injury is small for mid- and low-frequency cetaceans and sea lions, and is expected to be essentially eliminated through implementation of the planned mitigation measures—soft start (for impact driving), and shutdown zones.

DTH and impact driving, as compared with vibratory driving, have source characteristics (short, sharp pulses with higher peak levels and much sharper rise time to reach those peaks) that are potentially injurious or more likely to produce severe behavioral reactions. Given sufficient notice through use of soft start, marine mammals are expected to move away from a sound source that is annoying prior to it becoming potentially injurious or resulting in more severe behavioral reactions. Environmental conditions in these waters are expected to generally be good, with calm sea states, and we expect conditions would allow a high marine mammal detection capability, enabling a high rate of success in implementation of shutdowns to avoid injury.

As described previously, there are multiple species that should be considered rare in the project areas and for which we propose to authorize only nominal and precautionary take. Therefore, we do not expect meaningful impacts to these species (*i.e.,* gray whale, minke whale, transient and resident killer whales, and California sea lions) and find that the total marine mammal take from each of the specified activities will have a negligible impact on these marine mammal species.

For remaining species, we discuss the likely effects of the specified activities

in greater detail here. Effects on individuals that are taken by Level B harassment, on the basis of reports in the literature as well as monitoring from other similar activities, will likely be limited to reactions such as increased swimming speeds, increased surfacing time, or decreased foraging (if such activity were occurring) (*e.g.,* Thorson and Reyff, 2006; U.S. Navy, 2012; Lerma, 2014). Most likely, individuals will simply move away from the sound source and be temporarily displaced from the areas of pile driving, although even this reaction has been observed primarily only in association with impact pile driving. The pile driving activities analyzed here are similar to, or less impactful than, numerous other construction activities conducted in Alaska, San Francisco Bay and in the Puget Sound region, which have taken place with no known long-term adverse consequences from behavioral harassment.

The U.S. Navy has conducted multi-year activities in various locations such as San Diego Bay and Puget Sound, potentially affecting marine mammals, and typically involving greater levels of activity than what is contemplated here. Reporting from these activities has similarly documented no apparently consequential behavioral reactions or long-term effects on marine mammal populations (Lerma, 2014; U.S. Navy, 2016a and b).

Repeated exposures of individuals to relatively low levels of sound outside of preferred habitat areas are unlikely to significantly disrupt critical behaviors. Thus, even repeated Level B harassment of some small subset of the overall stock is unlikely to result in any significant realized decrease in viability for the affected individuals, and thus would not result in any adverse impact to the stock as a whole. Level B harassment will be reduced to the level of least practicable adverse impact through use of mitigation measures described herein and, if sound produced by project activities is sufficiently disturbing, animals are likely to simply avoid the area while the activity is occurring. While vibratory driving or DTH associated with some project components may produce sound at distances of many kilometers from the pile driving site, thus intruding on higher-quality habitat, the project sites themselves and the majority of sound fields produced by the specified activities are within industrialized areas. Therefore, we expect that animals annoyed by project sound would simply avoid the area and use more-preferred habitats.

In addition to the expected effects resulting from authorized Level B harassment, we anticipate that harbor seals, harbor porpoises, and Dall's porpoises may sustain some limited Level A harassment in the form of auditory injury at four of the facilities, assuming they remain within a given distance of the pile driving activity for the full number of pile strikes or DTH strikes. Considering the short duration to impact drive or vibrate each pile and breaks between pile installations (to reset equipment and move pile into place), this means an animal would have to remain within the area estimated to be ensonified above the Level A harassment threshold for multiple hours. This is highly unlikely given marine mammal movement throughout the area. Harbor seals and porpoises in these locations that do experience PTS would likely only receive slight PTS, *i.e.,* minor degradation of hearing capabilities within regions of hearing that align most completely with the energy produced by DTH or pile driving, *i.e.,* the low-frequency region below 2 kHz, not severe hearing impairment or impairment in the regions of greatest hearing sensitivity. If hearing impairment occurs, it is most likely that the affected animal would lose a few decibels in its hearing sensitivity, which in most cases is not likely to meaningfully affect its ability to forage and communicate with conspecifics. As described above, we expect that marine mammals would be likely to move away from a sound source that represents an aversive stimulus, especially at levels that would be expected to result in PTS, given sufficient notice through use of soft start. Shutdown zones for the porpoises are only slightly smaller than the extent of the Level A harassment zones, further minimizing the chances for PTS or more severe effects.

In addition, although affected humpback whales and Steller sea lions may be from distinct population segments (DPSs) that are listed under the ESA, it is unlikely that minor noise impacts in a small, localized area of sub-optimal habitat would have any effect on the stocks' ability to recover. In combination, we believe that these factors, as well as the available body of evidence from other similar activities, demonstrate that the potential effects of the specified activities will have only minor, short-term effects on individuals. The specified activities are not expected to impact rates of recruitment or survival and will therefore not result in population-level impacts.

In summary and as described above, the following factors primarily support our determination that the impacts resulting from this activity are not expected to adversely affect the species or stock through effects on annual rates of recruitment or survival:

- No mortality is anticipated or authorized.
- Use of soft start (for impact driving) is expected to minimize Level A harassment.
- No important habitat areas have been identified within the project area.
- For all species, the project locations are a very small and generally peripheral part of their range.
- Authorized Level A harassment would be very small amounts and of low degree.
- Monitoring reports from similar work in many of the locations in Alaska have documented little to no effect on individuals of the same species impacted by the specified activities.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the monitoring and mitigation measures, NMFS finds that the total marine mammal take from the planned activities will have a negligible impact on the affected marine mammal species or stocks.

Small Numbers

As noted above, only small numbers of incidental take may be authorized under Section 101(a)(5)(A) of the MMPA for specified activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is fewer than one-third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

The amount of take NMFS is authorizing is below one-third of the estimated stock abundance of all species and stocks (take of individuals is less than 14 percent of the abundance of the affected stocks for the year of this rulemaking with the maximum amount of activity; see table 19). This is likely a conservative estimate because it assumes all takes are of different individual animals, which is likely not the case. Some individuals may return

multiple times in a day, but PSOs would count them as separate takes if they cannot be individually identified.

For fin whale, minke whale, Dall's porpoise, and Southeast Alaska harbor porpoise, no valid abundance estimate for the entire stock is available. There is no stock-wide abundance estimate for Northeast Pacific fin whales. However, Muto *et al.* (2021) estimate the minimum stock size for the areas surveyed is 2,554. Therefore, the 23 maximum annual authorized takes of this stock represents small numbers of this stock. There is no stock-wide abundance estimate for the Alaska stock of minke whales. However, Muto *et al.* (2021) show over 2,000 animals for areas surveyed recently. Therefore, the six maximum annual authorized takes of this stock represents small numbers of this stock. The Alaska stock of Dall's porpoise has no official NMFS abundance estimate for this area, as the most recent estimate is greater than 8 years old. Nevertheless, the most recent estimate was 83,400 animals and it is unlikely this number has drastically declined. Therefore, the 245 maximum annual authorized takes of this stock represents small numbers of this stock. There is no stock-wide abundance estimate for the Southeast Alaska stock of harbor porpoises. However, Muto *et al.* (2021) estimate the minimum stock size for the areas surveyed is 1,057. Therefore, the 92 maximum annual authorized takes of this stock represents small numbers of this stock. Therefore, we find that small numbers of marine mammals will be taken relative to the population size of all stocks.

Based on the analysis contained herein of the planned activity (including the mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS finds that small numbers of marine mammals will be taken relative to the population sizes of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

In order to issue regulations and LOAs, NMFS must find that the specified activity will not have an ''unmitigable adverse impact'' on the subsistence uses of the affected marine mammal species or stocks by Alaskan Natives. NMFS has defined ''unmitigable adverse impact'' in 50 CFR 216.103 as an impact resulting from the specified activity: (1) that is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by: (i) causing the marine mammals to abandon or avoid hunting areas; (ii) directly displacing subsistence users; or (iii) placing physical barriers between the marine mammals and the subsistence hunters; and (2) that cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

As discussed above in the *Effects of Specified Activities on Subsistence Uses of Marine Mammals* section, subsistence harvest of harbor seals and other marine mammals is rare in the project areas and local subsistence users have not expressed concern about this project. All project activities will take place within industrialized areas where subsistence activities do not generally occur. The project also will not have an adverse impact on the availability of marine mammals for subsistence use at locations farther away, where these construction activities are not expected to take place. Some minor, short-term harassment of the harbor seals could occur, but any effects on subsistence harvest activities in the region will be minimal, and will not have an adverse impact.

Based on the effects and locations of the specified activity, and the mitigation and monitoring measures, NMFS has determined that there will not be an unmitigable adverse impact on subsistence uses from the Coast Guard's planned activities.

Adaptive Management

The regulations governing the take of marine mammals incidental to Coast Guard maintenance construction activities would contain an adaptive management component.

The reporting requirements associated with this final rule are designed to provide NMFS with monitoring data from the previous year to allow consideration of whether any changes are appropriate. The use of adaptive management allows NMFS to consider new information from different sources to determine (with input from the Coast Guard regarding practicability) on an annual basis if mitigation or monitoring measures should be modified (including additions or deletions). Mitigation measures could be modified if new data suggests that such modifications would have a reasonable likelihood of reducing adverse effects to marine mammals and if the measures are practicable.

The following are some of the possible sources of applicable data to be considered through the adaptive management process: (1) results from monitoring reports, as required by MMPA authorizations; (2) results from general marine mammal and sound research; and (3) any information which reveals that marine mammals may have been taken in a manner, extent, or number not authorized by these regulations or subsequent LOAs.

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of regulations and LOAs, NMFS consults internally, in this case with the Alaska Regional Office, whenever we propose to authorize take for endangered or threatened species.

NMFS is authorizing take of Western DPS Steller sea lions (*Eumetopias jubatus*), fin whales (*Balenoptera physalus*), and Mexico DPS of humpback whales (*Megaptera novaeangliae*), which are listed under the ESA. The NMFS Alaska Regional Office issued a Biological Opinion under Section 7 of the ESA (*https://www.fisheries.noaa.gov/action/incidental-take-authorization-us-coast-guards-alaska-facility-maintenance-and-repair*) on the issuance of regulations and an LOA to the Coast Guard under section 101(a)(5)(D) of the MMPA by the NMFS Office of Protected Resources. The Biological Opinion concluded that the proposed action is not likely to jeopardize the continued existence of Western DPS Steller sea lions, fin whales, or humpback whales from either the Mexico or Western North Pacific DPSs.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must evaluate our proposed action (*i.e.,* the promulgation of regulations and subsequent issuance of incidental take authorization) and alternatives with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 of the Companion Manual for NAO 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has determined that this action qualifies to be categorically excluded from further NEPA review.

Classification

Pursuant to the procedures established to implement Executive Order 12866, the Office of Management and Budget has determined that this rule is not significant.

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA), the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration at the proposed rule stage that this action will not have a significant economic impact on a substantial number of small entities. The Coast Guard is the sole entity that would be subject to the requirements in these proposed regulations, and the Coast Guard is not a small governmental jurisdiction, small organization, or small business, as defined by the RFA. No comments were received regarding this certification, and the factual basis for the certification has not changed. As a result, a regulatory flexibility analysis was not required and none was prepared.

This final rule does not contain a collection-of-information requirement subject to the provisions of the Paperwork Reduction Act because the applicant is a Federal agency.

List of Subjects in 50 CFR Part 217

Exports, Fish, Imports, Indians, Labeling, Marine mammals, Penalties, Reporting and recordkeeping requirements, Seafood, Transportation.

Dated: December 14, 2023.

Samuel D. Rauch III,

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

For reasons set forth in the preamble, NMFS amends 50 CFR part 217 as follows:

PART 217—REGULATIONS GOVERNING THE TAKING OF MARINE MAMMALS INCIDENTAL TO SPECIFIED ACTIVITES

■ 1. The authority citation for part 217 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*

■ 2. Add subpart T to read as follows:

Subpart T—Taking Marine Mammals Incidental to U.S. Coast Guard Alaska Facility Maintenance and Repair Activities

Sec.

Subpart T—Taking Marine Mammals Incidental to U.S. Coast Guard Alaska Facility Maintenance and Repair Activities

§ 217.190 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to incidental taking of marine mammals by the U.S. Coast Guard (Coast Guard) and those persons it authorizes or funds to conduct activities on its behalf in the areas outlined in paragraph (b) of this section and that occurs incidental to maintenance construction activities.

(b) The taking of marine mammals by the Coast Guard may be authorized in a Letter of Authorization (LOA) only if it occurs within Gulf of Alaska waters in the vicinity of one of the following eight Coast Guard facilities: Kodiak, Sitka, Ketchikan, Valdez, Cordova, Juneau, Petersburg, and Seward.

§ 217.191 Effective dates.

Regulations in this subpart are effective from March 1, 2024, through February 28, 2029.

§ 217.192 Permissible methods of taking.

Under LOAs issued pursuant to §§ 216.106 of this chapter and 217.196, the Holder of the LOA (hereinafter ''Coast Guard'') may incidentally, but not intentionally, take marine mammals within the areas described in § 217.190(b) by Level A or Level B harassment associated with maintenance construction activities, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA.

§ 217.193 Prohibitions.

Except for takings described in § 217.192 and authorized by a LOA issued under §§ 216.106 of this chapter and 217.196, it shall be unlawful for any person to do any of the following in connection with the activities described in § 217.190:

(a) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a LOA issued under §§ 216.106 of this chapter and 217.196;

(b) Take any marine mammal not specified in such LOAs;

(c) Take any marine mammal specified in such LOAs in any manner other than as authorized;

(d) Take a marine mammal specified in such LOAs after NMFS determines such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(e) Take a marine mammal specified in such LOAs after NMFS determines such taking results in an unmitigable adverse impact on the species or stock of such marine mammal for taking for subsistence uses.

§ 217.194 Mitigation requirements.

When conducting the activities identified in § 217.190(a), the mitigation measures contained in this subpart and any LOA issued under §§ 216.106 of this chapter and 217.196 must be implemented. These mitigation measures shall include but are not limited to:

(a) General conditions:

(1) A copy of any issued LOA must be in the possession of the Coast Guard, supervisory construction personnel, lead protected species observers, and any other relevant designees of the Coast Guard operating under the authority of this LOA at all times that activities subject to this LOA are being conducted.

(2) The Coast Guard shall conduct training between construction supervisors and crews and the marine mammal monitoring team and relevant Coast Guard staff prior to the start of all down-the-hole (DTH), pile driving, cutting or power washing activity and when new personnel join the work, so that responsibilities, communication procedures, monitoring protocols, and operational procedures are clearly understood.

(3) The Coast Guard shall avoid direct physical interaction with marine mammals during construction activity. If a marine mammal comes within 20 m of an activity regulated under this subpart, operations must cease and vessels must reduce speed to the minimum level required to maintain steerage and safe working conditions.

(b) Shutdown zones:

(1) For all DTH, pile driving, cutting or power washing activity, the Coast Guard shall implement a minimum shutdown zone of a 20-m radius around the pile or DTH hole. If a marine mammal comes within or approaches the shutdown zone, such operations shall cease.

(2) For all DTH and pile driving activity, the Coast Guard shall implement shutdown zones with radial distances as identified in any LOA issued under §§ 216.106 of this chapter and 217.196. If a marine mammal comes within or approaches the shutdown zone, such operations shall cease.

(3) For all DTH and pile driving activity, the Coast Guard shall designate monitoring zones with radial distances

as identified in any LOA issued under §§ 216.106 of this chapter and 217.196. Anticipated observable zones within the designated monitoring zones shall be identified in the Marine Mammal Monitoring Plan, subject to approval by NMFS.

(c) Shutdown protocols:

(1) The Coast Guard shall deploy Protected Species Observers (PSOs) as indicated in the Marine Mammal Monitoring Plan, which shall be subject to approval by NMFS, and as described in § 217.195.

(2) For all DTH and pile driving activities, a minimum of one PSO shall be stationed at the active pile driving rig or activity site or in reasonable proximity in order to monitor the entire shutdown zone.

(3) Monitoring must take place from 30 minutes prior to initiation of DTH and pile driving activity through 30 minutes post-completion of DTH and pile driving activity. Pre-start clearance monitoring must be conducted during periods of visibility sufficient for the lead PSO to determine the shutdown zones are clear of marine mammals. DTH and pile driving activity may commence following 30 minutes of observation when the determination is made.

(4) If DTH and pile driving activity is delayed or halted due to the presence of a marine mammal, the activity may not commence or resume until either the animal has voluntarily exited and been visually confirmed beyond the shutdown zone or 15 minutes have passed without re-detection of the animal.

(5) Should environmental conditions deteriorate such that marine mammals within the entire shutdown zone would not be visible (*e.g.,* fog, heavy rain, night), the Coast Guard must delay in-water construction activities until observers are confident marine mammals within the shutdown zone could be detected.

(6) Monitoring shall be conducted by trained PSOs, who shall have no other assigned tasks during monitoring periods. Trained PSOs shall be placed at the best vantage point(s) practicable to monitor for marine mammals and implement shutdown or delay procedures when applicable through communication with the equipment operator. The Coast Guard shall adhere to the PSO qualifications in § 217.195.

(d) The Coast Guard must use soft start techniques for impact pile driving. Soft start for impact drivers requires contractors to provide an initial set of three strikes at reduced energy, followed by a 30-second waiting period, then two subsequent reduced energy three-strike sets. Soft start shall be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of 30 minutes or longer.

§ 217.195 Requirements for monitoring and reporting.

(a) The Coast Guard must submit a Marine Mammal Monitoring Plan to NMFS for approval in advance of construction. Marine mammal monitoring must be conducted in accordance with the conditions in this section and the Marine Mammal Monitoring Plan.

(b) Monitoring must be conducted by qualified, NMFS-approved PSOs, in accordance with the following:

(1) PSOs must be independent of the activity contractor (*i.e.* not employed by the construction contractor), and have no other assigned tasks during monitoring periods.

(2) At least one PSO must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization.

(3) Other PSOs may substitute education (degree in biological science or related field) or training for prior experience.

(4) Where a team of three or more PSOs are required, one observer shall be designated as lead observer or monitoring coordinator. The lead observer must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization.

(5) The Coast Guard must submit PSO curriculum vitae (CVs) for approval by NMFS. PSOs must be approved by NMFS prior to beginning any activity subject to this regulation.

(c) PSOs must record all observations of marine mammals as described in the Marine Mammal Monitoring Plan, regardless of distance from the pile being driven. PSOs shall document any behavioral reactions in concert with distance from piles being driven or removed.

(d) The Coast Guard shall deploy additional PSOs to monitor harassment zones according to the minimum requirements defined in Marine Mammal Monitoring Plan, subject to approval by NMFS. These observers shall collect sighting data and behavioral responses to pile driving for marine mammal species observed in the region of activity during the period of activity, and shall communicate with the shutdown zone observer(s) as appropriate with regard to the presence of marine mammals. All observers shall be trained in identification and reporting of marine mammal behaviors.

(e) Reporting:

(1) Annual reporting:

(i) Coast Guard shall submit a draft monitoring report to NMFS within 90 work days of the completion of required monitoring for each portion of the project as well as a comprehensive summary report at the end of the project. Coast Guard shall provide a final report within 30 days following resolution of comments on the draft report. If no work requiring monitoring is conducted within a calendar year, Coast Guard shall provide a statement to that effect in lieu of a draft report.

(ii) These reports shall contain, at minimum, the following:

(A) Dates and times (begin and end) of all marine mammal monitoring;

(B) Construction activities occurring during each daily observation period, including the number and type of piles driven or removed and by what method (*i.e.,* impact or vibratory) and the total equipment duration for vibratory or DTH for each pile. When possible, the number of strikes for each pile/hole (impact driving, DTH); and, for DTH, the duration of operation for both impulsive and non-impulsive components as well as the strike rate must be included;

(C) PSO locations during marine mammal monitoring;

(D) Environmental conditions during monitoring periods (at beginning and end of PSO shift and whenever conditions change significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon, and estimated observable distance;

(E) Upon observation of a marine mammal, the following information: Name of PSO who sighted the animal(s) and PSO location and activity at time of sighting; Time of sighting; Identification of the animal(s) (*e.g.,* genus and species, lowest possible taxonomic level, or unidentified), PSO confidence in identification, and the composition of the group if there is a mix of species; Distance and bearing of each marine mammal observed relative to the pile being driven for each sighting (if pile driving was occurring at time of sighting); Estimated number of animals (min, max, and best estimate); Estimated number of animals by cohort (adults, juveniles, neonates, group composition, *etc.*); Animal's closest point of approach and estimated time spent within the harassment zone; and Description of any marine mammal behavioral observations (*e.g.,* observed behaviors such as feeding or traveling), including an assessment of

behavioral responses thought to have resulted from the activity (*e.g.,* no response or changes in behavioral state such as ceasing feeding, changing direction, flushing, or breaching);

(F) Number of marine mammals detected within the harassment zones, by species;

(G) Detailed information about any implementation of any mitigation triggered (*e.g.,* shutdowns and delays), a description of specific actions that ensued, and resulting changes in behavior of the animal(s), if any.

(2) Coast Guard shall submit a comprehensive summary report to NMFS not later than 90 days following the conclusion of marine mammal monitoring efforts described in this subpart. All PSO datasheets and/or raw sighting data must be submitted with the draft reports.

(3) All draft and final monitoring reports must be submitted to *PR.ITP.MonitoringReports@noaa.gov* and *ITP.Hotchkin@noaa.gov.*

(f) Reporting of injured or dead marine mammals:

(1) In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the Coast Guard must immediately cease the specified activities and report the incident to the Office of Protected Resources (*PR.ITP.MonitoringReports@noaa.gov* and *ITP.Hotchkin@noaa.gov*), NMFS and to Alaska Regional Stranding Coordinator as soon as feasible. If the death or injury was likely caused by the specified activity, the Coast Guard must immediately cease the specified activities until NMFS is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the regulations under this subpart and LOAs. The Coast Guard must not resume their activities until notified by NMFS. The report must include the following information:

(i) Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);

(ii) Species identification (if known) or description of the animal(s) involved;

(iii) Condition of the animal(s) (including carcass condition if the animal is dead);

(iv) Observed behaviors of the animal(s), if alive;

(v) If available, photographs or video footage of the animal(s); and

(vi) General circumstances under which the animal was discovered.

(2) [Reserved]

§ 217.196 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to the regulations under this subpart, the Coast Guard must apply for and obtain an LOA.

(b) An LOA, unless suspended or revoked, may be effective for a period of time not to exceed the expiration date of the regulations under this subpart.

(c) If an LOA expires prior to the expiration date of the regulations under this subpart, the Coast Guard may apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, the Coast Guard must apply for and obtain a modification of the LOA as described in § 217.197.

(e) The LOA shall set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact (*i.e.,* mitigation) on the species, its habitat, and on the availability of the species for subsistence uses; and

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under the regulations of this subpart.

(g) Notice of issuance or denial of an LOA shall be published in the **Federal Register** within 30 days of a determination.

§ 217.197 Renewals and modifications of Letters of Authorization.

(a) An LOA issued under §§ 216.106 of this chapter and 217.196 for the activity identified in § 217.190(a) shall be renewed or modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for the regulations under this subpart (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section), and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA under the regulations of this subpart were implemented.

(b) For LOA modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section) that do not change the findings made for the regulations or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of proposed LOA in the **Federal Register**, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) An LOA issued under §§ 216.106 of this chapter and 217.196 for the activity identified in § 217.190(a) may be modified by NMFS under the following circumstances:

(1) Adaptive Management—NMFS may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with the Coast Guard regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in an LOA:

(A) Results from the Coast Guard's monitoring from the previous year(s).

(B) Results from other marine mammal and/or sound research or studies.

(C) Any information that reveals marine mammals may have been taken in a manner, extent, or number not authorized by the regulations under this subpart or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of proposed LOA in the **Federal Register** and solicit public comment.

(2) Emergencies—If NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in LOAs issued pursuant to §§ 216.106 of this chapter and 217.196, an LOA may be modified without prior notice or opportunity for public comment. Notice would be published in the **Federal Register** within 30 days of the action.

§§ 217.198–217.199 [Reserved]

[FR Doc. 2023–27843 Filed 12–19–23; 8:45 am]

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Proposed Rules

Federal Register
Vol. 88, No. 243
Wednesday, December 20, 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.

OFFICE OF MANAGEMENT AND BUDGET

5 CFR Parts 1302 and 1303

RIN 0348–AB87

Privacy Act and Freedom of Information Act Regulations

AGENCY: Office of Management and Budget, Executive Office of the President.

ACTION: Proposed rule.

SUMMARY: The Office of Management and Budget (OMB) seeks public comment on a proposed rule that would revise OMB's regulations implementing the Privacy Act and the Freedom of Information Act (FOIA). These revisions would update OMB's regulations to reflect changes in OMB's current organizational structure and best practices. The proposed amendments would also ensure consistency between the access to records procedures in OMB's Privacy Act regulations and OMB's FOIA regulations; and with applicable law and policies that were enacted after OMB originally issued its Privacy Act regulations in 1976. The proposed revisions would also align OMB's regulations with those of other agencies.

DATES: Comments are due on or before January 19, 2024.

ADDRESSES: You may send comments by:

Federal eRulemaking Portal: https://www.regulations.gov.

Instructions: All submissions must contain the subject heading ''OMB Privacy Act and FOIA Regulations.''

FOR FURTHER INFORMATION CONTACT: For questions about these proposed regulations, please contact Timothy Ziese, 202–395–8693, *OMBPA@omb.eop.gov*. You must include ''OMB Privacy Act and FOIA Regulations'' in the subject line.

SUPPLEMENTARY INFORMATION:

Background

OMB proposes to revise its regulations at 5 CFR part 1302 governing requests and responses under the Privacy Act of 1974, as amended, 5 U.S.C. 552a (''Privacy Act'') and corresponding changes at 5 CFR part 1303 governing requests and responses under the Freedom of Information Act, as amended, 5 U.S.C. 552 (''FOIA'').

The Privacy Act establishes certain agency responsibilities and individual rights regarding the collection, use, maintenance, and disclosure of records about individuals. To carry out these responsibilities, the Privacy Act requires agencies to promulgate regulations that establish (1) procedures for notifying an individual if any system of records named by the individual contains a record pertaining to that individual; (2) procedures for making information pertaining to an individual available to that individual upon request, including with respect to timelines and other requirements; (3) procedures for reviewing and adjudicating a request from an individual concerning the amendment of any record or information pertaining to the individual, and generally ensuring that individuals can fully exercise their rights under the Privacy Act; and (4) fees to be charged, if any, to any individual for making copies of records pertaining to the individual, excluding the cost of any search for and review of the record. 5 U.S.C. 552a(f).

OMB's current Privacy Act regulations are codified at 5 CFR part 1302. These regulations were promulgated in 1976. OMB proposes to update them for consistency with OMB's current organizational structure and best practices. Amendments would also ensure consistency with (1) the access to records procedures in OMB's FOIA regulations found at 5 CFR part 1303; and (2) applicable law and policies that were enacted after 1976. The proposed revisions would also make OMB's regulations more consistent with those of other agencies, including as recently proposed by the Department of Justice (DOJ).

OMB also proposes conforming revisions to OMB's FOIA regulations, most notably with regard to identity verification. In accordance with 5 U.S.C. 552a(t), this proposal provides FOIA requesters the benefit of both the Privacy Act and FOIA disclosure requirements. Additionally, if a requested record is not part of a system of records, or if the FOIA requester is not an individual for purposes of the Privacy Act, a FOIA requester may be required to provide verification of identity in order to obtain greater access to records about themselves under the FOIA. The proposed revisions to the FOIA regulations therefore account for the limited circumstances when a FOIA requester may need to verify their identity in order to receive information that would otherwise be withheld under a FOIA exemption. OMB proposes additional revisions to OMB's FOIA regulations to reflect organizational changes and clarify language. If a requester cannot satisfy the identity verification requirements of OMB's proposed Privacy Act regulations, OMB will process the matter as a FOIA request.

A shorter summary is available at *www.regulations.gov/docket/OMB-2023-0022*.

Section-by-Section Analysis

General revisions to 5 CFR part 1302: General revisions are proposed throughout part 1302 to update terminology used and to streamline language for clarity, such as by including titles for each section summarizing the relevance of each provision. The proposed regulation would also reorder the regulation's text for consistency with those of other agencies, including DOJ's proposed Privacy Act regulation (88 FR 1012). All references to communications that are written or in writing include communications in hardcopy and electronic mail.

Section 1302.1—General provisions: This new section would include (1) the purpose and scope of the Privacy Act regulations; (2) definitions for ''request for access,'' ''request for amendment or correction,'' ''request for an accounting,'' ''requester,'' and ''system manager''; and (3) a clarification that OMB may disclose any record covered by the Privacy Act pursuant to a written request or consent of the individual about whom the record pertains.

Section 1302.2—Requirements for making requests for access: This proposed section, which would include material that is currently codified in 5 CFR 1302.1 (''Rules for determining if an individual is the subject of a record'') and 1302.2 (''Requests for access''), is

modeled after DOJ's proposed Privacy Act regulations. OMB proposes to replace its current regulations' sections on ''Rules for determining if an individual is the subject of a record'' and ''Requests for access'' with sections for ''Requirements for making requests for access'' and ''Responsibility for responding to requests.'' OMB believes that this revised categorization better delineates what requesters must do and what OMB must do.

Proposed paragraph (d) would describe the method of providing identity verification and proofing. OMB believes this paragraph is necessary to ensure appropriate methods are available to individuals when verifying their identity under proposed paragraphs (e) and (f). As such, OMB intends to provide a number of methods pursuant to which individuals may submit verification information in a manner that safeguards their personal information. Failure to use the approved methods may result in failure to expunge information consistent with approved records schedules.

Proposed paragraph (e), which would include provisions currently codified in 5 CFR 1302.2(b)(2)(vi)(A) through (G), includes updates to reflect the specific processes that a requester must perform to verify their identity.

Proposed paragraph (f), which would include provisions currently codified in 5 CFR 1302.2(b)(2)(vi)(E) (''Access by the parent of a minor or legal guardian''), describes the additional processes required for a legal guardian to request information on behalf of a minor or an individual determined by a court of competent jurisdiction to be incompetent.

Proposed paragraphs (d), (e), and (f) includes updates to accept remote identity-proofing and authentication when an individual makes a request under the Privacy Act.

Section 1302.3—Responsibility for responding to requests: This proposed section, which would include provisions currently codified in 5 CFR 1302.2(b)(2) (''OMB action on request''), includes revisions to reflect the current statutory requirements of 5 U.S.C. 552a.

Proposed paragraphs (a) and (b) describe how OMB would acknowledge a request, including any requests by OMB for additional information necessary to process a request.

Proposed paragraphs (c) and (d) would specify what information OMB will provide in response to a written request.

Section 1302.4—Requests for an Accounting: This proposed section, which would include provisions currently codified in 5 CFR 1302.3 (''Access to the accounting of disclosures from records''), includes a few editorial changes but otherwise remains substantively the same as the current regulation.

Section 1302.5—Requests for an Amendment or Correction: This proposed section, which would include provisions currently codified in 5 CFR 1302.4 (''Request to amend records''), adds paragraph (b)(2), which provides requesters an alternative address to which to send their Privacy Act request for amendment to a record. The requirements for notification and timelines in proposed paragraph (c), which would include provisions currently located in paragraph (b)(2) (''OMB action on the request''), are revised to reflect the current statutory requirements of 5 U.S.C. 552a.

Section 1302.6—Appeals: This proposed section, which would include provisions currently codified in 5 CFR 1302.5 (''Request for review''), includes a number of updates. For example, requests for review should be addressed to the Senior Agency Official for Privacy, who is responsible for reviewing requests, consistent with E.O. 13719, OMB Circular No. A–130, and OMB's current practices. The requirements for notification and timelines in proposed paragraph (d), which would include provisions currently codified in 5 CFR 1302.5(g), are revised to reflect the current statutory requirements of 5 U.S.C. 552a.

Section 1302.7—Fees: This proposed section, which would include provisions currently codified in 5 CFR 1302.6 (''Schedule of Fees''), includes a few editorial changes, but otherwise remains substantively the same as the existing regulation.

General Revisions to 5 CFR part 1303: OMB is proposing limited revisions to its FOIA regulations to update the requirements for the verification of identity, provide further clarity, and reflect OMB's current organizational structure. The revisions to the identity verification requirements, while minimal, are significant in that they describe OMB's practice of providing requesters the benefit of both the Privacy Act and the FOIA. Should a requester fail to provide adequate verification of identity under the Privacy Act, the request will normally be treated as a FOIA request and subject to the procedures in OMB's FOIA regulations at 5 CFR part 1303. Nevertheless, under some circumstances, for instance if the requester is not an individual for purposes of the Privacy Act or if the record is not maintained in a system of records, a FOIA requester may provide verification of identity in order to obtain greater access to records that would otherwise be exempt under FOIA.

Section 1303.3—Organization: Proposed paragraph (a)(5) deletes ''Intellectual Property Enforcement Coordinator'' because this office is no longer housed within OMB, and is now a separate office within the Executive Office of the President. This proposed paragraph also inserts the ''Made in America Office'' as a statutory office in OMB.

Section 1303.20—Where to send requests: Among other things, this proposed section adds ''or the Government-wide *FOIA.Gov* portal'' to account for the ability of members of the public to submit FOIA requests through the consolidated online request portal described in 5 U.S.C. 552(m), currently available at *https://www.foia.gov.*

Section 1303.21: This proposed revision would clarify that OMB retains discretion to request additional information relating to a FOIA request, including verification of identity. When OMB does so it will follow the identity verification processes as proposed in the Privacy Act regulations.

Section 1303.30—Responsibility for responding to requests: Proposed paragraph (c)(2)(i), concerning situations when OMB refers records responsive to FOIA requests to other agencies, clarifies that OMB will notify the requester, and will inform them of the agency that will be processing the record, so that requesters will be informed when a referral is made, not just upon the final determination concerning the record. In paragraph (c)(2)(ii), OMB is proposing to revise the opening language to clarify that the coordination process is undertaken with regard to particular records, and not to the request as a whole, and proposing to provide additional language to illustrate circumstances under which the coordination process would be appropriate.

Section 1303.40—Timing of responses to requests: Minimal proposed revisions are for clarity.

Section 1303.50—Responses to requests: Among other revisions, proposed revisions to paragraph (c) would clarify types of adverse determinations, and proposed paragraph (c)(4) adds ''under which the withholding is being made'' to clarify which exemption the regulation refers to.

Section 1303.60—Notification procedures for confidential commercial information: Proposed paragraph (e)(2) adds ''privileged or'' for clarity and consistency with the statutory standard

for withholding under FOIA Exemption 4, 5 U.S.C. 552(b)(4).

Section 1303.70—Appeals: Minimal proposed revisions are for clarity.

Section 1303.91—Fees to be charged—general: Among other revisions, this proposed section replaces ''(*see* definition in § 1303.30(b))'' with ''(*see* 5 U.S.C. 552(a)(4)(A)(vi))'' because the former is an unrelated provision, and the latter forms the statutory basis of this language.

Section 1303.92—Fees to be charged—categories of requesters: Proposed paragraphs (a) through (d) replace ''reproduction'' with ''duplication'' to better match the relevant statutory language. Proposed paragraph (d) also replaces ''reproducing'' with ''producing'' for clarity, and replaces ''reproduction'' with ''producing copies of records'' for clarity.

Section 1303.93—Miscellaneous fee provisions: Among other revisions, proposed paragraph (d)(1) replaces ''payments'' with ''a payment'' to clarify that a requester's single failure to pay fees in a timely fashion may result in OMB requiring advance payment of subsequent fees.

Regulatory Certifications

Regulatory Flexibility Act

The Director of OMB, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this proposed rule and certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities. Under the Privacy Act, agencies may recover only the direct costs of searching for, reviewing, and duplicating the records processed for requesters, and only for certain classes of requesters and when particular conditions are satisfied. Thus, fees assessed by OMB are nominal.

Executive Orders 12866, 13563, and 14094

E.O.s 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action under section 3(f) of E.O. 12866, as amended by E.O. 14094, and, therefore was not subject to review under section 6(b) of E.O. 12866.

Unfunded Mandates Reform Act of 1995

This proposed rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Comments Requested

Interested persons are invited to provide written comments concerning the proposed rule. In particular, comments are requested regarding OMB's proposal to require verification of identity through approved OMB processes that will be described on OMB's upcoming privacy program web page. These regulations do not specify the various methods of submitting identity verification information because OMB contemplates those methods will change based on evolving market tools and the capability of the Government to verify identity. Other methods, such as mail and stand-alone facsimile submissions, will continue to be available. OMB currently contemplates mail, stand-alone facsimile, password protected submissions to a designated email account, digital verification for current federal employees, and in-person verification for current OMB employees. Comments are requested on each of these methods and whether OMB should consider other methods of remote identity verification for all requesters.

Comments are due no later than 30 days after the date of publication of this document in the **Federal Register**. All comments and suggestions received will be available for review on *Regulations.gov*.

Privacy Act Statement: OMB proposes this rule pursuant to the Privacy Act of 1974, as amended, 5 U.S.C. 552a (''Privacy Act'') and the Freedom of Information Act, as amended, 5 U.S.C. 552 (''FOIA''). Submission of comments is voluntary. The information will be used to inform sound decision-making. Please note that all comments received in response to this document may be posted or released in their entirety, including any personal and business confidential information provided. Do not include any information you would not like to be made publicly available. Additionally, the OMB System of Records Notice, OMB Public Input System of Records, OMB/INPUT/01, 88 FR 20913 (available at *www.federalregister.gov/documents/2023/04/07/2023-07452/privacy-act-of-1974-system-of-records*), includes a list of routine uses associated with the collection of this information.

List of Subjects in 5 CFR Parts 1302 and 1303

Administrative practices and procedures, Archives and records, Freedom of information, Privacy.

For the reasons stated in the preamble, OMB proposes to amend 5 CFR parts 1302 and 1303 as follows:

■ 1. Revise part 1302 to read as follows:

PART 1302—PRIVACY ACT PROCEDURES

Sec.

Authority: 5 U.S.C. 552a.

§ 1302.1 General provisions.

(a) *Purpose and scope.* This part implements the rules that the Office of Management and Budget (OMB) follows under the Privacy Act of 1974, codified as amended at 5 U.S.C. 552a (Privacy Act). This part applies to all records in systems of records maintained by OMB that are retrieved by an individual's name or personal identifier. This part describes the procedures by which individuals may request access to records about themselves, request amendment or correction of those records, and request an accounting of disclosures of those records by OMB.

(b) *Definitions.* As used in this part:

Request for access to a record means a request made under 5 U.S.C. 552a(d)(1).

Request for amendment or correction of a record means a request made under 5 U.S.C. 552a(d)(2).

Request for an accounting means a request made under 5 U.S.C. 552a(c)(3).

Requester means an individual who makes a request for access, a request for amendment or correction, or a request for an accounting under the Privacy Act. The Privacy Act defines an ''individual'' as a citizen of the United States or an alien lawfully admitted for permanent residence.

System manager means the OMB official identified in a system of records notice as the manager of a system of records; and for Government-wide systems of records, the individual

designated by the agency to act on behalf of the system manager.

(c) *Providing written consent to disclose records protected under the Privacy Act.* OMB may disclose any record contained in a system of records by any means of communication to any person, or to another agency, pursuant to a written request by, or with the prior written consent of, the individual about whom the record pertains. An individual must verify the individual's identity in the same manner as required by § 1302.2(d) when providing written consent to disclose a record protected under the Privacy Act and pertaining to the individual.

§ 1302.2 Requirements for making requests for access.

(a) *How made and addressed.* You may make a Privacy Act request for access to an OMB record by submitting a request in writing to Privacy Officer, Office of Management and Budget, 725 17th Street NW, Room 9204, Washington, DC 20503 or by email at *OMBPA@omb.eop.gov* or by any other means described on OMB's privacy web page.

(b) *Description of the records sought.* In making a request for access, you must describe the records that you want in enough detail to enable OMB to locate the system of records containing them with a reasonable amount of effort. Your access request should name the system of records or contain a concise description of such system of records. OMB publishes notices of OMB systems of records subject to the Privacy Act in the **Federal Register**.

(c) *Information about yourself.* Your access request should also contain sufficient information to identify yourself in order to allow OMB to determine if there is a record pertaining to you in a particular system of records.

(d) *Verification of identity.* To ensure that information about you is disclosed only to you or your authorized representative, you are required to verify your identity when making a Privacy Act request for access, as detailed in paragraphs (d)(1) through (3) of this section. If OMB cannot verify your identity, disclosure will be limited to information that would be required to be made available if requested under 5 U.S.C. 552 by any person.

(1) You must state your name, current address, and date and place of birth and provide either a notarized statement of identity or a signed submission under 28 U.S.C. 1746; or

(2) When available, verify your identity through remote identity-proofing and authentication using digital processes.

(3) OMB may require you to supply additional information as necessary in order to verify your identity.

(e) *Verification of guardianship.* When making a request for access as the parent or guardian of a minor or as the guardian of someone determined by a court of competent jurisdiction to be incompetent, for access to records about that individual, you must establish the criteria listed in paragraphs (e)(1) through (4) of this section. If OMB cannot verify your identity, disclosure will be limited to information that would be required to be made available if requested under 5 U.S.C. 552 by any person.

(1) The identity of the individual who is the subject of the record, by stating the name, current address, and date and place of birth;

(2) Your own identity, as required in this paragraph (e);

(3) That you are the parent or guardian of that individual, which you may prove by providing a copy of the individual's birth certificate showing your parentage or by providing a court order establishing your guardianship; and

(4) That you are acting on behalf of that individual in making the request.

(f) *Submit identifying information only using approved OMB processes.* In order to safeguard information you submit in making a request for access for purposes of verifying your identity or verifying guardianship, or any information about yourself that may assist in the rapid identification of the record to which you are requesting access (*e.g.,* prior names, dates of employment, etc.) as well as any other identifying information contained in an OMB system of records, you must use one of OMB's approved processes as described on OMB's Privacy web page. Failure to submit identifying information through an OMB approved process may result in the failure to expunge your information in accordance with approved OMB records schedules after your access request has been processed.

(g) *Subsequent requests for access.* If your request for access follows a prior request under this section, and you already provided appropriate verifications with that prior request, you do not need to include the same verification or identifying information in the subsequent request for access if you reference that prior request or attach a copy of the OMB response to that request.

§ 1302.3 Responsibility for responding to requests.

(a) *Acknowledgment of requests.* OMB will acknowledge your request for access in writing and provide an individualized tracking number. Upon request, OMB will make information available to you about the status of your request using the assigned tracking number.

(b) *Timing of responses to a Privacy Act request for access.* OMB will respond to Privacy Act requests for access to records according to the order in which OMB receives the requests. Consistent with OMB's FOIA procedures at 5 CFR 1303.40(b), OMB may designate multiple processing tracks that distinguish between simple and more complex Privacy Act requests for access, based on the estimated amount of work or time needed to process the request.

(c) *Additional information.* If, after receiving a request, OMB determines that your request does not reasonably describe the records sought, OMB will inform you what additional information is needed and why the request is otherwise insufficient. If a request does not reasonably describe the records sought, OMB's response to the request may be delayed.

(d) *Grant of request for access.* Once OMB makes a determination to grant a request for access, OMB will provide you a written response, which may include the following:

(1) A statement as to whether OMB will grant access by providing a copy of the record through electronic means or the mail; and

(2) The amount of fees charged, if any (see § 1302.7). (Fees are applicable only to requests for duplicates.)

(e) *Adverse determination of request for access.* OMB will notify you of an adverse determination denying a request for access in writing. Adverse determinations, or denials of requests, consist of: A determination to withhold any requested record in whole or in part; a determination that a requested record does not exist or cannot be located; a determination that what has been requested is not a record subject to the Privacy Act; a determination on any disputed fee matter; or a denial of a request for expedited treatment. OMB's notification letter to you will include:

(1) The decision of OMB whether to grant in whole, or deny any part of the request;

(2) The reasons for the determination for any portion of the request that is denied; and

(3) A description of the procedure by which the OMB decision to deny your request may be appealed, including the

name and address of the official with whom you may lodge such an appeal.

§ 1302.4 Requests for an accounting.

You may request an accounting of disclosures by the same rules governing requests for access, outlined in § 1302.2.

§ 1302.5 Requests for an amendment or correction.

(a) *Requirement for written requests.* If you want to amend a record that pertains to you in a system of records maintained by OMB, you must submit your request in writing following the procedures established in this section unless the system manager waives the requirements in this section. OMB is not required to amend records that are not subject to the Privacy Act of 1974. However, individuals who believe that such records are inaccurate may bring this to the attention of OMB.

(b) *Procedures.* (1) You should address your request to amend a record in a system of records to the system manager. You should include the name of the system and a brief description of the record proposed for amendment. If the request to amend the record is the result of you gaining access to the record in accordance with the provisions concerning access to records as set forth in § 1302.2, you may attach a copy of previous correspondence between you and OMB instead of providing a separate description of the record.

(2) If a requester cannot determine where within OMB to send the Privacy Act request to amend a record, the requester may send it to Privacy Officer, Office of Management and Budget, 725 17th Street NW, Room 9204, Washington, DC 20503 or by email at *OMBPA@omb.eop.gov.* OMB will forward the request to the component(s) it believes most likely to have the relevant records. For the quickest possible handling, the requester should specify on either the letter and envelope, or in the email subject line, as applicable, ''Privacy Act Record Amendment Request.''

(3) You must validate your identity as described in § 1302.2(e). If OMB has previously verified your identity pursuant to § 1302.2(e), further verification of identity is not required as long as the communication does not suggest that a need for verification is present.

(4) You should clearly indicate the exact portion of the record you seek to have amended. If possible, you should also propose alternative language, or at a minimum, identify the facts that you believe are not accurate, relevant, timely, or complete, with such particularity as to permit OMB not only to understand the basis for your request, but also to make an appropriate amendment to the record.

(5) Your request must also state why you believe your record is not accurate, relevant, timely, or complete. The burden of persuading OMB to amend a record will be upon you. You must furnish sufficient facts to persuade the official in charge of the system of the inaccuracy, irrelevancy, timeliness, or incompleteness of the record.

(6) OMB will not categorically reject incomplete or inaccurate requests. OMB will ask you to clarify the request as needed.

(c) *OMB action on the request.* (1) OMB will acknowledge, in writing, receipt of a request to amend a record within 10 business days (*i.e.,* excluding Saturdays, Sundays, and legal Federal holidays) of OMB's receipt.

(2) OMB will promptly respond to a Privacy Act request for amendment or correction. OMB ordinarily will respond to Privacy Act requests for amendment or correction according to their order of receipt. Consistent with OMB's FOIA procedures at 5 CFR 1303.40(b), OMB may designate multiple processing tracks that distinguish between simple and more complex Privacy Act requests for amendment or correction, based on the estimated amount of work or time needed to process the request. The response reflecting the decision upon a request for amendment will include the following:

(i) The decision of OMB whether to grant in whole, or deny any part of, the request to amend the record;

(ii) The reasons for the determination for any portion of the request which is denied; and

(iii) A description of the procedure by which the OMB decision to deny your request may be appealed, including the name and address of the official with whom you may lodge such an appeal.

§ 1302.6 Appeals.

(a) If you wish to appeal a decision by OMB with regard to your request to access or amend a record in accordance with the provisions of §§ 1302.2 and 1302.5, you should submit the appeal in writing and, to the extent possible, include the information specified in paragraph (b) of this section.

(b) Your appeal should contain a brief description of the record involved or copies of the correspondence from OMB in which the request to access or to amend was denied and also the reasons why you believe that access should be granted or the information amended, as relevant. Your appeal should refer to the information you furnished in support of your claim and the reasons set forth by OMB in its decision denying access or amendment, as required by §§ 1302.2 and 1302.5. In order to make the appeal process as meaningful as possible, you should set forth your disagreement in an understandable manner. In order to avoid the unnecessary retention of personal information, OMB reserves the right to dispose of the material concerning the request to access or amend a record if OMB receives no appeal in accordance with this section within 180 days of the sending by OMB of its decision upon an initial request. OMB may treat an appeal received after the 180-day period as an initial request to access or amend a record.

(c) You should address your appeal to the Senior Agency Official for Privacy.

(d) The Senior Agency Official for Privacy will review a refusal to amend a record within 30 business days (excluding Saturdays, Sundays, and legal Federal holidays) from the date on which the individual requests such review, unless the OMB Director extends the 30-day period for good cause. If the Senior Agency Official for Privacy's decision does not grant in full the request, the notice of the decision will describe the steps you may take to obtain judicial review of such a decision.

§ 1302.7 Fees.

(a) *Prohibitions against charging fees for Privacy Act requests.* OMB will not charge you for:

(1) The search and review of requests for records subject to this part;

(2) Any copies of the record produced as a necessary part of the process of making the record available for access; or

(3) Any copies of the requested record when OMB determines that the only way you can access the record is by providing a copy to you through the mail.

(b) *Waiver.* OMB may at no charge provide copies of a record if it is determined the production of the copies is in the interest of the Government.

(c) *Fee schedule and method of payment.* OMB will charge fees as provided in paragraphs (c)(1) through (5) of this section except as provided in paragraphs (a) and (b) of this section.

(1) OMB will duplicate records at a rate of $.10 per page for all copying of 4 pages or more. There is no charge for duplication 3 or fewer pages.

(2) Where OMB anticipates that the fees chargeable under this section will amount to more than $25.00, OMB shall promptly notify you of the amount of the anticipated fee or such portion thereof as can readily be estimated. If

the estimated fees will greatly exceed $25.00, OMB may require an advance deposit. OMB's request for an advance deposit shall extend an offer to the requester to consult with OMB personnel in order to reformulate the request in a manner which will reduce the fees, yet still meet the needs of the requester.

(3) You should pay fees in full before the requested copies are issued. If the requester is in arrears for previous requests, OMB will not provide copies for any subsequent request until the arrears have been paid in full.

(4) Remittances shall be in the form either of a personal check or bank draft drawn on a bank in the United States, or a postal money order. Remittances shall be made payable to the order of the Treasury of the United States and mailed or delivered to the Assistant Director for Management and Operations, Office of Management and Budget, Washington, DC 20503.

(5) OMB will provide a receipt for fees paid upon request.

PART 1303—PUBLIC INFORMATION PROVISIONS OF THE ADMINISTRATIVE PROCEDURES ACT

■ 2. The authority citation for part 1303 continues to read as follows:

Authority: 5 U.S.C. 301 and 5 U.S.C. 552, unless otherwise noted.

■ 3. Amend § 1303.3 by revising paragraph (a)(5) to read as follows:

§ 1303.3 Organization.

(a) * * *

(5) Statutory offices include the Office of Federal Financial Management; Office of Federal Procurement Policy; Office of E-government and Information Technology; Made in America Office; and Office of Information and Regulatory Affairs.

* * * * *

■ 4. Revise § 1303.20 to read as follows:

§ 1303.20 Where to send requests.

The FOIA Officer is responsible for acting on all initial requests. Individuals wishing to file a request under the FOIA should address their request in writing to FOIA Officer, Office of Management and Budget, 725 17th Street NW, Room 9272, Washington, DC 20503, via fax to (202) 395–3504, by email at *OMBFOIA@omb.eop.gov,* or the Government-wide *FOIA.Gov* portal. Requesters must provide contact information sufficient to enable OMB to communicate with the requester. Additionally, OMB's FOIA Public Liaison is available to assist requesters who have questions and can be reached at (202) 395–FOIA or in writing at the address provided in this section.

■ 5. Revise § 1303.21 to read as follows:

§ 1303.21 Requesters making requests about themselves or on behalf of others.

In order to obtain greater access to records, a requester who is making a request for records about the requester or on behalf of another individual must comply with the verification of identity requirements as determined by OMB pursuant to OMB's requirements for making requests for access in 5 CFR part 1302. OMB may require a requester to supply additional information as necessary in order to verify the identity of the requester or to verify that a particular individual has consented to disclosure.

■ 6. Amend § 1303.30 by revising paragraphs (c)(2)(i) and (ii) to read as follows:

§ 1303.30 Responsibility for responding to requests.

* * * * *

(c) * * *

(2) * * *

(i) When OMB believes that a different agency is best able to determine whether to disclose the record, OMB will refer the responsibility for responding to the request regarding that record to that agency, will notify the requester, and will inform them of the agency which will be processing the record, including that agency's FOIA contact information. Ordinarily, the agency that originated the record is best situated to make the disclosure determination. However, if OMB and the originating agency jointly agree that OMB is in the best position to respond regarding the record, then OMB may respond to the requester.

(ii) When OMB believes that a different agency is best able to determine whether to disclose the record, but also believes that disclosure of the identity of the different agency could harm an interest protected by an applicable FOIA exemption, such as the exemptions that protect personal privacy or national security interests, OMB will coordinate with the originating agency to seek its views on the disclosability of the record and convey the release determination for the record that is the subject of the coordination to the requester. For example, if a non-law enforcement agency responding to a request for records on a living third party locates within its files records originating with a law enforcement agency, and if the existence of that law enforcement interest in the third party was not publicly known, then to disclose that law enforcement interest could cause an unwarranted invasion of the personal privacy of the third party. Similarly, if an agency locates within its files material originating with an Intelligence Community agency, and the involvement of that agency in the matter is classified and not publicly acknowledged, then to disclose or give attribution to the involvement of that Intelligence Community agency could cause national security harms.

■ 7. Amend § 1303.40 by revising paragraphs (e)(1)(iv) and (e)(4) to read as follows:

§ 1303.40 Timing of responses to requests.

* * * * *

(e) * * *

(1) * * *

(iv) There are possible questions, in a matter of widespread and exceptional public interest, about the Government's integrity which affect public confidence.

* * * * *

(4) OMB will decide whether to grant a request for expedited processing and will notify the requester within 10 calendar days after the date of the request. If a request for expedited treatment is granted, OMB will prioritize the underlying FOIA request, place the request in the processing track for expedited requests, and process the request as soon as practicable. If a request for expedited processing is denied, any appeal of that decision will be acted on expeditiously.

■ 8. Amend § 1303.50 by revising paragraphs (a), (c) introductory text, and (c)(4) to read as follows:

§ 1303.50 Responses to requests.

(a) *Acknowledgments of requests.* OMB will assign an individualized tracking number to each request received that will take longer than ten days to process; and acknowledge each request, informing the requester of their tracking number if applicable; and, upon request, make available information about the status of a request to the requester using the assigned tracking number, including—

(1) The date on which OMB originally received the request; and

(2) An estimated date on which OMB will complete action on the request.

* * * * *

(c) *Adverse determinations of requests.* Adverse determinations, or denials of requests, include decisions that the requested record is exempt, in whole or in part; the request does not reasonably describe the records sought; the information requested is not a record subject to the FOIA; the requested record does not exist, cannot

be located, or has been destroyed; or the requested record is not readily reproducible in the form or format sought by the requester. Adverse determinations also include denials involving fees or fee waiver matters or denials of requests for expedited processing. In the case of an adverse determination, the FOIA Officer will immediately notify the requester of—

* * * * *

(4) OMB's estimate of the volume of any requested records OMB is withholding, unless providing such estimate would harm an interest protected by the exemption in 5 U.S.C. 552(b) under which the withholding is being made.

■ 9. Amend § 1303.60 by revising paragraphs (a)(2) and (e)(2) to read as follows:

§ 1303.60 Notification procedures for confidential commercial information.

(a) * * *

(2) *Submitter* means any person or entity, including a corporation, State, or foreign government, but not including another Federal Government entity, that provides confidential commercial information, either directly or indirectly, to the Federal Government.

* * * * *

(e) * * *

(2) If a submitter has any objections to disclosure, it should provide OMB a detailed written statement that specifies all grounds for withholding the particular information under any exemption of the FOIA. In order to rely on Exemption 4 as basis for nondisclosure, the submitter must explain why the information constitutes a trade secret or commercial or financial information that is privileged or confidential. OMB is not required to consider any information received after the date of any disclosure decision.

* * * * *

■ 10. Amend § 1303.70 by revising paragraph (a) to read as follows:

§ 1303.70 Appeals.

(a) A requester must appeal to the head of OMB in writing within 90 calendar days after the date of such adverse determination addressed to the FOIA Officer at the address specified in § 1303.20. The appeal must include a statement explaining the basis for the appeal. Determinations of appeals will be set forth in writing and signed by the Deputy Director, or their designee, within 20 working days. If on appeal the denial is upheld in whole or in part, the written determination will also contain a notification of the provisions for judicial review, the names of the persons who participated in the determination, and notice of the services offered by OGIS as a non-exclusive alternative to litigation.

* * * * *

■ 11. Amend § 1303.91 by revising the introductory text and paragraph (i) to read as follows:

§ 1303.91 Fees to be charged—general.

OMB will charge fees that recoup the full allowable direct costs it incurs. Moreover, it will use the most efficient and least costly methods to comply with requests for documents made under the FOIA. For example, employees should not engage in line-by-line search when merely duplicating an entire document would prove the less expensive and quicker method of complying with a request. Search should be distinguished, moreover, from review of material in order to determine whether the material is exempt from disclosure. When documents that would be responsive to a request are maintained for distribution by agencies operating statutory-based fee schedule programs (see 5 U.S.C. 552(a)(4)(A)(vi)), such as the National Technical Information Service, OMB will inform requesters of the steps necessary to obtain records from those sources.

* * * * *

(i) *No Fees under $25.* No fee will be charged when the total fee, after deducting the first 100 free pages (or its cost equivalent) and the first two hours of search, is equal to or less than $25. If OMB estimates that the charges are likely to exceed $25, it will notify the requester of the estimated amount of fees, unless the requester has indicated in advance their willingness to pay fees as high as those anticipated. Such a notice shall offer a requester the opportunity to confer with agency personnel to meet the requester's needs at a lower cost.

■ 12. Amend § 1303.92 by revising paragraphs (a) through (d) to read as follows:

§ 1303.92 Fees to be charged—categories of requesters.

* * * * *

(a) *Commercial use requesters.* When OMB receives a request for documents for commercial use, it will assess charges that recover the full direct costs of searching for, reviewing for release, and duplicating the record sought. Commercial use requesters are not entitled to two hours of free search time nor 100 free pages of duplication of documents. OMB may recover the cost of searching for and reviewing records even if there is ultimately no disclosure of records (see § 1303.93(b)).

(b) *Educational and non-commercial scientific institution requesters.* OMB will provide documents to requesters in this paragraph (b) for the cost of duplication alone, excluding charges for the first 100 pages. To be eligible for inclusion in this paragraph (b), a requester must meet the criteria in § 1303.90(g) or (h). OMB may seek evidence from the requester that the request is in furtherance of scholarly research and will advise requesters of their placement in this paragraph (b).

(c) *Requesters who are representatives of the news media.* OMB will provide documents to requesters in this paragraph (c) for the cost of duplication alone, excluding charges for the first 100 pages. To be eligible for inclusion in this paragraph (c), a requester must meet the criteria in § 1303.90(i) and (j) and not make the request for commercial use. A request for records supporting the news dissemination function of the requester is not a commercial use for this paragraph (c).

(d) *All other requesters.* OMB will charge requesters who do not fit into any of the categories in paragraphs (a) through (c) of this section fees that recover the full reasonable direct cost of searching for and producing records that are responsive to the request, except that the first 100 pages of duplication and the first two hours of search time will be furnished without charge. Moreover, requests for records about the requesters filed in OMB's systems of records will continue to be treated under the fee provisions of the Privacy Act of 1974, which permit fees only for producing copies of records.

■ 13. Amend § 1303.93 by revising paragraph (a), the first sentence of paragraph (c), and paragraph (d)(1) to read as follows:

§ 1303.93 Miscellaneous fee provisions.

(a) *Charging interest—notice and rate.* OMB may begin assessing interest charges on an unpaid bill starting on the 31st day after OMB sends the bill. If OMB receives the fee within the thirty-day grace period, interest will not accrue on the paid portion of the bill, even if the payment is unprocessed. Interest will be at the rate prescribed in 31 U.S.C. 3717 and will accrue from the date of the billing.

* * * * *

(c) * * * When OMB reasonably believes that a requester, or a group of requesters acting in concert, is attempting to divide a single request into a series of requests for the purpose of avoiding fees, OMB may aggregate those requests and charge fees accordingly. * * *

(d) * * *

(1) OMB will not require a requester to make an advance payment, *i.e.,* payment before work is commenced or continued on a request, unless OMB estimates or determines that allowable charges that a requester may be required to pay will exceed $250 or the requester has previously failed to make a payment due within 30 days of billing.

* * * * *

Shraddha A. Upadhyaya,

Associate General Counsel, Office of Management and Budget.

[FR Doc. 2023–27473 Filed 12–19–23; 8:45 am]

BILLING CODE 3110–01–P

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 50 and 52

[NRC–2023–0216]

Draft Regulatory Guide: Installation, Inspection, and Testing for Class 1E Power, Instrumentation, and Control Equipment at Production and Utilization Facilities

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft guide; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing for public comment a draft regulatory guide (DG), DG–1419, ''Installation, Inspection, and Testing for Class 1E Power, Instrumentation, and Control Equipment at Production and Utilization Facilities.'' This DG is proposed Revision 1 to Regulatory Guide (RG) 1.30, ''Quality Assurance Requirements for the Installation, Inspection, and Testing of Instrumentation and Electric Equipment (Safety Guide 30).'' DG–1419 describes an approach that is acceptable to the NRC staff to meet the regulatory requirements for installation, inspection, and testing for Class 1E power, instrumentation, and control equipment at production and utilization facilities.

DATES: Submit comments by January 19, 2024. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date.

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

• *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2023–0216. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov*. For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

• *Mail Comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

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

FOR FURTHER INFORMATION CONTACT: Darrell Murdock, Office of Nuclear Regulatory Research, telephone: 301–415–1591; email: *Darrell.Murdock@nrc.gov* and Michael Eudy, Office of Nuclear Regulatory Research, telephone: 301–415–3104; email: *Michael.Eudy@nrc.gov*. Both are staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2023–0216 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–2023–0216.

• *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html*. To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, at 301–415–4737, or by email to *PDR.Resource@nrc.gov*. The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.

• *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2023–0216 in your comment submission.

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

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

II. Additional Information

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

The DG, entitled ''Installation, Inspection, and Testing for Class 1E Power, Instrumentation, and Control Equipment at Production and Utilization Facilities,'' is temporarily identified by its task number, DG–1419 (ADAMS Accession No. ML23222A182).

This DG is proposed Revision 1 to RG 1.30 (also known as Safety Guide 30) and describes an approach that is acceptable to the NRC staff to meet the regulatory requirements for installation, inspection, and testing for Class 1E power, instrumentation, and control equipment at production and utilization facilities. DG–1419 endorses, with a clarification, Institute of Electrical and Electronics Engineers (IEEE) Standard (Std) 336–2020, ''IEEE Recommended Practice for Installation, Inspection, and

Testing for Class 1E Power, Instrumentation, and Control Equipment at Nuclear Facilities.'' DG–1419 also removes all quality assurance (QA) requirements from RG 1.30 and addresses the requirements of a QA program for design and construction in RG 1.28, Revision 6, ''Quality Assurance Program Criteria (Design and Construction),'' (ADAMS Accession No. ML23177A002), and for operation in RG 1.33, Revision 3, ''Quality Assurance Program Requirements (Operation),'' (ADAMS Accession No. ML13109A458).

The staff is also issuing for public comment a draft regulatory analysis (ADAMS Accession No. ML23235A321). The staff developed a regulatory analysis to assess the value of issuing or revising a regulatory guide as well as alternative courses of action.

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

III. Backfitting, Forward Fitting, and Issue Finality

Issuance of DG–1419, if finalized, would not constitute backfitting as defined in section 50.109 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Backfitting,'' and as described in NRC Management Directive (MD) 8.4, ''Management of Backfitting, Forward Fitting, Issue Finality, and Information Requests''; affect issue finality of any approval issued under 10 CFR part 52, ''Licenses, Certificates, and Approvals for Nuclear Power Plants''; or constitute forward fitting as defined in MD 8.4, because, as explained in DG–1419, licensees would not be required to comply with the positions set forth in DG–1419.

IV. Submitting Suggestions for Improvement of Regulatory Guides

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

Dated: December 14, 2023.

For the Nuclear Regulatory Commission.

Stephen M. Wyman,

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

[FR Doc. 2023–27961 Filed 12–19–23; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2510

RIN 1210–AC16

Definition of ''Employer''—Association Health Plans

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to rescind the Department of Labor's (Department or DOL) 2018 rule entitled ''Definition of Employer—Association Health Plans'' (2018 AHP Rule). The 2018 AHP Rule establishes an alternative set of criteria from those set forth in the Department's pre-rule guidance for determining when a group or association of employers is acting ''indirectly in the interest of an employer'' under section 3(5) of the Employee Retirement Income Security Act of 1974 (ERISA) for purposes of establishing an association health plan (AHP) as a multiple employer group health plan. The 2018 AHP Rule's alternative criteria were set aside in large part by the U.S. District Court for the District of Columbia in *New York* v. *United States Department of Labor.* The district court found the bona fide association and working owner provisions in the rule to be an unreasonable interpretation of ERISA, inconsistent with congressional intent that ERISA applies to employee benefits arising out of employment relationships. The Department, after further review of the relevant statutory language, judicial decisions, and pre-rule guidance, and further consideration of ERISA's statutory purposes and related policy goals, now proposes to rescind in full the 2018 AHP Rule in order to resolve and mitigate any uncertainty regarding the status of the standards that were set under the 2018 AHP Rule, allow for a reexamination of the criteria for a group or association of employers to be able to sponsor an AHP, and ensure that guidance being provided to the regulated community is in alignment with ERISA's text, purposes, and policies.

DATES: Comments are due on or before February 20, 2024.

ADDRESSES: You may submit written comments, identified by RIN 1210–AC16, by one of the following methods:

Federal eRulemaking Portal: https://www.regulations.gov. Follow the instructions for submitting comments. To facilitate receipt and processing of comments, the Department encourages interested parties to submit their comments electronically.

Mail: Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N–5655, U.S. Department of Labor, 200 Constitution Ave. NW, Washington, DC 20210, Attention: Proposed Rescission of AHP Final Rule RIN 1210–AC16.

Instructions: All submissions must include the agency name and Regulatory Identifier Number (RIN) for this rulemaking. Any comment that is submitted will be shared with the Internal Revenue Service (IRS). If you submit comments electronically, do not submit paper copies. Comments will be available to the public, without charge, online at *https://www.regulations.gov* and *https://www.dol.gov/agencies/ebsa* and at the Public Disclosure Room, Employee Benefits Security Administration, Suite N–1513, 200 Constitution Ave. NW, Washington, DC 20210.

Warning: Do not include any personally identifiable or confidential business information that you do not want publicly disclosed. Comments are public records posted on the internet as received and can be retrieved by most internet search engines.

Docket: Go to the Federal eRulemaking Portal at *https://www.regulations.gov* for access to the rulemaking docket, including any background documents and the plain-language summary of the proposed rule of not more than 100 words in length required by the Providing Accountability Through Transparency Act of 2023.

FOR FURTHER INFORMATION CONTACT: Suzanne Adelman, Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, (202) 693–8500 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

A. Definition of Employer Under Section 3(5) of ERISA

ERISA regulates ''employee benefit plans'' (classified as ''employee welfare benefit plans'' and ''employee pension benefit plans''), and generally preempts State laws that relate to or have a

connection with such plans, subject to certain exceptions. An ''employee welfare benefit plan'' is defined in section 3(1) of ERISA to include, among other arrangements, ''any plan, fund, or program . . . established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund or program was established or is maintained for the purpose of providing for its participants, or their beneficiaries, through the purchase of insurance or otherwise . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, [or] death. . . .'' Thus, to be an employee welfare benefit plan, the plan, fund, or program must, among other criteria, be established or maintained by an employer, an employee organization, or both an employer and an employee organization.

Section 3(5) of ERISA generally defines the term ''employer'' as ''any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan.'' Thus, ERISA defines the term ''employer'' to include the ''direct'' (or common-law) employer of the covered employees or ''any person acting . . . indirectly in the interest of'' the common-law employer, in relation to an employee benefit plan. Section 3(5) of ERISA also expressly identifies ''a group or association of employers acting for an employer in such capacity'' as falling within the definition of ''employer.'' A group or association may establish an employee welfare benefit plan only when it is acting as an ''employer'' within the meaning of ERISA section 3(5). The Department of Labor's (Department or DOL) regulation at 29 CFR 2510.3–5, published in its 2018 rule entitled ''Definition of Employer—Association Health Plans'' (2018 AHP Rule),[1] which is the subject of this proposal to rescind, sought to define circumstances under which a group or association of employers constitutes an ''employer'' within the meaning of ERISA section 3(5) with respect to sponsorship of a group health plan and the provision of health benefits.

B. Historical Guidance Prior to the 2018 AHP Rule—''Bona Fide'' Group or Association of Employers

Based on definitions in title I of ERISA, and because title I's overall structure contemplates employment-based benefit arrangements, the Department has long recognized that, even absent the involvement of an employee organization, a group or association of employers may sponsor a single ''multiple employer'' plan if certain criteria are satisfied. If a group or association satisfies these criteria, the Department's guidance that predates the 2018 AHP Rule (hereinafter referred to as pre-rule guidance) generally refers to these entities as ''bona fide'' employer groups or associations. Under that pre-rule guidance, health coverage sponsored by a bona fide employer group or association can be structured as a single, multiple employer plan covered by ERISA. The criteria specified in the pre-rule guidance are intended to distinguish bona fide groups or associations of employers that provide coverage to their employees and the families of their employees from arrangements that more closely resemble State-regulated private health insurance coverage.The Department's pre-rule guidance is consistent with the criteria articulated and applied by every appellate court, in addition to several federal district courts, that considered whether an organization was acting in the interests of employer-members.[2] Moreover, to the Department's knowledge, no court has found, or even suggested, that the pre-rule guidance criteria too narrowly construe the meaning of acting ''indirectly in the interest of an employer'' under section 3(5) of ERISA.

Historically, the Department has taken a facts-and-circumstances approach to determining whether a group or association of employers is a bona fide employer group or association that may sponsor an ERISA group health plan on behalf of its employer members. The Department's pre-rule guidance, largely taking the form of a collection of advisory opinions issued over more than three decades, has expressed the Department's view regarding whether, based on individual circumstances, a particular group or association was able to sponsor a multiple employer welfare plan.[3] While the language in the Department's pre-rule advisory opinions was tailored to the issues presented in the specific arrangements involved, the Department's interpretive guidance has consistently focused on three criteria: (1) whether the group or association has business or organizational purposes and functions unrelated to the provision of benefits (the ''business purpose'' standard); (2) whether the employers share some commonality of interest and genuine organizational relationship unrelated to the provision of benefits (the ''commonality'' standard); and (3) whether the employers that participate in a benefit program, either directly or indirectly, exercise control over the program, both in form and substance (the ''control'' standard).

A variety of factors were set forth in the Department's pre-rule guidance as relevant when applying these three general criteria to a particular group or association. These factors include how members are solicited; who is entitled to participate and who actually participates in the group or association; the process by which the group or association was formed; the purposes for which it was formed; what, if any, were the preexisting relationships of its members; the powers, rights, and privileges of employer members that exist by reason of their status as employers; who actually controls and directs the activities and operations of

[1] 83 FR 28912 (June 21, 2018). The 2018 AHP Rule included an amendment to the Department's regulation at 29 CFR 2510.3–3, which excludes ''plans without employees'' from the definition of employee benefit plans covered by Title I of ERISA, to expressly address participation of working owners without any common-law employees in AHPs under that provision by cross-referencing the regulation at 29 CFR 2510.3–5, under which a working owner was able to be treated as an employee and the working owner's business as the individual's employer for purposes of being an employer member of the bona fide group or association and an employee participant in the AHP. This proposal would also rescind that amendment to 29 CFR 2510.3–3.

[2] *Gruber* v. *Hubbard Bert Karle Weber, Inc.,* 159 F.3d 780, 786–87 (3d Cir. 1998) (endorsing the Department's historical approach to determining whether an organization is acting in the interests of employer-members); *MDPhysicians & Assocs., Inc.* v. *State Bd. of Ins.,* 957 F.2d 178, 185–86 (5th Cir. 1992) (consistent with the Department's pre-rule guidance, requiring that, to act in the interests of employer members, an organization must not be a commercial, ''entrepreneurial venture'' but must instead represent members with ''a common economic or representation interest'' unrelated to the provision of benefits and who established or maintained the plan); *Wisconsin Educ. Ass'n Ins. Tr.* v. *Iowa State Bd. of Pub. Instruction,* 804 F.2d 1059, 1062–65 (8th Cir. 1986) (same); *Int'l Ass'n of Entrepreneurs of Am. Ben. Tr.* v. *Foster,* 883 F. Supp. 1050, 1056–62 (E.D. Va. 1995); *Assoc. Indus. Mgmt. Servs.* v. *Moda Health Plan, Inc.,* No. 3:14–CV–01711–AA, 2015 WL 4426241, at *2–*5 (D. Or. July 16, 2015); *Smith* v. *Prudential Health Care Plan Inc.,* No. CIV. A. 97–891, 1997 WL 297096, at *3–*4 (E.D. Pa. May 27, 1997).

[3] *See, e.g.,* Advisory Opinions Nos. 94–07A (Mar. 14, 1994), 95–01A (Feb. 13, 1995), 96–25 (Oct. 31, 1996), 2001–04A (Mar. 22, 2001), 2003–13A (Sept. 30, 2003), 2003–17A (Dec. 12, 2003), 2007–06A (Aug. 16, 2007), 2012–04A (May 25, 2012), and 2019–01A (July 8. 2019). *See also* Department of Labor Publication, ''Multiple Employer Welfare Arrangements Under ERISA, A Guide to Federal and State Regulation,'' at *www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/mewa-under-erisa-a-guide-to-federal-and-state-regulation.pdf.* Judicial decisions tended to take approaches consistent with that followed by the Department. *See also Wisconsin Educ. Assn. Ins. Trust* v. *Iowa State Bd. of Public Instruction,* 804 F.2d 1059, 1063–1064 (8th Cir. 1986); *MDPhysicians & Associates, Inc.* v. *State Bd. of Ins.,* 957 F.2d 178, 183–186 (5th Cir. 1992) [hereinafter *MDPhysicians*]; *National Business Assn. Trust* v. *Morgan,* 770 F. Supp. 1169 (W.D. Ky. 1991).

the benefit program; and the extent of any employment-based common nexus or other genuine organizational relationship unrelated to the provision of benefits.[4]

C. Association Coverage Under the Public Health Service Act

The Public Health Service Act (PHS Act) derives its definitions of group health plan and employer from the ERISA definitions of employee welfare benefit plan and employer.[5] Thus, reference to ERISA is needed when determining whether a group health plan exists for PHS Act purposes and determining, if one does exist whether it exists at the individual employer level or at the association level. In other words, the ERISA definitions determine whether health insurance coverage sold to or through associations is individual or group coverage for purposes of title XXVII of the PHS Act, and if group coverage, whether the sponsor of the group coverage is the association, or whether each employer-member of the association sponsors its own group coverage.

In general, unless health insurance coverage issued through a group or association constitutes a single group health plan, the group or association is disregarded in determining whether the coverage offered to an individual or employer member of the association is individual, small group, or large group market coverage. The Centers for Medicare & Medicaid Services (CMS) has long maintained that the test for determining whether association coverage is individual or group market coverage for purpose of title XXVII of the PHS Act is the same test as that applied to health insurance coverage offered directly to individuals or employers.[6] As that guidance explained, coverage that is provided to associations but not related to employment is not considered group health insurance coverage for purposes of the PHS Act. If the coverage is offered to an association member other than in connection with a group health plan, the coverage is considered coverage in the individual market, regardless of whether it is considered group coverage under State law.[7]

On the other hand, if the health insurance coverage is offered in connection with a group health plan as defined at section 2791 of the PHS Act, it is considered group health insurance coverage. The group market is divided into the small group market and the large group market. In situations involving employment-based association coverage where the group health plan exists at the individual employer level, the size of each individual employer participating in the association determines whether that employer's coverage is subject to the small group market or large group market rules. In instances where the group or association of employers is, in fact, sponsoring the group health plan and the association itself is deemed the ''employer,'' the association coverage is considered a single group health plan. In that case, because the PHS Act definitions of large employer and small employer are based on the average number of employees employed on business days during the preceding calendar year, the number of employees employed by all the employers participating in the association determines whether the coverage is subject to the small group market or large group market rules.

In a ''mixed'' association where different members have coverage that is subject to the individual market, small group market, and/or large group market rules under the PHS Act, as determined by each member's circumstances, each association member must receive coverage that complies with the requirements arising out of its status as an individual, small employer, or large employer. For example, it is not permissible under the PHS Act for mixed association coverage to comply only with the large group market rules, with respect to its individual and small employer members.

As explained below, by expanding access to AHPs, the 2018 AHP Rule sought to allow small employers and working owners to band together to purchase coverage in the large group market, thereby avoiding the application of certain legal provisions governing individual and small group markets, such as modified community rating, single risk pool, and essential health benefit requirements.

D. The 2018 AHP Rule

On June 21, 2018, the Department published the 2018 AHP Rule,[8] intended to broaden the types of employer groups and associations that may sponsor a single group health plan under ERISA. The Department issued the 2018 AHP Rule in response to a 2017 Executive order (E.O.) that was rescinded in 2021.[9] The 2018 AHP Rule substantially loosened the requirements for groups or associations to be considered a bona fide group or association that is eligible to establish an employee welfare benefit plan or to otherwise meet the definition of ''employer'' under ERISA section 3(5) (for example, by allowing such groups or associations to include ''working owners'' who have no employees).[10] But the Department expressly noted in the 2018 AHP Rule that the rule ''does not invalidate any existing advisory opinions, or preclude future advisory opinions, from the Department under section 3(5) of ERISA that address other circumstances in which the Department will view a person as able to act directly or indirectly in the interest of direct employers in sponsoring an employee welfare benefit plan that is a group health plan.'' [11]

To establish the additional and broader standard, paragraph (b) of the 2018 AHP Rule set forth eight overall criteria that a group or association must meet to be a bona fide group or association eligible to establish an ERISA plan, including criteria related to (1) purposes of the group or association, (2) status of each group member as an employer of at least one employee participant in the AHP, (3) formal organizational structure requirements for the group, (4) control of the group and the AHP by employer members, (5) a commonality requirement for employer members, (6) limitations on providing health coverage to persons other than employees and beneficiaries, (7) nondiscrimination requirements, and (8) a limitation on health insurance issuers' ability to own or control the association or plan other than being an employer member of the group or association. Paragraphs (c) and (d) added specific details on the commonality and nondiscrimination requirements, and paragraph (e) addressed the dual classification of working owners without common-law employees who could be treated as both employers and employees for purposes

[4] *See Gruber,* 159 F.3d at 788 fn. 5 (listing DOL criteria); *Int'l Ass'n of Entrepreneurs of Am. Ben. Tr.* v. *Foster,* 883 F. Supp. at 1061 (same); *Hall* v. *Maine Mun. Emps. Health Tr.,* 93 F. Supp. 2d 73, 77 (D. Me. 2000); *Assoc. Indus. Mgmt. Servs.* v. *Moda Health Plan, Inc.,* 2015 WL 4426241, at *3.

[5] Section 2791(a)(1) and (d)(6) of the PHS Act.

[6] Centers for Medicare & Medicaid Services, Application of Individual and Group Market Requirements under title XXVII of the Public Health Service Act when Insurance Coverage Is Sold to, or through Associations, Insurance Standards Bulletin Series—INFORMATION (Sept. 1, 2011), available at *https://www.cms.gov/cciio/resources/files/downloads/association_coverage_9_1_2011.pdf.*

[7] 45 CFR 144.102(c).

[8] 83 FR 28912, 28962 (June 21, 2018).

[9] E.O. 13813, 82 FR 48385 (rescinded by E.O. 14009, 86 FR 7793 (Jan. 28, 2021)).

[10] *See generally* 83 FR 28912 (June 21, 2018).

[11] 29 CFR 2510.3–5(a).

of participation in the employer group and the AHP.[12]

These criteria were modeled on elements of the pre-rule guidance, but the 2018 AHP Rule differed in several significant ways, discussed below,[13] that were designed to loosen some requirements of the pre-rule guidance.

While paragraph (b)(1) of the 2018 AHP Rule provided that ''the primary purpose of the group or association'' could be ''to offer and provide health coverage to its employer members and their employees,'' the pre-rule guidance requires that the group or association acting as an employer must exist for purposes *other than* providing health benefits. The 2018 AHP Rule required that ''the group or association also must have at least one substantial business purpose unrelated to offering and providing health coverage or other employee benefits to its employer members and their employees.'' A group of employers could satisfy the business purpose standard through a safe harbor requiring only that it would be a ''viable'' entity in the absence of sponsoring an employee benefit plan. The pre-rule guidance, however, does not equate the business purpose standard with whether the group or association could be viable even if it did not sponsor a plan. By equating purpose with viability, the 2018 AHP Rule weakened the business purpose standard and allowed the creation of groups or associations under ERISA section 3(5) primarily for the purpose of the provision of health benefits.

Paragraph (c) of the 2018 AHP Rule provided for a broader commonality standard than the pre-rule guidance. Under the 2018 AHP Rule, a group or association of employers satisfied the commonality of interest requirement if either (1) its employer members were in the same trade or business; or (2) the principal places of business for their employer members were located within a region that did not exceed the boundaries of the same State or metropolitan area, such as the Washington Metropolitan Area of the District of Columbia (which also includes portions of Maryland and Virginia). No other common interests were required.[14] Under the pre-rule guidance, geography alone is not sufficient to establish commonality between otherwise disparate businesses.

The 2018 AHP Rule also included express nondiscrimination standards that had to be met—aside from other health coverage requirements—in order for an employer group or association to act as an employer within the meaning of ERISA section 3(5) in sponsoring a single group health plan.[15] The 2018 AHP Rule incorporated and adapted existing health nondiscrimination provisions already applicable to group health plans, including AHPs, under the Health Insurance Portability and Accountability Act of 1996 (HIPAA).[16] In applying the HIPAA health nondiscrimination rules for defining similarly situated individuals, under the 2018 AHP Rule, the group or association could not treat member employers as distinct groups of similarly situated individuals if it wished to qualify as a bona fide group or association for purposes of sponsoring an AHP.[17] The pre-rule guidance does not include any explicit nondiscrimination requirements. The Department noted in the preamble to the 2018 AHP Rule, however, that the HIPAA nondiscrimination rules apply to group health plans, including AHPs, and noted, therefore, that AHPs, like any other group health plan, cannot discriminate in eligibility, benefits, or premiums against an individual within a group of similarly situated individuals based on a health factor.[18]

Lastly, paragraph (e) of the 2018 AHP Rule allowed working owners without any common-law employees to participate in AHPs, stating that a working owner would be treated both as an ''employer'' and ''employee'' for purposes of participating in, and being covered by, an AHP, notwithstanding the absence of any employment relationship with common-law employees.[19] Under the pre-rule guidance, working owners without common-law employees are not permitted to be treated as employers for the purpose of participating in a bona fide employer group or association and generally are not treated as employees able to be participants in an ERISA-covered employee welfare benefit plan.[20]

E. Decision Setting Aside Core Provisions of the 2018 AHP Rule

In July 2018, eleven States and the District of Columbia (collectively, the States) sued the Department in Federal district court. They argued that the 2018 AHP Rule violates the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.,* because it exceeds the Department's statutory authority and is arbitrary or capricious. The States moved for summary judgment, and the Department moved to dismiss the lawsuit for lack of standing and cross-moved in the alternative for summary judgment. On March 28, 2019, the U.S. District Court for the District of Columbia denied the Department's motions and granted the States' motion for summary judgment. In granting the States' motion, the court set aside the 2018 AHP Rule's definition of bona fide group or association of employers and the language permitting working owners without common-law employees to be treated as employees when participating in an AHP.[21] The Department's pre-rule guidance was not affected by the district court's decision.

Specifically, the district court concluded that the 2018 AHP Rule's criteria for establishing AHPs unreasonably construed ERISA's requirement that the association act ''indirectly in the interest of an employer'' because the 2018 AHP Rule's ''substantial business purpose'' and ''geographical commonality'' requirements were not drawn narrowly enough to limit AHPs to those that act in the interest of employers, thus unreasonably expanding the definition of ''employer.'' [22] In addition, the district court ruled that the 2018 AHP Rule's expansion of the term ''employer'' under ERISA to include working owners without common-law employees (when members of an association) was unreasonable because it was contrary to ERISA's text and central purpose of regulating employment-based relationships.[23] Regarding ERISA's text and purpose, the district court held that Congress did not intend for working owners without common-law employees to be included

[12] 29 CFR 2510.3–5(b)(4).

[13] *Infra,* section I.D.

[14] 29 CFR 2510.3–5(c); *see* 83 FR 28912, 28924 (June 21, 2018).

[15] Under the 2018 AHP rule, in addition to the bona fide group or association, the underlying health coverage offered by the bona fide group or association must also meet these requirements for the bona fide group or association to qualify as an employer under the 2018 AHP Rule. 29 CFR 2510.3–5(d).

[16] 83 FR 28912, 28926–27 (June 21, 2018).

[17] 29 CFR 2510.3–5(d)(4).

[18] 83 FR 28927 (June 21, 2018). The preamble also noted that AHPs, like other group health plans, generally may make distinctions between groups of individuals based on bona fide employment-based classifications consistent with the employer's usual business practice, provided such distinction is not directed at individual participants or beneficiaries based on a health factor. Id. The Department notes that no inference should be drawn based on this proposal to rescind the 2018 AHP Rule as to whether treating the employees of each employer member of an AHP as a distinct group of similarly situated individuals is a bona fide employment-based classification for purposes of the HIPAA nondiscrimination rules.

[19] 29 CFR 2510.3–5(e).

[20] 83 FR 28912, 28928, fn. 40 (June 21, 2018).

[21] *New York* v. *United States Department of Labor,* 363 F. Supp. 3d 109 (D.D.C. 2019).

[22] *Id.* at 131–34.

[23] *Id.* at 136–40.

within ERISA—either as individuals or when joined in an employer association.[24] In conclusion, the district court held that the 2018 AHP Rule was inconsistent with ERISA and the APA because the provisions unlawfully failed to limit bona fide associations to those acting ''in the interest of'' their employer members, within the meaning of ERISA, thus exceeding the Department's statutory authority.[25] The district court remanded the 2018 AHP Rule to the Department to consider how the severability provision of the 2018 AHP Rule affects any of its remaining provisions.[26]

The Department appealed the district court's decision.[27] Thereafter, at the Department's request, the U.S. Court of Appeals for the District of Columbia Circuit granted the Department's request to stay the appeal.[28] Subsequently, the Department informed the appeals court that it would undertake notice and comment rulemaking on a proposal to rescind the 2018 AHP Rule. The appeal pending before the D.C. Circuit remains stayed.

The Department considered the severability clause issue raised by the district court and concluded that, without the core provisions that the district court set aside, the 2018 AHP Rule would have no operationalizable substance and provide no meaningful guidance. To minimize consequences of the district court's decision on AHP participants, the Department announced a temporary enforcement policy on April 29, 2019.[29] Specifically, the Department announced that it would not pursue enforcement actions against parties for potential violations stemming from actions taken prior to the district court's decision and in good faith reliance on the 2018 AHP Rule, as long as parties met their responsibilities to association members and their participants and beneficiaries to pay health benefit claims as promised.[30] In addition, the Department announced that it would not take action against existing AHPs for continuing, through the remainder of the applicable plan year or contract term that was in force at the time of the district court's decision, to provide health benefits to members who enrolled in good faith reliance on the 2018 AHP Rule before the district court's order.[31] Because the 2018 AHP Rule ceased being an alternative pathway for entities to be treated as bona fide employer groups or associations after the district court's decision, the Department anticipated that parties who established AHPs in reliance on the 2018 AHP Rule would wind them down and that no new AHPs would be formed in reliance on the 2018 AHP rule until the judicial process ended. The Department's temporary enforcement policy period expired long ago, and the Department is not aware of any AHPs that currently exist in reliance on the 2018 AHP Rule.

II. Proposal To Rescind

The Department proposes to remove the 29 CFR 2510.3–5 regulation established by the 2018 AHP Rule and the related amendment to the 29 CFR 2510.3–3 regulation made by the 2018 AHP Rule. This proposed rule, if finalized, would rescind the 2018 AHP Rule in its entirety.

A. Authority To Define ''Employer'' in ERISA Section 3(5)

Congress tasked the Department with administering ERISA.[32] The Department has clear authority to interpret the term ''employer,'' including defining when a ''group or association of employers'' may act ''indirectly in the interest of an employer'' in establishing an employee benefit plan and has done so in numerous advisory opinions.[33] As emphasized elsewhere in this preamble, the courts and the Department have consistently stressed that ERISA's definition of ''employee benefit plan,'' including the definition's reference to arrangements ''established or maintained by an employer or employee organization, or both,'' envisions employment-based arrangements. No court decision or guidance from the Department, including the 2018 AHP Rule, has suggested the ''employer group or association'' provision in the ERISA section 3(5) definition of ''employer'' extends the concept of an ''employee benefit plan'' to commercial insurance-type arrangements.

As described above, the Department's pre-rule guidance, as articulated in advisory opinions, has traditionally applied a facts-and-circumstances approach to determine whether a group or association of employers is a bona fide employer group or association capable of sponsoring an ERISA plan on behalf of its employer members. As noted above, this pre-rule guidance focuses on three general criteria: (1) whether the group or association has business or organizational purposes and functions unrelated to the provision of benefits; (2) whether the employers share some commonality of interest and genuine organizational relationship unrelated to the provision of benefits; and (3) whether the employers that participate in a benefit program, either directly or indirectly, exercise control over the program, both in form and substance. While there are many organizations of employers, the Department's pre-rule guidance makes clear that only certain entities consisting of more than one employer meet the definition of a bona fide group or association of employers under ERISA.

Before the 2018 AHP Rule, the Department's approach to these determinations had consistently focused on employment-based arrangements, as contemplated by ERISA, rather than commercial insurance-type arrangements that lack the requisite connection to the employment relationship.[34] The Department's

[24] *Id.* at 137. The district court concluded that the provision was contrary to ERISA and the APA and that it relied on ''a tortured reading'' of the Affordable Care Act (ACA). *Id.* at 141.

[25] *Id.* at 128.

[26] *Id.* at 141.

[27] *New York* v. *United States Department of Labor,* 363 F. Supp. 3d 109, *appeal docketed,* No. 19–5125 (D.C. Cir. May 31, 2019).

[28] *New York* v. *United States Department of Labor,* No. 19–5125 (D.C. Cir. Feb. 8, 2021) (order granting consent motion to hold case in abeyance).

[29] Press Release, Employee Benefits Security Administration, U.S. Department of Labor Statement Relating to the *U.S. District Court Ruling in State of New York* v. *United States Department of Labor* (Apr. 29, 2019), available at *https://www.dol.gov/newsroom/releases/ebsa/ebsa20190429.*

[30] *Id.*

[31] In addition, as explained in the April 29, 2019 statement, the Department of Health and Human Services (HHS) had advised the Department that HHS would not pursue enforcement against nonfederal governmental plans or health insurance issuers for potential violations of title XXVII of the PHS Act caused by actions taken before the district court's decision in good faith reliance on the rule's validity, through the remainder of the applicable plan year or contract term that was in force at the time of the district court's decision. HHS had also advised the Department that HHS would not consider States to be failing to substantially enforce applicable requirements under title XXVII of the PHS Act in cases where the State adopted a similar approach with respect to health insurance coverage issued within the State. *Id.*

[32] 29 U.S.C. 1135 (delegating authority to the Secretary of Labor to ''prescribe such regulations as he finds necessary or appropriate to carry out the provisions of [ERISA]''); *see Black & Decker Disability Plan* v. *Nord,* 538 U.S. 822, 831 (2003) (deferring to the Department's interpretation of an ERISA provision).

[33] *See* 2018 AHP Rule, 83 FR 28912, 28914 (June 21, 2018); *New York* v. *United States Department of Labor,* 363 F. Supp. 3d 109, 128 (D.D.C. 2019).

See also Advisory Opinions Nos. 94–07A (Mar. 14, 1994), 95–01A (Feb. 13, 1995), 96–25A (Oct. 31, 1996), 2001–04A (Mar. 22, 2001), 2003–13A (Sept. 30, 2003), 2003–17A (Dec. 12, 2003), 2007–06A (Aug. 16, 2007), 2012–04A (May 25, 2012), and 2019–01A (July 8. 2019).

[34] ''We are mindful of the potentially harmful effects of an overly broad interpretation of the term 'employee benefit plan' when coupled with the policy of section 514. As we have already noted, we do not believe that the statute and legislative history will support the inclusion of what amounts to commercial products within the umbrella of the definition. Where a 'plan' is, in effect, an entrepreneurial venture, it is outside the policy of

longstanding pre-rule guidance has also been informed by its extensive experience with unscrupulous promoters, marketers, and operators of multiple employer welfare arrangements (MEWAs).[35] AHPs generally qualify as MEWAs under ERISA. Although MEWAs can provide valuable coverage, historically MEWAs, particularly self-funded MEWAs, have disproportionately suffered from financial mismanagement or abuse, leaving participants and providers with unpaid benefits and bills and putting small businesses at financial risk.[36] Because of this history of abuse by MEWA promoters claiming ERISA coverage and protection from State regulation, Congress amended ERISA in 1983 to provide an exception to ERISA's broad preemption provisions for the regulation of plan and non-plan MEWAs under State insurance laws.[37]

Employees and their dependents have too often become financially responsible for paying medical claims they were promised would be covered by the plan after paying premiums to fraudulent or mismanaged MEWAs, which could include AHPs. Because these entities often become insolvent, individuals and families bear the risk, and the impact can be devastating and can include being deprived of medical services if they cannot afford to pay out-of-pocket for medical claims that are not paid by the AHP.[38] Even before such MEWAs become insolvent, employees and their dependents may still become financially responsible for medical claims where the AHP failed to adequately disclose the limitations and exclusions under the plan.[39] The Department is concerned about the potential uptake and expansion of fraudulent and mismanaged MEWAs, especially at a time when over 90 million low-income children and adults are in the process of renewing their Medicaid and Children's Health Insurance Program (CHIP) coverage, and may need to transition to other sources of coverage if they no longer qualify.[40]

ERISA's overarching purpose is to protect participants and beneficiaries. The provisions of Title I of ERISA were initially enacted primarily to address public concern that funds of private pension plans were being mismanaged and abused. ERISA's protections have expanded over time for private group health plans as well. Both Federal regulators and State insurance regulators have devoted substantial resources to detecting and correcting mismanagement and abuse, and in some cases, prosecuting wrongdoers. Even the 2018 AHP Rule makes clear that DOL did not intend to depart too dramatically from its traditional interpretation of the word ''employer.'' [41] While the Department sought to expand the scope of covered entities, it recognized the danger that too broad an expansion could result in ''associations'' masquerading as bona fide employer groups or associations merely to promote the commercial sale of insurance. For that reason, DOL adopted and clarified the pre-rule guidance condition that the employers who participate in the AHP must control the group or association and the plan, and added an express nondiscrimination requirement as a counterweight to abuse. Thus, even in the context of the 2018 AHP Rule, DOL was concerned about the danger of expanding the meaning of the ''group or association of employers'' clause in ERISA section 3(5) to cover commercial insurance-type arrangements.

In fact, because available oversight resources are extremely limited and fraudulent operations resist detection until claims go unpaid, significant damage can be done before the Government even receives a complaint about an arrangement, making it difficult for regulators to mitigate damages and stop bad actors. The vulnerability of participants, beneficiaries, and the small employers whose employees receive benefits through an AHP is further heightened when the standard for becoming a bona fide group or association is weakened. A weakened standard also can hinder efforts by States to regulate MEWAs, including AHPs, within their borders.[42]

The preamble of the 2018 AHP Rule implies as much in explaining the importance of incorporating the nondiscrimination provision in paragraph (d)(4) of the 2018 AHP Rule. As noted above, paragraph (d)(4) of the 2018 AHP Rule sought to prohibit AHPs from treating member employers as distinct groups to distinguish AHPs from commercial insurance issuers. In discussing the importance of a requisite connection or commonality to lessen concerns about fraud, the preamble of the 2018 AHP Rule explained that because the final rule relaxed the Department's pre-rule guidance on the groups or associations that may sponsor a single ERISA-covered group health

section 514 . . . . In short, to be properly characterized as an ERISA employee benefit plan, a plan must satisfy the definitional requirement of section 3(3) in both form and substance.'' *Wisconsin Educ. Ass'n Ins. Trust* v. *Iowa State Bd. of Public Instruction,* 804 F.2d 1059, 1063–64 (8th Cir. 1986) (quoting H.R. Rep. No. 1785, 94th Cong., 2d Sess. 48 (1977)).

[35] ERISA section 3(40)(A) (defining MEWAs).

[36] For discussions of this history, see: (1) U.S. Gov't Accountability Office, GAO–92–40, ''States Need Labor's Help Regulating Multiple Employer Welfare Arrangements.'', March 1992, at *https://www.gao.gov/assets/220/215647.pdf;* (2) U.S. Gov't Accountability Office, GAO–04–312, ''Employers and Individuals Are Vulnerable to Unauthorized or Bogus Entities Selling Coverage.'' Feb. 2004, at *https://www.gao.gov/new.items/d04312.pdf;* and (3) Kofman, M. and Jennifer Libster, ''Turbulent Past, Uncertain Future: Is It Time to Re-evaluate Regulation of Self-Insured Multiple Employer Arrangements?'', Journal of Insurance Regulation, 2005, Vol. 23, Issue 3, pp. 17–33.

[37] ERISA section 514(b)(6), 29 U.S.C. 1144(b)(6).

[38] Based on DOL enforcement data, since 2001, the Department has taken civil and criminal enforcement action, such as criminal indictments, civil complaints filed, temporary restraining orders, and cease and desist orders on 108 fraudulent and mismanaged MEWAs and their operators. Just since 2018, the Department was forced to take civil and criminal enforcement action against 21 MEWAs in order to protect participants and beneficiaries from fraud or mismanagement of these arrangements. Further, the Department has civilly recovered over $95 million from mismanaged or fraudulent MEWAs in the last five years alone. *See* EBSA National Enforcement Project—Health Enforcement Initiatives at *www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement#national-enforcement-projects;* U.S. Department of Labor Files Complaint to protect Participants and Beneficiaries of failing Medova MEWA operating in 38 states, available at *https://www.dol.gov/newsroom/releases/ebsa/ebsa20201218;* Federal Court Appoints Independent Fiduciary as Claims Administrator of Medova Arrangement, available at *https://www.dol.gov/newsroom/releases/ebsa/ebsa20210412;* Federal Court Orders Kentucky Bankers Association to Pay $1,561,818 In Losses to Benefits Plan After U.S. Department of Labor Finds Violations, available at *https://www.dol.gov/newsroom/releases/ebsa/ebsa20201015;* MEWA Enforcement Fact Sheet, available at *https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/mewa-enforcement.pdf.*

[39] *See* 83 FR 28912, 28952 (June 21, 2018) (highlighting that many of the Department's civil enforcement cases involving MEWAs involved failure to follow plan terms or health care laws, failure to provide plan benefits, or reporting and disclosure deficiencies).

[40] During the COVID–19 public health emergency, States were required to maintain enrollment of nearly all Medicaid enrollees. This ''continuous enrollment condition'' ended on March 31, 2023, under the Consolidated Appropriations Act, 2023. State Medicaid programs have 12 months to initiate, and 14 months to complete, a renewal for all individuals enrolled in Medicaid. CHIP provides health coverage to eligible children, through both Medicaid and separate CHIP programs. HHS has estimated that 15 million beneficiaries could lose Medicaid or CHIP coverage as a result of Medicaid unwinding. *See* HHS, Assistant Secretary for Planning and Evaluation, Office of Health Policy, ''Unwinding the Medicaid Continuous Enrollment Provision: Projected Enrollment Effects and Policy Approaches,'' August 19, 2022, available at *https://aspe.hhs.gov/sites/default/files/documents/404a7572048090ec1259d216f3fd617e/aspe-end-mcaid-continuous-coverage_IB.pdf.*

[41] 83 FR 28912 (''[T]he regulation continues to distinguish employment-based plans, the focal point of Title I of ERISA, from commercial insurance programs and other service provider arrangements.'').

[42] U.S. Gov't Accountability Office, GAO–92–40, ''States Need Labor's Help Regulating Multiple Employer Welfare Arrangements.'' March 1992, pg. 2–3 at *https://www.gao.gov/assets/220/215647.pdf.*

plan, paragraph (d)(4) was especially important in the context of the new, broader arrangements to distinguish a group or association sponsored AHP from commercial-insurance-type arrangements, which lack the requisite connection to the employment relationship and whose purpose was, instead, principally to identify and manage risk on a commercial basis.[43]

The Department is no longer of the view that the business purpose standard, commonality standard, and working owner provision in the 2018 AHP Rule, even bolstered by the nondiscrimination standards in paragraph (d)(4), are sufficient to distinguish between meaningful employment-based relationships as compared to commercial insurance-type arrangements whose purpose is principally to identify and manage risk. The Department continues to be mindful of the unique risks to participants, beneficiaries, small employers, and health care providers in the context of AHPs and any other form of MEWAs. These concerns underscore the need to limit ERISA-covered AHPs to true employee benefit plans that are the product of a genuine employment relationship and not artificial structures marketed as employee benefit plans, often with an objective of attempting to sidestep otherwise applicable insurance regulations or misdirect State insurance regulators. Such artificial vehicles are not ''employee benefit plans'' as defined in ERISA section 3(3), nor, as explained above, would it be consistent with the purpose of the statute to treat them as such. In sum, upon further evaluation and consistent with the sound administration of ERISA, the Department has concluded that it should rescind the 2018 AHP Rule from the Code of Federal Regulations (CFR). The Department now believes that the provisions of the 2018 Rule that the district court set aside as inconsistent with the APA and in excess of the Department's authority are, at a minimum, not consistent with the best reading of the statutory requirements governing group health plans.

B. Discussion of Decision To Propose To Rescind

Under Supreme Court precedent, an agency has the discretion to change a policy position provided that the agency acknowledges changing its position, the new policy is permissible under the governing statute, there are good reasons for the new position, the agency believes that the new policy is better, as evidenced by the agency's conscious action to change its policy, and the agency takes into account any serious reliance interests in the prior policy.[44]

The Department has further reviewed the relevant statutory language, judicial decisions, and pre-rule guidance, and further considered ERISA's statutory purposes and related policy goals. Based on this review, the Department has concluded it is appropriate to propose to rescind the regulatory provisions adopted in the 2018 AHP Rule in order to ensure that guidance being provided to the regulated community is in alignment with ERISA's text, purposes, and policies, resolve and mitigate any uncertainty regarding the status of the standards that were set under the 2018 AHP Rule, and facilitate a reexamination of the criteria for a group or association of employers to be able to sponsor an AHP.

The intent of the 2018 AHP Rule was to expand access to affordable health coverage for employees of small employers and certain self-employed individuals by lessening restrictions on the formation of AHPs, and thereby allow for the purchase of health insurance through the less regulated large group market. As discussed further in this rulemaking, the Department is now of the view, however, that the business purpose standard, the viability safe harbor in the business purpose standard, the geography-based commonality standard, and the working owner provisions of the 2018 AHP Rule do not align with the best reading of ERISA's text and statutory purposes.

In addition, and independently, information presented to the Department during the public comment process of the 2018 AHP rulemaking indicates that implementation of the 2018 AHP Rule would have increased adverse selection against the individual and small group markets by drawing healthier, younger people into AHPs, thus increasing premiums for those remaining in those markets.[45] AHPs can also tailor plan benefits so that individuals with preexisting conditions, or those who are otherwise anticipated to have higher health care costs are discouraged from joining AHPs, causing further adverse selection, market segmentation, and higher premiums in the individual and small group markets.[46] The Department acknowledged in the 2018 AHP Rule that the rule's ''increased regulatory flexibility'' would necessarily result in some segmentation of risk that favors AHPs over individual and small group markets and some premium increase for individuals and other small businesses remaining in the individual and small group markets. The Department concluded, however, that practical considerations and Federal nondiscrimination rules would limit such segmentation, and that States may further limit risk segmentation through regulation of AHPs as MEWAs and assumed some premium protection for subsidy-eligible taxpayers with household incomes at or below 400 percent of the federal poverty level purchasing coverage on Exchanges. The Department is now of the view that the Department should give greater attention to the long-term impacts on market risk that the 2018 AHP Rule introduced, especially in the small group and individual markets.

Additionally, health insurance coverage offered through AHPs in the large group markets is not subject to the requirement to offer essential health benefits, which means that individuals who join these AHPs may become underinsured if their AHP offers only ''skinny'' coverage. Health plans that do not include benefits that non-grandfathered small group and individual market health insurance coverage are required to cover, such as maternity or prescription drug benefits, or even inpatient hospital coverage, are sometimes referred to as ''skinny plans.'' Because they offer less than comprehensive coverage, they are cheaper to purchase; however, participants and beneficiaries may not understand the significant limitations on such coverage. As discussed in this preamble at section I.C., the 2018 AHP Rule allowed small employers and working owners to band together to qualify as a single group health plan to purchase coverage in the large group market, thus avoiding the requirements on small group market and individual health insurance coverage and making it easier for AHPs to offer such skinny plans, resulting in participants and beneficiaries being vulnerable to high out-of-pocket costs and potentially not

[43] 83 FR 28912, 28928–29 (June 21, 2018).

[44] *Encino Motorcars, LLC* v. *Navarro,* 579 U.S. 211, 220–23 (2016); *see id.* At 225 (Ginsburg, J., concurring) (restating the rule governing an agency's reversal in policy, as articulated in *F.C.C.* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009)).

[45] *See* 83 FR 28957 (June 21, 2018).

[46] The American Medical Association noted that AHPs could exclude benefits like insulin, maternity care, mental health services and rehabilitative services that are particularly important to certain workers in blue-collar professions. *See, e.g.,* Brief for American Medical Association and Medical Society of the State of New York as Amici Curiae in Support of Plaintiffs' Motion for Summary Judgment, at *16, *New York* v. *U.S. Department of Labor,* 363 F. Supp. 3d 109 (D.D.C. 2019) (No. 1:18–CV–01747–JDB).

having access to benefits for care when they most need it.[47]

The Department is also concerned that the 2018 AHP Rule could interfere with the goal of increasing affordable, quality coverage because the rule increases the possibility that individuals who join AHPs will be subject to mismanaged plans. As noted above, ERISA generally classifies AHPs as MEWAs. Historically, MEWAs, especially self-funded MEWAs, have disproportionately suffered from financial mismanagement or abuse, leaving participants and providers with unpaid benefits and bills.[48]

The 2018 AHP Rule reflected a substantial change and significant departure from the Department's pre-rule guidance. While the alternative pathway provided in the 2018 AHP Rule has been unavailable as a basis for forming an AHP since the district court's decision, the Department's proposal to rescind the 2018 AHP Rule, if finalized, would make clear that this significant departure from pre-rule guidance no longer represents the Department's interpretation of when a group or association can constitute an ''employer'' for purposes of sponsoring a group health plan under ERISA. The proposed rescission leaves in place the longstanding pre-rule guidance that has been consistently supported and relied upon in numerous judicial decisions because it fosters a sufficient employer-employee nexus and proper oversight of AHPs, while remaining consistent with ERISA's text and purpose. The proposed rescission would also facilitate a reexamination of the rule's ''business purpose'' standard and viability safe harbor, the geography-based commonality alternative, and the working-owner provisions, including the potential those provisions have for encouraging abusive health care arrangements, especially self-insured programs, that sell low quality or otherwise unreliable health insurance products through MEWAs to unsuspecting employers, particularly small businesses. Further, the Department does not believe that there is a basis for reliance on the 2018 AHP Rule given the fact that the temporary enforcement policy period announced by the Department immediately following the district court's decision has long expired.[49] The Department has thus concluded for several reasons that it is appropriate to propose to rescind the 2018 AHP Rule.

1. Business Purpose Standard

The courts of appeals have uniformly interpreted ERISA's definition of employer to require common interests other than the provision of welfare benefits, independent of any deference to the Department's historical guidance.[50] The decision of the Eighth Circuit Court of Appeals in WEAIT is instructive; there, the court held that ''[t]he definition of an employee welfare benefit plan is grounded on the premise that the entity that maintains the plan and the individuals that benefit from the plan are tied by a common economic or representation interest, *unrelated to the provision of benefits.*'' [51] The pre-rule guidance also uniformly emphasized that a purpose unrelated to the provision of benefits is a critical factor for any group or association of employers to be a bona fide group or association able to act as an ''employer'' sponsoring an ''employee benefit plan'' under ERISA. Although neither the courts nor the DOL's pre-rule guidance articulated a generally applicable standard for measuring the sufficiency or substantiality of the unrelated purpose, employer groups or associations that were found to be able to sponsor an ERISA plan tended to have well developed and shared business purposes unrelated to the provision of benefits.[52]

Paragraph (b) of the 2018 AHP Rule also contained a business purpose standard. In relevant part, it provided that a group or association of employers must have at least one ''substantial'' business purpose unrelated to offering and providing health coverage or other employee benefits to its employer members and their employees, even if the primary purpose of the group or association is to offer such coverage to its members.[53] The 2018 AHP Rule did not define ''substantial'' for this purpose, but created a broad safe harbor that allowed a group or association to meet the business purpose standard ''if the group or association would be a viable entity in the absence of sponsoring an employee benefit plan.'' [54] On further consideration, the Department is concerned that the business purpose standard and accompanying viability safe harbor are too loose to ensure that the group or

[47] The Department notes concerns expressed by commenters that low barriers to entry to become an AHP could result in groups or associations with less of a connection to the member employer's community and unscrupulous operators siphoning off members by limiting their membership to healthier groups and offering lower rates for health coverage to their members. Commenters to the 2018 AHP notice of proposed rulemaking (NPRM) also expressed the concern that it could fragment the individual and small group markets, resulting in increased premiums. Commenters further communicated that organizations that form on the basis of offering health benefits could increase the prevalence of unscrupulous promoters that do not have strong incentives to maintain a credible reputation. *See* 83 FR 28912, 28917, and 28943 (June 21, 2018).

[48] *See* 83 FR 28951, 28953 (June 21, 2018).

[49] *See supra* note 25.

[50] *Wisconsin Educ. Ass'n Ins. Trust* v. *Iowa State Board of Public Instruction, 804 F.2d 1059,* 1065 (8th Cir. 1986) [hereinafter *WEAIT*] (''Our decision is premised on ERISA's language and Congress' intent. There is no need to resort to the Department of Labor's interpretations.''); *see MDPhysicians & Associates, Inc.* v. *State Bd. Of Ins.,* 957 F.2d 178, 186 n.9 (5th Cir. 1992) (''Although we ground our decision on the statutory language of ERISA and the intent of Congress, we recognize that [Department of Labor] opinions 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' '') (citation omitted).

[51] 804 F.2d 1059, 1064 (8th Cir. 1986) (emphasis added); *accord MDPhysicians,* 957 F.2d 178, 185 (5th Cir. 1992).

[52] *See, e.g., MDPhysicians, supra* note 3, at 185–87 (holding that a MEWA that made health coverage available to '''employers at large' in the Texas panhandle'' did not have sufficient common economic or representational interest) (citation omitted); *Gruber* v. *Hubbard Bert Karle Weber, Inc.,* 159 F.3d 780, 787 (3d Cir. 1998) (endorsing district court's finding of no commonality of interest ''because 'there was no nexus among the individuals benefitted by the [p]lan and the entity providing those benefits, other than the [p]lan itself' since [the association] 'was comprised of disparate and unaffiliated businesses' who [sic] had no relationship prior to the inception of the [p]lan'') (citation omitted); *Plog* v. *Colorado Ass'n of Soil Conservation Districts,* 841 F. Supp. 350, 353 (D. Colo. 1993) (rejecting claim that association was an ''employer'' under ERISA because the association was open to any person who paid the association fee); Advisory Opinion No. 2019–01A (July 8, 2019) (''Ace is a hardware retailer cooperative and is the largest cooperative, by sales, in the hardware industry. . . . Ace facilitates access to materials, supplies and services, as well as engages in activities that support Ace retail owners' operation of their retail hardware businesses. Ace currently serves approximately 2,700 retail owners who operate approximately 4,400 Ace stores in the U.S. In addition, approximately 120 corporate stores are owned and operated as wholly-owned subsidiaries of Ace.''); Advisory Opinion 2017–02AC (May 16, 2017) (''The First District Association (FDA) has been operating as an independent dairy cooperative organized under Minnesota Chapter 308A since 1921. . . . FDA's articles of incorporation provide that, among other related purposes, FDA's purposes and activities include the purchase, sale, manufacture, promotion and marketing of its members' dairy and agricultural products and engaging in other activities in connection with manufacture, sale or supply of machineries, equipment or supplies to its members.''); Advisory Opinion 2005–24A (Dec. 30, 2005) (''WAICU's purposes and activities include representing its members at State and national forums, encouraging cooperation among its members to utilize resources effectively, and encouraging collaboration with other institutions of higher learning for the benefit of Wisconsin citizens. WAICU's services to its members include professional development for officers, research, public relations, marketing, admissions support, and managing collaborative ventures among the members (*e.g.,* WAICU Study Abroad Collaboration).''); Advisory Opinion 2001–04A (Mar 22, 2001) (''The Association was incorporated in Wisconsin in 1935 for the purpose of promoting automotive trade in the State of Wisconsin . . . .'').

[53] 29 CFR 2520.3–5(b)(1).

[54] *Id.*

association sponsoring the AHP is actually acting in the employers' interest or to effectively differentiate an employee health benefit program offered by such an association from a commercial insurance venture. Although the rule provided that a business purpose had to be ''substantial,'' the preamble's discussion of what counts as ''substantial'' was confusing and in some tension with the word's ordinary meaning. At one point, the preamble suggested that merely ''offering classes or educational materials on business issues of interest to members'' was *per se* sufficient to qualify as substantial.[55] Moreover, the existence of the viability safe harbor suggested that some associations that were not viable (but for sponsoring an AHP) could still have a substantial business purpose under the rule.

In the preamble to the 2018 AHP rule, DOL posited that this relaxation of the standard would nonetheless work to differentiate employer groups or associations from commercial insurance ventures because the rule's control requirement and its new nondiscrimination requirement would ensure that only bona fide associations become AHPs. However, as described above, DOL has reexamined the rule's treatment of those features and does not view those elements of the 2018 AHP Rule as sufficient to mitigate problems with the business purpose standard and ensure the rule distinguishes bona fide employer groups or associations acting as an employer with respect to an employee benefit plan from a commercial insurance venture. For example, under the 2018 AHP Rule, especially the working owner provisions, promoters would be able to set up arrangements with separate contribution rates for ''employer'' members based on a variety of non-health factors, such as industry, occupation, or geography, in ways that would make the arrangement look strikingly similar to a commercial insurance venture.[56] The 2018 AHP Rule attempted to address the Department's policy concerns related to fraud and insolvency by requiring that a group or association of employers have at least one substantial business purpose unrelated to offering or providing employee welfare benefits. In the Department's current view, based on its long and significant experience in this area as well as current concerns about abuse, by permitting the provision of benefits as the entity's primary purpose and the low bar of the substantial business purpose standard and viability safe harbor, the 2018 AHP Rule does not establish conditions that appropriately distinguish an employer group sponsoring an employee benefit plan from a commercial insurance venture. Rather, for the reasons discussed in this preamble, it may instead expose participants, beneficiaries, and unsuspecting small employers to unscrupulous operators.[57]

Moreover, the Department no longer believes that the 2018 AHP Rule appropriately addressed the concerns expressed by commenters, and now shared by the Department, related to market fragmentation and reduction in the average size of AHPs, which could impact employer groups' ability to take advantage of their market power and economies of scale, which would ultimately impact the affordability for participants receiving benefits through the AHP.

2. Geographic Commonality

There is a substantial body of case law interpreting ERISA's definition of employer to require common interests other than the provision of welfare benefits, independent of any deference to the Department's historical guidance. For example, in WEAIT the Eighth Circuit concluded that ''[t]he definition of an employee welfare benefit plan is grounded on the premise that the entity that maintains the plan and the individuals that benefit from the plan are tied by a common economic or representation interest, *unrelated to the provision of benefits.*'' [58] The court further explained that ''[o]ur decision is premised on ERISA's language and Congress' intent'' and that ''[t]here [wa]s no need to resort to the Department of Labor's interpretations.'' [59] Like the commonality of interest requirement articulated by the Eighth Circuit in *WEAIT*—a requirement that court explained was grounded in ERISA—in *MDPhysicians,* the court also found that ERISA required a commonality of interest among employer members.[60]

Paragraph (c) of the 2018 AHP Rule set forth alternative ways an association could be treated as having the requisite commonality of interest necessary to constitute a bona fide group or association of employers. The employers who participate in the group or association could have had ''industry commonality,'' which means they were in the same trade, industry, line of business, or profession. Alternatively, the participating employers could have had ''geographic commonality'' if each employer had a principal place of business in the same geographic region that did not exceed the boundaries of a single State or metropolitan area (even if the metropolitan area included more than one State). In a departure from the pre-rule guidance, the 2018 AHP Rule permitted an employer group or association to establish the requisite commonality of interest based on a common geographic location alone, even if the membership within the geographic locale comprises otherwise unrelated employers in multiple unrelated trades, industries, lines of business, or professions.[61]

The preamble of the 2018 AHP Rule focused on the desired goal of the rule, to spur AHP formation, but did not adequately address the fundamental question of how geography alone provided for a commonality of interest. The preamble to 2018 AHP Rule did not dispute the importance of commonality. Indeed, the 2018 AHP Rule rejected suggestions that commonality could be established by shared ownership characteristics (all women-owned businesses; all minority-owned businesses; all veteran-owned businesses), shared business models (*e.g.,* all non-profit businesses), shared religious/moral convictions, or shared business size.[62] DOL did so because it concluded that a standard this lax

[55] 83 FR 28912, 28918 (June 21, 2018).

[56] *Id.* at 28929.

[57] *See supra* fn. 39.

[58] 804 F.2d at 1063 (8th Cir. 1986).

[59] *Id. at 1065.*

[60] *MDPhysicians,* 957 F.2d at 186 n.9 (''Although we ground our decision on the statutory language of ERISA and the intent of Congress, we recognize that [Department of Labor] opinions 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' '') (citation omitted); *id.* at 185–87 (holding that a MEWA that made health coverage available to '' 'employers at large' in the Texas panhandle'' did not have sufficient common economic or representational interest).

[61] *But see* Advisory Opinion No. 2008–07A (Sept. 26, 2008) (''In the Department's view, however, the Bend Chamber [of Commerce]'s structure is not the type of connection between employer members that the Department requires for a group or association of employers to sponsor a single 'multiple employer plan.' Rather, the Department would view the employers that use the Bend Chamber's arrangement as each having established separate employee benefit plans for their employees. Although we do not question the Bend Chamber's status as a genuine regional chamber of commerce with legitimate business and associational purposes, the primary economic nexus between the member employers is a commitment to private business development in a common geographic area. This would appear to open membership in the Bend Chamber, and in turn participation in the proposed health insurance arrangement, to virtually any employer in the region. The other factors the Bend Chamber cites do not directly relate to a connection between the member employers, the association, and the covered employees; instead, such factors are characteristics that evidence the reliability of the Bend Chamber's operations (*e.g.,* cash assets of $100,000 or more, physical office space, years in operation, etc.).'').

[62] 83 FR 28912, 28926 (June 21, 2018).

would be ''impossible to define or limit'' and would ''eviscerate'' the commonality requirement.[63] The AHP rule concluded that, as a policy matter, these line-drawing concerns did not apply to groups with geographical commonality, but the discussion was incomplete at best because it focused mostly on the benefits of having more AHPs, without providing any convincing explanation of how geographic commonality was an employment-based commonality that was different from the shared ownership, shared business models, shared religious/moral convictions, and shared business size criteria that the Department rejected. Upon further consideration, DOL now agrees that a commonality requirement based on common geography alone (same State or multi-State area) is not adequate as a means for making sure that commonality exists. The same reasons why DOL rejected other expansions of the commonality requirement militate against adopting geographic commonality as well. Although it is true that the existence of state-wide chambers of commerce demonstrates that certain statewide groups might have shared interests such that they could create an association, this form of commonality is too loose and undermines the commonality requirement's ability to ensure that AHP status is restricted to bona fide associations.

While the Department acknowledges that employers within the same geographic locale can share other factors that rise to the level of sufficient economic and representational interest, the Department is now concerned that the 2018 AHP Rule did not articulate an appropriate basis for treating common geography alone as a shared interest with respect to the employment relationship. Just as would be the case for associations consisting of employers whose membership is based on common business size, the Department is concerned that recognizing under ERISA section 3(5) an association composed of unrelated employers all operating in any specific State with no other commonality also would not sufficiently respect the genuine commonality of interest requirement under ERISA, which is intended to ensure that AHPs are operating in the interest of employers and are not merely operating as traditional health insurance issuers in all but name.[64]

3. Working Owners

The 2018 AHP Rule allowed certain self-employed persons without any common-law employees to participate in AHPs as ''working owners.'' [65] The 2018 AHP Rule established wage, hours of service, and other conditions for when a working owner would be treated as both an ''employer'' and ''employee'' for purposes of participating in, and being covered by, an AHP.[66] The 2018 AHP Rule treated persons as employers even though they had no employment relationship with anybody other than themselves. Thus, a group or association could become an employer by virtue of its working owner members being classified as both an employer and an employee, even though the working owners had no employees and also were not employed by another person or entity.

The Department believes that the 2018 AHP Rule struck the wrong balance between ensuring a sufficient employment nexus and enabling the creation of plan MEWAs and failed to appropriately account for the consequences of the working owner provision. ERISA applies when there is an employer-employee nexus. This employer-employee nexus is the heart of what makes an entity a *bona fide* group or association of employers capable of sponsoring an AHP. In other words, the standard is meant to reflect *genuine* employment relationships. The Department is now of the view that ERISA calls for a higher standard for what constitutes a bona fide group or association of employers than is evidenced in the 2018 AHP Rule. In the ERISA context, the bona fide group or association of employers consists of actual employers who, as of the time they join the group or association, hire, and pay wages or salaries to other people who are their common-law employees working for them. Under the 2018 AHP Rule, although working owners had to meet requirements related to the number of hours devoted to providing personal services to the trade or business or the amount of income earned from the trade or business in order to participate in an AHP, these requirements related to differentiating self-employed individuals from individuals engaged in hobbies that generate income or other de minimis commercial activities.[67] They did not, however, reflect the existence of an employer-employee relationship as in the exchange between an employee and an employer of personal services for wages and other compensation (such as health benefits offered through a group health plan) that would be expected in a common-law employment relationship.

By removing the requirement for a genuine employer-employee nexus, we now are concerned on further reflection that the 2018 AHP Rule departs too far from ERISA's essential purpose and fails to take appropriate account of the underlying basis for the *bona fide* group or association of employers standard. As stated previously, this purpose and basis require drawing appropriate distinctions between employers and associations acting ''in the interest of an employer'' on the one hand, and entrepreneurial ventures selling insurance on the other. A strong employer-employee nexus condition also helps reduce the vulnerability of MEWAs to fraudulent behavior and mismanagement. Routinely treating people as ''employers'' when they have no employees risks converting ERISA from an employment-based statute, as Congress intended, to one that regulates the sale of insurance to individuals, without regard to an employment relationship.

The Department, upon further review of relevant Supreme Court and circuit court judicial decisions, and consistent with the Department's reconsidered view of working owners (without common-law employees) for purposes of ERISA section 3(5), has concluded that the better interpretation of such case law, for purposes of furthering ERISA's statutory purposes and related policy goals, is that a working owner may act as an employer for purposes of participating in a bona fide employer group or association under circumstances where there are also common-law employees of the working owner. In the Supreme Court's decision, *Raymond B. Yates, M.D., P.C. Profit Sharing Plan* v. *Hendon,* the Court held that a working owner and spouse were eligible to participate in the corporation's ERISA plan, provided that at least one common-law employee of the corporation participated in its plan.[68] Several circuit court opinions

[63] *Id.*

[64] The preamble of the 2018 AHP Rule explained that a test that would treat all nationwide franchises, all nationwide small businesses, or all nationwide minority-owned businesses, as having a common employment-based nexus—no matter the differences in their products, services, regions, or lines of work—wouldn't be sufficient to establish commonality of interest for a national group or association and AHP because it would be impossible to define or limit (*e.g.,* business owners who support democracy) and, ''in the Department's view, would effectively eviscerate the genuine commonality of interest required under ERISA.'' 83 FR 28912, 28926 (June 21, 2018).

[65] 29 CFR 2510.3–5(e).

[66] *See id.*at § 2510.3–3(c).

[67] 83 FR 28931 (June 21, 2018).

[68] *Raymond B. Yates, M.D., P.C. Profit Sharing Plan* v. *Hendon,* 541 U.S. 1, 6 (2004).

also emphasize the existence of an employment relationship when determining if an owner is an employer and/or employee. As the Eleventh Circuit stated in *Donovan* v. *Dillingham,* ''[t]he gist of ERISA's definitions of employer, employee organization, participant, and beneficiary is that a plan, fund, or program falls within the ambit of ERISA only if the plan, fund, or program covers ERISA participants because of their employee status *in an employment relationship*. . . .'' [69] In *Meredith* v. *Time Insurance Company,* the Fifth Circuit held that the Department could reasonably decline to treat a sole proprietor both as an employer and employee under ERISA section 3(5) because the ''employee-employer relationship is predicated on the relationship between two different people.'' [70] Similarly, in *Marcella* v. *Capital Districts Health Plan, Inc.,* the Second Circuit found that working owners without common-law employees are not employers.[71] Further, as indicated in *Donovan,* just as the statutory definition of ''employer'' under ERISA requires an employee, the statutory definition of ''employee'' under ERISA requires the employee to work for another.[72] These holdings are consistent with the Department's traditional interpretation of ''employee'' in 29 CFR 2510.3–3(b) and (c).[73]

[69] *Donovan* v. *Dillingham,* 688 F.2d 1367, 1371 (11th Cir. 1982) (emphasis added).

[70] *Meredith* v. *Time Ins. Co.,* 980 F.2d 352, 358 (5th Cir. 1993); *id.* (''When the employee and employer are one and the same, there is little need to regulate plan administration. . . . It would appear axiomatic that the employee-employer relationship is predicated on the relationship between two different people. . . . We conclude that the power to so define the scope of ERISA has been delegated by Congress to the Department of Labor, and find no reason to disturb the Department's conclusion that ERISA does not intend to treat the spouse of a sole proprietor as an employee.'').

[71] *Marcella* v. *Capital Districts Health Plan, Inc.,* 293 F.3d 42, 48 (2d Cir. 2002); *id.* at 49 (holding that ''a group or association . . . that contains non-employers cannot be an 'employer' within the meaning of ERISA'').

[72] *Baucom* v. *Pilot Life Ins. Co.,* 674 F. Supp. 1175, 1180 (M.D.N.C. 1987). In *Baucom,* ''[r]eturning to ERISA's language, the court observe[d] that, despite its limitations, the statutory definition of 'employee' mandates that an employee must work for another.'' *Id.* (citation omitted).

[73] In 1996, HIPAA added provisions of ERISA and the PHS Act, which specified that for purposes of part 7 of title 1 of ERISA and title XXVII of the PHS Act ''[a]ny plan, fund, or program which would not be (but for this subsection) an employee welfare benefit plan and which is established or maintained by a partnership, to the extent that such plan, fund, or program provides medical care . . . to present or former partners in the partnership . . . shall be treated (subject to paragraph (2)) as an employee welfare benefit plan which is a group health plan.'' ERISA section 732(d); PHS Act section 2722(d). For a group health plan, the term employee also includes any bona fide partner. 26 CFR 54.9831–1(d)(2); 29 CFR 2590.732(d)(2); 45 CFR 146.145(c)(2).

C. Alternatives To Complete Rescission of the 2018 AHP Rule

As part of its deliberations as to whether to propose rescission, the Department considered several alternatives for this rulemaking. The Department contemplated proposing rescission to remove only certain provisions of the 2018 AHP Rule. For example, the Department considered proposing to rescind the working owner provision, which represents the most significant departure from the pre-rule guidance. Similarly, the Department considered proposing to remove the geographic commonality provision, another provision representing a dramatic departure from the pre-rule guidance, since geography is not, on its own, an interest with respect to an employment relationship. However, the Department decided against proposing a rescission of just the specific provisions set aside by the district court. The Department is concerned that the provisions that would remain in the 2018 AHP Rule would not provide an adequate definition of ''employer'' in ERISA section 3(5) that properly reflect the limits of ERISA's definition of ''employer'' and Congress' focus on employment-based arrangements, as opposed to the ordinary commercial provision of insurance outside the employment context, and, for the reasons discussed above, would be missing key elements necessary for a comprehensive framework for a group or association to demonstrate that it is acting ''indirectly in the interest of an employer'' within the meaning of section 3(5) of ERISA.[74]

The Department also considered a proposal to rescind the 2018 AHP Rule and instead codify, in the CFR, the pre-rule guidance. The Department recognizes that there could be benefits to codifying the pre-rule guidance. The pre-rule guidance is largely in the form of advisory opinions, which do not have the same applicability as regulations and technically are not precedential.[75] Application of the Department's pre-rule guidance thus requires interested parties to compare their specific circumstances to various opinions the Department issued to determine whether the Department has addressed analogous facts and circumstances. Nonetheless, the Department concluded that it would be better to seek comment from interested parties on whether the Department should first propose a rule either codifying the pre-rule guidance or creating alternative criteria and then consider that input as part of a comprehensive reevaluation of the definition of ''employer'' in the AHP context.

[74] *See, e.g., Gruber* v. *Hubbard Bert Karla Weber, Inc.,* 159 F.3d 780, 787 (3d Cir. 1988) (''[T]o qualify as an 'employer' for ERISA purposes, an employer group or association must satisfy both the commonality of interest and control requirements.'').

[75] Advisory opinions are issued pursuant to ERISA Procedure 76–1, which in Section 10 describes the effect of advisory opinions as follows: ''An advisory opinion is an opinion of the department as to the application of one or more sections of the Act, regulations promulgated under the Act, interpretive bulletins, or exemptions. The opinion assumes that all material facts and representations set forth in the request are accurate and applies only to the situation described therein. Only the parties described in the request for opinion may rely on the opinion, and they may rely on the opinion only to the extent that the request fully and accurately contains all the material facts and representations necessary to issuance of the opinion and the situation conforms to the situation described in the request for opinion.''

III. Requests for Public Comments

The Department seeks comments from interested parties on all aspects of this proposal to rescind the 2018 AHP Rule in its entirety. In the Department's view, ERISA's statutory purposes would be better served by rescinding the 2018 AHP Rule and removing it from the published CFR while the Department considers alternatives and engages with interested parties. In addition to comments on rescission of the 2018 AHP Rule, the Department also seeks comments on whether the Department should propose a rule for group health plans that codifies and replaces the pre-rule guidance, issue additional guidance clarifying the application of the Department's pre-rule guidance as it relates to group health plans (including, for example, the HIPAA nondiscrimination rule application to AHPs), propose revised alternative criteria for multiple employer association-based group health plans, or pursue some combination of those or other alternative steps. The public comments will inform the Department's decision on whether to finalize this proposal to rescind the 2018 AHP Rule and will also assist the Department in determining if it should engage in future rulemaking on AHPs under ERISA section 3(5). The Department intends that its evaluation will focus on ensuring that the Department's regulatory policy and actions in this area honor the Department's long held view, reiterated in the preamble to the 2018 AHP Rule, that Congress did not intend to treat commercial health insurance products marketed by private entrepreneurs, who lack the close economic or representational ties to participating employers and employees,

as ERISA-covered welfare benefit plans.[76] Comments should be submitted in accordance with the instructions at the beginning of this document.

This proposal and solicitation of public comments is focused on group health plans and does not include retirement plans and welfare plans other than group health plans (*e.g.,* disability plans). The Department acknowledges that its final rule on association retirement plans (ARPs), which was issued after the 2018 AHP Rule and after the district court decision in *New York* v. *United States Department of Labor,* includes commonality, business purpose, and working owner provisions that parallel the provisions in the 2018 AHP Rule.[77] In addition, ERISA has parallel language in the definitions of pension and welfare plan and does not explicitly provide a basis for distinguishing between the two rules. However, there are specific retirement plan considerations that involve issues beyond the scope of this rescission proposal. The Department does not intend to address the ARP rule, which was separately promulgated, in this rulemaking.

IV. Regulatory Impact Analysis

A. Relevant Executive Orders for Regulatory Impact Analyses

Executive Orders (E.O.s) 12866[78] and 13563[79] direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects; distributive impacts; and equity). E.O. 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. E.O. 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitative values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Under E.O. 12866 (as amended by E.O. 14094), the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and review by OMB. As amended by E.O. 14094, section 3(f) of E.O. 12866 defines a ''significant regulatory action'' as a regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $200 million or more; or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, Territorial, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the Executive order.

OMB has designated this action a ''significant regulatory action'' within the meaning of section 3(f)(1) of E.O. 12866, as amended. Key to this designation is that the Department is proposing to rescind a rule that was itself significant under section 3(f)(1).

However, it should also be noted that the 2018 AHP Rule was never fully implemented.[80] While the Department gave AHPs established under the 2018 AHP Rule a temporary safe harbor from enforcement after the district court's decision setting aside the 2018 AHP Rule, that time has long expired, and the Department is not aware of any AHPs that currently exist under the framework of the 2018 AHP Rule.

Consequently, any costs and benefits that would have been anticipated in response to the approach taken in the 2018 AHP Rule were never fully experienced and have long since lapsed for those plans that formed and briefly existed pursuant to the 2018 AHP Rule. The 2018 AHP Rule hypothesized that plans serving small employers and their participants potentially would have benefitted from the ability to band together to offer less generous benefits, and thus reduce their costs. At the same time, however, other plans and participants were assumed to bear the costs, with the 2018 AHP Rule's economic analysis projecting that those employers and participants that remained in the small-group and individual markets could face premium increases between 0.5 and 3.5 percent, resulting in an increase in the number of uninsured individuals caused by those that exited the individual market due to higher premiums. The Department's regulatory impact analysis accompanying the 2018 AHP Rule did not anticipate the litigation or the district court's decision, which largely nullified the assumed costs and benefits. Accordingly, the Department assumes that the costs of this proposal, the rescission of the 2018 AHP Rule, would effectively be zero, while the benefits would be limited to settling any uncertainty caused by the litigation surrounding the regulation and the Department's reexamination of the appropriate criteria for a group or association of employers to sponsor an AHP.

In accordance with E.O. 12866, this proposed rule was reviewed by OMB.

B. Background

An AHP is a health plan formed by a group or association of employers to provide health care coverage for their employees. AHPs have been in existence for some time and are a subset of MEWAs. Under the pre-rule guidance, to qualify as a bona fide employer group or association capable of establishing a single group health plan under ERISA, the group or association had to satisfy the business purpose standard, commonality standard, and control standard, which, along with factors that may be considered in applying these standards, are described above in section II.B. of this preamble. If these standards are not satisfied, a health care arrangement sponsored by the group or association is not treated as a single group health plan. Rather, in general, unless health insurance coverage issued through a group or association constitutes a single group health plan, the group or

[76] 83 FR 28912, 28928 (June 21, 2018); Advisory Opinions Nos. 94–07A (Mar. 14, 1994), available at *www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/1994-07a,* and 2001–04A (Mar. 22, 2001), available at *www.dol.gov/agencies/ebsa/employers-andadvisers/guidance/advisory-opinions/2001-04a.*

[77] 29 CFR 2510.3–55; Definition of ''Employer'' Under Section 3(5) of ERISA—Association Retirement Plans and Other Multiple-Employer Plans, 84 FR 37508 (July 31, 2019).

[78] 58 FR 51735 (Oct. 4, 1993).

[79] 76 FR 3821 (Jan. 21, 2011).

[80] The applicability date provision in the 2018 AHP Rule allowed fully insured plans to begin operating under the rule on September 1, 2018, existing self-insured AHPs could begin operating under the rule on January 1, 2019, and new self-insured AHPs could begin operating under the rule on April 1, 2019. The preamble explained that this phased approach was intended to allot some additional time for the Department and State authorities to address concerns about self-insured AHPs' vulnerability to financial mismanagement and abuse. *See* 83 FR 28912, 28953 (June 21, 2018).

association is disregarded in determining whether the coverage offered to an individual or employer member of the association is individual, small group, or large group market coverage. The scope of these standards, additional nondiscrimination and working owner provisions, and how treatment of AHPs is different under the 2018 AHP Rule are discussed in section I.C. of the preamble.

As noted in section I.E. of this preamble, on March 28, 2019, the U.S. District Court for the District of Columbia set aside the 2018 AHP Rule's definition of bona fide employer groups or associations and the language equating working owners with employees. In response, the Department announced its temporary enforcement policy designed to minimize undue consequences of the district court's decision on AHP participants.[81]

C. Need for Regulatory Action

As discussed in section I.E. of this preamble, the district court set aside the 2018 AHP Rule as inconsistent with ERISA's definition of ''employer'' and of persons ''acting in the interest of an employer.'' The district court concluded that the 2018 AHP Rule's standards for determining ''employer'' status were overbroad and inconsistent with Congress' intent to draw a distinction between genuine employers and persons standing in the shoes of employers, on the one hand, and commercial entities marketing benefits to unrelated employers, on the other.[82] After further consideration, the Department has concluded that the 2018 AHP Rule does not comport with the best interpretation of ERISA's text and animating purposes in the context of AHPs and should be rescinded while the Department reconsiders its specific provisions and possible different regulatory approaches. The Department is proposing to rescind the 2018 AHP Rule in its entirety to provide clarity to entities that wish to sponsor an AHP about the need to rely upon the criteria in the Department's pre-rule guidance and court decisions on the ERISA section 3(5) definition, as opposed to the terms of the 2018 AHP Rule.

D. Affected Entities

The Department does not believe that any entities currently rely upon the 2018 AHP Rule, now that the district court has set aside most of the 2018 AHP Rule and the temporary enforcement policy period has long expired. Rescinding the 2018 AHP Rule would simply maintain the status quo. At the time the Department first promulgated the 2018 AHP Rule, the Department identified 153 entities as potential ''early adopters'' that had signaled their intent to form an AHP under the 2018 AHP Rule. Of these early adopters, 112 of these entities ultimately submitted the required Form M–1, one other entity advised the Department that it intended to file a Form M–1, two indicated they were not required to file a Form M–1, 15 told the Department that they were not pursuing an AHP, one was under investigation for reasons unrelated to the early adopter program, and the remainder were unresponsive to further Department outreach.

E. Benefits

The proposed rule would rescind the 2018 AHP Rule and provide clarity to parties about the continuing unavailability of the 2018 AHP Rule as an alternative to the Department's pre-rule guidance. At the time the 2018 AHP Rule was finalized, the Department also anticipated that it would have to increase dramatically its MEWA enforcement efforts and enhance its coordination with State regulators because of the anticipated increase in the number of AHPs attributable to the new 2018 AHP Rule. Because the 2018 AHP Rule was set aside by the district court, the Department has not had to address a dramatic increase in the number of insolvent MEWAs, although existing fraudulent and mismanaged MEWAs remain a significant challenge to the agency.

F. Costs

Although the 2018 AHP Rule was finalized, it was never fully implemented, and no parties appear to currently rely on the 2018 AHP Rule, given the district court's decision and the expiration of the Department's temporary enforcement policy. As a result, the Department does not believe that rescinding the 2018 AHP Rule would result in any costs. The Department seeks comments on this assumption and any costs interested parties anticipate related to this proposal.

V. Paperwork Reduction Act

The 2018 AHP Rule was not subject to the requirements of the Paperwork Reduction Act of 1995[83] because it did not contain a collection of information as defined in 44 U.S.C. 3502(3). Accordingly, this proposal to rescind the 2018 AHP Rule also does not contain an information collection as defined in 44 U.S.C. 3502(3).

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) imposes certain requirements on rules subject to the notice and comment requirements of section 553(b) of the APA or any other law.[84] Under section 603 of the RFA, agencies must submit an initial regulatory flexibility analysis (IRFA) of a proposal that is likely to have a significant economic impact on a substantial number of small entities, such as small businesses, organizations, and governmental jurisdictions. However, because the 2018 AHP Rule was never fully implemented and the Department is not aware of any existing AHP that was formed in reliance on the rule, this proposed rescission of the 2018 AHP Rule would not have a significant economic impact on a substantial number of small entities.

Pursuant to section 605(b) of the RFA, the Assistant Secretary of the Employee Benefits Security Administration hereby certifies that the proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. The Department invites comments on this certification. As discussed above, at the time the Department first promulgated the 2018 AHP Rule, the Department identified only 153 entities as potential ''early adopters'' that had signaled their intent to form an AHP under the 2018 AHP Rule. Ultimately, 112 of these entities submitted the required Form M–1, one other entity advised the Department that it intended to file a Form M–1, two indicated they were not required to file a Form M–1, 15 told the Department that they were not pursuing an AHP, one was under investigation for reasons unrelated to the early adopter program, and the remainder were unresponsive to further Department outreach. Since the district court set aside the 2018 AHP Rule and the temporary enforcement policy period has expired, any AHPs that formed before the decision in reliance on the 2018 AHP Rule should have wound down, and the Department is not aware of any new AHPs that have formed in reliance on the 2018 AHP Rule. Accordingly, rescission of the 2018 AHP Rule would not have an impact on existing AHPs formed in accordance with the pre-rule guidance.

VII. Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 requires each

[81] *See supra* note 25.

[82] *See supra* at section II.E. of this preamble for a discussion of the decision in *New York* v. *United States Department of Labor.*

[83] 44 U.S.C. 3501 *et seq.*

[84] 5 U.S.C. 551 *et seq.*

Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (adjusted annually for inflation with the base year 1995) in any one year by State, local, and Tribal governments, in the aggregate, or by the private sector.[85] In 2023, that threshold is approximately $177 million. For purposes of the Unfunded Mandates Reform Act, as well as E.O. 12875, this proposal does not include any Federal mandate that the Department expects would result in such expenditures by State, local, or Tribal governments, or the private sector.[86]

VIII. Federalism

E.O. 13132 outlines the fundamental principles of federalism. It also requires Federal agencies to adhere to specific criteria in formulating and implementing policies that have ''substantial direct effects'' on the States, the relationship between the National Government and States, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have these federalism implications must consult with State and local officials and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the proposal. The preamble to the 2018 AHP Rule included a discussion of federalism implications of the rule, which largely focused on and confirmed that the 2018 AHP Rule did not modify State authority under ERISA section 514(b)(6), which gives the Department and State insurance regulators joint authority over MEWAs, including AHPs, to ensure appropriate regulatory and consumer protections for employers and employees relying on an AHP for health care coverage. Because the 2018 AHP Rule was never fully implemented and the Department is not aware of any entities currently relying on the 2018 AHP Rule, the Department does not believe its rescission would 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 that were discussed in the 2018 AHP Rule. Nonetheless, the Department notes that the level and type of State regulation of MEWAs vary widely. The Department is aware that some States have enacted or are considering State laws modeled on the 2018 AHP Rule that are intended to recognize AHPs as employee benefit plans for purposes of State regulation. In fact, CMS on behalf of HHS recently issued a final determination pursuant to section 2723(a)(2) of the PHS Act, section 1321(c)(2) of the ACA, and 45 CFR 150.219 that the Commonwealth of Virginia has not corrected the failure to substantially enforce certain Federal market reforms with respect to issuers offering health insurance coverage through an association of real estate salespersons under such a State law, specifically section 38.2–3521.1 G of the Code of Virginia, as enacted by HB 768/SB 335 (2022).[87] The Department is interested in input from affected States, including State insurance regulators and other State officials, regarding whether they see potential federalism implications that might arise from rescission of the 2018 AHP Rule.

List of Subjects in 29 CFR Part 2510

Employee benefit plans, Pensions.

For the reasons stated in the preamble, the Department of Labor proposes to amend 29 CFR part 2510 as follows:

PART 2510—DEFINITIONS OF TERMS USED IN SUBCHAPTERS C, D, E, F, G, AND L OF THIS CHAPTER

■ 1. The authority citation for part 2510 is revised to read as follows:

Authority: 29 U.S.C. 1002(1), 1002(2), 1002(3), 1002(5), 1002(16), 1002(21), 1002(37), 1002(38), 1002(40), 1002(42), 1002(43), 1002(44), 1031, and 1135; and Secretary of Labor's Order No. 1–2011, 77 FR 1088. Secs. 2510.3–101 and 2510.3–102 also issued under sec. 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. (E.O. 12108, 44 FR 1065, 3 CFR, 1978 Comp., p. 275) and 29 U.S.C. 1135 note.

■ 2. Section 2510.3–3 is amended by revising paragraph (c) introductory text to read as follows:

§ 2510.3–3 Employee benefit plan.

* * * * *

(c) *Employees.* For purposes of this section and except as provided in § 2510.3–55(d):

* * * * *

§ 2510.3–5 [Removed and Reserved]

■ 3. Remove and reserve § 2510.3–5.

Signed at Washington, DC, this 11th day of December 2023.

Lisa M. Gomez,

Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 2023–27510 Filed 12–19–23; 8:45 am]

BILLING CODE 4510–29–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2023–0524; FRL–11525–01–R9]

Air Plan Revisions; California; Vehicle Inspection and Maintenance Contingency Measure

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Under the Clean Air Act (CAA or ''Act''), the Environmental Protection Agency (EPA) is proposing to approve revisions to the California State Implementation Plan (SIP). These revisions concern an amendment to the California motor vehicle inspection and maintenance (I/M) program (also referred to as ''Smog Check'') to include a contingency measure that, if triggered, would narrow the Smog Check inspection exemption for newer model year vehicles in certain California nonattainment areas. The EPA is proposing to approve, as part of the California SIP, the contingency measure and a related statutory provision that authorizes the contingency measure because they meet all the applicable requirements. We are taking comments on this proposal and plan to follow with a final action.

DATES: Comments must be received on or before January 19, 2024.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R09–OAR–2023–0524 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

[85] 2 U.S.C. 1501 *et seq.* (1995).

[86] 58 FR 58093 (Oct. 28, 1993).

[87] The CMS letter, dated September 6, 2023, is available at *www.cms.gov/files/document/letter-virginia-governor-and-insurnace-commissioner-hb-768sb-335-2022-final-determination.pdf.*

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 disabilities who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Jeffrey Buss, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105. By phone: (415) 947–4152 or by email at *Buss.Jeffrey@epa.gov.*

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

Table of Contents

I. The State's Submittal

A. What measure did the State submit?

Table 1 lists the measure and the related statutory provision addressed by this proposal with the dates they were adopted and submitted by the California Air Resources Board (CARB).

TABLE 1—SUBMITTED MEASURE AND STATUTORY PROVISION

Agency	Statute No.	Measure/statutory provision title	Adopted/amended/revised	Submitted
CARB	Not Applicable	California Smog Check Contingency Measure State Implementation Plan Revision.	October 26, 2023	November 13, 2023.
CARB	CA Health & Safety Code (H&SC) section 44011(a)(4)(A) and (B).	Certificate of compliance or noncompliance; biennial requirement; exceptions; inspections; exemption from testing for collector motor vehicle.	Effective on October 10, 2017.	November 13, 2023.

CARB's November 13, 2023 SIP submission includes the ''California Smog Check Contingency Measure State Implementation Plan Revision'' (Released: September 15, 2023) (''Smog Check Contingency Measure SIP''). The Smog Check Contingency Measure itself is presented in Section 4 of the Smog Check Contingency Measure SIP. Other sections address the contingency measure requirements, discuss the opportunities for CARB to adopt contingency measures, provide the background on the California Smog Check program, and present the emission reductions estimates for the ten California nonattainment areas for which the Smog Check Contingency Measure was developed. The appendices included with the Smog Check Contingency Measure SIP include an infeasibility analysis, documentation of emissions estimates, and California H&SC section 44011(a)(4)(A) and (B), effective October 10, 2017. The SIP submission also includes the Notice of Public Hearing, dated September 15, 2023, and CARB Resolution 23–20 (October 26, 2023) adopting the Smog Check Contingency Measure SIP as a revision to the California SIP.

The EPA has reviewed the November 13, 2023 SIP submission of the Smog Check Contingency Measure SIP and finds it to be administratively complete for the purposes of CAA section 110(k)(1), effective upon publication of this proposed rule.[1]

B. Are there other versions of this measure?

There is no previously approved version of the submitted contingency measure. We approved an earlier version of California H&SC section 44011 in our most recent final action approving the regulatory and statutory foundation for the California Smog Check program.[2]

C. What is the purpose of the submitted measure?

Emissions of volatile organic compounds (VOCs) and oxides of nitrogen (NO_X) contribute to the production of ground-level ozone, smog and particulate matter (PM), which harm human health and the environment. The EPA has established national ambient air quality standards (NAAQS) to protect public health and welfare for certain pervasive air pollutants, including ozone and fine PM ($PM_{2.5}$). Section 110 of the CAA requires states to adopt and submit plans (''State Implementation Plans,'' or ''SIPs'') that provide for implementation, maintenance, and enforcement of the NAAQS within such state. Section 110(a) of the CAA requires SIPs to include enforceable emission limitations and other control measures, means or techniques to meet CAA SIP requirements, such as regulations that control VOC, NO_X, and PM emissions.

Additionally, section 182(b)(4) of the CAA requires states with ozone nonattainment areas classified under subpart 2 as Moderate to submit SIP revisions that provide for the implementation of a ''Basic'' vehicle inspection and maintenance (I/M) program in those areas. Section 182(c)(3) of the CAA requires states with ozone nonattainment areas classified under subpart 2 as Serious or above to submit SIP revisions that provide for the implementation of an ''Enhanced'' I/M program in certain urbanized portions of those areas.[3]

As a general matter, Basic and Enhanced I/M programs both achieve their objective by identifying vehicles that have high emissions due to one or more malfunctions and requiring them to be repaired. An Enhanced program covers more of the vehicles in operation and has additional features to better assure that all vehicles are tested properly and effectively repaired. The EPA has established specific

[1] EPA Region 9 SIP Completeness Checklist, November 20, 2023.

[2] 75 FR 38023 (July 1, 2010). See 40 CFR 52.220(c)(372)(ii)(A)(3). California H&SC section 44011 is found in Division 26, Part 5, Chapter 5, Article 2 of the California H&SC. The existing SIP version of California H&SC section 44011 is the version that was operative on April 1, 2005.

[3] The CAA I/M SIP requirements apply to Moderate and above nonattainment areas for the 2008 and 2015 ozone NAAQS pursuant to 40 CFR 51.1102 (for the 2008 ozone NAAQS) and 40 CFR 51.1302 (for the 2015 ozone NAAQS).

requirements for Basic and Enhanced I/M programs in 40 CFR part 51, subpart S (''The EPA's I/M regulation''). The EPA's I/M regulation establishes minimum performance standards for Basic and Enhanced I/M programs as well as requirements for certain elements of the programs, including, among other elements, test frequency, vehicle coverage, test procedures and standards, stations and inspectors, and data collection, analysis, and reporting.[4]

The EPA most recently approved California's Smog Check program into its SIP in 2010, and in that action, the EPA approved the program as meeting the applicable I/M requirements for the various nonattainment areas in the State.[5] The California Bureau of Automotive Repair (BAR) implements the SIP-approved Smog Check program in California, including oversight of the automotive repair industry and administration of the State's vehicle emissions reduction and safety programs. The California Department of Motor Vehicles (DMV) administers motor vehicle registration and licensing and supports BAR in administering the Smog Check program.[6]

Section 172(c)(9) of the CAA requires states with nonattainment areas to submit SIP revisions that provide for the implementation of specific measures, referred to as contingency measures, to be undertaken if the area fails to make reasonable further progress (RFP) or fails to attain the NAAQS by the applicable attainment date. Section 172(c)(9) of the CAA further specifies that contingency measures must be structured so as to take effect without further action by the state or the EPA. For ozone nonattainment areas classified as Serious and above, CAA section 182(c)(9) requires the SIP to include contingency measures to be undertaken if the area fails to meet any applicable RFP milestone. For $PM_{2.5}$ nonattainment areas, the EPA's $PM_{2.5}$ SIP Requirements Rule[7] requires the SIP to include contingency measures to be undertaken following a determination by the EPA that the area has failed: (1) to meet any RFP requirement in an attainment plan approved in accordance with 40 CFR 51.1012; (2) to meet any quantitative milestone in an attainment plan approved in accordance with 40 CFR 51.1013; (3) to submit a quantitative milestone report required under 40 CFR 51.1013(b); or, (4) to attain the applicable $PM_{2.5}$ NAAQS by the applicable attainment date.[8]

Contingency measures must be designed so as to be implemented prospectively and conditionally upon a triggering event; already-implemented control measures may not serve as contingency measures even if they provide emissions reductions beyond those needed for any other CAA purpose.[9] Contingency measures must also consist of control measures that are not otherwise included in the control strategy or that achieve emissions reductions not otherwise relied upon in the control strategy for the area to meet RFP or to demonstrate attainment; and must specify the timeframe within which its requirements become effective following a determination by the EPA that triggers the contingency measure.[10] Also, SIPs addressing the contingency measure requirement must contain a description of the specific trigger mechanisms for the contingency measure(s) and specify a schedule for implementation.[11] Generally, the EPA expects contingency measures to be implemented within approximately 60 days of a triggering event, and that the implemented contingency measures achieve the additional emissions reductions within a year of the triggering event.

The purpose of this SIP revision is to include the Smog Check Contingency Measure into the California SIP to address, in part, the contingency measure requirements for certain nonattainment areas with respect to certain ozone and $PM_{2.5}$ NAAQS.[12] The applicable nonattainment areas and NAAQS are Coachella Valley (2008 and 2015 ozone NAAQS), Eastern Kern County (2008 and 2015 ozone NAAQS), Mariposa County (2015 ozone NAAQS), Sacramento Metro Area (2008 and 2015 ozone NAAQS), San Diego County (2008 and 2015 ozone NAAQS), San Joaquin Valley (1997, 2008, and 2015 ozone NAAQS; 1997 annual, 2006 24-hour, and 2012 annual $PM_{2.5}$ NAAQS), South Coast Air Basin (2008 and 2015 ozone NAAQS; 2012 annual $PM_{2.5}$ NAAQS), Ventura County (2015 ozone NAAQS), Western Mojave Desert (2008 and 2015 ozone NAAQS), and Western Nevada County (2015 ozone NAAQS).[13]

Under the current California Smog Check program, certain vehicles are exempt from the biennial inspection requirement, including vehicles eight or fewer model years old. The Smog Check Contingency Measure, if triggered, will reduce this exemption[14] to seven model years in the nonattainment area at issue upon the first triggering event and to six model years in the nonattainment area at issue upon a second triggering event. Reducing the inspection exemption will increase the number of inspected vehicles and therefore result in additional emission reductions. CARB is authorized under California H&SC section 44011(a)(4)(B)(ii) to narrow the newer model year vehicle inspection exemption from eight or fewer model years old, to seven or fewer model years old, and then to six or less model years old if CARB makes certain findings.

Pursuant to the Smog Check Contingency Measure, within 30 days of the EPA's determination that a nonattainment area covered by the measure has failed to meet a reasonable further progress (RFP) milestone, meet an qualitative milestone, submit a required quantitative milestone report or milestone compliance demonstration, or attain the relevant NAAQS by the applicable attainment date, CARB will be obligated to transmit a letter to BAR and the DMV finding that providing an exemption from Smog Check for certain vehicles in the area at issue will prohibit the State from meeting the State's commitments with respect to the SIP required by the CAA, effectuating a reduction in the Smog Check vehicle inspection exemption to begin with the new calendar year.[15]

II. The EPA's Evaluation and Action

A. How is the EPA evaluating the measure?

The EPA has evaluated the Smog Check Contingency Measure SIP against the applicable procedural and substantive requirements of the CAA for SIPs and SIP revisions and is proposing to conclude that the Smog Check Contingency Measure SIP meets all of the applicable requirements. A SIP must

[4] 40 CFR part 51, subpart S, sections 350–373.

[5] 75 FR 38023 (July 1, 2010).

[6] Smog Check Contingency Measure SIP, at page 15.

[7] 81 FR 58010 (August 24, 2016).

[8] 40 CFR 51.1014(a).

[9] See *Bahr* v. *EPA,* 836 F.3d 1218, at 1235–1237 (9th Cir. 2016).

[10] 40 CFR 51.1014(b).

[11] 40 CFR 51.1014(c).

[12] Smog Check Contingency Measure SIP, pages 11–12: ''The Measure consists of a triggered contingency measure that, if triggered, would change the exemptions for motor vehicles in the California Smog Check Program for the relevant local air district and applicable standard as specified in Table 1 that, together with the local air districts' contingency measures, addresses the contingency measure requirements of the Act.''

[13] Smog Check Contingency Measure SIP, Table 1, at page 3.

[14] The statutory provision included with the Smog Check Contingency Measure SIP (California H&SC section 44011(a)(4)(A) and (B)) refers to the deferral in applicability of the biennial Smog Check inspection requirement based on the age of the vehicle (in model years) as an ''exception'' rather than as an ''exemption.'' Our I/M regulations use the term ''exemption'' for such provisions, and we do so as well in this document.

[15] Smog Check Contingency Measure SIP, at page 16–17.

include enforceable emission limitations and other control measures, means, or techniques, as well as schedules and timetables for compliance, as may be necessary to meet the requirements of the Act (see CAA section 110(a)(2)(A)); provide necessary assurances that the state will have adequate personnel, funding, and authority under state law to carry out such SIP (and is not prohibited by any provision of federal or state law from carrying out such SIP) (see CAA section 110(a)(2)(E)); be adopted by a state after reasonable notice and public hearing (see CAA section 110(l)); and not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the Act (see CAA section 110(l)).[16] We are also evaluating whether the measure meets the requirements for contingency measures for ozone and $PM_{2.5}$ nonattainment areas as specified in CAA sections 172(c)(9) and 182(c)(9) and 40 CFR 51.1014.

B. Does the measure meet the evaluation criteria?

1. Did the State provide for reasonable public notice and hearing prior to adoption?

Under CAA sections 110(a)(1), 110(a)(2), and 110(l), states must adopt and submit SIP revisions after reasonable notice and public hearing. In 40 CFR 51.102(d), the EPA specifies that reasonable public notice in this context is at least 30 days.

CARB adopted the Smog Check Contingency Measure SIP on October 26, 2023, through Resolution 23–20 following a public hearing held on that same day. Prior to adoption, CARB published notice on September 15, 2023 of an October 26, 2023, public hearing, and provided a 30-day written comment period. CARB submitted the Smog Check Contingency Measure SIP to the EPA on November 13, 2023, along with various other materials comprising the SIP submission package, including copies of public comments received during the comment period and CARB's responses to the comments.

Based on the materials provided in the November 13, 2023 SIP submission and summarized above, we are proposing to find that CARB has met the procedural requirements for adoption and submission of SIPs and SIP revisions under CAA sections 110(a)(1), 110(a)(2) and 110(l) and 40 CFR 51.102 with respect to the Smog Check Contingency Measure SIP.

2. Does the State have adequate legal authority to implement the measure?

CAA section 110(a)(2)(E)(i) requires states to provide with their SIPs necessary assurances that the state or relevant local or regional agency will have adequate legal authority to carry out the SIP (and is not prohibited by any provision of Federal or state law from carrying out such SIP).

California H&SC section 44011(a)(4)(B) provides CARB with adequate legal authority to implement the Smog Check Contingency Measure. California H&SC section 44011 requires all motor vehicles powered by internal combustion engines that are registered within an area designated for Smog Check program coverage to be subject to biennial emissions inspection requirements, with certain exceptions. Under California H&SC section 44011(a)(4)(A), motor vehicles four or fewer model years old are exempted. Beginning January 1, 2005, California H&SC section 44011(a)(4)(B)(i) extends the exemption to motor vehicles six or fewer model years old ''unless the state board finds that providing an exception for these vehicles will prohibit the state from meeting the requirements of Section 176(c) of the federal Clean Air Act (42 U.S.C. 7401 *et seq.*) or the state's commitments with respect to the state implementation plan required by the federal Clean Air Act.''

Beginning January 1, 2019, California H&SC section 44011(a)(4)(B)(ii) further extends the exemption to motor vehicles eight or fewer model years old, once again, ''unless the state board finds that providing an exception for these vehicles will prohibit the state from meeting the requirements of Section 176(c) of the federal Clean Air Act (42 U.S.C. 7401 *et seq.*) or the state's commitments with respect to the state implementation plan required by the federal Clean Air Act.'' Instead of the biennial Smog Check inspection, registered owners of motor vehicles seven or eight model years old are required to pay an annual $25 Smog Abatement Fee, $21 of which of which goes to the Air Pollution Control Fund for use to incentivize the purchase of cleaner vehicles and equipment through the Carl Moyer Memorial Air Quality Standards Attainment Program (Moyer Program).[17]

The Smog Check Contingency Measure SIP provides the framework for CARB to make the finding that is the prerequisite to the narrowing of the exemption from eight or fewer model years old to seven or fewer model years old, and then from seven model years old to six model years old (if triggered a second time in a given nonattainment area) and to set in motion the sequence of actions necessary to effectuate that change in the Smog Check program. Under the terms of the Smog Check Contingency Measure SIP, CARB's finding (and the subsequent narrowing of the newer model year exemption) is based on the EPA's determination that a given nonattainment area failed to attain the relevant NAAQS by the applicable attainment date, meet a reasonable further progress (RFP) milestone, meet a quantitative milestone; or submit a required quantitative milestone report or milestone compliance demonstration. Moreover, CARB's finding and subsequent narrowing of the newer model year exemption will allow the relevant State agencies to fulfill their ''commitments with respect to the state implementation plan required by the federal Clean Air Act.'' In this instance, the commitments are the obligations placed on CARB, BAR and the DMV that are set forth in the Smog Check Contingency Measure SIP to effectuate this change in the Smog Check program (if triggered) once the Smog Check Contingency Measure SIP is approved as part of the California SIP.

In addition, as a recipient of federal funds, CARB acknowledges that it must ensure that it complies with Title VI and the EPA's Title VI implementation regulations in its relevant programs and policies and concludes that, in developing the Smog Check Contingency Measure SIP, CARB staff engaged in a thorough public process to address the requirements of Title VI and other relevant laws.[18] CARB describes its process for developing and adopting the Smog Check Contingency Measure in Section IV.B (''Title VI and Environmental Justice'') of the Smog Check Contingency Measure SIP. In addition, the State included a description of its written Civil Rights Policy and Discrimination Complaint process.[19]

[16] The Smog Check Contingency Measure SIP is also not prohibited under CAA section 193, which prohibits any pre-1990 SIP control requirement relating to nonattainment pollutants in nonattainment areas from being modified unless the SIP is revised to insure equivalent or greater emission reductions of such air pollutants, because, by narrowing an exemption to testing, the Smog Check Contingency Measure (if triggered) would increase emissions reductions from the Smog Check program.

[17] Smog Check Contingency Measure SIP, at page 1.

[18] CARB Resolution 23–20, October 26, 2023, pages 4 and 5. The EPA's Title VI implementation regulations are set forth in 40 CFR part 7.

[19] Smog Check Contingency Measure SIP, Section IV.B., pages 20–22.

In light of the authority vested in CARB through California H&SC section 44011(a)(4)(B) and CARB's Title VI evaluation, the EPA is proposing to find that CARB has provided adequate necessary assurances for purposes of CAA section 110(a)(2)(E)(i) for the Smog Check Contingency Measure SIP. The EPA's proposed SIP approval does not constitute a formal finding of compliance with Title VI or 40 CFR part 7.

3. Is the measure enforceable as required under CAA section 110(a)(2)?

We have evaluated the enforceability of the Smog Check Contingency Measure with respect to applicability and exemptions; standard of conduct and compliance dates; sunset provisions; discretionary provisions; and test methods, recordkeeping and reporting,[20] and are proposing to conclude for the reasons below that the regulation is enforceable for the purposes of CAA section 110(a)(2).

First, with respect to applicability, we are proposing to find that the Smog Check Contingency Measure is sufficiently clear as to which nonattainment areas are covered by the measure and how the measure would be implemented by CARB, BAR and the DMV. Table 1 of the Smog Check Contingency Measure SIP lists the specific ozone and $PM_{2.5}$ nonattainment areas covered by the Smog Check Contingency Measure and the specific NAAQS that are covered in these areas. The Smog Check Contingency Measure would be triggered if the EPA makes one of the following determinations for an applicable nonattainment area and relevant NAAQS (referred to as ''triggering events''): (1) failure to attain by the applicable attainment date; (2) failure to meet a reasonable further progress (RFP) milestone; (3) failure to meet a quantitative milestone; or (4) failure to submit a required quantitative milestone report or milestone compliance demonstration.[21] Once triggered, BAR and the DMV will change the Smog Check program to remove the exemption for vehicles eight model years old in the nonattainment area at issue and to require such vehicles in the area at issue to be subject to biennial Smog Check inspections. This change will be effectuated through the annual vehicle registration process that is relied upon to implement the Smog Check program.

Second, we are proposing to find that the Smog Check Contingency Measure is sufficiently specific such that the applicable State agencies, including CARB, BAR and the DMV, know what they must do to implement the measure and the timeline for taking the necessary actions. The specific agencies, their responsibilities, and their respective timelines for implementation of the contingency measure are described in Section 4 of the Smog Check Contingency Measure SIP. With respect to compliance dates, we note that CARB is obligated to initiate the change in the Smog Check program for vehicles eight model years old within 30 days of the effective date of one of the EPA's determinations that constitute a triggering event.

Third, the Smog Check Contingency Measure does not include sunset provisions. Fourth, we note that the Smog Check Contingency Measure does not contain provisions that allow for discretion on the part of CARB's Executive Officer. Fifth, with respect to test methods, and recordkeeping and reporting requirements, we note that the Smog Check Contingency Measure does not affect the existing Smog Check inspection or emissions testing methods or procedures and that 40 CFR 51.366 requires all states with I/M programs to submit an annual report to the EPA. This report includes sufficient test statistics, by model year, to verify that the Smog Check Contingency Measure, if triggered, is being implemented in a given area.

4. Does the measure meet the requirements for contingency measures?

Based on our review of the Smog Check Contingency Measure in light of the requirements for contingency measures described in Section I.C of this document, we are proposing to find that the Smog Check Contingency Measure meets the applicable requirements for such measures under CAA sections 172(c)(9) and 182(c)(9) and 40 CFR 51.1014. First, we note that the Smog Check Contingency Measure is designed to be both prospective and conditional. The narrowing of the exemption for certain newer vehicles from Smog Check inspections would take effect in the future in a given nonattainment area only if the EPA makes certain determinations for that area that constitute a triggering event for the purposes of contingency measures.

Second, the Smog Check Contingency Measure includes an appropriate triggering mechanism (*i.e.,* EPA's final determination of failure to attain the NAAQS by the applicable attainment date, to meet an RFP milestone, to meet a quantitative milestone, or to submit a required quantitative milestone report or milestone compliance demonstration) and addresses all the types of contingencies listed in CAA sections 172(c)(9) and 182(c)(9) and 40 CFR 51.1014(a).

Third, the narrowing of the exemption for newer vehicles from Smog Check inspections is not required for any other CAA purpose, and the emissions reductions from the Smog Check Contingency Measure are not included in any RFP or attainment demonstration in any of the applicable nonattainment areas. We recognize that the existing exemption under the California Smog Check program for motor vehicles eight model years old or less is reflected in the State's certification (and performance standard modeling) of the existing Smog Check program as meeting the requirements for I/M programs under the CAA and the EPA's I/M regulations for the 2015 ozone NAAQS.[22] However, narrowing the exemption under the Smog Check Contingency Measure would provide emissions reductions that are surplus to those that are needed for other CAA purposes or that are relied upon for RFP or attainment.

Fourth, the Smog Check Contingency Measure is structured so as to be implemented in a timely manner without significant further action by the State or EPA. Within 30 days of the effective date of a triggering event, CARB has committed to transmit a letter to BAR and the DMV conveying its finding under California H&SC section 44011(a)(4)(B)(ii) that providing the exemption for certain motor vehicles from Smog Check inspection in specific nonattainment areas (defined by specified ZIP Codes) will prohibit the State from meeting commitments with

[20] These concepts are discussed in detail in an EPA memorandum from J. Craig Potter, EPA Assistant Administrator for Air and Radiation, et al., titled ''Review of State Implementation Plans and Revisions for Enforceability and Legal Sufficiency,'' dated September 23, 1987.

[21] Smog Check Contingency Measure SIP, page 15.

[22] CARB submitted ''California Smog Check Performance Standard Modeling and Program Certification for the 70 Parts Per Billion (ppb) 8-Hour Ozone Standard (release date: February 10, 2023)'' to the EPA as a SIP revision on April 26, 2023.

respect to the SIP required by the Clean Air Act.[23] CARB indicates that the letter to BAR and the DMV will explain that the Smog Check contingency measure is being triggered to meet contingency measure requirements under CAA sections 172(c)(9) or 182(c)(9) thereby effectuating the change to the Smog Check exemptions for motor vehicles from eight or fewer model years old to seven or fewer model years old throughout the applicable nonattainment area (or six or fewer model years old in cases of the second trigger).[24]

Lastly, the Smog Check Contingency Measure is designed to achieve the estimated emissions reductions within roughly a year of the triggering event. In this case, upon receipt of the CARB letter and the applicable ZIP Codes, CARB, BAR and the DMV staff will initiate the process to narrow the Smog Check exemption. Under the Smog Check Contingency Measure, the DMV will update their Smog Check renewal programing to require a Smog Check inspection for the eight model years old vehicles (or seven model years old vehicles in the case of a subsequent second triggering event) in the ZIP Codes provided by CARB staff, and the eight to seven model years old (or seven to six model years old) exemption change will begin for registrations expiring beginning January 1st of the applicable year. The corresponding emissions reductions would begin to accrue on a rolling basis in the year following the triggering event in tandem with the vehicle registration renewals that are due with each passing month of the year.

5. Would the measure interfere with reasonable further progress (RFP) and attainment or any other applicable requirement of the Act?

The Smog Check program continues to provide emissions reductions in nonattainment areas in California, and the emissions reduction benefits are included in the RFP and attainment plans developed for these areas. The current Smog Check program provides an exemption from biennial Smog Check inspections for motor vehicles eight model years or less. The Smog Check Contingency Measure, if triggered, would narrow the exemption to motor vehicles seven model years or less, or further narrow it to motor vehicles six model years or less, if triggered again by a second triggering event, and would result in additional emissions reductions beyond those included in the RFP and attainment demonstration for the applicable nonattainment area. Thus, we are proposing to find that the approval of the Smog Check Contingency Measure is consistent with CAA section 110(l) and would not interfere with RFP, attainment or any other applicable requirement of the Act.

6. Will the State have adequate personnel and funding for the measure?

CAA section 110(a)(2)(E)(i) requires states to provide with their SIPs necessary assurances that the state or relevant local or regional agency will have adequate personnel and funding to carry out the SIP.

The California Smog Check program is a mature program that has been in existence for several decades. The program is decentralized, and, thus, relies upon a network of licensed privately-owned Smog Check testing or repair stations. There are approximately 7,000 such stations throughout the State.[25] The Smog Check Contingency Measure, if triggered, would result in less funding for the Air Pollution Control Fund of the Moyer Program, but an increase in funding from certification fees to BAR.[26]

In addition, the Smog Check Contingency Measure would require CARB to coordinate with BAR and the DMV to update their Smog Check renewal program to require a Smog Check inspection for the eight model year old vehicles (or seven model years old in the case of a second triggering event in a given nonattainment area) in the applicable nonattainment area(s), as identified by ZIP codes provided by CARB staff.[27] The Smog Check Contingency Measure SIP does not explicitly indicate whether any additional personnel or funding for any of the relevant State agencies would be needed to implement the Smog Check Contingency Measure. However, given the maturity of the existing Smog Check program, the limited action required to implement the contingency measure, and the slight increase in funding for BAR (through an increase in number of vehicles paying certification fees), we expect that CARB, BAR and the DMV will be able to implement the Smog Check Contingency Measure without the need for additional personnel or funding. The costs for the additional Smog Check inspections resulting from implementation of the Smog Check Contingency Measure would be borne by vehicle owners.

7. What emissions reductions would the contingency measure achieve?

Additionally, we have reviewed CARB's estimate of the emissions reductions that can be expected if the Smog Check Contingency Measure is triggered and find the estimates to be reasonable and adequately documented.[28] CARB provides the documentation for the area-specific emissions estimates in Appendix B (''Smog Check Contingency Measure Emissions Benefits Methodology'') and Appendix C (''Carl Moyer Program Emission Impacts Analysis Methodology'') of the Smog Check Contingency Measure SIP.

Table 2 presents CARB's estimated emissions reductions from the Smog Check Contingency Measures for each of the applicable nonattainment areas and NAAQS, taking into account the estimated emissions reductions that would not be achieved by the Moyer Program (due to decreased funding from the smog check abatement fee). The estimates in Table 2 represent the emissions reductions expected to be achieved after the first triggering event (which will narrow the exemption from eight or fewer model years old to seven or fewer model years old).[29] The EPA will consider the estimated emissions reductions associated with the Smog Check Contingency Measure when determining whether CARB and the relevant air district have fully met the contingency measure requirements under CAA sections 172(c)(9) and 182(c)(9) and 40 CFR 51.1014 for the relevant NAAQS and nonattainment areas. For example, the emission reductions from the Smog Check Contingency Measure combined with the emission reduction from one or more other contingency measures may be sufficient in a given nonattainment area for a given NAAQS. The EPA expects to make these determinations in separate rulemakings.

[23] Smog Check Contingency Measure SIP, page 16.

[24] Id.

[25] BAR, ''California Smog Check Program,'' brochure, revised January 2019.

[26] Smog Check Contingency Measure SIP, page 22.

[27] Smog Check Contingency Measure SIP, page 16.

[28] Our review of CARB's emissions estimates is included in a Memorandum to Docket EPA–R09–OAR–2023–0524, titled ''Evaluation of CARB's Emissions Estimates from the Smog Check Contingency Measure,'' dated November 7, 2023.

[29] Smog Check Contingency Measure SIP, page 61.

TABLE 2—ESTIMATED EMISSIONS REDUCTIONS FROM SMOG CHECK CONTINGENCY MEASURE

Nonattainment area	Applicable NAAQS	Analysis year	Emissions reductions (tons per day) [a]	
			NO_X	VOC
Coachella Valley	2008 Ozone NAAQS	2031	0.0078	0.003
	2015 Ozone NAAQS	2037	0.0078	0.003
Eastern Kern County	2008 Ozone NAAQS	2026	0.002997	0.001
	2015 Ozone NAAQS	2032	0.002997	0.001
Mariposa County	2015 Ozone NAAQS	2026	0.0003	0.0001
Sacramento Metro	2008 Ozone NAAQS	2024	0.0761	0.037
	2015 Ozone NAAQS	2032	0.0463	0.015
San Diego County	2008 Ozone NAAQS	2026	0.064	0.027
	2015 Ozone NAAQS	2032	0.055	0.016
San Joaquin Valley	1997 Ozone NAAQS	2023	0.108	0.056
	2008 Ozone NAAQS	2031	0.076	0.025
	2015 Ozone NAAQS	2037	0.073	0.024
	1997 Annual $PM_{2.5}$ NAAQS	2023	0.113	0.052
	2006 24-Hour $PM_{2.5}$ NAAQS	2024	0.116	0.052
	2012 Annual $PM_{2.5}$ NAAQS	2030	0.083	0.027
South Coast Air Basin	2008 Ozone NAAQS	2029	0.271	0.096
	2015 Ozone NAAQS	2035	0.230	0.077
	2012 Annual $PM_{2.5}$ NAAQS	2030	0.276	0.093
Ventura County	2015 Ozone NAAQS	2026	0.01292	0.005
West Mojave Desert	2008 Ozone NAAQS	2026	0.02094	0.009
	2015 Ozone NAAQS	2032	0.01794	0.006
Western Nevada County	2015 Ozone NAAQS	2026	0.002	0.001

[a] Emissions estimates shown in this table are summarized from information presented in section 5 of the Smog Check Contingency Measure SIP. The emissions estimates represent the net change in emissions taking into account the emissions benefit from implementation of the Smog Check Contingency Measure and the foregone emissions reductions from corresponding reductions in funds paid into the Moyer Program. For ozone nonattainment areas, the estimates represent summer planning season values. For $PM_{2.5}$ nonattainment areas, the estimates represent annual average values.

C. Did the State consider environmental justice in developing this measure?

Environmental justice (EJ) is 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. As explained in the EJ Legal Tools to Advance Environmental Justice 2022 document,[30] the CAA provides states with the discretion to consider environmental justice in developing rules and measures related to nonattainment area SIP requirements, including contingency measures.

In this instance, CARB exercised this discretion and evaluated environmental justice considerations as part of its SIP submission.[31] CARB analyzed whether there would be disproportionate impact on disadvantaged communities within the affected nonattainment areas if the contingency measure were triggered and analyzed the impacts of the contingency measure on vehicle owners in disadvantaged communities.[32] Based on the results of these analyses, CARB concluded that the Smog Check Contingency Measure is consistent with CARB's environmental justice policies and would not disproportionately impact people of any race, culture, income, or national origin.[33]

In reviewing CARB's analysis, the EPA defers to CARB's reasonable exercise of its discretion in considering EJ in this way. The EPA is taking proposed action to approve the Smog Check Contingency Measure SIP because it meets minimum requirements pursuant to the CAA and relevant implementing regulations. The EPA also finds that consideration of EJ analyses in this context is reasonable. The EPA encourages air agencies generally to evaluate environmental justice considerations of their actions and carefully consider impacts to communities. The EJ analyses submitted by CARB were considered but were not the basis for the EPA's decision to propose approval of the Smog Check Contingency Measure SIP as meeting the minimum applicable requirements.

D. Proposed Action and Public Comment

Pursuant to section 110(k)(3) of the Act, and for the reasons given above, the EPA is proposing to approve the Smog Check Contingency Measure SIP and a related statutory provision (*i.e.,* California H&SC section 44011(a)(4)(A) and (B), operative October 10, 2017). Our proposed action is based on our finding that the Smog Check Contingency Measure SIP meets the applicable procedural and substantive CAA requirements for SIP revisions; that the Smog Check Contingency Measure itself meets applicable requirements for a valid contingency measure under the CAA and the EPA's implementation regulations; and that the Smog Check Contingency Measure would achieve additional emissions reductions of NO_X and VOC, if triggered by certain EPA determinations, in Coachella Valley, Eastern Kern County, Mariposa County, Sacramento Metro, San Diego County, San Joaquin Valley, South Coast Air Basin, Ventura County, West Mojave Desert, and Western Nevada County.

We are not making any determination presently as to whether this individual contingency measure is sufficient by itself for CARB and the relevant air district to fully comply with the contingency measure requirements in any specific nonattainment area or specific NAAQS under CAA sections 172(c)(9) and 182(c)(9) and 40 CFR 51.1014. We will be acting on the contingency measure SIP plan elements in the relevant nonattainment plan SIP submissions for the respective areas and

[30] EPA, EPA Legal Tools to Advance Environmental Justice, May 2022.

[31] Smog Check Contingency Measure SIP, Section 4.B (''Title VI and Environmental Justice).

[32] Id, at pages 18–20.

[33] CARB Resolution 23–20, October 26, 2023, page 5.

NAAQS in separate rulemakings, and will consider the emissions reductions associated with the Smog Check Contingency Measure at that time. We will accept comments from the public on this proposal until January 19, 2024.

If finalized as proposed, this action would add the Smog Check Contingency Measure and the related statutory provision to the federally-enforceable California SIP.

III. Incorporation by Reference

In this action, 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 California Health & Safety Code section 44011(a)(4)(A) and (B), which authorizes CARB to narrow the newer model vehicle Smog Check inspection exemption. 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 CAA, the Administrator is required to approve a SIP submission that complies with the relevant 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 CAA. Accordingly, this proposed action merely proposes to approve a state measure 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), 13563 (76 FR 3821, January 21, 2011) 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 an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); 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 CAA.

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 proposed 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.''

CARB evaluated environmental justice considerations as part of its SIP submission given that the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. The EPA reviewed and considered the air agency's evaluation of environmental justice considerations of this action, as is described above in the section titled, ''Environmental Justice Considerations'' as part of the EPA's review. Due to the nature of the action being taken here, this proposed action is expected to have a neutral to positive impact on the air quality of the affected areas. In addition, 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, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: December 12, 2023.

Martha Guzman Aceves,

Regional Administrator, Region IX.

[FR Doc. 2023–27688 Filed 12–19–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2023–0477; FRL–11532–01–R9]

Clean Air Plans; Contingency Measures for the Fine Particulate Matter Standards; San Joaquin Valley, California

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve two state implementation plan (SIP) submissions under the Clean Air Act (CAA) that address the contingency measures requirements for the 1997 annual, 2006 24-hour, and 2012 annual fine particulate matter ($PM_{2.5}$) national ambient air quality standards (NAAQS or ''standards'') for the San Joaquin Valley $PM_{2.5}$ nonattainment area. The two SIP submissions include the area's contingency measure plan element and two specific contingency measures that would apply to residential wood burning heaters and fireplaces and non-agricultural, rural open areas. A third contingency measure, applicable to light-duty on-road motor vehicles, is the subject of a separate action by the EPA, but the related emissions reductions from the third measure are accounted for in this proposed rule. The EPA is proposing approval of the SIP submissions because the Agency has

determined that they are in accordance with the applicable requirements for such SIP submissions under the CAA and EPA implementation regulations for the $PM_{2.5}$ NAAQS. The proposed approval, if finalized, would incorporate the two contingency measures into the federally enforceable SIP. The EPA will accept comments on this proposed rule during a 30-day public comment period.

DATES: Comments must be received by January 19, 2024.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R09–OAR–2023–0477 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 (*e.g.,* audio or video) 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: Rory Mays, Planning and Analysis Branch (AIR–2), Air and Radiation Division, EPA Region IX, 75 Hawthorne Street, San Francisco, CA 94105. By phone: (415) 972–3227 or by email at *mays.rory@epa.gov.*

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

Table of Contents

I. Background for Proposed Action

A. Standards, Designations, Classifications, and Plans

Under section 109 of the Clean Air Act (CAA or ''Act''), the EPA has established national ambient air quality standards (NAAQS or ''standards'') for certain pervasive air pollutants (referred to as ''criteria pollutants'') and conducts periodic reviews of the NAAQS to determine whether they should be revised or whether new NAAQS should be established. To date, the EPA has established NAAQS for particulate matter, ozone, carbon monoxide, nitrogen dioxide, sulfur dioxide and lead. Under CAA section 110, states have primary responsibility for meeting the NAAQS within the state, and must submit an implementation plan that specifies the manner in which the state will attain and maintain the NAAQS. These implementation plans are referred to as ''state implementation plans'' or ''SIPs.''

Periodically, states must make SIP submissions of different types to meet additional CAA requirements. For example, after the EPA promulgates a new or revised NAAQS, under CAA section 110(a)(1) and (2), states are required to adopt and submit to the EPA a state implementation plan that provides for implementation, maintenance, and enforcement of the NAAQS. Such plans are referred to as ''infrastructure SIPs.'' Similarly, after the EPA promulgates designations for a new or revised NAAQS, states with designated nonattainment areas must make SIP submissions that meet additional requirements for such nonattainment areas, under CAA section 172(c) and, in the case of the $PM_{2.5}$ NAAQS, CAA sections 188 and 189. This type of SIP submission is referred to as an ''attainment plan.''

Under CAA section 110(k), the EPA is charged with evaluation of each SIP submission submitted by states for compliance with applicable CAA requirements, and for approval or disapproval (in whole or in part) of the submission. The EPA evaluates SIP submissions and takes action to approve, disapprove, or conditionally approve them through notice-and-comment rulemaking published in the **Federal Register**. Where appropriate, the EPA may act on specific parts of a SIP submission in separate rulemaking actions.

In 1997, the EPA promulgated new NAAQS for fine particulate matter, using particles with an aerodynamic diameter less than or equal to a nominal 2.5 micrometers (''$PM_{2.5}$'') as the indicator.[1] The EPA established primary and secondary annual and 24-hour standards for $PM_{2.5}$. The EPA set the 1997 annual $PM_{2.5}$ NAAQS, both primary and secondary standards, at 15.0 micrograms per cubic meter (μg/m^3), based on a 3-year average of annual mean $PM_{2.5}$ concentrations. The EPA set the 1997 24-hour $PM_{2.5}$ NAAQS, both primary and secondary standards, at 65 μg/m^3, based on the 3-year average of the 98th percentile of 24-hour $PM_{2.5}$ concentrations. Collectively, we refer herein to the 1997 24-hour and annual $PM_{2.5}$ NAAQS as the ''1997 $PM_{2.5}$ NAAQS.'' In 2006, the EPA promulgated a new, more stringent 24-hour NAAQS for $PM_{2.5}$ by lowering the primary and secondary standards level from 65 μg/m^3 to 35 μg/m^3 (referred to herein as the ''2006 24-hour $PM_{2.5}$ NAAQS'').[2] In 2012, the EPA promulgated a new, more stringent annual NAAQS for $PM_{2.5}$ by lowering the primary standards level from 15.0 μg/m^3 to 12.0 μg/m^3 (herein referred to as the ''2012 annual $PM_{2.5}$

[1] 62 FR 38652 (July 18, 1997) and 40 CFR 50.7.

[2] 71 FR 61144 (October 17, 2006) and 40 CFR 50.13.

NAAQS'').[3] Each iteration of the $PM_{2.5}$ NAAQS remains in effect, and states with designated nonattainment areas for each of them are obligated to meet applicable attainment plan requirements for them.

The EPA established each of these NAAQS after considering substantial evidence from numerous health studies demonstrating that serious health effects are associated with exposures to $PM_{2.5}$ concentrations above these levels. Epidemiological studies have shown statistically significant correlations between elevated $PM_{2.5}$ levels and premature mortality. Other important health effects associated with $PM_{2.5}$ exposure include aggravation of respiratory and cardiovascular disease (as indicated by increased hospital admissions, emergency room visits, absences from school or work, and restricted activity days), changes in lung function, and increased respiratory symptoms. Individuals particularly sensitive to $PM_{2.5}$ exposure include older adults, people with heart and lung disease, and children.[4] $PM_{2.5}$ can be particles emitted by sources directly into the atmosphere as a solid or liquid particle (''primary $PM_{2.5}$'' or ''direct $PM_{2.5}$''), or can be particles that form in the atmosphere as a result of various chemical reactions involving $PM_{2.5}$ precursor emissions emitted by sources (''secondary $PM_{2.5}$''). The EPA has identified the precursors of $PM_{2.5}$ to be oxides of nitrogen (''NO_X''), sulfur oxides (''SO_X''), volatile organic compounds (VOCs), and ammonia.[5]

Following promulgation of a new or revised NAAQS, the EPA is required under CAA section 107(d) to designate areas throughout the Nation as attaining or not attaining the NAAQS. As noted previously, for areas the EPA has designated nonattainment, states are required under the CAA to submit attainment plan SIP submissions. These SIP submissions must provide for, among other elements, reasonable further progress (RFP) towards attainment of the NAAQS, attainment of the NAAQS no later than the applicable attainment date, and implementation of contingency measures to take effect if the state fails to meet RFP or to attain the NAAQS by the applicable attainment date.

The San Joaquin Valley is located in the southern half of California's Central Valley and includes all of San Joaquin, Stanislaus, Merced, Madera, Fresno, Tulare, and Kings Counties, and the valley portion of Kern County.[6] The area is home to four million people and is the Nation's leading agricultural region. Stretching over 250 miles from north to south and averaging 80 miles wide, it is partially enclosed by the Coast Mountain range to the west, the Tehachapi Mountains to the south, and the Sierra Nevada range to the east. In 2005, the EPA designated the San Joaquin Valley as nonattainment for the 1997 annual $PM_{2.5}$ NAAQS and nonattainment for the 1997 24-hour $PM_{2.5}$ NAAQS.[7]

The local air district with primary responsibility for developing attainment plan SIP submissions for the $PM_{2.5}$ NAAQS in this area is the San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD or ''District''). Once the District adopts the regional plan, the District submits the plan to the California Air Resources Board (CARB) for adoption as part of the California SIP. CARB is the State agency responsible for adopting and revising the California SIP and for submitting the SIP and SIP revisions to the EPA. Generally speaking, under California law, CARB is responsible for regulation of mobile sources while the local air districts are responsible for regulation of stationary sources.

Originally, the EPA designated areas for the 1997 annual and 24-hour $PM_{2.5}$ NAAQS under subpart 1 (of part D of title I of the CAA), *i.e.,* without specifying the classifications of nonattainment required by subpart 4. Later, in response to a court decision,[8] the EPA classified nonattainment areas for the 1997 annual and 24-hour $PM_{2.5}$ NAAQS, consistent with the classifications set forth in subpart 4. With respect to San Joaquin Valley, in 2014, the EPA classified the San Joaquin Valley as a ''Moderate'' nonattainment area,[9] and then in 2015, reclassified the area as a ''Serious'' nonattainment area for the 1997 annual and 24-hour $PM_{2.5}$ NAAQS.[10]

In 2016, the EPA determined that the San Joaquin Valley had failed to attain the 1997 annual and 24-hour $PM_{2.5}$ NAAQS by the applicable ''Serious'' area attainment date.[11] As a result, the State of California was required, under CAA section 189(d), to submit a new SIP submission that, among other elements, provides for expeditious attainment of the 1997 annual and 24-hour $PM_{2.5}$ NAAQS and for a minimum five percent annual reduction in the emissions of direct $PM_{2.5}$ or a $PM_{2.5}$ plan precursor pollutant in the San Joaquin Valley (herein, referred to as a ''Five Percent Plan''). The Five Percent Plan for the 1997 annual and 24-hour $PM_{2.5}$ NAAQS was due no later than December 31, 2016.[12]

With respect to the 2006 24-hour $PM_{2.5}$ NAAQS, the EPA initially designated San Joaquin Valley as nonattainment under subpart 1 (*i.e.,* without classification) [13] but, in 2014, in response to the court decision referred to previously, the EPA classified the area as Moderate.[14] In 2016, the EPA reclassified San Joaquin Valley as a Serious nonattainment area for the 2006 24-hour $PM_{2.5}$ NAAQS based on the EPA's determination that the area could not practicably attain these NAAQS by the applicable attainment date of December 31, 2015.[15] The EPA established an August 21, 2017 deadline for California to adopt and submit a SIP submission addressing the Serious nonattainment area requirements for the 2006 24-hour $PM_{2.5}$ NAAQS.[16]

With respect to the 2012 annual $PM_{2.5}$ NAAQS, the EPA designated San Joaquin Valley as a Moderate nonattainment area in 2015.[17] Under CAA section 189 and the EPA's $PM_{2.5}$ SIP Requirements Rule,[18] the deadline for the state to submit an attainment plan SIP submission addressing the Moderate nonattainment area requirements for the 2012 annual $PM_{2.5}$ NAAQS is 18 months from the effective date of the designation of the area.[19] The effective date of the designation of the San Joaquin Valley as a Moderate nonattainment area for the 2012 annual $PM_{2.5}$ NAAQS was April 15, 2015, and thus, the deadline for a SIP submission addressing the Moderate area requirements was October 15, 2016.

[3] 78 FR 3086 (January 15, 2013) and 40 CFR 50.18.

[4] 78 FR 3086, 3088.

[5] EPA, Air Quality Criteria for Particulate Matter, No. EPA/600/P–99/002aF and EPA/600/P–99/002bF, October 2004.

[6] For a precise description of the geographic boundaries of the San Joaquin Valley nonattainment area, see 40 CFR 81.305.

[7] 70 FR 944 (January 5, 2005), codified at 40 CFR 81.305.

[8] In *Natural Resources Defense Council* v. *EPA,* 706 F.3d 428 (D.C. Cir. 2013), the U.S. Court of Appeals for D.C. Circuit concluded that the EPA erred in implementing the 1997 $PM_{2.5}$ NAAQS solely pursuant to the general implementation requirements of subpart 1, without also considering the requirements specific to PM_{10} nonattainment areas in subpart 4, part D of title I of the CAA.

[9] 79 FR 31566 (June 2, 2014).

[10] 80 FR 18528 (April 7, 2015).

[11] 81 FR 84481 (November 23, 2016).

[12] Id. at 84482.

[13] 74 FR 58688 (November 13, 2009).

[14] 79 FR 31566.

[15] 81 FR 2993 (January 20, 2016).

[16] Id. at 3000.

[17] 80 FR 2206 (January 15, 2015).

[18] 81 FR 58010 (August 24, 2016); codified at 40 CFR part 51, subpart Z.

[19] 40 CFR 51.1003(a).

B. Findings and Contingency Measure Disapprovals

In the wake of these EPA actions, CARB and the District worked together to prepare a comprehensive SIP submission to address the nonattainment area requirements for the 1997, 2006, and 2012 $PM_{2.5}$ NAAQS for San Joaquin Valley, but did not meet the various SIP submission deadlines. In late 2018, the EPA issued a finding of failure to submit to the State for the required attainment plan SIP submissions for the 1997 annual and 24-hour $PM_{2.5}$ NAAQS, the 2006 24-hour $PM_{2.5}$ NAAQS, and the 2012 annual $PM_{2.5}$ NAAQS for the San Joaquin Valley.[20] The EPA's finding of failure to submit was effective January 7, 2019. Under CAA section 110(c), the EPA is obligated to promulgate a Federal Implementation Plan (FIP) within two years of a finding that a state has failed to make a required SIP submission, unless the state submits a SIP submission that corrects the deficiency, and the EPA approves that SIP submission, before the EPA promulgates such FIP.[21] In this case, the finding of failure to submit established a deadline of January 7, 2021, for the EPA to promulgate a FIP to address all applicable attainment plan requirements for the 1997 annual and 24-hour $PM_{2.5}$ NAAQS, the 2006 24-hour $PM_{2.5}$ NAAQS, and 2012 annual $PM_{2.5}$ NAAQS for San Joaquin Valley, for which the EPA had not received and approved an adequate SIP submission from the State.

To address a portion of current FIP obligation, the EPA recently proposed a FIP to address the contingency measures requirements for the San Joaquin Valley for the 1997 annual, 2006 24-hour, and 2012 annual $PM_{2.5}$ NAAQS.[22] In short, the proposed contingency measure FIP includes two specific contingency measures, one of which would extend certain wood-burning curtailment restrictions Valley-wide and another which would extend certain fugitive dust requirements to certain open areas that are not currently subject to control requirements.

On May 10, 2019, CARB submitted two SIP submissions to address the nonattainment area requirements for all four of the relevant $PM_{2.5}$ NAAQS for the San Joaquin Valley, including the contingency measure requirement.[23] On November 8, 2021, CARB submitted a third SIP submission to amend the portions of the May 10, 2019 SIP submissions that pertain to the 1997 annual $PM_{2.5}$ NAAQS.[24] As discussed in the following paragraph, the EPA has previously taken a series of actions on these SIP submissions to address different nonattainment area requirements for each of the NAAQS. In this proposed action, we are focused only on the contingency measure requirements.

In 2020, the EPA approved the portion of the SIP submissions related to the 2006 24-hour $PM_{2.5}$ NAAQS, but deferred action on the contingency measure element.[25] In 2021, the EPA approved the portion of the SIP submissions related to the Moderate area requirements for the 2012 annual $PM_{2.5}$ NAAQS except for the contingency measure element, which the EPA disapproved.[26] The EPA also disapproved the previously-deferred contingency measure element for the 2006 24-hour $PM_{2.5}$ NAAQS.[27] In another 2021 action, the EPA disapproved the portion of the SIP submissions related to the 1997 annual $PM_{2.5}$ NAAQS except for the emissions inventory, which the Agency approved.[28] In 2022, the EPA approved the portion of the SIP submission related to the 1997 24-hour $PM_{2.5}$ NAAQS, with the exception of the contingency measure element.[29] In our action on the SIP submission related to the 1997 24-hour $PM_{2.5}$ NAAQS, we disapproved the contingency measure element, but also found that the contingency measure requirement was moot for that particular $PM_{2.5}$ NAAQS because of the EPA's concurrent determination of attainment by the applicable attainment date for San Joaquin Valley for the 1997 24-hour $PM_{2.5}$ NAAQS.[30]

In July 2023, the EPA proposed approval of the portions of the three SIP submissions that pertain to the 1997 annual $PM_{2.5}$ NAAQS in the San Joaquin Valley nonattainment area.[31] More recently, we took action to finalize our approval of the SIP submissions for the 1997 annual $PM_{2.5}$ NAAQS, as proposed; however, our recent action on various elements of the San Joaquin Valley $PM_{2.5}$ plan for the 1997 annual $PM_{2.5}$ NAAQS did not address the contingency measures requirements for that particular $PM_{2.5}$ NAAQS.[32]

With respect to contingency measure elements, the State's May 10, 2019 $PM_{2.5}$ SIP submissions for San Joaquin Valley relied upon contingency provisions included in District Rule 4901 (''Wood Burning Fireplaces and Wood Burning Heaters''), specifically section 5.7.3 of the rule, and a demonstration that the emissions reductions from the contingency measure would be sufficient to meet the contingency measure SIP requirements of CAA section 172(c)(9) if the reductions were viewed together with ''surplus'' [33] emissions reductions from already-implemented measures.[34] We disapproved the contingency measure elements for San Joaquin Valley for the 1997 annual, 2006 24-hour, and 2012 annual $PM_{2.5}$ NAAQS because the contingency provision (*i.e.,* section 5.7.3) in Rule 4901 did not address the potential for State failures to meet RFP, to meet a quantitative milestone, or to submit a quantitative milestone report. In addition, the contingency measure provision of Rule 4901 was not structured to achieve any additional emissions reductions if the EPA were to find that the monitoring locations in the ''hot spot'' counties (*i.e.,* Fresno, Kern, or Madera) are the only counties in the San Joaquin Valley that are violating the $PM_{2.5}$ NAAQS as of the attainment date.[35] In addition, the contingency

[20] 83 FR 62720 (December 6, 2018).

[21] The finding of failure to submit also started an 18-month new source review (NSR) offset sanction clock and a 24-month highway sanction clock for the State of California. CAA section 179(a) and 40 CFR 52.31.

[22] 88 FR 53431 (August 8, 2023).

[23] The SIP revisions submitted on May 10, 2019, include the ''2016 Moderate Area Plan for the 2012 $PM_{2.5}$ Standard'' (''2016 $PM_{2.5}$ Plan'') and the ''2018 Plan for the 1997, 2006, and 2012 $PM_{2.5}$ Standards'' (''2018 $PM_{2.5}$ Plan''), which incorporates by reference the ''San Joaquin Valley Supplement to the 2016 State Strategy for the State Implementation Plan'' (''Valley State SIP Strategy''). On February 11, 2020, CARB submitted a revised version of Appendix H (''RFP, Quantitative Milestones, and Contingency'') that replaces the version submitted with the 2018 $PM_{2.5}$ Plan on May 10, 2019. The EPA found the SIP submissions complete in a letter dated June 24, 2020, from Elizabeth J. Adams, Director, EPA Region IX, to Richard W. Corey, Executive Officer, CARB. The EPA's completeness determination terminated the NSR offsets and highway sanctions started by the December 6, 2018 finding of failure to submit but did not affect the FIP obligation.

[24] The SIP revision submitted on November 8, 2021, is titled ''Attainment Plan Revision for the 1997 Annual $PM_{2.5}$ Standard'' (''15 $\mu g/m^3$ SIP Revision'').

[25] 85 FR 44192 (July 22, 2020).

[26] 86 FR 67343 (November 26, 2021).

[27] Id.

[28] 86 FR 67329 (November 26, 2021).

[29] 87 FR 4503 (January 28, 2022).

[30] Id.

[31] 88 FR 45276 (July 14, 2023).

[32] EPA, ''Air Quality State Implementation Plans; Approvals and Promulgations: California; 1997 Annual Fine Particulate Matter Serious and Clean Air Act Section 189(d) Nonattainment Area Requirements; San Joaquin Valley, CA,'' Final rule, signed December 5, 2023.

[33] In this context, ''surplus'' refers to emissions reductions not otherwise relied upon for RFP or attainment demonstrations.

[34] See 86 FR 38652, 38668–38669 (July 22, 2021); 86 FR 49100, 49123–49124 and 49132–49133 (September 1, 2021).

[35] See 86 FR 38652, 38669–38670 (proposed disapproval of the contingency measure element for

Continued

measure elements did not provide sufficient justification as to why the one adopted contingency measure (in Rule 4901) would suffice to meet the CAA requirements for contingency measures for the $PM_{2.5}$ NAAQS for San Joaquin Valley notwithstanding the fact that the one measure would not achieve one year's worth of RFP, as recommended in longstanding EPA guidance.[36] [37]

In our final rules disapproving the contingency measure elements for San Joaquin Valley for the 1997 annual, 2006 24-hour, and 2012 annual $PM_{2.5}$ NAAQS, we indicated that the disapprovals would begin an 18-month clock for imposition of the offset sanction in CAA section 179(b)(2) and a 24-month clock for imposition of the highway funding sanction in CAA section 179(b)(1) unless the State submits, and the EPA approves, a SIP revision that corrects the deficiencies that we identified in our final actions prior to implementation of the sanctions.[38]

II. Summary of SIP Submissions and Evaluation for Compliance With SIP Revision Procedural Requirements

A. Summary of SIP Submissions

On June 8, 2023, CARB submitted the ''$PM_{2.5}$ Contingency Measure State Implementation Plan Revision (May 18, 2023)'' (herein referred to as the ''SJV $PM_{2.5}$ Contingency Measure SIP'') to the EPA as a revision to the California SIP.[39] Also on June 8, 2023, CARB submitted revisions to Rule 4901 that add $PM_{2.5}$ NAAQS contingency provisions that we refer to herein as the ''Residential Wood Burning Contingency Measure.'' The District adopted the SJV $PM_{2.5}$ Contingency Measure SIP and Residential Wood Burning Contingency Measure on May 18, 2023, and submitted them to CARB for adoption and submission to the EPA as SIP revisions. The District adopted the SJV $PM_{2.5}$ Contingency Measure SIP and Residential Wood Burning Contingency Measure to correct the deficiencies identified by the EPA in the November 26, 2021 disapprovals of the contingency measure elements for the 1997 annual, 2006 24-hour, and 2012 annual $PM_{2.5}$ NAAQS and the previously adopted contingency provisions of Rule 4901. In this document, we are proposing action on both the SJV $PM_{2.5}$ Contingency Measure SIP and the Residential Wood Burning Contingency Measure.

The June 8, 2023 SIP submission includes the two specific SIP revisions (*i.e.,* the SJV $PM_{2.5}$ Contingency Measure SIP and the Residential Wood Burning Contingency Measure), as well as supporting material including the resolutions of adoption, CARB evaluation and completeness forms, and evidence of public notice and hearing. The SJV $PM_{2.5}$ Contingency Measure SIP includes a general discussion of contingency measures and related requirements and guidance, context for this particular SIP revision, and feasibility analyses developed by the District and CARB to identify potential contingency measures for the $PM_{2.5}$ NAAQS for the San Joaquin Valley. (In our evaluation of the latter, we refer to the State's feasibility analyses herein as infeasibility demonstrations.) The SJV $PM_{2.5}$ Contingency Measure SIP includes appendices that provide further detailed information and documentation for, among other things, the emissions reductions estimated for the Residential Wood Burning Contingency Measure. The District also attached excerpts from certain previously submitted SIPs to provide support for the conclusions drawn by the District and CARB with respect to the infeasibility of adopting additional contingency measures for the San Joaquin Valley. The June 8, 2023 SIP submission of the SJV $PM_{2.5}$ Contingency Measure SIP and Residential Wood Burning Contingency Measure was deemed administratively complete by operation of law on December 8, 2023, consistent with CAA section 110(k)(1).[40]

Through adoption of the SJV $PM_{2.5}$ Contingency Measure SIP, the District committed to evaluating revisions to a specific fugitive dust rule, District Rule 8051 (''Open Areas''), for potential as a second contingency measure for the $PM_{2.5}$ NAAQS for the SJV.[41] On September 21, 2023, the District adopted revisions to Rule 8051 to add contingency provisions that we refer to herein as the ''Rural Open Areas Contingency Measure.'' The District adopted the Rural Open Areas Contingency Measure to supplement the SJV $PM_{2.5}$ Contingency Measure SIP by providing additional emissions reductions for the San Joaquin Valley if triggered by one of the contingency events. On October 16, 2023, CARB submitted the Rural Open Areas Contingency Measure to the EPA as a revision to the California SIP.[42] In this document, we are also proposing action on the Rural Open Areas Contingency Measure.

The October 16, 2023 SIP submission includes the SIP revision itself (*i.e.,* the Rural Open Areas Contingency Measure) as well as supporting material including the resolutions of adoption, CARB evaluation and completeness forms, and evidence of public notice and hearing. The EPA has reviewed the October 16, 2023 SIP submission of the Rural Open Areas Contingency Measure and finds it to be administratively complete for the purposes of CAA section 110(k)(1), effective upon publication of this proposed rule.[43]

B. Evaluation for Compliance With SIP Revision Procedural Requirements

Under CAA section 110(l), SIP revisions must be adopted by the state, and the state must provide for reasonable public notice and hearing prior to adoption. Pursuant to 40 CFR 51.102, states must provide at least 30-days' notice of any public hearing to be held on a proposed SIP revision. States must provide the opportunity to submit written comments and allow the public the opportunity to request a public hearing within that period.[44]

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the 1997 annual $PM_{2.5}$ NAAQS); and 86 FR 49100, 49124–49125 (proposed disapproval of the contingency measure element for the 2012 annual $PM_{2.5}$ NAAQS) and 49133–49134 (proposed disapproval of the contingency measure element for the 2006 24-hour $PM_{2.5}$ NAAQS) (September 1, 2021). The proposed disapprovals were finalized at 86 FR 67329 (1997 annual $PM_{2.5}$ NAAQS); 86 FR 67343 (2012 annual $PM_{2.5}$ NAAQS and 2006 24-hour $PM_{2.5}$ NAAQS).

[36] Id.

[37] 81 FR 58010, 58066. See also 57 FR 13498, 13511, 13543–13544 (April 16, 1992), and 59 FR 41998, 42014–42015 (August 16, 1994).

[38] 86 FR 67329, 67341 (1997 annual $PM_{2.5}$ NAAQS); 86 FR 67343, 67346–67347 (2012 annual $PM_{2.5}$ NAAQS and 2006 24-hour $PM_{2.5}$ NAAQS).

[39] CARB adopted the SJV $PM_{2.5}$ Contingency Measure SIP and Residential Wood Burning Contingency Measure as SIP revisions on June 7, 2023, through Executive Order S–23–010 and submitted the SIP revisions to the EPA electronically on June 8, 2023, as attachments to a letter dated June 7, 2023, from Steven S. Cliff, Ph.D., Executive Officer, CARB to Martha Guzman, Regional Administrator, EPA Region IX.

[40] In addition, see EPA Region IX SIP Completeness Checklist, October 13, 2023.

[41] SJV $PM_{2.5}$ Contingency Measure SIP, pp. 31–32.

[42] CARB adopted the Rural Open Areas Contingency Measure as a SIP revision on October 13, 2023, through Executive Order S–23–014 and submitted the SIP revision to the EPA electronically on October 16, 2023, as an attachment to a letter dated October 13, 2023, from Steven S. Cliff, Ph.D., Executive Officer, CARB to Martha Guzman, Regional Administrator, EPA Region IX.

[43] EPA Region IX SIP Completeness Checklist, October 18, 2023.

[44] In addition to establishing procedural requirements for SIP revisions, CAA section 110(l) prohibits the EPA from approving any SIP revision that would interfere with any applicable requirement for reasonable further progress (RFP) or attainment or any other applicable requirement of the CAA. In this instance, the Residential Wood Burning Contingency Measure and the Rural Open Areas Contingency Measure would provide emissions reductions beyond those needed for RFP and attainment of the NAAQS in San Joaquin Valley and, thus, would not interfere with the RFP and attainment demonstrations for the area.

The District adopted the SJV $PM_{2.5}$ Contingency Measure SIP and the Residential Wood Burning Contingency Measure on May 18, 2023, through Resolution No. 2023–5–7, following a public hearing held on the same day. Prior to adoption, the District published notice of the May 18, 2023 public hearing in newspapers of general circulation in each of the eight counties that comprise the San Joaquin Valley, and provided more than 30 days for submission of written comments. CARB subsequently adopted the SJV $PM_{2.5}$ Contingency Measure SIP and the Residential Wood Burning Contingency Measure as a revision to the SIP on June 7, 2023, through Executive Order S–23–010. CARB then submitted the SJV $PM_{2.5}$ Contingency Measure SIP and the Residential Wood Burning Contingency Measure to the EPA on June 8, 2023, as an attachment to a transmittal letter dated June 7, 2023.

The District adopted the Rural Open Areas Contingency Measure on September 21, 2023, through Resolution No. 2023–9–9, following a public hearing held on the same day. Prior to adoption, the District published notice of the September 21, 2023 public hearing in newspapers of general circulation in each of the eight counties that comprise the San Joaquin Valley, and provided more than 30 days for submission of written comments. CARB subsequently adopted the Rural Open Areas Contingency Measure as a revision to the SIP on October 13, 2023, through Executive Order S–23–014. CARB then submitted the Rural Open Areas Contingency Measure to the EPA on October 16, 2023, as an attachment to a transmittal letter dated October 13, 2023.

Based on the materials provided in the June 8, 2023 and October 16, 2023 SIP submissions, we propose to find that the District and the CARB have met the procedural requirements for adoption and submission of SIP revisions under CAA section 110(l) and 40 CFR 51.102.

III. Contingency Measure Requirements, Guidance, and Legal Precedent

The EPA first provided its views on the CAA's requirements for particulate matter plans under part D, title I of the Act in the following guidance documents: (1) ''State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990'' (''General Preamble'');[45] (2) ''State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990; Supplemental'';[46] and (3) ''State Implementation Plans for Serious PM–10 Nonattainment Areas, and Attainment Date Waivers for PM–10 Nonattainment Areas Generally; Addendum to the General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990'' (''General Preamble Addendum'').[47] More recently, in the $PM_{2.5}$ SIP Requirements Rule, the EPA established regulatory requirements and provided further interpretive guidance on the statutory SIP requirements that apply to areas designated nonattainment for all $PM_{2.5}$ NAAQS.[48]

A. Statutory and Regulatory Requirements

Under CAA section 172(c)(9), states required to make an attainment plan SIP submission must include contingency measures to be implemented if the area fails to meet RFP (''RFP contingency measures'') or fails to attain the NAAQS by the applicable attainment date (''attainment contingency measures''). Under the $PM_{2.5}$ SIP Requirements Rule, states must include contingency measures that provide that the state will implement them following a determination by the EPA that the state has failed: (1) to meet any RFP requirement in the approved SIP; (2) to meet any quantitative milestone (QM) in the approved SIP; (3) to submit a required QM report; or (4) to attain the applicable $PM_{2.5}$ NAAQS by the applicable attainment date.[49] Contingency measures must be fully adopted rules or control measures that are ready to be implemented quickly upon failure to meet RFP or failure of the area to meet the relevant NAAQS by the applicable attainment date.[50] In general, we expect all actions needed to effect full implementation of the measures to occur within 60 days after the EPA notifies the state of a failure to meet RFP or to attain.[51] Moreover, we expect the additional emissions reductions from the contingency measures to be achieved within a year of the triggering event.[52]

The purpose of contingency measures is to continue progress in reducing emissions while a state revises its SIP to meet the missed RFP requirement or to correct ongoing nonattainment. Neither the CAA nor the EPA's implementing regulations establish a specific level of emission reductions that implementation of contingency measures must achieve, but the EPA recommends that contingency measures should provide for emission reductions equivalent to approximately one year of reductions needed for RFP in the nonattainment area.[53] For $PM_{2.5}$ NAAQS SIP planning purposes, the EPA recommends that RFP should be calculated as the overall level of reductions needed to demonstrate attainment divided by the number of years from the base year to the attainment year.[54] As part of the attainment plan SIP submission, the EPA expects states to explain the amount of anticipated emissions reductions that the contingency measures will achieve. In the event that a state is unable to identify and adopt contingency measures that will provide for approximately one year's worth of emissions reductions, then EPA recommends that the state provide a reasoned justification why the smaller amount of emissions reductions is appropriate.[55]

To satisfy the contingency measure requirements of 40 CFR 51.1014, the contingency measures adopted as part of a $PM_{2.5}$ NAAQS attainment plan must consist of control measures for the area that are not otherwise required to meet other attainment plan requirements (*e.g.,* to meet reasonably available control measure (RACM)/reasonably available control technology (RACT) requirements). By definition, contingency measures are measures that are over and above what a state must adopt and impose to meet RFP and to provide for attainment by the applicable attainment date.

Contingency measures serve the purpose of providing additional emission reductions during the period after a failure to meet RFP or failure to attain as the state prepares a new SIP submission to rectify the problem. Accordingly, contingency measures must provide such additional emission reductions during an appropriate period and must specify the timeframe within which their requirements would become effective following any of the EPA determinations specified in 40 CFR 51.1014(a).

[45] 57 FR 13498 (April 16, 1992).

[46] 57 FR 18070 (April 28, 1992).

[47] 59 FR 41998 (August 16, 1994).

[48] 81 FR 58010.

[49] 40 CFR 51.1014(a).

[50] 81 FR 58010, 58066 and General Preamble Addendum, 42015.

[51] 81 FR 58010, 58066. See also General Preamble 13512, 13543–13544, and General Preamble Addendum, 42014–42015.

[52] General Preamble, 13511.

[53] 81 FR 58010, 58066. See also General Preamble, 13511, 13543–13544, and General Preamble Addendum, 42014–42015.

[54] 81 FR 58010, 58066.

[55] 81 FR 58010, 58067.

In addition, to comply with CAA section 172(c)(9), contingency measures must be both conditional and prospective, so that they will go into effect and achieve emission reductions only in the event of a future triggering event such as a failure to meet RFP or a failure to attain. In a 2016 decision called *Bahr* v. *EPA,*[56] the Ninth Circuit Court of Appeals held that CAA section 172(c)(9) does not allow EPA approval of already-implemented control measures as contingency measures. Thus, already-implemented measures cannot serve as contingency measures under CAA section 172(c)(9). For purposes of the $PM_{2.5}$ NAAQS, a state must develop, adopt, and submit one or more contingency measures to be triggered upon a failure to meet any RFP requirement, failure to meet a quantitative milestone requirement, or failure to attain the NAAQS by the applicable attainment date, regardless of the extent to which already-implemented measures would achieve surplus emission reductions beyond those necessary to meet RFP or quantitative milestone requirements and beyond those predicted to achieve attainment of the NAAQS.

In a recent decision on the EPA's approval of a SIP contingency measure element for the ozone NAAQS, the Ninth Circuit Court of Appeals held that, under the EPA's current guidance, the surplus emissions reductions from already-implemented measures cannot be relied upon to justify the approval of a contingency measure that would achieve far less than one year's worth of RFP as sufficient by itself to meet the contingency measure requirements of CAA sections 172(c)(9) and 182(c)(9) for the nonattainment area.[57]

B. Draft Revised Contingency Measure Guidance

In March 2023, the EPA published notice of availability announcing a new draft guidance addressing the contingency measures requirement of section 172(c)(9), entitled ''Draft: Guidance on the Preparation of State Implementation Plan Provisions that Address the Nonattainment Area Contingency Measure Requirements for Ozone and Particulate Matter (DRAFT—3/17/23—Public Review Version)'' (herein referred to as the ''Draft Revised Contingency Measure Guidance'') and opportunity for public comment.[58] The principal differences between the draft revised guidance and existing guidance on contingency measures relate to the EPA's recommendations concerning the specific amount of emission reductions that implementation of contingency measures should achieve, and the timing for when the emissions reductions from the contingency measures should occur. The Draft Revised Contingency Measure Guidance also provides recommended procedures for developing a demonstration, if applicable, that the area lacks sufficient feasible measures to achieve one year's worth of reductions, building on existing guidance that the state provide a reasoned justification why the smaller amount of emissions reductions is appropriate.

Under the Draft Revised Contingency Measure Guidance, the recommended level of emissions reductions that contingency measures should achieve would represent one year's worth of ''progress'' as opposed to one year's worth of RFP.[59] One year's worth of ''progress'' is calculated by determining the average annual reductions between the base year emissions inventory and the projected attainment year emissions inventory, determining what percentage of the base year emissions inventory this amount represents, then applying that percentage to the projected attainment year emissions inventory to determine the amount of reductions needed to ensure ongoing progress if contingency measures are triggered.

With respect to the time period within which reductions from contingency measures should occur, the EPA previously recommended that contingency measures take effect within 60 days of being triggered, and that the resulting emission reductions generally occur within one year of the triggering event. Under the Draft Revised Contingency Measure Guidance, in instances where there are insufficient contingency measures available to achieve the recommended amount of emissions reductions within one year of the triggering event, the EPA believes that contingency measures that provide reductions within up to two years of the triggering event would be appropriate to consider towards achieving the recommended amount of emissions reductions. The Draft Revised Contingency Measure Guidance does not alter the 60-day recommendation for the contingency measures to take initial effect.

If, after adequately evaluating additional control measures, the state is unable to identify contingency measures that would provide approximately one year's worth of emissions reductions, the Draft Revised Contingency Measure Guidance recommends that the state should provide a reasoned justification (referred to herein as an ''infeasibility demonstration'') that explains and documents how it has evaluated all existing and potential control measures relevant to the appropriate source categories and pollutants in the nonattainment area and has reached reasonable conclusions regarding whether such measures are feasible.[60]

As explained in the Draft Revised Contingency Measure Guidance, while the EPA notes that CAA section 172(c)(9) and section 182(c)(9) do not explicitly provide for consideration of whether specific measures are feasible, the Agency believes that it is reasonable to infer that the statute does not require control measures regardless of any technological or cost constraints whatsoever.[61] It is more reasonable to interpret the contingency measure requirement not to require air agencies to adopt and impose infeasible measures. The statutory provisions applicable to other nonattainment area plan control measure requirements, including RACM/RACT (for ozone and PM), best available control measure (BACM)/best available control technology (BACT) (for PM), and most stringent measures (MSM) (for PM), allow air agencies to exclude certain control measures that are deemed unreasonable or infeasible (depending on the requirement). For example, the MSM provision in CAA section 188(e) requires plans to include ''the most stringent measures that are included in the implementation plan of any state or are achieved in practice in any state, and can feasibly be implemented in the area.'' The EPA considers it reasonable to conclude that Congress similarly did not expect air agencies to satisfy the contingency measure requirement with infeasible measures. Thus, the EPA anticipates that a demonstrated lack of feasible measures would be a reasoned justification for adopting contingency measures that only achieve a lesser amount of emission reductions.

[56] *Bahr* v. *EPA,* 836 F.3d 1218, 1235–1237 (9th Cir. 2016). See also *Sierra Club* v. *EPA,* 21 F.4th 815, 827–28 (D.C. Cir. 2021).

[57] *Assoc. of Irritated Residents* v. *EPA,* 10 F.4th 937, 946–47 (9th Cir. 2021) (''*AIR* v. *EPA*'' or ''*AIR*'').

[58] 88 FR 17571 (March 23, 2023). The Draft Revised Contingency Measure Guidance is available at *https://www.epa.gov/air-quality-implementation-plans/draft-contingency-measures-guidance.*

[59] Draft Revised Contingency Measure Guidance, p. 22.

[60] Draft Revised Contingency Measure Guidance, p. 29.

[61] Id.

IV. EPA Review of San Joaquin Valley Contingency Measures

We provide our review of two specific contingency measures—the Residential Wood Burning Contingency Measure and the Rural Open Areas Contingency Measure—in sections IV.A and IV.B of this document, respectively. As noted previously, we are reviewing and proposing approval of a third contingency measure, the Smog Check Contingency Measure,[62] in a separate rulemaking; [63] however, we provide a summary of the Smog Check Contingency Measure in section IV.C for informational purposes. Because we are proposing approval of the contingency measures, we take into account the measures' anticipated emission reductions in our evaluation of the SJV $PM_{2.5}$ Contingency Measure SIP, which we present in section V of this proposed rule.

A. Residential Wood Burning Contingency Measure

1. Background and Regulatory History

Residential wood burning includes wood-burning heaters (*i.e.,* woodstoves, pellet stoves, and wood-burning fireplace inserts), which are used primarily for heat generation, and wood-burning fireplaces, which are used primarily for aesthetic purposes. All of these devices emit direct $PM_{2.5}$ and NO_X. However, wood-burning heaters, that are certified under the EPA's New Source Performance Standards (NSPS) emit lower levels of $PM_{2.5}$ compared to wood-burning fireplaces and non-certified heaters when properly installed, operated, and maintained.

Residential wood-burning is included within the ''Residential Fuel Combustion'' emissions inventory category within the 2018 $PM_{2.5}$ Plan's emissions inventories. In the 2018 $PM_{2.5}$ Plan, the District estimates emissions of 2.82 tons per day (tpd) of $PM_{2.5}$ and 0.42 tpd NO_X (annual average) specifically from residential wood burning for each year from 2017 onward. However, these estimates do not account for the effect of 2019 amendments to Rule 4901, discussed in the following section of this document.

Rule 4901 (''Wood Burning Fireplaces and Wood Burning Heaters'') establishes requirements for the sale/transfer, operation, and installation of wood-burning devices and on the advertising of wood for sale intended for burning in a wood-burning fireplace, wood-burning heater, or outdoor wood-burning device within the San Joaquin Valley. One of the most effective ways to reduce wintertime smoke is a curtailment program that restricts use of wood-burning heaters and fireplaces on days that are conducive to buildup of PM concentrations (*i.e.,* days where ambient $PM_{2.5}$ and/or PM_{10} concentrations are forecast to be above a particular level, known as a ''curtailment threshold'').

Rule 4901 includes a tiered mandatory curtailment program that establishes different curtailment thresholds based on the type of devices (*i.e.,* registered clean-burning devices [64] vs. unregistered devices) and different counties (*i.e.,* hot spot vs. non-hot spot). During a Level One Episodic Wood Burning Curtailment, operation of wood-burning fireplaces and other unregistered wood-burning heaters or devices is prohibited, but properly operated, registered wood-burning heaters may be used.[65] During a Level Two Episodic Wood Burning Curtailment, operation of any wood-burning device is prohibited.[66] However, the rule includes an exemption from the curtailment provisions for (1) locations where piped natural gas service is not available and (2) residences for which a wood-burning fireplace or wood-burning heater is the sole available source of heat.[67]

In order to implement the curtailment program under Rule 4901, the District develops daily air quality forecasts, based on EPA and CARB guidance, which include a projection of the maximum $PM_{2.5}$ concentration in each county for the following day.[68] District staff then compare this maximum county $PM_{2.5}$ concentration forecast with the curtailment thresholds in Rule 4901. If a county's $PM_{2.5}$ forecast exceeds the applicable threshold, then the District's Air Pollution Control Officer declares a curtailment for the county for the following day.

In 2019, the District lowered the curtailment thresholds in Madera, Fresno, and Kern counties, which the District identified as ''hot spot'' counties, because they were ''either new areas of gas utility or areas deemed to have persistently poor air quality.'' [69] Table 1 presents the residential curtailment thresholds in Rule 4901, as revised in 2019.

TABLE 1—RESIDENTIAL WOOD BURNING CURTAILMENT THRESHOLDS IN RULE 4901

[As amended in 2019]

Episodic wood burning curtailment levels	Hot spot counties (Madera, Fresno, and Kern)	Non-hot spot counties (San Joaquin, Stanislaus, Merced, Kings, and Tulare)
Level One (No Burning Unless Registered)	12 µg/m³	20 µg/m³.
Level Two (No Burning for All)	35 µg/m³	65 µg/m³.

The 2019 revision by the District also added a provision to the rule to operate as a contingency measure, which would lower the curtailment thresholds for any county that failed to attain the applicable standards to levels consistent with current thresholds for hot spot counties. However, the EPA disapproved this provision because it did not meet all of the CAA requirements for contingency measures.[70] Specifically, it did not address three of the four required triggers for contingency measures in 40 CFR 51.1014(a) and was not structured to achieve any additional emissions reductions if the EPA found that the monitoring locations in the ''hot spot''

[62] CARB, ''California Smog Check Contingency Measure State Implementation Plan Revision,'' release date September 15, 2023, (''Smog Check Contingency Measure'').

[63] EPA, ''Air Plan Revision; California; Motor Vehicle Inspection and Maintenance Program Contingency Measure,'' Proposed rule, published in this **Federal Register**.

[64] In order to be registered, a device must either be certified under the NSPS at time of purchase or installation and at least as stringent as Phase II requirements or be a pellet-fueled wood burning heater exempt from EPA certification requirements at the time of purchase or installation (Rule 4901, section 5.9.1). The rule includes requirements for documentation and inspection to verify compliance with these standards (Rule 4901, sections 5.9.2 and 5.10).

[65] Rule 4901, section 5.7.1.

[66] Rule 4901, section 5.7.2.

[67] Rule 4901, section 5.7.4.

[68] Email dated October 9, 2019, from Jon Klassen, SJVUAPCD to Meredith Kurpius, EPA Region IX, Subject: ''RE: Info to support Rule 4901.''

[69] 2018 $PM_{2.5}$ Plan, Appendix J, 60.

[70] 86 FR 67329, 67338 (for the 1997 annual $PM_{2.5}$ NAAQS) and 86 FR 67343, 67345 (for the 2006 24-hour $PM_{2.5}$ NAAQS and 2012 annual $PM_{2.5}$ NAAQS).

counties (*i.e.,* Fresno, Kern, or Madera) were the only counties in the San Joaquin Valley that are violating the applicable $PM_{2.5}$ NAAQS as of the attainment date.[71] In addition, with respect to the 1997 annual $PM_{2.5}$ NAAQS in particular, the EPA also disapproved the contingency provision in Rule 4901 because the EPA was concurrently disapproving the RFP and attainment demonstrations and, thus, was unable to determine whether the emissions reductions from the contingency provision were in fact surplus to the reductions that would be needed to provide for RFP and attainment for the 1997 annual $PM_{2.5}$ NAAQS in the SJV.[72] Accordingly, the SIP-approved version of Rule 4901 does not include any contingency provision.

2. Summary of State Submission

On May 18, 2023, the District amended the contingency measure in section 5.7.3 of Rule 4901, and CARB submitted the amended rule as part of the June 8, 2023 SIP Submission. The contingency measure would be triggered by a final determination by the EPA that the District failed to meet one or more of the following triggering events for the applicable $PM_{2.5}$ NAAQS:

(1) Any Reasonable Further Progress requirement;

(2) Any quantitative milestone;

(3) Submission of a quantitative milestone report; or

(4) Attainment of the applicable $PM_{2.5}$ NAAQS by the applicable attainment date.

Following the first such triggering event, the measure would lower the thresholds for the non-hot spot counties to the current thresholds for hot spot counties (*i.e.,* from 20 μg/m^3 to 12 μg/m^3 for unregistered devices; and from 65 μg/m^3 to 35 μg/m^3 for registered devices). Following the second such event, the measure would further lower the threshold for unregistered devices in all counties of the San Joaquin Valley from 12 μg/m^3 to 11 μg/m^3.

The District estimates that the Residential Wood Burning Contingency Measure for the first triggering event would achieve annual average emissions reductions of 0.5793 tpd direct $PM_{2.5}$ and 0.0817 tpd NO_X in the SJV and the second triggering event would achieve additional reductions of 0.1078 tpd direct $PM_{2.5}$ and 0.0148 tpd NO_X.[73]

3. EPA Evaluation

Through the revisions adopted by the District to Rule 4901 on May 18, 2023, the District has corrected the deficiencies in the contingency provision of Rule 4901 that we identified in our November 26, 2021 final actions. Namely, the contingency provision in the rule (section 5.7.3) has been revised to address all the determinations for which contingency measures are required under 40 CFR 51.1014(a) and has been revised to achieve emissions reductions under all circumstances, *i.e.,* if triggered by one of the specific EPA determinations. In addition, we find that the contingency provision in section 5.7.3 of Rule 4901 is surplus to the RFP and attainment demonstrations for the annual 1997 $PM_{2.5}$ NAAQS based on the conclusions in our recent final action approving the RFP and attainment demonstrations in the State's 15 μg/m^3 SIP Revision.[74]

In our previous actions, we found that the contingency provision in Rule 4901 met the other specific criteria used to evaluate contingency measures.[75] Specifically, the contingency provision in Rule 4901 (the Residential Wood Burning Contingency Measure) is structured to be both conditional and prospective, to be implemented quickly following a triggering event (*i.e.,* within 60 days) and to be implemented without significant further action by the State or the EPA. The revisions to section 5.7.3 of Rule 4901 that were adopted on May 18, 2023 do not affect those features of the contingency provision, and thus we propose to re-affirm those findings in this proposed rule.

We also note that the contingency provisions do not require the replacement or installation of an emissions control device and can therefore achieve emission reductions upon the rule taking effect. For example, if the EPA were to determine that the San Joaquin Valley failed to attain a given $PM_{2.5}$ NAAQS, effective in July of a given year, the more stringent curtailment thresholds would take effect in September of that year, prior to the seasonal start of the No Burn Day program on November 1st. Thus, the emission reductions from the Residential Wood Burning Contingency Measure would be achieved within one year of the triggering event. Based on our review of the contingency provisions, as revised, we propose to re-affirm those findings.

Contingency measures must also be designed to provide emissions reductions (if triggered) that are not otherwise required to meet other attainment plan requirements and not relied upon to demonstrate RFP and attainment. In this regard, we note that none of the SJV plans for the 1997 annual, 2006 24-hour, and 2012 annual $PM_{2.5}$ NAAQS relied upon the contingency provision in Rule 4901 to meet any plan element (other than the contingency measure element) and that none of the plans relied on the related emissions reductions from the contingency provision to provide for RFP or attainment. Based on our previous approvals of the San Joaquin Valley plans for the 2006 24-hour $PM_{2.5}$ NAAQS in 2020 and 2012 annual $PM_{2.5}$ NAAQS in 2021,[76] and the recent approval of the San Joaquin Valley plan for the 1997 annual $PM_{2.5}$ NAAQS, including the various plan elements such as the BACM, RFP, and attainment demonstrations, we find that the Residential Wood Burning Contingency Measure is not otherwise required for these $PM_{2.5}$ NAAQS and that the associated emissions reductions would be surplus to the $PM_{2.5}$-related RFP and attainment needs of the San Joaquin Valley.

Therefore, for the reasons provided in the preceding paragraphs, we propose to approve Rule 4901, as revised, because we find that the Residential Wood Burning Contingency Measure set forth in section 5.7.3 of the rule now meets all the applicable requirements for a contingency measure for the San Joaquin Valley for the 1997 annual, 2006 24-hour, and 2012 annual $PM_{2.5}$ NAAQS.

Lastly, we reviewed the emissions reduction estimates for the Residential Wood Burning Contingency Measure that were prepared by the District and included in Appendix C (''Emission Reduction Analysis for Rule 4901'') of the SJV $PM_{2.5}$ Contingency Measure SIP and find the estimates to be reasonable and adequately documented. As described in Appendix C of the SJV $PM_{2.5}$ Contingency Measure SIP, the District has estimated the reductions from the two triggering events provided for in the Residential Wood Burning Contingency Measure by taking into account many different factors, such as the number of fireplaces and wood stoves in the individual counties within

[71] Id. See also 86 FR 38652, 38669 (proposed rule on contingency measures element for the 1997 annual $PM_{2.5}$ NAAQS) and 86 FR 49100, 49125 and 49133–49134 (proposed rule on contingency measures element for the 2012 annual $PM_{2.5}$ NAAQS and 2006 24-hour $PM_{2.5}$ NAAQS, respectively).

[72] 86 FR 67329, 67338.

[73] SJV $PM_{2.5}$ Contingency Measure SIP, p. C–15.

[74] EPA, ''Air Quality State Implementation Plans; Approvals and Promulgations: California; 1997 Annual Fine Particulate Matter Serious and Clean Air Act Section 189(d) Nonattainment Area Requirements; San Joaquin Valley, CA,'' Final rule, signed December 5, 2023.

[75] See, *e.g.,* 86 FR 38652, 38669.

[76] 85 FR 44192 and 86 FR 67343.

the San Joaquin Valley, the different types of wood stoves (registered and unregistered, certified and uncertified), and the number of additional curtailment days under various scenarios, among other factors. Taking into account these various factors, the District estimates the Residential Wood Burning Contingency Measure would achieve annual average emissions reductions of 0.5793 tpd direct $PM_{2.5}$ and 0.0817 tpd NO_X in the SJV following the first triggering event and additional reductions of 0.1078 tpd direct $PM_{2.5}$ and 0.0148 tpd NO_X following the second triggering event.

Because we are proposing to find that the Residential Wood Burning Contingency Measure meets the requirements for individual contingency measures, the associated emissions reductions can be taken into account by the EPA when determining whether CARB and the District have met the requirements for the San Joaquin Valley as a whole with respect to the contingency measure SIP requirements of CAA section 172(c)(9) and 40 CFR 51.1014 for $PM_{2.5}$ nonattainment areas. Section V of this document presents our evaluation of the SJV $PM_{2.5}$ Contingency Measure SIP for compliance with these requirements for the San Joaquin Valley for the 1997 annual, 2006 24-hour, and 2012 annual $PM_{2.5}$ NAAQS, and, as part of that evaluation, we have taken into account the District's estimates of emissions reductions from the Residential Wood Burning Contingency Measure.

B. Rural Open Areas Contingency Measure

1. Background and Regulatory History

In areas where there is open, uncovered land, a natural crust will form and minimize dust emissions. However, activities such as earthmoving activities, material dumping, weed abatement, and vehicle traffic will disturb otherwise naturally stable land and allow windblown fugitive dust emissions to occur.

The District adopted fugitive dust control requirements in Regulation VIII (containing the 8000 series rules) on November 15, 2001, to address RACM/RACT and BACM/BACT attainment plan requirements for the 1987 p.m.$_{10}$ NAAQS.[77] The EPA found that new provisions in Regulation VIII ''significantly strengthened'' the prior existing rules by tightening standards, covering more activities, and adding more requirements to control dust-producing activities.[78] Subsequently, the District adopted amendments to Regulation VIII on August 19, 2004, and September 16, 2004, that the EPA approved into the San Joaquin Valley portion of the California SIP in 2006.[79] More recently the EPA has reviewed Regulation VIII for RACM/RACT, BACM/BACT, and MSM requirements in acting on the San Joaquin Valley plan for the 2006 24-hour $PM_{2.5}$ NAAQS.[80]

Among the rules of Regulation VIII, Rule 8051 (''Open Areas'') applies to vacant portions of residential and commercial lots and contiguous parcels and the 2004 amendments added applicability thresholds for rural and urban areas required to meet both the conditions for a stabilized surface (defined in Rule 8011) and a 20% opacity standard. Rule 8051 applies to any open area having 0.5 acres or more within urban areas, or 3.0 acres or more within rural areas, that contains at least 1,000 square feet of disturbed surface area.[81] In addition, under Rule 8051, upon evidence of vehicle trespass, owners/operators must apply a measure(s) that effectively prevents access to the lot. Rule 8051 does not apply to agricultural areas, which are subject to other fugitive dust controls such as those under Rule 4550 (''Conservation Management Practices'') and Rule 8081 (''Agricultural Sources'').

2. Summary of State Submission

On September 21, 2023, the District adopted a new contingency measure in section 7.0 of District Rule 8051 (referred to herein as the ''Rural Open Areas Contingency Measure''), and CARB submitted Rule 8051, as amended, to include the Rural Open Areas Contingency Measure, as a supplement to the SJV $PM_{2.5}$ Contingency Measure SIP. The Rural Open Areas Contingency Measure would be triggered by a final determination by the EPA that the District failed to meet one or more of the following triggering events for the applicable $PM_{2.5}$ NAAQS:

(1) Any Reasonable Further Progress requirement;

(2) Any quantitative milestone;

(3) Submission of a quantitative milestone report; or

(4) Attainment of the applicable $PM_{2.5}$ NAAQS by the applicable attainment date.

The Rural Open Areas Contingency Measure would lower the applicability threshold for rural open areas from 3.0 acres to 1.0 acres, thereby reducing windblown fugitive dust, including the direct $PM_{2.5}$ portion of such dust emissions. The State estimates that the newly subject total acreage would be 18,816 acres. The Rural Open Areas Contingency Measure would be effective 60 days after an EPA determination under 40 CFR 51.1014(a) that triggers contingency measures. At such time, Rule 8051 would require any rural open area having 1.0 acre or more and containing at least 1,000 square feet of disturbed surface area (notwithstanding exemptions in section 4.0 of the rule) to meet section 5.0 of the rule, which requires that:

> Whenever open areas are disturbed or vehicles are used in open areas, an owner/operator shall implement one or a combination of control measures indicated in Table 8051–1 to comply with the conditions of a stabilized surface at all times and to limit VDE to 20% opacity. In addition to the requirements of this rule, a person shall comply with all other applicable requirements of Regulation VIII.[82]

Table 8051–1 contains the following control measures for open areas:

> A. Open Areas:
>
> Implement, apply, maintain, and reapply if necessary, at least one or a combination of the following control measures to comply at all times with the conditions for a stabilized surface and limit VDE to 20% opacity as defined in Rule 8011:
>
> A1. Apply and maintain water or dust suppressant(s) to all unvegetated areas; and/or
>
> A2. Establish vegetation on all previously disturbed areas; and/or
>
> A3. Pave, apply and maintain gravel, or apply and maintain chemical/organic stabilizers/suppressant(s).
>
> B. Vehicle Use in Open Areas:
>
> Upon evidence of trespass, prevent unauthorized vehicle access by:
>
> Posting 'No Trespassing' signs or installing physical barriers such as fences, gates, posts, and/or other appropriate barriers to effectively prevent access to the area.

The Rural Open Areas Contingency Measure is narrowed by the addition of

[77] Regulation VIII includes eight rules. Rule 8011 (''General Requirements'') provides definitions and the general requirements on which the seven other rules rely. In turn, those seven rules apply to different sources of fugitive windblown dust based on activity type. They include Rule 8021 (''Construction, Demolition, Excavation, Extraction, and Other Earthmoving Activities''), Rule 8031 (''Bulk Materials''), Rule 8041 (''Carryout and Trackout''), Rule 8051 (''Open Areas''), Rule 8061 (''Paved and Unpaved Roads''), Rule 8071 (Unpaved Vehicle/Equipment Traffic Area''), and Rule 8081 (''Agricultural Sources''). In this proposed rule, the EPA proposes to approve Rule 8051, as amended to include a contingency provision, as a revision to the California SIP.

[78] 67 FR 15345, 15346–15447 (April 1, 2002) (proposed rule on 2001 version of Regulation VIII).

[79] 71 FR 8461 (February 17, 2006).

[80] See, *e.g.,* 85 FR 17382, 17431 (March 27, 2020) (proposal on BACM/BACT and MSM for the 2006 24-hour $PM_{2.5}$ NAAQS); and EPA Region IX, ''Technical Support Document, EPA Evaluation of BACM/MSM, San Joaquin Valley $PM_{2.5}$ Plan for the 2006 $PM_{2.5}$ NAAQS,'' February 2020.

[81] Rule 8051, section 2.1.

[82] VDE is Visible Dust Emissions.

a new exemption in section 4.2 of Rule 8051 that exempts owners or operators of rural parcels between 1.0 acres to 3.0 acres that implement fire prevention activities required by a Federal, State, or local agency by mowing or cutting (if three inches or more of stubble remains after moving or cutting) or discing (if no more than two passes are made).

The District estimates that the Rural Open Burning Contingency Measure would achieve annual average emissions reductions of 0.008 tpd direct $PM_{2.5}$.[83]

3. EPA Evaluation

As discussed further in the EPA's technical support document that documents our evaluation of amended Rule 8051,[84] we find that the Rural Open Areas Contingency Measure now included as section 7.0 of Rule 8051 meets the applicable requirements for contingency measures. First, we note that the expansion of the control requirements to rural parcels between one (1.0) to three (3.0) acres under section 7.0 of Rule 8051 is conditional and prospective by design and is not required to meet existing control requirements (*i.e.,* RACM or BACM)[85] nor relied upon by the area as part of the area's $PM_{2.5}$ RFP or attainment demonstrations. Moreover, the exemption for owners or operators of certain rural parcels of 1.0 to 3.0 acres in size from the requirements of the rule that would otherwise be included if the Rural Open Areas Contingency Measure were triggered is narrowly drawn and limited such that the exemption will have essentially no impact on the emissions reductions expected from implementation of the Rural Open Areas Contingency Measure. This is because the exemption applies only to owners and operators acting in response to a Federal, State, or local agency that is requiring implementation of fire prevention activities and is further limited by specifying the methods that must be followed to be covered by the exemption.

Second, the Rural Open Areas Contingency Measure includes a trigger mechanism (''. . . final determination by EPA that the District has failed to meet any of the following elements for any of the $PM_{2.5}$ NAAQS . . .'') that addresses all of the specific types of determinations listed in 40 CFR 51.1014(a). Third, the Rural Open Areas Contingency Measure specifies a schedule for timely implementation (''Upon 60 days after the issuance of a final determination . . .''). While the extension of the control requirements to rural parcels between 1.0 to 3.0 acres under section 7.0 is self-executing (*i.e.,* does not require additional rulemaking), the District will need as a practical matter to provide notice to the affected owners/operators that the contingency measure has been triggered. However, we do not find that providing such notice constitutes ''further action'' by the state for the purposes of CAA section 172(c)(9). Lastly, given the nature of the controls required under Rule 8051 (such as watering, establishing vegetation, applying gravel, or fencing (if needed)), we find that the associated emissions reductions from implementation of the Rural Open Areas Contingency Measure can be achieved within a year of the triggering event.

Therefore, for the reasons provided in the preceding paragraphs, we propose to approve Rule 8051, as revised, because we find that the Rural Open Areas Contingency Measure meets all the applicable requirements for a contingency measure for the San Joaquin Valley for the 1997 annual, 2006 24-hour, and 2012 annual $PM_{2.5}$ NAAQS.

We have also reviewed the emissions reduction estimates for the Rural Open Areas Contingency Measure that were prepared by the District and included in Appendix B (''Emission Reduction and Cost Effectiveness Analysis for Proposed Amendments to Rule 8051 (Open Areas)'') of the Final Draft Staff Report and find the estimates to be reasonable and adequately documented. As documented in Appendix B of the Final Draft Staff Report, the District took into account county-specific parcel size data, among other relevant factors to develop the emissions reduction estimate of 0.008 tpd of direct $PM_{2.5}$ for the Rural Open Areas Contingency Measure.[86]

Because we are proposing to find that the Rural Open Areas Contingency Measure meets the requirements for individual contingency measures, the associated emissions reductions can be taken into account by the EPA when determining whether CARB and District have met the requirements for the San Joaquin Valley as a whole with respect to the contingency measure requirements of CAA section 172(c)(9) and 40 CFR 51.1014 for $PM_{2.5}$ nonattainment areas. Section V of this document presents our evaluation of the SJV $PM_{2.5}$ Contingency Measure SIP for compliance with these requirements for the San Joaquin Valley for the 1997 annual, 2006 24-hour, and 2012 annual $PM_{2.5}$ NAAQS, and, as part of that evaluation, we have taken into account the District's estimates of emissions reductions from the Rural Open Areas Contingency Measure.

C. Smog Check Contingency Measure

The general purpose of motor vehicle inspection and maintenance (I/M) programs is to reduce emissions from in-use motor vehicles in need of repairs and thereby contribute to state and local efforts to improve air quality and to attain the NAAQS. California has operated an I/M program, also known as the ''Smog Check'' program, in certain areas of the state for over 30 years. Under the current California Smog Check program, certain vehicles are exempt from the biennial inspection requirement, including vehicles eight or fewer model years old.

On November 13, 2023, CARB submitted a third contingency measure for San Joaquin Valley for the $PM_{2.5}$ NAAQS, which we refer to herein as the Smog Check Contingency Measure. Under the Smog Check Contingency Measure, CARB would, within 30 days of the effective date of an EPA determination that an applicable triggering event has occurred for San Joaquin Valley for the $PM_{2.5}$ NAAQS, transmit a letter to the California Bureau of Automotive Repair and Department of Motor Vehicles that, in effect, would narrow the newer vehicle exemption from eight or fewer model years old to seven or fewer model years old throughout the San Joaquin Valley.[87] CARB estimates that the Smog Check Contingency Measure would, after the first triggering event and adjusting slightly for the effect on foregone emission reductions from Carl Moyer

[83] SJVUAPCD, Final Draft Staff Report, ''Proposed Amendments to Rule 8051 (Open Areas),'' September 21, 2023, p. B–7.

[84] EPA Region IX, ''Technical Support Document for EPA's Rulemaking for the California State Implementation Plan, San Joaquin Valley Air Pollution Control District Rule 8051 ('Open Areas'),'' December 2023.

[85] As noted previously, the RACM and BACM demonstrations that the EPA has approved for the 1997 annual, 2006 24-hour, and the 2012 annual $PM_{2.5}$ NAAQS included review of Regulation VIII, including Rule 8051. See 85 FR 44192, 86 FR 67343, and EPA, ''Air Quality State Implementation Plans; Approvals and Promulgations: California; 1997 Annual Fine Particulate Matter Serious and Clean Air Act Section 189(d) Nonattainment Area Requirements; San Joaquin Valley, CA,'' Final rule, signed December 5, 2023.

[86] SJVUAPCD, Final Draft Staff Report, ''Proposed Amendments to Rule 8051 (Open Areas),'' September 21, 2023, p. B–7. The District's estimate compares favorably with the EPA's own estimate of 0.01 tpd for essentially the same contingency measure in EPA's proposed $PM_{2.5}$ contingency measure FIP for San Joaquin Valley. 88 FR 53431, 53444.

[87] Smog Check Contingency Measure, section 4. The Smog Check Contingency Measure is structured to further narrow the newer vehicle exemption by another year upon a second triggering event.

funding,[88] achieve annual average emission reductions of 0.113 tpd NO_X for the 1997 annual $PM_{2.5}$ NAAQS, 0.116 tpd NO_X for the 2006 24-hour $PM_{2.5}$ NAAQS, and 0.083 tpd NO_X for the 2012 annual $PM_{2.5}$ NAAQS in the San Joaquin Valley.[89]

In a separate proposed rule published in this **Federal Register**, we are proposing to approve the Smog Check Contingency Measure and, therefore, its associated emissions reductions can be taken into account by the EPA when determining whether the State and District have met the contingency measure requirements of CAA section 172(c)(9) and 40 CFR 51.1014 for $PM_{2.5}$ nonattainment areas for the San Joaquin Valley as a whole. Section V of this document presents our evaluation of the SJV $PM_{2.5}$ Contingency Measure SIP for compliance with these requirements for the San Joaquin Valley for the 1997 annual, 2006 24-hour, and 2012 annual $PM_{2.5}$ NAAQS, and as part of that evaluation, we have taken into account CARB's estimates of emissions reductions from the Smog Check Contingency Measure.

V. EPA Review of San Joaquin Valley $PM_{2.5}$ Contingency Measure Plan Element

A. Background and Regulatory History

In light of the nonattainment designation for San Joaquin Valley for the $PM_{2.5}$ NAAQS, the State of California was required under CAA section 172(c)(9) and 40 CFR 51.1014 to adopt and submit a SIP revision providing for implementation of contingency measures to take effect in the San Joaquin Valley if the EPA determines that the area has failed to meet an RFP requirement, failed to submit a quantitative milestone report, failed to meet a quantitative milestone, or failed to attain the $PM_{2.5}$ NAAQS by the applicable attainment date.

In 2019, as discussed in section I.B of this document, CARB submitted a SIP revision that included contingency measure plan elements for San Joaquin Valley for the 1997 annual and 24-hour, 2006 24-hour, and 2012 annual $PM_{2.5}$ NAAQS. The contingency measure plan elements relied on an earlier version of the Residential Wood Burning Contingency Measure and justified reliance on that single measure notwithstanding the fact that the measure alone would not achieve emissions reductions equivalent to one year's worth of RFP by reference to larger planning context for the area and related surplus emissions reductions expected to be achieved from already-implemented control measures.

In 2021, the EPA disapproved the contingency measure plan elements for the applicable $PM_{2.5}$ NAAQS because the plan elements did not include a contingency measure that addressed all four triggering events for the $PM_{2.5}$ NAAQS under 40 CFR 51.1014; that would ensure that emissions reductions would be achieved, once triggered; or, for the 1997 annual $PM_{2.5}$ NAAQS, that would be surplus to the area's needs for RFP and attainment.[90] We proposed disapproval of the contingency measure elements before the Ninth Circuit's *Assoc. of Irritated Residents (AIR)* v. *EPA* decision [91] was published and, thus, did not identify the contingency measure elements' reliance on surplus emissions reductions from already-implemented measures (to justify adoption of a single contingency measure which would not, on its own, achieve one year's worth of RFP) as a specific deficiency.

B. Summary of State Submission

In response to the disapprovals of the previous contingency measure elements, the District and CARB prepared the SJV $PM_{2.5}$ Contingency Measure SIP, which CARB adopted as part of the California SIP and submitted for EPA approval on June 8, 2023. In the SJV $PM_{2.5}$ Contingency Measure SIP, the District and CARB present their evaluation of potential contingency measures, amendments to the previous contingency provisions in the District's residential wood burning rule (*i.e.,* the Residential Wood Burning Contingency Measure), a commitment to evaluate potential contingency provisions for Rule 8051 (''Open Areas''), analysis of one year's worth of emission reductions, and infeasibility demonstrations for rejecting other potential contingency measures. In light of the *AIR* v. *EPA* decision, the District and CARB do not justify the selection of the contingency measures on the basis of surplus emissions reductions from already-implemented measures, as had been the case previously, but rather ''due to a scarcity of available, qualifying measures,'' and the time period in which emission reductions should occur.[92] Subsequent to the submission of the SJV $PM_{2.5}$ Contingency Measure SIP, the District and CARB have supplemented the contingency measure elements for the applicable $PM_{2.5}$ NAAQS with the adoption and submission of two additional contingency measures—the Rural Open Areas Contingency Measure and the Smog Check Contingency Measure.

1. General Considerations

''General Considerations,'' for the purposes of this proposed action, includes identification of the relevant pollutants, the use of contingency measures for more than one triggering event and for more than one NAAQS, and the magnitude of emissions reductions. Contingency measure feasibility analyses are addressed in a separate subsection.

a. $PM_{2.5}$ and $PM_{2.5}$ Precursors

CARB and the District have concluded, based on CARB modeling, that sulfur oxides (SO_X), volatile organic compounds (VOCs), and ammonia are not significant precursors for $PM_{2.5}$ formation in the San Joaquin Valley. Therefore, their contingency measure submissions address sources of direct $PM_{2.5}$ and NO_X emissions.

b. Using Same Contingency Measures for More Than One Triggering Event, NAAQS

The contingency measures that CARB and the District rely upon in the SJV $PM_{2.5}$ Contingency Measure SIP are not limited to one $PM_{2.5}$ NAAQS, but rather cover all three of the 1997 annual, 2006 24-hour, and 2012 annual $PM_{2.5}$ NAAQS (*i.e.,* the same set of contingency measures has been submitted to address the contingency measure requirements for more than one $PM_{2.5}$ NAAQS).

c. Magnitude of Emissions Reductions

To evaluate the sufficiency of the Residential Wood Burning Contingency Measure with respect to the magnitude of emissions reductions that the contingency measures should achieve, the SJV $PM_{2.5}$ Contingency Measure SIP

[88] The Carl Moyer Program distributes incentive grants to fund the incremental cost of cleaner-than-required engines, equipment, and other technology. The slight adjustment to emission reductions mentioned results from a decrease in funding to the Carl Moyer program. If the contingency measure were triggered, fewer vehicles would be exempt from the Smog Check program, and thus fewer vehicles would be subject to the Smog Check abatement fee (which is only assessed on vehicles exempted from Smog Check testing). That fee provides funding to the Carl Moyer Program. For more information on the program, see *https://ww2.arb.ca.gov/carl-moyer-program-apply*.

[89] Smog Check Contingency Measure, Table 28 and Table 31.

[90] 86 FR 38652, 38669–38670; and 86 FR 49100, 49124–49125 and 49133–49134.

[91] In *AIR* v. *EPA,* the Ninth Circuit held that, under the EPA's current guidance, the surplus emissions reductions from already-implemented measures cannot be relied upon to justify the approval of a contingency measure that would achieve far less than one year's worth of RFP as sufficient by itself to meet the contingency measure requirements of CAA sections 172(c)(9) and 182(c)(9) for the nonattainment area. 10 F.4th at 946–47.

[92] SJV $PM_{2.5}$ Contingency Measure SIP, p. 5.

includes calculations of one year's worth of RFP for the relevant $PM_{2.5}$ NAAQS for the San Joaquin Valley. To do this, the District calculated the change in annual average emission reductions from the base year to the attainment year for the 1997 annual $PM_{2.5}$ NAAQS (from 2013 to 2023) and 2006 24-hour $PM_{2.5}$ NAAQS (from 2013 to 2024), and the outermost Moderate area RFP year for the 2012 annual $PM_{2.5}$ NAAQS (from 2013 to 2022), and divided those by the number of years between the base year and applicable attainment or RFP year. The State's estimates of one year's worth of RFP in the SJV $PM_{2.5}$ Contingency Measure SIP are as follows: 0.44 tpd direct $PM_{2.5}$ and 16.7 tpd NO_X (for the 1997 annual $PM_{2.5}$ NAAQS); 0.58 tpd direct $PM_{2.5}$ and 18.4 tpd NO_X (for the 2006 24-hour $PM_{2.5}$ NAAQS); and 0.46 tpd direct $PM_{2.5}$ and 15.3 tpd NO_X (for the 2012 annual $PM_{2.5}$ NAAQS).[93]

Per the EPA's Draft Revised Contingency Measure Guidance, the SJV $PM_{2.5}$ Contingency Measure SIP also includes estimates of one year's worth of progress that were made by calculating one year's worth of RFP as a percentage of the base year emissions inventory and applying that percentage to the attainment year emissions inventory for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS, and to the outermost Moderate area RFP year for the 2012 annual $PM_{2.5}$ NAAQS. The estimates of one year's worth of progress in the SJV $PM_{2.5}$ Contingency Measure SIP are as follows: 0.41 tpd direct $PM_{2.5}$ and 7.91 tpd NO_X (for the 1997 annual $PM_{2.5}$ NAAQS); 0.52 tpd direct $PM_{2.5}$ and 6.66 tpd NO_X (for the 2006 24-hour $PM_{2.5}$ NAAQS); and 0.43 tpd direct $PM_{2.5}$ and 8.65 tpd NO_X (for the 2012 annual $PM_{2.5}$ NAAQS).[94]

CARB and the District present their comparison of emission reductions from the Residential Wood Burning Contingency Measure to those needed for one year's worth of progress in Table 17 of the SJV $PM_{2.5}$ Contingency Measure SIP.[95] They conclude that this contingency measure would achieve emission reductions of 0.69 tpd direct $PM_{2.5}$ and 0.1 tpd NO_X (including reductions following both first and second triggering events) and that such reductions would exceed those needed for one year's worth of progress for direct $PM_{2.5}$ but would fall short of those needed for one year's worth of progress for NO_X.

Noting the direct $PM_{2.5}$ surplus, CARB and the District then trade the surplus direct $PM_{2.5}$ emission reductions at a ratio of 6:1 (*i.e.,* 6 tpd NO_X for each excess 1 tpd direct $PM_{2.5}$),[96] based on analyses in their 2021 ''Progress Report and Technical Submittal for the 2012 $PM_{2.5}$ Standard San Joaquin Valley'' (''2021 Progress Report'').[97] CARB and the District note that direct $PM_{2.5}$ emission reductions are a more efficient and cost-effective way to reduce ambient $PM_{2.5}$ in the San Joaquin Valley than NO_X emission reductions.[98] The report presented analysis of the relative effect of reducing 30% direct $PM_{2.5}$ (annual average) emissions versus 30% NO_X (annual average) emissions on ambient annual average $PM_{2.5}$ concentrations (as modeled for 2024) at each regulatory monitoring site in the San Joaquin Valley using data from the precursor sensitivity analyses in the 2018 $PM_{2.5}$ Plan.[99] CARB and the District examined several methods for calculating the ratio based on varying combinations of monitoring sites. They concluded that 6:1 was a conservative ratio as it was less than the average ratio for the two sites with the highest modeled (annual average) ambient $PM_{2.5}$ concentrations in 2025 (6.1:1), the average ratio of sites with modeled 2025 concentrations over 11.00 $\mu g/m^3$ (6.4:1), and the average ratio of sites with a 2020 design value over 12 $\mu g/m^3$ (6.6:1).[100] They also conclude that a ratio of 6:1 would be conservative as it was less than the 8.1:1 ratio for the modeled design value for the Bakersfield-Planz site (*i.e.,* the site with the highest modeled 2025 concentration).

Applying this 6:1 trading ratio, CARB and the District estimate that, after achieving the full one year's worth of progress for direct $PM_{2.5}$ emission reductions, the shortfall of NO_X emissions for one year's worth of progress would be as follows: 6.13 tpd (compared to 7.91 tpd for the 1997 annual $PM_{2.5}$ NAAQS), 5.54 tpd (compared to 6.66 tpd for the 2006 24-hour $PM_{2.5}$ NAAQS), and 6.99 tpd (compared to 8.65 tpd for the 2012 annual $PM_{2.5}$ NAAQS).[101] The NO_X equivalent emissions reductions equate to a range of 17% to 23% of one year's worth of progress for NO_X.

In light of the shortfall of NO_X emissions reductions, the SJV $PM_{2.5}$ Contingency Measure SIP includes feasibility analyses by the District for stationary and area sources and by CARB for mobile sources to justify the reliance on a contingency measure that would not provide for one year's worth of progress (*i.e.,* for NO_X). We summarize the feasibility analyses prepared by the District and CARB in the following section of this document.

2. Contingency Measure Feasibility Analyses

The District states that it has already implemented rules for sources that meet or go beyond federal requirements and that few measures remain to explore as contingency measures. The District describes the relative stringency of their stationary and area source measures by noting the EPA's 2020 approval of the State's demonstration of BACM and MSM for the 2006 24-hour $PM_{2.5}$ NAAQS; highlights the District's tighter limits for certain industrial sources compared to the EPA's national emission limits to address the interstate transport of air pollution; and describes the numerous regulatory measures and incentive-based measures adopted since and in fulfillment of the 2018 $PM_{2.5}$ Plan.[102]

More specifically, the District analyzed the wide range of stationary and area sources for contingency measure opportunities, including identification of potential control measures, analysis of the technological and economic feasibility of such measures, assessment of the time required to develop and implement such measures within 60 days and achieve emission reductions within one to two years, and discussion of whether the District could adopt such measures

[93] SJV $PM_{2.5}$ Contingency Measure SIP, pp. 5–6; see ''Step 1b'' emissions estimates in the ''Step 1'' table for one year's worth of RFP.

[94] SJV $PM_{2.5}$ Contingency Measure SIP, pp. 5–6; see the ''Step 3'' table for one year's worth of progress.

[95] SJV $PM_{2.5}$ Contingency Measure SIP, Table 17.

[96] SJV $PM_{2.5}$ Contingency Measure SIP, pp. 73–74.

[97] CARB and SJVUAPCD, ''Progress Report and Technical Submittal for the 2012 $PM_{2.5}$ Standard San Joaquin Valley,'' October 19, 2021 (''2021 Progress Report''). See pages 34–38 for the State's ''$PM_{2.5}$ Precursor Sensitivity Modeling Analysis and Trading Ratios.'' Transmitted to the EPA by letter dated October 20, 2021, from Richard W. Corey, Executive Officer, CARB, to Deborah Jordan, Acting Regional Administrator, EPA Region IX.

[98] 2021 Progress Report, p. 34.

[99] See Appendix K (''Modeling Attainment Demonstration'') of the 2018 $PM_{2.5}$ Plan, including Table 14 (annual average modeled emissions inventory) and Table 49 (precursor sensitivity analysis for annual average ambient $PM_{2.5}$ concentration in 2024).

[100] At the time, the modeled 2025 $PM_{2.5}$ concentrations corresponded to the attainment year in the State's Serious area plan for the 2012 annual $PM_{2.5}$ NAAQS, which was later withdrawn on October 27, 2022. Letter dated October 27, 2022, from Steven S. Cliff, Executive Officer, CARB, to Martha Guzman, Regional Administrator, EPA Region IX.

[101] SJV $PM_{2.5}$ Contingency Measure SIP, p. 74.

[102] SJV $PM_{2.5}$ Contingency Measure SIP, section 4.1 (''Stringency of District's Regulatory Program''). See also 87 FR 20036 (April 6, 2022) (proposed rule for the interstate transport FIP for the 2015 ozone NAAQS); and 88 FR 36654 (June 5, 2023) (final rule for interstate transport FIP for the 2015 ozone NAAQS).

and secure EPA approval prior to the EPA promulgating a contingency measure FIP for $PM_{2.5}$ in the San Joaquin Valley. For the potential control measures identified through this process, the District further analyzed possible contingency measures for wood burning fireplaces and wood burning heaters, rural open areas, commercial charbroiling, almond harvesting, and oil and gas production combustion equipment. Based on this analysis, the District adopted the Residential Wood Burning Contingency Measure and concluded that the other possible contingency measures were infeasible or untimely but committed to further evaluate the rural open areas rule as a potential contingency measure. Subsequently, the District fulfilled the Agency's commitment to further evaluate the rural open areas rule and adopted the Rural Open Areas Contingency Measure to supplement the SJV $PM_{2.5}$ Contingency Measure SIP.

In turn, CARB states that its mobile source control programs often set the standard for other states to follow and that more than half of mobile source NO_X emissions in the San Joaquin Valley are from primarily federally regulated sources, which limit opportunities for contingency measures that would achieve one year's worth of progress in emission reductions. CARB further notes that a relatively limited portion (of NO_X) emissions are regulated by local air districts in California and that, even if discounting the emission reductions needed for contingency measures by primarily federally regulated emission sources, additional control measures to achieve the one year's worth of emission reductions are scarce or nonexistent.

CARB states that if such measures were identified, they would be adopted to improve air quality and help attain the NAAQS, rather than held in reserve as contingency measures, and that control measures to achieve large emission reductions often take longer than two years to implement—beyond the one- to two-year timeframe for achieving emission reductions for contingency purposes. For example, CARB states that the three largest NO_X reduction measures committed to in the 2022 State SIP Strategy [103] rely on accelerated turnover of engines and trucks and shifting to zero-emission equipment, which is limited by infrastructure and equipment options. CARB further states that a central difficulty in considering contingency measures is that CARB has already committed to zero emission standards where feasible and as expeditiously as possible to fulfill goals established in California Executive Order N–79–20 for mobile sources ranging from light-duty cars by 2035 to heavy-duty trucks by 2045.[104]

More specifically, CARB analyzed all sources under its authority to identify potential contingency measures using three criteria, per CAA requirements, court decisions, and the EPA's Draft Revised Contingency Measure Guidance. First, CARB assessed whether the measure could be implemented within 60 days of a triggering event and emission reductions achieved within one to two years. Second, CARB assessed the technological and economic feasibility of implementing the measure, particularly within the one- to two-year timeframe. Third, CARB evaluated whether it could adopt the measure and secure EPA approval by the September 30, 2024 consent decree deadline for the EPA to promulgate a FIP or alternatively approve contingency measure SIP submissions meeting the contingency measure requirements.

Regarding mobile source contingency measures, CARB describes several challenges that limit the control measure options that would meet contingency measure requirements. For new engine standards, CARB states that engine manufacturers need lead time to ''design, plan, certify, manufacture, and deploy cleaner engines.'' For fleet regulations, CARB states that manufacturing must be mature to provide sufficient supply and that owners and operators must ''plan, purchase, and deploy new, often zero-emission, equipment'' that may involve changes to business operations and infrastructure. Based on the time required for implementing such measures, CARB concludes that new engine standards and fleet regulations are not appropriate for contingency measures.

Furthermore, CARB states that its regulations are technology-forcing, which requires time for industry to plan, develop, and implement new technologies, and that it is driving mobile sources to zero-emissions where feasible to achieve criteria, air toxic, and climate pollutant goals. Similarly, CARB argues that the technology-forcing and zero-emission-based nature of its mobile source regulations reduce or eliminate opportunities for contingency measure emission reductions. Lastly, CARB states that its full rulemaking process for most mobile source measures takes about five years to develop and adopt, which would not be possible prior to the September 30, 2024 consent decree deadline for the EPA to promulgate a FIP, or approve contingency measure SIP submissions meeting the contingency measure requirements.

CARB concludes that there are no feasible mobile source contingency measures for the 1997 annual, 2006 24-hour, and 2012 annual $PM_{2.5}$ NAAQS (as of the April 2023 public notice for the SJV $PM_{2.5}$ Contingency Measure SIP) yet continued to assess opportunities for feasible contingency measures. Per a June 2023 commitment letter by CARB's Executive Officer, and as further described in section IV.C of this proposed rule, CARB has since completed the development of and adopted the state-wide Smog Check Contingency Measure that complements the District contingency measures for residential wood burning and rural open areas.

3. Conclusion

Based on achieving the full one year's worth of progress for direct $PM_{2.5}$ emission reductions, a portion of one year's worth of progress for NO_X emission reductions, and their contingency measure feasibility analyses, CARB and the District conclude that the SJV $PM_{2.5}$ Contingency Measure SIP, and related infeasibility demonstrations, and the Residential Wood Burning Contingency Measure fulfill the contingency measure requirements for the $PM_{2.5}$ NAAQS.[105]

C. EPA Evaluation

We propose to find that CARB and the District have corrected the specific deficiencies that we identified in the previously submitted contingency measure elements for the applicable $PM_{2.5}$ NAAQS and that were the bases for our previous disapprovals of the contingency measure element. Our proposed conclusion in this regard recognizes that the revised contingency measure plan elements for the applicable $PM_{2.5}$ NAAQS (SJV $PM_{2.5}$ Contingency Measure SIP) now includes contingency measures (Residential Wood Burning Contingency Measure, Rural Open Areas Contingency Measure, and the Smog Check Contingency Measure) that address all four triggering events for the $PM_{2.5}$ NAAQS under 40

[103] CARB, ''2022 State Strategy for the State Implementation Plan,'' adopted September 22, 2022, Chapter 5 (''State SIP Measures'').

[104] Executive Department, State of California, Executive Order N–79–20, September 23, 2020.

[105] SJV $PM_{2.5}$ Contingency Measure SIP, p. 74. As noted previously, the SJV $PM_{2.5}$ Contingency Measure SIP has been supplemented with two additional contingency measures (*i.e.,* the Rural Open Areas Contingency Measure and the Smog Check Contingency Measure).

CFR 51.1014, that have been structured to ensure emissions reductions, once triggered, and that are surplus to the RFP and attainment needs of the San Joaquin Valley for the 1997 annual $PM_{2.5}$ NAAQS.[106]

1. General Considerations

As stated previously, ''General Considerations,'' for the purposes of this proposed action, includes identification of the relevant pollutants, the use of contingency measures for more than one triggering event and for more than one NAAQS, and the magnitude of emissions reductions. We present our evaluation of the State's contingency measure feasibility analyses in a separate subsection.

a. $PM_{2.5}$ and $PM_{2.5}$ Plan Precursors

Under the CAA, states are required to regulate not only direct emissions of $PM_{2.5}$ in an attainment plan, but also all $PM_{2.5}$ precursors. Under the EPA's $PM_{2.5}$ SIP Requirements Rule, states must identify, adopt, and implement control measures, including control technologies, on sources of direct $PM_{2.5}$ emissions and sources of emissions of $PM_{2.5}$ plan precursors located in $PM_{2.5}$ nonattainment areas.[107] $PM_{2.5}$ plan precursors are those $PM_{2.5}$ precursors (which are sulfur dioxide (SO_2), NO_X, VOCs, and ammonia) that the state must regulate in the applicable attainment plan.[108] A state may elect to submit to the EPA precursor demonstrations for a specific nonattainment area in order to establish that regulation of one or more precursors is not necessary for attainment in the nonattainment area at issue.[109] If the EPA approves a comprehensive precursor demonstration that shows that emissions of a particular precursor does not contribute significantly to $PM_{2.5}$ levels that exceed the NAAQS in an area, then the state is not required to control emissions of the relevant precursor from existing sources in the current attainment plan.[110] Accordingly, the state would not need to address the precursor in order to meet attainment plan requirements, including RFP, in QMs and associated QM reports, or be required to adopt contingency measures to reduce the precursor at issue.[111]

For the San Joaquin Valley, as noted in section V.B.1 of this proposed rule, CARB and the District have concluded, based on CARB modeling, that SO_X, VOCs, and ammonia are not significant precursors for $PM_{2.5}$ formation in the San Joaquin Valley.[112] The EPA has considered, and approved, the State's precursor demonstrations with respect to the 1997 annual, 2006 24-hour, and the 2012 annual $PM_{2.5}$ NAAQS in taking action on the SIP submissions applicable to each NAAQS.[113] Therefore, we agree with CARB and the District that the contingency measure submissions for the 1997 annual, 2006 24-hour, and 2012 annual $PM_{2.5}$ NAAQS must address sources of direct $PM_{2.5}$ and NO_X emissions but do not need to address sources of SO_X, VOCs, or ammonia.

For the 2006 24-hour $PM_{2.5}$ NAAQS, the EPA approved the comprehensive precursor demonstration that established that SO_2, VOCs, and ammonia emissions do not contribute significantly to $PM_{2.5}$ levels that exceed the 2006 24-hour $PM_{2.5}$ NAAQS in the San Joaquin Valley.[114] In 2020, a petition for review before the Ninth Circuit Court of Appeals challenged the EPA's approval of the portions of the 2019 SIP submissions related to the 2006 24-hour $PM_{2.5}$ NAAQS. In 2021, the Court vacated the approval of aggregate commitments to the extent such commitments relied on inadequately funded incentive-based control measures and remanded to the EPA for further consideration of the aggregate commitments, and for further proceedings consistent with the decision, but denied the petition in all other respects.[115] The EPA's approval of the comprehensive precursor demonstration was not the subject of the court challenge. In light of the current circumstances surrounding these precursor demonstrations, the EPA agrees that direct $PM_{2.5}$ and NO_X are the appropriate pollutants for which contingency measures are required in the San Joaquin Valley for the 2006 24-hour $PM_{2.5}$ NAAQS.

b. Using Same Contingency Measures for More Than One Triggering Event, NAAQS

Under CAA section 172(c)(9), SIPs must provide for the implementation of specific contingency measures if the area fails to meet RFP or to attain the NAAQS by the applicable attainment date. For $PM_{2.5}$, there are four potential triggering events: failure to meet any RFP requirement, failure to submit a QM report, failure to meet a QM, and failure to attain the NAAQS by the applicable attainment date.[116]

To meet the contingency measure requirement, states may adopt different measures for different triggering events but are not required to do so. If the state adopts the same set of contingency measures for all the triggering events, however, then the contingency measures may all be implemented by earlier-occurring triggering events leaving no contingency measures for potential later-occuring events. In that case, if a state has no remaining approved contingency measures, then the EPA believes that states must adopt and submit additional contingency measures to be available for potential later-occuring triggering events. The potential for states to have used all approved contingency measures, and thus to lack contingency measures for potential later-triggering events is compounded by the reliance on the same set of contingency measures for more than one iteration of the $PM_{2.5}$ NAAQS. Accordingly, while the EPA might approve a SIP that relies on the same contingency measures for multiple potential triggering events, a SIP that does so may be subject to the need for future revision each time a triggering event occurs.

As noted previously, CARB and the District have submitted three contingency measures, each of which covers all three of the 1997 annual, 2006 24-hour, and 2012 annual $PM_{2.5}$ NAAQS (*i.e.,* the same set of contingency measures has been submitted to address the contingency measure requirements for more than one $PM_{2.5}$ NAAQS). In addition, each of the contingency measures addresses each of the four potential triggering events: failure to meet any RFP requirement, failure to submit a QM report, failure to meet a QM, and failure to attain the NAAQS by the applicable attainment date.[117] As noted previously, states may adopt different measures for different triggering events and different NAAQS, but we do not believe that states are

[106] With respect to the contingency measures being surplus to the RFP and attainment needs of the San Joaquin Valley for the 1997 annual $PM_{2.5}$ NAAQS, we are relying on the recent approval of the RFP and attainment demonstrations in the State's 15 $\mu g/m^3$ SIP Revision.

[107] See generally 40 CFR 51.1009(a) and 40 CFR 51.1010(a).

[108] 40 CFR 51.1000.

[109] 40 CFR 51.1006(a).

[110] 40 CFR 51.1006(a)(1)(iii).

[111] 40 CFR 51.1009(a)(4)(i).

[112] See, *e.g.,* SJV $PM_{2.5}$ Contingency Measure SIP, Appendix G (Appendix C from the 2018 $PM_{2.5}$ Plan), p. C–12.

[113] EPA, ''Air Quality State Implementation Plans; Approvals and Promulgations: California; 1997 Annual Fine Particulate Matter Serious and Clean Air Act Section 189(d) Nonattainment Area Requirements; San Joaquin Valley, CA,'' Final rule, signed December 5, 2023; 85 FR 17382, 17390–17396, finalized at 85 FR 44192; 86 FR 49100, 49107–49112, finalized at 86 FR 67343.

[114] 85 FR 17382, 17390–17396, finalized at 85 FR 44192.

[115] *Medical Advocates for Healthy Air* v. *EPA,* No. 20–72780, Memorandum, Dkt. #58–1 (9th Cir. Apr. 13, 2022).

[116] 40 CFR 51.1014(a).

[117] 40 CFR 51.1014(a).

required to do so, and thus, we find that the State's reliance on the same set of contingency measures for more than one triggering event and more than one NAAQS to be acceptable.

In this instance, two of the three contingency measures—the Residential Wood Burning Contingency Measure and the Smog Check Contingency Measure—include provisions that would separately be implemented after a second triggering event.[118] Under section 5.7.3 of Rule 4901, upon a first triggering event, the No Burn (*i.e.,* curtailment) thresholds for the five non-hot spot counties (Kings, Merced, San Joaquin, Stanislaus, and Tulare) would be lowered to match the tighter No Burn thresholds for the three hot spot counties (Fresno, Madera, and Kern) (*i.e.,* to 35 μg/m^3 for registered devices and to 12 μg/m^3 for unregistered devices). Upon a subsequent triggering event (*i.e.,* in response to a separate, later determination by the EPA), the No Burn threshold for unregistered fireplaces and woodstoves for all eight counties would be lowered from 12 μg/m^3 to 11 μg/m^3.

Similarly, under the Smog Check Contingency Measure, upon a first triggering event, the Smog Check exemption would be lowered from eight or fewer model years old to seven or fewer model years old. Upon a subsequent triggering event (*i.e.,* in response to a separate, later determination by the EPA), the Smog Check exemption would be lowered from seven or fewer model years old to six or fewer model years old.

Therefore, after a first triggering event, the State would have two remaining SIP-approved contingency measures that are not yet triggered as it develops a SIP revision to meet the missed RFP requirement or to correct ongoing nonattainment. The EPA believes that the State would need to assess whether those two remaining contingency measures were sufficient to meet the contingency measure requirements in that future time and, if necessary, adopt and submit additional contingency measures to be available for potential later-occuring triggering events.

c. Magnitude of Emissions Reductions

As noted previously, neither the CAA nor the EPA's implementing regulations establish a specific level of emission reductions that implementation of contingency measures must achieve, but the EPA has recommended in existing guidance that contingency measures should provide for emission reductions equivalent to approximately one year of reductions needed for RFP in the nonattainment area.

Using the longstanding approach, contingency measures should provide for emissions reductions of approximately one year's worth of RFP for each of the relevant $PM_{2.5}$ NAAQS. Under the approach described in the EPA's Draft Revised Contingency Measure Guidance, the EPA has suggested that contingency measures provide for emissions reductions of approximately one year's worth of progress for each of the relevant $PM_{2.5}$ NAAQS rather than one year's worth of RFP.

We have reviewed the calculations in the SJV $PM_{2.5}$ Contingency Measure SIP, as summarized in section V.B.1 of this proposed rule, and find that the State properly calculated one year's worth of RFP (as an interim step in calculating one year's worth of progress) and one year's worth of progress for each of the relevant $PM_{2.5}$ NAAQS in the San Joaquin Valley.[119] We have also reviewed the calculations in the SJV $PM_{2.5}$ Contingency Measure SIP used to compare the emissions reductions from the Residential Wood Burning Contingency Measure with one year's worth of progress and generally find them to be acceptable with the exception that the calculation includes the emissions reductions from both triggering events in the evaluation. Only the emissions reductions from the first trigger should be used because there is no assurance that the additional emissions reductions from the second triggering event will provide emissions reductions in the year or two following the first triggering event.

We recognize that the calculations in the SJV $PM_{2.5}$ Contingency Measure SIP relied upon an interpollutant trading ratio of 6:1 (*i.e.,* 6 tpd NO_X for each excess 1 tpd direct $PM_{2.5}$) to convert ''excess'' $PM_{2.5}$ emissions reductions to equivalent NO_X emissions reductions. The technical basis of the interpollutant trading ratio of 6:1 was provided in the State's 2021 Progress Report to the EPA to support the State's Serious area attainment demonstration for the 2012 annual $PM_{2.5}$ NAAQS. Specifically, the State analyzed the relative effect of reducing 30% direct $PM_{2.5}$ (annual average) emissions versus 30% NO_X (annual average) emissions on ambient annual average $PM_{2.5}$ concentrations (as modeled for 2024) at each regulatory monitoring site in the San Joaquin Valley using data from the precursor sensitivity analyses in the 2018 $PM_{2.5}$ Plan.[120] While the 2021 Progress Report was nominally for only the 2012 annual $PM_{2.5}$ NAAQS and corresponded to the modeled 2025 attainment year in the State's Serious area plan for the 2012 annual $PM_{2.5}$ NAAQS (later withdrawn on October 27, 2022), we note that the control strategy in the 2018 $PM_{2.5}$ Plan was built upon annual average emissions inventories (*e.g.,* for demonstrating RFP) and applied in common to the 1997, 2006, and 2012 $PM_{2.5}$ NAAQS. Later, the 15 μg/m^3 SIP Revision for the 1997 annual $PM_{2.5}$ NAAQS retained the annual average emissions inventory basis for the control strategy to attain that NAAQS and continued to rely on the State's precursor sensitivity analyses. In other words, there is a common foundation on which CARB and the District selected the 6:1 ratio.

As previously discussed, CARB and the District examined several methods for calculating the ratio based on varying combinations of monitoring sites. They concluded that 6:1 was a conservative ratio as it was less than the average ratio for the two sites (in Fresno and Kern Counties) with the highest modeled (annual average) ambient $PM_{2.5}$ concentrations in 2025 (6.1:1), the average ratio of the six sites (in Fresno, Kern, Stanislaus, and Tulare Counties) with modeled 2025 concentrations over 11.00 μg/m^3 (6.4:1), and the average ratio of the six sites (in Fresno, Kern, Kings, and Tulare Counties) with a 2020 design value over 12 μg/m^3 (6.6:1).[121]

We have reviewed the State's technical basis for the 6:1 interpollutant trading ratio and find that it is a reasonable ratio for purposes of estimating the NO_X equivalent of excess direct $PM_{2.5}$ emission reductions for purposes of contingency measures in the San Joaquin Valley for the 1997 annual, 2006 24-hour, and 2012 annual $PM_{2.5}$ NAAQS. First, the annual average emissions inventory and integrated

[118] We note that the contingency provisions in Rule 8051 would be fully implemented following a first triggering event.

[119] With respect to the 2012 $PM_{2.5}$ NAAQS, we agree with the calculation of one year's worth of progress in the SJV $PM_{2.5}$ Contingency Measure SIP that is based on the outermost RFP milestone year, rather than the attainment year, because, as an area for which an impracticability demonstration has been approved, the attainment year has not yet been established.

[120] See Appendix K (''Modeling Attainment Demonstration'') of the 2018 $PM_{2.5}$ Plan, including Table 14 (annual average modeled emissions inventory) and Table 49 (precursor sensitivity analysis for annual average ambient $PM_{2.5}$ concentration in 2024).

[121] 2021 Progress Report, Table 7 (''Base and Projected 2025 Annual Average Design Values Used to Select/Prioritize Sites for Calculating an Average Trading Ratio''). At the time, the modeled 2025 concentrations corresponded to the attainment year in the State's Serious area plan for the 2012 annual $PM_{2.5}$ NAAQS, which was later withdrawn on October 27, 2022.

nature of attainment planning for the three NAAQS provides a common emissions and control strategy basis for the ratios. Second, the ratios are based on whole emissions inventories (rather than, for example, only on-road emissions inventories that might be relevant to motor vehicle emission budgets) and modeling for a near-term year (2025), given that these contingency measures would be triggered no sooner than 2024.

Third, by examining several methods that involve averaging across two to six sites, including two methods that include both hot spot and non-hot spot counties, the State provides robustness in the ratio (*i.e.,* may better reflect the effect of emission reductions from the three contingency measures across sites in the San Joaquin Valley). The inclusion of non-hot spot counties in two of the averaging methods is important in that, upon a first triggering event, the Residential Wood Burning Contingency Measure—which is the contingency measure that would achieve emission reductions in excess of one year's worth of direct $PM_{2.5}$ emission reductions—would lower the No Burn (*i.e.,* curtailment) thresholds for the five non-hot spot counties (Kings, Merced, San Joaquin, Stanislaus, and Tulare) to match the tighter No Burn thresholds for the three hot spot counties (Fresno, Madera, and Kern). Fourth, we agree with CARB and the District that the selected 6:1 ratio is conservative relative to the slightly higher average ratios of 6.1:1, 6.4:1, and 6.6:1 from the methods that select sites with relatively high modeled concentrations, and relative to the ratio of 8.1:1 at the modeled 2025 high site of Bakersfield-Planz.[122]

The SJV $PM_{2.5}$ Contingency Measure SIP calculated the emissions reductions only from the Residential Wood Burning Contingency Measure because that was the only adopted contingency measure at the time, but the District and CARB have since supplemented the submission with two additional contingency measures—the Rural Open Areas Contingency Measure and the Smog Check Contingency Measure. As described in sections IV.A and IV.B of this proposed rule, the EPA proposes to approve the Residential Wood Burning Continency Measure and the Rural Open Areas Contingency Measure and, in a separate rulemaking action, we are proposing to approve the Smog Check Contingency Measure. Table 2 summarizes the estimated emissions reductions from these contingency measures, as evaluated by the EPA.

TABLE 2—ANNUAL AVERAGE EMISSIONS REDUCTIONS FROM DISTRICT AND CARB CONTINGENCY MEASURES, tpd

Contingency measure	1997 Annual $PM_{2.5}$ NAAQS		2006 24-hour $PM_{2.5}$ NAAQS		2012 Annual $PM_{2.5}$ NAAQS	
	Direct $PM_{2.5}$	NO_X	Direct $PM_{2.5}$	NO_X	Direct $PM_{2.5}$	NO_X
District: Residential Wood Burning (first triggering event)	0.5793	0.0817	0.5793	0.0817	0.5793	0.0817
District: Non-agricultural Rural Open Areas	0.008	.....	0.008	.....	0.008	.....
CARB: Smog Check (first triggering event)	.....	0.117	.....	0.120	.....	0.086
CARB: Effect of Moyer Program funding decrease in the San Joaquin Valley if Smog Check Contingency Measure triggered	.....	(0.004)	.....	(0.004)	.....	(0.003)
Total	0.5873	0.1947	0.5873	0.1977	0.5873	0.1647

Table 3 presents the estimated emissions reductions as percentages of one year's worth of RFP and one year's worth of progress both with and without trading between direct $PM_{2.5}$ and NO_X emissions. As noted previously in this proposed rule, one year's worth of RFP is the longstanding recommendation by the EPA to states regarding the magnitude of emissions reductions that contingency measures should be capable of achieving. One year's worth of progress is the new recommendation described in the EPA's Draft Revised Contingency Measure Guidance. In addition, we are proposing to approve the State's trading ratio of 6:1 (*i.e.,* 6 tpd NO_X for each excess 1 tpd direct $PM_{2.5}$) and to trade excess direct $PM_{2.5}$ emission reductions, as evaluated by the EPA, to substitute for a portion of the shortfall in NO_X emission reductions compared to one year's worth of RFP and one year's worth of progress.[123] We apply this trading ratio in our calculations for all three $PM_{2.5}$ NAAQS considered in this proposed rule.

TABLE 3—EPA EVALUATION OF DISTRICT AND CARB CONTINGENCY MEASURES AS PERCENTAGE OF ONE YEAR'S WORTH (OYW) OF RFP AND ONE YEAR'S WORTH OF PROGRESS

$PM_{2.5}$ NAAQS	Pollutant	One year's worth of RFP			One year's worth of progress		
		Reductions target	% OYW (no trading)	% OYW (with trading) [a]	Reductions target	% OYW (no trading)	% OYW (with trading) [a]
1997 Annual	Direct $PM_{2.5}$	0.44	132	100	0.41	142	100
	NO_X	16.7	1.2	6.3	7.9	2.5	15.7
2006 24-hour	Direct $PM_{2.5}$	0.58	101	100	0.52	112	100
	NO_X	18.4	1.1	1.3	6.7	3.0	8.8
2012 Annual	Direct $PM_{2.5}$	0.46	129	100	0.43	138	100

[122] We note that the interpollutant trading ratio of 6:1 compares favorably with the interpollutant trading ratios that the EPA used recently in the Agency's proposed San Joaquin Valley $PM_{2.5}$ contingency measure FIP. We provide our evaluation of the interpollutant trading ratio in the SJV $PM_{2.5}$ Contingency Measure SIP relative to the corresponding ratios in our proposed FIP in a Memorandum to File from Rory Mays and Scott Bohning, EPA Region IX, Subject: ''Comparison of California and EPA Interpollutant Trading Ratios for Trading Excess Direct $PM_{2.5}$ Emission Reductions to NO_X Equivalent Emission Reductions for $PM_{2.5}$ Contingency Measure Purposes in the San Joaquin Valley,'' December 2023.

[123] While this trading would not make up the entire shortfall in NO_X emission reductions, it gives a sense for the magnitude of the relative ambient effect of the excess direct $PM_{2.5}$ emission reductions towards meeting one year's worth of RFP or one year's worth of progress.

TABLE 3—EPA EVALUATION OF DISTRICT AND CARB CONTINGENCY MEASURES AS PERCENTAGE OF ONE YEAR'S WORTH (OYW) OF RFP AND ONE YEAR'S WORTH OF PROGRESS—Continued

$PM_{2.5}$ NAAQS	Pollutant	One year's worth of RFP			One year's worth of progress		
		Reductions target	% OYW (no trading)	% OYW (with trading) [a]	Reductions target	% OYW (no trading)	% OYW (with trading) [a]
	NO_X	15.3	1.1	6.3	8.7	1.9	13.1

[a] The EPA has calculated % OYW (With Trading) for NO_X based on the 6:1 ratio presented in the SJV $PM_{2.5}$ Contingency Measure SIP.

As shown in Table 2, the sum of the emissions reductions from the three contingency measures is approximately 0.5873 tpd direct $PM_{2.5}$ and ranges from 0.1647 tpd to 0.1977 tpd NO_X, depending on the particular $PM_{2.5}$ NAAQS. Without taking into account the substitution principle, these reductions would exceed one year's worth of RFP for direct $PM_{2.5}$ and provide a portion of one year's worth of RFP for NO_X for the 1997 annual $PM_{2.5}$ NAAQS, 2006 24-hour $PM_{2.5}$ NAAQS, and the 2012 annual $PM_{2.5}$ NAAQS, as shown in Table 3. With respect to one year's worth of progress, these reductions would similarly exceed one year's worth of progress for direct $PM_{2.5}$ and provide a portion of one year's worth of progress for NO_X for all three $PM_{2.5}$ NAAQS, as shown in Table 3.

Taking into account the substitution principle, under which, in this case, excess direct $PM_{2.5}$ emissions are substituted for a shortfall in NO_X emissions, the reductions would amount to 100% of one year's worth of RFP for direct $PM_{2.5}$ and the following amounts of one year's worth of RFP for NO_X for each NAAQS: 1997 annual $PM_{2.5}$ NAAQS (6.3%), 2006 24-hour $PM_{2.5}$ NAAQS (1.3%), and 2012 annual $PM_{2.5}$ NAAQS (6.3%). Similarly, the reductions would amount to 100% of one year's worth of progress for direct $PM_{2.5}$ and the following amounts of one year's worth of progress for NO_X for each NAAQS: 1997 annual $PM_{2.5}$ NAAQS (15.7%), 2006 24-hour $PM_{2.5}$ NAAQS (8.8%), and 2012 annual $PM_{2.5}$ NAAQS (13.1%).

While our estimates of the emissions from the contingency measures relative to one year's worth of RFP or progress differ in some respects from those contained in the SJV $PM_{2.5}$ Contingency Measure SIP, our conclusion is the same as the conclusion drawn by the District and CARB, namely, that the emissions reductions would provide for one year's worth of RFP or progress for direct $PM_{2.5}$ but would provide only a portion of one year's worth of RFP or progress for NO_X. Thus, we would expect the State to provide a ''reasoned justification'' to support approval of the contingency measures as meeting the requirements under CAA section 172(c)(9) and 40 CFR 51.1014 for the nonattainment area even though the contingency measures would not provide for the magnitude of emissions reductions recommended by the EPA to comply with the requirements. The District and CARB have included their reasoned justifications in the form of feasibility analyses included as chapters 4 and 5 of the SJV $PM_{2.5}$ Contingency Measure SIP, respectively. We provide our review of the feasibility analyses in the following section of this document.

2. Contingency Measure Feasibility Analyses

The EPA has reviewed the State's infeasibility demonstrations for not adopting contingency measures beyond the residential wood burning, rural open areas, and Smog Check contingency measures, including both the process used by the State and its assessment specific to a wide range of stationary, area, and mobile source categories.[124] Notably, in connection with the EPA's proposed contingency measure FIP for the San Joaquin Valley, the EPA recently prepared a detailed evaluation of source categories and measures that we considered as potential additional contingency measures but determined to be infeasible or otherwise unsuitable for contingency measures. See ''EPA Source Category and Control Measure Assessment and Reasoned Justification Technical Support Document, Proposed Contingency Measures Federal Implementation Plan for the Fine Particulate Matter Standards for San Joaquin Valley, California,'' July 2023 (''EPA's Reasoned Justification TSD''). We have relied heavily on that TSD given its breadth and depth, as well as the expertise of EPA Region IX staff, to review the State's infeasibility demonstration, understand where the State's and the EPA's analyses draw largely similar conclusions, and identify those source categories where the control measure analyses differ. As described in the following paragraphs, the EPA proposes to find that the State's infeasibility demonstrations adequately justify the contingency measures selected by the State to meet the contingency measure requirement under CAA section 172(c)(9) and 40 CFR 51.1014 for the San Joaquin Valley for the 1997 annual, 2006 24-hour, and 2012 annual $PM_{2.5}$ NAAQS.

In terms of process, both CARB and the District identified and evaluated existing and potential control measures using components of the process recommended in the EPA's Draft Revised Contingency Measures Guidance,[125] even if not necessarily in the same sequence as those recommended by the EPA. As described in section V.B.2 of this proposed rule, for the wide range of stationary and area sources under its jurisdiction, the District described their ongoing stationary source regulatory efforts, identified potential control measures as candidate contingency measures, and analyzed the technological and/or economic feasibility of each candidate measure, including the feasibility of implementing such measures within 60 days and achieving the resulting emission reductions within one to two years.[126] The District also provided more in-depth analysis of potential control measures for five source categories, ultimately adopting measures for two source categories (wood burning fireplaces and wood burning heaters and rural open areas) and providing a reasoned justification for not adopting such measures for the other three source categories (commercial charbroiling, almond harvesting, and oil and gas production combustion equipment). We find that the District employed a reasonable process to identify and assess the feasibility and suitability of potential control measures as contingency measures for stationary and area sources in the San Joaquin Valley.

Similarly, as described in section V.B.2 of this proposed rule, CARB identified potential mobile source control measures, assessed whether

[124] Our summaries of the infeasibility demonstrations are found in section V.B.2 of this document.

[125] EPA's Draft Contingency Measure Guidance, section 4 (''Reasoned Justification for Less Than [One Year's Worth] of Progress'').

[126] SJV $PM_{2.5}$ Contingency Measure SIP, pp. 9–11.

each candidate measure could be implemented within 60 days of a triggering event and emission reductions achieved within one to two years, and then analyzed their technological and/or economic feasibility.[127] Regarding timing of emission reductions from mobile sources, CARB concludes that new engine standards and fleet regulations are not appropriate for contingency measures given the time needed for manufacturers to design, develop, and deploy cleaner engines or equipment at scale, especially for zero-emission equipment.

As described in the EPA's Reasoned Justification TSD,[128] as a general matter, new mobile source engine or vehicle emission standards require significant lead time (more than two years) to allow manufacturers time to retool factories to produce compliant engines or vehicles. Retrofit or replacement requirements also require significant lead time to allow owners and operators to manage the process of retrofitting or replacing old engines or vehicles. Therefore, we agree with CARB that such mobile source control measures would not achieve emission reductions within one to two years of a contingency measure triggering event. Overall, we find that the CARB employed a reasonable process to identify and assess the feasibility and suitability of potential control measures as contingency measures for mobile sources in the San Joaquin Valley and in California more broadly.[129]

Beyond the analytical components employed by CARB and the District that mirror those recommended by the EPA, CARB and the District also evaluated whether they could develop, adopt, and secure EPA approval of SIP submissions, including additional contingency measures, meeting the contingency measure requirements, prior to the September 30, 2024 consent decree deadline for the EPA to promulgate a contingency measures FIP for San Joaquin Valley for the 1997 annual, 2006 24-hour and 2012 $PM_{2.5}$ NAAQS.[130] The EPA finds that such considerations, while important in the broader context of environmental regulation and sanctions in the San Joaquin Valley, are not appropriate for evaluating the feasibility or suitability of potential control measures as contingency measures. Even absent final guidance from the EPA, states are required to adopt and submit contingency measures within the timelines established by the CAA in response to EPA actions, including disapproval of prior contingency measure submissions, as was the case here, effective December 27, 2021.[131] In this instance, however, neither CARB nor the District relied upon the inability to adopt contingency measures and secure EPA approval by the consent decree deadline as the sole justification for not adopting additional contingency measures for any of the relevant source categories.

In addition, in certain instances, the District states that the robust public process necessary to develop and adopt control measures would take more than two years,[132] while CARB states that a state-wide regulatory measure typically needs five years to develop and adopt,[133] and therefore fall outside the one to two-year timeframe recommended in the EPA's Draft Revised Contingency Measures Guidance. While we certainly appreciate the importance of robust public process in developing control measures, inclusive of public process requirements in the CAA and the Administrative Procedures Act, the EPA finds that such timing considerations are not appropriate for assessing the feasibility of potential control measures as contingency measures. As previously noted, states are required to adopt and submit contingency measures within the timelines established by the CAA in response to EPA actions, including disapproval of prior contingency measure submissions.

For each of the stationary and area source categories examined, the EPA agrees with the District's determination that additional control measures cannot feasibly reduce emissions within one to two years. We first describe those source categories where we agree with the bases presented by the District. Then we discuss those source categories where the basis of the EPA's conclusion differs from that of the District, even while the conclusion itself is the same—that the additional control measure evaluated cannot feasibly reduce emissions within one to two years.

The District's analyses and conclusions were substantially the same as those of the EPA for the following source categories: open burning and prescribed/hazard burning (Rules 4103 and 4106), cotton gins (Rule 4204), fuel burning equipment (Rule 4301), flares (Rule 4311), lime kilns (Rule 4313; none operate in the San Joaquin Valley), solid fuel-fired boilers, steam generators, and process heaters (Rule 4352), glass melting furnaces (Rule 4354), asphalt paving and maintenance (Rule 4641; a VOC rule), internal combustion engines (Rule 4702), stationary gas turbines (Rule 4703), residential wood burning (Rule 4901, excluding the Residential Wood Burning Contingency Measure submitted as amendments to the rule), and fugitive dust (Regulation VIII, excluding the Rural Open Areas Contingency Measure submitted as amendments to Rule 8051).[134]

We note that the candidate control measures evaluated for certain sources, such as internal combustion engines, stationary gas turbines, boilers, steam generators, and process heaters, would require installation of costly and engineering-intensive devices (*e.g.,* oxy-fuel fired furnaces and natural gas furnaces equipped with selective catalytic reduction (SCR) for glass melting). As described in the EPA's Reasoned Justification TSD, while these technologies may be available and feasible in some contexts, we found that it would be technologically infeasible for these measures to be implemented and achieve meaningful emission reductions within one to two years.[135] Thus, we agree with the District's determinations that such measures would be technologically infeasible in the context of contingency measures at this time.

We note that the EPA's Reasoned Justification TSD does not present an evaluation of potential contingency measures specifically related to District Rules 4301, 4309, and 4352 and, thus,

[127] SJV $PM_{2.5}$ Contingency Measure SIP, section 5.3 (''Measure Analysis''); and Smog Check Contingency Measure, Appendix A (''Infeasibility Analysis'').

[128] EPA's Reasoned Justification TSD, pp. 143–144.

[129] We note that the EPA's Reasoned Justification TSD contains additional information that presents a comprehensive summary of the emissions inventories for direct $PM_{2.5}$ and NO_X in the San Joaquin Valley, as well as consideration of past recommendations of new control measures or improvements to existing control measures by the EPA and community and environmental groups (whether for purposes of RACM/RACT, BACM/BACT, MSM, attainment and RFP demonstrations, or contingency measures).

[130] SJV $PM_{2.5}$ Contingency Measure SIP, pp. 12–25 and pp. 57–58.

[131] 86 FR 67329 and 86 FR 67343.

[132] SJV $PM_{2.5}$ Contingency Measure SIP, section 4.2 (''District Feasibility Analysis'').

[133] SJV $PM_{2.5}$ Contingency Measure SIP, 57.

[134] We note that, in responding to comments received during the public review of the SJV $PM_{2.5}$ Contingency Measure SIP and Residential Wood Burning Contingency Measure, the District states that, while there are limited opportunities for contingency measures, the District ''will consider additional wood burning curtailments as part of control measure analyses for upcoming [SIPs].'' SJV $PM_{2.5}$ Contingency Measure SIP, Appendix J (''Comments and Responses''), p. J–4. See also EPA's Reasoned Justification TSD, section G.1 (''Residential Fuel Combustion'').

[135] See, *e.g.,* EPA's Reasoned Justification TSD, pp. 9–22 (the EPA's evaluation of contingency measures for boilers, steam generators, and process heaters).

we provide our review and evaluation in this document. With respect to fuel burning equipment (Rule 4301), the SJV $PM_{2.5}$ Contingency Measure SIP notes that the District has adopted more stringent NO_X requirements for specific types of fuel burning equipment that supersede Rule 4301.[136] Potential contingency measures for emission sources related to Rule 4301 are covered in the EPA's evaluation of Rules 4306, 4307, 4308, 4309, 4320, and 4352. Our assessments of Rules 4309 and 4352 are contained in the following paragraphs.

With respect to dryers, dehydrators, and ovens (related to Rule 4309), the District considered controls such as low NO_X burners and determined that such technology could not feasibly be implemented within the two-year timeframe for contingency measures for this category, includes further discussion in appendices F and G of the SJV $PM_{2.5}$ Contingency Measure SIP (*i.e.,* copies of the stationary and area source control evaluations for the 2022 Ozone Plan [137] and the 2018 $PM_{2.5}$ Plan, respectively), and states that, in certain applications (*e.g.,* dehydrators for onions), may have an adverse effect on food product quality.[138] We have reviewed the District's infeasibility demonstration and agree that emissions reductions for this category could not feasibly be achieved within one to two years, and are therefore not suitable for contingency measures. As discussed in Appendix F of the SJV $PM_{2.5}$ Contingency Measure SIP, South Coast Air Quality Management District (AQMD) has recently revised and divided its rules for comparable sources, including amendments to NO_X limits, that are difficult to compare to Rule 4309 given their distinct applicability and provisions (*e.g.,* whether limits are differentiated by operating temperature). The EPA recommends that the District continue to evaluate dryers, dehydrators, and ovens for opportunities to further reduce NO_X emissions (and, as applicable, $PM_{2.5}$ emissions) in developing subsequent plans.

With respect to Rule 4352, the State's submittal notes that the District adopted amendments to Rule 4352 in December 2021, and District analysis associated with the 2021 amendments to Rule 4352 found that all control alternatives that would further reduce emissions require technology that had prohibitively high capital costs and were not cost effective,[139] and have not been widely implemented at facilities subject to Rule 4352. Given these reasons and given that the emission limits included in the 2021 amendments to Rule 4352 are lower than those of other districts' rules, we agree with the District's conclusion with respect to Rule 4352.

For several other source categories, the EPA finds that the contingency measure analyses by the District and the EPA differ in certain respects that warrant further discussion. Notwithstanding these differences, both the District's analyses and the EPA's analyses supporting our recent contingency measure FIP proposal support the conclusion that the measures evaluated cannot feasibly reduce emissions within one to two years. We discuss each of these cases in the paragraphs that follow.

With respect to residential water heaters (Rule 4902) and residential furnaces (Rule 4905), the District evaluated a contingency measure option to adopt electrification requirements (*i.e.,* requiring newly purchased furnaces and water heaters to be zero-emission units) earlier than a commitment by CARB to develop a state-wide building electrification measure that would achieve emission reductions starting in 2030.[140] The District deemed this contingency measure option infeasible, citing the lead time necessary for manufacturers to design and produce electric units, the need for collaboration with energy and building code regulators, consistency with State and local efforts, consideration of housing cost and affordability impacts, and equity considerations for low-income and environmental justice communities.[141] While we note that certain aspects of these factors do not necessarily align with the feasibility criteria outlined in the EPA's Draft Revised Contingency Measures Guidance,[142] the EPA determined that the building electrification contingency measure option would not be feasible because we expect that it would result in negligible emissions reductions within two years after trigger,[143] consistent with the District's suggestion that the attrition-based nature of implementation of this contingency measure option deem the measure infeasible. The EPA also recommended that the District consider developing control measures or programs that would incentivize the early replacement of existing gas space and water heaters with electric appliances, as such actions could significantly reduce emissions from this significant source category in the longer-term future.

With respect to commercial charbroiling (Rule 4692), the District noted that particulate matter control devices are required to be installed and operated on chain-driven commercial charbroilers under Rule 4692. The District evaluated a contingency measure option involving the requirement of particulate matter controls on underfired charbroilers. The District's evaluation includes a detailed cost analysis, concluding that underfired charbroiler contingency measure option is infeasible based on high costs of installation and maintenance, technological infeasibility considerations, lack of availability of specialized staff at restaurants, control equipment fire safety certification concerns, and the lack of demonstrated controls in areas that have adopted underfired charbroiling control measures.[144] The District also described ongoing and upcoming efforts to advance underfired charbroiler emissions control technology and demonstrate its performance in practice. The EPA's evaluation did not present cost information to conclude that an underfired charbroiling contingency measure would be economically infeasible, and we did not include the same considerations regarding lack of availability of specialized staff at restaurants and other technological feasibility concerns presented by the District. However, the EPA determined that an underfired charbroiling contingency measure would be infeasible based on fire safety certification concerns and lack of demonstrated implementation of controls.[145] In addition to recommending that the District and CARB collaborate with control technology manufacturers and industry to develop effective methods for reducing the commercial cooking industry's impact on public health, the EPA strongly encouraged the District to expand its Restaurant Charbroiler

[136] SJV $PM_{2.5}$ Contingency Measure SIP, pp. 13–14.

[137] SJVUAPCD, ''2022 Plan for the 2015 8-hour Ozone Standard,'' adopted December 15, 2022.

[138] SJV $PM_{2.5}$ Contingency Measure SIP, p. 16.

[139] SJVUAPCD, ''Appendix C, Cost Effectiveness Analysis for Proposed Amendments to Rule 4352 (Solid Fuel Fired Boilers, Steam Generators, and Process Heaters,'' December 16, 2021.

[140] SJV $PM_{2.5}$ Contingency Measure SIP, 20–22.

[141] For further discussion of these factors, see CARB, ''2022 State Strategy for the State Implementation Plan,'' adopted September 22, 2022, pp. 101–103 (''Proposed Measures: Residential and Commercial Buildings'').

[142] EPA's Draft Revised Contingency Measures Guidance, pp. 35–38.

[143] EPA's Reasoned Justification TSD, pp. 43–51.

[144] SJV $PM_{2.5}$ Contingency Measure SIP, pp. 32–41.

[145] EPA's Reasoned Justification TSD, pp. 131–136.

Technology Partnership program beyond hot spot counties.

With respect to conservation management practices (Rule 4550), the District describes its commitment in the 2018 $PM_{2.5}$ Plan to evaluate emission reduction opportunities for sources in this category (*e.g.,* emission reductions from fallowed lands and promotion of selection of conservation tillage as a conservation management practice [CMP]), explaining that rule development is ongoing and describing Rule 4550 as an ''on-the-way'' measure.[146] We acknowledge the ongoing efforts by the District to pursue emission reductions from these sources,[147] although we note that the District's use of the ''on-the-way'' term differs from its usage in the Draft Revised Contingency Measures Guidance, where the EPA defines ''on-the-way'' measures as ''the control measures in the nonattainment plan that will be implemented during the upcoming planning period'' (*i.e.,* adopted measures whose implementation is forthcoming in the near-term).[148] However, the EPA conducted its own evaluation of Rule 4550, finding that Rule 4550 contains conservation management practice options that are comparable with the rules identified in other jurisdictions and generally contain the same control measures required in other jurisdictions.[149]

The District also presented an evaluation of dust emissions from almond harvesting, concluding that a contingency measure requiring the replacement of conventional harvesting technology with low dust harvesting technology would be infeasible based on long lead times needed to meet significant increased demand generated by such a measure, prohibitively high cost of equipment, and the need to conduct additional research to better understand the changing landscape in harvesting techniques and associated emissions.[150] The EPA's evaluation determined that such a measure would be infeasible based only on the timing of emissions reductions; while the EPA presented cost effectiveness information for low dust almond harvesters,[151] the EPA did not determine that a low dust harvester replacement contingency measure would be economically infeasible, nor did we determine that any work needed to understand the emissions profile of low dust nut harvesters would disqualify a potential low dust harvester replacement contingency measure.[152]

With respect to oil and gas production combustion equipment (related to District Rules 4306 and 4320), the District evaluated numerous control options including direct control of $PM_{2.5}$ (*e.g.,* electrostatic precipitators or venturi scrubbers), electrification of oilfield steam generators, and solar powered oilfield steam generators.[153] For each of these options, the District provided technological and/or economic feasibility considerations deeming each option infeasible as a contingency measure. The District also evaluated lower emission limits for boilers and steam generators.[154] In this evaluation, the District explained that the EPA has determined that Rule 4306 meets MSM requirements and that Rule 4320 goes beyond MSM by establishing even lower emissions limits. The District noted that equipment operators are already in the process of investing in and installing technology to meet the recently amended Rule 4320 limits and suggests that the time needed to plan and prepare for installation of control equipment to meet lower limits would exceed the one- to two-year timeline for a contingency measure to achieve emissions reductions. The District also claims numerous technological feasibility considerations associated with lowering emission limits for this category. While the District describes a ''lack of EPA recognized SIP-creditable emissions reductions from Rule 4320'' due to the technology advancing nature of Rule 4320,[155] the EPA would recognize SIP-creditable emission reductions for this category if provided with the appropriate information such as records of the number of units complying with Rule 4320 NO_X emission limits and their associated emissions.[156]

The EPA's evaluation focused on lowering emission limits for boilers and steam generators, including identification of lower emission limits adopted by the South Coast AQMD for oilfield steam generators than those adopted in Rule 4306. While the EPA's evaluation does not claim that control requirements required to meet the lower limits would be technologically infeasible altogether (in light of the lower limits adopted by South Coast AQMD), we determined that it would be technologically infeasible to meet the lower limits within the two-year timeframe for contingency measures due to the likely requirement that affected units would need to install SCR to meet the lower limits.

The District also included evaluations for boilers, steam generators, and process heaters in general covered by District Rules 4307 and 4308.[157] The District's assessments for these rules focus on economic and technological feasibility, citing dollar per ton cost effectiveness values for numerous control options and adding technological feasibility concerns for SCONOx/EMx units. The EPA's evaluation for boilers in general does not provide cost effectiveness values to suggest that lower emission limits for boilers, steam generators, and process heaters are economically infeasible. However, as described in the EPA's evaluation, we expect that units required to meet lower limits than those already adopted in Rules 4307 and 4308 would require installation of SCR, which cannot be feasibly achieved within the two-year timeframe for contingency measures.[158]

Similar to our evaluation of the District's feasibility analysis, we have evaluated CARB's feasibility analysis, in part, by comparing the bases and conclusions of the State's analysis against those presented in the EPA's Reasoned Justification TSD.[159] Both CARB and the EPA note the importance of mobile source emissions in the San Joaquin Valley, particularly given that the large majority of NO_X emissions are from mobile sources, and describe the breadth of control measures considered by CARB to reduce direct $PM_{2.5}$ and NO_X emissions for broader CAA purposes in the San Joaquin Valley. These include new vehicle and engine emission standards, for both on-road and non-road applications, which generally apply to manufacturers and

[146] SJV $PM_{2.5}$ Contingency Measure SIP, pp. 23–24.

[147] See, *e.g.,* SJVUAPCD, ''Public Workshop for Potential Amendments to District Rule 4550 (Conservation Management Practices),'' November 7, 2022 (workshop presentation).

[148] EPA's Draft Revised Contingency Measure Guidance, p. 32.

[149] EPA's Reasoned Justification TSD, pp. 86–90.

[150] SJV $PM_{2.5}$ Contingency Measure SIP, pp. 41–43.

[151] EPA's Reasoned Justification TSD, chapter V.

[152] EPA's Reasoned Justification TSD, p. 95.

[153] SJV $PM_{2.5}$ Contingency Measure SIP, pp. 44–47.

[154] SJV $PM_{2.5}$ Contingency Measure SIP, pp. 47–49.

[155] SJV $PM_{2.5}$ Contingency Measure SIP, p. 49.

[156] See also, EPA Region IX, ''Technical Support Document for EPA's Notice of Proposed Rulemaking for the California State Implementation Plan, San Joaquin Valley Unified Air Pollution Control District's Rule 4320, Advanced Emission Reduction Options for Boilers, Steam Generators, and Process Heaters Greater than 5.0 MMBtu/hr),'' August 19, 2010, p. 8.

[157] SJV $PM_{2.5}$ Contingency Measure SIP, pp. 14–16.

[158] EPA's Reasoned Justification TSD, pp. 9–22.

[159] EPA's Reasoned Justification TSD, section H (''Mobile Sources'').

achieve emission reductions through vehicle turnover; retrofit or replacement requirements for existing vehicles and fleets; and inspection and maintenance (I/M) program requirements, such as those implemented under California's Smog Check program for light-duty passenger cars and trucks, and those entering implementation under California's Heavy-Duty I/M program. We agree that the adopted measures and on-going development of mobile sources measures by CARB, including zero-emission standards, further constrain the opportunities for additional emission reductions via contingency measures.[160]

With respect to contingency measure requirements, CARB examined potential controls across the wide range of mobile source categories, including on-road light-duty passenger cars, trucks, and motorcycles; medium- and heavy-duty trucks and buses and transportation refrigeration units; commercial harbor craft, recreational boats, and ocean going vessels; off-road industrial, construction, and mining equipment; airport ground equipment, port and rail operations, and locomotives; lawn and garden equipment; and space and water heaters. The potential controls considered include pulling forward compliance dates and/or phase-in requirements; setting more stringent standards (often atop recently tightened standards) through mechanisms such as emission standards, emissions caps, thresholds for compliance, testing frequency, making optional standards required, or percentage of sales requirements; and removing exemptions and/or compliance options. In virtually all cases, CARB found that control measures beyond those already adopted or in development to fulfill commitments (*e.g.,* under the 2022 State SIP Strategy) were not technologically feasible.[161] In all cases (except the adopted Smog Check Contingency Measure), CARB found that the measures were not suitable for contingency measures due to lead time to develop, certify, adopt, and/or implement measures that could not be implemented within 60 days of a triggering event and achieve emission reductions within one year of the triggering event.

We have reviewed CARB's specific control measure analyses and agree that such potential control measures are not feasible within the timeframe necessary for contingency measures and, in many cases, are not technologically feasible to the extent that they build upon on-the-books and on-the-way measures that are technology- or market-forcing. Consistent with our evaluation presented in the EPA's Reasoned Justification TSD,[162] the EPA has not identified any engine or vehicle emission standards for consideration as contingency measures. Beyond the wide range of source types and control approaches examined by CARB, the EPA also examined a handful of potential additional controls and concluded that they too were not suitable as contingency measures, including expansion of Enhanced I/M requirements to areas currently subject to Basic I/M or Partial Enhanced I/M requirements in the San Joaquin Valley,[163] provisions to expand the applicability of and add requirements to District Rule 9510 (''Indirect Source Review''),[164] and additional transportation control measures.[165] Therefore, we propose to find that CARB's infeasibility demonstration adequately justifies the contingency measures selected by CARB for the San Joaquin Valley for the 1997 annual, 2006 24-hour and 2012 annual $PM_{2.5}$ NAAQS.

3. Conclusion

Based on our review and proposed approval of the three contingency measures submitted by the State that would achieve the full one year's worth of emission reductions for direct $PM_{2.5}$ and a portion of one year's worth of emission reductions for NO_X (whether using the longstanding RFP method or the new progress method) and our review of and proposed finding that the State's infeasibility demonstrations adequately justify the selection of the three contingency measures, we propose to approve the SJV $PM_{2.5}$ Contingency Measures SIP, the Residential Wood Burning Contingency Measure, the Rural Open Areas Contingency Measure, and the Smog Check Contingency Measure (as applied to the San Joaquin Valley) as meeting the contingency measure requirements of CAA section 172(c)(9) and 40 CFR 51.1014 for the 1997 annual, 2006 24-hour, and 2012 annual $PM_{2.5}$ NAAQS in the San Joaquin Valley.

VI. Environmental Justice Considerations

Executive Order 12898 (59 FR 7629, February 16, 1994) requires that federal agencies, to the greatest extent practicable and permitted by law, identify and address disproportionately high and adverse human health or environmental effects of their actions on minority and low-income populations.[166] To identify environmental burdens and susceptible populations in underserved communities in the San Joaquin Valley nonattainment area and to better understand the context of our proposed action on these communities, we conducted a screening-level analysis for $PM_{2.5}$ in the San Joaquin Valley using the EPA's environmental justice (EJ) screening and mapping tool (''EJSCREEN'').[167] The results of this analysis are being provided for informational and transparency purposes.

Our screening-level analysis indicates that all eight counties in the San Joaquin

[160] EPA's Reasoned Justification TSD, pp. 139–142. See also, SJV $PM_{2.5}$ Contingency Measure SIP, pp. 53–56; and Smog Check Contingency Measure, pp. 8–10.

[161] There were three measures that CARB indicated as technologically feasible. One is the Smog Check Contingency Measure that CARB has adopted and submitted to the EPA. A second was a different Smog Check measure that would add requirements for only high mileage vehicles; however, CARB found that the compliance burden would disproportionately fall on low-income populations and disadvantaged communities. SJV $PM_{2.5}$ Contingency Measures SIP, p. 59. The third was to increase the testing frequency under the Heavy-Duty I/M program; however, CARB found that the compliance burden would disproportionately fall on small businesses and low-income populations. SJV $PM_{2.5}$ Contingency Measure SIP, p. 62 and Appendix A, p. 49. In the latter two cases, CARB also found that, even if the measure were technologically feasible, the measures could not be effectuated within the timeframe necessary for contingency measures.

[162] EPA's Reasoned Justification TSD, pp. 138–144.

[163] EPA's Reasoned Justification TSD, section IV.E. In addition, CARB noted in its comment letter on the EPA's proposed contingency measure FIP that, under the I/M measure evaluated by the EPA, 50% of the vehicles that would be newly subject to Enhanced I/M would be in disadvantaged communities whereas only 35% of San Joaquin Valley population live in such disadvantaged communities. Letter dated September 22, 2023, from Steven S. Cliff, Ph.D., Executive Officer, CARB to Martha Guzman, Regional Administrator, EPA Region IX. In other words, the compliance burden would disproportionately fall on low-income populations and disadvantaged communities.

[164] EPA's Reasoned Justification TSD, section IV.B.

[165] EPA's Reasoned Justification TSD, pp. 144–146.

[166] 59 FR 7629 (February 16, 1994).

[167] EJSCREEN provides a nationally consistent dataset and approach for combining environmental and demographic indicators. EJSCREEN is available at *https://www.epa.gov/ejscreen/what-ejscreen.* The EPA used EJSCREEN to obtain environmental and demographic indicators representing each of the eight counties in the San Joaquin Valley. We note that the indicators for Kern County are for the entire county. While the indicators might have slightly different numbers for the San Joaquin Valley portion of the county, most of the county's population is in the San Joaquin Valley portion, and thus the differences would be small. These indicators are included in EJSCREEN reports that are available in the rulemaking docket for this action.

Valley score above the national average for the EJSCREEN ''Demographic Index'' (*i.e.,* ranging from 48% in Stanislaus County to 61% in Tulare County, compared to 36% nationally).[168] [169] The Demographic Index is the average of an area's percent minority and percent low income populations, *i.e.,* the two populations explicitly named in Executive Order 12898.[170] All eight counties also score above the national average for demographic indices of ''linguistically isolated population'' and ''population with less than high school education.''

With respect to pollution, all eight counties (Fresno, Kern, Kings, Madera, Merced, San Joaquin, Stanislaus, and Tulare) score at or above the 97th percentile nationally for the $PM_{2.5}$ index and seven of the eight counties in the San Joaquin Valley score at or above the 90th percentile nationally for the $PM_{2.5}$ EJ index (*i.e.,* each county except Stanislaus County, which scores at the 87th percentile nationally), which is a combination of the Demographic Index and the $PM_{2.5}$ index.[171] Most counties also scored above the 80th percentile for each of 11 additional EJ indices included in the EPA's EJSCREEN analysis. In addition, several counties scored above the 90th percentile for certain EJ indices, including, for example, the Ozone EJ Index (Fresno, Kern, Madera, Merced, and Tulare Counties), the National Air Toxics Assessment (NATA) Respiratory Hazard EJ Index (Madera and Tulare Counties), and the Wastewater Discharge Indicator EJ Index (Merced, San Joaquin, Stanislaus, and Tulare Counties).[172]

We have considered the geographic scope of each of the contingency measures that the EPA proposes to approve herein on $PM_{2.5}$ concentrations in each county of the San Joaquin Valley, as well as other environmental considerations that pertain to applicable pollutant (*i.e.,* combustion $PM_{2.5}$, dust $PM_{2.5}$, or NO_X) and the applicable source category or categories.

For residential wood burning, upon a first triggering event, the Rule 4901 contingency measure would lower the No Burn (*i.e.,* curtailment) thresholds for the five non-hot spot counties (Kings, Merced, San Joaquin, Stanislaus, and Tulare) to match the tighter No Burn thresholds for the three hot spot counties (Fresno, Madera, and Kern). A prominent effect of this change would be to provide similar protections to people in the two southern-most non-hot spot counties that record among the highest year-to-year $PM_{2.5}$ design values in the San Joaquin Valley (*i.e.,* Kings County, including Corcoran and Hanford monitoring sites, and Tulare County, including Visalia monitoring site).[173] Were No Burn days to be called in Kings or Tulare County according to the more stringent thresholds, we also anticipate there would be smaller but still beneficial effect in the adjacent Fresno or Kern Counties, depending on the meteorology of the day. Upon a second triggering event, the Rule 4901 contingency measure would further lower the curtailment threshold for unregistered devices in all eight counties of the San Joaquin Valley. This would provide further protections to people throughout the area, including both hot-spot and non-hot spot counties, including those that record among the highest year-to-year $PM_{2.5}$ design values in the San Joaquin Valley.[174]

Where these direct $PM_{2.5}$ emission reductions from combustion occur, we also note that they do not require further chemical transformation in the atmosphere to form $PM_{2.5}$ (*i.e.,* the benefit is immediate) and, as they include fine particulate matter under one micron and toxic air chemicals, the reduction of such sub-micron particles would similarly reduce exposure of all residents in these areas, including minority and low-income populations to these environmental stressors. These reductions would also specifically reduce emissions on the winter days with the highest ambient $PM_{2.5}$ levels.

For open areas, the Rule 8051 contingency measure, if triggered, would lower the applicability threshold for the rural open area requirements of Rule 8051 (*i.e.,* for parcels having at least 1,000 square feet of disturbed soil) from 3.0 acres to 1.0 acre. Based on our analysis of land use to date, such rural open areas are found in all counties of the San Joaquin Valley, though with some variation from county to county consistent with overall land use types (*e.g.,* San Joaquin County has the smallest proportion of rural open areas, while Madera County has the highest proportion of rural open areas). Furthermore, there is variation in the number of rural open areas that would be newly subject to the rule, *i.e.,* those between 1.0 to 3.0 acres in size (*e.g.,* Kern County has the most total rural open area acreage from parcels between 1.0 to 3.0 acres in size, while Tulare County has the least). Given the overall land use and emission factors,[175] and assuming roughly equal levels of activity in each county (*i.e.,* soil disturbances over 1,000 square feet), we anticipate that the proposed contingency measure would provide air quality benefits in all counties of the San Joaquin Valley, with most air quality benefits occuring in Fresno, Kern, Kings, and Madera Counties.

Given that Rule 8051 for open areas was originally introduced as a PM_{10} control measure, we anticipate that the proposed measure would provide co-benefits to limiting PM_{10} levels in the San Joaquin Valley, with the same

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[168] EPA Region IX, ''EJSCREEN Analysis for the Eight Counties of the San Joaquin Valley Nonattainment Area,'' August 2022.

[169] By comparison, the eight counties score above the State average for the EJSCREEN ''Demographic Index'' (*i.e.,* ranging from 52% in Stanislaus County to 71% in Tulare County, compared to 47% in California).

[170] EJSCREEN reports environmental indicators (*e.g.,* air toxics cancer risk, Pb paint exposure, and traffic proximity and volume) and demographic indicators (*e.g.,* people of color, low income, and linguistically isolated populations). The score for a particular indicator measures how the community of interest compares with the state, the EPA region, or the national average. For example, if a given location is at the 95th percentile nationwide, this means that only five percent of the U.S. population has a higher value than the average person in the location being analyzed. EJSCREEN also reports EJ indexes, which are combinations of a single environmental indicator with the EJSCREEN Demographic Index. For additional information about environmental and demographic indicators and EJ indexes reported by EJSCREEN, see EPA, ''EJSCREEN Environmental Justice Mapping and Screening Tool—EJSCREEN Technical Documentation,'' section 2 (September 2019).

[171] By comparison, two counties score at or above the 97th percentile in California for the $PM_{2.5}$ index and five counties score at or above the 80th percentile in California for the $PM_{2.5}$ EJ index (rather than seven of eight counties that score at or above the 90th percentile nationally).

[172] Notably, Tulare County scores above the 90th percentile on six of the 12 EJ indices in the EPA's EJSCREEN analysis, including the $PM_{2.5}$ EJ Index, which is the highest count among all San Joaquin Valley counties.

[173] For example, the certified 2020–2022 $PM_{2.5}$ design value for Visalia (AQS Site ID 061072003) is 18.4 μg/m^3 for the 2012 annual $PM_{2.5}$ NAAQS and 65 μg/m^3 for the 2006 24-hour $PM_{2.5}$ NAAQS. EPA design value workbook dated May 23, 2023, ''PM25_DesignValues_2020_2022_FINAL_05_23_23.xlsx,'' worksheets ''Table5a. Site Status Ann'' and ''Table5b.Site Status 24hr.'' The certified design value includes all available data; no data flagged for exceptional events have been excluded. The EPA's Air Quality System (AQS) contains ambient air pollution data collected by federal, state, local, and tribal air pollution control agencies from thousands of monitors. More information is available at *https://www.epa.gov/aqs.*

[174] For example, the certified 2020–2022 $PM_{2.5}$ design value for Bakersfield-Airport (Planz) (AQS Site ID 060290016) is 18.8 μg/m^3 for the 2012 annual $PM_{2.5}$ NAAQS and 61 μg/m^3 for the 2006 24-hour $PM_{2.5}$ NAAQS. EPA design value workbook dated May 23, 2023, ''PM25_DesignValues_2020_2022_FINAL_05_23_23.xlsx,'' worksheets ''Table5a. Site Status Ann'' and ''Table5b.Site Status 24hr.'' The certified design value includes all available data; no data flagged for exceptional events have been excluded.

[175] For further discussion of the land use and emission factors for open areas in the San Joaquin Valley, see EPA Region IX, ''Technical Support Document, Proposed Contingency Measures Federal Implementation Plan for the Fine Particulate Matter Standards for San Joaquin Valley, California,'' July 2023, section III.E.

geographical distribution as discussed herein for direct $PM_{2.5}$ emission reductions.[176]

Lastly, we anticipate that the Smog Check Contingency Measure (discussed in more detail in our separate proposed rule),[177] if triggered, would reduce NO_X and VOC emissions from light-duty vehicles throughout the San Joaquin Valley. Such emission reductions would provide air quality benefits in all counties of the San Joaquin Valley and especially along roadways with the highest vehicle miles traveled, including the major freeways (*e.g.,* California Highway 99) and urban areas (*e.g.,* Bakersfield, Fresno, Stockton, Visalia) that intersect minority populations and low-income populations throughout the San Joaquin Valley.

VII. Proposed Action and Request for Public Comment

For the reasons described in sections IV and V of this document, and under CAA section 110(k)(3), the EPA proposes to approve two SIP revisions submitted by CARB on June 8, 2023, and October 16, 2023, for the San Joaquin Valley to address the contingency measure SIP requirements for San Joaquin Valley for the 1997 annual, 2006 24-hour, and 2012 annual $PM_{2.5}$ NAAQS. The SIP submissions include the contingency measure plan element for San Joaquin Valley for the relevant $PM_{2.5}$ NAAQS (referred to herein as the ''SJV $PM_{2.5}$ Contingency Measure SIP'') and two specific contingency measures, referred to herein as the Residential Wood Burning Contingency Measure and the Rural Open Areas Contingency Measure. We are proposing to approve the SJV $PM_{2.5}$ Contingency Measure SIP as meeting the applicable requirements of CAA section 172(c)(9) and 40 CFR 51.1014 for San Joaquin Valley for the applicable $PM_{2.5}$ NAAQS based on the infeasibility demonstrations that are provided in the submission and based on our proposed approval of the contingency measures. The Residential Wood Burning Contingency Measure and the Rural Open Areas Contingency Measure are included in amendments to SJVUAPCD Rule 4901 (''Wood Burning Fireplaces and Wood Burning Heaters'') and Rule 8051 (''Open Areas''), respectively. We are proposing to approve the two specific contingency measures because they meet the requirements under CAA section 172(c)(9) and 40 CFR 51.1014 for such measures. We will accept comments from the public on this proposal until January 19, 2024.

If we finalize this action as proposed, our action will resolve the disapproval of the contingency measure plan elements for San Joaquin Valley for the 1997 annual, 2006 24-hour, and 2012 annual $PM_{2.5}$ NAAQS, and our action will be codified through revisions to 40 CFR 52.220, ''Identification of plan—in part'' and 40 CFR 52.237, ''Part D Disapproval.'' In conjunction with our final approval into the SIP of the submitted amended versions of SJVUAPCD Rules 4901 and 8051, we would remove from the SIP the previously approved versions of SJVUAPCD Rules 4901 and 8051. Lastly, if we finalize our action as proposed, our FIP obligation arising from our December 6, 2018 finding of failure to submit will be terminated, and thus, we will no longer be obligated to finalize our August 8, 2023 proposed contingency measure FIP for San Joaquin Valley.

VIII. Incorporation by Reference

In this rulemaking, 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 SJVUAPCD Rule 4901 (''Wood Burning Fireplaces and Wood Burning Heaters''), amended May 18, 2023, and Rule 8051 (''Open Areas''), amended September 21, 2023, identified and discussed in sections IV.A and IV.B of this preamble and that include revisions to meet the contingency measure requirements under part D of title I of the CAA. The EPA has made, and will continue to make, these materials available through *https://www.regulations.gov* and at the EPA Region IX Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

IX. 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 a state plan and related measures 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

[176] We also note that environmental and community groups have recommended that fugitive dust sources in the San Joaquin Valley be subject to specific requirements rather than having the option to select from a menu of control requirements in Rule 8011 (where the definition for open areas is found). Letter dated May 18, 2022, from Tom Frantz, Association of Irritated Residents, et al., to Michael S. Regan, EPA Administrator, Attachment B, 7. The proposed measure would not alter the existing structure but rather tighten the applicability threshold for rural open areas.

[177] EPA, ''Air Plan Revision; California; Motor Vehicle Inspection and Maintenance Program Contingency Measure,'' Proposed rule, published in this **Federal Register**.

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 EPA performed an environmental justice analysis, as is described in section VI of this proposed rule, titled ''Environmental Justice Considerations.'' The analysis was done for the purpose of providing additional context and information about this rulemaking to the public, not as a basis of the action. Due to the nature of the action being taken here, this action is expected to have a neutral to positive impact on the air quality of the affected area. In addition, there is no information in the record upon which this decision is based inconsistent with the stated goal of E.O. 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Ammonia, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Sulfur dioxide, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: December 12, 2023.

Martha Guzman Aceves,

Regional Administrator, Region IX.

[FR Doc. 2023–27686 Filed 12–19–23; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R5–ES–2023–0179; FF09E21000 FXES1111090FEDR 245]

RIN 1018–BH06

Endangered and Threatened Wildlife and Plants; Endangered Species Status for West Virginia Spring Salamander and Designation of Critical Habitat

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to list the West Virginia spring salamander (*Gyrinophilus subterraneus*), an amphibian species from Greenbrier County, West Virginia, as an endangered species and to designate critical habitat under the Endangered Species Act of 1973, as amended (Act). This determination also serves as our 12-month finding on a petition to list the West Virginia spring salamander. After a review of the best available scientific and commercial information, we find that listing the species is warranted. We also propose to designate critical habitat for the West Virginia spring salamander under the Act. In total, approximately 3.5 kilometers (2.2 miles) in Greenbrier County, West Virginia, fall within the boundaries of the proposed critical habitat designation. We announce the availability of a draft economic analysis of the proposed designation of critical habitat for the West Virginia spring salamander. If we finalize this rule as proposed, it would extend the Act's protections to the species and its designated critical habitat.

DATES: We will accept comments received or postmarked on or before February 20, 2024. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES,** below) must be received by 11:59 p.m. eastern time on the closing date. We must receive requests for a public hearing, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by February 5, 2024.

ADDRESSES: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *https://www.regulations.gov.* In the Search box, enter FWS–R5–ES–2023–0179, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on ''Comment.''

(2) *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: FWS–R5–ES–2023–0179, U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on *https://www.regulations.gov.* This generally means that we will post any personal information you provide us (see Information Requested, below, for more information).

Availability of supporting materials: Supporting materials, such as the species status assessment report, are available on the Service's website at *https://www.fws.gov/office/west-virginia-ecological-services,* at *https://www.regulations.gov* at Docket No. FWS–R5–ES–2023–0179, or both. For the proposed critical habitat designation, the coordinates or plot points or both from which the maps are generated are included in the decision file for this critical habitat designation and are available at *https://www.regulations.gov* at Docket No. FWS–R5–ES–2023–0179 and on the Service's website at *https://www.fws.gov/office/west-virginia-ecological-services.*

FOR FURTHER INFORMATION CONTACT: Jennifer Norris, Field Supervisor, U.S. Fish and Wildlife Service, West Virginia Ecological Services Field Office, 6263 Appalachian Highway, Davis, WV 26260; telephone 304–866–3858. 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. Please see Docket No. FWS–R5–ES–2023–0179 on *https://www.regulations.gov* for a document that summarizes this proposed rule.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Act (16 U.S.C. 1531 *et seq.*), a species warrants listing if it meets the definition of an endangered species (in danger of extinction throughout all or a significant portion of its range) or a threatened species (likely to become an

endangered species within the foreseeable future throughout all or a significant portion of its range). If we determine that a species warrants listing, we must list the species promptly and designate the species' critical habitat to the maximum extent prudent and determinable. We have determined that the West Virginia spring salamander meets the Act's definition of an endangered species; therefore, we are proposing to list it as such and proposing a designation of its critical habitat. Both listing a species as an endangered or threatened species and designating critical habitat can be completed only by issuing a rule through the Administrative Procedure Act rulemaking process (5 U.S.C. 551 *et seq.*).

What this document does. We propose to list the West Virginia spring salamander as an endangered species under the Act, and we propose to designate critical habitat for the species.

The basis for our action. Under the Act, we may determine that a species is an endangered or threatened species because of any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. We have determined that the West Virginia spring salamander is endangered due to the following threats: past collection for scientific purposes (Factor B); current climate change conditions, including the increased magnitude of major flood events (Factor A); and threats associated with small population size (Factor E).

Section 4(a)(3) of the Act requires the Secretary of the Interior (Secretary), to the maximum extent prudent and determinable, to designate critical habitat concurrent with listing. Section 3(5)(A) of the Act defines critical habitat as (i) the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protections; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species. Section 4(b)(2) of the Act states that the Secretary must make the designation on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impacts of specifying any particular area as critical habitat.

Information Requested

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other governmental agencies, Native American Tribes, the scientific community, industry, or any other interested parties concerning this proposed rule. We particularly seek comments concerning:

(1) The species' biology, range, and population trends, including:

(a) Biological or ecological requirements of the species, including habitat requirements for feeding, breeding, and sheltering;

(b) Genetics and taxonomy;

(c) Historical and current range, including distribution patterns and the locations of any additional populations of this species;

(d) Historical and current population levels, and current and projected trends; and

(e) Past and ongoing conservation measures for the species, its habitat, or both.

(2) Threats and conservation actions affecting the species, including:

(a) Factors that may be affecting the continued existence of the species, which may include habitat modification or destruction, overutilization, disease, predation, the inadequacy of existing regulatory mechanisms, or other natural or manmade factors;

(b) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to this species; and

(c) Existing regulations or conservation actions that may be addressing threats to this species.

(3) Additional information concerning the historical and current status of this species.

(4) Specific information on:

(a) The amount and distribution of West Virginia spring salamander habitat;

(b) Any additional areas occurring within the range of the species, in Greenbrier County, West Virginia, that should be included in the critical habitat designation because they (i) are occupied at the time of listing and contain the physical or biological features that are essential to the conservation of the species and that may require special management considerations or protection, or (ii) are unoccupied at the time of listing and are essential for the conservation of the species;

(c) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change; and

(d) Whether occupied areas are adequate for the conservation of the species, as this will help us evaluate the potential to include areas not occupied at the time of listing. Additionally, please provide specific information regarding whether or not unoccupied areas would, with reasonable certainty, contribute to the conservation of the species and contain at least one physical or biological feature essential to the conservation of the species. We also seek comments or information regarding whether areas not occupied at the time of listing qualify as habitat for the species.

(5) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(6) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation, and the related benefits of including or excluding specific areas.

(7) Information on the extent to which the description of probable economic impacts in the draft economic analysis is a reasonable estimate of the likely economic impacts.

(8) Whether the specific area we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding this area outweigh the benefits of including this area under section 4(b)(2) of the Act.

(9) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Please note that submissions merely stating support for, or opposition to, the action under consideration without providing supporting information, although noted, do not provide substantial information necessary to support a determination. Section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or a threatened

species must be made solely on the basis of the best scientific and commercial data available, and section 4(b)(2) of the Act directs that the Secretary shall designate critical habitat on the basis of the best scientific data available.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via *https://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *https://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *https://www.regulations.gov.*

Our final determination may differ from this proposal because we will consider all comments we receive during the comment period as well as any information that may become available after this proposal. Based on the new information we receive (and, if relevant, any comments on that new information), we may conclude that the species is threatened instead of endangered, or we may conclude that the species does not warrant listing as either an endangered species or a threatened species. For critical habitat, our final designation may not include all areas proposed, may include some additional areas that meet the definition of critical habitat, or may exclude some areas if we find the benefits of exclusion outweigh the benefits of inclusion and exclusion will not result in the extinction of the species. In our final rule, we will clearly explain our rationale and the basis for our final decision, including why we made changes, if any, that differ from this proposal.

Public Hearing

Section 4(b)(5) of the Act provides for a public hearing on this proposal, if requested. Requests must be received by the date specified in **DATES**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule a public hearing on this proposal, if requested, and announce the date, time, and place of the hearing, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing. We may hold the public hearing in person or virtually via webinar. We will announce any public hearing on our website, in addition to the **Federal Register**. The use of virtual public hearings is consistent with our regulations at 50 CFR 424.16(c)(3).

Previous Federal Actions

On April 20, 2010, we received a petition from the Center for Biological Diversity, Alabama Rivers Alliance, Clinch Coalition, Dogwood Alliance, Gulf Restoration Network, Tennessee Forests Council, West Virginia Highlands Conservancy, Tierra Curry, and Noah Greenwald to list 404 species, including the West Virginia spring salamander, as endangered or threatened under the Act. On September 27, 2011, we published in the **Federal Register** (76 FR 59836) a 90-day finding that the petition presented substantial scientific and commercial information indicating that listing the West Virginia spring salamander may be warranted. This document serves as our 12-month finding for the West Virginia spring salamander.

Peer Review

A species status assessment (SSA) team prepared an SSA report for the West Virginia spring salamander. The SSA team was composed of Service biologists, in consultation with other species experts. The SSA report represents a compilation of the best scientific and commercial data available concerning the status of the species, including the impacts of past, present, and future factors (both negative and beneficial) affecting the species.

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review in listing actions under the Act, we solicited independent scientific review of the information contained in the West Virginia spring salamander SSA report. We sent the SSA report to five independent peer reviewers and received one response. Results of this structured peer review process can be found at *https://www.regulations.gov.* In preparing this proposed rule, we incorporated the results of the review, as appropriate, into the SSA report, which is the foundation for this proposed rule.

Summary of Peer Reviewer Comments

As discussed in Peer Review above, we received comments from one peer reviewer on the draft SSA report. We reviewed all comments we received from the peer reviewer for substantive issues and new information regarding the information contained in the SSA report.

The peer reviewer generally concurred with our methods and conclusions and provided additional information on the potential for hybridization of West Virginia spring salamanders with spring salamanders (*Gyrinophilus porphyriticus*). The peer reviewer also provided suggestions for clarifications in terminology and other editorial suggestions. We made no substantive changes to our analysis and conclusions within the SSA report, and peer reviewer comments are addressed in version 1.0 of the SSA report.

I. Proposed Listing Determination

Background

A thorough review of the taxonomy, life history, and ecology of the West Virginia spring salamander (*Gyrinophilus subterraneus*) is presented in the SSA report (version 1.0; Service 2023, pp. 13–38). The West Virginia spring salamander is endemic to a single small cave system (General Davis Cave) in southern Greenbrier County, West Virginia (see figure 1, below). The West Virginia spring salamander is a member of the *Gyrinophilus* complex, which are semi-aquatic or aquatic, large-bodied, lungless salamanders with a prolonged larval period. Limited information is available specific to the life history of the West Virginia spring salamander. Where appropriate, we apply what is known about other *Gyrinophilus* species, and specifically the spring salamander (*Gyrinophilus porphyriticus*), as a surrogate for the West Virginia spring salamander. The spring salamander is described as one of the most common and abundant salamander species encountered in West Virginia caves (Dearolf 1956, p. 205; Green and Brant 1966, p. 42; Osbourn 2005, p. 12) and is the only other member of the *Gyrinophilus* complex known to occur sympatrically with the West Virginia spring salamander in General Davis Cave. Although both larval and adult stage West Virginia spring salamanders resemble the spring salamander, the two species can be distinguished using a suite of morphological characteristics, genetic analyses, or both (Niemiller et al. 2009, p. 244; Niemiller et al. 2010, p. 34; Grant et al. 2022, p. 735).

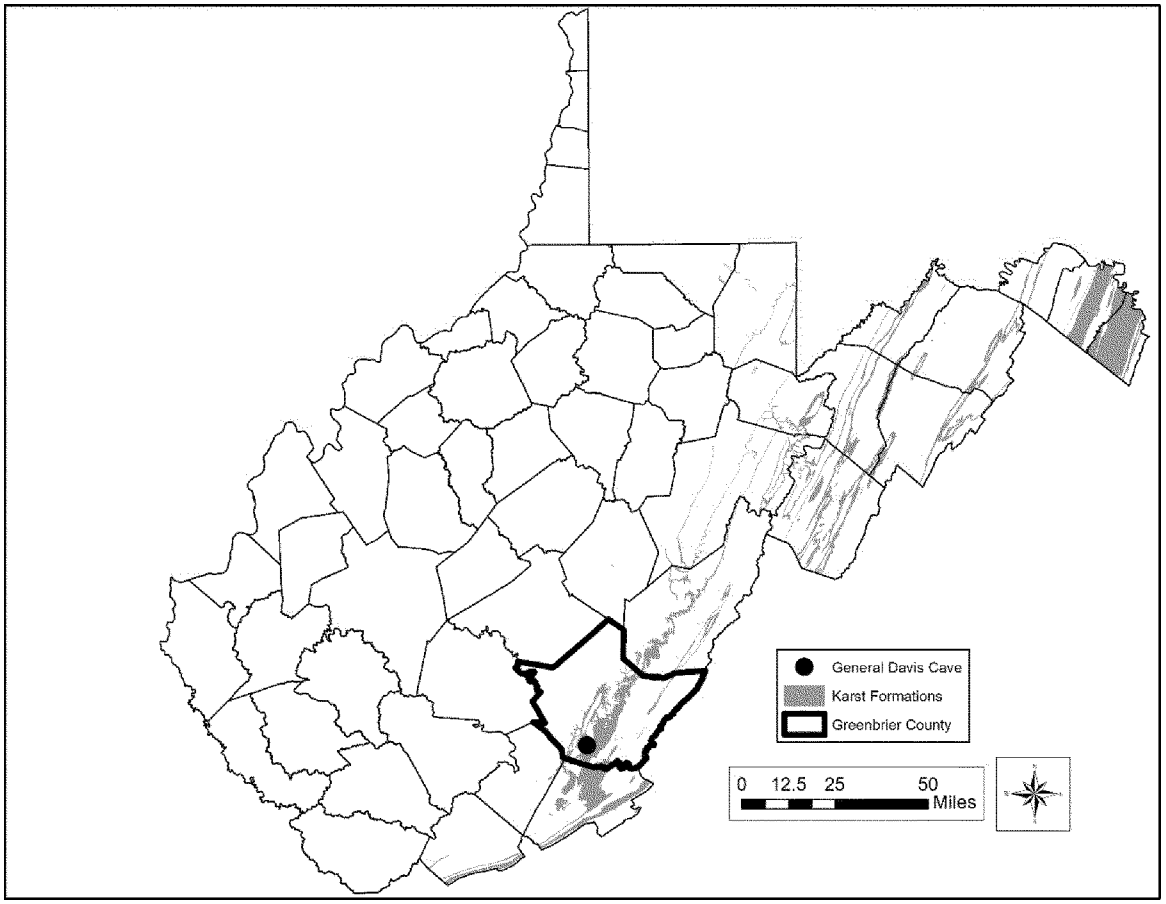


Figure 1. Location of General Davis Cave in Greenbrier County, West Virginia.

West Virginia spring salamanders inhabit aquatic habitats within the General Davis Cave system, including the cave stream, rimstone pools, drip pools, and seeps; adults also are found on the steep, muddy streambanks. West Virginia spring salamanders are found in the first 450 meters (m) (1,476 feet (ft)) (the maximum length that has been able to be accessed and sampled) of the General Davis Cave stream and on its banks, while spring salamanders are generally found in the first 200 m (656 ft) of the cave stream (Grant et al. 2022, p. 733). Nest sites have not been located, but it is thought that females lay eggs attached to submerged or partially submerged rocks or logs. Based on the one known observation of a gravid female West Virginia spring salamander in October, we suspect that the reproductive period for the West Virginia spring salamander is similar to those of cave-dwelling spring salamander populations and other members of the *Gyrinophilus* complex, which is from fall to early winter. We also assume the species has characteristics of other cave species and is relatively long-lived (approximately 9 to 20 or more years), with lower metabolic and growth rates, reduced reproduction, and slower development than their epigean (aboveground) relatives.

West Virginia spring salamanders are considered generalist predators that feed mainly on small invertebrates found in the General Davis Cave stream and on its banks (Besharse and Holsinger 1977, p. 627; Osbourn 2005, pp. 159–161; Fong et al. 2007, pp. 145–146; Huntsman et al. 2011, p. 1753; Grant et al. 2018, p. 1).

The Nature Conservancy in West Virginia owns the main entrance to General Davis Cave and has a conservation easement on the cave passage. The main entrance to General Davis Cave is gated, and, since 1981, The Nature Conservancy has granted access for only a select group of researchers and cave mappers. The surface land above the cave is privately owned.

Regulatory and Analytical Framework

Regulatory Framework

Section 4 of the Act (16 U.S.C. 1533) and the implementing regulations in title 50 of the Code of Federal Regulations set forth the procedures for determining whether a species is an endangered species or a threatened species, issuing protective regulations for threatened species, and designating critical habitat for endangered and threatened species. In 2019, jointly with the National Marine Fisheries Service, the Service issued a final rule that revised the regulations in 50 CFR part 424 regarding how we add, remove, and reclassify endangered and threatened species and the criteria for designating listed species' critical habitat (84 FR 45020; August 27, 2019). On the same day, the Service also issued final regulations that, for species listed as threatened species after September 26, 2019, eliminated the Service's general protective regulations automatically applying to threatened species the prohibitions that section 9 of the Act applies to endangered species (84 FR 44753; August 27, 2019).

The Act defines an ''endangered species'' as a species that is in danger of extinction throughout all or a significant portion of its range, and a ''threatened species'' as a species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether any species is an endangered

species or a threatened species because of any of the following factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

We use the term ''threat'' to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term ''threat'' includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term ''threat'' may encompass—either together or separately—the source of the action or condition or the action or condition itself.

However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an ''endangered species'' or a ''threatened species.'' In determining whether a species meets either definition, we must evaluate all identified threats by considering the species' expected response and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species, such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an ''endangered species'' or a ''threatened species'' only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

The Act does not define the term ''foreseeable future,'' which appears in the statutory definition of ''threatened species.'' Our implementing regulations at 50 CFR 424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis. The term ''foreseeable future'' extends only so far into the future as we can reasonably determine that both the future threats and the species' responses to those threats are likely. In other words, the foreseeable future is the period of time in which we can make reliable predictions. ''Reliable'' does not mean ''certain;'' it means sufficient to provide a reasonable degree of confidence in the prediction. Thus, a prediction is reliable if it is reasonable to depend on it when making decisions.

It is not always possible or necessary to define the foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics. Data that are typically relevant to assessing the species' biological response include species-specific factors such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.

Analytical Framework

The SSA report documents the results of our comprehensive biological review of the best scientific and commercial data regarding the status of the species, including an assessment of the potential threats to the species. The SSA report does not represent our decision on whether the species should be proposed for listing as an endangered or threatened species under the Act. However, it does provide the scientific basis that informs our regulatory decisions, which involve the further application of standards within the Act and its implementing regulations and policies.

To assess the West Virginia spring salamander's viability, we used the three conservation biology principles of resiliency, redundancy, and representation (Shaffer and Stein 2000, pp. 306–310). Briefly, resiliency is the ability of the species to withstand environmental and demographic stochasticity (for example, wet or dry, warm or cold years); redundancy is the ability of the species to withstand catastrophic events (for example, droughts, large pollution events); and representation is the ability of the species to adapt to both near-term and long-term changes in its physical and biological environment (for example, climate conditions, pathogens). In general, species viability will increase with increases in resiliency, redundancy, and representation (Smith et al. 2018, p. 306). Using these principles, we identified the species' ecological requirements for survival and reproduction at the individual, population, and species levels, and described the beneficial and risk factors influencing the species' viability.

The SSA process can be categorized into three sequential stages. During the first stage, we evaluated the individual species' life-history needs. The next stage involved an assessment of the historical and current condition of the species' demographics and habitat characteristics, including an explanation of how the species arrived at its current condition. The final stage of the SSA involved making predictions about the species' responses to positive and negative environmental and anthropogenic influences. Throughout all of these stages, we used the best available information to characterize viability as the ability of a species to sustain populations in the wild over time, which we then used to inform our regulatory decision.

The following is a summary of the key results and conclusions from the SSA report; the full SSA report can be found at Docket No. FWS–R5–ES–2023–0179 on *https://www.regulations.gov* and at *https://www.fws.gov/office/west-virginia-ecological-services.*

Summary of Biological Status and Threats

In this discussion, we review the biological condition of the species and its resources, and the threats that influence the species' condition, in order to assess the species' overall viability and the risks to that viability.

Hydrogeological Setting

General Davis Cave is located in the Davis Hollow subwatershed within the Greenbrier Valley. The cave system under Davis Hollow, which includes General Davis and Sinks of the Run Caves, is a relatively simple cave system, compared to the complexity of many other systems in karst topography, in that the cave system has one main subterranean stream course. The primary source of water for the General Davis Cave stream is the unnamed surface stream that enters the Sinks of the Run Cave through a swallet hole (opening where a stream descends underground) (Jones 2018, p. 33). Ninety percent of the water entering the Davis Hollow drainage basin enters at

Sinks of the Run Cave and continues through to enter the General Davis Cave through a siphon at the upstream extent of General Davis Cave (Jones 1997, pp. 20, 24, 32).

General Davis Cave has approximately 4,000 m (13,123 ft) of mapped passage, and is essentially one, long narrow stream passage that heads north/northeast from the main cave entrance. The cave can readily be traversed for approximately the first 450 m (1,476 ft) until a significant breakdown occurs; after that point, the cave can only be traversed by experienced cavers (Oxenrider 2021, pers. comm.; Grant et al. 2022, p. 733). For the first 450 m (1,476 ft), the stream banks are very steep and made of soft clay and mud on both sides, with deposits of coarse and fine particulate organic matter (Besharse and Holsinger 1977, p. 627; Bartkus 2009, p. 41; Niemiller et al. 2010, p. 34; Grant et al. 2022, p. 741). The cave banks are composed of organic material (mainly leaf litter) and can be up to 1.0 m (3.2 ft) deep in some areas along the cave stream, most notably in areas where small side passages flow into the main cave (Niemiller et al. 2010, p. 39). The streambed in this portion of the cave consists mainly of small cobble and gravel substrate, interspersed with long stretches of silt, mud, and periodic leaf litter buildup with occasional bedrock exposure (Bartkus 2009, p. 41; Niemiller et al. 2010, p. 34; Brand 2021, pers. comm.).

There are two major landowners within Davis Hollow drainage. Approximately 450 acres (ac) (182 hectares (ha)) in the southern part of Davis Hollow directly over General Davis Cave has been privately owned by one family for more than 200 years. Over this time, approximately 100 ac (40 ha) of the property has been used mainly as pasture for cattle grazing, with the rest being maintained as forest that has been subjected to occasional harvests (Powell 2021, pers. comm.). In the northern part of Davis Hollow, above the Sinks of the Run Cave and the area surrounding the headwaters of the unnamed surface stream that sinks and flows through both cave systems, approximately 500 ac (200 ha) are owned by a private timber company. We have no information on the management of this forested area, although timber harvests have been proposed in the past (Hammerson and Jackson 2019, p. 3). The Nature Conservancy owns approximately 1.56 acres (0.63 hectare) at the entrance to General Davis Cave and restricts access.

Species Needs

Based upon the best available scientific and commercial information, and acknowledging existing ecological uncertainties, the resource and demographic needs for breeding, feeding, sheltering, and dispersal of the West Virginia spring salamander include: (1) adequate freshwater availability (water quantity), (2) sufficient water quality, (3) appropriate cave habitat, and (4) sufficient allochthonous materials (organic material originating outside the cave) to provide a prey base. We provide a summary here of each of the species needs; a more detailed review of the species needs can be found in the SSA report (Service 2023, pp. 38–41).

Adequate Freshwater Availability (Water Quantity)

Water availability is fundamental to the survival of the West Virginia spring salamander. All life stages rely on sufficient flow as their source of oxygenated water and for habitat availability during important life stages. West Virginia spring salamanders require sufficient water quantity for nests to be submerged or partially submerged during egg laying (Niemiller et al. 2009, p. 67). We assume that shallow pools and riffle habitat in the cave stream with water depths from 13–30 centimeters (5.9–11.8 inches) are needed for all life stages (Besharse and Holsinger 1977, p. 627; Niemiller et al. 2010, pp. 36–37, 39; Oxenrider 2021, pers comm.; Grant et al. 2022, p. 729).

Water Quality

There is little information about specific water quality parameters necessary to support the species. However, we consider appropriate water quality as exhibiting the conditions present during species surveys and water sampling in 2003, 2004, and 2018. Water conditions in the cave stream of General Davis Cave were cool and well-oxygenated with a neutral to slightly basic pH (7.0–7.9), temperatures between 10.0–11.8 degrees Celsius (50.0–53.2 degrees Fahrenheit), dissolved oxygen around 8.2–9.9 milligrams per liter (mg/l), and no evidence of pesticides, herbicides, or other contaminants or pollutants (Osbourn 2005, pp. 24, 31; Grant et al. 2022, p. 736; U.S. Geological Survey (USGS) 2022, entire).

Cave Habitat Quality and Allochthonous Material Supply

West Virginia spring salamanders require cave habitat that provides interstitial spaces, drip pools, rimstone pools, and other spaces isolated from the main cave stream for larval-stage individuals to escape predation and/or strong flooding events, and for adults to escape flooding events and secure suitable nest sites (Niemiller et al. 2010, p. 39; Miller 2018, pers. comm.). Additionally, rocks or objects suitable for larvae and adults to use as cover objects within the stream are needed, as well as a sufficient amount of allochthonous material to support the species' prey base.

Threats Influencing the West Virginia Spring Salamander

The primary threat facing the West Virginia spring salamander is impacts from current climate change conditions, including the increased frequency and intensity of major flood events (Factor A). Secondary threats potentially impacting the species in conjunction with the primary threat include past collection for scientific purposes (Factor B) and factors associated with small population size (Factor E). Although human collection of West Virginia spring salamanders is no longer considered a threat, past collection of salamanders has likely had a negative impact on their current status. In the SSA report (Service 2023, pp. 86–91), we evaluated other threats that could impact the West Virginia spring salamander, including habitat alteration from changes in land use (Factor A), disease (Factor C), hybridization (Factor E), and other climate change impacts including drought (Factor A), but we found that these threats are not currently impacting the species. Below, we provide an overview of the factors that have influenced the current condition of the West Virginia spring salamander.

Flood Events

General Davis Cave is a stream-passage cave prone to some degree of flooding on an annual basis (Pauley et al. 1985 p. 2; Osbourn 2005, p. 69). The intensity of these yearly flooding events is uncertain, but debris and mud have been observed on the cave ceiling, on stalactites, and well above stream elevation, indicating occasional strong flood events that would fill the entire cave (Grant et al. 2022, p. 741). Recent preliminary monitoring of the Sinks of the Run Cave has indicated that it has a consistent flood response at various times throughout the year, likely in response to local precipitation events with short-lived flood pulses (lasting hours to a day), particularly during repeated rainfall events across multiple days (Brooks 2020, pers. comm.). Given the connectedness and proximity of Sinks of the Run Cave to General Davis

Cave, we assume General Davis Cave has a similar flooding regime, with peak flows moderately above average flow, occurring in response to local precipitation events.

Major (catastrophic) flood events are defined by the National Weather Service (NWS) as events causing extensive inundation of structures and roads, and typically have a 50- to 100-year recurrence interval (NWS 2023, entire). There have been 17 catastrophic flood events across West Virginia since recordkeeping began in 1844; 6 of these have occurred in the Greenbrier River watershed where the General Davis Cave is located (Wiley and Atkins 2010, p. 4; Thurkettle 2019, p. 17; Austin et al. 2018, p. 11). The USGS gauging station at Alderson, West Virginia, located approximately 10.1 kilometers (km) (6.3 miles (mi)) downstream of General Davis Cave, is the nearest gauging station and, given its proximity, likely reflects major flood events around General Davis Cave. When the river gauge reaches approximately 4.2 m (14.0 ft) at Alderson, it triggers the flood stage warning.

Yearly peak flows at the Alderson gauge station have been increasing over the past 125 years, and three catastrophic flooding events have occurred in the area within the past 36 years (1985 to 2021). In 1985, a strong storm system caused a flood event, during which water reached 7.3 m (23.9 ft) at the Alderson gauge. This is the second highest recorded water level at this gauge since monitoring began in 1844 (Grote et al. 2019, p. 8; Thurkettle 2019, p. 25; National Oceanic Atmospheric Administration (NOAA) 2022, entire). In 1996, a widespread rain-on-snow flooding event caused flooding throughout the Mid-Atlantic and Appalachian regions and caused the highest ever flood levels recorded in the area, with the Alderson gauge topping out at 7.4 m (24.3 ft) (Grote et al. 2019, p. 8; Thurkettle 2019, p. 25; NOAA 2022, entire). In 2016, the third largest flood event was recorded, with water levels reaching approximately 6.7 m (22.0 ft) (Grote et al. 2019, p. 9; Thurkettle 2019, p. 25; NOAA 2022, entire).

Additionally, catchment basins in the Greenbrier Valley are known to be very flashy in response to storm events (Jones 1997, pp. 48–51; Jones 2018, pp. 23–24), and anecdotal observations provide evidence that localized flooding events have occurred in Davis Hollow but were not recorded as flood-stage events at a large scale. For example, in January 2006, the secondary overflow entrance to General Davis Cave, which is located near the ceiling of the cave, was observed to be flooded (Powell 2021, pers. comm.; Service 2023, p. 59). Flow from the secondary entrance is an uncommon event and would occur only at very high water levels within General Davis Cave. Accordingly, we assume that flood events occur on a more frequent basis (albeit, an unknown frequency) in Davis Hollow than in the Greenbrier River watershed, due to the topography and flashy nature of Davis Hollow, and because of this observation of flood waters flowing from the cave entrance when no flood stage was indicated in the Greenbrier River (Service 2023, p. 121).

The flood return interval for the major floods in the Greenbrier River watershed in 1996 and 2016 is estimated at 50 to 200 years and 200 to more than 500 years, respectively (Thurkettle 2019, pp. 69–70; Grote et al. 2019, p. 19). However, these flood events occurred within 20 years of each other. This increased frequency of recent major flood events, combined with the rising level of peak flows for the Greenbrier River at Alderson, indicates that major flood events are increasing in both frequency and intensity in the area, as is predicted with most climate change models (Service 2023, pp. 69–71, 110–112).

Flooding has long been recognized as a key disturbance in karst ecosystems and described as being important to cave fauna (Hawes 1939, entire), but the specifics of how flood events affect cave species and cave communities are largely unstudied (Niemiller et al. 2010, pp. 37–38; Simon 2019, p. 226). The basis of the food web in most caves is allochthonous input, and for caves with limited surface connectivity, such as General Davis Cave, these organic materials are mainly transported into the cave via the cave stream during flood events (Service 2023, p. 39). Thus, cave fauna is dependent on some degree of periodic flooding. The right balance of flood intensity and frequency that will replenish organic material in General Davis Cave, but also maintain suitable habitat, while only displacing a minimum number of individuals from the cave and allowing suitable recovery time for the population, is vital for the continued viability of the West Virginia spring salamander.

Many cave species, including crayfish, fish, copepods, and other cave-obligate salamanders are known to be swept out of caves during severe flood events, or can be displaced to areas within the cave that have fewer resources or more stressors (Juberthie 2004, p. 766; Graening et al. 2006, pp. 377, 379; Aljančič et al. 2014, p. 72; Bradley 2018, p. 49; Service 2019, p. 22; Miller 2021, pers. comm.). Other potential effects of flood events are large sediment and debris deposits, which may reduce habitat by burying rock substrates. Thus, food sources, areas available for egg deposition, and escape cover may be compromised.

Extreme variation in precipitation events impacts survivorship of some cave-dwelling or cave-associated salamanders (Rudolph 1978, p. 155). Similarly, flooding events or extreme variability in stream flows may alter the demography of some surface stream-dwelling salamanders (Nickerson et al. 2007, pp. 115–116; Lowe et al. 2019, pp. 19564–19565). For example, Lowe et al. (2019, pp. 19565–19566) found that larger-sized larval spring salamanders were inordinately affected by altered stream flows, as, unlike smaller larvae, they were too large to bury into interstitial spaces in the streambed to avoid strong floods or drought conditions, and yet unable to leave the stream for terrestrial refuge, as adults are expected to do. Thus, over time, the lower survivorship of larger-sized larvae contributed to a decline in overall abundance of the population. We may expect the different life stages of the West Virginia spring salamander to behave in a similar fashion during typical flooding events to avoid or limit physical exposure to flood waters and debris. It is likely that small West Virginia spring salamander larvae would bury into the interstitial spaces of the stream substrate, while adults retreat to side channels out of the main cave stream or find refuge under larger cover items. However, as with the spring salamander, later stage West Virginia spring salamander larvae may be too large to get into interstitial spaces in the cave stream but are unable to move out of the cave stream to seek shelter in other areas of the cave during altered streamflow (Lowe et al. 2019, pp. 19565–19566), leaving this life stage especially vulnerable to flood events.

Collection

There are at least 40 West Virginia spring salamander specimens that have been collected from the General Davis Cave between 1973 and 1988 (Besharse and Holsinger 1977, p. 625; VertNet 2023, entire; National Museum of Natural History (NMNH) 2023, entire). However, there is an unknown number of specimens not recorded in online collections records. For example, there are at least two specimens that were not included in any of these records (Pauley 2021, pers. comm.).

Eighteen individuals, both adults and larvae of different sizes, were removed from General Davis Cave from 1973 to

1975 (Besharse and Holsinger 1977, p. 625). The second significant collection event occurred in 1976 and 1977, when Blaney and Blaney (1978, entire) removed at least 12 more adult stage individuals from the cave in October 1976 (2 individuals) and October 1977 (10 individuals). It is unknown how many larval-stage individuals were collected during this event (Pauley et al. 1985, p. 1). Two additional individuals (unknown life stage) were removed from General Davis Cave in 1980, five individuals (unknown life stage) were collected in 1984, and three individuals (unknown life stage) were collected in October 1988 (Howard et al. 1984, pp. 3–4; VertNet 2023, entire; NMNH 2023, entire).

While all collection events affect the West Virginia spring salamander at an individual level, it is also likely that these past collection events had negative effects at the population and species level. Because the species is believed to breed infrequently and exhibits life-history characteristics typical of other cave Gyrinophilus species (and other cave fauna), in which individuals have slow growth rates, reduced reproduction, slower development, a long larval period, and longer lifespans, these collection events are more likely to have a negative impact on the population, due to the length of time needed to replace lost individuals. Furthermore, since adult female West Virginia spring salamanders are believed to be gravid from late fall to early winter, the removal of a relatively high number of adults in the fall (October), at least some of which were female, is likely to have further reduced the reproductive capacity of the species.

While these past collection events have had a direct impact on the West Virginia spring salamander at the individual level, and likely at the population and species level (see Current Condition, below), we know of no additional individuals being removed from General Davis Cave in more than three decades (last documented collection was in 1988). However, there have been at least three instances of researchers taking tissue samples (tail tips) for genetics work. While this type of sampling typically causes little negative effect to individual salamanders, as they readily regenerate lost body parts (including tail tips), there is uncertainty about the effect of this type of sampling on the West Virginia spring salamander. Given the presumptive low metabolic and growth rates of the West Virginia spring salamander, individuals may be slow to recover, and it is possible that the energy expenditure of regenerating a tail tip could translate into some reduction in reproductive output or survivorship for individuals. However, it is also possible that individuals losing tail tips during encounters with predators is not uncommon and individuals are able to recover with little effect. A larval West Virginia spring salamander with a missing tail tip was documented during the 2018 survey of General Davis Cave (Grant et al. 2018, p. 12).

We estimate it is likely that any further scientific collection of the West Virginia spring salamander would occur sparingly and would be limited to tissue samples, rather than individuals. Furthermore, West Virginia State Code (chapter 20, article 7A, section 20–7A–4) prohibits the removal of cave organisms from any cave within the State, unless a scientific collection permit is issued by the West Virginia Department of Natural Resources (DNR). West Virginia State regulations at title 58, series 73, sections 58–73–1 through 58–73–5 (known as the State reptile and amphibian rule) prohibit the take and possession of most salamander species in the State, including the West Virginia spring salamander.

In summary, past collection of a relatively large number of West Virginia spring salamanders from the General Davis Cave has likely impacted species viability. Because the species is believed to have slow growth rates, reduced reproduction, and a long larval period, past collection events are more likely to have a negative impact on the population due to the length of time needed to replace lost individuals. Furthermore, since adult females are believed to be gravid in fall and winter, the removal of a relatively high number of adults in the fall, at least some of which were female, is likely to have further reduced the reproductive capacity of the species.

Cave Species Characteristics and the Effects of Small Population Size

The West Virginia spring salamander's small population size and restricted range contribute to its vulnerability to impacts from catastrophic flooding. Cave species, such as the West Virginia spring salamander, have geographically restricted ranges, are typically numerically rare (*i.e.,* found at low abundance), generally have a low tolerance for changes in abiotic conditions, and tend to have lower metabolic and growth rates and reduced reproduction than surface populations; thus, they are vulnerable to even relatively minor or very localized disturbances in their environment (Urich 2002, p. 42; Niemiller et al. 2010, p. 40; Culver and Pipan 2019, p. 226; Mammola et al. 2019, p. 646; Niemiller and Taylor 2019, pp. 824–825). The ability of a population to recover from human-caused change (*e.g.,* collection) in their environment or a stochastic or catastrophic event (*e.g.,* flooding) leading to the loss of individuals or suitable habitat is limited for cave species, as their populations cannot be as readily augmented by the immigration of new individuals (as in surface populations), they seldom have the capability or option of moving to another suitable habitat, and their life histories are such that it will take a longer period of time (due to their lower growth rates, reduced reproduction, and slower development than their aboveground relatives) to recover to pre-disturbance numbers.

The reduced genetic diversity that is typical of small populations further complicates recovery for cave-dwelling species, as small populations are often associated with a higher likelihood of individuals with decreased fitness (the ability to produce viable offspring) and greater expression of deleterious recessive genes (Allendorf and Luikart 2007, pp. 306, 315). With small populations, genetic drift (random change in gene frequencies) is also more likely to result in reduced genetic diversity, which may cause the loss of genes that help allow populations to adapt to environmental change. These factors can increase the likelihood of extirpation (Allendorf and Luikart 2007, p. 355). Thus, populations of cave species that are subjected to an ecological stress that results in a reduction of individuals will have a smaller breeding population size for a longer period of time (compared to their aboveground relatives), increasing the risk of extinction (Urich 2002, p. 42; Culver and Pipan 2019, p. 230; Niemiller and Taylor 2019, p. 825).

The West Virginia spring salamander is a single-site endemic with a troglobitic (cave-dwelling) life-history and which has likely always been isolated in a restricted range that supports a small population with limited genetic diversity. However, the species has apparently been able to maintain population viability with this low level of genetic diversity for presumably thousands of years. Thus, for some narrow endemics, such as the West Virginia spring salamander, the low level of genetic diversity inherent in the species may not necessarily translate into deleterious genetic effects leading to reduced fitness of individuals within the population, as described above. However, at the species level, low

genetic diversity poses an inherent vulnerability, because the species may lack the behavioral, morphological, or genetic diversity that would allow it to readily adapt to alterations to the cave habitat, with potentially significant negative impacts to the species (Niemiller et al. 2010, p. 40; Miller 2018, pers. comm.; West Virginia DNR 2020, p. 81; Grant et al. 2022, p. 741).

In summary, the West Virginia spring salamander is assumed to exhibit multiple life-history elements characteristic of cave fauna (slow metabolic and growth rates, breeds biennially at a maximum, low clutch sizes, and extended time in the nonbreeding or larval stage) that limit its ability to recover from stressors and disturbance events. While the West Virginia spring salamander has low genetic diversity (Grant et al. 2022, p. 734), it is not clear that this has resulted in deleterious effects on individuals. However, at the species level, lower genetic diversity means that the species has less capacity to adapt to changes in its environment or reductions in its population size.

Current Condition

Resiliency

Resiliency is the ability of a species to withstand environmental and demographic stochasticity. Resiliency is measured based on metrics of population health, such as the size and growth rate of populations and how quickly they are able to rebound in numbers after an event results in loss of individuals or populations. For a species to maintain viability, its populations, or some portion of its populations, must be sufficiently resilient. For the West Virginia spring salamander, only one population (in the General Davis Cave) is known to exist. Stochastic events that have the potential to affect the West Virginia spring salamander include extreme weather events (such as flooding) and the introduction of disease.

To evaluate current resiliency, we evaluated abundance data and trends in population growth rate (Grant et al. 2022, pp. 736, 738–740); these data are considered the best available information and encompass the entire 45-year period over which abundance data were collected (from 1973 to 2018; see table 1, below; Service 2023, pp. 101–102).

Overall population abundance is difficult to quantify given surveys have only been conducted within the first 450 m (1,476 ft) of the cave. The rest of the cave is inaccessible and not logistically amenable to standard sampling, which limits our ability to truly evaluate population abundance for this species. That said, multiple surveys have been conducted for this species since 1973 and provide our best estimate of the current population status.

There was high variation in the observed number of individuals during the 1973–2018 survey period (see table 1, below). The highest number of individuals observed during a survey event was 34 salamanders in 1979, and the lowest number of individuals observed during a survey event was 2 salamanders in 2001 (see table 1, below). The most recent survey in 2018 reported six West Virginia spring salamanders (five adults and one larval stage individual).

TABLE 1—SURVEY DATA FOR THE WEST VIRGINIA SPRING SALAMANDER IN GENERAL DAVIS CAVE FROM 1973 THROUGH 2018

Date	Adult	Larvae	Total	Length of cave surveyed in meters[1] [2]
October 1973	1	3	4	180
1973 or 1974	[3] N/A	[3] N/A	14	[3] N/A
September 1974	[3] N/A	[3] N/A	11	[3] N/A
May 1975	6	1	7	290
September 1976	1	7	8	290
October 1978 and October 1979	15	[3] N/A	15	[3] N/A
September 1979	34	0	34	213
September 1979	10	2	12	290
April 1980	14	1	15	213
June 1980	4	13	17	213
July 1982	2	3	5	290
1982	4	5	9	[3] N/A
July 1983	4	8	12	290
September 1984	3	9	12	290
May 1985	9	4	13	213
September 1986	1	6	7	290
October 1988	1	13	14	290
September 1990	1	6	7	290
October 1993	0	5	5	290
September 1995	0	5	5	290
October 1998	2	6	8	290
September 2001	0	2	2	290
August 2002	3	23	26	290
October 2003	3	12	15	290
August 2007	1	28	29	290
October 2008	1	15	16	290
January 2015	2	5	7	450
August 2018	5	1	6	450

[1] All surveys begin at the intersection of the cave entrance and the cave stream.
[2] Length of cave surveyed is reported in meters and is considered an approximation.
[3] N/A indicates information that is not available.

Over the past 45 years, surveys have recorded high variation in the counts observed for the West Virginia spring salamander (Grant et al. 2022, pp. 739–740; see figure 2, below). Because the length of the cave surveyed differed among sampling occasions, Grant et al. (2022, pp. 733, 740) calculated an observed density of salamanders for each survey occasion (count per meter). After accounting for high variation in the counts, Grant et al. (2022, p. 736) found that the observed population density of the West Virginia spring salamander in General Davis Cave appears to have declined over the 45-year sampling period and the overall population growth rate is negative (Grant et al. 2022, p. 738; see figure 2, below). Calculating the probability of decline over the entire dataset resulted in an 81.4 percent probability that the West Virginia spring salamander population is in decline (Grant et al. 2022, p. 736). Even when the results of the two most recent survey efforts (2015 and 2018), which had fewer individuals overall, are excluded from analysis, the West Virginia spring salamander population still exhibits a declining population trend, with the probability of population decline approximately 57.6 percent. The observed density of the West Virginia spring salamander over the 45-year survey period was 0.049 individuals per meter of cave stream and bank surveyed, although most surveys completed since 1990 have had densities lower than this overall mean (Grant et al. 2022, p. 736).

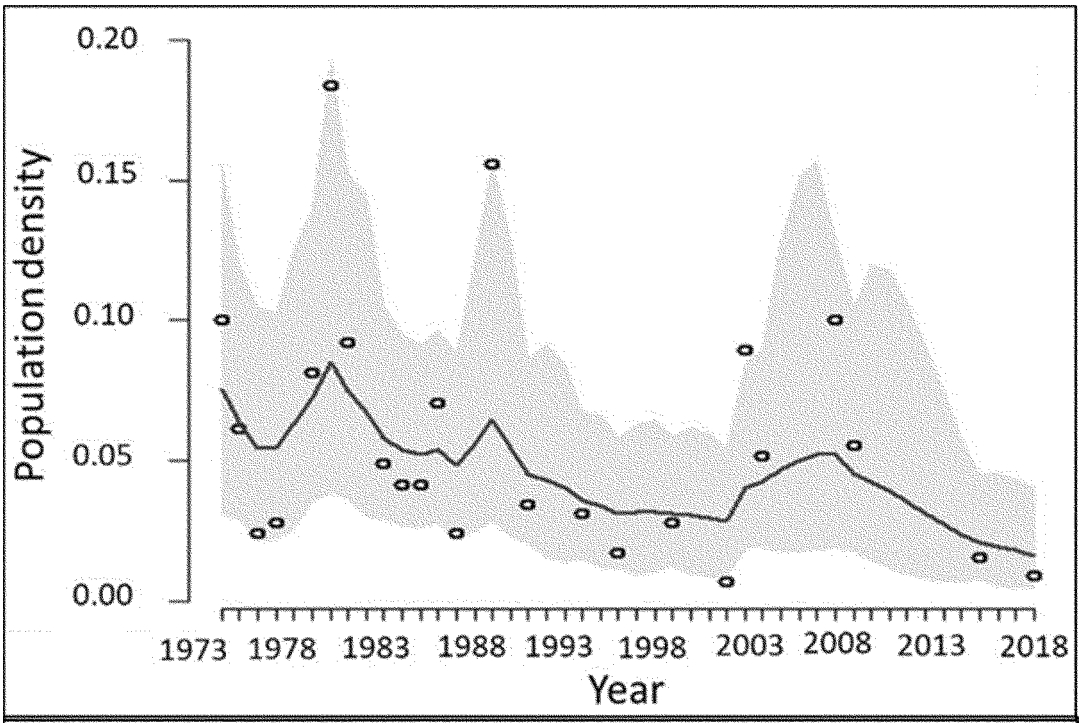


Figure 2. Trends in West Virginia spring salamander abundance and growth rate based on 24 surveys in General Davis Cave from 1973 to 2018. The line is the fitted mean, the observed data are the open circles, and the 95 percent confidence interval is shaded in gray. Figure modified and used with permission from Grant et al. (2022, entire).

Summary of Current Resiliency

The West Virginia spring salamander appears to be experiencing a population decline, with lower numbers of salamanders observed in recent survey years (Grant et al. 2022, p. 736). The number of individuals collected, the timing of those collections, and the current overall low number of West Virginia spring salamanders in General Davis Cave (six salamanders) have likely contributed to the negative population growth trend. Since current trend data indicate a negative population growth, we consider current resiliency for the West Virginia spring salamander to be low. The reason(s) behind this population decline remain unclear. At present, the cave habitat, water quality and quantity, and supply of allochthonous material in General Davis Cave appear to be in good condition (Service 2023, pp. 96–97). We could find no evidence of major changes in land use within Davis Hollow since before 1950, and the water quality of the cave and surface stream were unimpaired as of 2018 (Grant et al. 2022, p. 737; USGS 2022, entire). However, past collection of a relatively large number of West Virginia spring salamanders from the General Davis Cave has likely had a negative impact on the population due to the length of time needed to replace lost individuals, specifically from catastrophic flooding events. In the past 35 years, there has been an increase in the frequency of storm events leading to higher intensity flooding in Davis Hollow and in the Greenbrier River watershed, which may have directly affected the number of West Virginia spring salamanders in General Davis Cave. Because we know that cave fauna can be killed or displaced from caves or moved around within caves during flood events (Hawes 1939, pp. 3–4; Barr 1967, pp. 476, 485), we postulate that individual West Virginia spring salamanders are negatively impacted during intense flood events. The most recent flood event in 2016 in General Davis Cave reached such high levels that the entire cave, floor to ceiling, was filled with flood waters and bits of debris were left on the cave ceiling (Grant et al. 2022, p. 741). Given the increase in frequency and intensity of storm events projected with current climate change models, we expect effects on individuals from

higher intensity floods to continue, with the potential for the reduced recovery time between such events to compound these impacts, resulting in a continued reduction in species viability (Service 2023, pp. 108–118).

Redundancy

Redundancy is defined at the species level and is a measure of a species' ability to withstand natural or anthropogenic catastrophic events. Redundancy is about spreading the species-level risk, as measured through the distribution of populations (or individuals in a large population) across the species' range. Redundancy guards against potential species-level risks, such as hurricanes, intense drought, or variable precipitation (including extreme flooding). Greater redundancy is exhibited when a species' populations are not completely isolated and when movement between populations is achievable. The West Virginia spring salamander is an endemic species found in a single cave in Greenbrier County, West Virginia. As initially described, and at present, all individuals have been observed within the first 450 m (1,476 ft) of the cave due to lack of access beyond that point. Even if the entire cave system were occupied, the species is likely restricted to a single population, thus, we consider this species to have no redundancy.

Representation

Representation is the ability of a species to adapt to both near-term and long-term changes in its physical and biological environments. It can be measured through ecological diversity (environmental variation) and genetic diversity within and among populations. Based on a recent analysis of genetic data, the West Virginia spring salamander has relatively low genetic diversity (Grant et al. 2022, p. 734), which is somewhat expected in a species with a small population (Service 2023, pp. 13–23). As there is only one cave population, we do not expect any significant behavioral or ecological variation within this population (Mammola et al. 2019, entire). Thus, we consider representation of the West Virginia spring salamander to be inherently low.

Summary of Current Condition

The species currently has low resiliency with only six individual salamanders detected in the most recent survey in 2018, and an overall declining population growth rate. The species is not considered to have redundancy since it is a narrow, cave endemic found only within the General Davis Cave. Representation is considered to be low given the overall low genetic diversity and low morphological and ecological variability.

As part of the SSA, we also developed three future condition scenarios to capture the range of uncertainties regarding future threats and the projected responses by the West Virginia spring salamander. Our scenarios assumed a moderate or enhanced probability of more frequent flood events, and either changes in land use (that would impact water quality in the cave) or no changes in land use. Because we determined that the current condition of the West Virginia spring salamander is consistent with an endangered species (see Determination of the West Virginia Spring Salamander's Status, below), we are not presenting the results of the future scenarios in this proposed rule. Please refer to the SSA report (Service 2023, pp. 108–118) for the full analysis of future scenarios.

We note that, by using the SSA framework to guide our analysis of the scientific information documented in the SSA report, we have analyzed the cumulative effects of identified threats and conservation actions on the species. To assess the current and future condition of the species, we evaluate the effects of all the relevant factors that may be influencing the species, including threats and conservation efforts. Because the SSA framework considers not just the presence of the factors, but to what degree they collectively influence risk to the entire species, our assessment integrates the cumulative effects of the factors and replaces a standalone cumulative-effects analysis.

Conservation Efforts and Regulatory Mechanisms

The Nature Conservancy owns a conservation easement at the General Davis Cave passage, and holds the title to the main entrance, which is thought to be the only entrance accessible to humans. The Nature Conservancy installed a gate at the cave entrance in 1981 to restrict access and, since that time, has approved cave access requests only sparingly. For example, just three entry requests by researchers and/or cave mappers have been approved in the past 14 years (Powell 2021, pers. comm.).

State Conservation Actions and Laws

The West Virginia spring salamander is listed as a Priority 1 (S1) Species of Greatest Conservation Need in the West Virginia State Wildlife Action Plan (West Virginia DNR 2015, p. 25). West Virginia DNR has also developed an individual cave management plan for General Davis Cave, which provides broad guidelines for conservation of the cave, and includes protection of groundwater and surface water resources, the pursuit of general cave conservation actions, and restriction on visitation to the cave (West Virginia DNR 2020, p. 81). However, the extent to which this cave management guidance can be implemented remains unclear, as the surface above the cave system remains privately owned and the guidelines within the management plan remain voluntary.

Since 1977, General Davis Cave (and all caves in the State) are afforded some legal protection under West Virginia State Code (chapter 20, article 7A). This State law protects the cave habitat itself, by making it illegal in West Virginia for any person, without express, prior, written permission of the owner, to willfully or knowingly cause disturbance of any type to the cave (West Virginia State Code, chapter 20, article 7A, section 20–7A–2; West Virginia DNR 2020, p. 6). Cave organisms (including plants) are also protected from collection without a scientific collection permit from West Virginia DNR (West Virginia State Code, chapter 20, article 7A, section 20–7A–4). Additionally, West Virginia recently passed its State reptile and amphibian rule (West Virginia State regulations at title 58, series 73, sections 58–73–1 through 58–73–5). This rule, which went into effect on March 23, 2021, bans the possession of 80 species of herpetofauna, including the West Virginia spring salamander.

Federal Laws

While there are no Federal cave protections offered to caves that are not located on Federal lands, General Davis Cave does have a known wintering colony of the federally endangered Indiana bat (*Myotis sodalis*). Therefore, the Act offers some protection for species within General Davis Cave, as disturbance to the cave from any Federal action would be required to go through section 7 consultation under the Act. While any section 7 consultation would be specific to listed bats and may not necessarily provide protections for other species within the cave, access to the cave during the Indiana bat's hibernation season (November 15 through March 31) is restricted and would provide additional protections for the West Virginia spring salamander during that time period.

It is also unlawful under the Lacey Act (see 16 U.S.C. 3372(a)(2)(A)) to import, export, transport, sell, receive,

acquire, or purchase in interstate or foreign commerce any wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State. Because the possession of West Virginia spring salamanders is illegal in West Virginia, interstate or international sale of individuals collected is prohibited by the Lacey Act.

Determination of the West Virginia Spring Salamander's Status

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species meets the definition of an endangered species or a threatened species. The Act defines an ''endangered species'' as a species in danger of extinction throughout all or a significant portion of its range, and a ''threatened species'' as a species likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether a species meets the definition of an endangered species or a threatened species because of any of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

Status Throughout All of Its Range

After evaluating threats to the species and assessing the cumulative effect of the threats under the Act's section 4(a)(1) factors, the West Virginia spring salamander has limited resiliency, redundancy, and representation in order to maintain viability over time. Only one population of West Virginia spring salamander is known to exist (within General Davis Cave, Greenbrier County, West Virginia), and this population currently has low resiliency. The last survey in 2018 observed only six individuals (five adults and one larval stage individual) and supported an overall negative population growth trend. Because there is only one known population, the species has no redundancy. A single catastrophic event, such as a severe storm that results in major flooding, could result in the extinction of the species. As there is only one cave population for this species, we do not expect any significant behavioral, ecological, or genetic variation within this population, and the species is considered to have low representation. The current and projected near-term increase in the frequency of catastrophic floods exacerbates the current condition for the West Virginia spring salamander. We do not find the West Virginia spring salamander meets the definition of a threatened species because the species has already shown declines in abundance and resiliency of its population. Because the West Virginia spring salamander lacks redundancy and representation is limited, the species is vulnerable to catastrophic flooding events. Thus, after assessing the best available information, we conclude that the West Virginia spring salamander is in danger of extinction throughout all of its range.

Status Throughout a Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so within the foreseeable future throughout all or a significant portion of its range. We have determined that the West Virginia spring salamander is in danger of extinction throughout all of its range and accordingly did not undertake an analysis of any significant portion of its range. Because the West Virginia spring salamander warrants listing as endangered throughout all of its range, our determination does not conflict with the decision in *Center for Biological Diversity* v. *Everson,* 435 F. Supp. 3d 69 (D.D.C. 2020), which vacated the provision of the Final Policy on Interpretation of the Phrase ''Significant Portion of Its Range'' in the Endangered Species Act's Definitions of ''Endangered Species'' and ''Threatened Species'' (79 FR 37578; July 1, 2014) providing that if the Service determines that a species is threatened throughout all of its range, the Service will not analyze whether the species is endangered in a significant portion of its range.

Determination of Status

Our review of the best available scientific and commercial information indicates that the West Virginia spring salamander meets the Act's definition of an endangered species. Therefore, we propose to list the West Virginia spring salamander as an endangered species in accordance with sections 3(6) and 4(a)(1) of the Act.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened species under the Act include recognition as a listed species, planning and implementation of recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness, and conservation by Federal, State, Tribal, and local agencies, private organizations, and individuals. The Act encourages cooperation with the States and other countries and calls for recovery actions to be carried out for listed species. The protection required by Federal agencies, including the Service, and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Section 4(f) of the Act calls for the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

The recovery planning process begins with development of a recovery outline made available to the public soon after a final listing determination. The recovery outline guides the immediate implementation of urgent recovery actions while a recovery plan is being developed. Recovery teams (composed of species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) may be established to develop and implement recovery plans. The recovery planning process involves the identification of actions that are necessary to halt and reverse the species' decline by addressing the threats to its survival and recovery. The recovery plan identifies recovery criteria for review of when a species may be ready for reclassification from endangered to threatened (''downlisting'') or removal from protected status (''delisting''), and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery outline, draft recovery plan, final recovery plan, and any revisions will be available on our website as they are completed (*https://www.fws.gov/program/endangered-species*), or from our West Virginia

Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (*e.g.,* restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their ranges may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

If this species is listed, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost-share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the State of West Virginia would be eligible for Federal funds to implement management actions that promote the protection or recovery of the West Virginia spring salamander. Information on our grant programs that are available to aid species recovery can be found at: *https://www.fws.gov/service/financial-assistance*.

Although the West Virginia spring salamander is only proposed for listing under the Act at this time, please let us know if you are interested in participating in recovery efforts for this species. Additionally, we invite you to submit any new information on this species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7 of the Act is titled, ''Interagency Cooperation'' and mandates all Federal action agencies to use their existing authorities to further the conservation purposes of the Act and to ensure that their actions are not likely to jeopardize the continued existence of listed species or adversely modify critical habitat. Regulations implementing section 7 are codified at 50 CFR part 402.

Section 7(a)(2) states that each Federal action agency shall, in consultation with the Secretary, ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. Each Federal agency shall review its action at the earliest possible time to determine whether it may affect listed species or critical habitat. If a determination is made that the action may affect listed species or critical habitat, formal consultation is required (50 CFR 402.14(a)), unless the Service concurs in writing that the action is not likely to adversely affect listed species or critical habitat. At the end of a formal consultation, the Service issues a biological opinion containing its determination of whether the Federal action is likely to result in jeopardy or adverse modification.

In contrast, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. Although the conference procedures are required only when an action is likely to result in jeopardy or adverse modification, action agencies may voluntarily confer with the Service on actions that may affect species proposed for listing or critical habitat proposed to be designated. In the event that the subject species is listed or the relevant critical habitat is designated, a conference opinion may be adopted as a biological opinion and serve as compliance with section 7(a)(2) of the Act.

Examples of discretionary actions for the West Virginia spring salamander that may be subject to conference and consultation procedures under section 7 are land management or other landscape-altering activities on Federal lands administered by the U.S. Department of Agriculture as well as actions on State, Tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat—and actions on State, Tribal, local, or private lands that are not federally funded, authorized, or carried out by a Federal agency—do not require section 7 consultation. Federal agencies should coordinate with the local Service Field Office (see **FOR FURTHER INFORMATION CONTACT**) with any specific questions on section 7 consultation and conference requirements.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to endangered wildlife. The prohibitions of section 9(a)(1) of the Act, codified at 50 CFR 17.21, make it illegal for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit or to cause to be committed any of the following: (1) import endangered wildlife into, or export from, the United States; (2) take (which includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct) endangered wildlife within the United States or on the high seas; (3) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such wildlife that has been taken illegally; (4) deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of commercial activity; or (5) sell or offer for sale in interstate or foreign commerce. Certain exceptions to these prohibitions apply to employees or agents of the Service, the National Marine Fisheries Service, other Federal land management agencies, and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered wildlife under certain circumstances. Regulations governing permits for endangered wildlife are codified at 50 CFR 17.22. With regard to endangered wildlife, a permit may be issued for scientific purposes, for enhancing the propagation or survival of the species, or for take incidental to otherwise lawful activities. The statute also contains certain exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

It is the policy of the Service, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify, to the extent known at the time a species is listed, specific activities that will not be considered likely to result in violation of section 9 of the Act. To the extent possible, activities that will be considered likely to result in violation will also be identified in as specific a manner as possible. The intent of this policy is to increase public awareness of the effect of a proposed listing on proposed and ongoing activities within the range of the species proposed for listing.

At this time, we are unable to identify specific activities that will or will not be considered likely to result in a violation of section 9 of the Act beyond what is already clear from the descriptions of prohibitions or already excepted through our regulations at 50 CFR 17.21

(*e.g.,* any person may take endangered wildlife in defense of his own life or the lives of others (see 50 CFR 17.21(c)(2))). Also, as mentioned above, certain activities that are prohibited under section 9 may be permitted under section 10 of the Act. Questions regarding whether specific activities would or would not constitute a violation of section 9 of the Act should be directed to the West Virginia Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

II. Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features.

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as an area that may generally be delineated around species' occurrences, as determined by the Secretary (*i.e.,* range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (*e.g.,* migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that each Federal action agency ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of designated critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation also does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Rather, designation requires that, where a landowner requests Federal agency funding or authorization for an action that may affect an area designated as critical habitat, the Federal agency consult with the Service under section 7(a)(2) of the Act. If the action may affect the listed species itself (such as for occupied critical habitat), the Federal agency would have already been required to consult with the Service even absent the designation because of the requirement to ensure that the action is not likely to jeopardize the continued existence of the species. Even if the Service were to conclude after consultation that the proposed activity is likely to result in destruction or adverse modification of the critical habitat, the Federal action agency and the landowner are not required to abandon the proposed activity, or to restore or recover the species; instead, they must implement ''reasonable and prudent alternatives'' to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat).

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information from the SSA report and information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species; the recovery plan for the species; articles in peer-reviewed journals; conservation plans developed by States and counties; scientific status surveys and studies; biological assessments; other unpublished materials; or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act; (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species; and (3) the prohibitions found in section 9 of the Act. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas

may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of the species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of those planning efforts calls for a different outcome.

Physical or Biological Features Essential to the Conservation of the Species

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12(b), in determining which areas we will designate as critical habitat from within the geographical area occupied by the species at the time of listing, we consider the physical or biological features that are essential to the conservation of the species and which may require special management considerations or protection. The regulations at 50 CFR 424.02 define ''physical or biological features essential to the conservation of the species'' as the features that occur in specific areas and that are essential to support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity. For example, physical features essential to the conservation of the species might include gravel of a particular size required for spawning, alkaline soil for seed germination, protective cover for migration, or susceptibility to flooding or fire that maintains necessary early-successional habitat characteristics. Biological features might include prey species, forage grasses, specific kinds or ages of trees for roosting or nesting, symbiotic fungi, or absence of a particular level of nonnative species consistent with conservation needs of the listed species. The features may also be combinations of habitat characteristics and may encompass the relationship between characteristics or the necessary amount of a characteristic essential to support the life history of the species.

In considering whether features are essential to the conservation of the species, we may consider an appropriate quality, quantity, and spatial and temporal arrangement of habitat characteristics in the context of the life-history needs, condition, and status of the species. These characteristics include, but are not limited to, space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, or rearing (or development) of offspring; and habitats that are protected from disturbance.

As described in the *Species Needs* section in the Proposed Listing Determination, above, and the SSA report (Service 2023, pp. 38–41), the resource and demographic needs for breeding, feeding, sheltering, and dispersal of the West Virginia spring salamander include:

- Appropriate cave habitat;
- Sufficient allochthonous materials (organic material originating outside the cave) to provide a prey base;
- Adequate freshwater availability (water quantity) and sufficient water quality

Summary of Essential Physical or Biological Features

We derive the specific physical or biological features essential to the conservation of the West Virginia spring salamander from studies of the species' habitat, ecology, and life history, as described above. Additional information can be found in the SSA report (Service 2023, entire; available on *https://www.regulations.gov* under Docket No. FWS–R5–ES–2023–0179). We have determined that the following physical or biological features in the General Davis Cave in Greenbrier County, West Virginia, are essential to the conservation of the West Virginia spring salamander:

(1) Cave habitat, including the cave stream and banks, interstitial spaces, rocks and other objects suitable for use as cover and nest sites, and drip and rimstone pools away from the main cave stream (to provide protected nest site habitats);

(2) Sufficient amounts and regular replenishment of allochthonous (organic material from outside the cave) inputs to support the invertebrate prey base in the cave; and

(3) Water conditions in the cave stream that are cool; are well-oxygenated with a neutral pH; have no evidence of excessive sediments, nutrients, pesticides, or herbicides; and have a cave stream flow and pattern consistent with current seasonal flows.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features which are essential to the conservation of the species and which may require special management considerations or protection. The features essential to the conservation of the West Virginia spring salamander may require special management considerations or protection to reduce threats posed by climate change (increased frequency of major flood events) and human activities (cave access for cave exploration, research activities, or recreational activities).

Management activities that could ameliorate these threats include, but are not limited to, minimizing human access to the cave; following applicable management plans and/or laws for cave visitation and recreational use; and conducting restoration and debris cleanup around or near the General Davis Cave after major flood events. These activities should be conducted in a way that minimizes disturbance to West Virginia spring salamanders and their habitat.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. In accordance with the Act and our implementing regulations at 50 CFR 424.12(b), we review available information pertaining to the habitat requirements of the species and identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the species to be considered for designation as critical habitat. We are not currently proposing to designate any areas outside the geographical area occupied by the species because the West Virginia spring salamander is endemic to one cave. We determined that the occupied area, General Davis Cave, is sufficient for the conservation of the West Virginia spring salamander and, therefore, we are not proposing to designate any unoccupied areas as critical habitat for the species.

In summary, for areas within the geographical area occupied by the species at the time of listing, we delineated the critical habitat unit's boundaries using the following criteria:

(1) Geographic extent—To maintain viability of the West Virginia spring

salamander population, the critical habitat unit should encompass the entire range of the species which is limited to the subterranean area of the General Davis cave.

Sources of data used for the delineation of critical habitat units included:

(1) U.S. Geological Survey digital ortho-photo quarter-quadrangles base layer map using Universal Transverse Mercator (UTM) Zone 17N coordinates, was used to delineate the critical habitat unit.

(2) Environmental Systems Research Institute's (ESRI's) Aeronautical Reconnaissance Coverage Geographical Information System (ArcGIS) online basemap aerial imagery was used to cross-check the base layer map.

When determining proposed critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack physical or biological features necessary for the West Virginia spring salamander. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is finalized as proposed, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

We propose to designate as critical habitat lands that we have determined are occupied at the time of listing (*i.e.,* currently occupied) and that contain one or more of the physical or biological features that are essential to support the life-history processes of the species.

We propose to designate one critical habitat unit based on the presence of the physical or biological features essential to the West Virginia spring salamander's life-history processes. The proposed unit contains all of the identified essential physical or biological features and supports multiple life-history processes.

The proposed critical habitat designation is defined by the map, as modified by any accompanying regulatory text, presented at the end of this document under Proposed Regulation Promulgation. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which the map is based available to the public on *https://www.regulations.gov* at Docket No. FWS–R5–ES–2023–0179 and on our internet site at *https://www.fws.gov/office/west-virginia-ecological-services.*

Proposed Critical Habitat Designation

We are proposing one unit as critical habitat for the West Virginia spring salamander. The critical habitat area we describe below constitutes our current best assessment of the area that meets the definition of critical habitat for West Virginia spring salamander. The area we propose as critical habitat is the General Davis Cave in Greenbrier County, West Virginia. We present a brief description of the unit, and reasons why it meets the definition of critical habitat for West Virginia spring salamander, below.

General Davis Cave Unit

The General Davis Cave consists of approximately 3.5 km (2.2 mi) of subterranean area in Greenbrier County, West Virginia. The General Davis Cave is considered occupied by the West Virginia spring salamander and represents the entire known range of the species. Based on our review, we concluded that the proposed unit is representative of the species' historical range, and it constitutes our best assessment of the area that meets the definition of critical habitat for the West Virginia spring salamander. The proposed unit is considered occupied year-round. The proposed unit contains the physical or biological features in the appropriate quantity and spatial arrangement essential to the conservation of the West Virginia spring salamander and to support multiple life-history processes for the species. Therefore, the conservation function of the unit is to provide for all life stages of the species.

The land above the proposed subterranean unit is entirely privately owned. Approximately 450 ac (182 ha) directly over General Davis Cave has been privately owned by one family for more than 200 years. Over this time, approximately 100 ac (40 ha) of the property has been used mainly as pasture for cattle grazing, with the rest being maintained as forest that has been subjected to occasional harvests (Powell 2021, pers. comm.). West Virginia DNR has developed an individual cave management plan for General Davis Cave, which provides broad guidelines for the conservation of the cave, and includes protection of groundwater and surface water resources, the pursuit of general cave conservation actions, and restrictions on visitation to the cave (West Virginia DNR 2020, p. 81). The physical and biological features in this unit may require special management considerations or protection such as minimizing human access to the cave; following applicable management plans and/or laws for cave visitation and recreational use; and conducting restoration and debris cleanup around or near the General Davis Cave after major flood events. These activities should be conducted in a way that minimizes disturbance to West Virginia spring salamanders and their habitat.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

We published a final rule revising the definition of destruction or adverse modification on August 27, 2019 (84 FR 44976). Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.

Compliance with the requirements of section 7(a)(2) is documented through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define ''reasonable

and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during formal consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Service Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 set forth requirements for Federal agencies to reinitiate consultation if any of the following four conditions occur: (1) the amount or extent of taking specified in the incidental take statement is exceeded; (2) new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or (4) a new species is listed or critical habitat designated that may be affected by the identified action. The reinitiation requirement applies only to actions that remain subject to some discretionary Federal involvement or control. As provided in 50 CFR 402.16, the requirement to reinitiate consultations for new species listings or critical habitat designation does not apply to certain agency actions (*e.g.,* land management plans issued by the Bureau of Land Management in certain circumstances).

Destruction or Adverse Modification of Critical Habitat

The key factor related to the destruction or adverse modification determination is whether implementation of the proposed Federal action directly or indirectly alters the designated critical habitat in a way that appreciably diminishes the value of the critical habitat for the conservation of the listed species. As discussed above, the role of critical habitat is to support the physical or biological features essential to the conservation of a listed species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may violate section 7(a)(2) of the Act by destroying or adversely modifying such habitat, or that may be affected by such designation.

Activities that we may, during a consultation under section 7(a)(2) of the Act, consider likely to destroy or adversely modify critical habitat include, but are not limited to, agricultural practices, forestry practices, and/or development/urbanization activities that alter the quality or quantity of water within the General Davis Cave stream. These activities, particularly in the absence of proper application of best management practices, could eliminate or reduce the quality or quantity of the General Davis Cave stream habitat by increasing stream sedimentation, introducing pesticides and herbicides, or changing the water flow pattern of the cave stream.

Exemptions

Application of Section 4(a)(3) of the Act

Section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) provides that the Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense (DoD), or designated for its use, that are subject to an integrated natural resources management plan (INRMP) prepared under section 101 of the Sikes Act Improvement Act of 1997 (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation. No DoD lands with a completed INRMP are within the proposed critical habitat designation.

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from designated critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. Exclusion decisions are governed by the regulations at 50 CFR 424.19 and the Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (hereafter, the ''2016 Policy''; 81 FR 7226, February 11, 2016), both of which were developed jointly with the National Marine Fisheries Service (NMFS). We also refer to a 2008 Department of the Interior Solicitor's opinion entitled, ''The Secretary's Authority to Exclude Areas from a Critical Habitat Designation under Section 4(b)(2) of the Endangered Species Act'' (M–37016).

In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise discretion to exclude the area only if such exclusion would not result in the extinction of the species. In making the determination to exclude a particular area, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor. In our final rules, we explain any decision to exclude areas, as well as decisions not to exclude, to make clear the rational basis for our decision. We describe below the process that we use for taking into consideration each category of impacts and any initial analyses of the relevant impacts.

Consideration of Economic Impacts

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. To assess the probable economic impacts of a designation, we must first evaluate specific land uses or activities and projects that may occur in the area of the critical habitat. We then must evaluate the impacts that a specific critical habitat designation may have on restricting or modifying specific land uses or activities for the benefit of the species and its habitat within the areas proposed. We then identify which conservation efforts may be the result of the species being listed under the Act versus those attributed solely to the designation of critical habitat for this particular species. The probable economic impact of a proposed critical habitat designation is analyzed by comparing scenarios both ''with critical habitat'' and ''without critical habitat.''

The ''without critical habitat'' scenario represents the baseline for the analysis, which includes the existing

regulatory and socio-economic burden imposed on landowners, managers, or other resource users potentially affected by the designation of critical habitat (*e.g.,* under the Federal listing as well as other Federal, State, and local regulations). Therefore, the baseline represents the costs of all efforts attributable to the listing of the species under the Act (*i.e.,* conservation of the species and its habitat incurred regardless of whether critical habitat is designated). The ''with critical habitat'' scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts would not be expected without the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs. These are the costs we use when evaluating the benefits of inclusion and exclusion of particular areas from the final designation of critical habitat should we choose to conduct a discretionary section 4(b)(2) exclusion analysis.

Executive Order (E.O.) 14094 supplements and reaffirms E.O. 12866 and E.O. 13563 and directs Federal agencies to assess the costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consistent with the E.O. regulatory analysis requirements, our effects analysis under the Act may take into consideration impacts to both directly and indirectly affected entities, where practicable and reasonable. If sufficient data are available, we assess to the extent practicable the probable impacts to both directly and indirectly affected entities. Section 3(f) of E.O. 12866 identifies four criteria when a regulation is considered a ''significant regulatory action'' and requires additional analysis, review, and approval if met. The criterion relevant here is whether the designation of critical habitat may have an economic effect of $200 million or more in any given year (section 3(f)(1), as amended by E.O. 14094). Therefore, our consideration of economic impacts uses a screening analysis to assess whether a designation of critical habitat for the West Virginia spring salamander is likely to exceed the economically significant threshold.

For this particular designation, we developed an incremental effects memorandum (IEM) considering the probable incremental economic impacts that may result from this proposed designation of critical habitat. The information contained in our IEM was then used to develop a screening analysis of the probable effects of the designation of critical habitat for the West Virginia spring salamander (IEc 2023, entire). We began by conducting a screening analysis of the proposed designation of critical habitat in order to focus our analysis on the key factors that are likely to result in incremental economic impacts. The purpose of the screening analysis is to filter out particular geographical areas of critical habitat that are already subject to such protections and are, therefore, unlikely to incur incremental economic impacts. In particular, the screening analysis considers baseline costs (*i.e.,* absent critical habitat designation) and includes any probable incremental economic impacts where land and water use may already be subject to conservation plans, land management plans, best management practices, or regulations that protect the habitat area as a result of the Federal listing status of the species.

Ultimately, the screening analysis allows us to focus our analysis on evaluating the specific areas or sectors that may incur probable incremental economic impacts as a result of the designation. The presence of the listed species in occupied areas of critical habitat means that any destruction or adverse modification of those areas is also likely to jeopardize the continued existence of the species. Therefore, designating occupied areas as critical habitat typically causes little if any incremental impacts above and beyond the impacts of listing the species. As a result, we generally focus the screening analysis on areas of unoccupied critical habitat (unoccupied units or unoccupied areas within occupied units). Overall, the screening analysis assesses whether designation of critical habitat is likely to result in any additional management or conservation efforts that may incur incremental economic impacts. This screening analysis combined with the information contained in our IEM constitute what we consider to be our draft economic analysis (DEA) of the proposed critical habitat designation for the West Virginia spring salamander; our DEA is summarized in the narrative below.

As part of our screening analysis, we considered the types of economic activities that are likely to occur within the areas likely affected by the critical habitat designation. In our evaluation of the probable incremental economic impacts that may result from the proposed designation of critical habitat for the West Virginia spring salamander, first we identified, in the IEM dated July 25, 2023, probable incremental economic impacts associated with agricultural activities. Additionally, we considered whether the activities have any Federal (*e.g.,* U.S. Department of Agriculture) involvement. Critical habitat designation generally will not affect activities that do not have any Federal involvement; under the Act, designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. If we list the species, in areas where the West Virginia spring salamander is present, Federal agencies would be required to consult with the Service under section 7 of the Act on activities they authorize, fund, or carry out that may affect the species. If, when we list the species, we also finalize this proposed critical habitat designation, Federal agencies would be required to consider the effects of their actions on the designated habitat, and if the Federal action may affect critical habitat, our consultations would include an evaluation of measures to avoid the destruction or adverse modification of critical habitat.

In our IEM, we attempted to clarify the distinction between the effects that would result from the species being listed and those attributable to the critical habitat designation (*i.e.,* difference between the jeopardy and adverse modification standards) for the West Virginia spring salamander's critical habitat. Because the designation of critical habitat for the West Virginia spring salamander is being proposed concurrently with the listing, it has been our experience that it is more difficult to discern which conservation efforts are attributable to the species being listed and those which will result solely from the designation of critical habitat. However, the following specific circumstances in this case help to inform our evaluation: (1) The essential physical or biological features identified for critical habitat are the same features essential for the life requisites of the species, and (2) any actions that would likely adversely affect the essential physical or biological features of occupied critical habitat are also likely to adversely affect the species itself. The IEM outlines our rationale concerning this limited distinction between baseline conservation efforts and incremental impacts of the designation of critical habitat for this species. This evaluation of the incremental effects has been used as the basis to evaluate the probable incremental economic impacts of this proposed designation of critical habitat.

The proposed critical habitat designation for the West Virginia spring salamander is currently occupied by the

species and totals approximately 3.5 km (2.2 miles) of subterranean cave habitat, with the surface area above the cave entirely privately owned lands. It is unlikely that there will be economic costs related to implementing this proposed critical habitat designation through section 7 of the Act given the absence of activities that may trigger section 7 consultation. This finding is based on a lack of historical consultations for other species in or near the proposed critical habitat unit, and no future project activities reported by Federal agencies. Therefore, the rule is unlikely to meet the threshold for an economically significant rule as defined in E.O. 14094.

We are soliciting data and comments from the public on the DEA discussed above. During the development of a final designation, we will consider the information presented in the DEA and any additional information on economic impacts we receive during the public comment period to determine whether any specific areas should be excluded from the final critical habitat designation under the authority of section 4(b)(2) of the Act, our implementing regulations at 50 CFR 424.19, and the 2016 Policy. We may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of this species.

Consideration of National Security Impacts

Section 4(a)(3)(B)(i) of the Act may not cover all DoD lands or areas that pose potential national-security concerns (*e.g.,* a DoD installation that is in the process of revising its INRMP for a newly listed species or a species previously not covered). If a particular area is not covered under section 4(a)(3)(B)(i), then national-security or homeland-security concerns are not a factor in the process of determining what areas meet the definition of ''critical habitat.'' However, the Service must still consider impacts on national security, including homeland security, on those lands or areas not covered by section 4(a)(3)(B)(i) because section 4(b)(2) requires the Service to consider those impacts whenever it designates critical habitat. Accordingly, if DoD, Department of Homeland Security (DHS), or another Federal agency has requested exclusion based on an assertion of national-security or homeland-security concerns, or we have otherwise identified national-security or homeland-security impacts from designating particular areas as critical habitat, we generally have reason to consider excluding those areas.

However, we cannot automatically exclude requested areas. When DoD, DHS, or another Federal agency requests exclusion from critical habitat on the basis of national-security or homeland-security impacts, we must conduct an exclusion analysis if the Federal requester provides information, including a reasonably specific justification of an incremental impact on national security that would result from the designation of that specific area as critical habitat. That justification could include demonstration of probable impacts, such as impacts to ongoing border-security patrols and surveillance activities, or a delay in training or facility construction, as a result of compliance with section 7(a)(2) of the Act. If the agency requesting the exclusion does not provide us with a reasonably specific justification, we will contact the agency to recommend that it provide a specific justification or clarification of its concerns relative to the probable incremental impact that could result from the designation. If we conduct an exclusion analysis because the agency provides a reasonably specific justification or because we decide to exercise the discretion to conduct an exclusion analysis, we will defer to the expert judgment of DoD, DHS, or another Federal agency as to: (1) Whether activities on its lands or waters, or its activities on other lands or waters, have national-security or homeland-security implications; (2) the importance of those implications; and (3) the degree to which the cited implications would be adversely affected in the absence of an exclusion. In that circumstance, in conducting a discretionary section 4(b)(2) exclusion analysis, we will give great weight to national-security and homeland-security concerns in analyzing the benefits of exclusion.

In preparing this proposal, we have determined that the lands within the proposed designation of critical habitat for the West Virginia spring salamander are not owned or managed by the DoD or DHS, and, therefore, we anticipate no impact on national security or homeland security.

Consideration of Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security discussed above. To identify other relevant impacts that may affect the exclusion analysis, we consider a number of factors, including whether there are permitted conservation plans covering the species in the area—such as HCPs, safe harbor agreements, or candidate conservation agreements with assurances—or whether there are non-permitted conservation agreements and partnerships that may be impaired by designation of, or exclusion from, critical habitat. In addition, we look at whether Tribal conservation plans or partnerships, Tribal resources, or government-to-government relationships of the United States with Tribal entities may be affected by the designation. We also consider any State, local, social, or other impacts that might occur because of the designation.

Summary of Exclusions Considered Under Section 4(b)(2) of the Act

In preparing this proposal, we have determined that no HCPs or other management plans for the West Virginia spring salamander currently exist, and the proposed designation does not include any Tribal lands or trust resources or any lands for which designation would have any economic or national security impacts. Therefore, we anticipate no impact on Tribal lands, partnerships, or HCPs from this proposed critical habitat designation and thus, as described above, we are not considering excluding any particular areas on the basis of the presence of conservation agreements or impacts to trust resources.

However, if through the public comment period we receive information that we determine indicates that there are economic, national security, or other relevant impacts from designating particular areas as critical habitat, then as part of developing the final designation of critical habitat, we will evaluate that information and may conduct a discretionary exclusion analysis to determine whether to exclude those areas under authority of section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19. If we receive a request for exclusion of a particular area and after evaluation of supporting information we do not exclude, we will fully explain our decision in the final rule for this action. (Please see **ADDRESSES**, above, for instructions on how to submit comments.)

Required Determinations

Clarity of the Rule

We are required by E.O.s 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

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

(3) Use clear language rather than jargon;

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

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Regulatory Planning and Review (Executive Orders 12866, 13563, and 14094)

Executive Order (E.O.) 14094 reaffirms the principles of E.O. 12866 and E.O. 13563 and states that regulatory analysis should facilitate agency efforts to develop regulations that serve the public interest, advance statutory objectives, and are consistent with E.O. 12866, E.O. 13563, and the Presidential Memorandum of January 20, 2021 (Modernizing Regulatory Review). Regulatory analysis, as practicable and appropriate, shall recognize distributive impacts and equity, to the extent permitted by law. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this proposed rule in a manner consistent with these requirements.

E.O. 12866, as reaffirmed by E.O. 13563 and E.O. 14094, provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is not significant.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine whether potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

Under the RFA, as amended, and as understood in light of recent court decisions, Federal agencies are required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself; in other words, the RFA does not require agencies to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Consequently, it is our position that only Federal action agencies would be directly regulated if we adopt the proposed critical habitat designation. The RFA does not require evaluation of the potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, because no small entities would be directly regulated by this rulemaking, the Service certifies that, if made final as proposed, the proposed critical habitat designation will not have a significant economic impact on a substantial number of small entities.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if made final, the proposed critical habitat designation would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare statements of energy effects to the extent permitted by law when undertaking actions identified as significant energy actions (66 FR 28355; May 22, 2001). E.O. 13211 defines a ''significant energy action'' as an action that (i) is a significant regulatory action under E.O. 12866 (or any successor order, including most recently E.O. 14094 (88 FR 21879; Apr. 11, 2023)); and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy. This proposed rule is not a significant regulatory action under E.O. 12866 or E.O. 14094. Therefore, this action is not a significant energy action, and there is no requirement to prepare a statement of energy effects for this action.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following finding:

(1) This proposed rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that

''would impose an enforceable duty upon State, local, or Tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or Tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions are not likely to destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule would significantly or uniquely affect small governments because it will not produce a Federal mandate of $100 million or more (adjusted annually for inflation) in any year, that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. Therefore, a small government agency plan is not required.

Takings—Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the West Virginia spring salamander in a takings implications assessment. The Act does not authorize the Service to regulate private actions on private lands or confiscate private property as a result of critical habitat designation. Designation of critical habitat does not affect land ownership or establish any closures or restrictions on use of or access to the designated areas. Furthermore, the designation of critical habitat does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. However, Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify critical habitat. A takings implications assessment has been completed for the proposed designation of critical habitat for West Virginia spring salamander, and it concludes that, if adopted, this designation of critical habitat does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this proposed rule does not have significant Federalism effects. A federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of this proposed critical habitat designation with, appropriate State resource agencies. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, the proposed rule does not have substantial direct effects either on the States, or on the relationship between the Federal Government and the States, or on the distribution of powers and responsibilities among the various levels of government. The proposed designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the physical or biological features of the habitat necessary for the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist State and local governments in long-range planning because they no longer have to wait for case-by-case section 7 consultations to occur.

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) of the Act would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with E.O. 12988 (Civil Justice Reform), the Office of the Solicitor has determined that this proposed rule would not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, this proposed rule identifies the physical or biological features essential to the conservation of the species. The proposed area of critical habitat is presented on a map, and the proposed rule provides several options for the interested public to obtain more detailed location information, if desired.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain information collection requirements, and a submission to OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) is not required. 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.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

Regulations adopted pursuant to section 4(a) of the Act are exempt from

the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) and do not require an environmental analysis under NEPA. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This includes listing, delisting, and reclassification rules, as well as critical habitat designations. In a line of cases starting with *Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), the courts have upheld this position.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), E.O. 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with federally recognized Tribes on a government-to-government basis. In accordance with Secretaries' Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. We have determined that no Tribal lands fall within the boundaries of the proposed critical habitat designation for the West Virginia spring salamander, so no Tribal lands would be affected by the proposed designation.

References Cited

A complete list of references cited in this rulemaking is available on the internet at *https://www.regulations.gov* and upon request from the West Virginia Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this proposed rule are the staff members of the Fish and Wildlife Service's Species Assessment Team and the West Virginia Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Plants, Reporting and recordkeeping requirements, Transportation, Wildlife.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. In § 17.11, in paragraph (h), amend the List of Endangered and Threatened Wildlife by adding an entry for ''Salamander, West Virginia spring'' in alphabetical order under AMPHIBIANS to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
*	*	*	*	*
Amphibians				
*	*	*	*	*
Salamander, West Virginia spring.	*Gyrinophilus subterraneus.*	Wherever found	E	[**Federal Register** citation when published as a final rule]; 50 CFR 17.95(d).[CH]
*	*	*	*	*

■ 3. In § 17.95, amend paragraph (d) by adding an entry for ''West Virginia Spring Salamander (*Gyrinophilus subterraneus*)'' after the entry for ''San Marcos Salamander (*Eurycea nana*),'' to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(d) *Amphibians.*

* * * * *

West Virginia Spring Salamander (*Gyrinophilus subterraneus*)

(1) The critical habitat unit is depicted for Greenbrier County, West Virginia, on the map in this entry.

(2) Within these areas, the physical or biological features essential to the conservation of the West Virginia spring salamander consist of the following components in the General Davis Cave in Greenbrier County, West Virginia:

(i) Cave habitat, including the cave stream and banks, interstitial spaces, rocks and other objects suitable for use as cover and nest sites, and drip and rimstone pools away from the main cave stream (to provide protected nest site habitats);

(ii) Sufficient amounts and regular replenishment of allochthonous (organic material from outside the cave) inputs to support the invertebrate prey base in the cave; and

(iii) Water conditions in the cave stream that are cool; are well-oxygenated with a neutral pH; have no evidence of excessive sediments, nutrients, pesticides, or herbicides; and have a cave stream flow and pattern consistent with current seasonal flows.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on the effective date of the final rule.

(4) Data layers defining map units were created on a base of U.S. Geological Survey digital ortho-photo quarter-quadrangles, and the critical habitat unit was then mapped using Universal Transverse Mercator (UTM) Zone 17N coordinates. The map in this entry, as modified by any accompanying regulatory text, establishes the boundaries of the critical habitat designation. The coordinates or plot points or both on which the map is based are available to the public at the Service's internet site at *https://www.fws.gov/office/west-virginia-ecological-services,* at *https://www.regulations.gov* at Docket No. FWS–R5–ES–2023–0179, and at the field office responsible for this

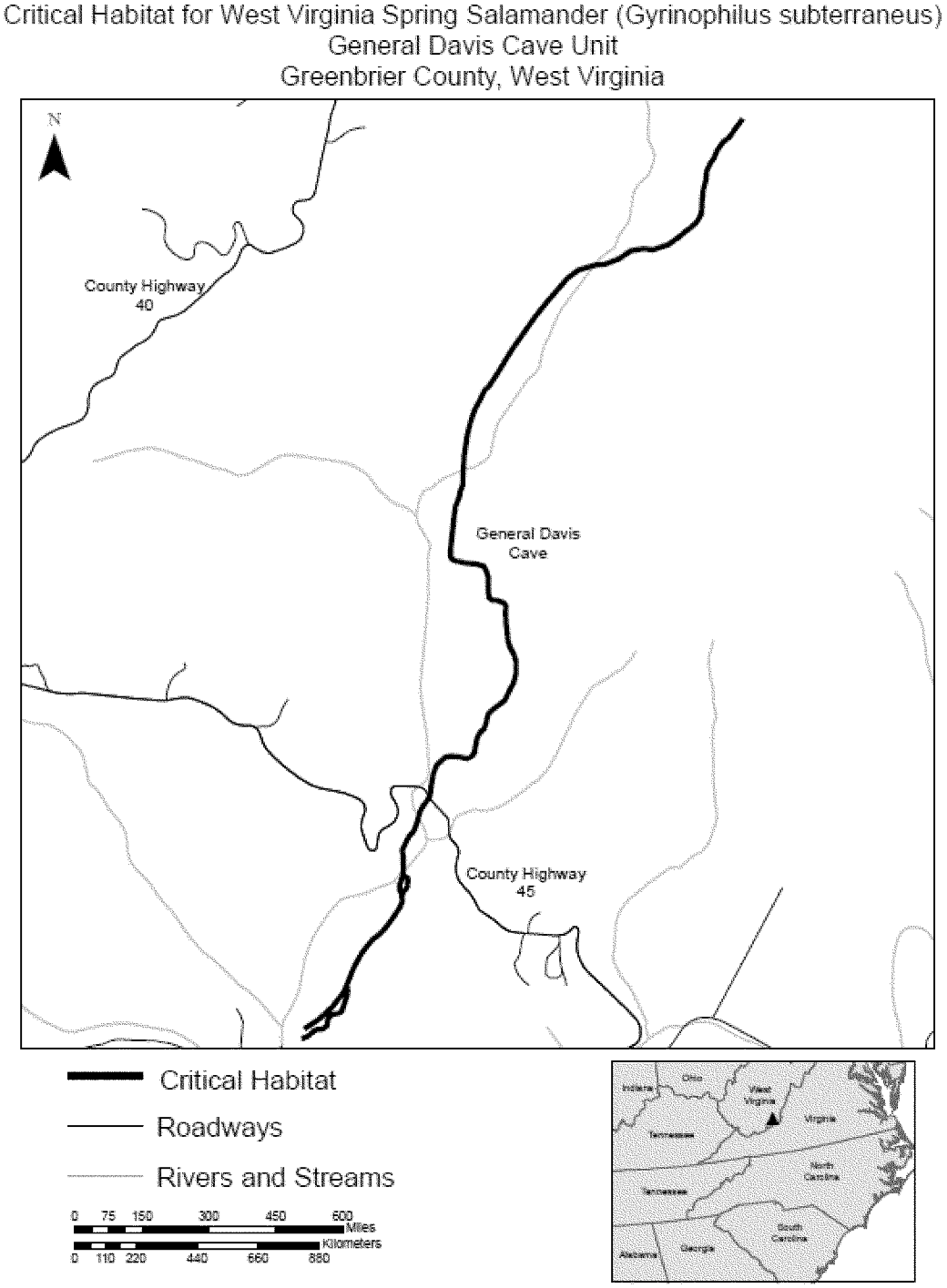
designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) General Davis Cave Unit; Greenbrier County, West Virginia.

(i) The General Davis Cave Unit consists of 3.5 kilometers (2.2 miles) in Greenbrier County, West Virginia, and is composed entirely of private lands.

(ii) Unit map follows:

Figure 1 to West Virginia Spring Salamander (*Gyrinophilus subterraneus*) paragraph (5)(ii)



* * * * *

Martha Williams,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2023–27741 Filed 12–19–23; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FF09E21000 FXES1111090FEDR245]

Endangered and Threatened Wildlife and Plants; Ten Species Not Warranted for Listing as Endangered or Threatened Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notification of findings.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce findings that 10 species are not warranted for listing as endangered or threatened species under the Endangered Species Act of 1973, as amended (Act). After a thorough review of the best available scientific and commercial information, we find that it is not warranted at this time to list Hupp's Hill cave beetle (*Pseudanophthalmus parvicollis*), Hubbard's cave beetle (*Pseudanophthalmus hubbardi*), overlooked cave beetle (*Pseudanophthalmus praetermissus*), Shenandoah cave beetle (*Pseudanophthalmus limicola*), Little Kennedy cave beetle (*Pseudanophthalmus cordicollis*), Holsinger's cave beetle (*Pseudanophthalmus holsingeri*), Hubricht's cave beetle (*Pseudanophthalmus hubrichti*), silken cave beetle (*Pseudanophthalmus sericus*), Pinaleño talussnail (*Sonorella grahamensis*), and San Xavier talussnail (*Sonorella eremita*). However, we ask the public to submit to us at any time any new information relevant to the status of any of the species mentioned above or their habitats.

DATES: The findings in this document were made on December 20, 2023.

ADDRESSES: Detailed descriptions of the bases for these findings are available on the internet at *https://www.regulations.gov* under the following docket numbers:

Species	Docket No.
Holsinger's cave beetle	FWS–R5–ES–2023–0233
Hubbard's cave beetle	FWS–R5–ES–2023–0235
Hubricht's cave beetle	FWS–R5–ES–2023–0236
Hupp's Hill cave beetle	FWS–R5–ES–2023–0237
Little Kennedy cave beetle	FWS–R5–ES–2023–0238
Overlooked cave beetle	FWS–R5–ES–2023–0239
Pinaleño talussnail	FWS–R2–ES–2023–0240
San Xavier talussnail	FWS–R2–ES–2023–0241
Shenandoah cave beetle	FWS–R5–ES–2023–0242
Silken cave beetle	FWS–R5–ES–2023–0243

Those descriptions are also available by contacting the appropriate person as specified under **FOR FURTHER INFORMATION CONTACT**. Please submit any new information, materials, comments, or questions concerning this finding to the appropriate person, as specified under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT:

Species	Contact Information
Hupp's Hill cave beetle, Hubbard's cave beetle, overlooked cave beetle, Shenandoah cave beetle, Little Kennedy cave beetle, Holsinger's cave beetle, Hubricht's cave beetle, and silken cave beetle.	Cindy Schulz, Field Office Supervisor, Virginia Ecological Services Field Office, 804–654–1842, *cindy_schulz@fws.gov*.
Pinaleño talussnail and San Xavier talussnail	Heather Whitlaw, Arizona Ecological Services Field Office Supervisor, 806–773–5932, *heather_whitlaw@fws.gov*.

Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Background

Under section 4(b)(3)(B) of the Act (16 U.S.C. 1531 *et seq.*), we are required to make a finding on whether or not a petitioned action is warranted within 12 months after receiving any petition that we have determined contains substantial scientific or commercial information indicating that the petitioned action may be warranted (''12-month finding''). We must make a finding that the petitioned action is: (1) Not warranted; (2) warranted; or (3) warranted, but precluded by other listing activity. We must publish a notification of these 12-month findings in the **Federal Register**.

Summary of Information Pertaining to the Five Factors

Section 4 of the Act (16 U.S.C. 1533) and the implementing regulations at part 424 of title 50 of the Code of Federal Regulations (50 CFR part 424) set forth procedures for adding species to, removing species from, or reclassifying species on the Lists of Endangered and Threatened Wildlife and Plants (Lists). The Act defines ''species'' as including any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature. The Act defines ''endangered species'' as any species that is in danger of extinction throughout all or a significant portion of its range (16 U.S.C. 1532(6)), and ''threatened species'' as any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range (16 U.S.C. 1532(20)). Under section 4(a)(1) of the Act, a species may be determined to be an endangered

species or a threatened species because of any of the following five factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

We use the term ''threat'' to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term ''threat'' includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term ''threat'' may encompass—either together or separately—the source of the action or condition or the action or condition itself. However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an ''endangered species'' or a ''threatened species.'' In determining whether a species meets either definition, we must evaluate all identified threats by considering the expected response by the species, and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species, such as any existing regulatory mechanisms or conservation efforts. The Secretary of the Interior determines whether the species meets the Act's definition of an ''endangered species'' or a ''threatened species'' only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

The Act does not define the term ''foreseeable future,'' which appears in the statutory definition of ''threatened species.'' Our implementing regulations at 50 CFR 424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis. The term ''foreseeable future'' extends only so far into the future as the Service can reasonably determine that both the future threats and the species' responses to those threats are likely. In other words, the foreseeable future is the period of time in which we can make reliable predictions. ''Reliable'' does not mean ''certain''; it means sufficient to provide a reasonable degree of confidence in the prediction. Thus, a prediction is reliable if it is reasonable to depend on it when making decisions.

It is not always possible or necessary to define foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics. Data that are typically relevant to assessing the species' biological response include species-specific factors such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.

In conducting our evaluation of the five factors provided in section 4(a)(1) of the Act to determine whether the Holsinger's cave beetle, Hubbard's cave beetle, Hubricht's cave beetle, Hupp's Hill cave beetle, Little Kennedy cave beetle, overlooked cave beetle, Pinaleño talussnail, San Xavier talussnail, Shenandoah cave beetle, or silken cave beetle meet the Act's definition of ''endangered species'' or ''threatened species,'' we considered and thoroughly evaluated the best scientific and commercial information available regarding the past, present, and future stressors and threats. We reviewed the petitions for the Hubbard's cave beetle, Hubricht's cave beetle, Little Kennedy cave beetle, overlooked cave beetle, Pinaleño talussnail, San Xavier talussnail, Shenandoah cave beetle, and silken cave beetle (see the discussion below for information on Holsinger's and Hupp's Hill cave beetles). For all of these species, including the species for which we completed discretionary status reviews (Holsinger's and Hupp's Hill beetles), we reviewed information available in our files, and other available published and unpublished information. Our evaluation may include information from recognized experts; Federal, State, and Tribal governments; academic institutions; foreign governments; private entities; and other members of the public.

In accordance with the regulations at 50 CFR 424.14(h)(2)(i), this document announces the not-warranted findings on petitions to list eight species and the discretionary status reviews of two species. We have also elected to include brief summaries of the analyses on which these findings are based. We provide the full analyses, including the reasons and data on which the findings are based, in the decisional file for each of the actions included in this document. The following is a description of the documents containing these analyses:

The species assessment forms for the Holsinger's cave beetle, Hubbard's cave beetle, Hubricht's cave beetle, Hupp's Hill cave beetle, Little Kennedy cave beetle, overlooked cave beetle, Pinaleño talussnail, San Xavier talussnail, Shenandoah cave beetle, and silken cave beetle contain more detailed biological information, a thorough analysis of the listing factors, a list of literature cited, and an explanation of why we determined that these species do not meet the Act's definition of an ''endangered species'' or a ''threatened species.'' To inform our status reviews, we completed species status assessment (SSA) reports for these 10 species. Each SSA report contains a thorough review of the taxonomy, life history, ecology, current status, and projected future status for each species. This supporting information can be found on the internet at *https://www.regulations.gov* under the appropriate docket number (see **ADDRESSES**, above). Our analyses for these decisions applied our current regulations, portions of which were last revised in 2019. Given that we proposed further revisions to these regulations on June 22, 2023 (88 FR 40764), we have also analyzed whether the decisions would be different if we were to apply those proposed revisions. We concluded that the decisions would have been the same if we had applied the proposed 2023 regulations. The analyses under both the regulations currently in effect and the regulations after incorporating the June 22, 2023, proposed revisions are included in our decision file for each action.

Holsinger's Cave Beetle, Hubbard's Cave Beetle, Hubricht's Cave Beetle, Hupp's Hill Cave Beetle, Little Kennedy Cave Beetle, Overlooked Cave Beetle, Shenandoah Cave Beetle, and Silken Cave Beetle

Previous Federal Actions

On April 20, 2010, we received a petition from the Center for Biological Diversity, Alabama Rivers Alliance, Clinch Coalition, Dogwood Alliance, Gulf Restoration Network, Tennessee Forests Council, and West Virginia Highlands to list 404 aquatic, riparian, and wetland species, including 15 cave beetle species: *Pseudanophthalmus hubbardi, Pseudanophthalmus praetermissus, Pseudanophthalmus limicola, Pseudanophthalmus cordicollis, Pseudanophthalmus hubrichti, Pseudanophthalmus sericus, Pseudanophthalmus avernus, Pseudanophthalmus intersectus, Pseudanophthalmus hirsutus, Pseudanophthalmus virginicus, Pseudanophthalmus egberti, Pseudanophthalmus pontis, Pseudanophthalmus sanctipauli, Pseudanophthalmus potomaca,* and *Pseudanophthalmus thomasi* (referred to by the common names ''Hubbard's cave beetle,'' ''overlooked cave beetle,'' ''Shenandoah cave beetle,'' ''Little Kennedy cave beetle,'' ''Hubricht's cave beetle,'' ''silken cave beetle,'' ''Avernus cave beetle,'' ''crossroads cave beetle,'' ''Cumberland Gap cave beetle,'' ''Maiden Spring cave beetle,'' ''New River Valley cave beetle,'' ''Natural Bridge cave beetle,'' ''Saint Paul cave beetle,'' ''South Branch Valley cave beetle,'' and ''Thomas' cave beetle,'' respectively, in the petition), as endangered or threatened species under the Act. On September 27, 2011, we published in the **Federal Register** (76 FR 59836) a 90-day finding that the petition provided substantial information indicating 374 of those species may warrant listing, including the 15 species listed above.

In a letter dated September 12, 2022, the petitioners withdrew their petition for nine of the Virginia cave beetle species, citing new information indicating the species no longer merit consideration for listing. These nine species are the Avernus cave beetle, crossroads cave beetle, Cumberland Gap cave beetle, Maiden Spring cave beetle, New River Valley cave beetle, Natural Bridge cave beetle, Saint Paul cave beetle, South Branch Valley cave beetle, and Thomas' cave beetle.

This document constitutes our 12-month finding on the April 20, 2010, petition to list Hubbard's, overlooked, Shenandoah, Little Kennedy, Hubricht's, and silken cave beetles under the Act. We also decided, as discretionary actions, to assess two additional Virginia cave beetle species (*Pseudanophthalmus holsingeri* (Holsinger's cave beetle) and *Pseudanophthalmus parvicollis* (Hupp's Hill cave beetle)) identified by the Service and partners as species of concern.

Summary of Finding

The eight focal cave beetle species are found in Virginia throughout the Appalachian Valley and Ridge (AVR) geologically unique limestone formations. Uplift, erosion, and dissolution of the faulted and folded strata of the AVR have produced isolated belts of karst topography with numerous caves, where carbonate bedrock is exposed in the valleys and flanks of ridges capped with non-cave forming rocks.

Cave beetles are eyeless, wingless beetles generally reddish/brown in color. The eight cave beetle species are insects in the Carabidae Family (Carabid beetles) under the Order Coleoptera. More specifically, they fall under the subfamily Trechinae, which includes numerous genera, including *Pseudanophthalmus.* Genus *Pseudanophthalmus* beetles (within which the eight species fall) are typically 3–9 millimeters in size (Service 2023, p. 2–4).

The eight cave beetle species are troglobites, meaning they are obligate cave dwellers and complete all phases of their life cycle within caves (Service 2023, p. v). Caves are a natural opening in solid rock with areas of complete darkness and are larger than a few millimeters (mm) in diameter (Culver and Pipan 2019, pp. 4–5). Caves typically form in karst landscapes that are defined as areas in which dissolution by weak acids is the primary agent shaping the landscape, as opposed to erosion, volcanoes, and earthquakes (Culver and Pipan 2019, pp. 4–5). Most solution caves form in carbonate (limestone or dolostone) bedrock.

Pseudanophthalmus cave beetles typically inhabit riparian mudbanks and other moist areas within limestone caves (Lewis 2001a, p. 5). Notable habitat features where *Pseudanophthalmus* cave beetles have been collected in Virginia include mud cracks, fine silt, woody debris, cobbles, and rocks. It is difficult to interpret these microhabitat features in terms of individual needs because we know so little about the life history of these species. It is common for other carabid beetles to prefer areas where they may seek shelter (hence the mudcracks, rocks, cobbles, and woody debris), and it is likely, again based on other carabid beetles, that females lay eggs in moist silty areas. The combination of moisture and organic material also likely presents the right circumstances for their prey items to be available. The individual needs that seem clear are that karst environments with water or moisture are necessary for beetles to be present; they have not been observed outside of caves or in completely dry caves.

Cave beetles are generally predatory and carnivorous, most likely feeding on mites, springtails, and opportunistic items, including beetle eggs and larvae. The primary food source of *Pseudanophthalmus* is enchytraeid and tubificid worms found associated with cave mudbanks (Lewis 2001a, b, and c, p. 4; Lewis 2002, p. 5). While it is not clear exactly what each species eats, experts are confident that they forage at a higher trophic level than some other cave invertebrates; they have not been observed associated with mammal scat like some other troglobites that feed on the associated bacterial and fungal growth (Service 2023, p. 2–5).

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the Hupp's Hill, Hubbard's, overlooked, Shenandoah, Little Kennedy, Holsinger's, Hubricht's, and silken cave beetles, and we evaluated all relevant factors under the five listing factors, including any regulatory mechanisms and conservation measures addressing these threats. The primary threats affecting the eight cave beetles' biological status include quarrying, commercial operations inside caves, and urbanization/development. These activities may alter the physical structure of caves and change the water table or hydrology of cave systems; we made the conservative assumption that compromised water quality and quantity may impact cave beetle species (Service 2023, p. 4–6). We also considered potential threats of agriculture and timbering (Service 2023, pp. 4–2—4–3).

Despite potential impacts from the primary threats, the best scientific and commercial data available indicate that the Little Kennedy, Shenandoah, and Hubricht's cave beetle species have maintained resilient populations throughout their respective ranges. This projection also applies to the single site-endemic species (Hupp's Hill, Hubbard's, Holsinger's, overlooked, and silken cave beetles), because, similar to Little Kennedy, Shenandoah, and Hubricht's cave beetles, the best available information indicates that

these species are projected to maintain resilient populations even under the projected future threats.

The eight cave beetles' redundancy and representation are limited due to their narrow ranges; however, this may be similar to historical conditions for most of the eight species. We assume that Hupp's Hill cave beetle is extirpated from one location (Battlefield Crystal Caverns); however, the best available information indicates no population- or species-level threats are acting on the species at Ogden's location.

Cave beetles are cryptic species that can be hard to locate within their habitats. Most caves likely undergo seasonal fluctuations in moisture that may influence the distribution of cave fauna within the system. The nature of caves and karst systems is such that there is presumed to be a large portion of area that is accessible to cave beetles (but not to humans), including cracks and crevices that may extend long distances and connect to unknown caves. We find that the eight cave beetle species have sufficient resiliency, redundancy, and representation in light of the best available potential stressor data and information. Thus, after assessing the best available information, we conclude that the eight cave beetle species (*i.e.,* Hupp's Hill, Hubbard's, overlooked, Shenandoah, Little Kennedy, Holsinger's, Hubricht's, and silken cave beetles) are not in danger of extinction throughout all of their ranges.

Next, we proceed with determining whether the eight cave beetle species are likely to become endangered within the foreseeable future throughout all of their ranges. Our evaluation is based upon analysis of threats and regional land-use projections for a foreseeable future extending out to 2070. The best available information does not indicate the threats will impact the species such that any of them meet the Act's definition of a threatened species. We expect no changes in redundancy or representation for any of the eight species as a result of future threats. After assessing the best available information, we conclude that the eight cave beetle species (*i.e.,* Hupp's Hill, Hubbard's, overlooked, Shenandoah, Little Kennedy, Holsinger's, Hubricht's, and silken cave beetles) are not likely to become endangered within the foreseeable future throughout all of their ranges.

We also evaluated whether the Hupp's Hill, Hubbard's, overlooked, Shenandoah, Little Kennedy, Holsinger's, Hubricht's, and silken cave beetles are endangered or threatened in a significant portion of their ranges. We did not find any portions of the Hupp's Hill, Hubbard's, overlooked, Shenandoah, Little Kennedy, Holsinger's, Hubricht's, and silken cave beetles ranges for which both (1) the portion is significant; and (2) the species is in danger of extinction in that portion, either now or within the foreseeable future. Thus, after assessing the best available information, we conclude that the Hupp's Hill, Hubbard's, overlooked, Shenandoah, Little Kennedy, Holsinger's, Hubricht's, and silken cave beetles are not in danger of extinction in a significant portion of their ranges now, or within the foreseeable future.

After assessing the best available information, we conclude that Hupp's Hill, Hubbard's, overlooked, Shenandoah, Little Kennedy, Holsinger's, Hubricht's, and silken cave beetles are not in danger of extinction now or likely to become in danger of extinction within the foreseeable future throughout all of their ranges or in any significant portion of their ranges. Therefore, we find that listing the eight cave beetle species as endangered species or threatened species under the Act is not warranted. For each beetle species, a detailed discussion of the basis for this finding can be found in the species assessment form and other supporting documents, which are available on *https://www.regulations.gov* under the appropriate docket number (see **ADDRESSES**, above).

Peer Review

In accordance with our July 1, 1994, peer review policy (59 FR 34270; July 1, 1994) and the Service's August 22, 2016, Director's Memo on the Peer Review Process, we solicited independent scientific reviews of the information contained in the SSA report for the eight cave beetle species. The Service sent the SSA report to six independent peer reviewers and received one response. Results of this structured peer review process can be found at *https://www.regulations.gov* under the appropriate docket number (see **ADDRESSES**, above). We incorporated the results of these reviews, as appropriate, into the SSA report, which is the foundation for this finding.

Pinaleño Talussnail and San Xavier Talussnail

Previous Federal Actions

On June 25, 2007, the Service received a petition from Forest Guardians (*i.e.,* WildEarth Guardians) requesting that we list 475 species, including the Pinaleño talussnail and the San Xavier talussnail, as endangered or threatened species and designate critical habitat under the Act. All 475 species occur within the Southwestern Region and were ranked as G1 or G1G2 species by NatureServe at the time. In a July 11, 2007, letter to the petitioner, the Service acknowledged receipt of the petition and stated that the petition was under review by staff in the Southwest Regional Office. On December 16, 2009, the Service published a partial 90-day finding for 192 of the species (74 FR 66866); that finding stated that the petition presented substantial scientific information indicating that listing may be warranted for 67 of the 192 species, including the Pinaleño talussnail and the San Xavier talussnail.

Summary of Finding

The Pinaleño talussnail and San Xavier talussnail are land snails endemic to southeastern Arizona that reside on rocky hillsides, rocky washes, and talus slopes. The Pinaleño talussnail occurs in the Pinaleño Mountains on the Coronado National Forest within an estimated 25 square miles (64.7 square kilometers) of potentially suitable habitat. The San Xavier talussnail is restricted to the northwestern slope of White Hill in the Sonoran Desert with an approximate range of 1.08 acres (0.44 hectares) on private land.

Both species require interstitial spaces in the talus for estivation (dormancy); dense vegetation and canopy cover; available food sources of fungus, lichen, decaying plant matter, and young green shoots; and adequate moisture. An adequate level of moisture is needed for the talussnails' active periods when they carry out their necessary life-history processes, as well as to support suitable habitat. An adequate level of moisture occurs when weather conditions fall within appropriate ranges of temperature, precipitation, relative humidity, and evaporation deficit. Individuals spend most of their time in estivation to avoid drying out or freezing during unfavorable conditions. The primary environmental influences are climate change and drought for both species, as well as wildfire and erosion for the Pinaleño talussnail.

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the Pinaleño talussnail and San Xavier talussnail, and we evaluated all relevant factors under the five listing factors, including any regulatory mechanisms and conservation measures addressing these threats. The primary threats affecting the Pinaleño talussnail's status include

drought and impacts from climate change, erosion, and wildfire. Population resiliency is dependent on a variety of climate conditions that influence talussnail active period, habitat quality, and habitat quantity. Our assessment used weather parameters to evaluate the talussnails' resiliency (*e.g.,* high, moderate, or low condition) based on the requirements of active periods (*i.e.,* mean daily maximum temperature, mean annual precipitation, mean daily maximum relative humidity), habitat quality (*i.e.,* mean annual evaporation deficit), and habitat quantity (*i.e.,* mean annual temperature change). Our results indicate that the weather parameters assessed are currently fully supportive of talussnail life history requirements; therefore, the overall current condition of Pinaleño talussnail population resiliency is assessed as ''high condition.'' The species' life history indicates that the species is adapted to variable environmental conditions by spending most of its time in estivation to avoid desiccation or freezing during unfavorable conditions. Surveys effort indicated that land snail abundance estimates were unchanged due to a recent fire, and fuel reduction activities are ongoing. Thus, after assessing the best available information, we conclude that the Pinaleño talussnail is not in danger of extinction throughout all of its range.

Climate change impacts to mean maximum relative humidity and mean temperature change for the Pinaleño talussnail are expected in 50-year future scenarios. However, the changes are expected to be very small and are not expected to decrease the viability of the species such that the species is in danger of extinction within the foreseeable future. The species' life history allows it to rebound after fires and other historical catastrophic events like mega droughts. Additionally, all historical habitat for the species remains intact, and there is no loss of range to date. Although there is some potential for climate effects in the 50-year timeframe, these effects are not substantial enough to substantially decrease habitat conditions for the species and result in the species being in danger of extinction. After assessing the best available information, we conclude that the Pinaleño talussnail is not likely to become endangered within the foreseeable future throughout all of its range.

The primary threats affecting San Xavier talussnail's biological status include drought and impacts from climate change. The San Xavier talussnail's current population resiliency is on the border between moderate and high condition. Habitat is intact, is connected, and does not have any development or land-use changes nearby that would alter the habitat conditions at these sites, thereby contributing to the conservation of habitat quality into the future. The species' life history indicates that the species is adapted to variable environmental conditions by spending most of its time in estivation to avoid desiccation or freezing during unfavorable conditions. The most likely catastrophic event for the San Xavier talussnail would be the loss of interstitial spaces in occupied talus habitats, but this is unlikely due to conservation commitments in the ''2018 Strategic Conservation Plan for the San Xavier Talussnail in Pima, Arizona.'' Thus, after assessing the best available information, we conclude that the San Xavier talussnail is not in danger of extinction throughout all of its range.

Climate change impacts to mean maximum temperature and mean temperature change for the San Xavier talussnail are expected in 50-year future scenarios. However, the changes are expected to be very small and are not expected to decrease the viability of the species such that the species is in danger of extinction within the foreseeable future. The species' life history allows it to rebound after fires and other historical catastrophic events like mega droughts. Additionally, all historical habitat for the species remains intact, and there is no loss of range to date. Although there is some potential for climate effects in the 50-year timeframe, these effects are not substantial enough to substantially decrease habitat conditions for the species and result in the species being in danger of extinction. After assessing the best available information, we conclude that the San Xavier talussnail is not likely to become endangered within the foreseeable future throughout all of its range.

We also evaluated whether the Pinaleño talussnail and the San Xavier talussnail are endangered or threatened in a significant portion of their range. We did not find any portions of the Pinaleño talussnail and the San Xavier talussnail ranges for which both (1) the portion is significant; and (2) the species is in danger of extinction in that portion, either now or within the foreseeable future. Thus, after assessing the best available information, we conclude that the Pinaleño talussnail and the San Xavier talussnail are not in danger of extinction in a significant portion of their ranges now, or within the foreseeable future.

After assessing the best available information, we conclude that the Pinaleño talussnail and the San Xavier talussnail are not in danger of extinction now or likely to become in danger of extinction within the foreseeable future throughout all of their ranges or in any significant portion of their ranges. Therefore, we find that listing the Pinaleño talussnail and the San Xavier talussnail as endangered species or threatened species under the Act is not warranted. A detailed discussion of the basis for this finding can be found in the Pinaleño talussnail and the San Xavier talussnail species assessment form and other supporting documents on *https://www.regulations.gov* under the appropriate docket number (see **ADDRESSES**, above).

Peer Review

In accordance with our July 1, 1994, peer review policy (59 FR 34270; July 1, 1994) and the Service's August 22, 2016, Director's Memo on the Peer Review Process, we solicited independent scientific reviews of the information contained in the Pinaleño talussnail and the San Xavier talussnail SSA report. The Service sent the SSA report to eight independent peer reviewers and received six responses. Results of this structured peer review process can be found at *https://www.regulations.gov* under Docket Nos. FWS–R2–ES–2023–0241 and FWS–R2–ES–2023–0242. We incorporated the results of these reviews, as appropriate, into the SSA report, which is the foundation for this finding.

New Information

We request that you submit any new information concerning the taxonomy of, biology of, ecology of, status of, or stressors to the Holsinger's cave beetle, Hubbard's cave beetle, Hubricht's cave beetle, Hupp's Hill cave beetle, Little Kennedy cave beetle, overlooked cave beetle, Pinaleño talussnail, San Xavier talussnail, Shenandoah cave beetle, or silken cave beetle to the appropriate person, as specified under **FOR FURTHER INFORMATION CONTACT**, whenever it becomes available. New information will help us monitor these species and make appropriate decisions about their conservation and status. We encourage local agencies and stakeholders to continue cooperative monitoring and conservation efforts.

References

A complete list of the references used in these petition findings is available in the relevant species assessment form, which is available on the internet at *https://www.regulations.gov* in the

appropriate docket (see **ADDRESSES**, above) and upon request from the appropriate person (see **FOR FURTHER INFORMATION CONTACT**, above).

Authors

The primary authors of this document are the staff members of the Species Assessment Team, Ecological Services Program.

Signing Authority

Martha Williams, Director of the U.S. Fish and Wildlife Service, approved this action on December 7, 2023, for publication. On December 7, 2023, Martha Williams authorized the undersigned to sign the document electronically and submit it to the Office of the Federal Register for publication as an official document of the U.S. Fish and Wildlife Service.

Authority

The authority for this action is section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Madonna Baucum,

Regulations and Policy Chief, Division of Policy, Economics, Risk Management, and Analytics of the Joint Administrative Operations, U.S. Fish and Wildlife Service.

[FR Doc. 2023–27966 Filed 12–19–23; 8:45 am]

BILLING CODE 4333–15–P

Notices

Federal Register
Vol. 88, No. 243
Wednesday, December 20, 2023

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding; whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by January 19, 2024 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food and Nutrition Service

Title: Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) Program Regulations—Reporting and Recordkeeping Burden.

OMB Control Number: 0584–0043.

Summary of Collection: The Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) provides supplemental foods, nutrition education, including breastfeeding promotion and support, and health care referrals to low income, nutritionally at-risk pregnant, breastfeeding and postpartum women, infants, and children up to age five. Currently, WIC operates through State health departments in 50 States, 33 Indian Tribal Organizations, American Samoa, District of Columbia, Guam, Commonwealth of the Northern Mariana Islands, Puerto Rico, and the Virgin Islands. The Federal regulations governing the WIC Program (7 CFR part 246) require that certain program-related information be collected and that full and complete records concerning WIC operations are maintained. The WIC Program is authorized by the Child Nutrition Act of 1966, as amended.

Need and Use of the Information: The Food and Nutrition Service (FNS) collects information from state and local agencies, applicants, and retail vendors to determine eligibility in the WIC Program. This ongoing information collection is mandatory for state agencies and required to obtain or retain benefits for the WIC participants. This information includes participant certification information (*e.g.,* income and nutrition risk); nutrition education documentation; local agency and vendor application and agreement information; vendor sales and shelf price data; data related to vendor monitoring and training; financial and food delivery system records, and Electronic Benefits Transfer (EBT) delivery. State Plans are the principal source of information about how each State agency operates its WIC Program. The information is needed for the general operation of the Program, including regulatory compliance, and for ongoing program integrity and cost-saving efforts. The information is also used by FNS to manage, plan, evaluate, make decisions, and report on WIC Program operations. If the information were not collected, the efficiency and effectiveness of the Program would be jeopardized, improper use of Federal funds would increase, and FNS' ability to detect violations would diminish greatly.

Description of Respondents: Individuals or Households; Businesses or Other for Profit; Not-for profit institutions; and State, Local, or Tribal Government.

Number of Respondents: 6,283,276.

Frequency of Responses: Recordkeeping; Reporting: Quarterly; Semi-annually; Monthly; Annually; and as Needed.

Total Burden Hours: 15,686,416.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–27888 Filed 12–19–23; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Farm Service Agency

[Docket ID: FSA–2023–0022]

Information Collection Request; County Committee Elections

AGENCY: Farm Service Agency, USDA.

ACTION: Notice; request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Farm Service Agency (FSA) is requesting comments from all interested individuals and entities on an extension of a currently approved information collection associated with FSA county committee elections. The collection of information from FSA farmers and ranchers is used to receive nominations from eligible voters for the FSA county committee.

DATES: We will consider comments we receive by February 20, 2024.

ADDRESSES: We invite you to submit comments on this notice. You may submit comments electronically through the Federal eRulemaking Portal: Go to *https://www.regulations.gov* and search for Docket ID FSA–2023–0022. Follow the online instructions for submitting comments. All comments received will be posted without change and will be publicly available on *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection

activities, please contact Cherie Moore; telephone: (202) 941–8659; email: *cherie.moore@usda.gov.* Individuals who require alternative means for communication should contact the USDA TARGET Center at (202) 720–2600 (voice and text telephone (TTY)) or dial 711 for Telecommunications Relay service (both voice and text telephone users can initiate this call from any telephone).

SUPPLEMENTARY INFORMATION:

Title of Collection: County Committee Election.

OMB Control Number: 0560–0229.

Expiration Date of Approval: May 31, 2024.

Type of Request: Extension.

Abstract: This information collection is necessary to effectively allow farmers and ranchers to nominate potential candidates using the form FSA–669A for the FSA county committee election in accordance with the requirements as authorized by the Soil Conservation and Domestic Allotment Act, as amended. Specifically, FSA uses the information provided by the nominee annually or, if needed, throughout the year for special elections to create ballots for FSA county committee elections. Elections for FSA county committees are held each year; therefore, nominations for eligible nominees are requested each year. Any individual who meets the qualifications mentioned in form FSA–669A may be nominated by another person or by themselves. The form FSA–669A is used to collect the information for nominations; it requires the name and address of the nominee and the signatures of both the nominee and the person nominating the individual to be a nominee (only one signature is required for self-nominated individuals). The nominee must be eligible to vote in the designated FSA county committee election, eligible to hold the office of FSA county committee member, and willing to serve, if elected. For more information about FSA county committees, including elections, nominations, eligible voters, eligibility, and other related information, see the regulations in 7 CFR part 7. In addition, the form also includes a voluntary request for race, ethnicity, and gender information from the nominee.

The number of respondents, responses and burden hours have not changed since the last OMB submission.

For the following estimated total annual burden on respondents, the formula used to calculate the total burden hour is the estimated average time per response hours multiplied by the estimated total annual responses.

Estimate of Average Time to Respond: Public reporting burden for collecting information under this notice is estimated to average 0.25 hours 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 for all respondents.

Type of Respondents: Individuals (eligible voters).

Estimated Number of Respondents: 10,500.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Reponses: 10,500.

Estimated Average Time per Response: 0.25 hours.

Estimated Total Annual Burden on Respondents: 2,625 hours.

FSA is requesting comments on all aspects of this information to help us to:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of FSA, including whether the information will have practical utility;

(2) Evaluate the accuracy of FSA's estimate of burden 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.

All comments received in response to this notice, including names and addresses when provided, will be a matter of public record. Comments will be summarized and included in the submission for Office of Management and Budget approval.

USDA Non-Discrimination Policy

In accordance with Federal civil rights law and USDA civil rights regulations and policies, USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family or parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Individuals who require alternative means of communication for program information (for example, braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA TARGET Center at (202) 720–2600 (voice and text telephone (TTY) or dial 711 for Telecommunications Relay Service (both voice and text telephone users can initiate this call from any telephone). Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD–3027, found online at *https://www.usda.gov/oascr/how-to-file-a-program-discrimination-complaint* and at any USDA office or write a letter addressed to USDA and provide in the letter all the information requested in the form. To request a copy of the complaint form, call (866) 632–9992. Submit your completed form or letter to USDA by mail to: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410 or email: *OAC@usda.gov.*

USDA is an equal opportunity provider, employer, and lender.

Zach Ducheneaux,

Administrator, Farm Service Agency.

[FR Doc. 2023–27969 Filed 12–19–23; 8:45 am]

BILLING CODE 3410–EB–P

DEPARTMENT OF AGRICULTURE

Forest Service

Land Management Plan Direction for Old-Growth Forest Conditions Across the National Forest System

AGENCY: Forest Service, Department of Agriculture.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The United States Department of Agriculture (Department) is proposing to amend all land management plans for units of the National Forest System (128 plans in total) to include consistent direction to conserve and steward existing and recruit future old-growth forest conditions and to monitor their condition across planning areas of the National Forest System. The intent is to foster the long-term resilience of old-growth forest conditions and their contributions to ecological integrity across the National Forest System. This notice initiates a scoping period on a

preliminary proposed action and advises the public that the Department is preparing an environmental impact statement to evaluate the effects of amending the 128 land management plans.

DATES: Comments are most valuable to the Department if received by February 2, 2024. The proposed action and draft environmental impact statement are expected in May 2024 and will be accompanied by a 90-day comment period, and the final environmental impact statement is expected in January 2025.

ADDRESSES: Comments may be submitted using the following methods: *Online (preferred):* Individuals and entities are encouraged to submit comments via webform at *https://cara.fs2c.usda.gov/Public//CommentInput?Project=65356*.

Mail: Hardcopy letters must be submitted to the Director, Ecosystem Management Coordination, 201 14th Street SW, Mailstop 1108, Washington, DC 20250–1124.

FOR FURTHER INFORMATION CONTACT: Jennifer McRae, Planning Team Leader, at 202–791–8488. Individuals who use telecommunication devices for the deaf and hard of hearing (TDD) may call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION: The Forest Service, an agency of the U.S. Department of Agriculture, is responsible for managing the land and resources of the National Forest System to provide for multiple-use and sustained-yield of products and services. The Forest and Rangeland Renewable Resources Planning Act of 1974 (88 Stat. 470 *et seq.*), as amended by the National Forest Management Act of 1976 (90 Stat. 2949 *et seq.;* 16 U.S.C. 1601–1614), requires land management plans for all units of the National Forest System. Regulations to implement the National Forest Management Act are set forth at 36 CFR 219.

Background

On April 22, 2022, President Biden issued Executive Order 14072 *Strengthening the Nation's Forests, Communities, and Local Economies.* Section 2 of the Executive Order (E.O.) recognizes the distinctive role that Federal forest lands play in sustaining ecological, social, and economic benefits throughout the nation and calls particular attention to the importance of mature and old-growth forests on Federal lands for their role in contributing to nature-based climate solutions by storing large amounts of carbon and increasing biodiversity, mitigating wildfire risks, enhancing climate resilience, enabling subsistence and cultural uses, providing outdoor recreational opportunities, and promoting sustainable local economic development.

Section 2(b) [1] of the E.O. required the Department to inventory mature and old-growth forest conditions on National Forest System lands, which the Forest Service completed an initial draft of in April 2023 (*Mature and Old-Growth Forests: Definition, Identification, and Initial Inventory on Lands Managed by the Forest Service and Bureau of Land Management, https://www.fs.usda.gov/sites/default/files/mature-and-old-growth-forests-tech.pdf*). The initial inventory was conducted by applying working definitions of old-growth and mature forest conditions for over 200 regional vegetation types to Forest Inventory and Analysis field plot data. Definitions and inventories have been established for forests exhibiting old-growth conditions, but mature forest conditions had not previously been ecologically defined in a consistent manner at a national scale. This initial inventory resulted in the Forest Service identifying an estimated 24.7 million acres of old-growth forest conditions and 68.1 million acres of mature forest conditions representing 17 and 47 percent, respectively, of the 144.3 million acres of forested National Forest System lands.

Section 2(c)(ii) of the E.O. directed the Department, following completion of the initial inventory, to analyze threats to inventoried mature and old-growth forests on National Forest System lands, including threats from wildfires and climate change. Like the inventory, the initial threat analysis was national in scale and presents an initial compilation and summation of threats associated with wildfire, fire exclusion, insects and disease, extreme weather, climate and temperature, drought, tree cutting, roads, land use allocation, and wildland urban interface. In the analysis, the term ''threat'' indicated a change in forest structure resulting in a reclassification of the forest condition but not necessarily a loss of ecological function and integrity.

Initial analysis from that ongoing effort indicates several key findings that informed this proposed action. The initial analysis found that mortality from wildfires is currently the leading threat to mature and old-growth forest conditions, followed by insects and disease. The analysis found that tree cutting is now a relatively minor threat compared to climate amplified disturbances such as wildfire, insects and disease. However, past management practices, including timber harvest and fire suppression, contributed to current vulnerabilities in the distribution, abundance, and resilience of old-growth forest characteristics.

The amount and distribution of mature forests across the National Forest System suggest that these lands have the inherent capability to sustain old-growth forest conditions into the future. This proposed amendment is intended to create a consistent approach to manage for old-growth forest conditions with sufficient distribution, abundance, and ecological integrity (composition, structure, function, connectivity) to be persistent over the long term, in the context of climate amplified stressors. The amendment establishes a set of national plan components and direction for geographically informed adaptive implementation strategies that promote the long-term persistence, distribution, and recruitment of old-growth forest conditions across the National Forest System.

The proposed action recognizes the role of old-growth forest conditions in contributing to ecological integrity. It also recognizes that there are significant ecosystem and geographic differences that would require the development of geographically informed adaptive management strategies, in collaboration with the public and through consultation with Tribes and Alaska Native Corporations. The proposed amendment includes direction to integrate Indigenous Knowledge and respect for the ethic of reciprocity and responsibility to future generations and directs land managers to advance co-stewardship, recognizing the importance of general trust responsibilities, treaty rights, and cultural, religious, and other tribal interests and practices. The proposed amendment provides a framework for strategic conservation, and proactive stewardship and management, to mitigate risks across a range of forest conditions to both maintain and intentionally develop old-growth forest conditions, where feasible given climate impacts, and within the context of the multiple-use mandate that guides management of the National Forest System.

Given the key threat that rapidly changing wildfire disturbances pose to national forest ecosystems and watersheds and the old-growth forests therein, this proposed action is intended to complement the Department's continued focus on, funding, and

[1] Executive Order 14072 also applies to the Bureau of Land Management but this notice of intent applies to National Forest System lands only.

implementation of the Forest Service's Wildfire Crisis Strategy. Providing consistent national direction that recognizes the beneficial role that functional old-growth forest conditions play in enhancing forest resiliency to wildfire further strengthens efforts to abate the wildfire crisis. The proposed action also recognizes the importance of strategic conservation and proactive stewardship for wildfire resilience efforts, including science-based vegetation treatments and restoring prescribed fire in fire-adapted ecosystems, for the long-term retention and future recruitment of old-growth forest conditions.

Focusing on the intentional management, conservation, and furtherance of old-growth across the National Forest System via a national amendment to land management plans is also warranted given the longstanding commitment demonstrated by the Forest Service to manage old-growth forest conditions for multiple values including ecosystem diversity, habitat, recreation, aesthetics, and water quality. For several decades, it has been the agency's position that decisions concerning the management of old-growth forest conditions will be made in the development and implementation of land management plans, including plan direction that provides for a succession of young and mature forests into old-growth forests. Current data has identified approximately 2,700 land management plan components, across nearly all 128 individual plans, which provide direction on the management, conservation, or monitoring of old-growth forest conditions across the National Forest System. The proposed amendment builds on those existing plan components and promotes consistency in old-growth management, conservation, and recruitment efforts.

This proposed action was informed by public feedback received on the Climate Resilience Advance Notice of Proposed Rulemaking (ANPR) the Forest Service initiated in April 2023 (88 FR 24497). The ANPR gave the public an opportunity to provide input on how the Forest Service should respond to the changing climate through forest management activities and possibly future policies. It included the following two questions:

1. How might the Forest Service use the mature and old-growth forest inventory together with analyzing threats and risks to determine and prioritize when, where, and how different types of management will best enable retention and expansion of mature and old-growth forests over time?

2. Given our current understanding of the threats to the amount and distribution of mature and old-growth forest conditions, what policy, management, or practices would enhance ecosystem resilience and distribution of these conditions under a changing climate?

The Forest Service received 92,000 comments in response to the ANPR, representing nearly 500,000 respondents. Many responses included feedback on the appropriate conservation and management of mature and old-growth forest conditions, reflecting a diversity of perspectives. In developing this proposed action, the Department identified some potential areas of agreement, including:

1. Land management plans, the forest planning process, and National Forest Management Act implementing regulations (36 CFR 219 ''planning regulations'') provide useful and durable mechanisms and frameworks for the furtherance of mature and old-growth conservation and management objectives.

2. Old-growth forest conditions have distinct, unique, and special ecological, cultural, and social values and contribute to ecological integrity. There is value in the long-term presence and resilience of old-growth forest conditions on the National Forest System.

3. Old-growth forest conditions exist in a dynamic landscape, and changes in the distribution and abundance of old-growth forest conditions related to disturbance and climate amplified stressors, including mortality from persistent drought, rapidly changing wildfire disturbance regimes, insects and disease, and encroachment pressures from urban development are likely to occur.

4. There is concern over climate amplified disturbance impacts that pose a threat to the persistence of old-growth forest conditions on the National Forest System lands, and an understanding that current management practices may benefit from consistent direction to reduce vulnerabilities and increase resilience to stressors.

5. There are differences in threats and conditions in different regions and ecosystems across the National Forest System that will require additional consultation with Tribes and Alaska Native Corporations and place-based collaboration to develop geographically informed adaptive management strategies. For example, in July 2023, the Secretary of Agriculture appointed a Federal Advisory Committee to guide related work in the Pacific Northwest to develop a climate informed amendment for the national forests of the Northwest Forest Plan.

6. Management must be science-based, including Indigenous Knowledge as a source of best-available scientific information.

7. Management direction should enable co-stewardship and recognize the importance of trust responsibilities, treaty rights, and cultural, religious, and other tribal interests and eco-cultural practices associated with old-growth forest conditions.

8. Consistent and effective monitoring of current and future old-growth forest conditions over time would better inform adaptive management.

9. Good examples of proactive stewardship and management direction and monitoring can be drawn from recent tribal co-stewardship agreements, Collaborative Forest Landscape Restoration Partnership projects, land management plans, and implementation of other programs.

10. Nationally consistent direction for conserving, stewarding and recruiting old-growth forest conditions is connected to and should complement related Forest Service policy and direction, including the Wildfire Crisis Strategy and Climate Adaptation Plan.

The Department believes that reaffirming, at a national scale, the commitment to maintaining and developing old-growth forests conditions across the National Forest System is prudent and warranted, and best advanced at this time via amendment of land management plans. As noted, abundances of mature forest condition across National Forest System lands suggest an inherent capability of these ecosystems to sustain old-growth forest conditions into the future. Given climate amplified stressors, management actions must be guided by science, including Indigenous Knowledge, intentionality, and commitment to evaluate the effectiveness of strategies designed to further desired old-growth forest conditions.

Purpose of the Amendment

The purpose of this amendment is to establish consistent plan direction to foster ecologically appropriate management across the National Forest System by maintaining and developing old-growth forest conditions while improving and expanding their abundance and distribution and protecting them from the increasing threats posed by climate change, wildfire, insects and disease, encroachment pressures from urban development, and other potential stressors, within the context of the

National Forest System's multiple-use mandate.

With consideration of the old-growth definition and initial inventory information, the initial threats analysis, comments the Forest Service received on the Climate Resilience ANPR, and an analysis of existing land management plan direction for old-growth management and conservation, the Department is proposing to amend all land management plans to establish consistent direction for old-growth forest conditions across the National Forest System. The proposed amendment establishes national intent to maintain and improve amounts and distributions of old-growth forest conditions within national forest ecosystems and watersheds so that old-growth forest conditions are resilient and adaptable to stressors and likely future environments.

Standards are proposed to prevent degradation of old-growth conditions and to enable conservation and proactive stewardship within old-growth forest conditions to foster or increase resilience to disturbances and stressors that may have adverse impacts. Proactive stewardship includes ecologically appropriate management and recognition of when natural succession processes can support achievement of desired conditions. A guideline is proposed to encourage proactive stewardship to increase amounts and improve distributions and climate resilience of future old-growth forest conditions.

The proposed action also includes a management approach to direct the development of a place-based strategy. The intent is for a unit or units to create a new *Adaptive Strategy for Old-Growth Forest Conservation* based on geographically relevant data or information, or adopt an already existing strategy that meets this intent, and include it as an appendix to either the broader scale monitoring strategy or in the biennial monitoring report. The *Adaptive Strategy for Old-Growth Forest Conservation* would not be a decision document representing final agency action—as a management approach, the strategy is ''other plan content'' that can be established or modified through an administrative change to enable adaptation, see 36 CFR 219.7(f)(2).

This proposal is not intended to replace existing direction in plans but rather to add language that provides consistency across all plans. If existing plan direction provides more restrictive constraints on actions that may affect existing or potential old-growth forest conditions, those more restrictive constraints would govern. Additional purposes of this amendment are to:

- Establish a clear role for Indigenous Knowledge and tribal leadership in the proactive stewardship and furtherance of old-growth forest conditions on the National Forest System lands.
- Establish a National Old-Growth Monitoring Network to track trends and distribution patterns in old-growth for inventory, evaluation, assessment, and adaptive management purposes.
- Facilitate the development of geographically informed adaptive strategies for old-growth forest conservation to support the effective implementation of this amendment and enable co-stewardship with Tribes and Alaska Native Corporations and collaboration with States, local governments, industry partners, and public stakeholders.

Need for Change

In preparing an amendment, the responsible official shall base an amendment on a preliminary identification of the need to change the plan (36 CFR 219.13(b)(1)). *The need for change is* to create a consistent set of national plan components and direction for the development of geographically informed adaptive implementation strategies for the long-term persistence, distribution, and recruitment of old-growth forest conditions across the National Forest System; to provide for consistent and effective monitoring of old-growth forest characteristics to inform adaptive management; and to more clearly recognize and incorporate Indigenous Knowledge and tribal rights and interests in managing for old-growth forest conditions.

The proposed amendment focuses on interrelated topic areas, including:

- Improving conservation of old-growth forest conditions
- Improving durability, resilience, and resistance to fire, insects and disease within old-growth forest conditions across the National Forest System
- Strengthening the capacity of existing and future old-growth forest conditions to adapt to the ongoing effects of climate change
- Addressing concerns about future durability, distribution, and redundancy of old-growth forest conditions
- Incorporating Indigenous Knowledge into planning, project design, and implementation to achieve forest management goals and help meet general trust responsibilities
- Establishing a National Old-Growth Monitoring Network
- Providing direction for geographically informed adaptive management strategies

Preliminary Alternatives

This notice of intent initiates the official scoping process, which guides the development of the environmental impact statement. Written comments received in response to this notice will be analyzed to further develop the proposed action and to identify potential significant issues for developing alternatives to the proposed action. A no-action alternative, which represents no change to existing management direction, will be analyzed in addition to the proposed action and will serve as the baseline for the comparison among action alternatives. Consistent with 36 CFR 219.16(a)(2), there will be a 90-day comment period for additional input when the proposed action and draft environmental impact statement are released.

Lead and Cooperating Agencies

The Forest Service will prepare the environmental analysis in compliance with the National Environmental Policy Act and operate as the lead agency for this amendment. State agencies and Federally recognized Tribes and Alaska Native Corporations are invited to indicate interest in participating as a cooperating agency.

Responsible Official

The responsible official for this amendment is the Secretary of Agriculture.

Nature of the Decision To Be Made

The Secretary will decide whether and how to amend all National Forest System land management plans.

Substantive Provisions

When proposing a land management plan amendment, the planning regulations (36 CFR 219), as amended, require the responsible official to identify in this notice what part of the substantive requirements (219.8 through 219.11) will govern this amendment process. These are the requirements likely to be directly related to the amendment based on the purpose of the amendment or the effects of the amendment (36 CFR 219.13(b)(5)). The Secretary's initial determination, subject to change, is that the following sections of the specific substantive requirements within 219.8 through 219.11 are directly related to the plan direction being added by the amendment and therefore will apply within the scope and scale of the amendment.

36 CFR 219.8(a)(1)—Terrestrial and aquatic ecosystem integrity (including associated analytical considerations in 219.8(a)(1) (i through vi).

36 CFR 219.8(a)(1 and 2)—Watershed integrity, water quality, and soils.

36 CFR 219.8(a)(3)—Riparian areas.

36 CFR 219.8(b)—Social and economic sustainability, including the analytical requirements of 219.8(b)(1 through 6).

39 CFR 219.9(a)(2) Ecosystem diversity.

36 CFR 219.9(b) Ecological conditions for species (including threatened, endangered, proposed or candidate species and potential species-of-conservation-concern).

36 CFR 219.10(a) Ecosystem services and multiple use (including analytical requirements 1 through 10).

36 CFR 219.10(b)(1)(i) Recreation settings, opportunities, access, and scenic character.

36 CFR 219.10(b)(1)(ii) Cultural and historic resources.

36 CFR 219.10(b)(1)(iii) Areas of tribal importance.

Scoping Process—Submitting Comments

This notice of intent begins the scoping process, 36 CFR 220.4(e). Comments submitted in response to this notice will be considered and guide the development of the draft environmental impact statement. The Department is requesting comments on the proposed action, including any modifications or additional language, potential alternatives, and identification of any relevant information, studies, or analyses concerning impacts that may affect the quality of the environment. The Department does not anticipate that the proposed action will require any permits or other authorizations.

It is important that reviewers provide their comments at such times and in such manner that they are useful in the preparation of the environmental impact statement. Therefore, comments should be provided prior to the close of the comment period and should clearly articulate the reviewer's concerns and contentions.

Specific written comments should be within the scope of the proposed action, have a direct relationship to the proposed action, and include supporting reasons for the Secretary to consider. Comments received in response to this solicitation, including names (and addresses, if included) of those who comment, will be part of the public record for this proposed action.

Objection Process Information

The proposed action is not subject to the 36 CFR 219 subpart B objection process, in accordance with 36 CFR 219.51(b).

Preliminary Proposed Action

The following is a description of the Department's proposed action to address the interrelated concerns identified in the Need for Change section above. The proposed action consists of plan components and other plan content that would be added to all land management plans. Existing plan components in all plans would remain in effect, and if existing plan components are more restrictive, the more restrictive direction would govern.

The Department seeks to amend the following land management plans: Region 1—Beaverhead-Deerlodge, Bitterroot, Clearwater, Custer-Gallatin, Dakota Prairie Grassland, Flathead, Helena-Lewis and Clark, Idaho Panhandle, Kootenai, Lolo, Nez Perce; Region 2—Arapaho-Roosevelt-Pawnee, Bighorn, Black Hills, Grand Mesa-Uncompahgre-Gunnison, Medicine Bow, Nebraska, Pike-San Isabel-Cimarron-Comanche, Rio Grande, Routt, San Juan, Shoshone, Thunder Basin, White River; Region 3—Apache-Sitgreaves, Carson, Cibola Mountains, Cibola Grasslands, Coconino, Coronado, Gila, Kaibab, Lincoln, Prescott, Santa Fe, Tonto; Region 4—Ashley, Boise, Bridger-Teton, Caribou, Challis, Curlew Grasslands, Dixie, Fishlake, Humboldt, Manti-La Sal, Payette, Salmon, Sawtooth, Targhee, Toiyabe, Uinta, Wasatch-Cache; Region 5—Angeles, Cleveland, Eldorado, Inyo, Klamath, Lake Tahoe Basin, Lassen, Los Padres, Mendocino, Modoc, Plumas, San Bernardino, Sequoia, Shasta-Trinity, Sierra, Six Rivers, Stanislaus, Tahoe; Region 6—Colville, Crooked River National Grassland, Deschutes, Fremont, Gifford Pinchot, Malheur, Mt. Baker-Snoqualmie, Mt. Hood, Ochoco, Okanogan, Olympic, Rogue River, Siskiyou, Siuslaw, Umatilla, Umpqua, Wallowa-Whitman, Wenatchee, Willamette, Winema; Region 8—Chattahoochee-Oconee, Cherokee, Croatan, Daniel Boone, El Yunque, Francis Marion, George Washington, Jefferson, Kisatchie, Land Between the Lakes, National Forests in Alabama, National Forests in Florida, National Forests in Mississippi, Nantahala-Pisgah, National Forests in Texas, Ouachita, Ozark and St. Francis, Sumter, Uwharrie; Region 9—Allegheny, Chequamegon-Nicolet, Chippewa, Finger Lakes, Green Mountain, Hiawatha, Hoosier, Huron-Manistee, Mark Twain, Midewin Tallgrass Prairie, Monongahela, Ottawa, Shawnee, Superior, Wayne, White Mountain; Region 10—Chugach, Tongass.

The following would be added to each land management plan: a statement of distinctive roles and contributions, one goal, one management approach, four desired conditions, one objective, four standards, one guideline, and plan monitoring requirements. For general descriptions of plan components and other plan content, see 36 CFR 219.7(e) and (f).

Proposed Plan Components and Other Plan Content To Add to Each Land Management Plan

Statement of Distinctive Roles and Contributions—

The National Forest System plays a distinctive and key role in providing the nation with benefits related to national forests and grasslands within the broader landscape, including old-growth forest conditions. Old-growth forests are dynamic systems distinguished by old trees and related structural attributes. Old growth typically differs from other stages of stand development in a variety of characteristics, including the presence of old trees, variability in canopy structure, patchiness, and development pathways depending on disturbance regimes and resulting patterns. The structure and composition of old-growth forests is highly place-based and can range from old, multi-layered temperate coniferous forests with high amounts of dead wood in the form of standing snags and coarse wood to old, single-storied pine forests or oak woodlands with open canopy structure and fire-maintained herb and litter dominated understories.

Old-growth forest conditions support ecological integrity and contribute to distinctive ecosystem services—such as long-term storage of carbon, increased biodiversity, improved watershed health, and social, cultural, and economic values. Old-growth forests have place-based meanings tied to cultural identity and heritage; local economies and ways of life; traditional and subsistence uses; aesthetic, spiritual, and recreational experiences; and Tribal and Indigenous histories, cultures, and practices. For millennia, Tribal and Indigenous practices have maintained resilient forest structure and composition of forests that harbor high structural and compositional diversity, with particular emphasis on understory plants and fire-dependent wildlife habitat.

Goal—

1. Interpretation and implementation is grounded in recognition and respect of tribal sovereignty, treaties, Indigenous Knowledge and the ethic of reciprocity and responsibility to future generations. Implementation should enable co-stewardship, including for cultural burning, prescribed fire, and other activities, and should occur in consultation with Tribes and Alaska Native Corporations to fulfill treaty obligations and general trust responsibilities.

Management Approach—

1. *Adaptive Strategy for Old-Growth Forest Conservation:*

(a) Within two years, in consultation with Tribes and Alaska Native Corporations and in collaboration with States, local governments, industry partners, and public stakeholders, create or adopt an *Adaptive Strategy for Old-Growth Forest Conservation* based on geographically relevant data or information to:

- Effectively braid place-based Indigenous Knowledge and Western science to inform and prioritize the conservation and recruitment of old-growth forest conditions through proactive stewardship.
- Identify criteria used to indicate conditions where plan components will apply.
- Prioritize areas for the retention and promotion of old-growth forest conditions, based on threats, stressors, and opportunities relevant to the plan area.
- Establish target milestones for management specific to the plan area, to support progress toward the desired conditions of this amendment.
- Develop additional proactive climate-informed stewardship, conservation, and management approaches as needed to effectively achieve the desired conditions, standards, and guidelines in the amendment.
- Identify a program of work and partnerships that can support effective delivery of the plan monitoring requirements to inform adaptive management.
- Provide geographically relevant information about threats, stressors, and management opportunities relevant to the ecosystem of the plan area to facilitate effective implementation.

(b) One or more units may create a joint *Adaptive Strategy for Old-Growth Forest Conservation.* An already existing strategy or other document may also be used if it meets this intent.

(c) Include the *Adaptive Strategy for Old-Growth Forest Conservation* as an appendix to either the broader scale monitoring strategy or the biennial monitoring report, see 36 CFR 219.12. Units should use this strategy to inform priorities. The strategy may be periodically updated (36 CFR 219.13(c)) to reflect new information and monitoring results.

Desired Conditions—

1. The amount and distribution of old-growth forest conditions are maintained and improved relative to the existing condition over time, recognizing that old-growth forest conditions are dynamic in nature and shift on the landscape over time as a result of succession and disturbance.

2. Proactive stewardship, including for retention and recruitment, along with natural succession, foster an increasing trend in the amount, representativeness, redundancy, and connectivity of old-growth forest conditions such that future conditions are resilient and adaptable to stressors and likely future environments.

3. Carbon stored in old-growth conditions contributes to the long-term carbon storage, stability, and resiliency of forest carbon across the National Forest System.

4. The long-term abundance, distribution, and resiliency of old-growth conditions contribute to the overall ecological integrity of ecosystems and watersheds.

Objective—

1. Within ten years, at the unit level, at least one landscape prioritized within an *Adaptive Strategy for Old-Growth Forest Conservation* will exhibit measurable improvements in old growth desired conditions as a result of retention, recruitment, and proactive stewardship activities and natural succession.

Standards for Management Actions Within Old-Growth Forest Conditions—

1. Vegetation management activities must not degrade or impair the composition, structure, or ecological processes in a manner that prevents the long-term persistence of old-growth forest conditions within the plan area.

2. (a) Vegetation management in old-growth forest conditions must be for the purpose of proactive stewardship, to promote the composition, structure, pattern, or ecological processes necessary for the old-growth forest conditions to be resilient and adaptable to stressors and likely future environments. Proactive stewardship activities shall promote one or more of the following:

i. amount, density and distribution of old trees, downed logs, and standing snags;

ii. vertical and horizontal distribution of old-growth structures, including canopy structure;

iii. patch size characteristics, percentage or proportion of forest interior, and connectivity;

iv. types, frequencies, severities, patch sizes, extent, and spatial patterns of disturbances;

v. return of appropriate fire disturbance regimes and conditions;

vi. successional pathways and stand development;

vii. connectivity and the ability of native species to move through the area and cross into adjacent areas;

viii. ecological conditions for at-risk species associated with old-growth forest conditions;

ix. the presence of key understory species or culturally significant species or values;

x. species diversity, and presence and abundance of rare and unique habitat types associated with old-growth forest conditions; or

xi. other key characteristics of ecological integrity.

b) Exceptions to this standard may be allowed if the responsible official determines that actions are necessary:

i. to reduce fuel hazards on National Forest System land within the wildland-urban interface to protect a community or infrastructure from wildfire;

ii. to protect public health and safety;

iii. to comply with other statutes or regulations;

iv. for culturally significant uses; or

v. in cases where it is determined that the direction in this amendment is not relevant or beneficial to a particular forest ecosystem type.

In granting an exception, the responsible official must include the rationale in a decision document.

3. Vegetation management within old-growth forest conditions may not be for the primary purpose of growing, tending, harvesting, or regeneration of trees for economic reasons. Ecologically appropriate harvest is permitted in accordance with standards 1 and 2.

4. Exceptions to standards 2 and 3 may be granted by the Regional Forester in Alaska if necessary to allow for implementation of the Southeast Alaska Sustainability Strategy and the rationale must be included in a decision document.

Guideline—

1. This guideline is intended to increase amounts and improve distributions and climate resilience of future old-growth forest conditions. It

applies to areas that do not currently meet old-growth definitional conditions but that have been identified in the *Adaptive Strategy for Old-Growth Forest Conservation* as a priority for the future contribution of the development of those conditions over time.

For the purposes of fostering an increasing trend in the amount, representativeness, redundancy, and connectivity of old-growth forest conditions such that future conditions will be resilient and adaptable to stressors and likely future environments, landscape-level proactive stewardship activities should, within the scope of meeting other desired conditions, and characteristic of the ecosystem, be developed for the following priorities and purposes:

(a) To provide landscape-level redundancy and representation of old-growth conditions such that loss due to natural disturbance events does not result in a loss or isolation of the old-growth conditions at the landscape scale.

(b) To retain and promote the development of resilient old-growth conditions adjacent to existing old-growth forest conditions, including for the purposes of reducing fire hazard, altering potential fire spread or fire severity, or reducing potential insect or disease outbreak that may spread to adjacent old-growth forest.

(c) To enhance landscape and patch connectivity in forest conditions between old-growth condition patches where connectivity is poor or old-growth patches are isolated.

(d) To retain and promote the development of old-growth conditions where current conditions are likely to provide old-growth conditions in the shortest timeframe possible.

(e) To retain and promote the development of old-growth conditions in watersheds, firesheds, or other relevant landscape units where existing amounts and distributions of old-growth conditions lack resilience and adaptability to stressors and likely future environments.

(f) To retain and promote the development of old-growth conditions in areas of likely climate refugia that are projected to have the inherent capability to sustain old-growth conditions.

(g) To promote climate adapted species assemblages in areas where changing climatic conditions are likely to alter current conditions and change species assemblages over time.

Plan Monitoring—

The Chief of the Forest Service is responsible for establishing a National Old-Growth Monitoring Network for the purposes of informing the continued implementation and evaluating the effectiveness of this amendment, based on the initial inventory and remote sensing data and other sources of finer scale information. The National Old-Growth Monitoring Network will adapt to emerging inventory methods, regularly update the national inventory of mature and old-growth conditions, develop analytical processes to interpret trend information, and convey findings to the field as they relate to implementation of the amendment. Regions and units will collaborate with the Chief's Office on the development of approaches to identify old-growth forest conditions and for effectively verifying estimated abundances and distributions.

For plan-level monitoring:

1. Within two years, identify initial criteria indicating where these plan components will apply and include such identification in the biennial monitoring report or the broader scale monitoring strategy to be updated as conditions change.

2. Within biennial monitoring evaluation reports, provide regular updates on actions taken pursuant to this amendment and provide updates on measurable changes in unit-level old-growth forest conditions when new information is available.

3. Add the following questions and indicators to plan-level monitoring programs:

a. *Question:* Are retention, development, and proactive stewardship activities implemented under the *Adaptive Old-Growth Conservation and Management Strategy* fostering an increasing trend in the amount, representativeness, redundancy, and connectivity of old-growth forest conditions on the unit?

i. *Indicator:* Changes in trends in amounts and distributions of old-growth forest conditions on the unit.

b. *Question:* Are vegetation management activities within old-growth forest promoting the desired composition, structure, pattern, and ecological conditions?

i. *Indicator:* Changes in composition, structure, and patterns related to desired ecological conditions in areas affected by vegetation management.

This proposed action and other related documents are available for comment on the project website at *https://www.fs.usda.gov/project/?project=65356.* Additional information can be found on the Forest Service website for mature and old-growth forests at *https://www.fs.usda.gov/managing-land/old-growth-forests.*

Thomas J. Vilsack,

Secretary of Agriculture.

[FR Doc. 2023–27875 Filed 12–19–23; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF COMMERCE

Census Bureau

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Generic Clearance for Internet Panel Pretesting and Qualitative Survey Methods Testing

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 October 17, 2023 during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: U.S. Census Bureau, Department of Commerce.

Title: Generic Clearance for internet Panel Pretesting and Qualitative Survey Methods Testing.

OMB Control Number: 0607–0978.

Form Number(s): TBD.

Type of Request: Regular submission, Request for an Extension, without Change, of a Currently Approved Collection.

Number of Respondents: 67,600.

Average Hours per Response: 0.25 hours.

Burden Hours: 16,900.

Needs and Uses: The information collected in this program of developing and testing questionnaires will be used by staff from the Census Bureau and sponsoring agencies to evaluate and improve the quality of the data in the surveys and censuses that are ultimately conducted. Because the questionnaires being tested under this clearance are still in the process of development, the data that result from these collections are not considered official statistics of the Census Bureau or other Federal agencies. Data will be included in

research reports prepared for sponsors inside and outside of the Census Bureau. The results may also be prepared for presentations related to survey methodology at professional meetings or publications in professional journals.

Affected Public: Individuals or households.

Frequency: Once.

Respondent's Obligation: Voluntary.

Legal Authority: Data collection for this project is authorized under the authorizing legislation for the questionnaire being tested. This may be Title 13, Sections 131, 141, 161, 181, 182, 193, and 301 for Census Bureau-sponsored surveys, and Title 13, Section 8(b) and Title 15 for surveys sponsored by other Federal agencies. We do not now know what other titles will be referenced, since we do not know what survey questionnaires will be pretested during the course of the clearance.

This information collection request may be viewed at *www.reginfo.gov.* Follow the instructions to view the Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the collection or the OMB Control Number 0607–0978.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2023–28005 Filed 12–19–23; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

[Docket No. 231208–0291]

RIN 0694–XC103

Impact of the Implementation of the Chemical Weapons Convention (CWC) on Legitimate Commercial Chemical, Biotechnology, and Pharmaceutical Activities Involving ''Schedule 1'' Chemicals (Including ''Schedule 1'' Chemicals Produced as Intermediates) During Calendar Year 2023

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Notice of inquiry.

SUMMARY: The Bureau of Industry and Security is seeking public comments on the impact that the implementation of the Chemical Weapons Convention, through the Chemical Weapons Convention Implementation Act of 1998 and the Chemical Weapons Convention Regulations, has had on commercial activities involving ''Schedule 1'' chemicals during calendar year 2023. The purpose of this notice of inquiry is to collect information to assist BIS in its preparation of the annual certification to the Congress on whether the legitimate commercial activities and interests of chemical, biotechnology, and pharmaceutical firms are harmed by such implementation. This certification is required under Condition 9 of Senate Resolution 75 (April 24, 1997), in which the Senate gave its advice and consent to the ratification of the Chemical Weapons Convention.

DATES: Comments must be received by January 19, 2024.

ADDRESSES: Comments on this rule may be submitted to the Federal rulemaking portal *https://www.regulations.gov.* The *regulations.gov* ID for this rule is: BIS–2023–0039. Please refer to RIN 0694–XC103 in all comments.

All filers using the portal should use the name of the person or entity submitting the comments as the name of their files, in accordance with the instructions below. Anyone submitting business confidential information should clearly identify the business confidential portion 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.*

Commenters submitting business confidential information are encouraged to scan a hard copy of the non-confidential version to create an image of the file, rather than submitting a digital copy with redactions applied, to avoid inadvertent redaction errors which could enable the public to read business confidential information.

FOR FURTHER INFORMATION CONTACT: For questions on the Chemical Weapons Convention requirements for ''Schedule 1'' chemicals, contact James Truske, Treaty Compliance Division, (202) 482–2509, Email: *james.truske@bis.doc.gov.* For questions on the submission of comments, contact Logan Norton, Regulatory Policy Division, Email: *RPD2@bis.doc.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and Their Destruction, commonly called the Chemical Weapons Convention (CWC or ''the Convention'') is an international arms control treaty that seeks to eliminate chemical weapons through requiring ratifying countries (States Parties) to prohibit the development, production, acquisition, stockpiling, retention, and transfer of chemical weapons. The CWC imposes certain obligations on States Parties, among which are the enactment of legislation to implement the treaty's prohibitions. In the United States, the Chemical Weapons Convention Implementation Act of 1998, 22 U.S.C. 6701 *et seq.,* implements the provisions of the CWC. In providing its advice and consent to the ratification of the CWC, the Senate included, in Senate Resolution 75 (S. Res. 75, April 24, 1997), several conditions to its ratification. Condition 9, titled ''Protection of Advanced Biotechnology,'' calls for the President to certify to Congress on an annual basis that ''the legitimate commercial activities and interests of chemical, biotechnology, and pharmaceutical firms in the United States are not being significantly harmed by the limitations of the Convention on access to, and production of, those chemicals and toxins listed in Schedule 1.'' On July 8, 2004, President George W. Bush, by Executive Order 13346, delegated his authority to make the annual certification to the Secretary of Commerce.

''Schedule 1'' chemicals consist of those toxic chemicals and precursors set forth in the CWC ''Annex on Chemicals'' and in ''Supplement No. 1 to part 712—SCHEDULE 1 CHEMICALS'' of the Chemical Weapons Convention Regulations (CWCR) (15 CFR parts 710–722). The CWC identified these toxic chemicals and

precursors as posing a high risk to the object and purpose of the Convention.

The CWC (Part VI of the ''Verification Annex'') restricts the production of ''Schedule 1'' chemicals for protective purposes to two facilities per State Party: a single small-scale facility and a facility for production in quantities not exceeding 10 kg per year. The CWC Article-by-Article Analysis submitted to the Senate in Treaty Doc. 103–21 defined the term ''protective purposes'' to mean ''used for determining the adequacy of defense equipment and measures.'' Consistent with this definition and as authorized by Presidential Decision Directive (PDD) 70 (December 17, 1999), which specifies agency and departmental responsibilities as part of the U.S. implementation of the CWC, the Department of Defense (DOD) was assigned the responsibility to operate these two facilities. DOD maintains strict controls on ''Schedule 1'' chemicals produced at its facilities in order to ensure accountability for such chemicals, as well as their proper use, consistent with the Convention's objectives. Although this assignment of responsibility to DOD under PDD–70 effectively precluded commercial production of ''Schedule 1'' chemicals for ''protective purposes'' in the United States, it did not establish any limitations on ''Schedule 1'' chemical activities that are not prohibited by the CWC.

The provisions of the CWC that affect commercial activities involving ''Schedule 1'' chemicals are implemented in the CWCR (*see* 15 CFR part 712) and in the Export Administration Regulations (EAR) (*see* 15 CFR 742.18 and 15 CFR part 745), both of which are administered by the Bureau of Industry and Security (BIS). Pursuant to CWC requirements, the CWCR restrict commercial production of ''Schedule 1'' chemicals to research, medical, or pharmaceutical purposes. The CWCR prohibit commercial production of ''Schedule 1'' chemicals for ''protective purposes'' because such production is effectively precluded per PDD–70, as described above (*see* 15 CFR 712.2(a)).

The CWCR also contain other requirements and prohibitions that apply to ''Schedule 1'' chemicals and/or ''Schedule 1'' facilities. Specifically, the CWCR:

(1) Prohibits the import of ''Schedule 1'' chemicals from States not Party to the Convention (15 CFR 712.2(b));

(2) Requires annual declarations by certain facilities engaged in the production of ''Schedule 1'' chemicals in excess of 100 grams aggregate per calendar year (*i.e.,* declared ''Schedule 1'' facilities) for purposes not prohibited by the Convention (15 CFR 712.5(a)(1) and (a)(2));

(3) Provides for government approval of ''declared Schedule 1'' facilities (15 CFR 712.5(f));

(4) Requires 200 days advance notification of the establishment of new ''Schedule 1'' production facilities producing greater than 100 grams aggregate of ''Schedule 1'' chemicals per calendar year (15 CFR 712.4);

(5) Provides that ''declared Schedule 1'' facilities are subject to initial and routine inspection by the OPCW (15 CFR 712.5(e) and 716.1(b)(1));

(6) Requires advance notification and annual reporting of all imports and exports of ''Schedule 1'' chemicals to, or from, other States Parties to the Convention (15 CFR 712.6, 742.18(a)(1) and 745.1); and

(7) Prohibits the export of ''Schedule 1'' chemicals to States not Party to the Convention (15 CFR 742.18(a)(1) and (b)(1)(ii)).

For purposes of the CWCR (*see* the definition of ''production'' in 15 CFR 710.1), the phrase ''production of a Schedule 1 chemical'' means the formation of ''Schedule 1'' chemicals through chemical synthesis as well as processing to extract and isolate ''Schedule 1'' chemicals. The phrase also encompasses the formation of a chemical through chemical reaction, including by a biochemical or biologically mediated reaction. ''Production of a Schedule 1 chemical'' is understood, for CWCR declaration purposes, to include intermediates, by-products, or waste products that are produced and consumed within a defined chemical manufacturing sequence, where such intermediates, by-products, or waste products are chemically stable and therefore exist for a sufficient time to make isolation from the manufacturing stream possible, but where, under normal or design operating conditions, isolation does not occur.

Request for Comments

In order to assist in determining whether the legitimate commercial activities and interests of chemical, biotechnology, and pharmaceutical firms in the United States are significantly harmed by the limitations of the Convention on access to, and production of, ''Schedule 1'' chemicals as described in this notice, BIS is seeking public comments on any effects that implementation of the CWC, through the Chemical Weapons Convention Implementation Act of 1998 and the CWCR, has had on commercial activities involving ''Schedule 1'' chemicals during calendar year 2023. To allow BIS to properly evaluate the significance of any harm to commercial activities involving ''Schedule 1'' chemicals, public comments submitted in response to this notice of inquiry should include both a quantitative and qualitative assessment of the impact of the CWC on such activities.

Submission of Comments

All comments must be submitted to one of the addresses indicated in this notice and in accordance with the instructions provided herein. BIS will consider all comments received on or before January 19, 2024.

Matthew S. Borman,

Deputy Assistant Secretary for Export Administration.

[FR Doc. 2023–27951 Filed 12–19–23; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–469–815]

Finished Carbon Steel Flanges From Spain: Final Results of Antidumping Duty Administrative Review; 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) determines that ULMA Forja, S.Coop (ULMA) and companies not selected for individual examination made sales of finished carbon steel flanges (flanges) from Spain in the United States at less than normal value (NV) during the period of review (POR) June 1, 2021, through May 31, 2022.

DATES: Applicable December 20, 2023.

FOR FURTHER INFORMATION CONTACT: Carolyn Adie or Mark Flessner, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–6250 or (202) 482–6312, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 7, 2023, Commerce published the *Preliminary Results* and invited interested parties to comment.[1] In

[1] *See Finished Carbon Steel Flanges from Spain: Preliminary Results of Antidumping Duty Administrative Review; 2021–2022,* 88 FR 43307

September 2023, Commerce conducted on-site verification of ULMA's sales information.[2] On October 12, 2023, Commerce extended the deadline for these final results of review to January 3, 2023.[3] On November 24, 2023, ULMA, the sole mandatory respondent for this review,[4] submitted its case brief.[5] No other interested party filed a case or rebuttal brief. As the comments submitted in ULMA's case brief are addressed herein, there is no Issues and Decision Memorandum accompanying this notice. These final results cover eight companies for which an administrative review was initiated and not rescinded. Commerce conducted this review in accordance with section 751(a)(1)(B) of the Tariff Act of 1930, as amended (the Act).

Scope of the Order [6]

The scope of this *Order* covers finished carbon steel flanges. Finished carbon steel flanges differ from unfinished carbon steel flanges (also known as carbon steel flange forgings) in that they have undergone further processing after forging, including, but not limited to, beveling, bore threading, center or step boring, face machining, taper boring, machining ends or surfaces, drilling bolt holes, and/or de-burring or shot blasting. Any one of these post-forging processes suffices to render the forging into a finished carbon steel flange for purposes of this *Order.* However, mere heat treatment of a carbon steel flange forging (without any other further processing after forging) does not render the forging into a finished carbon steel flange for purposes of this *Order.*

While these finished carbon steel flanges are generally manufactured to specification ASME B16.5 or ASME B16.47 series A or series B, the scope is not limited to flanges produced under those specifications. All types of finished carbon steel flanges are included in the scope regardless of pipe size (which may or may not be expressed in inches of nominal pipe size), pressure class (usually, but not necessarily, expressed in pounds of pressure, *e.g.,* 150, 300, 400, 600, 900, 1,500, 2,500, *etc.*), type of face (*e.g.,* flat face, full face, raised face, *etc.*), configuration (*e.g.,* weld neck, slip on, socket weld, lap joint, threaded, *etc.*), wall thickness (usually, but not necessarily, expressed in inches), normalization, or whether or not heat treated. These carbon steel flanges either meet or exceed the requirements of the ASTM A105, ASTM A694, ASTM A181, ASTM A350 and ASTM A707 standards (or comparable foreign specifications). The scope includes any flanges produced to the above-referenced ASTM standards as currently stated or as may be amended. The term ''carbon steel'' under this scope is steel in which:

(a) iron predominates, by weight, over each of the other contained elements:

(b) the carbon content is 2 percent or less, by weight; and

(c) none of the elements listed below exceeds the quantity, by weight, as indicated:

(i) 0.87 percent of aluminum;
(ii) 0.0105 percent of boron;
(iii) 10.10 percent of chromium;
(iv) 1.55 percent of columbium;
(v) 3.10 percent of copper;
(vi) 0.38 percent of lead;
(vii) 3.04 percent of manganese;
(viii) 2.05 percent of molybdenum;
(ix) 20.15 percent of nickel;
(x) 1.55 percent of niobium;
(xi) 0.20 percent of nitrogen;
(xii) 0.21 percent of phosphorus;
(xiii) 3.10 percent of silicon;
(xiv) 0.21 percent of sulfur;
(xv) 1.05 percent of titanium;
(xvi) 4.06 percent of tungsten;
(xvii) 0.53 percent of vanadium; or
(xviii) 0.015 percent of zirconium.

Finished carbon steel flanges are currently classified under subheadings 7307.91.5010 and 7307.91.5050 of the Harmonized Tariff Schedule of the United States (HTSUS). They may also be entered under HTSUS subheadings 7307.91.5030 and 7307.91.5070. The HTSUS subheadings are provided for convenience and customs purposes; the written description of the scope is dispositive.

Verification

As provided in section 782(i) of the Act, from September 11 through 15, 2023, we conducted verification of the sales information submitted by ULMA for use in these final results. We used standard verification procedures, including an examination of relevant sales and accounting records, and original source documents provided by ULMA.[7]

Changes Since the Preliminary Results and Analysis of Comments Received

Based on our analysis of the comments received, we made one change to the preliminary weighted-average margin calculations for ULMA and the non-examined companies. In its case brief, ULMA argued that we should rely on the databases that ULMA submitted, at Commerce's request, following verification.[8] We are incorporating into these final results the relevant databases, which reflect changes based on the minor corrections ULMA submitted at verification.[9] For additional details, *see* the Final Analysis Memorandum.[10]

Non-Individually Examined Companies

For guidance when calculating the rate for non-selected respondents, *i.e.,* non-individually-examined companies, in an administrative review, generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in a market economy investigation. Under section 735(c)(5)(A) of the Act, the all-others rate is normally ''an amount equal to the weighted-average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero or *de minimis* margins, and any margins determined entirely {on the basis of facts available}.'' We calculated a margin for ULMA that was not zero, *de minimis,* or based on facts available. Accordingly, we have applied the margin calculated for ULMA to the non-individually examined respondents.

Final Results of Administrative Review

For these final results, we determine that the following weighted-average dumping margins exist for the period June 1, 2021, through May 31, 2022:

Producer/exporter	Weighted-average dumping margin (percent)
ULMA Forja, S. Coop	3.93
Review-Specific Rate for the Non-Selected Companies	
Aleaciones De Metales Sinterizados S.A	3.93
Central Y Almacenes	3.93

(July 7, 2023) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

[2] *See* Memorandum, ''Verification of the Sales Response of ULMA Forja, S. Coop in the Antidumping Review of Finished Carbon Steel Flanges from Spain,'' dated November 16, 2023 (Verification Report).

[3] *See* Memorandum, ''Extension of Deadline for Final Results of Antidumping Duty Administrative Review, 2021–2022,'' dated October 12, 2023.

[4] *See Preliminary Results,* 88 FR at 43307.

[5] *See* ULMA's Letter, ''ULMA Forja, S. Coop's Case Brief, POR 5,'' dated November 24, 2023 (ULMA Case Brief).

[6] *See Finished Carbon Steel Flanges from Spain: Antidumping Duty Order,* 82 FR 27229 (June 14, 2017) (*Order*).

[7] Verification Report.

[8] *See* ULMA Case Brief at 1–2.

[9] *See* Verification Report at 2–3.

[10] *See* Memorandum, ''Analysis of Data Submitted by ULMA Forja S. Coop. for Final Results of Antidumping Duty Administrative Review; 2021–2022,'' dated concurrently with, and hereby adopted by, this notice (Final Analysis Memorandum).

Producer/exporter	Weighted-average dumping margin (percent)
Farina Group Spain	3.93
Friedrich Geldbach Gmbh	3.93
Grupo Cunado	3.93
Transglory S.A	3.93
Tubacero, S.L	3.93

Disclosure

Commerce intends to disclose the calculations performed in connection with these final results of review to interested parties within five days of the date of publication of this notice in the **Federal Register**, in accordance with 19 CFR 351.224(b).

Assessment Rates

Commerce shall determine and U.S. Customs and Border Protection (CBP) shall assess antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review pursuant to section 751(a)(2)(C) of the Act and 19 CFR 351.212(b). For ULMA, we calculated importer-specific assessment rates on the basis of the ratio of the total amount of dumping calculated for each importer's examined sales and the total entered value of those sales in accordance with 19 CFR 351.212(b)(1). Where an importer-specific assessment rate is *de minimis* (*i.e.,* less than 0.5 percent), the entries by that importer will be liquidated without regard to antidumping duties. For entries of subject merchandise during the POR produced by ULMA for which it did not know its merchandise was destined for the United States, we will instruct CBP to liquidate unreviewed entries at the all-others rate in the original less-than-fair-value (LTFV) investigation [11] if there is no rate for the intermediate company(ies) involved in the transaction.[12] For the companies identified above that were not selected for individual examination, we will instruct CBP to liquidate entries of subject merchandise during the POR at the rates established in these final results of review as listed above.

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

The following cash deposit requirements for estimated antidumping duties will be effective upon publication of this notice for all shipments of flanges from Spain entered, or withdrawn from warehouse, for consumption on or after the date of publication as provided by section 751(a)(2) of the Act: (1) the cash deposit rate for the companies subject to this review will be equal to the company-specific weighted-average dumping margin established in the final results of the review; (2) for merchandise exported by producers or exporters not covered in this review but covered in a prior completed segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published in the completed segment for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original investigation, but the producer has been covered in a prior completed segment of this proceeding, then the cash deposit rate will be the rate established in the completed segment for the most recent period for the producer of the merchandise; (4) the cash deposit rate for all other producers or exporters will continue to be 18.81 percent, the all-others rate established in the LTFV investigation of this proceeding.[13] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Administrative Protective Order

This notice also serves as a reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the destruction or return of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the destruction or return of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

Notification to Interested Parties

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.221(b)(5).

Dated: December 13, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2023–27892 Filed 12–19–23; 8:45 am]

BILLING CODE 3510–DS–P

[11] *See Order,* 82 FR at 27230.

[12] *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[13] *See Order,* 82 FR at 27230.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–588–878]

Glycine From Japan: Final Results of Antidumping Duty Administrative Review; 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) determines that Yuki Gosei Kogyo Co., Ltd. (YGK) and Nagase & Co., Ltd. (Nagase) (collectively, YGK/Nagase) made sales of glycine from Japan at less than normal value during the period of review (POR) June 1, 2021, through May 31, 2022.

DATES: Applicable December 20, 2023.

FOR FURTHER INFORMATION CONTACT: John Drury, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0195.

SUPPLEMENTARY INFORMATION:

Background

On July 7, 2023, Commerce published the *Preliminary Results.*[1] We invited interested parties to comment on the *Preliminary Results.* The review covers one mandatory respondent, YGK/Nagase. On November 3, 2023, Commerce extended the deadline for the final results of review until December

[1] *See Glycine from Japan: Preliminary Results of Antidumping Duty Administrative Review, 2021–2022,* 88 FR 43273 (July 7, 2023) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

15, 2023.[2] A summary of the events that occurred since Commerce published the *Preliminary Results,* may be found in the Issues and Decision Memorandum.[3]

Scope of the Order

The merchandise covered by this order is glycine. Glycine and glycine slurry are classified under Harmonized Tariff Schedule of the United States (HTSUS) subheading 2922.49.43.00. Sodium glycinate is classified in the HTSUS under 2922.49.80.00. For a complete description of the scope of the order, *see* the Issues and Decision Memorandum.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this administrative review are addressed in the Issues and Decision Memorandum. For a list of the issues raised by parties, *see* the appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Changes Since the Preliminary Results

Based on our review of the record and comments received from interested parties, we made certain changes to the margin calculations for YGK/Nagase.[4] Specifically, we made changes to the calculation of indirect selling expenses, U.S. credit expense and inventory carrying cost, and financial expense.

Final Results of the Administrative Review

We determine that the following estimated weighted-average dumping margins exist for the period June 1, 2021, through May 31, 2022:

Producer/exporter	Estimated weighted-average dumping margin (percent)
Yuki Gosei Kogyo Co., Ltd./ Nagase & Co., Ltd.[5]	0.00

Disclosure

We will disclose the calculations performed to parties in this proceeding within five days after the date of the public announcement of these final results of review, in accordance with 19 CFR 351.224(b).

Assessment Rate

Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries.[6] For any individually examined respondents whose weighted-average dumping margin is above *de minimis* (*i.e.,* 0.5 percent), we calculated importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of dumping calculated for the importer's examined sales to the total entered value of those same sales, in accordance with 19 CFR 351.212(b)(1). Upon issuance of the final results of this administrative review, if any importer-specific assessment rates calculated in the final results are above *de minimis,* Commerce will issue instructions directly to CBP to assess antidumping duties on appropriate entries.

To determine whether the duty assessment rates covering the period were *de minimis,* in accordance with the requirement set forth in 19 CFR 351.106(c)(2), we calculated importer (or customer)-specific *ad valorem* rates by aggregating the amount of dumping calculated for all U.S. sales to that importer or customer and dividing this amount by the total entered value of the sales to that importer (or customer). Where an importer (or customer)-specific *ad valorem* rate is greater than *de minimis,* and the respondent has reported reliable entered values, we will apply the assessment rate to the entered value of the importer's/customer's entries during the POR.

Commerce intends to issue appropriate assessment instructions directly 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 this notice for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication of these final results, as provided by section 751(a)(2) of the Act: (1) the cash deposit rate for respondents noted above will be equal to the weighted-average dumping margins established in the final results of this administrative review; (2) for merchandise exported by producers or exporters not covered in this administrative review but covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment of this proceeding; (3) if the exporter is not a firm covered in this review, a prior review, or the original investigation, but the producer is, the cash deposit rate will be the rate established for the most recently completed segment of this proceeding for the producer of the subject merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 53.66 percent, the all-others rate established in the less-than-fair-value investigation.[7] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers Regarding the Reimbursement of Duties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during the POR. Failure to comply with this requirement could result in Commerce's presumption that

[2] *See* Memorandum, ''Glycine from Japan: Extension of Deadline for Final Results of Antidumping Duty Administrative Review,'' dated November 3, 2023.

[3] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Glycine from Japan; 2021–2022,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[4] *See* Issues and Decision Memorandum at Comments 4, 5, and 8.

[5] Based on the record information, Commerce preliminarily determined that Nagase and YGK are affiliated within the meaning of section 771(33)(E) of Tariff Act of 1930, as amended (the Act), and should be treated as a single entity pursuant to 19 CFR 351.401(f). *See Preliminary Results.* No party commented on our preliminary determination with respect to this issue, and we have received no new information regarding this issue. Therefore, we determine that Nagase and YGK are affiliated within the meaning of section 771(33)(E) of the Act.

[6] In these final results, Commerce applied the assessment rate calculation method adopted in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification,* 77 FR 8101 (February 14, 2012).

[7] *See Glycine from India and Japan: Amended Final Affirmative Antidumping Duty Determination and Antidumping Duty Orders,* 84 FR 29170 (June 21, 2019).

reimbursement of antidumping duties did occur and the subsequent assessment of doubled antidumping duties.

Administrative Protective Order

This notice also serves as a reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Interested Parties

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213(h) and 19 CFR 351.221(b)(5).

Dated: December 14, 2023.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

[FR Doc. 2023–27949 Filed 12–19–23; 8:45 am]

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DEPARTMENT OF DEFENSE

Office of the Secretary

Department of Defense Wage Committee (DoDWC); Notice of Federal Advisory Committee Meetings

AGENCY: Under Secretary of Defense for Personnel and Readiness, Department of Defense (DoD).

ACTION: Notice of closed Federal advisory committee meetings.

SUMMARY: The DoD is publishing this notice to announce that the following Federal advisory committee meetings of the DoDWC will take place.

DATES:

Tuesday, December 12, 2023, from 10 a.m. to 11:30 a.m. and will be closed to the public.

Tuesday, December 19, 2023, from 10 a.m. to 10:30 a.m. and will be closed to the public.

Tuesday, January 9, 2024, from 10 a.m. to 11:00 a.m. and will be closed to the public.

Tuesday, January 23, 2024, from 10 a.m. to 10:30 a.m. and will be closed to the public.

Tuesday, February 6, 2024, from 10 a.m. to 10:30 a.m. and will be closed to the public.

Tuesday, February 20, 2024, from 10 a.m. to 11:30 a.m. and will be closed to the public.

Tuesday, March 5, 2024, from 10 a.m. to 11:30 a.m. and will be closed to the public. All eastern standard time.

ADDRESSES: The closed meetings will be held by Microsoft Teams.

FOR FURTHER INFORMATION CONTACT: Mr. Karl Fendt, (571) 372–1618 (voice), *karl.h.fendt.civ@mail.mil* (email), 4800 Mark Center Drive, Suite 05G21, Alexandria, Virginia 22350 (mailing address). Any agenda updates can be found at the DoDWC's official website: *https://wageandsalary.dcpas.osd.mil/BWN/DODWC/.*

SUPPLEMENTARY INFORMATION: Due to circumstances beyond the control of the Designated Federal Officer, the Department of Defense Wage Committee was unable to provide public notification required by 41 CFR 102–3.150(a) concerning its December 12, 2023 meeting. Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

Due to circumstances beyond the control of the Designated Federal Officer, the Department of Defense Wage Committee was unable to provide public notification required by 41 CFR 102–3.150(a) concerning its December 19, 2023 meeting. Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

These meetings are being held under the provisions of chapter 10 of title 5, United States Code (U.S.C.) (commonly known as the ''Federal Advisory Committee Act'' or ''FACA''), 5 U.S.C. 552b (commonly known as the ''Government in the Sunshine Act''), and 41 CFR 102–3.140 and 102–3.150.

Purpose of the Meeting: The purpose of these meetings is to provide independent advice and recommendations on matters relating to the conduct of wage surveys and the establishment of wage schedules for all appropriated fund and non-appropriated fund areas of blue-collar employees within the DoD.

Agendas

December 12, 2023

Opening Remarks by Chair, Mr. Eric Clayton, and Designated Federal Officer (DFO), Mr. Karl Fendt.

Reviewing survey results and/or survey specifications for the following Non-appropriated Fund areas:

1. Any items needing further clarification or action from the previous meeting.

2. Survey Specifications for the Calhoun, Alabama wage area (AC–104).

3. Survey Specifications for the Madison, Alabama wage area (AC–105).

4. Survey Specifications for the Lake, Illinois wage area (AC–145).

5. Survey Specifications for the Douglas-Sarpy, Nebraska wage area (AC–149).

6. Survey Specifications for the Leavenworth, Kansas/Jackson-Johnson, Missouri wage area (AC–151).

7. Survey Specifications for the St. Clair, Illinois wage area (AC–157).

Reviewing survey results and/or survey specifications for the following Appropriated Fund areas:

8. Wage Schedule (Full Scale) for the Cocoa Beach-Melbourne, Florida wage area (AC–028).

9. Wage Schedule (Full Scale) for the Eastern South Dakota wage area (AC–121).

10. Wage Schedule (Wage Change) for the Bloomington-Bedford-Washington, Indiana wage area (AC–048).

11. Wage Schedule (Wage Change) for the Ft. Wayne-Marion, Indiana wage area (AC–049).

12. Wage Schedule (Wage Change) for the Indianapolis, Indiana wage area (AC–050).

13. Wage Schedule (Wage Change) for the Kansas City, Missouri wage area (AC–080).

14. Wage Schedule (Wage Change) for the St. Louis, Missouri wage area (AC–081).

15. Wage Schedule (Wage Change) for the Southern Missouri wage area (AC–082).

16. Wage Schedule (Wage Change) for the Omaha, Nebraska wage area (AC–084).

17. Wage Schedule (Wage Change) for the Dallas-Ft. Worth, Texas wage area (AC–131).

18. Survey Specifications for the Reno, Nevada wage area (AC–086).

19. Special Pay—Omaha, Nebraska Special Rates.

20. Any items needing further clarification from this agenda may be discussed during future scheduled meetings.

Closing Remarks by Chair, Mr. Eric Clayton.

December 19, 2023

Opening Remarks by Chair, Mr. Eric Clayton, and DFO, Mr. Karl Fendt.

Reviewing survey results and/or survey specifications for the following Appropriated Fund areas:

1. Any items needing further clarification or action from the previous meeting.

2. Wage Schedule (Full Scale) for the Davenport-Rock Island-Moline, Iowa wage area (AC–053).

3. Wage Schedule (Full Scale) for the Southwestern Michigan wage area (AC–073).

4. Wage Schedule (Full Scale) for the Philadelphia, Pennsylvania wage area (AC–115).

5. Survey Specifications for the Syracuse-Utica-Rome, New York wage area (AC–097).

6. Survey Specifications for the North Dakota wage area (AC–103).

7. Survey Specifications for the Houston-Galveston-Texas City, Texas wage area (AC–133).

8. Special Rates—Philadelphia, Pennsylvania Special Rates.

9. Any items needing further clarification from this agenda may be discussed during future scheduled meetings.

Closing Remarks by Chair, Mr. Eric Clayton.

January 9, 2024

Opening Remarks by Chair, Mr. Eric Clayton, and DFO, Mr. Karl Fendt.

Reviewing survey results and/or survey specifications for the following Non-appropriated Fund areas:

1. Any items needing further clarification or action from the previous meeting.

2. Survey Specifications for the Cumberland, Pennsylvania wage area (AC–092).

3. Survey Specifications for the York, Pennsylvania wage area (AC–093).

4. Survey Specifications for the Honolulu, Hawaii wage area (AC–106).

5. Survey Specifications for the Norfolk-Portsmouth-Virginia Beach, Virginia wage area (AC–111).

6. Survey Specifications for the Hampton-Newport News, Virginia wage area (AC–112).

7. Survey Specifications for the Harford, Maryland wage area (AC–148).

Reviewing survey results and/or survey specifications for the following Appropriated Fund areas:

8. Wage Schedule (Full Scale) for the Wilmington, Delaware wage area (AC–026).

9. Wage Schedule (Full Scale) for the Topeka, Kansas wage area (AC–056).

10. Wage Schedule (Full Scale) for the Wichita, Kansas wage area (AC–057).

11. Wage Schedule (Full Scale) for the Biloxi, Mississippi wage area (AC–076).

12. Wage Schedule (Full Scale) for the Roanoke, Virginia wage area (AC–142).

13. Wage Schedule (Wage Change) for the Richmond, Virginia wage area (AC–141).

14. Special Pay—Wilmington, Delaware Special Rates.

15. Any items needing further clarification from this agenda may be discussed during future scheduled meetings.

Closing Remarks by Chair, Mr. Eric Clayton.

January 23, 2024

Opening Remarks by Chair, Mr. Eric Clayton, and DFO, Mr. Karl Fendt.

Reviewing survey results and/or survey specifications for the following Appropriated Fund areas:

1. Any items needing further clarification or action from the previous meeting.

2. Wage Schedule (Wage Change) for the New Orleans, Louisiana wage area (AC–061).

3. Survey Specifications for the Anniston-Gadsden, Alabama wage area (AC–001).

4. Survey Specifications for the Huntsville, Alabama wage area (AC–004).

5. Survey Specifications for the Tampa-St. Petersburg, Florida wage area (AC–035).

6. Survey Specifications for the Lake Charles-Alexandria, Louisiana wage area (AC–060).

7. Survey Specifications for the El Paso, Texas wage area (AC–132).

8. Any items needing further clarification from this agenda may be discussed during future scheduled meetings.

Closing Remarks by Chair, Mr. Eric Clayton.

February 6, 2024

Opening Remarks by Chair, Mr. Eric Clayton, and DFO, Mr. Karl Fendt.

Reviewing survey results and/or survey specifications for the following Non-appropriated Fund areas:

1. Any items needing further clarification or action from the previous meeting.

2. Survey Specifications for the Pennington, South Dakota wage area (AC–086).

3. Survey Specifications for the Nueces, Texas wage area (AC–115).

4. Survey Specifications for the Bexar, Texas wage area (AC–117).

5. Survey Specifications for the Anchorage, Alaska wage area (AC–118).

6. Survey Specifications for the Kitsap, Washington wage area (AC–142).

7. Survey Specifications for the Dallas, Texas wage area (AC–152).

8. Survey Specifications for the Tarrant, Texas wage area (AC–156).

9. Any items needing further clarification from this agenda may be discussed during future scheduled meetings.

Closing Remarks by Chair, Mr. Eric Clayton.

February 20, 2024

Opening Remarks by Chair, Mr. Eric Clayton, and DFO, Mr. Karl Fendt.

Reviewing survey results and/or survey specifications for the following Non-appropriated Fund areas:

1. Any items needing further clarification or action from the previous meeting.

2. Wage Schedule (Full Scale) for the Washoe-Churchill, Nevada wage area (AC–011).

3. Wage Schedule (Full Scale) for the Orange, Florida wage area (AC–062).

4. Wage Schedule (Full Scale) for the Bay, Florida wage area (AC–063).

5. Wage Schedule (Full Scale) for the Escambia, Florida wage area (AC–064).

6. Wage Schedule (Full Scale) for the Okaloosa, Florida wage area (AC–065).

7. Wage Schedule (Full Scale) for the Clark, Nevada wage area (AC–140).

8. Wage Schedule (Wage Change) for the Brevard, Florida wage area (AC–061).

9. Wage Schedule (Wage Change) for the Hillsborough, Florida wage area (AC–119).

10. Wage Schedule (Wage Change) for the Miami-Dade, Florida wage area (AC–158).

11. Wage Schedule (Wage Change) for the Duval, Florida wage area (AC–159).

12. Wage Schedule (Wage Change) for the Monroe, Florida wage area (AC–160).

Reviewing survey results and/or survey specifications for the following Appropriated Fund areas:

13. Survey Specifications for the Shreveport, Louisiana wage area (AC–062).

14. Survey Specifications for the Central North Carolina wage area (AC–099).

15. Survey Specifications for the Columbia, South Carolina wage area (AC–120).

16. Survey Specifications for the Norfolk-Portsmouth-Newport News-Hampton, Virginia wage area (AC–140).

17. Any items needing further clarification from this agenda may be discussed during future scheduled meetings.

Closing Remarks by Chair, Mr. Eric Clayton.

March 5, 2024

Opening Remarks by Chair, Mr. Eric Clayton, and DFO, Mr. Karl Fendt.

Reviewing survey results and/or survey specifications for the following Non-appropriated Fund areas:

1. Any items needing further clarification or action from the previous meeting.

2. Survey Specifications for the Arapahoe-Denver, Colorado wage area (AC–084).

3. Survey Specifications for the El Paso, Colorado wage area (AC–085).

4. Survey Specifications for the Laramie, Wyoming wage area (AC–087).

5. Survey Specifications for the New London, Connecticut wage area (AC–136).

6. Survey Specifications for the Snohomish, Washington wage area (AC–141).

7. Survey Specifications for the Pierce, Washington wage area (AC–143).

8. Survey Specifications for the Newport, Rhode Island wage area (AC–167).

Reviewing survey results and/or survey specifications for the following Appropriated Fund areas:

9. Wage Schedule (Full Scale) for the Birmingham, Alabama wage area (AC–002).

10. Wage Schedule (Full Scale) for the Hagerstown-Martinsburg-Chambersburg, Maryland wage area (AC–067).

11. Wage Schedule (Full Scale) for the Harrisburg, Pennsylvania wage area (AC–114).

12. Wage Schedule (Wage Change) for the Jacksonville, Florida wage area (AC–030).

13. Wage Schedule (Wage Change) for the Detroit, Michigan wage area (AC–070).

14. Wage Schedule (Wage Change) for the Southeastern North Carolina wage area (AC–101).

15. Wage Schedule (Wage Change) for the Columbus, Ohio wage area (AC–106).

16. Survey Specifications for the Augusta, Maine wage area (AC–063).

17. Special Pay—Jacksonville, Florida Special Rates.

18. Any items needing further clarification from this agenda may be discussed during future scheduled meetings.

Closing Remarks by Chair, Mr. Eric Clayton.

Meeting Accessibility: Pursuant to 5 U.S.C. 552b(c)(4), the DoD has determined that the meetings shall be closed to the public. The Under Secretary of Defense for Personnel and Readiness, in consultation with the DoD Office of General Counsel, has determined in writing that each of these meetings is likely to disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential.

Written Statements: Pursuant to 5 U.S.C. 1009(a)(3) and 41 CFR 102–3.140, interested persons may submit written statements to the DFO for the DoDWC at any time. Written statements should be submitted to the DFO at the email or mailing address listed in the **FOR FURTHER INFORMATION CONTACT** section. If statements pertain to a specific topic being discussed at a planned meeting, then these statements must be submitted no later than five (5) business days prior to the meeting in question. Written statements received after this date may not be provided to or considered by the DoDWC until its next meeting. The DFO will review all timely submitted written statements and provide copies to all the committee members before the meetings that are the subject of this notice.

Dated: December 13, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–28012 Filed 12–19–23; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0217]

Agency Information Collection Activities; Comment Request; Comprehensive Literacy Program Evaluation: Comprehensive Literacy State Development (CLSD) Program Evaluation

AGENCY: Institute of Education Sciences (IES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing an extension without change of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before February 20, 2024.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2023–SCC–0217. 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 Tracy Rimdzius, (202) 453–7403.

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: Comprehensive Literacy Program Evaluation: Comprehensive Literacy State Development (CLSD) Program Evaluation.

OMB Control Number: 1850–0945.

Type of Review: Extension without change of a currently approved ICR.

Respondents/Affected Public: Individuals or Households; State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 612.

Total Estimated Number of Annual Burden Hours: 331.

Abstract: The Institute of Education Sciences within the U.S. Department of Education requests an extension of the Comprehensive Literacy Program Evaluation: Comprehensive Literacy State Development Grant Program (1850–0945, approved on February 26, 2021). The extension is to complete the collection of state administrative data. The extension is needed because the state administrative data for the 2022–23 school year will not be ready to collect prior to the February 29, 2024 expiration date in all 13 CLSD grantee states. No material change in the collection instrument, instructions, frequency of collection, or use of information is being requested.

The Comprehensive Literacy State Development (CLSD) Program Evaluation was mandated by Congress. The CLSD evaluation includes an examination of implementation, a randomized trial to estimate the impact of CLSD funding on teacher and student outcomes, and a longitudinal comparison of trends in achievement in CLSD and similar, non-CLSD schools. With the exception of the state administrative data collection—for which this extension is being requested—all other data collection for the study previously approved (including state interviews, district, school leader, and teacher surveys) have been completed.

Dated: December 14, 2023.

Juliana Pearson,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2023–27907 Filed 12–19–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Secretary of Energy Advisory Board

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: The Department of Energy hereby publishes a notice of open meeting of the Secretary of Energy Advisory Board (SEAB). This meeting will be held virtually for members of the public and for SEAB members. The Federal Advisory Committee Act requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Tuesday, January 16, 2024; 12:15 p.m.–2:15 p.m. eastern time.

ADDRESSES: Virtual meeting for members of the public, Board members, Department of Energy (DOE) representatives, agency liaisons, and Board support staff. Registration is required by registering at the SEAB January 16 meeting page at: *www.energy.gov/seab/seab-meetings.*

FOR FURTHER INFORMATION CONTACT: David Borak, Designated Federal Officer, U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585; email: *seab@hq.doe.gov;* telephone: (202) 586–5216.

SUPPLEMENTARY INFORMATION:

Background: The Board was established to provide advice and recommendations to the Secretary on the Administration's energy policies; the Department's basic and applied research and development activities; economic and national security policy; and other activities as directed by the Secretary.

Purpose of the Meeting: This is the tenth meeting of Secretary Jennifer M. Granholm's SEAB.

Tentative Agenda: The tentative meeting agenda includes: roll call; remarks from the Secretary of Energy; updates from the Accelerating Clean Energy Deployment Working Group, the Laboratory Entrepreneurship Ecosystems Working Group, and the Artificial Intelligence Working Group; and public comments. The meeting will conclude at approximately 2:15 p.m. Meeting materials can be found here: *https://www.energy.gov/seab/seab-meetings.*

Public Participation: The meeting is open to the public via a virtual meeting option. Individuals who would like to attend must register for the meeting here: *https://www.energy.gov/seab/seab-meetings.*

Individuals and representatives of organizations who would like to offer comments and suggestions may do so during the meeting. Approximately 15 minutes will be reserved for public comments. Time allotted per speaker will depend on the number who wish to speak but will not exceed three minutes. The Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Those wishing to speak should register to do so via email, *seab@hq.doe.gov,* no later than 5 p.m. on Friday, January 12, 2024.

Those not able to attend the meeting or who have insufficient time to address the committee are invited to send a written statement to David Borak, U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585, or email to: *seab@hq.doe.gov.*

Minutes: The minutes of the meeting will be available on the SEAB website or by contacting Mr. Borak. He may be reached at the above postal address or email address, or by visiting SEAB's website at *www.energy.gov/seab.*

Signed in Washington, DC, on December 14, 2024.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2023–27904 Filed 12–19–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

21st Century Energy Workforce Advisory Board

AGENCY: Office of Energy Jobs, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces an open virtual meeting for members and the public of the 21st Century Energy Workforce Advisory Board (EWAB). The Federal Advisory Committee Act requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Monday, January 22, 2024; 12:30 p.m. to 2 p.m. eastern

ADDRESSES: Virtual meeting.

Registration to participate remotely is available: *https://doe.webex.com/weblink/register/rfb190a8fe56a2b6f00285baedefef84b.*

The meeting information will be posted on the 21st Century Energy Workforce Advisory Board website at: *https://www.energy.gov/policy/21st-century-energy-workforce-advisory-board-ewab,* and can also be obtained by contacting *EWAB@hq.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Piper O'Keefe, Designated Federal Officer, EWAB; email: *EWAB@hq.doe.gov* or at (202) 809–5110.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The 21st Century Energy Workforce Advisory Board (EWAB) advises the Secretary of Energy in developing a strategy for the Department of Energy (DOE) to support and develop a skilled energy workforce to meet the changing needs of the U.S. energy system. It was established pursuant to section 40211 of the Infrastructure Investment and Jobs Act (IIJA), Public Law 117–58 (42 U.S.C. 18744) in accordance with the provisions of the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C. 10. This is the fifth meeting of the EWAB.

Tentative Agenda: The meeting will start at 12:30 p.m. Eastern Time on January 22, 2024. The tentative meeting agenda includes roll call, continuing discussion of DOE's role in meeting future energy workforce needs, and public comments. The meeting will conclude at approximately 2 p.m.

Public Participation: The meeting is open to the public via a virtual meeting option. Individuals who would like to attend must register for the meeting here: *https://doe.webex.com/weblink/register/rfb190a8fe56a2b6f00285baedefef84b.*

It is the policy of the EWAB to accept written public comments no longer than 5 pages and to accommodate oral public comments, whenever possible. The EWAB expects that public statements presented at its meetings will not be repetitive of previously submitted oral or written statements. The public comment period for this meeting will take place on January 22, 2024, at a time specified in the meeting agenda. This public comment period is designed only for substantive commentary on the EWAB's work, not for business marketing purposes. The Designated Federal Officer will conduct the meeting to facilitate the orderly conduct of business.

Oral Comments: To be considered for the public speaker list at the meeting, interested parties should register to speak by contacting *EWAB@hq.doe.gov* no later than 12 p.m. eastern time on January 15, 2024. To accommodate as many speakers as possible, the time for public comments will be limited to three (3) minutes per person, with a total public comment period of up to 15 minutes. If more speakers register than there is space available on the agenda, the EWAB will select speakers on a first-come, first-served basis from those who applied. Those not able to present oral comments may always file written comments with the Board.

Written Comments: Although written comments are accepted continuously, written comments relevant to the subjects of the meeting should be submitted to *EWAB@hq.doe.gov* no later than 12 p.m. eastern time on January 15, 2024, so that the comments may be made available to the EWAB members prior to this meeting for their consideration. Please note that because EWAB operates under the provisions of FACA, all public comments and related materials will be treated as public documents and will be made available for public inspection, including being posted on the EWAB website.

Minutes: The minutes of this meeting will be available on the 21st Century Energy Workforce Advisory Board website at *https://www.energy.gov/policy/21st-century-energy-workforce-advisory-board-ewab* or by contacting Piper O'Keefe at *EWAB@hq.doe.gov.*

Signed in Washington, DC, on December 14, 2023.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2023–27976 Filed 12–19–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

21st Century Energy Workforce Advisory Board

AGENCY: Office of Energy Jobs, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces an open virtual meeting for members and the public of the 21st Century Energy Workforce Advisory Board (EWAB). The Federal Advisory Committee Act requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Tuesday, February 20, 2024; 2 to 3:30 p.m. Eastern.

ADDRESSES: Virtual meeting.

Registration to participate remotely is available: *https://doe.webex.com/weblink/register/r511e600ebe4e3bf804ea657d8f052a44.*

The meeting information will be posted on the 21st Century Energy Workforce Advisory Board website at: *https://www.energy.gov/policy/21st-century-energy-workforce-advisory-board-ewab,* and can also be obtained by contacting *EWAB@hq.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Piper O'Keefe, Designated Federal Officer, EWAB; email: *EWAB@hq.doe.gov* or at (202) 809–5110.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The 21st Century Energy Workforce Advisory Board (EWAB) advises the Secretary of Energy in developing a strategy for the Department of Energy (DOE) to support and develop a skilled energy workforce to meet the changing needs of the U.S. energy system. It was established pursuant to Section 40211 of the Infrastructure Investment and Jobs Act (IIJA), Public Law 117–58 (42 U.S.C. 18744) in accordance with the provisions of the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C. 10. This is the sixth meeting of the EWAB.

Tentative Agenda: The meeting will start at 2 p.m. Eastern Time on February 20, 2024. The tentative meeting agenda includes roll call, continuing discussion of DOE's role in meeting future energy workforce needs, and public comments. The meeting will conclude at approximately 3:30 p.m.

Public Participation: The meeting is open to the public via a virtual meeting option. Individuals who would like to attend must register for the meeting here: *https://doe.webex.com/weblink/register/r511e600ebe4e3bf804ea657d8f052a44.*

It is the policy of the EWAB to accept written public comments no longer than 5 pages and to accommodate oral public comments, whenever possible. The EWAB expects that public statements presented at its meetings will not be repetitive of previously submitted oral or written statements. The public comment period for this meeting will take place on February 20, 2024, at a time specified in the meeting agenda. This public comment period is designed only for substantive commentary on the EWAB's work, not for business marketing purposes. The Designated Federal Officer will conduct the meeting to facilitate the orderly conduct of business.

Oral Comments: To be considered for the public speaker list at the meeting, interested parties should register to speak by contacting *EWAB@hq.doe.gov* no later than 12 p.m. Eastern Time on February 13, 2024. To accommodate as many speakers as possible, the time for public comments will be limited to three (3) minutes per person, with a total public comment period of up to 15 minutes. If more speakers register than there is space available on the agenda, the EWAB will select speakers on a first-come, first-served basis from those who applied. Those not able to present oral comments may always file written comments with the Board.

Written Comments: Although written comments are accepted continuously, written comments relevant to the subjects of the meeting should be submitted to *EWAB@hq.doe.gov* no later than 12 p.m. Eastern Time on February

13, 2024, so that the comments may be made available to the EWAB members prior to this meeting for their consideration. Please note that because EWAB operates under the provisions of FACA, all public comments and related materials will be treated as public documents and will be made available for public inspection, including being posted on the EWAB website.

Minutes: The minutes of this meeting will be available on the 21st Century Energy Workforce Advisory Board website at *https://www.energy.gov/policy/21st-century-energy-workforce-advisory-board-ewab* or by contacting Piper O'Keefe at *EWAB@hq.doe.gov.*

Signed in Washington, DC, on December 14, 2023.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2023–27977 Filed 12–19–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12790–015]

Andrew Peklo III; Notice of Availability of Environmental Assessment

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission or FERC) regulations, 18 CFR part 380, Commission staff reviewed Andrew Peklo III's (licensee) application for an amendment of the project license for the Pomperaug Hydroelectric Project No. 12790 and have prepared an Environmental Assessment (EA) for the proposed amendment. The licensee proposes to install two 45 kilowatt (kW) turbines (for a total generating capacity of 90 kW) instead of the single 76 kW turbine authorized in the project license. The Pomperaug Project is unconstructed and would consist of a powerhouse located adjacent to the existing Pomperaug Dam on the Pomperaug River in the town of Woodbury, Litchfield County, Connecticut, and is not located on Federal lands.

The final EA contains Commission staff's analysis of the potential environmental effects of the proposed two-turbine installation and supporting activities, alternatives to the proposed action, and concludes that the proposed installation, with appropriate environmental protective measures, would not constitute a major Federal action that would significantly affect the quality of the human environment.

The final EA may be viewed on the Commission's website at *http://www.ferc.gov* using the ''elibrary'' link. Enter the docket number (P–12790–015) in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

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.*

For further information, contact Zeena Aljibury at 202–502–6065 or *zeena.aljibury@ferc.gov.*

Dated: December 14, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–27980 Filed 12–19–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2628–000]

Alabama Power Company; Notice of Authorization for Continued Project Operation

The license for the R.L. Harris Hydroelectric Project No. 2628 was issued for a period ending November 30, 2023.

Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year-to-year an annual license to the then licensee(s) under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 2628 is issued to Alabama Power Company for a period effective December 1, 2023, through November 30, 2024, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before November 30, 2024, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that Alabama Power Company is authorized to continue operation of the R.L. Harris Hydroelectric Project under the terms and conditions of the prior license until the issuance of a subsequent license for the project or other disposition under the FPA, whichever comes first.

Dated: December 13, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–27881 Filed 12–19–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 8047–015]

Willimantic Power Corporation; Notice Soliciting Applications

On August 31, 2020, Willimantic Power Corporation (licensee), a subsidiary of Enel Green Power North America filed a Notice of Intent (NOI) to file an application for a subsequent license for its Willimantic #2 Hydroelectric Project, No. 8047, pursuant to section 16.19(b)(3) of the

Commission's regulations.[1] On October 23, 2020, Commission staff noticed the NOI and approved the use of the traditional licensing process (TLP) to develop the license application. The existing license for Project No. 8047 expires on September 30, 2025.

The 684-kilowatt (kW) Willimantic #2 Project is located on the Willimantic River, in Windham County, Connecticut.

The principal project works consist of: (1) an upper dam with (i) a 12-foot-high and 175-foot-long granite block spillway with a crest elevation of 206.10 feet mean sea level (msl), (ii) a reservoir with a surface area of 2.5 acres, (iii) a 419-foot long power canal, (iv) trashracks with 2-inch clear bar spacing, (v) a 275-foot-long, 9-foot-diameter penstock, (vi) a powerhouse containing a Kaplan turbine-generator unit with an installed capacity of 684 kilowatts (kW), and (vii) a 50-foot-long tailrace with a tailwater elevation of 182.6 feet msl; (2) a lower dam with (i) a 15.2-foot-high and 125-foot-long granite block spillway with a crest elevation of 193.7 feet msl, and (ii) a reservoir with a surface area of 3.0 acres; (3) 1,000-foot-long, 4,160-Volt (V) generator lead, and a 1,500-kVA 600/2,400–V transformer bank; (4) a 520-foot-long, 23,500–V transmission line; and (5) appurtenant facilities. The project operates run-of-river and generates and estimated average of 1,201,000 kW hours a year.

Pursuant to section 16.20(c) 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 at least 24 months prior to the expiration of the current license.[2] As stated above, Willimantic Power Corporation's NOI indicated that it would be filing an application for a subsequent license; however, it did not file an application for a subsequent license or an application for an exemption from licensing for the Willimantic #2 Project by the October 2, 2023 deadline.[3]

Therefore, pursuant to section 16.25(a) of the Commission's regulations, we are soliciting applications from potential applicants other than the existing licensee.[4] Interested parties have 90 days from the date of this notice to file a NOI to file an application for a subsequent license. An application for subsequent license or exemption for the Willimantic #2 Project (No. 8047) may be filed within 18 months of the date of filing the NOI. The existing licensee is prohibited from filing an application either individually or in combination with other entities.[5]

Questions concerning this notice should be directed to Jeanne Edwards at (202) 502–6181 or *jeanne.edwards@ferc.gov.*

Dated: December 14, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–27982 Filed 12–19–23; 8:45 am]

BILLING CODE 6717–01–P

[1] On March 22, 2021, Hydroland Omega, LLC, notified the Commission that the Willimantic Power Corporation is a wholly owned subsidiary of Hydroland Omega, LLC and replaced Enel Green Power North America, Inc. as the parent company.

[2] 18 CFR 16.20(c) (2022).

[3] The Commission's Rules of Practice and Procedure provide that if a filing deadline falls on a Saturday, Sunday, holiday, or other day when the Commission is closed for business, the filing deadline does not end until the close of business on the next business day. 18 CFR 385.2007(a)(2) (2022). Because the 24-month deadline fell on a Saturday (*i.e.,* September 30, 2023), the filing deadline was extended until the close of business on Monday, October 2, 2023.

[4] 18 CFR 16.25(a) (2022).

[5] *Id.* § 16.24(b)(2) (2022).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2417–067]

Northern States Power Company; Notice of Application Tendered for Filing With the Commission and Soliciting Additional Study Requests and Establishing Procedural Schedule for Relicensing and Deadline for Submission of Final Amendments

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Subsequent Minor License.

b. *Project No.:* 2417–067.

c. *Date Filed:* November 30, 2023.

d. *Applicant:* Northern States Power Company (Northern States Power).

e. *Name of Project:* Hayward Hydroelectric Project (Hayward Project).

f. *Location:* The Hayward Project is located on the Namekagon River in the City of Hayward in Sawyer County, Wisconsin.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Donald Hartinger, Director of Renewable Operation-Hydro, Xcel Energy, 414 Nicollet Mall, 2, Minneapolis, MN 55401; phone (651) 261–7668; or Matthew Miller, Environmental Analyst, Xcel Energy, 1414 W Hamilton Ave., P.O. Box 8, Eau Claire, WI 54702–0008; phone 715–737–1353.

i. *FERC Contact:* Laura Washington (202) 502–6072, *Laura.Washington@ferc.gov.*

j. *Cooperating Agencies:* Federal, state, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests described in item l below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. *See,* 94 FERC ¶ 61,076 (2023).

k. Pursuant to section 4.32(b)(7) of 18 CFR of the Commission's regulations, if any resource agency, Indian Tribe, or person believes that an additional scientific study should be conducted in order to form an adequate factual basis for a complete analysis of the application on its merit, the resource agency, Indian Tribe, or person must file a request for a study with the Commission not later than 60 days from the date of filing of the application, and serve a copy of the request on the applicant.

l. *Deadline for filing additional study requests and requests for cooperating agency status:* January 29, 2024.

The Commission strongly encourages electronic filing. Please file additional study requests and requests for cooperating agency status using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include docket number P–2417–067.

m. This application is not ready for environmental analysis at this time.

n. The existing Hayward Project consists of the following existing facilities: (1) a 246.9-acre reservoir; (2) a 442-foot-long the concrete overflow dam; (3) a 18-foot-wide, 24-foot long powerhouse with intake channel containing one S. Morgan Smith vertical Francis-Type turbine with a total installed capacity of 0.168 megawatts;

(4) a tailrace; (5) a 150-foot-long underground transmission line. Northern States Power is not proposing any changes to project facilities or operation.

o. A copy of the application can be viewed on the Commission's website at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or (202) 502–8659 (TTY).

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

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.*

p. *Procedural Schedule:* The application will be processed according to the following preliminary schedule. Revisions to the schedule will be made as appropriate.

Milestone	Target date
Issue Deficiency Letter (if necessary).	February 2024.
Request Additional Information (if necessary).	February 2024.
Issue Scoping Document 1 for comments.	May 2024.
Issue Acceptance Letter	June 2024.
Request Additional Information (if necessary).	July 2024.
Issue Scoping Document 2 (if necessary).	August 2024.

Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of the notice of ready for environmental analysis.

Dated: December 14, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–27986 Filed 12–19–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2570–000]

Eagle Creek Racine Hydro, LLC; Notice of Authorization for Continued Project Operation

The license for the Racine Hydroelectric Project No. 2570 was issued for a period ending November 30, 2023.

Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year-to-year an annual license to the then licensee(s) under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 2570 is issued to Eagle Creek Racine Hydro, LLC for a period effective December 1, 2023, through November 30, 2024, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before November 30, 2024, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that Eagle Creek Racine Hydro, LLC is authorized to continue operation of the Racine Hydroelectric Project under the terms and conditions of the prior license until the issuance of a subsequent license for the project or other disposition under the FPA, whichever comes first.

Dated: December 13, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–27882 Filed 12–19–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2445–028]

Green Mountain Power Corporation; Notice of Revised Procedural Schedule for Environmental Assessment for the Proposed Project Relicense

On December 23, 2021, Green Mountain Power Corporation filed an application for a subsequent license to continue to operate and maintain the 275-kilowatt Center Rutland Hydroelectric Project No. 2445 (Center Rutland Project). On April 28, 2023, Commission staff issued a notice of intent to prepare an Environmental Assessment (EA) to evaluate the effects of relicensing the Center Rutland Project. The notice of intent included a schedule for preparing the EA.

By this notice, Commission staff is updating the procedural schedule for completing the EA. The revised schedule is shown below. Further revisions to the schedule may be made as appropriate.

Milestone	Target date
Issue EA	February 2024.

Any questions regarding this notice may be directed to Steve Kartalia at (202) 502–6131, or by email at *stephen.kartalia@ferc.gov.*

Dated: December 14, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–27992 Filed 12–19–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 5867–054]

Alice Falls Hydro, LLC; Notice of Revised Procedural Schedule for Environmental Assessment for the Proposed Project Relicense

On September 29, 2021, Alice Falls Hydro, LLC filed an application for a

new license to continue to operate and maintain the 2.1-megawatt Alice Falls Hydroelectric Project No. 5867 (Alice Falls Project). On April 24, 2023, Commission staff issued a notice of intent to prepare an Environmental Assessment (EA) to evaluate the effects of relicensing the Alice Falls Project. The notice of intent included a schedule for preparing a single EA.

By this notice, Commission staff is updating the procedural schedule for completing the EA. The revised schedule is shown below. Further revisions to the schedule may be made as appropriate.

Milestone	Target date
Issue EA	March 2024.

Any questions regarding this notice may be directed to Kelly Wolcott at (202) 502–6480, or by email at *kelly.wolcott@ferc.gov.*

Dated: December 13, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–27878 Filed 12–19–23; 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: RP24–243–000.

Applicants: Southern Star Central Gas Pipeline, Inc.

Description: § 4(d) Rate Filing: Correction to Tariff Sheet No. 241 to be effective 4/1/2023.

Filed Date: 12/13/23.

Accession Number: 20231213–5146.

Comment Date: 5 p.m. ET 12/26/23.

Docket Numbers: RP24–244–000.

Applicants: Bear Creek Storage Company, L.L.C.

Description: Compliance filing: Annual Fuel Summary 2023 to be effective N/A.

Filed Date: 12/14/23.

Accession Number: 20231214–5063.

Comment Date: 5 p.m. ET 12/26/23.

Docket Numbers: RP24–245–000.

Applicants: Rockies Express Pipeline LLC.

Description: § 4(d) Rate Filing: REX 2023–12–14 Negotiated Rate Agreement Amendments to be effective 12/15/2023.

Filed Date: 12/14/23.

Accession Number: 20231214–5125.

Comment Date: 5 p.m. 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: PR24–4–001.

Applicants: The Peoples Gas Light and Coke Company.

Description: Amendment Filing: Limited Supplement to Petition for Rate Approval to be effective 11/1/2023.

Filed Date: 12/13/23.

Accession Number: 20231213–5134.

Comment Date: 5 p.m. ET 1/3/24.

§ 284.123(g) Protest: 5 p.m. ET 1/17/24.

Docket Numbers: RP24–203–001.

Applicants: Gulf South Pipeline Company, LLC.

Description: Tariff Amendment: Amendment Filing in Docket No. RP24–203–000 to be effective 11/30/2023.

Filed Date: 12/13/23.

Accession Number: 20231213–5144.

Comment Date: 5 p.m. 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.

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 14, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–27988 Filed 12–19–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 8051–012]

Willimantic Power Corporation; Notice Soliciting Applications

On August 31, 2020, Willimantic Power Corporation (licensee), a subsidiary of Enel Green Power North America filed a Notice of Intent (NOI) to file an application for a subsequent license for its Willimantic #1 Hydroelectric Project No. 8051, pursuant to section 16.19(b)(3) of the Commission's regulations.[1] On October 23, 2020, Commission staff noticed the NOI and approved the use of the traditional licensing process (TLP) to develop the license application. The existing license for the project expires on November 30, 2025.

The 684-kilowatt (kW) Willimantic #1 Project is located on the Willimantic River, in Windham County, Connecticut.

The principal project works consist of: (1) a 16-foot-high and 225-foot-long granite block dam with a spillway crest elevation of 182.39 feet mean sea level (msl); (2) a reservoir with a surface area of 3 acres; (3) an intake structure at the north side of the dam; (4) trashracks with a 2-inch clear bar spacing; (5) a head gate with a 120-foot-long, 9-foot-diameter penstock; (6) a powerhouse containing a Kaplan turbine-generator unit with an installed capacity of 684 kilowatts (kW); (7) a 347-foot-long tailrace channel with a tailwater elevation of 159.80 feet msl; (8) a 4,160-Volt (V) generator lead, and a 1500-kVA 600/2,400–V transformer bank; (9) a 520-foot-long, 23,500–V transmission line; and (10) appurtenant facilities. The project operates run-of-river and generates and an estimated average of 1,201,000 kW hours a year.

Pursuant to section 16.20(c) 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 at least 24 months prior to the expiration

[1] On March 22, 2021, Hydroland Omega, LLC, notified the Commission that the Willimantic Power Corporation is a wholly owned subsidiary of Hydroland Omega, LLC and replaced Enel Green Power North America, Inc. as the parent company.

of the current license.[2] As stated above, Willimantic Power Corporation's NOI indicated that it would be filing an application for a subsequent license; however, it did not file an application for a subsequent license or an application for an exemption from licensing for the Willimantic #1 Project by the November 30, 2023 deadline.

Therefore, pursuant to section 16.25(a) of the Commission's regulations, we are soliciting applications from potential applicants other than the existing licensee.[3] Interested parties have 90 days from the date of this notice to file a NOI to file an application for a subsequent license. An application for a subsequent license or exemption for the Willimantic #1 Project (No. 8051) may be filed within 18 months of the date of filing the NOI. The existing licensee is prohibited from filing an application either individually or in combination with other entities.[4]

Questions concerning this notice should be directed to Jeanne Edwards at (202) 502–6181 or *jeanne.edwards@ferc.gov.*

Dated: December 14, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–27981 Filed 12–19–23; 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: RP24–241–000.

Applicants: Eastern Gas Transmission and Storage, Inc.

Description: 4(d) Rate Filing: EGTS—December 13, 2023 Administrative Changes to be effective 1/16/2024.

Filed Date: 12/13/23.

Accession Number: 20231213–5027.

Comment Date: 5 p.m. ET 12/26/23.

Docket Numbers: RP24–242–000.

Applicants: Cove Point LNG, LP.

Description: 4(d) Rate Filing: Cove Point—December 13, 2023 Administrative Changes to be effective 1/16/2024.

Filed Date: 12/13/23.

Accession Number: 20231213–5029.

Comment Date: 5 p.m. 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 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: RP24–219–001.

Applicants: Gulf South Pipeline Company, LLC.

Description: Tariff Amendment: Amendment filing to RP24–219–000 to be effective 12/1/2023.

Filed Date: 12/12/23.

Accession Number: 20231212–5109.

Comment Date: 5 p.m. ET 12/26/23.

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 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: December 13, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–27884 Filed 12–19–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. TX23–5–000]

THSI bn, LLC; Notice of Filing

Take notice that on December 12, 2023, in accordance with the Federal Energy Regulatory Commission's proposed order directing interconnection service issued October 19, 2023,[1] THSI bn, LLC and Arizona Electric Power Cooperative filed a proposed Large Generator Interconnection Agreement and three other agreements.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

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://ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically may mail similar

[2] 18 CFR 16.20(c) (2022).

[3] *Id.* § 16.25(a) (2022).

[4] *Id.* § 16.24(b)(2) (2022).

[1] *THSI bn, LLC,* 185 FERC ¶ 61,032 (2023).

pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

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.*

Comment Date: 5 p.m. eastern time on January 2, 2024.

Dated: December 14, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–27978 Filed 12–19–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2711–025]

Northern States Power Company; Notice of Application Tendered for Filing With the Commission and Soliciting Additional Study Requests and Establishing Procedural Schedule for Relicensing and Deadline for Submission of Final Amendments

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Subsequent Minor License.

b. *Project No.:* 2711–025.

c. *Date Filed:* November 30, 2023.

d. *Applicant:* Northern States Power Company (Northern States Power).

e. *Name of Project:* Trego Hydroelectric Project (Trego Project).

f. *Location:* The project is located on the Namekagon River in the City of Trego in Washburn County, Wisconsin.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. Donald Hartinger, Director of Renewable Operation-Hydro, Xcel Energy, 414 Nicollet Mall, 2, Minneapolis, MN 55401; phone (651) 261–7668; or Matthew Miller, Environmental Analyst, Xcel Energy, 1414 W Hamilton Ave., P.O. Box 8, Eau Claire, WI 54702–0008; phone 715–737–1353.

i. *FERC Contact:* Laura Washington (202) 502–6072, *Laura.Washington@ferc.gov.*

j. *Cooperating Agencies:* Federal, state, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests described in item l below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. *See,* 94 FERC ¶ 61,076 (2023).

k. Pursuant to section 4.32(b)(7) of 18 CFR of the Commission's regulations, if any resource agency, Indian Tribe, or person believes that an additional scientific study should be conducted in order to form an adequate factual basis for a complete analysis of the application on its merit, the resource agency, Indian Tribe, or person must file a request for a study with the Commission not later than 60 days from the date of filing of the application, and serve a copy of the request on the applicant.

l. *Deadline for filing additional study requests and requests for cooperating agency status*: January 29, 2024.

The Commission strongly encourages electronic filing. Please file additional study requests and requests for cooperating agency status using the Commission's eFiling system at *http://www.ferc.gov/docs-filing/efiling.asp.* For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or(202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include docket number P–2711–025.

m. This application is not ready for environmental analysis at this time.

n. *The existing Trego Project consists of the following existing facilities:* (1) a 435.2-acre reservoir; (2) a 642-foot-long, 43.5-foot-high concrete dam; (3) a 59.5-foot-long, 74-feet-high powerhouse containing two James Leffel Company vertical Francis-type turbines with a total generating capacity of 1.2 megawatts; (4) a tailwater; and (5) a 49-foot-long transmission line. Northern States Power is not proposing any changes to project facilities or operation.

o. A copy of the application can be viewed on the Commission's website at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (866) 208–3676 or (202) 502–8659 (TTY).

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

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p. *Procedural schedule:* The application will be processed according to the following preliminary schedule. Revisions to the schedule will be made as appropriate.

Milestone	Target date
Issue Deficiency Letter (if necessary)	February 2024.
Request Additional Information (if necessary)	February 2024.
Issue Scoping Document 1 for comments	May 2024.
Issue Acceptance Letter	June 2024.
Request Additional Information (if necessary)	July 2024.

Milestone	Target date
Issue Scoping Document 2 (if necessary)	August 2024.

Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of the notice of ready for environmental analysis.

Dated: December 14, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–27983 Filed 12–19–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2639–000]

Northern States Power Company; Notice of Authorization for Continued Project Operation

The license for the Cornell Hydroelectric Project No. 2639 was issued for a period ending November 30, 2023.

Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year-to-year an annual license to the then licensee(s) under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 2639 is issued to Northern States Power Company for a period effective December 1, 2023, through November 30, 2024, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before November 30, 2024, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that Northern States Power Company is authorized to continue operation of the Cornell Hydroelectric Project under the terms and conditions of the prior license until the issuance of a subsequent license for the project or other disposition under the FPA, whichever comes first.

Dated: December 13, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–27880 Filed 12–19–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 4881–000]

Fulcrum, LLC; Notice of Authorization for Continued Project Operation

The license for the Barber Dam Project No. 4881 was issued for a period ending November 30, 2023.

Section 15(a)(1) of the FPA, 16 U.S.C. 808(a)(1), requires the Commission, at the expiration of a license term, to issue from year-to-year an annual license to the then licensee(s) under the terms and conditions of the prior license until a new license is issued, or the project is otherwise disposed of as provided in section 15 or any other applicable section of the FPA. If the project's prior license waived the applicability of section 15 of the FPA, then, based on section 9(b) of the Administrative Procedure Act, 5 U.S.C. 558(c), and as set forth at 18 CFR 16.21(a), if the licensee of such project has filed an application for a subsequent license, the licensee may continue to operate the project in accordance with the terms and conditions of the license after the minor or minor part license expires, until the Commission acts on its application. If the licensee of such a project has not filed an application for a subsequent license, then it may be required, pursuant to 18 CFR 16.21(b), to continue project operations until the Commission issues someone else a license for the project or otherwise orders disposition of the project.

If the project is subject to section 15 of the FPA, notice is hereby given that an annual license for Project No. 4881 is issued to Fulcrum, LLC for a period effective December 1, 2023, through November 30, 2024, or until the issuance of a new license for the project or other disposition under the FPA, whichever comes first. If issuance of a new license (or other disposition) does not take place on or before November 30, 2024, notice is hereby given that, pursuant to 18 CFR 16.18(c), an annual license under section 15(a)(1) of the FPA is renewed automatically without further order or notice by the Commission, unless the Commission orders otherwise.

If the project is not subject to section 15 of the FPA, notice is hereby given that Fulcrum, LLC is authorized to continue operation of the Barber Dam Project under the terms and conditions of the prior license until the issuance of a subsequent license for the project or other disposition under the FPA, whichever comes first.

Dated: December 13, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–27879 Filed 12–19–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP24–22–000]

Southern Star Central Gas Pipeline, Inc.; Notice of Application and Establishing Intervention Deadline

Take notice that on December 4, 2023, Southern Star Central Gas Pipeline, Inc. (Southern Star), 4700 State Route 56, Owensboro, Kentucky, 42301, filed an application under section 7(b) of the Natural Gas Act (NGA), and Part 157 of the Commission's regulations, requesting authorization to abandon by sale to Black Hills/Kansas Gas Utility Company, LLC, d/b/a Black Hills Energy, 273 domestic meters in the State

of Kansas. Southern Star states that there will be no change to its certificated capacity as a result of this project, and that the project will have no impact on any firm shippers, all as more fully set forth in the application which is on file with the Commission and open for public inspection.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. Public access to records formerly available in the Commission's physical Public Reference Room, which was located at the Commission's headquarters, 888 First Street NE, Washington, DC 20426, are now available via the Commission's website. For assistance, contact the Federal Energy Regulatory Commission at *FercOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TTY (202) 502–8659.

Any questions regarding the proposed project should be directed to Cindy C. Thompson, Director, Regulatory, Compliance and Information Governance, Southern Star Central Gas Pipeline, Inc., 4700 State Route 56, Owensboro, Kentucky, 42301, by phone at (270) 302–9280, or by email at *cindy.thompson@southernstar.com*.

Pursuant to section 157.9 of the Commission's Rules of Practice and Procedure,[1] within 90 days of this Notice the Commission staff will either: complete its environmental review and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or environmental assessment (EA) for this proposal. The filing of an EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

[1] 18 CFR (Code of Federal Regulations) § 157.9.

Public Participation

There are three ways to become involved in the Commission's review of this project: you can file comments on the project, you can protest the filing, and you can file a motion to intervene in the proceeding. There is no fee or cost for filing comments or intervening. The deadline for filing a motion to intervene is 5:00 p.m. Eastern Time on January 4, 2024. How to file protests, motions to intervene, and comments is explained below.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov*.

Comments

Any person wishing to comment on the project may do so. Comments may include statements of support or objections, to the project as a whole or specific aspects of the project. The more specific your comments, the more useful they will be.

Protests

Pursuant to sections 157.10(a)(4)[2] and 385.211[3] of the Commission's regulations under the NGA, any person[4] may file a protest to the application. Protests must comply with the requirements specified in section 385.2001[5] of the Commission's regulations. A protest may also serve as a motion to intervene so long as the protestor states it also seeks to be an intervenor.

To ensure that your comments or protests are timely and properly recorded, please submit your comments on or before January 4, 2024.

There are three methods you can use to submit your comments or protests to the Commission. In all instances, please reference the Project docket number CP24–22–000 in your submission.

(1) You may file your comments electronically by using the eComment feature, which is located on the Commission's website at *www.ferc.gov* under the link to Documents and Filings. Using eComment is an easy method for interested persons to submit brief, text-only comments on a project;

(2) You may file your comments or protests electronically by using the eFiling feature, which is located on the Commission's website (*www.ferc.gov*) under the link to Documents and Filings. 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 will be asked to select the type of filing you are making; first select ''General'' and then select ''Comment on a Filing''; or

(3) You can file a paper copy of your comments or protests by mailing them to the following address below. Your written comments must reference the Project docket number (CP24–22–000).

To file via USPS: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

To file via any other courier: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

The Commission encourages electronic filing of comments (options 1 and 2 above) and has eFiling staff available to assist you at (202) 502–8258 or *FercOnlineSupport@ferc.gov*.

Persons who comment on the environmental review of this project will be placed on the Commission's environmental mailing list, and will receive notification when the environmental documents (EA or EIS) are issued for this project and will be notified of meetings associated with the Commission's environmental review process.

The Commission considers all comments received about the project in determining the appropriate action to be taken. However, the filing of a comment alone will not serve to make the filer a party to the proceeding. To become a party, you must intervene in the proceeding. For instructions on how to intervene, see below.

Interventions

Any person, which includes individuals, organizations, businesses, municipalities, and other entities,[6] has the option to file a motion to intervene in this proceeding. Only intervenors have the right to request rehearing of Commission orders issued in this proceeding and to subsequently

[2] 18 CFR 157.10(a)(4).

[3] 18 CFR 385.211.

[4] Persons include individuals, organizations, businesses, municipalities, and other entities. 18 CFR 385.102(d).

[5] 18 CFR 385.2001.

[6] 18 CFR 385.102(d).

challenge the Commission's orders in the U.S. Circuit Courts of Appeal.

To intervene, you must submit a motion to intervene to the Commission in accordance with Rule 214 of the Commission's Rules of Practice and Procedure [7] and the regulations under the NGA [8] by the intervention deadline for the project, which is January 4, 2024. As described further in Rule 214, your motion to intervene must state, to the extent known, your position regarding the proceeding, as well as your interest in the proceeding. For an individual, this could include your status as a landowner, ratepayer, resident of an impacted community, or recreationist. You do not need to have property directly impacted by the project in order to intervene. For more information about motions to intervene, refer to the FERC website at *https://www.ferc.gov/resources/guides/how-to/intervene.asp.*

There are two ways to submit your motion to intervene. In both instances, please reference the Project docket number CP24–22–000 in your submission.

(1) You may file your motion to intervene by using the Commission's eFiling feature, which is located on the Commission's website (*www.ferc.gov*) under the link to Documents and Filings. New eFiling users must first create an account by clicking on ''eRegister.'' You will be asked to select the type of filing you are making; first select ''General'' and then select ''Intervention.'' The eFiling feature includes a document-less intervention option; for more information, visit *https://www.ferc.gov/docs-filing/efiling/document-less-intervention.pdf*.; or

(2) You can file a paper copy of your motion to intervene, along with three copies, by mailing the documents to the address below. Your motion to intervene must reference the Project docket number CP24–22–000.

To file via USPS: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

To file via any other courier: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

The Commission encourages electronic filing of motions to intervene (option 1 above) and has eFiling staff available to assist you at (202) 502–8258 or *FercOnlineSupport@ferc.gov.*

Protests and motions to intervene must be served on the applicant either by mail or email at: Cindy C. Thompson, Director, Regulatory, Compliance and Information Governance, Southern Star Central Gas Pipeline, Inc., 4700 State Route 56, Owensboro, Kentucky 42301, or at *cindy.thompson@southernstar.com.* Any subsequent submissions by an intervenor must be served on the applicant and all other parties to the proceeding. Contact information for parties can be downloaded from the service list at the eService link on FERC Online. Service can be via email with a link to the document.

All timely, unopposed [9] motions to intervene are automatically granted by operation of Rule 214(c)(1).[10] Motions to intervene that are filed after the intervention deadline are untimely, and may be denied. Any late-filed motion to intervene must show good cause for being late and must explain why the time limitation should be waived and provide justification by reference to factors set forth in Rule 214(d) of the Commission's Rules and Regulations.[11] A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies (paper or electronic) of all documents filed by the applicant and by all other parties.

Tracking the Proceeding

Throughout the proceeding, additional information about the project will be available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website at *www.ferc.gov* using the ''eLibrary'' link as described above. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. For more information and to register, go to *www.ferc.gov/docs-filing/esubscription.asp.*

Intervention Deadline: 5:00 p.m. Eastern Time on January 4, 2024.

Dated: December 14, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–27987 Filed 12–19–23; 8:45 am]

BILLING CODE 6717–01–P

[7] 18 CFR 385.214.

[8] 18 CFR 157.10.

[9] The applicant has 15 days from the submittal of a motion to intervene to file a written objection to the intervention.

[10] 18 CFR 385.214(c)(1).

[11] 18 CFR 385.214(b)(3) and (d).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP24–13–000]

MountainWest Overthrust Pipeline, LLC; Notice of Scoping Period Requesting Comments on Environmental Issues for the Proposed Westbound Compression Expansion Project

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental document that will discuss the environmental impacts of the Westbound Compression Expansion Project (Westbound Project) involving construction and operation of facilities by MountainWest Overthrust Pipeline, LLC (Overthrust) in Sweetwater, Lincoln, and Uinta Counties, Wyoming. The Commission will use this environmental document in its decision-making process to determine whether the Westbound Project is in the public convenience and necessity.

This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies regarding the Westbound Project. As part of the National Environmental Policy Act (NEPA) review process, the Commission takes into account concerns the public may have about proposals and the environmental impacts that could result from its action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. This gathering of public input is referred to as ''scoping.'' The main goal of the scoping process is to focus the analysis in the environmental document on the important environmental issues. Additional information about the Commission's NEPA process is described below in the *NEPA Process and Environmental Document* section of this notice.

By this notice, the Commission requests public comments on the scope of issues to address in the environmental document. To ensure that your comments are timely and properly recorded, please submit your comments so that the Commission receives them in Washington, DC on or before 5:00 p.m. Eastern Time on January 16, 2024. Further details on how to submit comments are provided in the *Public Participation* section of this notice.

Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts.

Your input will help the Commission staff determine what issues they need to evaluate in the environmental document. Commission staff will consider all written comments during the preparation of the environmental document.

If you submitted comments on this project to the Commission *before* the opening of this docket on November 2, 2023, you will need to file those comments in Docket No. CP24–13–000 to ensure they are considered as part of this proceeding.

This notice is being sent to the Commission's current environmental mailing list for this project. State and local government representatives should notify their constituents of this proposed project and encourage them to comment on their areas of concern.

If you are a landowner receiving this notice, an Overthrust representative may contact you about the acquisition of an easement to construct, operate, and maintain the proposed facilities. The company would seek to negotiate a mutually acceptable easement agreement. You are not required to enter into an agreement. However, if the Commission approves the project, the Natural Gas Act conveys the right of eminent domain to the company. Therefore, if you and the company do not reach an easement agreement, Overthrust could initiate condemnation proceedings in court. In such instances, compensation would be determined by a judge in accordance with state law. The Commission does not subsequently grant, exercise, or oversee the exercise of that eminent domain authority. The courts have exclusive authority to handle eminent domain cases; the Commission has no jurisdiction over these matters.

Overthrust provided landowners with a fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility On My Land? What Do I Need To Know?'' which addresses typically asked questions, including the use of eminent domain and how to participate in the Commission's proceedings. This fact sheet along with other landowner topics of interest are available for viewing on the FERC website (*www.ferc.gov*) under the Natural Gas, Landowner Topics link.

Public Participation

There are three methods you can use to submit your comments to the Commission. Please carefully follow these instructions so that your comments are properly recorded. The Commission encourages electronic filing of comments and has staff available to assist you at (866) 208–3676 or *FercOnlineSupport@ferc.gov.*

(1) You can file your comments electronically using the *eComment* feature, which is located on the Commission's website (*www.ferc.gov*) under the link to FERC Online. Using eComment is an easy method for submitting brief, text-only comments on a project.

(2) You can file your comments electronically by using the *eFiling* feature, which is located 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 will be asked to select the type of filing you are making; a comment on a particular project is considered a ''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 (CP24–13–000) 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, MD 20852.

Additionally, the Commission offers a free service called eSubscription which makes it easy to stay informed of all issuances and submittals regarding the dockets/projects to which you subscribe. These instant email notifications are the fastest way to receive notification and provide a link to the document files which can reduce the amount of time you spend researching proceedings. Go to *https://www.ferc.gov/ferc-online/overview* to register for eSubscription.

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.*

Summary of the Proposed Project

Overthrust proposes to construct and operate an expansion of its existing natural gas transmission system at its existing Point of Rocks and Rock Springs Compressor Stations in Sweetwater County, Wyoming including related aboveground facilities in Uinta and Lincoln Counties, Wyoming. Overthrust would provide an additional 325,000 dekatherms per day (Dth/day) of year-round firm transportation capacity on its existing mainline. Overthrust anticipates providing western and northwestern U.S. gas markets with greater access to eastern gas supplies.

The Westbound Project would consist of the following facilities and activities, all in Wyoming:

- addition of one gas-fired turbine driven compressor unit with 15,900 nominal horsepower (hp) at the existing Point of Rocks Compressor Station in Sweetwater County;
- addition of one gas-fired turbine driven compressor unit with 15,900 nominal hp at the existing Rock Springs Compressor Station in Sweetwater County;
- an approximate 1,400-foot-long, 24-inch-diameter pipe interconnect (JTL–148) extending from a new tap on Overthrust's mainline 122 at its existing North Rendezvous Tap facility to a new meter station being constructed by Kern River Gas Transmission at an existing site in Lincoln County;
- upgrades to the existing Rockies Express Pipeline Wamsutter Meter Station to accommodate additional gas volumes in Sweetwater County;
- upgrades at three existing facilities—Roberson Compressor Station (new pig launcher and receiver [1] in Lincoln County), Cabin 31 Interconnect Pipeline Facility (new pig launcher in Sweetwater County), and Opal Interconnect Pipeline Facility (new pig launcher in Lincoln County), to support in-line inspections along the Overthrust mainline; and
- modifications to Overthrust's existing Granger Interconnect Facility to accommodate new flow conditions in Sweetwater County.

The general location of the project facilities is shown in appendix 1.[2]

[1] A ''pig'' is a tool that the pipeline company inserts into and pushes through the pipeline for cleaning the pipeline, conducting internal inspections, or other purposes.

[2] The appendices referenced in this notice will not appear in the **Federal Register**. Copies of the appendices were sent to all those receiving this notice in the mail and are available at *www.ferc.gov* using the link called ''eLibrary.'' For instructions on connecting to eLibrary, refer to the last page of this notice. For assistance, contact FERC at

Land Requirements for Construction

Construction of the proposed facilities would disturb about 61.8 acres of land for the compressor stations and other aboveground facilities. Following construction, Overthrust would maintain about 50.3 acres for permanent operation of the project's facilities. The remaining acreage would be restored and revert to former uses. Overthrust would utilize a 50-foot-wide operational (permanent) right-of-way pipeline easement that would be restored and revegetated following construction.

NEPA Process and the Environmental Document

Any environmental document issued by the Commission will discuss impacts that could occur as a result of the construction and operation of the proposed project under the relevant general resource areas:

- geology and soils;
- water resources and wetlands;
- vegetation and wildlife;
- threatened and endangered species;
- cultural resources;
- land use;
- socioeconomics and environmental justice;
- air quality and noise; and
- reliability and safety.

Commission staff will also evaluate reasonable alternatives to the proposed project or portions of the project and make recommendations on how to lessen or avoid impacts on the various resource areas. Your comments will help Commission staff identify and focus on the issues that might have an effect on the human environment and potentially eliminate others from further study and discussion in the environmental document.

Following this scoping period, Commission staff will determine whether to prepare an Environmental Assessment (EA) or an Environmental Impact Statement (EIS). The EA or the EIS will present Commission staff's independent analysis of the issues. If Commission staff prepares an EA, a *Notice of Schedule for the Preparation of an Environmental Assessment* will be issued. The EA may be issued for an allotted public comment period. The Commission would consider timely comments on the EA before making its decision regarding the proposed project. If Commission staff prepares an EIS, a *Notice of Intent to Prepare an EIS/ Notice of Schedule* will be issued, which will open up an additional comment period. Staff will then prepare a draft EIS which will be issued for public comment. Commission staff will consider all timely comments received during the comment period on the draft EIS and revise the document, as necessary, before issuing a final EIS. Any EA or draft and final EIS will be available in electronic format in the public record through eLibrary [3] and the Commission's natural gas environmental documents web page (*https://www.ferc.gov/industries-data/natural-gas/environment/environmental-documents*). If eSubscribed, you will receive instant email notification when the environmental document is issued.

With this notice, the Commission is asking agencies with jurisdiction by law and/or special expertise with respect to the environmental issues of this project to formally cooperate in the preparation of the environmental document.[4] Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the *Public Participation* section of this notice. Currently, the U.S. Bureau of Land Management has expressed its intention to participate as a cooperating agency in the preparation of the environmental document to satisfy its NEPA responsibilities related to the Westbound Project.

Consultation Under Section 106 of the National Historic Preservation Act

In accordance with the Advisory Council on Historic Preservation's implementing regulations for section 106 of the National Historic Preservation Act, the Commission is using this notice to initiate consultation with Wyoming State Historic Preservation Office, and to solicit their views and those of other government agencies, interested Indian tribes, and the public on the project's potential effects on historic properties.[5] The environmental document for this project will document findings on the impacts on historic properties and summarize the status of consultations under section 106.

Environmental Mailing List

The environmental mailing list includes federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; environmental justice stakeholders, Native American Tribes; other interested parties; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within certain distances of aboveground facilities, and anyone who submits comments on the project and includes a mailing address with their comments. Commission staff will update the environmental mailing list as the analysis proceeds to ensure that Commission notices related to this environmental review are sent to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project.

If you need to make changes to your name/address, or if you would like to remove your name from the mailing list, please complete one of the following steps:

(1) Send an email to *GasProjectAddressChange@ferc.gov* stating your request. You must include the docket number CP24–13–000 in your request. If you are requesting a change to your address, please be sure to include your name and the correct address. If you are requesting to delete your address from the mailing list, please include your name and address as it appeared on this notice. *This email address is unable to accept comments.*

OR

(2) Return the attached ''Mailing List Update Form'' (appendix 2).

Additional Information

Additional information about the Westbound Project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website at *www.ferc.gov* using the eLibrary link. Click on the eLibrary link, click on ''General Search'' and enter the docket number in the ''Docket Number'' field. Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

Public sessions or site visits will be posted on the Commission's calendar located at *https://www.ferc.gov/news-*

FERCOnlineSupport@ferc.gov or call toll free, (886) 208–3676 or TTY (202) 502–8659.

[3] For instructions on connecting to eLibrary, refer to the last page of this notice.

[4] The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at title 40, Code of Federal Regulations, section 1501.8.

[5] The Advisory Council on Historic Preservation's regulations are at title 36, Code of Federal Regulations, part 800. Those regulations define historic properties as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places.

events/events along with other related information.

Dated: December 14, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–27989 Filed 12–19–23; 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 rate filings:

Docket Numbers: ER22–2550–001.
Applicants: Midway-Sunset Cogeneration Company.
Description: Project Daily Surcharge Payment True-Up Report of Midway Sunset Cogeneration Company.
Filed Date: 11/30/23.
Accession Number: 20231130–5390.
Comment Date: 5 p.m. ET 1/4/24.

Docket Numbers: ER24–201–000.
Applicants: Karbone Energy LLC.
Description: Report Filing: Karbone Energy LLC Supplemental MBR Filing to be effective N/A.
Filed Date: 12/14/23.
Accession Number: 20231214–5116.
Comment Date: 5 p.m. ET 12/26/23.

Docket Numbers: ER24–646–000.
Applicants: Wisconsin Electric Power Company.
Description: Petition for Limited Waiver of Wisconsin Electric Power Company.
Filed Date: 12/13/23.
Accession Number: 20231213–5139.
Comment Date: 5 p.m. ET 1/3/24.

Docket Numbers: ER24–658–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 4189 CED Burt County Wind GIA to be effective 11/29/2023.
Filed Date: 12/14/23.
Accession Number: 20231214–5059.
Comment Date: 5 p.m. ET 1/4/24.

Docket Numbers: ER24–659–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 4195 NextEra Energy Resources Surplus Interconnection GIA to be effective 2/12/2024.
Filed Date: 12/14/23.
Accession Number: 20231214–5064.
Comment Date: 5 p.m. ET 1/4/24.

Docket Numbers: ER24–660–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 4196 NextEra Energy Resources Surplus Interconnection GIA to be effective 2/12/2024.
Filed Date: 12/14/23.
Accession Number: 20231214–5069.
Comment Date: 5 p.m. ET 1/4/24.

Docket Numbers: ER24–661–000.
Applicants: ISO New England Inc., New England Power Pool Participants Committee.
Description: § 205(d) Rate Filing: ISO New England Inc. submits tariff filing per 35.13(a)(2)(iii: Revisions to Update to FCM Delivery Financial Assurance Calculation in the FAP to be effective 3/1/2024.
Filed Date: 12/14/23.
Accession Number: 20231214–5071.
Comment Date: 5 p.m. ET 1/4/24.

Docket Numbers: ER24–662–000.
Applicants: SR Bell Buckle, LLC.
Description: § 205(d) Rate Filing: Revised Market-Based Tariff to be effective 12/15/2023.
Filed Date: 12/14/23.
Accession Number: 20231214–5141.
Comment Date: 5 p.m. ET 1/4/24.

Docket Numbers: ER24–663–000.
Applicants: SR Canadaville Lessee, LLC.
Description: § 205(d) Rate Filing: Revised Market-Based Rate Tariff to be effective 12/15/2023.
Filed Date: 12/14/23.
Accession Number: 20231214–5142.
Comment Date: 5 p.m. ET 1/4/24.

Docket Numbers: ER24–664–000.
Applicants: SR Canadaville, LLC.
Description: § 205(d) Rate Filing: Revised Market-Based Rate Tariff to be effective 12/15/2023.
Filed Date: 12/14/23.
Accession Number: 20231214–5146.
Comment Date: 5 p.m. ET 1/4/24.

Docket Numbers: ER24–665–000.
Applicants: SR McKellar Lessee, LLC.
Description: § 205(d) Rate Filing: Revised Market-Based Rate Tariff to be effective 12/15/2023.
Filed Date: 12/14/23.
Accession Number: 20231214–5152.
Comment Date: 5 p.m. ET 1/4/24.

Docket Numbers: ER24–666–000.
Applicants: SR McKellar, LLC.
Description: § 205(d) Rate Filing: Revised Market-Based Rate Tariff to be effective 12/15/2023.
Filed Date: 12/14/23.
Accession Number: 20231214–5155.
Comment Date: 5 p.m. ET 1/4/24.

Docket Numbers: ER24–667–000.
Applicants: SR Platte, LLC.
Description: § 205(d) Rate Filing: Revised Market-Based Rate Tariff to be effective 12/15/2023.
Filed Date: 12/14/23.
Accession Number: 20231214–5157.
Comment Date: 5 p.m. ET 1/4/24.

Docket Numbers: ER24–668–000.
Applicants: SR Rattlesnake, LLC.
Description: § 205(d) Rate Filing: Revised Market-Based Rate Tariff to be effective 12/15/2023.
Filed Date: 12/14/23.
Accession Number: 20231214–5162.
Comment Date: 5 p.m. ET 1/4/24.

Docket Numbers: ER24–669–000.
Applicants: SR Turkey Creek, LLC.
Description: § 205(d) Rate Filing: Revised Market-Based Rate Tariff to be effective 12/15/2023.
Filed Date: 12/14/23.
Accession Number: 20231214–5164.
Comment Date: 5 p.m. ET 1/4/24.

Docket Numbers: ER24–670–000.
Applicants: Duke Energy Progress, LLC.
Description: Tariff Amendment: DEP–INGENCO Notice of Cancellation of SA No. 288 to be effective 2/13/2024.
Filed Date: 12/14/23.
Accession Number: 20231214–5179.
Comment Date: 5 p.m. ET 1/4/24.

Docket Numbers: ER24–671–000.
Applicants: Helix Ravenswood, LLC.
Description: Compliance filing: Ravenswood Operation Notice of Succession Filing to be effective 11/7/2023.
Filed Date: 12/14/23.
Accession Number: 20231214–5182.
Comment Date: 5 p.m. ET 1/4/24.

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 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

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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 14, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–27990 Filed 12–19–23; 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 exempt wholesale generator filings:

Docket Numbers: EG24–55–000.
Applicants: Moonshot Solar, LLC.
Description: Moonshot Solar, LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.
Filed Date: 12/13/23.
Accession Number: 20231213–5062.
Comment Date: 5 p.m. ET 1/3/24.

Docket Numbers: EG24–56–000.
Applicants: PGR 2022 Lessee 5, LLC.
Description: PGR 2022 Lessee 5, LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.
Filed Date: 12/13/23.
Accession Number: 20231213–5067.
Comment Date: 5 p.m. ET 1/3/24.

Take notice that the Commission received the following Complaints and Compliance filings in EL Dockets:

Docket Numbers: EL24–37–000; QF87–237–026.
Applicants: Midland Cogeneration Venture Limited Partnership, Midland Cogeneration Venture Limited Partnership.
Description: Request for Waiver of the Operating and Efficiency Standards for a Topping-Cycle Cogeneration Facility of Midland Cogeneration Venture Limited Partnership.
Filed Date: 12/6/23.
Accession Number: 20231206–5197.
Comment Date: 5 p.m. ET 12/27/23.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER22–962–006.
Applicants: PJM Interconnection, L.L.C.
Description: Compliance filing: Order No. 2222 Compliance Filing to be effective 7/1/2024.
Filed Date: 12/13/23.
Accession Number: 20231213–5055.
Comment Date: 5 p.m. ET 1/3/24.

Docket Numbers: ER24–627–000.
Applicants: Mammoth North LLC.
Description: Baseline eTariff Filing: Baseline new reactive rate tariff to be effective 6/30/2024.
Filed Date: 12/12/23.
Accession Number: 20231212–5159.
Comment Date: 5 p.m. ET 1/2/24.

Docket Numbers: ER24–628–000.
Applicants: Dominion Energy South Carolina, Inc.
Description: 205(d) Rate Filing: Southeastern Power Admin NITSA to be effective 1/1/2024.
Filed Date: 12/13/23.
Accession Number: 20231213–5035.
Comment Date: 5 p.m. ET 1/3/24.

Docket Numbers: ER24–629–000.
Applicants: Lancaster Solar LLC.
Description: 205(d) Rate Filing: Revised Market-Based Rate Tariff to be effective 12/14/2023.
Filed Date: 12/13/23.
Accession Number: 20231213–5053.
Comment Date: 5 p.m. ET 1/3/24.

Docket Numbers: ER24–630–000.
Applicants: Odom Solar LLC.
Description: 205(d) Rate Filing: Revised Market-Based Rate Tariff to be effective 12/14/2023.
Filed Date: 12/13/23.
Accession Number: 20231213–5056.
Comment Date: 5 p.m. ET 1/3/24.

Docket Numbers: ER24–631–000.
Applicants: SR Arlington II MT, LLC.
Description: 205(d) Rate Filing: Revised Market-Based Rate Tariff to be effective 12/14/2023.
Filed Date: 12/13/23.
Accession Number: 20231213–5058.
Comment Date: 5 p.m. ET 1/3/24.

Docket Numbers: ER24–632–000.
Applicants: SR Arlington II, LLC.
Description: 205(d) Rate Filing: Revised Market-Based Rate Tariff to be effective 12/14/2023.
Filed Date: 12/13/23.
Accession Number: 20231213–5068.
Comment Date: 5 p.m. ET 1/3/24.

Docket Numbers: ER24–633–000.
Applicants: SR Arlington, LLC.
Description: 205(d) Rate Filing: Revised Market-Based Rate Tariff to be effective 12/14/2023.
Filed Date: 12/13/23.
Accession Number: 20231213–5072.
Comment Date: 5 p.m. ET 1/3/24.

Docket Numbers: ER24–634–000.
Applicants: Chevelon Butte RE II LLC.
Description: 205(d) Rate Filing: Chevelon Butte RE II LLC Shared Facilities Agreement Concurrence to be effective 12/14/2023.
Filed Date: 12/13/23.
Accession Number: 20231213–5076.
Comment Date: 5 p.m. ET 1/3/24.

Docket Numbers: ER24–635–000.
Applicants: SR Baxley, LLC.
Description: 205(d) Rate Filing: Revised Market-Based Rate Tariff to be effective 12/14/2023.
Filed Date: 12/13/23.
Accession Number: 20231213–5077.
Comment Date: 5 p.m. ET 1/3/24.

Docket Numbers: ER24–636–000.
Applicants: SR Cedar Springs, LLC.
Description: 205(d) Rate Filing: Revised Market-Based Rate Tariff to be effective 12/14/2023.
Filed Date: 12/13/23.
Accession Number: 20231213–5079.
Comment Date: 5 p.m. ET 1/3/24.

Docket Numbers: ER24–637–000.
Applicants: SR Clay, LLC.
Description: 205(d) Rate Filing: Revised Market-Based Rate Tariff to be effective 12/14/2023.
Filed Date: 12/13/23.
Accession Number: 20231213–5095.
Comment Date: 5 p.m. ET 1/3/24.

Docket Numbers: ER24–638–000.
Applicants: SR DeSoto I Lessee, LLC.
Description: 205(d) Rate Filing: Revised Market-Based Rate Tariff to be effective 12/14/2023.
Filed Date: 12/13/23.
Accession Number: 20231213–5098.
Comment Date: 5 p.m. ET 1/3/24.

Docket Numbers: ER24–639–000.
Applicants: SR DeSoto I, LLC.
Description: 205(d) Rate Filing: Revised Market-Based Rate Tariff to be effective 12/14/2023.
Filed Date: 12/13/23.
Accession Number: 20231213–5105.
Comment Date: 5 p.m. ET 1/3/24.

Docket Numbers: ER24–640–000.
Applicants: SR DeSoto II, LLC.
Description: 205(d) Rate Filing: Revised Market-Based Rate Tariff to be effective 12/14/2023.
Filed Date: 12/13/23.
Accession Number: 20231213–5112.
Comment Date: 5 p.m. ET 1/3/24.

Docket Numbers: ER24–641–000.
Applicants: SR DeSoto III Lessee, LLC.
Description: 205(d) Rate Filing: Revised Market-Based Rate Tariff to be effective 12/14/2023.
Filed Date: 12/13/23.
Accession Number: 20231213–5115.
Comment Date: 5 p.m. ET 1/3/24.

Docket Numbers: ER24–642–000.
Applicants: SR DeSoto III, LLC.
Description: 205(d) Rate Filing: Revised Market-Based Rate Tariff to be effective 12/14/2023.
Filed Date: 12/13/23.
Accession Number: 20231213–5119.
Comment Date: 5 p.m. ET 1/3/24.

Docket Numbers: ER24–643–000.
Applicants: SR Georgia Portfolio I MT, LLC.
Description: 205(d) Rate Filing: Revised Market-Based Rate Tariff to be effective 12/14/2023.

Filed Date: 12/13/23.
Accession Number: 20231213–5124.
Comment Date: 5 p.m. ET 1/3/24.
Docket Numbers: ER24–644–000.
Applicants: SR Georgia Portfolio II Lessee, LLC.
Description: 205(d) Rate Filing: Revised Market-Based Rate Tariff to be effective 12/14/2023.
Filed Date: 12/13/23.
Accession Number: 20231213–5133.
Comment Date: 5 p.m. ET 1/3/24.
Docket Numbers: ER24–645–000.
Applicants: SR Hazlehurst III, LLC.
Description: 205(d) Rate Filing: Revised Market-Based Rate Tariff to be effective 12/14/2023.
Filed Date: 12/13/23.
Accession Number: 20231213–5138.
Comment Date: 5 p.m. ET 1/3/24.
Docket Numbers: ER24–647–000.
Applicants: SR Hazlehurst, LLC.
Description: 205(d) Rate Filing: Revised Market-Based Rate Tariff to be effective 12/14/2023.
Filed Date: 12/13/23.
Accession Number: 20231213–5141.
Comment Date: 5 p.m. ET 1/3/24.
Docket Numbers: ER24–648–000.
Applicants: SR Lumpkin, LLC.
Description: 205(d) Rate Filing: Revised Market-Based Tariff to be effective 12/14/2023.
Filed Date: 12/13/23.
Accession Number: 20231213–5143.
Comment Date: 5 p.m. ET 1/3/24.
Docket Numbers: ER24–649–000.
Applicants: SR Meridian III, LLC.
Description: 205(d) Rate Filing: Revised Market-Based Rate Tariff to be effective 12/14/2023.
Filed Date: 12/13/23.
Accession Number: 20231213–5149.
Comment Date: 5 p.m. ET 1/3/24.
Docket Numbers: ER24–650–000.
Applicants: SR Perry, LLC.
Description: 205(d) Rate Filing: Revised Market-Based Rate Tariff to be effective 12/14/2023.
Filed Date: 12/13/23.
Accession Number: 20231213–5153.
Comment Date: 5 p.m. ET 1/3/24.
Docket Numbers: ER24–651–000.
Applicants: SR Snipesville II, LLC.
Description: 205(d) Rate Filing: Revised Market-Based Rate Tariff to be effective 12/14/2023.
Filed Date: 12/13/23.
Accession Number: 20231213–5176.
Comment Date: 5 p.m. ET 1/3/24.
Docket Numbers: ER24–652–000.
Applicants: SR Snipesville III, LLC.
Description: 205(d) Rate Filing: Revised Market-Based Rate Tariff to be effective 12/14/2023.
Filed Date: 12/13/23.
Accession Number: 20231213–5180.
Comment Date: 5 p.m. ET 1/3/24.
Docket Numbers: ER24–653–000.
Applicants: GenOn REMA, LLC.
Description: Tariff Amendment: Notice of Cancellation to be effective 12/14/2023.
Filed Date: 12/13/23.
Accession Number: 20231213–5181.
Comment Date: 5 p.m. ET 1/3/24.
Docket Numbers: ER24–654–000.
Applicants: SR Snipesville, LLC.
Description: 205(d) Rate Filing: Revised Market-Based Rate Tariff to be effective 12/14/2023.
Filed Date: 12/13/23.
Accession Number: 20231213–5186.
Comment Date: 5 p.m. ET 1/3/24.
Docket Numbers: ER24–655–000.
Applicants: GenOn Power Midwest, LP.
Description: Tariff Amendment: Notice of Cancellation to be effective 12/14/2023.
Filed Date: 12/13/23.
Accession Number: 20231213–5189.
Comment Date: 5 p.m. ET 1/3/24.
Docket Numbers: ER24–656–000.
Applicants: SR Terrell, LLC.
Description: 205(d) Rate Filing: Revised Market-Based Tariff to be effective 12/14/2023.
Filed Date: 12/13/23.
Accession Number: 20231213–5190.
Comment Date: 5 p.m. ET 1/3/24.
Docket Numbers: ER24–657–000.
Applicants: GenOn California South, LP.
Description: Tariff Amendment: Notice of Cancellation to be effective 12/14/2023.
Filed Date: 12/13/23.
Accession Number: 20231213–5193.
Comment Date: 5 p.m. ET 1/3/24.

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.

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Dated: December 13, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–27885 Filed 12–19–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AD21–15–000]

Joint Federal-State Task Force on Electric Transmission; Notice Announcing Meeting and Inviting Agenda Topics

On June 17, 2021, the Commission established a Joint Federal-State Task Force on Electric Transmission (Task Force) to formally explore transmission-related topics outlined in the Commission's order.[1] The Commission stated that the Task Force will convene for multiple formal meetings annually, which will be open to the public for listening and observing and on the record.[2] The next public meeting of the Task Force will be held on Wednesday, February 28, 2024, starting at approximately 1:30 p.m. Eastern Standard Time. The meeting will be held at the Westin Washington in Washington, DC. Commissioners may attend and participate in this meeting.

The meeting will be open to the public for listening and observing and on the record. There is no fee for attendance and registration is not required. The public may attend in person or via Webcast.[3] This conference will be transcribed. Transcripts will be available for a fee from Ace Reporting, 202–347–3700.

Commission conferences are accessible under section 508 of the

[1] *Joint Fed.-State Task Force on Elec. Transmission,* 175 FERC ¶ 61,224 (2021) (Establishing Order).

[2] *Id.* P 4.

[3] A link to the Webcast will be available here on the day of the event: *https://www.ferc.gov/TFSOET.*

Rehabilitation Act of 1973. For accessibility accommodations, please send an email to *accessibility@ferc.gov* or call toll free 1–866–208–3372 (voice) or 202–208–8659 (TTY), or send a fax to 202–208–2106 with the required accommodations.

As explained in the Establishing Order, the Commission will issue agendas for each meeting of the Task Force, after consulting with all Task Force members and considering suggestions from state commissions.[4] The Establishing Order set forth a broad array of transmission-related topics that the Task Force has the authority to examine and will focus on topics related to planning and paying for transmission, including transmission to facilitate generator interconnection, that provides benefits from a federal and state perspective.[5] All interested persons, including all state commissions, are hereby invited to file comments in this docket on agenda topics for the next public meeting of the Task Force by January 8, 2024. The Task Force members will consider the suggested agenda topics in developing the agenda for the next public meeting. The Commission will issue the agenda no later than February 14, 2024, for the public meeting to be held on February 28, 2024.

Comments may be filed electronically via the internet.[6] Instructions are available on the Commission's website, *https://www.ferc.gov/ferc-online/overview.* For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, 202–502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, submissions sent via the U.S. Postal Service must be addressed to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street NE, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Federal Energy Regulatory Commission, Office of the Secretary, 12225 Wilkins Avenue, Rockville, Maryland 20852.

More information about the Task Force, including frequently asked questions, is available here: *https://www.ferc.gov/TFSOET.* For more information about this meeting, please contact: Cameron Schilling, 202–502–8202, *Cameron.Schilling@ferc.gov;* or Sarah Fitzpatrick, 202–898–2205, *sfitzpatrick@naruc.org.* For information related to logistics, please contact Rob Thormeyer, 202–502–8694, *robert.thormeyer@ferc.gov.*

Dated: December 14, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–27991 Filed 12–19–23; 8:45 am]

BILLING CODE 6717–01–P

[4] Establishing Order, 175 FERC ¶ 61,224 at PP 4, 7.

[5] *Id.* P 6.

[6] *See* 18 CFR 385.2001(a)(1)(iii) (2022).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2466–037]

Appalachian Power Company; Notice of Intent To Prepare an Environmental Assessment

On February 28, 2022, Appalachian Power Company (Appalachian) filed an application for a new major license for the 2.4-megawatt Niagara Hydroelectric Project (Niagara Project; FERC No. 2466). The Niagara Project is located on the Roanoke River, in Roanoke County, Virginia. The project is adjacent to and partially within the Blue Ridge Parkway.

In accordance with the Commission's regulations, on February 7, 2023, Commission staff issued a notice that the project was ready for environmental analysis (REA Notice). Based on the information in the record, including comments filed on the REA Notice, staff does not anticipate that licensing the project would constitute a major federal action significantly affecting the quality of the human environment. On April 26, 2023, the Commission issued a notice indicating that staff intended to prepare a draft and final Environmental Assessment (EA). However, upon further review, staff intends to prepare a single EA on the application to relicense the Niagara Project.

The EA will be issued and circulated for review by all interested parties. All comments filed on the EA will be analyzed by staff and considered in the Commission's final licensing decision.

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.*

By this notice, Commission staff is updating the procedural schedule for completing the EA. The revised schedule is shown below. Further revisions to the schedule may be made as appropriate.

Milestone	Target date
Commission issues EA	April 2024.[1]
Comments on EA	May 2024.

Any questions regarding this notice may be directed to Laurie Bauer at (202) 502–6519 or *laurie.bauer@ferc.gov.*

Dated: December 14, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–27984 Filed 12–19–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 15302–001]

LinkPast Solutions, Inc.; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On June 26, 2023, LinkPast Solutions, Inc., filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of hydropower on the Black River in Jefferson County, New York. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed Sewalls Island Hydro Project would be located on the North Channel of the Black River at Sewalls Island in Watertown, New York. The proposed project would operate with flows below the minimum and above the maximum hydraulic capacities of Erie Boulevard Hydropower, L.P.'s Sewalls Development of the Black River Hydroelectric Project No. P–2569 (Sewalls Development). The Sewalls

[1] The Council on Environmental Quality's (CEQ) regulations under 40 CFR 1501.10(b)(1) (2022) require that EAs be completed within 1 year of the federal action agency's decision to prepare an EA. *See* National Environmental Policy Act, 42 U.S.C. 4321 *et seq., as amended by* section 107(g)(1)(B)(iii) of the Fiscal Responsibility Act of 2023, Public Law 118–5, 4336a, 137 Stat. 42.

Development consists of two dams—a 90-foot-long, 18.5-foot-high concrete gravity dam on the North Channel of Sewalls Island (North Channel dam) and a 243-foot-long, 15.5-foot-high concrete gravity dam on the South Channel of Sewalls Island. A 4-acre reservoir with a storage capacity of 48-acre-feet at an elevation of 466.45 feet National Geodetic Vertical Datum of 1929 was created by the dams.

The proposed project would consist of the following: (1) two new powerhouses—a 70-foot-long by 30-foot-wide reinforced concrete powerhouse at the North Channel dam (powerhouse #1) and a 60-foot-long, 40-foot-wide reinforced concrete powerhouse downstream on the North Channel at the lower end of Sewalls Island (powerhouse #2); (2) a new 70-foot-long, 25-foot-wide integral intake structure at the North Channel dam for use by both powerhouses; (3) a new 12.5-foot-diameter, 1,250-foot-long steel and concrete penstock for conveying water to powerhouse #2 that would involve the demolition of the existing 80-foot-long, 16-foot-high Black Clawson Dam on the western tip of the island in the North Channel; (4) an axial flow vertical turbine-generator unit with an installed capacity of 3,600 kilowatts (kW) and a micro turbine-generator unit with an installed capacity of 15.7 kW housed in powerhouse #1; (5) one or more axial flow vertical turbine-generator unit(s) with a total installed capacity of 5,500 kW housed in powerhouse #2; (6) a new approximately 120-foot-long access road for powerhouse #1 and a new approximately 320-foot-long access road for powerhouse #2; (7) a new 1,900-foot-long, 23-kilovolt (kV) transmission line connecting the powerhouses to the existing switchyard of the Black River Project's Sewalls Development (option 1) or a new 4,270-foot-long, 23-kV transmission line connecting the powerhouses to a switchyard adjacent to the New York Airbrake Manufacturing plant; and (8) appurtenant facilities. The proposed project would have an average annual generation of approximately 2,245 megawatt-hours.

Applicant Contact: Brian McArthur, LinkPast Solutions, Inc., P.O. Box 5474, Clark, NJ 07066; phone: (848) 628–4414.

FERC Contact: Monir Chowdhury; phone: (202) 502–6736.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, notices of intent, and competing applications using the Commission's eFiling system at *https://ferconline.ferc.gov/FERCOnline.aspx.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *https://ferconline.ferc.gov/QuickComment.aspx.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of the Commission's website at *https://elibrary.ferc.gov/eLibrary/search.* Enter the docket number (P–15302) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: December 14, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–27979 Filed 12–19–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL24–22–000]

Madison Fields Solar Project, LLC; Notice of Institution of Section 206 Proceeding and Refund Effective Date

On December 13, 2023, the Commission issued an order in Docket No. EL24–22–000, pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. 824e, instituting an investigation to determine whether Madison Fields Solar Project, LLC's Rate Schedule is unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. *Madison Fields Solar Project, LLC,* 185 FERC ¶ 61,183 (2023).

The refund effective date in Docket No. EL24–22–000 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 Madison Fields' 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. EL24–22–000, 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 13, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–27883 Filed 12–19–23; 8:45 am]

BILLING CODE 6717–01–P

FEDERAL COMMUNICATIONS COMMISSION

[MB Docket No. 11–43; DA 23–1119; FRS 190156]

Audio Description: Preliminary Nonbroadcast Network Rankings

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: FCC announces the top national nonbroadcast network rankings from the 2022–2023 ratings year, and gives networks the opportunity to seek exemption from the July 1, 2024 update to the Commission's audio description requirements.

DATES: Exemption requests are due January 19, 2024.

ADDRESSES: Filings should be submitted electronically in MB Docket No. 11–43 by accessing the Commission's Electronic Comment Filing System (ECFS) at *https://www.fcc.gov/ecfs/.* Filers should follow the instructions provided on the website for submitting filings.

FOR FURTHER INFORMATION CONTACT: For further information, contact Diana Sokolow (202–418–0588; *Diana.Sokolow@fcc.gov*).

SUPPLEMENTARY INFORMATION: This is a summary of the Media Bureau's Public Notice, DA 23–1119, released on November 30, 2023. The full text of this public notice will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat via ECFS. Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format), by sending an email to *fcc504@fcc.gov* or calling the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), 1–844–4–FCC–ASL (1–844–432–2275) (videophone).

Synopsis

The Commission's audio description rules require multichannel video programming distributor (MVPD) systems that serve 50,000 or more subscribers to provide 87.5 hours of audio description [1] per calendar quarter on channels carrying each of the top five national nonbroadcast networks.[2] The top five national nonbroadcast networks are defined by an average of the national audience share during prime time among nonbroadcast networks that reach 50 percent or more of MVPD households and have at least 50 hours per quarter of prime time programming that is not live or near-live or otherwise exempt under the audio description rules.

In accordance with the Commission's rules, the list of top five nonbroadcast networks is updated at three year intervals to account for changes in ratings, and the fourth triennial update will occur on July 1, 2024, based on the 2022 to 2023 ratings year.[3] According to data provided by the Nielsen Company, for the purposes of our requirements, the top ten nonbroadcast networks for the 2022 to 2023 ratings year are: Fox News Channel, ESPN, MSNBC, HGTV, Hallmark, TLC, TNT, TBS, Discovery, and History.

If a program network believes it should be excluded from the list of top five networks covered by the audio description requirements because it does not air at least 50 hours per quarter of prime time programming that is not live or near-live or is otherwise exempt, it must seek an exemption no later than 30 days after publication of this Public Notice in the **Federal Register**. The Media Bureau will promptly evaluate requests for exemption and will provide notice of any resulting revisions to the list.

Federal Communications Commission.

Thomas Horan,

Chief of Staff, Media Bureau.

[FR Doc. 2023–27954 Filed 12–19–23; 8:45 am]

BILLING CODE 6712–01–P

[1] Audio description makes video programming accessible to individuals who are blind or visually impaired through ''[t]he insertion of audio narrated descriptions of a television program's key visual elements into natural pauses between the program's dialogue.'' 47 CFR 79.3(a)(3).

[2] The rule requires that 50 hours per calendar quarter be provided in prime time or during children's programming, while the additional 37.5 hours may be provided at any time between 6 a.m. and 11:59 p.m. local time.

[3] The nonbroadcast networks currently subject to the audio description requirements are TLC, HGTV, Hallmark, History, and TBS. We note that the Media Bureau granted TBS a limited waiver of section 79.3(b)(4) of the audio description rules for the triennial period beginning on July 1, 2021 and ending on June 30, 2024.

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0609; FR ID 190753]

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before February 20, 2024. If you anticipate that you will be submitting comments but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email to *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0609.

Title: Section 76.934(e), Petitions for Extension of Time.

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; and State, local, or tribal governments.

Number of Respondents and Responses: 20 respondents; 10 responses.

Frequency of Response: On occasion reporting requirement; Third party disclosure requirement.

Estimated Time per Response: 4 hours.

Total Annual Burden: 80 hours.

Total Annual Cost: None.

Needs and Uses: The information collection requirements contained under 47 CFR 76.934(e) states that small cable systems may obtain an extension of time to establish compliance with rate regulations provided that they can demonstrate that timely compliance would result in severe economic hardship. Requests for the extension of time should be addressed to the local franchising authorities (''LFAs'') concerning rates for basic service tiers.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2023–27902 Filed 12–19–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meetings

TIME AND DATE: 2 p.m. on December 20, 2023.

PLACE: This Board meeting will be open to public observation only by webcast. Visit *https://www.fdic.gov/news/board-matters/video.html* for a link to the webcast. FDIC Board Members and staff will participate from FDIC Headquarters, 550 17th Street NW, Washington, DC.

Observers requiring auxiliary aids (*e.g.,* sign language interpretation) for this meeting should email *DisabilityProgram@fdic.gov* to make necessary arrangements.

STATUS: Open to public observation via webcast.

MATTERS TO BE CONSIDERED: The Federal Deposit Insurance Corporation's Board of Directors will meet to consider the following matters:

Discussion Agenda

Memorandum and resolution re: Proposed 2024 FDIC Operating Budget.

Memorandum and resolution re: Final Rule on FDIC Official Signs and Advertising Requirements, False Advertising, Misrepresentation of Insured Status, and Misuse of the FDIC's Name or Logo.

Summary Agenda

No substantive discussion of the following items is anticipated. The Board will resolve these matters with a single vote unless a member of the Board of Directors requests that an item be moved to the discussion agenda.

Disposition of Minutes of a Board of Directors' Meeting Previously Distributed.

Summary reports, status reports, and reports of actions taken pursuant to authority delegated by the Board of Directors.

CONTACT PERSON FOR MORE INFORMATION: Direct requests for further information concerning the meeting to Debra A. Decker, Executive Secretary of the Corporation, at 202–898–8748.

Authority: 5 U.S.C. 552b.

Dated at Washington, DC, on December 14, 2023.

Federal Deposit Insurance Corporation.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2023–28157 Filed 12–18–23; 4:15 pm]

BILLING CODE 6714–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments, relevant information, or documents regarding the agreements to the Secretary by email at *Secretary@fmc.gov,* or by mail, Federal Maritime Commission, 800 North Capitol Street, Washington, DC 20573. Comments will be most helpful to the Commission if received within 12 days of the date this notice appears in the **Federal Register**, and the Commission requests that comments be submitted within 7 days on agreements that request expedited review. Copies of agreements are available through the Commission's website (*www.fmc.gov*) or by contacting the Office of Agreements at (202) 523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 201325–001.

Agreement Name: Sealand/Network Space Charter Agreement.

Parties: Maersk A/S; Network Shipping, Ltd.

Filing Party: Wayne Rohde; Cozen O'Connor.

Synopsis: The Amendment changes the name of the agreement and deletes Panama, El Salvador, Nicaragua and Mexico from the geographic scope of the agreement. The Amendment changes the authority that Maersk had to charter space to Network to now authorizing Network to charter space to Maersk. The Amendment deletes obsolete language from the agreement and adds new language, revises the notice for termination and updates the persons to whom the notice is to be provided. The Amendment also restates the Agreement.

Proposed Effective Date: 1/26/2024.

Location: https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/25450.

Dated: December 15, 2023.

Carl Savoy,

Federal Register Alternate Liaison Officer.

[FR Doc. 2023–27959 Filed 12–19–23; 8:45 am]

BILLING CODE 6730–02–P

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Proposed Collection; Comment Request; Extension

AGENCY: Federal Trade Commission.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the Federal Trade Commission (FTC or Commission) is seeking public comment on its proposal to extend for an additional three years the Office of Management and Budget clearance for the Contact Lens Rule (the Rule). The current clearance expires on December 31, 2023.

DATES: Comments must be filed by January 19, 2024.

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. 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. The *reginfo.gov* web link is a United States Government website produced by the Office of Management and Budget (OMB) and the General Services Administration (GSA). Under PRA requirements, OMB's Office of Information and Regulatory Affairs (OIRA) reviews Federal information collections.

FOR FURTHER INFORMATION CONTACT: Paul Spelman, Attorney, Division of Advertising Practices, Bureau of Consumer Protection, Federal Trade Commission, (202) 326–2889, *pspelman@ftc.gov.*

SUPPLEMENTARY INFORMATION:

Title: Contact Lens Rule (Rule), 16 CFR part 315.

OMB Control Number: 3084–0127.

Type of Review: Extension of a currently approved collection.

The Rule was promulgated by the FTC pursuant to the Fairness to Contact Lens Consumers Act (FCLCA), Public Law 108–164 (Dec. 6, 2003), which was enacted to enable consumers to purchase contact lenses from the seller of their choice. The Rule became effective on August 2, 2004, and was most recently amended in 2020.[1] As mandated by the FCLCA, the Rule requires the release and verification of contact lens prescriptions which are generally valid for one year and contains recordkeeping requirements applying to both prescribers and sellers of contact lenses.

Specifically, the Rule requires that prescribers provide a copy of the prescription to the consumer upon the completion of a contact lens fitting, even if the patient does not request it, and verify or provide prescriptions to authorized third parties. The Rule also mandates that a contact lens seller may sell contact lenses only in accordance with a prescription that the seller either: (a) has received from the patient or prescriber; or (b) has verified through direct communication with the prescriber. Additional provisions in the Rule that constitute collections of information as defined by 5 CFR 1320.3(c) require that sellers who use calls containing automated verification messages record the entire call, and preserve such recordings for at least three years. In addition, the Rule requires that prescribers either: (a) obtain from patients, and maintain for a period of not less than three years, a signed confirmation of prescription release on a separate stand-alone document; (b) obtain from patients, and maintain for a period of not less than three years, a patient's signature on a confirmation of prescription release included on a copy of a patient's prescription; (c) obtain from patients, and maintain for a period of not less than three years, a patient's signature on a confirmation of prescription release included on a copy of a patient's contact lens fitting sales receipt; or (d) provide each patient with a copy of the prescription via online portal, electronic mail, or text message, and for three years retain evidence that such prescription was sent, received, or, if provided via an online-patient portal, made accessible, downloadable, and printable by the patient. For prescribers who choose to offer an electronic method of prescription delivery, the Rule requires that such prescribers maintain records or evidence of affirmative consent by patients to such digital delivery for three years. The Rule also requires prescribers to document in their records the medical reasons for setting a contact lens prescription expiration date of less than one year, and requires contact lens sellers to maintain records for three years of all direct communications involved in obtaining verification of a contact lens prescription, as well as prescriptions, or copies thereof, which they receive directly from customers or prescribers.

The information retained under the Rule's recordkeeping requirements is used by the Commission to substantiate compliance with the Rule and may also provide a basis for the Commission to bring an enforcement action. Without the required records, it would be difficult either to ensure that entities are complying with the Rule's requirements or to bring enforcement actions based on violations of the Rule.

Likely Respondents: Contact lens prescribers and contact lens sellers.

Estimated Annual Labor Hours Burden: 3,104,050 hours (derived from 2,045,650 contact lens prescriber hours + 1,058,400 contact lens seller hours).

- *Contact Lens Prescribers:* 750,000 hours (45 million contact lens wearers × 1 minute per prescription release/60 minutes) + 187,500 hours (33,750,000 contact lens wearers × 20 seconds per confirmation of prescription release) + 62,500 hours (11,250,000 contact lens wearers × 20 seconds per affirmative consent to electronic prescription delivery) + 295,650 hours (3,547,800 verification requests × 5 minutes per response/60 minutes) + 750,000 hours recordkeeping = 2,045,650 hours.
- *Contact Lens Sellers:* 985,500 hours (11,826,000 orders × 5 minutes per verification/60 minutes) + 72,900 burden hours (4,374,000 orders × 1 minute recordkeeping/60 minutes) = 1,058,400 hours.

Estimated Total Labor Cost Burden: Approximately $117,606,598 (derived from ($63.99 × 888,803 optometrist hours) + ($127.62 × 156,848 ophthalmologist hours) + ($19.78 × 1,000,000 prescribers' office clerk hours) + ($19.78 × 1,058,400 sellers' office clerk hours).

Estimated Total Non-Labor Cost Burden: $591,300 (11,826,000 × $.05 per automated message recording).

Estimated Total Annual Cost Burden: $120,764,786 ($117,606,598 labor cost + $591,300 non-labor cost).

Request for Comment:

On August 14, 2023, the FTC sought public comment on the information collection requirements associated with the Rule. 88 FR 55044. The FTC received one comment germane to the issues that the agency sought comment on pursuant to the PRA renewal request. That comment was from the American Optometric Association (''AOA''), an organization representing more than 50,000 optometrists and optometric professionals. In its comment, the AOA contends that the 2020 Rule amendment requiring that prescribers obtain a signed confirmation-of-prescription has created a greater compliance burden than previously projected by the FTC.[2]

As noted above, the 2020 Rule amendments require that upon completion of a contact lens fitting, the prescriber must request that a patient sign a statement confirming receipt of their contact lens prescription (unless a digital copy of a prescription is provided to the patient via portal, email, or text message).[3] The prescriber may, but is not required to, use the one-sentence confirmation statement, ''My eye care professional provided me with a copy of my contact lens prescription at the completion of my contact lens fitting'' to satisfy the requirement, and such statement can be on a stand-alone document or included on a contact lens prescription or exam receipt.[4]

In approving the Rule amendments in 2020, the FTC estimated that the time required to collect a patient signature and confirmation of prescription takes ten seconds on average.[5] The FTC's estimate of ten seconds was derived from two sources. The first was a similar previously-approved patient-acknowledgment-requirement under HIPAA, the Health Insurance Portability and Accountability Act, which requires, among other things, that each health provider obtain a patient signature confirming receipt of that provider's HIPAA Notice of Privacy Practices.[6] The

[1] Final Rule, 85 FR 50668 (Aug. 17, 2020).

[2] American Optometric Association (PRA Comment #7) *available at https://www.regulations.gov/comment/FTC-2023-0049-0007.*

[3] 16 CFR 315.3(c). In order to provide digital copies of prescriptions, the prescriber must first obtain a single signed consent-to-electronic-delivery from each patient.

[4] 16 CFR 315.3(c)(ii).

[5] 85 FR 50709.

[6] Standards for Privacy of Individually Identifiable Health Information, 67 FR 53182, 53261

Continued

HIPAA acknowledgment requirement,[7] which has been in effect for more than 20 years, faced objections prior to implementation over concerns it would be burdensome and costly to implement.[8] The U.S. Department of Health and Human Services rejected those contentions and determined that its signed acknowledgment would require just ten seconds to hand out and ten seconds to obtain a patient's signature.[9]

The second source for the FTC's estimate of 10 seconds was a consumer survey by the polling firm Survey Sampling International (''SSI'') of how long it took consumers to read a proposed two-sentence statement, ''My eye care professional provided me with a copy of my contact lens prescription at the completion of my contact lens fitting. I understand I am free to purchase contact lenses from the seller of my choice.'' The survey found that it took consumers, on average, twelve seconds to review those two sentences, and 90% of respondents read it in 20 seconds or less.[10] Additionally, 90% of consumers surveyed indicated they understood the proposed acknowledgement statement, and 94% indicated that they had no follow-up questions.[11] The Commission's Final Rule did not include the second sentence of the surveyed confirmation statement, thereby shortening the final confirmation statement by nearly half, with the expected result that it might only take six or seven seconds for consumers to read and comprehend. Based on the survey average of 12 seconds to read the previously-proposed two-sentence statement, and on the approved HHS signed-acknowledgment estimate, the Commission, in its Rule amendments of 2020, estimated ten seconds to read and provide a signature for the Rule's one-sentence confirmation-of-prescription-release statement.[12]

In its new PRA comment, however, the AOA contends that the FTC ''significantly underestimated'' how long it would take to confirm prescription releases.[13] According to the AOA, a 2023 survey it conducted of some of its member optometrists found that 84.8% indicate it takes 30 seconds or more to obtain the patient's signed confirmation, not counting additional time necessary to address patient questions about the form they are signing, and 69.9% of prescribers said patients ''typically'' have questions regarding the acknowledgment.[14]

AOA's comment accords with some written and verbal comments provided to the Commission during an ongoing review of the Eyeglass Rule,[15] which includes a proposal to add a similar confirmation-of-prescription-release requirement. The Commission's Eyeglass Rule review has examined, among other things, the burden arising from the existing Contact Lens Rule's confirmation-of-prescription-release requirement, and thus some of the comments received during the Eyeglass Rule review pertain to the Rule burden discussed herein. For instance, at a 2023 FTC workshop on the Eyeglass Rule,[16] panelist Dr. Stephen Montaquila, a Rhode Island optometrist, estimated that it takes his staff four minutes to complete the entire Contact Lens Rule process of printing out a patient's prescription, handing it to the patient, explaining why it needs to be signed, having the patient sign it, making a copy of it, and storing the signed copy as a record.[17] Dr. Montaquila did not break down his estimate by task, so it is unclear how long he estimates it takes for a consumer to simply read and sign the confirmation statement, as opposed to the time it takes for his staff to print out the prescription and confirmation and store the confirmation as a record. As detailed in this submission, the Commission has allowed for one minute for prescribers to print out the prescription, and an additional minute for staff to store the signed confirmation.

In addition, the National Taxpayers Union, an Alexandria, Virginia-based advocacy organization, submitted a comment to the Eyeglass Rule review stating that while it generally supports the confirmation requirement, ''[G]iven the various reading speeds of customers who may be elderly or have limited proficiency in English, the 10 second estimate [used for the Contact Lens Rule's confirmation requirement] could prove low.'' [18]

Some commenters, however, disagreed that it takes a significant amount of time to obtain a patient's signed confirmation. The National Association of Retail Optical Companies (''NAROC''), a trade association comprised of retail optical companies with co-located eye care services (such as LensCrafters, Costco Optical, and Walmart Vision Center), commented that thousands of optometrists affiliated in co-location with NAROC member companies ''regularly comply with [Contact Lens Rule requirements] with little or no added cost or other burden on the eye care practice.'' [19] According to NAROC representative and Eyeglass Rule Workshop panelist Joseph Neville, ''I've personally witnessed a couple of situations where the process for contact lenses seemed very easy. . . . the Rx was handed over at the front desk by the staff person, and the staff person maybe a bit simplistically said, ''We'd like to ask you to sign this receipt for your

(Aug. 14, 2002) (implementing 45 CFR 164.520(c)(2)(ii)).

[7] 45 CFR 164.520(c)(2)(ii).

[8] Standards for Privacy of Individually Identifiable Health Information, 67 FR 53182, 53240–43 (Aug. 14, 2002) (implementing 45 CFR 164.520(c)(2)(ii)).

[9] *Id.* at 53240–43, 53260–61. HHS also calculated three cents per signed acknowledgment for the cost some doctors might incur for the paper. *Id.* at 53256. Since 2018, HHS has been considering a proposal to eliminate its signed-acknowledgment requirement as no longer necessary to compel providers to distribute Notices of Privacy Practices to patients, but HHS has not determined that the 10-second time estimate for obtaining a patient signature is inaccurate. Request for Information on Modifying HIPAA Rules to Improve Coordinated Care, 83 FR 64302, 64302–03 (2018), *https://www.govinfo.gov/content/pkg/FR-2018-12-14/pdf/2018-27162.pdf#page=1.* For a more fulsome discussion about the HHS proposal to eliminate its signed acknowledgment, and why this has little relevance with respect to the Contact Lens Rule, *see* CLR Final Rule, 85 FR 50684–85, footnotes and accompanying text.

[10] 1–800 CONTACTS (Contact Lens Rule Workshop Comment #3207); Laurence C. Baker, ''Analysis of Costs and Benefits of the FTC Proposed Patient Acknowledgment and Recordkeeping Amendment to the Contact Lens Rule,'' 11 (2017), *https://www.ftc.gov/system/files/summaries/initiatives/677/10192017_meeting_summary_from_mko_for_the_contact_lens_rule_rulemaking_proceeding.pdf* (SSI online survey of 500 respondents). Twelve seconds was the average, the median was 10 seconds.

[11] *Id.* at 18.

[12] 84 FR 24693.

[13] AOA (PRA Comment #7), *supra* note 9.

[14] *Id.* According to AOA, the survey was conducted in-house by its Health Policy Institute and Research Departments, and distributed to member optometrists via AOA's weekly email newsletter with a link and invite to the survey titled ''Voice your concerns by Oct. 9: Complying with the FTC Contact Lens Rule.'' Of members who responded to the AOA's link request, 327 completed the survey.

[15] This is officially the Ophthalmic Practice Rules, 16 CFR part 456.

[16] ''A Clear Look at the Eyeglass Rule,'' Public Workshop (May 18, 2023), transcript *available at https://www.ftc.gov/news-events/events/2023/05/clear-look-eyeglass-rule* [hereinafter ER Workshop Transcript].

[17] Montaquila, ER Workshop Transcript at 23–24.

[18] National Taxpayers Union (ER NPRM Comment #28) *available at https://www.regulations.gov/comment/FTC-2023-0001-0028. See also* Prine (ER Workshop Comment #38) (simply stated that having patients sign a receipt of their prescription and then scan that into their chart ''took a lot of extra time'') *available at https://www.regulations.gov/comment/FTC-2023-0001-0038;* Michaels, ER Workshop Transcript at 9 (stating, ''There's a lot of time, effort, discussion around [the confirmation requirement]. I think that is something that is greatly underestimated in terms of how long it takes and how effort it takes to go through that process.'').

[19] NAROC (ER NPRM Comment #24) *available at https://www.regulations.gov/comment/FTC-2023-0001-0024. See also* Consumer Action (ER NPRM Comment #26) (''we do not believe it is a burden on providers to obtain, document, and retain a consumer's affirmative receipt of their prescription.'').

prescription. We're required to get your signature acknowledging that you've received it.'' And a couple of people, and again, anecdotes here that I witnessed on this, just said, ''Okay, fine, thank you.'' [20]

Discussion of the Comments and Evidence Regarding the Time Required

In considering how much time it takes to complete the confirmation-of-prescription-release requirement for this Paperwork Reduction Act purpose, the Commission has evaluated the evidence in the record, including the previously-approved HHS estimate for a similar signed-acknowledgment, the comments in response to the PRA request for comment in the 60-Day **Federal Register** notice and the Contact Lens Rule and Eyeglass Rule rulemakings, and the two surveys mentioned above, one of consumer read-times and the other of prescriber-estimates for staff time.

The Commission finds none of the comments, and neither survey, dispositive in and of itself. The surveys, in particular, are suggestive but not determinative. The SSI survey of consumer read-times on a computer monitor is helpful, but may not take into account elderly patients or those for whom English is not their first language. It also does not take into account the time it takes for prescribers' staff to hand a paper confirmation document to the patient and for the patient to sign it and hand it back. The AOA survey, meanwhile, very likely overestimates the time necessary to obtain a confirmation because of the manner in which the survey solicited its respondents. The prescribers were self-selected in response to an AOA invitation to ''Voice your concerns'' about complying with the Contact Lens Rule. Because the poll only included prescribers who responded to this invitation, its findings may not be representative of the average prescriber. In fact, it is probable that a large number of those who responded were prescribers who *have* concerns about the patient-confirmation requirement and the time it takes to obtain a confirmation, while prescribers who do not have concerns, or have fewer concerns, did not bother to respond. By framing the survey as an invitation to voice concerns about complying with the Rule, the survey has been transformed from a disinterested information-gathering tool into a motivating call to action. So while it is possible that prescribers who did not respond to the survey also share the concerns raised by survey respondents, that cannot be concluded from the survey.[21]

The Commission also has concerns that some of the time prescribers ascribe to patients reading and signing the confirmation is, in fact, due to non-mandated choices by prescribers with respect to the design of the confirmation statement. As noted above, the Rule merely requires that patients read and sign a simple statement confirming receipt of their prescription, and the Commission allowed that the one-sentence statement, ''My eye care professional provided me with a copy of my contact lens prescription at the completion of my contact lens fitting,'' would fully satisfy the requirement. According to the AOA survey, nearly 60% of prescribers use a separate form with a statement confirming receipt (as opposed to obtaining a patient signature on a prescription copy or sales receipt), but the survey did not specify or ask prescribers what confirmation statement they used on their form, making it difficult to determine the true average time it takes to comply with the confirmation-of-prescription-release requirement. Moreover, the AOA has supplied its members with a model template confirmation form that includes four additional paragraphs consisting of ''important information to review prior to receiving your contact lens prescription.'' [22] This information includes various recommendations from the Centers for Disease Control and the Food and Drug Administration about healthy contact lens use (such as ''Take out your contacts and call your eye doctor if you have eye pain, discomfort, redness, or blurry vision'') as well as five bullet points listing some of the symptoms for an eye infection (''Irritated, red eyes, worsening pain in or around the eyes,'' etc.).[23] While the document is titled ''Contact Lens Prescription Acknowledgment Form,'' only at the very end is there a statement, ''Sign below to acknowledge that you were provided a copy of your contact lens prescription at the completion of your contact lens fitting.''

According to Workshop Panelist Dr. Montaquila, the AOA template is a common form used to obtain patient confirmations.[24] If this is indeed the case, the Commission is not surprised that many prescribers report it takes patients 30 seconds or longer to read and sign, nor that patients might have questions, or be confused, as to why they now have to sign and acknowledge not just receipt of their prescription, but that they read these recommendations from the CDC and FDA. The additional information from these two other federal agencies may be useful for patients, but is not required by the Rule, nor considered part of the PRA burden of compliance.

Despite the aforementioned concerns about the reliability of the AOA survey in establishing the time it takes for a patient confirmation, the Commission does not discount the survey altogether, and views it as suggestive, and an additional indication that many prescribers sincerely believe the 10-second estimate does not accurately reflect the time required to obtain a patient's signed confirmation. The Commission has therefore decided to increase the estimated time to obtain a patient confirmation signature (and the time to collect an affirmative consent to electronic delivery, in instances where the prescription is provided digitally rather than in paper) from 10 to 20 seconds. The Commission believes that 20 seconds may better reflect the time required for a patient to not just read a one-sentence confirmation, but also to physically sign and return the document to staff, and for any staff explanation as to why the patient's signature is required. The 20-second estimate may also better align with the original HIPAA estimate, which accorded 10 seconds to hand out the acknowledgment and another ten seconds to obtain a patient's signature and collect the document.[25]

Pursuant to OMB regulations, 5 CFR part 1320, that implement the PRA, 44 U.S.C. 3501 *et seq.,* the FTC is providing this second opportunity for public comment while seeking OMB approval to renew the pre-existing clearance for the Rule.

Estimated Annual Hours and Labor Cost Burden

Estimated annual hours burden: 3,104,050 hours.

This figure is derived by adding disclosure and recordkeeping-hours for contact lens prescribers to

[20] Neville, ER Workshop Transcript at 28–29.

[21] The Commission also notes that while the AOA states that it represents some 50,000 optometric professionals, only 327 members responded to AOA's invitation and completed the survey, which could indicate that most AOA members do not have concerns about complying with the Contact Lens Rule. However, there could be other reasons for the relatively small number of prescribers (in proportion to the total membership) who responded, so the Commission will not draw any inferences from the low response rate.

[22] *See* AOA Contact Lens Rule Compliance Toolkit, sample template, 8, available at *https://documents.aoa.org/Documents/CLCS/Contact-Lens-Rule-Compliance-Toolkit.pdf.*

[23] *Id.*

[24] Montaquila, ER Workshop transcript at 23.

[25] *See supra* notes 15–16.

recordkeeping hours for contact lens sellers.

1. Prescribers and Their Office Staff

The Rule requires prescribers to collect information and make disclosures in three ways. Upon completing a contact lens fitting, the Rule requires that prescribers (1) provide a copy of the contact lens prescription to the patient,[26] (2) collect a patient's signature on either a Confirmation of Prescription Release or a consent-to-electronic-prescription-release and preserve such record, and (3) as directed by any person designated to act on behalf of the patient, provide or verify the contact lens prescription. Prescribers can verify a prescription either by responding affirmatively to a request for verification, or by not responding at all, in which case the prescription will be ''passively verified'' after eight business hours. Prescribers are also required to correct an incorrect prescription submitted by a seller, and notify a seller if the prescription submitted for verification is expired or otherwise invalid. Staff believes that the burden of complying with these requirements is relatively low.

The number of contact lens wearers in the United States is estimated by the Centers for Disease Control to be approximately 45 million.[27] Therefore, assuming an annual contact lens exam for each contact lens wearer, approximately 45 million people would receive a copy of their prescription each year under the Rule and be required to either sign a Confirmation of Prescription Release or consent to electronic delivery of their prescription.[28]

At an estimated one minute per prescription, the annual time spent by prescribers complying with the requirement to release prescriptions to patients would be approximately 750,000 hours [(45 million × 1 minute)/60 minutes = 750,000 hours]. Since the Rule requires that prescriptions be released automatically at completion of a fitting, the Commission—for purposes of calculating the PRA burden—assumes that prescription releases to patients are handled by the prescriber rather than the prescriber's office staff.[29] In all likelihood, this estimate overstates the actual burden because it includes the time spent by prescribers who already release prescriptions to patients in the ordinary course of business. Furthermore, this estimate allocates the same time for both paper and electronic delivery of prescriptions, even though the latter likely takes less time for the prescriber.[30]

The time required to collect a signature from a patient confirming release of a prescription is estimated at twenty seconds, as discussed above. It is estimated that 25% of patients would opt for electronic delivery of their prescriptions and thus would not need to sign a Confirmation of Prescription Release. Based on our knowledge of the industry and how the medical field operates, the Commission believes most signed patient confirmations are obtained by prescribers' office staff rather than by the prescribers themselves.[31] The time spent by prescribers' staff complying with the requirement to obtain signed confirmations from the other 75% of patients is approximately 187,500 hours annually [(75% × 45 million prescriptions yearly × 20 seconds) = 187,500 hours].

As noted above, it is estimated that approximately 25% of patients would opt for electronic delivery of their prescriptions. In order to opt for electronic delivery, patients are required to sign an affirmative consent to receive their prescription via email, text, or patient portal. The time required to collect an affirmative consent signature is estimated at twenty seconds, and the annual time spent complying with the requirement to obtain such signatures is approximately 62,500 hours [(25% × 45 million prescriptions yearly × 20 seconds) = 62,500 hours]. Based on our knowledge of the industry and how the medical field operates, the Commission believes most signed patient consents are obtained by prescribers' office staff rather than by the prescribers themselves.[32]

As stated above, prescribers may also be required to provide or verify contact lens prescriptions to sellers. According to survey data, approximately 36% of contact lens purchases are from a source other than the prescriber.[33] Assuming that each of the 45 million contact lens wearers in the U.S. makes one purchase per year, this means that approximately 16,200,000 contact lens purchases (45 million × 36% = 16,200,000) are made from sellers other than the prescriber.

Based on prior discussions with industry, approximately 73% of sales by non-prescriber sellers require verification, and prescribers affirmatively respond (by notifying the seller that the prescription is invalid or incorrect) to approximately 15% of those verification requests. Using a response rate of 15%, the FTC therefore estimates that prescribers' offices respond to approximately 1,773,900 verification requests annually [(16,200,000 purchases × 73%) × 15% = 1,773,900 responses]. Additionally, some prescribers may voluntarily respond to verification requests and confirm prescriptions (as opposed to simply letting the prescription passively verify). Because correcting or declining

[26] The 2020 amendments to the Contact Lens Rule altered the definition of ''provide to the patient a copy'' of the contact lens prescription to include electronic delivery of the prescription, such as via email, text, or by uploading it to a patient portal. In order to avail themselves of this option, prescribers must obtain and maintain evidence of the patients' affirmative consent to electronic delivery for three years.

[27] Centers for Disease Control, Healthy Contact Lens Wear and Care, Fast Facts, *https://www.cdc.gov/contactlenses/fast-facts.html. See also* U.S. Food & Drug Administration, Focusing on Contact Lens Safety, *https://www.fda.gov/consumers/consumer-updates/focusing-contact-lens-safety.*

[28] In the past, some commentators have suggested that typical contact lens wearers obtain annual exams every 18 months or so, not every year. However, because prescriptions under the Rule are valid for a minimum of one year, we continue to estimate that patients seek exams every 12 months. Staff believes a calculation that assumes adherence to the Rule will provide the best estimate of the Rule's contemplated burden, even if, in practical terms, it overestimates the burden.

[29] This assumption may be incorrect, particularly in instances where a contact lens fitting is not completed during the prescriber's examination itself, but rather after the patient tests out the lenses for a few days. Nonetheless, the Commission does not have information as to what percentage of prescriptions are released by prescribers or by prescribers' staff, and thus will calculate the PRA with the assumption that they are all released by the prescriber.

[30] *See* Michaels, Workshop Transcript at 18 (noting that in his office, prescriptions are automatically uploaded to a patient portal ''the very second the prescription is finalized.'')

[31] In prior PRA submissions, the task of collecting a patient signature on a confirmation-of-prescription-receipt was attributed to prescribers, but based on more recent conversations with prescribers and others in the industry, the Commission now believes that this task is more appropriately designated as performed by prescribers' office staff. This is further supported by comments during the Eyeglass Rule Workshop, such as that of panelist Dr. Montaquila, who noted that his staff completes the process ''from explaining why we're doing it to the patient, providing them with their prescription, making copies, providing their prescription back to them, and ultimately storing it. . . . Our staff has to explain, 'You're signing this for this reason.'' Montaquila, ER Workshop Transcript at 22, 28. *See also* Neville, ER Workshop Transcript at 28 (commenting that he has observed situations where the doctor pushed a button to have the prescription printed out at the front desk, the prescription was handed over at the desk by the staff person, and the staff person obtained the patient's signature on the confirmation.); AOA Report for Complying with the FTC Contact Lens Rule, (survey to prescribers, Question 3, ''Have you experienced challenges in training staff on the new requirements for the Contact Lens Rule?''; Question 9 ''How much time per day does your staff spend on addressing patient questions with the acknowledgment form and process?'').

[32] *See supra* note 40.

[33] Jason J. Nichols & Deborah Fisher, ''2018 Annual Report,'' Contact Lens Spectrum, Jan. 1, 2019, *https://www.clspectrum.com/issues/2019/january-2019.*

incorrect prescriptions is mandated by the Rule and occurs in response to approximately 15% of requests, staff assumes that prescribers voluntarily confirm prescriptions less often, and confirm at most an additional 15% of prescriptions (and, in all likelihood, significantly less). Using a combined response rate of 30%, the FTC estimates that prescribers' offices respond to approximately 3,547,800 requests annually.

According to prior industry comments,[34] responding to verification requests requires approximately five minutes per request. Using that data, we estimate that these responses require an additional 295,650 hours annually [(3,547,800 × 5 minutes)/60 minutes = 295,650 hours]. Based on investigations and anecdotal comments, FTC staff is aware that many verification requests are handled by office staff rather than by the prescribers themselves. FTC staff, however, does not possess reliable information as to what percentage of verification requests are performed by prescribers or their staff, and thus will allocate all such time to prescribers.

Lastly, the Rule and FCLCA also impose recordkeeping requirements on prescribers' offices. First, they must maintain signed confirmations, or signed consent to electronic prescription delivery and proof that such prescriptions were delivered via email, text, or patient portal, for a period of three years. For purposes of PRA analysis, the Commission has used the assumption that all prescriber offices require a full minute to store and maintain each confirmation record, and a full minute to store and maintain each consent to electronic prescription delivery and proof of electronic prescription delivery.[35] The Commission thus allots an additional 750,000 annual hours for prescribers' offices to store and maintain records of patient confirmations and consents. The Commission believes these labor hours are most likely performed by prescribers' office staff.

The Rule also requires prescribers to document the specific medical reasons for setting a contact lens prescription expiration date shorter than the one-year minimum established by the FCLCA. This burden is likely to be nil because the requirement applies only in cases when the prescriber invokes the medical judgment exception, which is expected to occur infrequently, and prescribers are likely to record this information in the ordinary course of business as part of their patients' medical records. As mentioned previously, the OMB regulation that implements the PRA defines ''burden'' to exclude any effort that would be expended regardless of a regulatory requirement.

Combining all hours spent annually disclosing prescriptions to consumers, obtaining confirmations of prescription release from consumers, obtaining affirmative consent to electronic prescription delivery from consumers, responding to verification requests, and maintaining records as required by the Rule, we estimate a total of 2,045,650 hours for all contact lens prescribers to comply with the Rule [750,000 prescription-release hours + 187,500 confirmation-collection hours + 62,500 electronic-delivery-consent-collection hours + 295,650 verification-response hours + 750,000 recordkeeping hours = 2,045,650 hours]. Of this total, we estimate 1,045,650 are prescriber labor hours, and 1,000,000 are labor hours performed by prescribers' clerical office staff.

2. Sellers

As noted above, a seller may sell contact lenses only in accordance with a valid prescription that the seller has (a) received from the patient or prescriber, or (b) verified through direct communication with the prescriber. The FCLCA also requires sellers to retain prescriptions and records of communications with prescribers relating to prescription verification for three years.

As stated previously, there are approximately 16,200,000 sales by non-prescriber sellers annually and approximately 73% of such sales require verification. Therefore, sellers verify approximately 11,826,000 orders annually and retain two records for such sales: the verification request and any response from the prescriber. Staff estimates that sellers' verification and recordkeeping for those orders will entail a maximum of five minutes per sale. At an estimated five minutes per sale to each of the approximately 11,826,000 orders, contact lens sellers will spend a total of 985,500 burden hours complying with this portion of the requirement [(11,826,000 × 5 minutes)/60 minutes = 985,500 hours].

Approximately 27% of sales to non-prescriber sellers do not require verification and thus require only that the seller retain the prescription provided. Staff estimates that this recordkeeping burden requires at most one minute per order (in truth, in many cases this retention is electronic and automatic and will not require any time) for 4,374,000 orders [16,200,000 sales × 27%], resulting in 72,900 recordkeeping burden hours [(4,374,000 orders × 1 minute)/60 minutes = 72,900 hours].

Combining burden hours for all orders [985,500 hours + 72,900 hours], staff estimates a total of 1,058,400 hours for contact lens sellers. It is likely that this estimate overstates the actual burden because it includes the time spent by sellers who already keep records pertaining to contact lens sales in the ordinary course of business, and those whose records are generated and preserved automatically when a customer orders online, which staff believes is the case for many online sellers.

Estimated total labor cost burden: Approximately $117,606,598.

This figure is derived from applying hourly wage figures for optometrists, ophthalmologists, and office clerical staff to the burden hours described above. This estimate is higher than the $84,548,448 labor cost estimate submitted to OMB in 2019 due to new information collection and recordkeeping requirements in the Rule, and to wage increases for optometrists, ophthalmologists, and office staff.

According to Bureau of Labor Statistics (BLS), salaried optometrists earn an average wage of $63.99 per hour, ophthalmologists—which are listed by BLS under ''surgeons''—earn an average wage of $127.62 per hour, and general office clerks earn an average wage of $19.78 per hour.[36] Based on our knowledge of the industry and the number of optometrists and ophthalmologists in the United States, we assume that of the 1,045,650 prescriber labor hours relating to the Rule, optometrists are performing 85% of such hours and ophthalmologists are performing the remaining 15% of prescriber hours.[37] We credit general office clerks for performing the remaining hours, both for prescribers' offices (1,000,000 hours) and for non-prescriber sellers (1,058,400 hours). Based on these assumptions and

[34] Notice and Request for Comment, 81 FR 62501 (Sept. 9, 2016).

[35] 85 FR 5709.

[36] Press Release, Bureau of Labor Statistics, United States Department of Labor, Occupational Employment and Wage Statistics—May 2022, *https://www.bls.gov/news.release/ocwage.t01.htm.* Median salaries for prescribers and clerks are slightly lower than average salaries and, consequently, would result in a lower overall burden imposed by the Rule. It is possible that medians are more representative since they do not include salary outliers that can distort the average. Salaries can also vary significantly by region. However, since Contact Lens Rule PRA submissions have historically used national salary averages to estimate the burden, the FTC will continue to do so for this submission.

[37] *See* Proposed Collection Request, 81 FR 31938, 31940 (May 20, 2016); Proposed Collection Request, 84 FR 32170, 32172 (July 5, 2019).

estimates above, the estimated total labor cost attributable to the Rule is approximately $117,606,597 [($63.99 × 888,803 optometrist hours = $56,874,504) + ($127.62 × 156,848 ophthalmologist hours = $20,016,942) + ($19.78 × 1,000,000 prescribers' office clerk hours = $19,780,000) + ($19.78 × 1,058,400 sellers' office clerk hours = $20,935,152) = $117,606,598].

Capital and Other Non-Labor Costs

Estimated annual non-labor cost burden: $591,300.

Staff believes that the Rule's disclosure and recordkeeping requirements described above impose negligible capital or other non-labor costs, as the affected entities are likely to have the necessary supplies and/or equipment already (*e.g.,* prescription pads, patients' medical charts, facsimile machines and paper, telephones, and recordkeeping facilities such as filing cabinets or other storage) to perform those requirements. The 2020 Rule amendments, however, modified the Rule to require that sellers who use automated verification messages record the calls and preserve the recordings for three years. The Commission does not believe that requiring sellers who use automated messages for verification to record the calls and preserve them will create a substantial burden. The requirement will not require additional labor time, since the calls will be for the same duration as they were previously, but may require capital and other non-labor costs to record the calls and store them electronically. Based on comments supplied during the Rule modification process, the Commission estimates the cost to record each verification call at five cents apiece.[38]

Based on survey data, approximately 36% of contact lens purchases are from a source other than the prescriber. Assuming that each of the 45 million contact lens wearers in the U.S. makes on purchase per year, this would mean that approximately 16,200,000 contact lens purchases are made annually from sellers other than the prescribers. And since approximately 73% of sales by non-prescriber sellers require verification, this means that approximately 11,826,000 contact lens purchases would require verification calls, faxes, or emails. The Commission does not possess information as to the percentage of verifications completed by telephone versus fax or email, and thus for purposes of this analysis will assume that all verifications are performed via phone and deliver automated messages that are subject to the call-recording requirement. Based on the aforementioned assumptions, the Commission estimates that the requirement to record automated telephone verification messages will cost sellers, in aggregate, $591,300 (11,826,000 × $.05).

Total Costs to the Industry (Including Labor and Non-Labor Costs)

Combining the annual labor cost burden with the non-labor cost burden, the total cost burden of the Rule is estimated at $118,197,898 ($117,606,598 + $591,300 = $118,197,898).

This burden is not insubstantial, but to put it in perspective, a recent survey estimated the value of the U.S. contact lens market at approximately $9.6 billion (not counting examination revenue).[39] Therefore, the total cost burden estimate of $118,197,898, imposed by the Rule, represents a cost of approximately 1.2% of the overall retail revenue generated through the sale of contact lenses.

Your comment—including your name and your state—will be placed on the public record of this proceeding. Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, such as anyone's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or any commercial or financial information which . . . is privileged or confidential''—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Josephine Liu,

Assistant General Counsel for Legal Counsel.

[FR Doc. 2023–27877 Filed 12–19–23; 8:45 am]

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[38] 85 FR 50711. It is possible this would be a one-time expense for sellers to invest in recording equipment, as opposed to an annual outlay. But in the absence of information as to how sellers manage such recordings, the Commission will assume, for the purpose of this PRA analysis, that recording expense is a recurring annual cost burden.

[39] *See https://www.globenewswire.com/en/news-release/2022/09/05/2509723/0/en/Contact-Lenses-Market-Size-Will-Achieve-USD-17-4-Billion-by-2030-growing-at-6-9-CAGR-Exclusive-Report-by-Acumen-Research-and-Consulting.html.* Some estimates already put the U.S. contact lens market as high as $17 billion, *see https://www.visionmonday.com/business/article/us-optical-retail-market-estimated-at-765-billion-in-the-vision-councils-first-comprehensive-market-insights-report/.*

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Notice of Closed Meeting

Pursuant to 5 U.S.C. 1009(d), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended, and the Determination of the Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, CDC, pursuant to Public Law 92–463. 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: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP)–PAR 20–280, Cooperative Research Agreements Related to the World Trade Center Health Program (U01); RFA–OH–24–002, Exploratory/Developmental Grants on Lifestyle Medicine Research Related to the World Trade Center Health Program (R21); RFA–OH–24–003, Exploratory/Developmental Grants Related to the World Trade Center Survivors (R21–No Applications with Responders Accepted); and RFA–OH–24–004, World Trade Center Health Program Mentored Research Scientist Career Development Award (K01).

Dates: March 19–21, 2024.

Times: 11 a.m.–6 p.m., EDT.

Place: Video-Assisted Meeting.

Agenda: To review and evaluate grant applications.

For Further Information Contact: Laurel Garrison, M.P.H., Scientific Review Officer, Office of Extramural Programs, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention, 5555 Ridge Avenue, Cincinnati, Ohio 45213. Telephone: (513) 533–8324; Email: *LGarrison@cdc.gov*.

The Director, Office of Strategic Business Initiatives, Office of the Chief

Operating Officer, Centers for Disease Control and Prevention, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Kalwant Smagh,

Director, Office of Strategic Business Initiatives, Office of the Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2023–27972 Filed 12–19–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–5020]

Notice to Public of Website Location of the Office of the Chief Scientist Proposed Guidance Development List

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) is announcing the website location where the Agency will post a list of possible topics for future guidance document development or revision by the Office of the Chief Scientist (OCS) during the next year. In addition, FDA has established a docket where interested persons may provide comments that could benefit the OCS guidance program and its engagement with stakeholders, including comments on the priority of topics for guidance. This feedback is critical to the OCS guidance program as we consider feedback from stakeholders along with Agency resources and priorities.

ADDRESSES: You may submit either electronic or written comments at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2023–N–5020 for ''Notice to Public of Website Location of OCS Proposed Guidance Development Agenda.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Jennifer Ross, Office of the Chief Scientist, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 1, Rm. 4332, Silver Spring, MD 20993–0002, 301–796–4880 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

FDA welcomes comments on any or all of the topics for guidance documents on the list as explained in § 10.115(f)(5) (21 CFR 10.115(f)(5)). FDA has established Docket No. FDA–2023–N–5020 where comments on the list, drafts of proposed guidance documents on those or other topics, suggestions for new or different guidances within OCS's purview, and relative priority of listed guidance documents may be submitted and shared with the public (see **ADDRESSES**). FDA believes this docket is a valuable tool for receiving information from interested persons. FDA anticipates that feedback from interested persons will allow OCS to better prioritize and more efficiently draft guidances to meet the needs of the Agency and our stakeholders.

Consistent with the Good Guidance Practices regulation at § 10.115(f)(4), OCS would appreciate suggestions that OCS revise or withdraw an already existing guidance document within OCS's purview. We request that the suggestion clearly explain why the guidance document should be revised or withdrawn and, if applicable, how it should be revised.

II. Website Location of Guidance List

This notice announces the website location of the document that provides

the list of possible topics for future guidance document development or revision by OCS during the next year. The initial list covers calendar year (CY) 2024. To access the list, visit FDA's website at *https://www.fda.gov/about-fda/guidance-documents-office-chief-scientist/office-chief-scientist-guidance-documents-under-development.* We note that the topics on this list may be removed or modified based on current priorities, as well as comments received regarding this list. Furthermore, several factors may impact FDA's ability to issue a guidance, including, for example, new Administration priorities, emerging public health issues, or other extenuating circumstances. The Agency is not required to publish every guidance on the list if, for example, the resources needed would be to the detriment of meeting other Agency priorities and statutory obligations. In addition, the Agency is not precluded from issuing guidance documents that are not on the list.

Dated: December 15, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–27967 Filed 12–19–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Public Comment Request; Information Collection Request Title: Implement Maternal, Infant, and Early Childhood Home Visiting Program 2022 Legislative Changes: Assessment of Administrative Burden

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the requirement for opportunity for public comment on proposed data collection projects of the Paperwork Reduction Act of 1995, HRSA announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

DATES: Comments on this ICR should be received no later than February 20, 2024.

ADDRESSES: Submit your comments to *paperwork@hrsa.gov* or mail the HRSA Information Collection Clearance Officer, Room 14N39, 5600 Fishers Lane, Rockville, Maryland 20857.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email *paperwork@hrsa.gov* or call Joella Roland, the HRSA Information Collection Clearance Officer, at (301) 443–3983.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the ICR title for reference.

Information Collection Request Title: Implement Maternal, Infant, and Early Childhood Home Visiting Program 2022 Legislative Changes: Assessment of Administrative Burden, OMB No. 0906–xxxx—[New].

Abstract: The Consolidated Appropriations Act, 2023, Public Law 117–328, Section 6101, the Jackie Walorski Maternal and Child Home Visiting Reauthorization Act of 2022 (Section 6101 of the Consolidated Appropriations Act, 2023) extended funding for the Maternal, Infant, and Early Childhood Home Visiting (MIECHV) Program for an additional 5 years and adopted new program requirements. This included a new requirement for the Secretary of Health and Human Services to assess and reduce burden on MIECHV funding recipients in administering the program by (1) eliminating duplication and streamlining reporting requirements; (2) analyzing ways, in consultation with administering agencies (*i.e.,* MIECHV funding recipients) to reduce the number of hours spent on complying with paperwork requirements by at least 15 percent; (3) reviewing paperwork and data collection requirements for tribal MIECHV funding recipients and exploring, in consultation with tribes and tribal organizations, ways to reduce administrative burden, respect sovereignty, and acknowledge the different focus points for tribal funding recipients; (4) collecting input from relevant state fiscal officials to align fiscal requirements and oversight for states and eligible entities to ensure consistency with standards and guidelines for other federal formula grant programs; and (5) consulting with administering agencies and service delivery model representatives on needed and unneeded data elements regarding the dashboards provided for in newly added Social Security Act subsection 511(d)(1)(B), consistent with the data requirements of such subsection.

Through this ICR, HRSA aims to survey state, jurisdiction, and tribal MIECHV funding recipients to obtain feedback regarding potential ways to reduce administrative burden, as described above. Home visiting model developers will also be surveyed on potential ways to reduce administrative burden in their work to refine data collection requirements that align with MIECHV Program requirements.

Need and Proposed Use of the Information: Section 511(h)(6)(A) of the Social Security Act requires the Secretary of Health and Human Services to assess and reduce administrative burden on MIECHV funding recipients. Information gained from this information collection will inform recommendations to reduce administrative burden.

Likely Respondents: State and jurisdiction MIECHV Program funding recipients that are states, territories, and, where applicable, nonprofit organizations receiving MIECHV funding to provide home visiting services within states; tribal MIECHV Program funding recipients that are tribes and tribal organizations; and developers of home visiting models that are eligible for MIECHV funding.

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
State and Jurisdiction MIECHV Funding Recipient Survey	56	1	56	1.25	70
Tribal MIECHV Funding Recipient Survey	28	1	28	1.25	35
Home Visiting Model Developer Survey	24	1	24	1.25	30
Total	108	1	108		135

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2023–27895 Filed 12–19–23; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS–0937–0025]

Agency Information Collection Request; 30-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment.

DATES: Comments on the ICR must be received on or before January 19, 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: Sherrette Funn, *Sherrette.Funn@hhs.gov* or (202) 264–0041, or *PRA@HHS.GOV.* When submitting comments or requesting information, please include the document identifier 0937–0025–30D and project title for reference.

SUPPLEMENTARY INFORMATION: Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Title of the Collection: U.S. Public Health Service Commissioned Corps.

Type of Collection: Extension.

OMB No.: 0937–0025.

Abstract: Under the Department of Health and Human Services, The Commissioned Corps of the U.S. Public Health Service has a need for the information in order to assess the qualifications of each applicant and make a determination whether the applicant meets the requirements to receive a commission. The information is used to make determinations on candidates/applicants seeking appointment to the Regular Corps and Ready Reserve Corps to assess whether they are suitable for life in the uniformed services based upon a review of a variety of assessment factors including, but not limited to personal adjustment, employment history, character, and a candidate's prior history of service in one of the uniformed services. Their potential for leadership as a commissioned officer and their ability to deal effectively with people is evaluated.

ANNUALIZED BURDEN HOUR TABLE

Type of respondent	Form name	Number of Regular Corps respondents	Number of Reserve Corps respondents	Number response per respondent	Average burden per responses (in hours)	Total burden hours
Interested Health Professionals	Prequalification Questionnaire	6,000	1,000	1	10/60	1,167
Health Professionals	Form PHS–50	3,000	500	1	15/60	875
References (college professors/teachers).	Form PHS–1813	3,000	500	1	15/60	875
Health Professionals	Addendum: Commissioned Corps Personal Statement.	3,000	500	1	15/60	875
Total						3,792

Sherrette A. Funn,

Paperwork Reduction Act Reports Clearance Officer, Office of the Secretary.

[FR Doc. 2023–27974 Filed 12–19–23; 8:45 am]

BILLING CODE 4150–49–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS–0990–0421]

Agency Information Collection Request; 30-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment.

DATES: Comments on the ICR must be received on or before January 19, 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: Sherrette Funn, *Sherrette.Funn@hhs.gov* or (202) 264–0041, or *PRA@HHS.GOV.* When submitting comments or requesting information, please include the document identifier 0990–New–30D and project title for reference.

SUPPLEMENTARY INFORMATION: Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Title of the Collection: ASPE Generic Clearance for the Collection of Qualitative Research and Assessment.

Type of Collection: (Revision).

OMB No. 0990–0421—Office of the Assistant Secretary for Planning and Evaluation (ASPE).

Abstract: The Office of the Assistant Secretary for Planning and Evaluation (ASPE) is requesting a three-year renewal with change for their generic clearance for purposes of conducting qualitative research. The ICR is for an extension of the approved information collection assigned OMB control number 0990–0421, scheduled to expire on January 31, 2024. ASPE conducts qualitative research to gain a better understanding of emerging health and human services policy issues, develop future intramural and extramural research projects, and to ensure HHS leadership, agencies and offices have recent data and information to inform program and policy decision-making. ASPE is requesting approval for at least four types of qualitative research which include, but are not limited to, (a) interviews, (b) focus groups, (c) questionnaires, and (d) other qualitative methods.

ASPE advises the Secretary of the Department of Health and Human Services on policy development in health, disability, human services, data, and science, and provides advice and analysis on economic policy. ASPE leads special initiatives, coordinates many of the Department's evaluation, research and demonstration activities, and manages cross-Department planning activities such as implementation of the Evidence Act, strategic planning, legislative planning, and review of regulations. Integral to this role, ASPE will use this mechanism to conduct qualitative research, evaluation, or assessment, conduct analyses, and understand needs, barriers, or facilitators for HHS-related programs and services.

ASPE is requesting comment on the increased burden for qualitative research aimed at understanding emerging health and human services policy issues. The goal of developing these activities is to identify emerging issues and research gaps to ensure the successful implementation of HHS programs. The participants may include health and human services experts; national, state, and local health or human services representatives; public health, human services, or healthcare providers; and representatives of other health or human services organizations, and people with lived experience.

Need and Proposed Use of the Information: ASPE is requesting comment on the burden for qualitative research aimed at understanding emerging health and human services policy issues. The goal of developing these activities is to identify emerging issues and research gaps to ensure the successful implementation of HHS programs. The participants may include health and human services experts; national, state, and local health or human services representatives; public health, human services, or healthcare providers; and representatives of other health or human services organizations, and people with lived experience. The increase in burden from 2,000 annually in 2020 to 5,000 respondents annually in 2023 reflects an increase in the number of research projects and information collections expected to be conducted over the next three years.

ESTIMATED ANNUALIZED BURDEN TABLE

Type of respondent	Number of respondents	Number responses per respondent	Average burden per response (in hours)	Total burden hours per year
Health or Human Services Policy Stakeholder	5,000	1	1	5,000
Total	5,000	1	1	5,000

Sherrette A. Funn,

Paperwork Reduction Act Reports Clearance Officer, Office of the Secretary.

[FR Doc. 2023–27899 Filed 12–19–23; 8:45 am]

BILLING CODE 4150–05–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Funding Opportunity for Tribal Self-Governance Planning Cooperative Agreement Program

Announcement Type: New.

Funding Announcement Number: HHS–2024–IHS–TSGP–0001.

Assistance Listing (Catalog of Federal Domestic Assistance or CFDA) Number: 93.444.

Key Dates

Application Deadline Date: February 19, 2024.

Earliest Anticipated Start Date: April 1, 2024.

I. Funding Opportunity Description

Statutory Authority

The Indian Health Service (IHS) is accepting applications for cooperative agreements for the Tribal Self-Governance Planning Cooperative Agreement Program. This program is authorized under the Snyder Act, 25 U.S.C. 13; the Transfer Act, 42 U.S.C. 2001(a); and Title V of the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. 5383(e). The Assistance Listings section of *SAM.gov* (*https://same.gov/content/home*) describes this program under 93.444.

Background

The Tribal Self-Governance Program (TSGP) is more than an IHS program; it is an expression of the Government-to-Government relationship between the United States (U.S.) and Indian Tribes. Through the TSGP, Tribes negotiate with the IHS to assume Programs, Services, Functions, and Activities (PSFAs), or portions thereof, which gives Tribes the authority to manage and tailor health care programs in a manner that best fits the needs of their communities.

Participation in the TSGP affords Tribes the most flexibility to tailor their health care needs by choosing one of three ways to obtain health care from the Federal Government for their citizens. Specifically, Tribes can choose to: (1) receive health care services directly from the IHS; (2) contract with the IHS to administer individual programs and services the IHS would otherwise provide (referred to as Title I Self-Determination Contracting); and (3) compact with the IHS to assume control over health care programs the IHS would otherwise provide (referred to as Title V Self-Governance Compacting or the TSGP). These options are not exclusive and Tribes may choose to combine options based on their individual needs and circumstances.

The TSGP is a tribally-driven initiative and strong Federal-Tribal partnerships are essential to the program's success. The IHS established the Office of Tribal Self-Governance (OTSG) to implement the Self-Governance authorities under the ISDEAA. The primary OTSG functions are to: (1) serve as the primary liaison and advocate for Tribes participating in the TSGP; (2) develop, direct, and implement TSGP policies and procedures; (3) provide information and technical assistance to Self-Governance Tribes; and (4) advise the IHS Director on compliance with TSGP policies, regulations, and guidelines. Each IHS Area has an Agency Lead Negotiator (ALN), designated by the IHS Director to act on his or her behalf, who has authority to negotiate Self-Governance Compacts and Funding Agreements. Tribes interested in participating in the TSGP should contact their respective ALN to begin the Self-Governance planning and negotiation process. Tribes currently participating in the TSGP that are interested in expanding existing or adding new PSFAs should also contact their respective ALN to discuss the best methods for expanding or adding new PSFAs.

Purpose

The purpose of this Planning Cooperative Agreement is to provide resources to Tribes interested in entering the TSGP and to existing Self-Governance Tribes interested in assuming new or expanded PSFAs. Title V of the ISDEAA requires a Tribe or Tribal organization (T/TO) to complete a planning phase to the satisfaction of the Tribe. The planning phase must include legal and budgetary research and internal Tribal government planning and organizational preparation relating to the administration of health care programs. See 25 U.S.C. 5383(d).

The planning phase is critical to negotiations and helps Tribes make informed decisions about which PSFAs to assume and what organizational changes or modifications are necessary to successfully support those PSFAs. A thorough planning phase improves timeliness and efficient negotiations and ensures that the Tribe is fully prepared to assume the transfer of IHS PSFAs to the Tribal health program.

A Planning Cooperative Agreement is not a prerequisite to enter the TSGP and a Tribe may use other resources to meet the planning requirement. Tribes that receive Planning Cooperative Agreements are not obligated to participate in the TSGP and may choose to delay or decline participation based on the outcome of their planning activities. This also applies to existing Self-Governance Tribes exploring the option to expand their current PSFAs or assume additional PSFAs.

II. Award Information

Funding Instrument—Cooperative Agreement

Estimated Funds Available

The total funding identified for fiscal year (FY) 2024 is approximately $900,000. Individual award amounts are anticipated to be $180,000. The funding available for competing awards issued under this announcement is subject to the availability of appropriations and budgetary priorities of the Agency. The IHS is under no obligation to make awards that are selected for funding under this announcement.

Anticipated Number of Awards

The IHS anticipates issuing approximately five awards under this program announcement.

Period of Performance

The period of performance is for 1 year.

Cooperative Agreement

Cooperative agreements awarded by the Department of Health and Human Services (HHS) are administered under the same policies as grants. However, the funding agency, IHS, is anticipated to have substantial programmatic involvement in the project during the entire period of performance. Below is a detailed description of the level of involvement required of the IHS.

Substantial Agency Involvement Description for Cooperative Agreement

A. Provide descriptions of PSFAs and associated funding at all organizational levels (service unit, area, and headquarters) including funding formulas and methodologies related to determining Tribal shares.

B. Meet with Planning Cooperative Agreement recipients to provide program information and discuss methods currently used to manage and deliver health care.

C. Identify and provide statutes, regulations, and policies that provide

authority for administering IHS programs.

D. Provide technical assistance on the IHS budget, Tribal shares, and other topics as needed.

III. Eligibility Information

1. Eligibility

To be eligible for this opportunity, applicant must meet the following criteria:

- Applicant must be an ''Indian Tribe'' as defined in 25 U.S.C. 5304(e); a ''Tribal Organization'' as defined in 25 U.S.C. 5304(l); or an ''Inter-Tribal Consortium'' as defined at 42 CFR 137.10. Please note that Tribes prohibited from contracting pursuant to the ISDEAA are not eligible. See section 424(a) of the Consolidated Appropriations Act, 2014, Public Law 113–76, as amended by section 445 of the Consolidated Appropriations Act, 2023, Public Law 117–328, and the Continuing Appropriations Act, 2024 and Other Extensions Act, Public Law 118–15.
- Pursuant to 25 U.S.C. 5383(c)(1)(B), applicant must request participation in self-governance by resolution or other official action by the governing body of each Indian Tribe to be served. Note: If the applicant has already successfully completed the planning phase required and requested participation in the IHS Tribal Self-Governance Program by official Tribal action, then the applicant is not eligible for this funding opportunity.
- Pursuant to 25 U.S.C. 5383(c)(1)(C), applicant must demonstrate financial stability and financial management capability for 3 fiscal years.

Meeting the eligibility criteria for a Planning Cooperative Agreement does not mean that a T/TO is eligible for participation in the IHS TSGP under Title V of the ISDEAA. See 25 U.S.C. 5383, 42 CFR 137.15–23. For additional information on the eligibility for the IHS TSGP, please visit the ''Eligibility and Funding'' page on the OTSG website located at *https://www.ihs.gov/SelfGovernance.*

The Division of Grants Management (DGM) will notify any applicants deemed ineligible.

2. Additional Information on Eligibility

The IHS does not fund concurrent projects. If an applicant is successful under this announcement, any subsequent applications in response to other Tribal Self-Governance Planning Cooperative Agreement Program announcements from the same applicant will not be funded. Applications on behalf of individuals (including sole proprietorships) and foreign organizations are not eligible and will be disqualified from competitive review and funding under this funding opportunity.

Note: Please refer to Section IV.2 (Application and Submission Information/ Subsection 2, Content and Form of Application Submission) for additional proof of applicant status documents required, such as Tribal Resolutions, proof of nonprofit status, etc.

3. Cost Sharing or Matching

The IHS does not require matching funds or cost sharing for grants or cooperative agreements.

4. Other Requirements

Applications with budget requests that exceed the highest dollar amount outlined under Section II Award Information, Estimated Funds Available, or exceed the period of performance outlined under Section II Award Information, Period of Performance, are considered not responsive and will not be reviewed. The DGM will notify the applicant.

Additional Required Documentation

Tribal Resolution

The DGM must receive an official, signed Tribal Resolution prior to issuing a Notice of Award (NoA) to any T/TO selected for funding. An applicant that is proposing a project affecting another Indian Tribe must include resolutions from all affected Tribes to be served. However, if an official signed Tribal Resolution cannot be submitted with the application prior to the application deadline date, a draft Tribal Resolution must be submitted with the application by the deadline date in order for the application to be considered complete and eligible for review. The draft Tribal Resolution is not in lieu of the required signed resolution but is acceptable until a signed resolution is received. If an application without a signed Tribal Resolution is selected for funding, the applicant will be contacted by the Grants Management Specialist (GMS) listed in this funding announcement and given 90 days to submit an official signed Tribal Resolution to the GMS. If the signed Tribal Resolution is not received within 90 days, the award will be forfeited.

Applicants organized with a governing structure other than a Tribal council may submit an equivalent document commensurate with their governing organization.

IV. Application and Submission Information

Grants.gov uses a Workspace model for accepting applications. The Workspace consists of several online forms and three forms in which to upload documents—Project Narrative, Budget Narrative, and Other Documents. Give your files brief descriptive names. The filenames are key in finding specific documents during the merit review and in processing awards. Upload all requested and optional documents individually, rather than combining them into a single file. Creating a single file creates confusion when trying to find specific documents. Such confusion can contribute to delays in processing awards, and could lead to lower scores during the merit review.

1. Obtaining Application Materials

The application package and detailed instructions for this announcement are available at *https://www.Grants.gov.*

Please direct questions regarding the application process to *DGM@ihs.gov.*

2. Content and Form Application Submission

Mandatory documents for all applications are listed below. An application is incomplete if any of the listed mandatory documents are missing. Incomplete applications will not be reviewed.

- Application forms:

1. SF–424, Application for Federal Assistance.

2. SF–424A, Budget Information—Non-Construction Programs.

3. SF–424B, Assurances—Non-Construction Programs.

4. Project Abstract Summary form.

- Project Narrative (not to exceed 10 pages). See Section IV.2.A, Project Narrative for instructions.
- Budget Narrative (not to exceed 5 pages). See Section IV.2.B, Budget Narrative for instructions.
- One-page Timeframe Chart.
- Biographical sketches for all Key Personnel.
- Certification Regarding Lobbying (GG-Lobbying Form).

The documents listed here may be required. Please read this list carefully.

- Tribal Resolution(s) as described in Section III, Eligibility.
- Disclosure of Lobbying Activities (SF–LLL), if applicant conducts reportable lobbying.
- Copy of current Negotiated Indirect Cost (IDC) rate agreement (required in order to receive IDC).
- Documentation of current Office of Management and Budget (OMB) Financial Audit.

Acceptable forms of documentation include:

1. Email confirmation from Federal Audit Clearinghouse (FAC) that audits were submitted; or

2. Face sheets from audit reports. Applicants can find these on the FAC website at *https://facdissem.census.gov/*.

Additional documents can be uploaded as Other Attachments in *Grants.gov*. These can include:

- Work plan, logic model, and/or timeline for proposed objectives.
- Position descriptions for key staff.
- Resumes of key staff that reflect current duties.
- Consultant or contractor proposed scope of work and letter of commitment (if applicable).
- Organizational chart.
- Map of area identifying project location(s).
- Additional documents to support narrative (for example, data tables, key news articles).

Public Policy Requirements

All Federal public policies apply to IHS grants and cooperative agreements. Pursuant to 45 CFR 80.3(d), an individual shall not be deemed subjected to discrimination by reason of their exclusion from benefits limited by Federal law to individuals eligible for benefits and services from the IHS. See *https://www.hhs.gov/grants/grants/grants-policies-regulations/index.html.*

Requirements for Project and Budget Narratives

A. Project Narrative

This narrative should be a separate document that is no more than 10 pages and must: (1) have consecutively numbered pages; (2) use black font 12 points or larger (applicants may use 10 point font for tables); (3) be single-spaced; and (4) be formatted to fit standard letter paper (8½ x 11 inches). Do not combine this document with any others.

Be sure to succinctly answer all questions listed under the evaluation criteria (refer to Section V.1, Evaluation Criteria), and place all responses and required information in the correct section noted below or they will not be considered or scored. If the narrative exceeds the overall page limit, the reviewers will be directed to ignore any content beyond the page limit. The 10-page limit for the project narrative does not include the work plan, standard forms, Tribal Resolutions, budget, budget narratives, and/or other items. Page limits for each section within the project narrative are guidelines, not hard limits.

There are three parts to the project narrative: Part 1—Program Information; Part 2—Program Planning and Evaluation; and Part 3—Program Report. See below for additional details about what must be included in the narrative.

The page limits below are for each narrative and budget submitted.

Part 1: Program Information (Limit—4 Pages)

Section 1: Needs

Describe the Tribe's current health program activities, including: how long it has been operating; what programs or services are currently being provided; and if the applicant is currently administering any ISDEAA Title I Self-Determination Contracts or Title V Self-Governance Compacts. Identify the need for assistance and how the Planning Cooperative Agreement would benefit the health activities the Tribe is currently administering or looking to expand.

Part 2: Program Planning and Evaluation (Limit—4 Pages)

Section 1: Program Plans

Project Objective(s), Work Plan, and Approach

State in measureable terms the objectives and appropriate activities to achieve the following Planning Cooperative Agreement recipient award activities:

(A) Research and analyze the complex IHS budget to gain a thorough understanding of funding distribution at all organizational levels and determine which PSFAs the Tribe may elect to assume or expand.

(B) Establish a process to identify PSFAs and associated funding that may be incorporated into current programs.

(C) Determine the Tribe's share of each PSFA and evaluate the current level of health care services being provided to make an informed decision on new or expanded program assumption.

(D) Describe how the objectives are consistent with the purpose of the program, the needs of the people to be served, and how they will be achieved within the proposed timeframe. Identify the expected results, benefits, and outcomes or products to be derived from each objective of the project and how they will be measured.

Organizational Capabilities, Key Personnel, and Qualifications

Describe the organizational structure of the Tribe and its ability to manage the proposed project. Include resumes or position descriptions of key staff showing requisite experience and expertise. If applicable, include resumes and scope of work for consultants that demonstrate experience and expertise relevant to the project.

Section 2: Program Evaluation

Define the criteria to be used to evaluate planning activities and how they will be measured. Describe fully and clearly the methodology that will be used to determine if the needs identified are being met and if the outcomes are being achieved. This section must address the following questions:

(A) Are the goals and objectives measurable and consistent with the purpose of the program and the needs of the people to be served?

(B) Are the goals achievable within the proposed timeframe?

Part 3: Program Report (Limit—2 Pages)

Section 1: Describe your organization's significant program activities and accomplishments over the past 6 to 12 months associated with the goals of this announcement.

Please identify and describe significant program activities and achievements associated with the delivery of quality health services. Provide a comparison of the actual accomplishments to the goals established for the project period or, if applicable, provide justification for the lack of progress.

B. Budget Narrative (Limit—5 Pages)

Provide a budget narrative that explains the amounts requested for each line item of the budget from the SF–424A (Budget Information for Non-Construction Programs) for the entire project. The applicant can submit with the budget narrative a more detailed spreadsheet than is provided by the SF–424A (the spreadsheet will not be considered part of the budget narrative). The budget narrative should specifically describe how each item would support the achievement of proposed objectives. Be very careful about showing how each item in the ''Other'' category is justified. Do NOT use the budget narrative to expand the project narrative.

3. Submission Dates and Times

Applications must be submitted through *Grants.gov* by 11:59 p.m. Eastern Time on the Application Deadline Date. Any application received after the application deadline will not be accepted for review. *Grants.gov* will notify the applicant via email if the application is rejected.

If technical challenges arise and assistance is required with the application process, contact *Grants.gov* Customer Support (see contact

information at *https://www.Grants.gov*). If problems persist, contact Mr. Paul Gettys, Deputy Director, DGM, by email at *DGM@ihs.gov.* Please be sure to contact Mr. Gettys at least 10 days prior to the application deadline. Please do not contact the DGM until you have received a *Grants.gov* tracking number. In the event you are not able to obtain a tracking number, call the DGM as soon as possible.

The IHS will not acknowledge receipt of applications.

4. Intergovernmental Review

Executive Order 12372 requiring intergovernmental review is not applicable to this program.

5. Funding Restrictions

- Pre-award costs are not allowable.
- The available funds are inclusive of direct and indirect costs.
- Only one cooperative agreement may be awarded per applicant.

6. Electronic Submission Requirements

All applications must be submitted via *Grants.gov*. Please use the *https://www.Grants.gov* website to submit an application. Find the application by selecting the ''Search Grants'' link on the homepage. Follow the instructions for submitting an application under the Package tab. No other method of application submission is acceptable.

If you cannot submit an application through *Grants.gov*, you must request a waiver prior to the application due date. You must submit your waiver request by email to *DGM@ihs.gov.* Your waiver request must include clear justification for the need to deviate from the required application submission process. The IHS will not accept any applications submitted through any means outside of *Grants.gov* without an approved waiver.

If the DGM approves your waiver request, you will receive a confirmation of approval email containing submission instructions. You must include a copy of the written approval with the application submitted to the DGM. Applications that do not include a copy of the waiver approval from the DGM will not be reviewed. The Grants Management Officer of the DGM will notify the applicant via email of this decision. Applications submitted under waiver must be received by the DGM no later than 5:00 p.m. Eastern Time on the Application Deadline Date. Late applications will not be accepted for processing. Applicants that do not register for both the System for Award Management (SAM) and *Grants.gov* and/or fail to request timely assistance with technical issues will not be considered for a waiver to submit an application via alternative method.

Please be aware of the following:

- Please search for the application package in *https://www.Grants.gov* by entering the Assistance Listing number or the Funding Opportunity Number. Both numbers are located in the header of this announcement.
- If you experience technical challenges while submitting your application, please contact *Grants.gov* Customer Support (see contact information at *https://www.Grants.gov*).
- Upon contacting *Grants.gov*, obtain a tracking number as proof of contact. The tracking number is helpful if there are technical issues that cannot be resolved and a waiver from the agency must be obtained.
- Applicants are strongly encouraged not to wait until the deadline date to begin the application process through *Grants.gov* as the registration process for SAM and *Grants.gov* could take up to 20 working days.
- Please follow the instructions on *Grants.gov* to include additional documentation that may be requested by this funding announcement.
- Applicants must comply with any page limits described in this funding announcement.
- After submitting the application, you will receive an automatic acknowledgment from *Grants.gov* that contains a *Grants.gov* tracking number. The IHS will not notify you that the application has been received.

System for Award Management

Organizations that are not registered with the System for Award Management (SAM) must access the SAM online registration through the SAM home page at *https://sam.gov*. Organizations based in the U.S. will also need to provide an Employer Identification Number from the Internal Revenue Service that may take an additional 2–5 weeks to become active. Please see *SAM.gov* for details on the registration process and timeline. Registration with the SAM is free of charge but can take several weeks to process. Applicants may register online at *https://sam.gov*.

Unique Entity Identifier

Your *SAM.gov* registration now includes a Unique Entity Identifier (UEI), generated by *SAM.gov*, which replaces the DUNS number obtained from Dun and Bradstreet. *SAM.gov* registration no longer requires a DUNS number.

Check your organization's *SAM.gov* registration as soon as you decide to apply for this program. If your *SAM.gov* registration is expired, you will not be able to submit an application. It can take several weeks to renew it or resolve any issues with your registration, so do not wait.

Check your *Grants.gov* registration. Registration and role assignments in *Grants.gov* are self-serve functions. One user for your organization will have the authority to approve role assignments, and these must be approved for active users in order to ensure someone in your organization has the necessary access to submit an application.

The Federal Funding Accountability and Transparency Act of 2006, as amended (''Transparency Act''), requires all HHS recipients to report information on sub-awards. Accordingly, all IHS recipients must notify potential first-tier sub-recipients that no entity may receive a first-tier sub-award unless the entity has provided its UEI number to the prime recipient organization. This requirement ensures the use of a universal identifier to enhance the quality of information available to the public pursuant to the Transparency Act.

Additional information on implementing the Transparency Act, including the specific requirements for SAM, are available on the DGM Grants Management, Policy Topics web page at *https://www.ihs.gov/dgm/policytopics/*.

V. Application Review Information

Possible points assigned to each section are noted in parentheses. The project narrative and budget narrative should include the proposed activities for the entire period of performance. The project narrative should be written in a manner that is clear to outside reviewers unfamiliar with prior related activities of the applicant. It should be well organized, succinct, and contain all information necessary for reviewers to fully understand the project. Attachments requested in the criteria do not count toward the page limit for the narratives. Points will be assigned to each evaluation criteria adding up to a total of 100 possible points. Points are assigned as follows:

1. Evaluation Criteria

A. Introduction and Need for Assistance (25 Points)

Describe the Tribe's current health program activities, including: how long it has been operating, what programs or services are currently being provided, and if the applicant is currently administering any ISDEAA Title I Self-Determination Contracts or Title V Self-Governance Compacts. Identify the need for assistance and how the Planning Cooperative Agreement would benefit

the health activities the Tribe is currently administering and/or looking to expand.

B. Project Objective(s), Work Plan and Approach (25 Points)

State in measurable terms the objectives and appropriate activities to achieve the following Planning Cooperative Agreement recipient award activities:

(1) Research and analyze the complex IHS budget to gain a thorough understanding of funding distribution at all organizational levels and determine which PSFAs the Tribe may elect to assume or expand.

(2) Establish a process to identify PSFAs and associated funding that may be incorporated into current programs.

(3) Determine the Tribe's share of each PSFA and evaluate the current level of health care services being provided to make an informed decision on new or expanded program assumption.

(4) Describe how the objectives are consistent with the purpose of the program, the needs of the people to be served, and how they will be achieved within the proposed timeframe. Identify the expected results, benefits, and outcomes or products to be derived from each objective of the project.

C. Program Evaluation (25 Points)

Define the criteria to be used to evaluate planning activities and how they will be measured. Clearly describe the methodologies and parameters that will be used to determine if the needs identified are being met and if the outcomes identified are being achieved. Are the goals and objectives measurable and consistent with the purpose of the program and meet the needs of the people to be served? Are they achievable within the proposed timeframe? Describe how the assumption of PSFAs enhances sustainable health delivery. Ensure the measurement includes activities that will lead to sustainability.

D. Organizational Capabilities, Key Personnel, and Qualifications (15 Points)

Describe the organizational structure of the Tribe and its ability to manage the proposed project. Include resumes or position descriptions of key staff showing requisite experience and expertise. If applicable, include resumes and scope of work for consultants that demonstrate experience and expertise relevant to the project.

E. Categorical Budget and Budget Justification (10 Points)

Submit a budget with a narrative describing the budget request and matching the scope of work described in the project narrative. Justify all expenditures identifying reasonable and allowable costs necessary to accomplish the goals and objectives as outlined in the project narrative.

2. Review and Selection

Each application will be prescreened for eligibility and completeness as outlined in this funding announcement. The Review Committee (RC) will review applications that meet the eligibility criteria. The RC will review the applications for merit based on the evaluation criteria. Incomplete applications and applications that are not responsive to the administrative thresholds (budget limit, period of performance limit) will not be referred to the RC and will not be funded. The DGM will notify the applicant of this determination.

Applicants must address all program requirements and provide all required documentation.

3. Notifications of Disposition

All applicants will receive an Executive Summary Statement from the IHS Office of Tribal Self-Governance within 30 days of the conclusion of the ORC outlining the strengths and weaknesses of their application. The summary statement will be sent to the Authorizing Official identified on the face page (SF–424) of the application.

A. Award Notices for Funded Applications

The NoA is the authorizing document for which funds are dispersed to the approved entities and reflects the amount of Federal funds awarded, the purpose of the award, the terms and conditions of the award, the effective date of the award, the budget period, and period of performance. Each entity approved for funding must have a user account in GrantSolutions in order to retrieve the NoA. Please see the Agency Contacts list in Section VII for GrantSolutions or *Grants.gov* contact information.

B. Approved But Unfunded Applications

Approved applications not funded due to lack of available funds will be held for 1 year. If funding becomes available during the course of the year, the application may be reconsidered.

Note: Any correspondence, other than the official NoA executed by an IHS grants management official announcing to the project director that an award has been made to their organization, is not an authorization to implement their program on behalf of the IHS.

VI. Award Administration Information

1. Administrative Requirements

Awards issued under this announcement are subject to, and are administered in accordance with, the following regulations and policies:

A. The criteria as outlined in this program announcement.

B. Administrative Regulations for Awards:

- Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards currently in effect or implemented during the period of award, other Department regulations and policies in effect at the time of award, and applicable statutory provisions. At the time of publication, this includes 45 CFR part 75, at *https://www.govinfo.gov/content/pkg/CFR-2022-title45-vol1/pdf/CFR-2022-title45-vol1-part75.pdf.*
- If you receive an award, HHS may terminate it if any of the conditions in 2 CFR 200.340(a)(1)–(4) are met. Please review all HHS regulatory provisions for Termination at 45 CFR 75.372, at the time of this publication located at *https://www.govinfo.gov/content/pkg/CFR-2022-title45-vol1/pdf/CFR-2022-title45-vol1-sec75-372.pdf.*

C. Grants Policy:

- HHS Grants Policy Statement, Revised January 2007, at *https://www.hhs.gov/sites/default/files/grants/grants/policies-regulations/hhsgps107.pdf.*

D. Cost Principles:

- Uniform Administrative Requirements for HHS Awards, ''Cost Principles,'' at 45 CFR part 75 subpart E, at the time of this publication located at *https://www.govinfo.gov/content/pkg/CFR-2022-title45-vol1/pdf/CFR-2022-title45-vol1-part75-subpartE.pdf.*

E. Audit Requirements:

- Uniform Administrative Requirements for HHS Awards, ''Audit Requirements,'' at 45 CFR part 75 subpart F, at the time of this publication located at *https://www.govinfo.gov/content/pkg/CFR-2022-title45-vol1/pdf/CFR-2022-title45-vol1-part75-subpartF.pdf.*

F. As of August 13, 2020, 2 CFR part 200 was updated to include a prohibition on certain telecommunications and video surveillance services or equipment. This prohibition is described in 2 CFR 200.216. This will also be described in the terms and conditions of every IHS

grant and cooperative agreement awarded on or after August 13, 2020.

2. Indirect Costs

This section applies to all recipients that request reimbursement of IDC in their application budget. In accordance with HHS Grants Policy Statement, Part II–27, the IHS requires applicants to obtain a current IDC rate agreement and submit it to the DGM prior to the DGM issuing an award. The rate agreement must be prepared in accordance with the applicable cost principles and guidance as provided by the cognizant agency or office. A current rate covers the applicable award activities under the current award's budget period. If the current rate agreement is not on file with the DGM at the time of award, the IDC portion of the budget will be restricted. The restrictions remain in place until the current rate agreement is provided to the DGM.

Per 2 CFR 200.414(f) Indirect (F&A) costs, found at *https://www.govinfo.gov/content/pkg/CFR-2023-title2-vol1/pdf/CFR-2023-title2-vol1-sec200-414.pdf.*

Electing to charge a de minimis rate of 10 percent can be used by applicants that have received an approved negotiated indirect cost rate from HHS or another cognizant Federal agency. Applicants awaiting approval of their indirect cost proposal may request the 10 percent de minimis rate. When the applicant chooses this method, costs included in the indirect cost pool must not be charged as direct costs to the award.

Available funds are inclusive of direct and appropriate indirect costs. Approved indirect funds are awarded as part of the award amount, and no additional funds will be provided.

Generally, IDC rates for IHS recipients are negotiated with the Division of Cost Allocation at *https://rates.psc.gov/* or the Department of the Interior (Interior Business Center) at *https://ibc.doi.gov/ICS/tribal.* For questions regarding the indirect cost policy, please write to *DGM@ihs.gov.*

3. Reporting Requirements

The recipient must submit required reports consistent with the applicable deadlines. Failure to submit required reports within the time allowed may result in suspension or termination of an active award, withholding of additional awards for the project, or other enforcement actions such as withholding of payments or converting to the reimbursement method of payment. Continued failure to submit required reports may result in the imposition of special award provisions and/or the non-funding or non-award of other eligible projects or activities. This requirement applies whether the delinquency is attributable to the failure of the recipient organization or the individual responsible for preparation of the reports. Per DGM policy, all reports must be submitted electronically by attaching them as a ''Grant Note'' in GrantSolutions. Personnel responsible for submitting reports will be required to obtain a login and password for GrantSolutions. Please use the form under the Recipient User section of *https://www.grantsolutions.gov/home/getting-started-request-a-user-account/.* Download the Recipient User Account Request Form, fill it out completely, and submit it as described on the web page and in the form.

The reporting requirements for this program are noted below.

A. Progress Reports

Program progress reports are required semi-annually. The progress reports are due within 30 days after the reporting period ends (specific dates will be listed in the NoA Terms and Conditions). These reports must include a brief comparison of actual accomplishments to the goals established for the period, a summary of progress to date or, if applicable, provide sound justification for the lack of progress, and other pertinent information as required. A final report must be submitted within 120 days of the period of performance end date.

B. Financial Reports

Federal Financial Reports are due 90 days after the end of each budget period, and a final report is due 120 days after the end of the period of performance.

Recipients are responsible and accountable for reporting accurate information on all required reports: the Progress Reports and the Federal Financial Report.

Failure to submit timely reports may result in adverse award actions blocking access to funds.

C. Federal Sub-Award Reporting System (FSRS)

This award may be subject to the Transparency Act sub-award and executive compensation reporting requirements of 2 CFR part 170.

The Transparency Act requires the OMB to establish a single searchable database, accessible to the public, with information on financial assistance awards made by Federal agencies. The Transparency Act also includes a requirement for recipients of Federal awards to report information about first-tier sub-awards and executive compensation under Federal assistance awards.

The IHS has implemented a Term of Award into all IHS Standard Terms and Conditions, NoAs, and funding announcements regarding the FSRS reporting requirement. This IHS Term of Award is applicable to all IHS grant and cooperative agreements issued on or after October 1, 2010, with a $25,000 sub-award obligation threshold met for any specific reporting period.

For the full IHS award term implementing this requirement and additional award applicability information, visit the DGM Grants Management website at *https://www.ihs.gov/dgm/policytopics/.*

D. Non-Discrimination Legal Requirements for Recipients of Federal Financial Assistance (FFA)

If you receive an award, you must follow all applicable nondiscrimination laws. You agree to this when you register in *SAM.gov.* You must also submit an Assurance of Compliance (HHS–690). To learn more, see *https://www.hhs.gov/civil-rights/for-providers/laws-regulations-guidance/laws/index.html.* Pursuant to 45 CFR 80.3(d), an individual shall not be deemed subjected to discrimination by reason of their exclusion from benefits limited by Federal law to individuals eligible for benefits and services from the IHS.

E. Federal Awardee Performance and Integrity Information System (FAPIIS)

The IHS is required to review and consider any information about the applicant that is in the FAPIIS at *https://www.fapiis.gov/fapiis/#/home* before making any award in excess of the simplified acquisition threshold (currently $250,000) over the period of performance. An applicant may review and comment on any information about itself that a Federal awarding agency previously entered. The IHS will consider any comments by the applicant, in addition to other information in FAPIIS, in making a judgment about the applicant's integrity, business ethics, and record of performance under Federal awards when completing the review of risk posed by applicants, as described in 45 CFR 75.205.

As required by 45 CFR part 75 appendix XII of the Uniform Guidance, NFEs are required to disclose in FAPIIS any information about criminal, civil, and administrative proceedings, and/or affirm that there is no new information to provide. This applies to NFEs that receive Federal awards (currently active grants, cooperative agreements, and procurement contracts) greater than $10

million for any period of time during the period of performance of an award/project.

Mandatory Disclosure Requirements

As required by 2 CFR part 200 of the Uniform Guidance, and HHS implementing regulations at 45 CFR part 75, the IHS must require an NFE or an applicant for a Federal award to disclose, in a timely manner, in writing to the IHS or pass-through entity all violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award.

All applicants and recipients must disclose in writing, in a timely manner, to the IHS and to the HHS Office of Inspector General all information related to violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award. 45 CFR 75.113.

Disclosures must be sent in writing to:

U.S. Department of Health and Human Services, Indian Health Service, Division of Grants Management, ATTN: Marsha Brookins, Director, 5600 Fishers Lane, Mail Stop: 09E70, Rockville, MD 20857 (Include ''Mandatory Grant Disclosures'' in subject line), Office: (301) 443–5204, Fax: (301) 594–0899, Email: *DGM@ihs.gov*

AND

U.S. Department of Health and Human Services, Office of Inspector General, ATTN: Mandatory Grant Disclosures, Intake Coordinator, 330 Independence Avenue SW, Cohen Building, Room 5527, Washington, DC 20201, URL: *https://oig.hhs.gov/fraud/report-fraud/* (Include ''Mandatory Grant Disclosures'' in subject line), Fax: (202) 205–0604 (Include ''Mandatory Grant Disclosures'' in subject line) or Email: *MandatoryGranteeDisclosures@oig.hhs.gov*

Failure to make required disclosures can result in any of the remedies described in 45 CFR 75.371 Remedies for noncompliance, including suspension or debarment (see 2 CFR part 180 and 2 CFR part 376).

VII. Agency Contacts

1. Questions on the program matters may be directed to: Roxanne Houston, Program Officer, Indian Health Service, Office of Tribal Self-Governance, 5600 Fishers Lane, Mail Stop: 08E05, Rockville, MD 20857, Phone: (301) 443–7821, Email: *Roxanne.Houston@ihs.gov.*

2. Questions on awards management and fiscal matters may be directed to: Indian Health Service, Division of Grants Management, 5600 Fishers Lane, Mail Stop: 09E70, Rockville, MD 20857, Email: *DGM@ihs.gov.*

3. For technical assistance with *Grants.gov*, please contact the *Grants.gov* help desk at (800) 518–4726, or by email at *support@grants.gov.*

4. For technical assistance with GrantSolutions, please contact the GrantSolutions help desk at (866) 577–0771, or by email at *help@grantsolutions.gov.*

VIII. Other Information

The Public Health Service strongly encourages all grant, cooperative agreement, and contract recipients to provide a smoke-free workplace and promote the non-use of all tobacco products. In addition, Public Law 103–227, the Pro-Children Act of 1994, prohibits smoking in certain facilities (or in some cases, any portion of the facility) in which regular or routine education, library, day care, health care, or early childhood development services are provided to children. This is consistent with the HHS mission to protect and advance the physical and mental health of the American people.

Roselyn Tso,

Director, Indian Health Service.

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Funding Opportunity for Tribal Self-Governance Negotiation Cooperative Agreement Program

Announcement Type: New.

Funding Announcement Number: HHS–2024–IHS–TSGN–0001.

Assistance Listing (Catalog of Federal Domestic Assistance or CFDA) Number: 93.444.

Key Dates

Application Deadline Date: February 19, 2024.

Earliest Anticipated Start Date: April 1, 2024.

I. Funding Opportunity Description

Statutory Authority

The Indian Health Service (IHS) is accepting applications for cooperative agreements for the Tribal Self-Governance Negotiation Cooperative Agreement Program. This program is authorized under the Snyder Act, 25 U.S.C. 13; the Transfer Act, 42 U.S.C. 2001(a); and title V of the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. 5383(e). The Assistance Listings section of SAM.gov (*https://same.gov/content/home*) describes this program under 93.444.

Background

The Tribal Self-Governance Program (TSGP) is more than an IHS program; it is an expression of the government-to-government relationship between the United States (U.S.) and Indian Tribes. Through the TSGP, Tribes negotiate with the IHS to assume Programs, Services, Functions, and Activities (PSFAs), or portions thereof, which gives Tribes the authority to manage and tailor health care programs in a manner that best fits the needs of their communities.

Participation in the TSGP affords Tribes the most flexibility to tailor their health care needs by choosing one of three ways to obtain health care from the Federal Government for their citizens. Specifically, Tribes can choose to: (1) receive health care services directly from the IHS; (2) contract with the IHS to administer individual programs and services the IHS would otherwise provide (referred to as Title I Self-Determination Contracting); and (3) compact with the IHS to assume control over health care programs the IHS would otherwise provide (referred to as Title V Self-Governance Compacting or the TSGP). These options are not exclusive and Tribes may choose to combine options based on their individual needs and circumstances.

The TSGP is a Tribally-driven initiative and strong Federal-Tribal partnerships are essential to the program's success. The IHS established the Office of Tribal Self-Governance (OTSG) to implement the Tribal Self-Governance authorities under the ISDEAA. The primary OTSG functions are to: (1) serve as the primary liaison and advocate for Tribes participating in the TSGP; (2) develop, direct, and implement TSGP policies and procedures; (3) provide information and technical assistance to Self-Governance Tribes; and (4) advise the IHS Director on compliance with TSGP policies, regulations, and guidelines. Each IHS Area has an Agency Lead Negotiator (ALN), designated by the IHS Director to act on his or her behalf, who has authority to negotiate Self-Governance Compacts and Funding Agreements (FA). Tribes interested in participating in the TSGP should contact their respective ALN to begin the Self-Governance planning and negotiation process. Tribes currently participating in the TSGP that are interested in expanding existing or adding new PSFAs should also contact their

respective ALN to discuss the best methods for expanding or adding new PSFAs.

Purpose

The purpose of this Negotiation Cooperative Agreement is to provide Tribes with resources to help defray the costs associated with preparing for and engaging in TSGP negotiations. TSGP negotiations are a dynamic, evolving, and Tribally-driven process that requires careful planning, preparation, and sharing of precise, up-to-date information by both Tribal and Federal parties. Because each Tribal situation is unique, a Tribe's successful transition into the TSGP, or expansion of their current program, requires focused discussions between the Federal and Tribal negotiation teams about the Tribe's specific health care concerns and plans. One of the hallmarks of the TSGP is the collaborative nature of the negotiations process, which is designed to: (1) enable a Tribe to set its own priorities when assuming responsibility for IHS PSFAs; (2) observe and respect the government-to-government relationship between the U.S. and each Tribe; and (3) involve the active participation of both Tribal and IHS representatives, including the OTSG. Negotiations are a method of determining and agreeing upon the terms and provisions of a Tribe's Compact and FA, the implementation documents required for the Tribe to enter into the TSGP. The Compact sets forth the general terms of the government-to-government relationship between the Tribe and the Secretary of the U.S. Department of Health and Human Services (HHS). The FA: (1) describes the length of the agreement (whether it will be annual or multi-year); (2) identifies the PSFAs, or portions thereof, the Tribe will assume; (3) specifies the amount of funding associated with the Tribal assumption; and (4) includes terms required by Federal statutes and other terms agreed to by the parties. Both documents are required to participate in the TSGP and they are mutually negotiated agreements that become legally binding and mutually enforceable after both parties sign the documents. Either document can be renegotiated at the request of the Tribe.

The negotiation process has four major stages, including: (1) planning; (2) pre-negotiations; (3) negotiations; and (4) post-negotiations. Title V of the ISDEAA requires that a Tribe or Tribal Organization (T/TO) complete a planning phase to the satisfaction of the Tribe. The planning phase must include legal and budgetary research and internal Tribal government planning and organizational preparation relating to the administration of health care programs. See 25 U.S.C. 5383(d). The planning phase is critical to the negotiation process and assists Tribes with making informed decisions about which PSFAs to assume and what organizational changes or modifications are necessary to support those PSFAs. A thorough planning phase improves timeliness and efficient negotiations and ensures that the Tribe is fully prepared to assume the transfer of IHS PSFAs to the Tribal health program.

During pre-negotiations, the Tribal and Federal negotiation teams review and discuss issues identified during the planning phase. Pre-negotiations provide an opportunity for the Tribe and the IHS to identify and discuss issues directly related to the Tribe's Compact, FA, and Tribal shares.

In advance of final negotiations, the Tribe should work with the IHS to secure the following: (1) program titles and descriptions; (2) financial tables and information; (3) information related to the identification and justification of residuals; and (4) the basis for determining Tribal shares (distribution formula). The Tribe may also wish to discuss financial materials that show estimated funding for next year and the increases or decreases in funding it may receive in the current year, as well as the basis for those changes.

During the final negotiation, both the Federal and Tribal negotiation teams work together in good faith to determine and agree upon the terms and provisions of the Tribe's Compact and FA. Negotiations are not an allocation process; they provide an opportunity to mutually review and discuss budget and program issues to reach agreement and finalize documents.

There are various entities involved throughout the negotiation process. For example, a Tribal government selects its representative(s) for the Tribal negotiation team, which may include a Tribal leader from the governing body, a Tribal health director, technical and program staff, legal counsel, and other consultants. Regardless of the composition of the Tribal team, Tribal representatives must have decision-making authority from the Tribal governing body to successfully negotiate and agree to the provisions within the agreements. The Federal negotiation team is led by the ALN and may include area and headquarters subject matter experts, OTSG staff, the Office of Finance and Accounting, and the Office of the General Counsel. The ALN is the only member of the Federal negotiation team with delegated authority to negotiate on behalf of the IHS Director. The ALN is the designated official that provides Tribes with Self-Governance information, assists Tribes in planning, organizes meetings between the Tribe and the IHS, and coordinates the agency's response to Tribal questions during the negotiation process. The ALN role requires detailed knowledge of the IHS, awareness of current policy and practice, and understanding of the rights and authorities available to a Tribe under Title V of the ISDEAA.

In post-negotiations, the mutually agreed to and negotiated Compact and FA are signed by the authorizing Tribal official and submitted to the OTSG in preparation for the IHS Director's signature. Once the Compact and FA have been signed by both parties, they become legally binding and enforceable agreements. A signed Compact and FA are necessary for the payment process to begin. The negotiating Tribe then becomes a ''Self-Governance Tribe'' and a participant in the TSGP.

Acquiring a Negotiation Cooperative Agreement is not a prerequisite to enter the TSGP. A Tribe may use other resources to develop and negotiate its Compact and FA. See 42 CFR 137.26. Tribes that receive a Negotiation Cooperative Agreement are not obligated to participate in Title V and may choose to delay or decline participation or expansion in the TSGP.

II. Award Information

Funding Instrument—Cooperative Agreement

Estimated Funds Available

The total funding identified for fiscal year (FY) 2024 is approximately $420,000. The IHS anticipates individual award amounts will be $84,000. The funding available for competing awards issued under this announcement is subject to the availability of appropriations and budgetary priorities of the Agency. The IHS is under no obligation to make awards to applicants selected for funding under this announcement.

Anticipated Number of Awards

The IHS anticipates issuing approximately five awards under this program announcement.

Period of Performance

The period of performance is for 1 year.

Cooperative Agreement

Cooperative agreements awarded by the Department of Health and Human Services (HHS) are administered under the same policies as grants. However,

the funding agency, IHS, is anticipated to have substantial programmatic involvement in the project during the entire period of performance. Below is a detailed description of the level of involvement required of the IHS.

Substantial Agency Involvement Description for Cooperative Agreement

A. Provide descriptions of PSFAs and associated funding at all organizational levels (service unit, area, and headquarters) including funding formulas and methodologies related to determining Tribal shares.

B. Meet with Negotiation Cooperative Agreement recipients to provide program information and discuss methods currently used to manage and deliver health care.

C. Identify and provide statutes, regulations, and policies that provide authority for administering IHS programs.

D. Provide technical assistance on the IHS budget, Tribal shares, and other topics as needed.

III. Eligibility Information

1. Eligibility

To be eligible for this opportunity, an applicant must meet the following criteria:

• Applicant must be an ''Indian Tribe'' as defined in 25 U.S.C. 5304(e); a ''Tribal Organization'' as defined in 25 U.S.C. 5304(l); or an ''Inter-Tribal Consortium'' as defined at 42 CFR 137.10. Please note that Tribes prohibited from contracting pursuant to the ISDEAA are not eligible. See section 424(a) of the Consolidated Appropriations Act, 2014, Public Law 113–76, as amended by section 445 of the Consolidated Appropriations Act, 2023, Public Law 117–328, and the Continuing Appropriations Act, 2024 and Other Extensions Act, Public Law 118–15.

• Pursuant to 25 U.S.C. 5383(c)(1)(B), applicant must request participation in self-governance by resolution or other official action by the governing body of each Indian Tribe to be served.

• Pursuant to 25 U.S.C. 5383(c)(1)(C), applicant must demonstrate financial stability and financial management capability for 3 consecutive fiscal years prior to the application submission.

Meeting the eligibility criteria for a Negotiation Cooperative Agreement does not mean that a T/TO is eligible for participation in the IHS TSGP under title V of the ISDEAA. See 25 U.S.C. 5383, 42 CFR 137.15–23. For additional information on the eligibility for the IHS TSGP, please visit the ''Eligibility and Funding'' page on the OTSG website located at *https://www.ihs.gov/SelfGovernance.*

The Division of Grants Management (DGM)will notify any applicants deemed ineligible.

2. Additional Information on Eligibility

The IHS does not fund concurrent projects. If an applicant is successful under this announcement, any subsequent applications in response to other Tribal Self-Governance Negotiation Cooperative Agreement Program announcements from the same applicant will not be funded. Applications on behalf of individuals (including sole proprietorships) and foreign organizations are not eligible and will be disqualified from competitive review and funding under this funding opportunity.

Note: Please refer to Section IV.2 (Application and Submission Information/ Subsection 2, Content and Form of Application Submission) for additional proof of applicant status documents required, such as Tribal Resolutions, proof of nonprofit status, etc.

3. Cost Sharing or Matching

The IHS does not require matching funds or cost sharing for grants or cooperative agreements.

4. Other Requirements

Applications with budget requests that exceed the highest dollar amount outlined under Section II Award Information, Estimated Funds Available, or exceed the period of performance outlined under Section II Award Information, Period of Performance, are considered not responsive and will not be reviewed. The DGM will notify the applicant.

Additional Required Documentation

Tribal Resolution

The DGM must receive an official, signed Tribal Resolution prior to issuing a Notice of Award (NoA) to any T/TO selected for funding. An applicant that is proposing a project affecting another Indian Tribe must include resolutions from all affected Tribes to be served. However, if an official signed Tribal Resolution cannot be submitted with the application prior to the application deadline date, a draft Tribal Resolution must be submitted with the application by the deadline date in order for the application to be considered complete and eligible for review. The draft Tribal Resolution is not in lieu of the required signed resolution but is acceptable until a signed resolution is received. If an application without a signed Tribal Resolution is selected for funding, the applicant will be contacted by the Grants Management Specialist (GMS) listed in this funding announcement and given 90 days to submit an official signed Tribal Resolution to the GMS. If the signed Tribal Resolution is not received within 90 days, the award will be forfeited.

Applicants organized with a governing structure other than a Tribal council may submit an equivalent document commensurate with their governing organization.

IV. Application and Submission Information

Grants.gov uses a Workspace model for accepting applications. The Workspace consists of several online forms and three forms in which to upload documents—Project Narrative, Budget Narrative, and Other Documents. Give your files brief descriptive names. The filenames are key in finding specific documents during the merit review and in processing awards. Upload all requested and optional documents individually, rather than combining them into a single file. Creating a single file creates confusion when trying to find specific documents. Such confusion can contribute to delays in processing awards, and could lead to lower scores during the merit review.

1. Obtaining Application Materials

The application package and detailed instructions for this announcement are available at *https://www.Grants.gov.*

Please direct questions regarding the application process to *DGM@ihs.gov.*

2. Content and Form Application Submission

Mandatory documents for all applications are listed below. An application is complete if any of the listed mandatory documents are missing. Incomplete applications will not be reviewed.

• Application forms:

1. SF–424, Application for Federal Assistance.

2. SF–424A, Budget Information—Non-Construction Programs.

3. SF–424B, Assurances—Non-Construction Programs.

4. Project Abstract Summary form.

• Budget Narrative (not to exceed 5 pages). See Section IV.2.B, Budget Narrative for instructions.

• One-page Timeframe of award activities.

• Tribal Resolution(s) as described in Section III, Eligibility.

• Biographical sketches for all Key Personnel.

• Certification Regarding Lobbying (GG-Lobbying Form).

The documents listed here may be required. Please read this list carefully.

- Tribal Resolution(s) as described in Section III, Eligibility.
- Disclosure of Lobbying Activities (SF–LLL), if applicant conducts reportable lobbying.
- Copy of current Negotiated Indirect Cost (IDC) rate agreement (required in order to receive IDC).
- Organizational Chart (optional).
- Documentation sufficient to demonstrate financial stability and financial management capability for 3 fiscal years. The Indian Tribe must provide evidence that, for the 3 fiscal years prior to requesting participation in the TSGP, the Indian Tribe has had no uncorrected significant and material audit exceptions in the required annual audit of the Indian Tribe's Self-Determination Contracts or Self-Governance Funding Agreements with any Federal agency. See 25 U.S.C. 5383, 42 CFR 137.15–23. For T/TO that expended $500,000 or more in Federal awards, the OTSG shall retrieve the audits directly from the Federal Audit Clearinghouse. For T/TO that expended less than $500,000 in Federal awards, the T/TO must provide evidence of the program review correspondence from the IHS or Bureau of Indian Affairs officials. See 42 CFR 137.21–23.
- Documentation of current Office of Management and Budget (OMB) Financial Audit.

Acceptable forms of documentation include:

1. Email confirmation from Federal Audit Clearinghouse (FAC) that audits were submitted; or
2. Face sheets from audit reports. Applicants can find these on the FAC website at *https://facdissem.census.gov/.*

Additional documents can be uploaded as Other Attachments in *Grants.gov*. These can include:

- Work plan, logic model, and/or timeline for proposed objectives.
- Position descriptions for key staff.
- Resumes of key staff that reflect current duties.
- Consultant or contractor proposed scope of work and letter of commitment (if applicable).
- Organizational chart.
- Map of area identifying project location(s).
- Additional documents to support narrative (for example, data tables, key news articles).

Public Policy Requirements

All Federal public policies apply to IHS grants and cooperative agreements. Pursuant to 45 CFR 80.3(d), an individual shall not be deemed subjected to discrimination by reason of their exclusion from benefits limited by Federal law to individuals eligible for benefits and services from the IHS. See *https://www.hhs.gov/grants/grants/grants-policies-regulations/index.html.*

Requirements for Project and Budget Narratives

A. Project Narrative

This narrative should be a separate document that is no more than 10 pages and must: (1) have consecutively numbered pages; (2) use black font 12 points or larger (applicants may use 10 point font for tables); (3) be single-spaced; and (4) be formatted to fit standard letter paper (8½ x 11 inches). Do not combine this document with any others.

Be sure to succinctly answer all questions listed under the evaluation criteria (refer to Section V.1, Evaluation Criteria), and place all responses and required information in the correct section noted below or they will not be considered or scored. If the narrative exceeds the overall page limit, the reviewers will be directed to ignore any content beyond the page limit. The 10 page limit for the project narrative does not include the work plan, standard forms, Tribal Resolutions, budget, budget narratives, and/or other items. Page limits for each section within the project narrative are guidelines, not hard limits.

There are three parts to the project narrative: Part 1—Program Information; Part 2—Program Planning and Evaluation; and Part 3—Program Report. See below for additional details about what must be included in the narrative.

The page limits below are for each narrative and budget submitted.

Part 1: Program Information (Limit—4 Pages)

Section 1: Needs

Demonstrate that the Tribe has conducted previous Self-Governance planning activities by clearly stating the results of what was learned during the planning process. Explain how the Tribe has determined it has the knowledge and expertise to assume or expand PSFAs and the administrative infrastructure to support the assumption of PSFAs. Identify the need for assistance and how the Negotiation Cooperative Agreement would benefit the health activities the Tribe is preparing to assume or expand.

Part 2: Program Planning and Evaluation (Limit—4 Pages)

Section 1: Program Plans

State in measurable terms the objectives and appropriate activities to achieve the following Negotiation Cooperative Agreement recipient award activities:

(A) Determine the PSFAs that will be negotiated into the Tribe's Compact and FA. Prepare and discuss each PSFA in comparison to the current level of services provided so that an informed decision can be made on new or expanded program assumption.

(B) Identify Tribal shares associated with the PSFAs that will be included in the FA.

(C) Develop the terms and conditions that will be set forth in both the Compact and FA to submit to the ALN prior to negotiations.

Describe fully and clearly how the Tribe's proposal will result in an improved approach to managing the PSFAs to be assumed or expanded. Include how the Tribe plans to demonstrate improved health services to the community and incorporate the proposed timelines for negotiations.

Section 2: Program Evaluation

Describe fully and clearly how the goals and proposed activities will improve the health care system and identify the anticipated or expected benefits for the Tribe. Define the criteria to be used to evaluate objectives associated with the project using a model for tracking.

Part 3: Program Report (Limit—2 Pages)

Section 1

Describe your organization's significant program activities and accomplishments over the past several years associated with the goals of this announcement and leading up to the negotiation phase.

Please identify and describe significant program activities and achievements associated with the delivery of quality health services. Provide a comparison of the actual accomplishments to the goals established for the project period or, if applicable, provide justification for the lack of progress.

B. Budget Narrative (Limit—5 Pages)

Provide a budget narrative that explains the amounts requested for each line item of the budget from the SF–424A (Budget Information for Non-Construction Programs) for the project. The applicant can submit with the budget narrative a more detailed spreadsheet than is provided by the SF–424A (the spreadsheet will not be considered part of the budget narrative). The budget narrative should specifically describe how each item would support the achievement of proposed objectives. Be very careful about showing how each item in the ''Other'' category is justified.

Do NOT use the budget narrative to expand the project narrative.

3. Submission Dates and Times

Applications must be submitted through *Grants.gov* by 11:59 p.m. Eastern Time on the Application Deadline Date. Any application received after the application deadline will not be accepted for review. *Grants.gov* will notify the applicant via email if the application is rejected.

If technical challenges arise and assistance is required with the application process, contact *Grants.gov* Customer Support (see contact information at *https://www.Grants.gov*). If problems persist, contact Mr. Paul Gettys, Deputy Director, DGM, by email at *DGM@ihs.gov.* Please be sure to contact Mr. Gettys at least 10 days prior to the application deadline. Please do not contact the DGM until you have received a *Grants.gov* tracking number. In the event you are not able to obtain a tracking number, call the DGM as soon as possible by email at *DGM@ihs.gov.*

The IHS will not acknowledge receipt of applications.

4. Intergovernmental Review

Executive Order 12372 requiring intergovernmental review is not applicable to this program.

5. Funding Restrictions

- Pre-award costs are not allowable.
- The available funds are inclusive of direct and indirect costs.
- Only one cooperative agreement may be awarded per applicant.

6. Electronic Submission Requirements

All applications must be submitted via *Grants.gov*. Please use the *https://www.Grants.gov* website to submit an application. Find the application by selecting the ''Search Grants'' link on the homepage. Follow the instructions for submitting an application under the Package tab. No other method of application submission is acceptable.

If you cannot submit an application through *Grants.gov*, you must request a waiver prior to the application due date. You must submit your waiver request by email to *DGM@ihs.gov.* Your waiver request must include clear justification for the need to deviate from the required application submission process. The IHS will not accept any applications submitted through any means outside of *Grants.gov* without an approved waiver.

If the DGM approves your waiver request, you will receive a confirmation of approval email containing submission instructions. You must include a copy of the written approval with the application submitted to the DGM. Applications that do not include a copy of the waiver approval from the DGM will not be reviewed. The Grants Management Officer of the DGM will notify the applicant via email of this decision. Applications submitted under waiver must be received by the DGM no later than 5:00 p.m. Eastern Time on the Application Deadline Date. Late applications will not be accepted for processing. Applicants that do not register for both the System for Award Management (SAM) and *Grants.gov* and/or fail to request timely assistance with technical issues will not be considered for a waiver to submit an application via alternative method.

Please be aware of the following:

- Please search for the application package in *https://www.Grants.gov* by entering the Assistance Listing number or the Funding Opportunity Number. Both numbers are located in the header of this announcement.
- If you experience technical challenges while submitting your application, please contact *Grants.gov* Customer Support (see contact information at *https://www.Grants.gov*).
- Upon contacting *Grants.gov*, obtain a tracking number as proof of contact. The tracking number is helpful if there are technical issues that cannot be resolved and a waiver from the agency must be obtained.
- Applicants are strongly encouraged not to wait until the deadline date to begin the application process through *Grants.gov* as the registration process for SAM and *Grants.gov* could take up to 20 working days.
- Please follow the instructions on *Grants.gov* to include additional documentation that may be requested by this funding announcement.
- Applicants must comply with any page limits described in this funding announcement.
- After submitting the application, you will receive an automatic acknowledgment from *Grants.gov* that contains a *Grants.gov* tracking number. The IHS will not notify you that the application has been received.

System for Award Management

Organizations that are not registered with the System for Award Management (SAM) must access the SAM online registration through the SAM home page at *https://sam.gov.* Organizations based in the U.S. will also need to provide an Employer Identification Number from the Internal Revenue Service that may take an additional 2–5 weeks to become active. Please see *SAM.gov* for details on the registration process and timeline. Registration with the SAM is free of charge but can take several weeks to process. Applicants may register online at *https://sam.gov.*

Unique Entity Identifier

Your *SAM.gov* registration now includes a Unique Entity Identifier (UEI), generated by *SAM.gov*, which replaces the DUNS number obtained from Dun and Bradstreet. *SAM.gov* registration no longer requires a DUNS number.

Check your organization's *SAM.gov* registration as soon as you decide to apply for this program. If your *SAM.gov* registration is expired, you will not be able to submit an application. It can take several weeks to renew it or resolve any issues with your registration, so do not wait.

Check your *Grants.gov* registration. Registration and role assignments in *Grants.gov* are self-serve functions. One user for your organization will have the authority to approve role assignments, and these must be approved for active users in order to ensure someone in your organization has the necessary access to submit an application.

The Federal Funding Accountability and Transparency Act of 2006, as amended (''Transparency Act''), requires all HHS recipients to report information on sub-awards. Accordingly, all IHS recipients must notify potential first-tier sub-recipients that no entity may receive a first-tier sub-award unless the entity has provided its UEI number to the prime recipient organization. This requirement ensures the use of a universal identifier to enhance the quality of information available to the public pursuant to the Transparency Act.

Additional information on implementing the Transparency Act, including the specific requirements for SAM, are available on the DGM Grants Management, Policy Topics web page at *https://www.ihs.gov/dgm/policytopics/.*

V. Application Review Information

Possible points assigned to each section are noted in parentheses. The project narrative and budget narrative should include the proposed activities for the entire period of performance. The project narrative should be written in a manner that is clear to outside reviewers unfamiliar with prior related activities of the applicant. It should be well organized, succinct, and contain all information necessary for reviewers to fully understand the project. Attachments requested in the criteria do not count toward the page limit for the narratives. Points will be assigned to each evaluation criteria adding up to a total of 100 possible points. Points are assigned as follows:

1. Evaluation Criteria

A. Introduction and Need for Assistance (25 Points)

Demonstrate that the Tribe has conducted previous Self-Governance planning activities by clearly stating the results of what was learned during the planning process. Explain how the Tribe has determined it has the knowledge and expertise to assume or expand PSFAs and the administrative infrastructure to support the assumption of PSFAs. Identify the need for assistance and how the Negotiation Cooperative Agreement would benefit the health activities the Tribe is preparing to assume or expand.

B. Project Objective(s), Work Plan and Approach (25 Points)

State in measurable terms the objectives and appropriate activities to achieve the following Negotiation Cooperative Agreement recipient award activities:

1. Determine the PSFAs that will be negotiated into the Tribe's Compact and FA. Prepare and discuss each PSFA in comparison to the level of services provided so that an informed decision can be made on new or expanded program assumption.

2. Identify Tribal shares associated with the PSFAs that will be included in the FA.

3. Develop the terms and conditions that will be set forth in both the Compact and FA to submit to the ALN prior to negotiations. Clearly describe how the Tribe's proposal will result in an improved approach to managing the PSFAs to be assumed or expanded. Include how the Tribe plans to demonstrate improved health care services to the community and incorporate the proposed timelines for negotiations.

C. Program Evaluation (25 Points)

Describe fully the improvements that will be made by the Tribe to manage the health care system and identify the anticipated or expected benefits for the Tribe. Define the criteria to be used to evaluate objectives associated with the project and how they will be measured.

D. Organizational Capabilities, Key Personnel, and Qualifications (15 Points)

Describe the organizational structure of the Tribe and its ability to manage the proposed project. Include resumes or position descriptions of key staff showing requisite experience and expertise. If applicable, include resumes and scope of work for consultants that demonstrate experience and expertise relevant to the project.

E. Categorical Budget and Budget Justification (10 Points)

Submit a budget with a narrative describing the budget request and matching the scope of work described in the project narrative. Justify all expenditures identifying reasonable and allowable costs necessary to accomplish the goals and objectives as outlined in the project narrative.

2. Review and Selection

Each application will be prescreened for eligibility and completeness as outlined in this funding announcement. The Review Committee (RC) will review applications that meet the eligibility criteria. The RC will review the applications for merit based on the evaluation criteria. Incomplete applications and applications that are not responsive to the administrative thresholds (budget limit, period of performance limit) will not be referred to the RC and will not be funded. The DGM will notify the applicant of this determination.

Applicants must address all program requirements and provide all required documentation.

3. Notifications of Disposition

All applicants will receive an Executive Summary Statement from the OTSG within 30 days of the conclusion of the RC outlining the strengths and weaknesses of their application. The summary statement will be sent to the Authorizing Official identified on the face page (SF–424) of the application.

A. Award Notices for Funded Applications

The NoA is the authorizing document for which funds are dispersed to the approved entities and reflects the amount of Federal funds awarded, the purpose of the award, the terms and conditions of the award, the effective date of the award, the budget period, and period of performance. Each entity approved for funding must have a user account in GrantSolutions in order to retrieve the NoA. Please see the Agency Contacts list in Section VII for the system's contact information.

B. Approved but Unfunded Applications

Approved applications not funded due to lack of available funds will be held for 1 year. If funding becomes available during the course of the year, the application may be reconsidered.

Note: Any correspondence, other than the official NoA executed by an IHS grants management official announcing to the project director that an award has been made to their organization, is not an authorization to implement their program on behalf of the IHS.

VI. Award Administration Information

1. Administrative Requirements

Awards issued under this announcement are subject to, and are administered in accordance with, the following regulations and policies:

A. The criteria as outlined in this program announcement.

B. Administrative Regulations for Awards:

- Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards currently in effect or implemented during the period of award, other Department regulations and policies in effect at the time of award, and applicable statutory provisions. At the time of publication, this includes 45 CFR part 75, at *https://www.govinfo.gov/content/pkg/CFR-2022-title45-vol1/pdf/CFR-2022-title45-vol1-part75.pdf.*
- If you receive an award, HHS may terminate it if any of the conditions in 2 CFR 200.340(a)(1)–(4) are met. Please review all HHS regulatory provisions for Termination at 45 CFR 75.372, at the time of this publication located at *https://www.govinfo.gov/content/pkg/CFR-2022-title45-vol1/pdf/CFR-2022-title45-vol1-sec75-372.pdf.*

C. Grants Policy:

- HHS Grants Policy Statement, Revised January 2007, at *https://www.hhs.gov/sites/default/files/grants/grants/policies-regulations/hhsgps107.pdf.*

D. Cost Principles:

- Uniform Administrative Requirements for HHS Awards, ''Cost Principles,'' at 45 CFR part 75 subpart E, at the time of this publication located at *https://www.govinfo.gov/content/pkg/CFR-2022-title45-vol1/pdf/CFR-2022-title45-vol1-part75-subpartE.pdf.*

E. Audit Requirements:

- Uniform Administrative Requirements for HHS Awards, ''Audit Requirements,'' at 45 CFR part 75 subpart F, at the time of this publication located at *https://www.govinfo.gov/content/pkg/CFR-2022-title45-vol1/pdf/CFR-2022-title45-vol1-part75-subpartF.pdf.*

F. As of August 13, 2020, 2 CFR part 200 was updated to include a prohibition on certain telecommunications and video surveillance services or equipment. This prohibition is described in 2 CFR 200.216. This will also be described in the terms and conditions of every IHS

grant and cooperative agreement awarded on or after August 13, 2020.

2. Indirect Costs

This section applies to all recipients that request reimbursement of IDC in their application budget. In accordance with HHS Grants Policy Statement, Part II–27, the IHS requires applicants to obtain a current IDC rate agreement and submit it to the DGM prior to the DGM issuing an award. The rate agreement must be prepared in accordance with the applicable cost principles and guidance as provided by the cognizant agency or office. A current rate covers the applicable award activities under the current award's budget period. If the current rate agreement is not on file with the DGM at the time of award, the IDC portion of the budget will be restricted. The restrictions remain in place until the current rate agreement is provided to the DGM.

Per 2 CFR 200.414(f) Indirect (F&A) costs, found at *https://www.govinfo.gov/content/pkg/CFR-2023-title2-vol1/pdf/CFR-2023-title2-vol1-sec200-414.pdf.*

Electing to charge a de minimis rate of 10 percent can be used by applicants that have received an approved negotiated indirect cost rate from HHS or another cognizant Federal agency. Applicants awaiting approval of their indirect cost proposal may request the 10 percent de minimis rate. When the applicant chooses this method, costs included in the indirect cost pool must not be charged as direct costs to the award.

Available funds are inclusive of direct and appropriate indirect costs. Approved indirect funds are awarded as part of the award amount, and no additional funds will be provided.

Generally, IDC rates for IHS recipients are negotiated with the Division of Cost Allocation at *https://rates.psc.gov/* or the Department of the Interior (Interior Business Center) at *https://ibc.doi.gov/ICS/tribal.* For questions regarding the indirect cost policy, please write to *DGM@ihs.gov.*

3. Reporting Requirements

The recipient must submit required reports consistent with the applicable deadlines. Failure to submit required reports within the time allowed may result in suspension or termination of an active award, withholding of additional awards for the project, or other enforcement actions such as withholding of payments or converting to the reimbursement method of payment. Continued failure to submit required reports may result in the imposition of special award provisions and/or the non-funding or non-award of other eligible projects or activities. This requirement applies whether the delinquency is attributable to the failure of the recipient organization or the individual responsible for preparation of the reports. Per DGM policy, all reports must be submitted electronically by attaching them as a ''Grant Note'' in GrantSolutions. Personnel responsible for submitting reports will be required to obtain a login and password for GrantSolutions. Please use the form under the Recipient User section of *https://www.grantsolutions.gov/home/getting-started-request-a-user-account/.* Download the Recipient User Account Request Form, fill it out completely, and submit it as described on the web page and in the form.

The reporting requirements for this program are noted below.

A. Progress Reports

Program progress reports are required semi-annually. The progress reports are due within 30 days after the reporting period ends (specific dates will be listed in the NoA Terms and Conditions). These reports must include a brief comparison of actual accomplishments to the goals established for the period, a summary of progress to date or, if applicable, provide sound justification for the lack of progress, and other pertinent information as required. A final report must be submitted within 120 days of the period of performance end date.

B. Financial Reports

Federal Financial Reports are due 90 days after the end of each budget period, and a final report is due 120 days after the end of the period of performance. Recipients are responsible and accountable for reporting accurate information on all required reports: the Progress Reports and the Federal Financial Report. Failure to submit timely reports may result in adverse award actions blocking access to funds.

C. Federal Sub-Award Reporting System (FSRS)

This award may be subject to the Transparency Act sub-award and executive compensation reporting requirements of 2 CFR part 170.

The Transparency Act requires the OMB to establish a single searchable database, accessible to the public, with information on financial assistance awards made by Federal agencies. The Transparency Act also includes a requirement for recipients of Federal awards to report information about first-tier sub-awards and executive compensation under Federal assistance awards.

The IHS has implemented a Term of Award into all IHS Standard Terms and Conditions, NoAs, and funding announcements regarding the FSRS reporting requirement. This IHS Term of Award is applicable to all IHS grant and cooperative agreements issued on or after October 1, 2010, with a $25,000 sub-award obligation threshold met for any specific reporting period.

For the full IHS award term implementing this requirement and additional award applicability information, visit the DGM Grants Management website at *https://www.ihs.gov/dgm/policytopics/.*

D. Non-Discrimination Legal Requirements for Recipients of Federal Financial Assistance (FFA)

If you receive an award, you must follow all applicable nondiscrimination laws. You agree to this when you register in *SAM.gov.* You must also submit an Assurance of Compliance (HHS–690). To learn more, see *https://www.hhs.gov/civil-rights/for-providers/laws-regulations-guidance/laws/index.html.* Pursuant to 45 CFR 80.3(d), an individual shall not be deemed subjected to discrimination by reason of their exclusion from benefits limited by Federal law to individuals eligible for benefits and services from the IHS.

E. Federal Awardee Performance and Integrity Information System (FAPIIS)

The IHS is required to review and consider any information about the applicant that is in the FAPIIS at *https://www.fapiis.gov/fapiis/#/home* before making any award in excess of the simplified acquisition threshold (currently $250,000) over the period of performance. An applicant may review and comment on any information about itself that a Federal awarding agency previously entered. The IHS will consider any comments by the applicant, in addition to other information in FAPIIS, in making a judgment about the applicant's integrity, business ethics, and record of performance under Federal awards when completing the review of risk posed by applicants, as described in 45 CFR 75.205.

As required by 45 CFR part 75 Appendix XII of the Uniform Guidance, NFEs are required to disclose in FAPIIS any information about criminal, civil, and administrative proceedings, and/or affirm that there is no new information to provide. This applies to NFEs that receive Federal awards (currently active grants, cooperative agreements, and procurement contracts) greater than $10 million for any period of time during

the period of performance of an award/project.

Mandatory Disclosure Requirements

As required by 2 CFR part 200 of the Uniform Guidance, and HHS implementing regulations at 45 CFR part 75, the IHS must require an NFE or an applicant for a Federal award to disclose, in a timely manner, in writing to the IHS or pass-through entity all violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award.

All applicants and recipients must disclose in writing, in a timely manner, to the IHS and to the HHS Office of Inspector General all information related to violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award. 45 CFR 75.113.

Disclosures must be sent in writing to:

U.S. Department of Health and Human Services, Indian Health Service, Division of Grants Management, ATTN: Marsha Brookins, Director, 5600 Fishers Lane, Mail Stop: 09E70, Rockville, MD 20857 (Include ''Mandatory Grant Disclosures'' in subject line), Office: (301) 443–5204, Fax: (301) 594–0899, Email: *DGM@ihs.gov.*

AND

U.S. Department of Health and Human Services, Office of Inspector General, ATTN: Mandatory Grant Disclosures, Intake Coordinator, 330 Independence Avenue SW, Cohen Building, Room 5527, Washington, DC 20201, URL: *https://oig.hhs.gov/fraud/report-fraud/* (Include ''Mandatory Grant Disclosures'' in subject line), Fax: (202) 205–0604 (Include ''Mandatory Grant Disclosures'' in subject line) or Email: *MandatoryGrantee Disclosures@oig.hhs.gov*

Failure to make required disclosures can result in any of the remedies described in 45 CFR 75.371 Remedies for noncompliance, including suspension or debarment (see 2 CFR part 180 and 2 CFR part 376).

VII. Agency Contacts

1. Questions on the program matters may be directed to: Roxanne Houston, Program Officer, Indian Health Service, Office of Tribal Self-Governance, 5600 Fishers Lane, Mail Stop: 08E09B, Rockville, MD 20857, Phone: (301) 443–7821, Email: *Roxanne.Houston@ihs.gov*, website: *https://www.ihs.gov/SelfGovernance/.*

2. Questions on awards management and fiscal matters may be directed to: Indian Health Service, Division of Grants Management, 5600 Fishers Lane, Mail Stop: 09E70, Rockville, MD 20857, Email: *DGM@ihs.gov.*

3. For technical assistance with *Grants.gov*, please contact the *Grants.gov* help desk at 800–518–4726, or by email at *support@grants.gov.*

4. For technical assistance with GrantSolutions, please contact the GrantSolutions help desk at (866) 577–0771, or by email at *help@grantsolutions.gov.*

VIII. Other Information

The Public Health Service strongly encourages all grant, cooperative agreement, and contract recipients to provide a smoke-free workplace and promote the non-use of all tobacco products. In addition, Public Law 103–227, the Pro-Children Act of 1994, prohibits smoking in certain facilities (or in some cases, any portion of the facility) in which regular or routine education, library, day care, health care, or early childhood development services are provided to children. This is consistent with the HHS mission to protect and advance the physical and mental health of the American people.

Roselyn Tso,

Director, Indian Health Service.

[FR Doc. 2023–26955 Filed 12–19–23; 8:45 am]

BILLING CODE 4166–14–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; 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 contract proposals 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 and contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; TEP–1: SBIR Contract Review.

Date: February 1, 2024.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W102, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Shakeel Ahmad, Ph.D., Branch Chief, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W102, Rockville, Maryland 20850, 240–276–6442, *ahmads@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Projects in Physical Sciences Oncology Review.

Date: February 2, 2024.

Time: 11:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W640, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Saejeong J. Kim, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W640, Rockville, Maryland 20850, 240–276–7684, *saejeong.kim@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–5: NCI Clinical and Translational Cancer Research.

Date: February 6–7, 2024.

Time: 10:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W240, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Hasan Siddiqui, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W240, Rockville, Maryland 20850, 240–276–5122, *hasan.siddiqui@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; TEP–5: SBIR Contract Review.

Date: February 9, 2024.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W106, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Eduardo Emilio Chufan, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W106, Rockville, Maryland 20850, 240–276–7975, *chufanee@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; The NCI Predoctoral to Postdoctoral Fellow Transition Award (F99/K00).

Date: February 14–15, 2024.

Time: 10:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W238, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Byeong-Chel Lee, Ph.D., Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W238, Rockville, Maryland 20850, 240–276–7755, *byeong-chel.lee@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI SPORE (P50) Review SEP–III.

Date: February 15–16, 2024.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W244, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Amr M. Ghaleb, Ph.D., Scientific Review Officer, Research Program Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W244, Rockville, Maryland 20850, 240–276–6611, *amr.ghaleb@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; TEP–2: SBIR Contract Review.

Date: February 15, 2024.

Time: 9:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W238, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Jeffrey E. DeClue, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W238, Rockville, Maryland 20850, 240–276–6371, *decluej@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI R01/R34 Advancing Adolescent Tobacco Cessation Intervention.

Date: February 16, 2024.

Time: 9:30 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W248, Rockville, Maryland 20850 (Telephone Conference Call).

Contact Person: Anita T. Tandle, Ph.D., Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W248, Rockville, Maryland 20850, 240–276–5085, *tandlea@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–7: NCI Clinical and Translational Cancer Research.

Date: February 16, 2024.

Time: 10:00 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W640, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Saejeong J. Kim, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W640, Rockville, Maryland 20850, 240–276–7684, *saejeong.kim@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI Research Specialist Award (R50) Clinician.

Date: February 22, 2024.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W242, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Zhiqiang Zou, M.D., Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W242, Rockville, Maryland 20850, 240–276–6372, *zouzhiq@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; TEP–9: SBIR Contract Review.

Date: February 28–29, 2024.

Time: 10:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W106, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Eduardo Emilio Chufan, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W106, Rockville, Maryland 20850, 240–276–7975, *chufanee@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; TEP–3: SBIR Contract Review.

Date: February 29, 2024.

Time: 9:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W238, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Jeffrey E. DeClue, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W238, Rockville, Maryland 20850, 240–276–6371, *decluej@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; TEP–4: SBIR Contract Review: Microbiome-Based Tests for Cancer Research.

Date: February 29, 2024.

Time: 11:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W246, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Jun Fang, Ph.D., Scientific Review Officer, Research Technology and Contract Review, Branch Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W246, Rockville, Maryland 20850, 240–276–5460, *jfang@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI Research Specialist Award (R50).

Date: February 29–March 1, 2024.

Time: 10:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W242, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Zhiqiang Zou, M.D., Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W242, Rockville, Maryland 20850, 240–276–6372, *zouzhiq@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI Assay Validation of High-Quality Markers for Clinical Studies in Cancer (UH2/3) meeting.

Date: February 29, 2024

Time: 12:30 p.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W244, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: John Paul Cairns, Ph.D., Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W244, Rockville, Maryland 20850, 240–276–5415, *paul.cairns@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–6: NCI Clinical and Translational Cancer Research.

Date: March 1, 2024.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W260, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Robert F. Gahl, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9606 Medical Center Drive, Room 7W260, Rockville, Maryland 20850, 240–276–7869, *robert.gahl@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–9: NCI Clinical and Translational Cancer Research.

Date: March 6, 2024.

Time: 11:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W526, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Viktoriya Sidorenko, Ph.D., Scientific Review Officer, Program and Review Extramural Staff Training Office,

Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W526, Rockville, Maryland 20850, 240–276–5073, *viktoriya.sidorenko@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Advanced Development of Informatics Technologies for Cancer Research.

Date: March 6, 2024.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W246, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Jun Fang, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W246, Rockville, Maryland 20850, 240–276–5460, *jfang@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; SEP–11: NCI Clinical and Translational Cancer Research.

Date: March 7, 2024.

Time: 10:00 a.m. to 1:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W238, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Byeong-Chel Lee, Ph.D., Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W238, Rockville, Maryland 20850, 240–276–7755, *byeong-chel.lee@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI Informatics Technologies for Cancer Research.

Date: March 7, 2024.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W236, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Shuli Xia, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W236, Rockville, Maryland 20850, 240–276–5256, *shuli.xia@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI Pediatric Early Phase Clinical Trial Network.

Date: March 7, 2024.

Time: 10:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W640, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Saejeong J. Kim, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W640, Rockville, Maryland 20850, 240–276–7684, *saejeong.kim@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Utilizing the PLCO Biospecimens Resource (U01).

Date: March 21, 2024.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W120, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Majed M. Hamawy, Ph.D., Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W120, Rockville, Maryland 20850, 240–276–6457, *mh101v@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Mechanisms of Fusion-Driven Oncogenesis in Childhood Cancers and Next Generation Chemistry Centers for Fusion Oncoproteins.

Date: March 29, 2024.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute at Shady Grove, 9609 Medical Center Drive, Room 7W260, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Robert F. Gahl, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9606 Medical Center Drive, Room 7W260, Rockville, Maryland 20850, 240–276–7869, *robert.gahl@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: December 15, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–27963 Filed 12–19–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Innovations in Functional B Cell Epitope Discovery (N01).

Date: January 18–19, 2024.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3F52, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Lindsey M. Pujanandez, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3F52, Rockville, MD 20852, (240) 627–3206, *lindsey.pujanandez@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: December 14, 2023.

Lauren A. Fleck,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–27893 Filed 12–19–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Topics in Kidney Diseases.

Date: January 5, 2024.

Time: 11:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Santanu Banerjee, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2106, Bethesda, MD 20892, (301) 435–5947, *banerjees5@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 14, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–27894 Filed 12–19–23; 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 Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Initial Review Group; Biomedical Research Study Section.

Date: March 5, 2024.

Time: 10:00 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes 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.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.273, Alcohol Research Programs, National Institutes of Health, HHS)

Dated: December 15, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–27964 Filed 12–19–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Advancing Translational Sciences; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The cooperative agreement applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the cooperative agreement applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Center for Advancing Translational Sciences Special Emphasis Panel; NCATS CTSA UM1 Review Special Emphasis Panel.

Date: February 20, 2024.

Time: 11:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate cooperative agreement applications.

Place: National Center for Advancing Translational Sciences, National Institutes of Health, 6701 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Victor Henriquez, Ph.D., Scientific Review Officer, Office of Scientific Review, National Center for Advancing Translational Sciences, National Institutes of Health, 6701 Democracy Boulevard, Room 1066, Bethesda, MD 20892, (301) 435–0813, *henriquv@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.350, B—Cooperative Agreements; 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: December 15, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–27962 Filed 12–19–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2023–0925]

Area Maritime Security Advisory Committee (AMSC), Eastern Great Lakes, Western New York Sub-Committee Vacancy

AGENCY: Coast Guard, DHS.

ACTION: Notice of availability of committee vacancy; solicitation for membership.

SUMMARY: The Coast Guard requests individuals interested in serving on the Area Maritime Security Committee, Eastern Great Lakes, Western New York Region sub-committee submit their applications for membership to the U.S. Coast Guard Captain of the Port, Buffalo. The Committee assists the Captain of the Port as the Federal Maritime Security Coordinator, Buffalo, in developing, reviewing, and updating the Area Maritime Security Plan for their area of responsibility.

DATES: Requests for membership should reach the Captain of the Port, Buffalo, by January 15, 2024.

ADDRESSES: Applications for membership should be submitted to the Captain of the Port at the following address: Captain of the Port, Buffalo, Attention: LCDR Eric Lunde, 1 Fuhrmann Boulevard, Buffalo, NY 14203–3189.

FOR FURTHER INFORMATION CONTACT: For questions about submitting an application or about the AMSC in general, contact Mr. John Kelly, Western New York Region Sub-Committee Executive Coordinator, at 716–843–9574 or *John.K.Kelly@uscg.mil.*

SUPPLEMENTARY INFORMATION:

Basis and Purpose

Section 102 of the Maritime Transportation Security Act (MTSA) of 2002 authorized the Secretary of the Department in which the Coast Guard is operating to establish Area Maritime Security Advisory Committees (ASMC) for any port area of the United States. The MTSA includes a provision exempting these AMSCs from the Federal Advisory Committee Act (FACA). The AMSCs assist the Federal

Maritime Security Coordinator (FMSC) in the development, review, update, and exercising of the Area Maritime Security Plan (AMSP) for their area of responsibility. Such matters may include, but are not limited to, the following:

(1) Identifying critical port infrastructure and operations; Identifying risks (threats, vulnerabilities, and consequences).

(2) Determining mitigation strategies and implementation methods.

(3) Developing strategies to facilitate the recovery of the Maritime Transportation System after a Transportation Security Incident.

(4) Developing and describing the process to continually evaluate overall port security by considering consequences and vulnerabilities, how they may change over time, and what additional mitigation strategies can be applied; and

(5) Providing advice to and assisting the Federal Maritime Security Coordinator in developing and maintaining the Area Maritime Security Plan.

AMSC Membership

Members of the AMSC should have at least five years of experience related to maritime or port security operations. We are seeking to fill one (1) Sub-Committee vacancies with this solicitation, an Executive Board member to serve as Vice-Chairperson; the position will serve concurrently as a member of the Eastern Great Lakes AMSC when so convened by the FMSC.

Applicants may be required to pass an appropriate security background check prior to appointment to the committee. Applicants must register with and remain active as a Coast Guard Homeport user if appointed. Member's term of office will be for five years; however, a member is eligible to serve additional terms of office. Members will not receive any salary or other compensation for their service on an AMSC. In accordance with 33 CFR 103, members may be selected from Federal, Territorial, or Tribal governments; State government and political subdivisions of the State; local public safety, crisis management, and emergency response agencies; law enforcement and security organizations; maritime industry, including labor; other port stakeholders having a special competence in maritime security; and port stakeholders affected by security practices and policies.

The Department of Homeland Security does not discriminate in selection of committee members on the basis of race, color, religion, sex, national origin, political affiliation, sexual orientation, gender identity, marital status, disability, and genetic information, age, membership in an employee organization, or any other non-merit factor. The Department of Homeland Security strives to achieve a widely diverse candidate pool for all of its recruitment actions.

Request for Applications

Those seeking membership are not required to submit formal applications to the local Captain of the Port, however, because we do have an obligation to ensure that a specific number of members have the prerequisite maritime security experience, we encourage the submission of resumes highlighting experience in the maritime and security industries.

Dated: December 14, 2023.

Mark I. Kuperman,

Captain, U.S. Coast Guard, Captain of the Port & Federal Maritime Security Coordinator, Eastern Great Lakes.

[FR Doc. 2023–27944 Filed 12–19–23; 8:45 am]

BILLING CODE 9110–15–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. CISA–2023–0027]

Request for Information on ''Shifting the Balance of Cybersecurity Risk: Principles and Approaches for Secure by Design Software''

AGENCY: Cybersecurity and Infrastructure Security Agency (CISA), Department of Homeland Security (DHS).

ACTION: Notice; request for information.

SUMMARY: CISA requests input from all interested parties on the white paper ''Shifting the Balance of Cybersecurity Risk: Principles and Approaches for Secure by Design Software.''

DATES: Written comments are requested on or before February 20, 2024. Submissions received after the deadline for receiving comments may not be considered.

ADDRESSES: You may send comments, identified by docket number CISA–2023–0027, by following the instructions below for submitting comments via the Federal eRulemaking Portal at *http://www.regulations.gov.*

Instructions: All comments received will be posted to *https://www.regulations.gov,* including any personal information provided. If you cannot submit your comment using *https://www.regulations.gov,* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this notice for alternate instructions. For detailed instructions on sending comments and additional information on the types of comments that are of particular interest to CISA, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Documents: The draft white paper titled ''Shifting the Balance of Cybersecurity Risk: Principles and Approaches for Secure by Design Software'' is available at *https://www.cisa.gov/sites/default/files/2023-10/SecureByDesign_1025_508c.pdf.*

Docket: For access to the docket and to read comments received, go to *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Megan Doscher, 202–975–4911, *SecureByDesign@cisa.dhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Public Participation

Response to this RFI is voluntary. Interested persons are invited to comment on this notice by submitting written data, views, or arguments using the method identified in the **ADDRESSES** section above. All members of the public including, but not limited to, specialists in the field, academic experts, members of industry, public interest groups, and those with relevant economic expertise are invited to comment. The draft white paper titled ''Shifting the Balance of Cybersecurity Risk: Principles and Approaches for Secure by Design Software'' is available at *https://www.cisa.gov/sites/default/files/2023-10/SecureByDesign_1025_508c.pdf.*

Instructions: All submissions must include the agency name and Docket number for this notice. Comments may be submitted electronically via the Federal e-Rulemaking Portal. To submit comments electronically:

1. Go to *www.regulations.gov* and CISA–2023–0027 into the search field.
2. Click on the ''Comment Now!'' icon.
3. Complete the required fields.
4. Enter or attach your comments.

All submissions, including attachments and other supporting materials, will become part of the public record and may be subject to public disclosure. CISA reserves the right to publicly publish relevant and unedited comments in their entirety. Do not include personal information such as account numbers, Social Security numbers, or the names of other individuals. Do not submit confidential business information or otherwise sensitive or protected information. All

comments received shall be posted to *http://www.regulations.gov.* Commenters are encouraged to identify the number of specific topic(s) they are addressing.

II. Background

Products that are secure by design are those where the security of the customers is a core business goal, not a technical feature. Secure by design products start with that goal before development begins. Secure by default products are secure and ready to use ''out of the box'' with little to no necessary configuration changes; moreover, the security features are available without any additional costs. Together, these two concepts move much of the burden of staying secure to the manufacturers and reduce the chance that the customer will fall victim to security incidents resulting from misconfigurations, insufficiently fast patching, or other common issues.

Consequently, it is crucial for software manufacturers to make secure by design and secure by default the focal points of product design and development processes. The white paper strongly encourages every software manufacturer to build products in a way that reduces the burden of cybersecurity on customers. To achieve this outcome, software manufacturers are urged to evolve their design and development programs to permit only secure by design and secure by default products to be shipped to customers.

The white paper identifies three core principles to guide software manufacturers in building software security into their design processes prior to developing, configuring, and shipping their products to customers:

1. *Take Ownership of Customer Security Outcomes:* Software manufacturers should take ownership of their customers' security outcomes and evolve their products accordingly. Software manufacturers should invest in product security efforts that include application hardening, application security features, and application default settings.

2. *Embrace Radical Transparency and Accountability:* Software manufacturers should pride themselves in delivering safe and secure products. Transparency will help convey what ''good'' looks like, and that information will benefit the defenders more than our adversaries.

3. *Lead From the Top:* Build organizational structure and leadership to achieve these goals. Senior leaders must make security a business priority and not just a technical matter. Internal incentives and culture must support security as a design requirement. While technical subject matter expertise is critical to product security, senior leaders are the primary decision makers for implementing change in an organization.

CISA acknowledges that security by design is not easy. For example, implementing a secure software development lifecycle (SDLC) is a difficult task and takes time; smaller software manufacturers may struggle to implement many of these suggestions. As more organizations focus their attention on secure software development, there is room for innovations that will narrow the gap between the larger and smaller software manufacturers. Furthermore, engineering teams will be able to establish a new, steady-state rhythm in which security is built into the design and takes less effort to maintain.

The ''Shifting the Balance of Cybersecurity Risk: Principles and Approaches for Secure by Design Software'' white paper identifies a path forward for implementing security by design and security by default into the SDLC, placing the burden of cybersecurity on manufacturers instead of customers. The white paper explores the benefits and challenges of applying the three secure by design principles. In doing so, the white paper outlines the requirements and activities necessary for software manufacturers to adopt a secure by design philosophy. An updated version of the white paper was published on October 16, 2023.[1]

III. Additional Topics for Commenters

This white paper is part of a broader campaign across CISA and the federal government to encourage technology manufacturers to prioritize security in their development processes. For future iterations of guidance, CISA also seeks additional information on the economics of secure development, particularly as compared with the cost of incident response. Additionally, for use in future guidance, CISA seeks information from the public describing how security could be more fully integrated into computer science and software development courses of study.

In addition to comments on the white paper, CISA seeks comments and information on the following related topics:

1. *Incorporating security into the SDLC.*

a. Among the many tactics for weaving security into the SDLC, which tactics are the most effective? How is that impact measured?

b. What actions in the white paper are respondents taking, and what measured results are they seeing? Have respondents publicly documented these actions and their results and, if so, where?

c. Smaller software manufacturers report that they struggle to implement the tools and practices that larger manufacturers can implement. What are some examples of smaller software companies that have implemented well-lit paths to reduce product vulnerabilities?

d. What are some best practices that smaller software companies can adopt?

e. What improvements are needed to allow most small software manufacturers to build and maintain software that is secure by design?

f. What are some examples of companies that invest in continuous security education for software developers? How much do these programs cost, and what are the results?

2. *Education.* University-based computer science degree programs must manage many priorities, including research, student demand, faculty and tenure requirements, and curriculum design. Security is often relegated to an elective, rather than a core component of the program. Online education programs, which offer a viable and convenient pathway toward a degree or a specialized skill set in computer science or software development, have similar outcomes, though perhaps for different reasons.

a. What are some examples of commercial entities signaling their demands to universities for knowledge of security and secure coding in graduates of computer science programs? Is knowledge of security evaluated during the hiring stage, or are employees reskilled after being hired?

b. What are some examples of higher education incorporating foundational security knowledge into their computer science curricula? How did the universities incorporate the knowledge and what were some results? Did students demand additional security training, or were they resistant? Were students able to differentiate their skillsets based on this knowledge and experience?

c. How can current or prospective students for online computer science or coding education programs signal their demands for security? What are some actions that online programs can take to incentivize companies to develop content with integrated security

[1] The updated white paper ''Shifting the Balance of Cybersecurity Risk: Principles and Approaches for Secure by Design Software'' can be found at *https://www.cisa.gov/sites/default/files/2023-10/SecureByDesign_1025_508c.pdf.*

principles that are hosted on their platforms?

3. *Hardening/loosening guides.* Hardening guides are supplements to installation guides that help customers configure and deploy a product with a stronger security posture than the product's defaults would create.

a. What are some best practices for hardening guides? What are some good examples?

b. How do software manufacturers decide on their products' default configurations, and how do those decisions affect the length and complexity of the hardening guide?

c. What are some examples of products that have something closer to a ''loosening guide?''

d. How do companies decide which staff members author the hardening/loosening guides, and how much cybersecurity experience do those members have? What are some best practices that more companies should adopt?

e. Are there examples of products that offer automated hardening mechanisms, such as in installation scripts or in real-time when configuring settings, rather than in a supplemental document?

f. What are customers' experiences with multiple hardening guides across a large tech stack?

4. *Economics of implementing secure by design practices.* Just as cars with crumple zones and air bags may cost their manufacturers more to build than cars without such safety mechanisms, developing secure by design products is likely to cost the software manufacturer more than if the manufacturer did not emphasize product and customer security. CISA requests additional information about the magnitude and sources of these costs.

a. What types of costs do software manufacturers incur as they implement and mature their secure by design programs? Examples might include developer training, security analysis tools, migrating to memory safe languages (MSL), and vetting the security of open-source libraries.

b. How much are these costs, typically; to what extent are they absorbed by manufacturers; and to what extent are they passed along to consumers through price increases?

c. Which secure by design practices are the most effective, and what voluntary guidance should CISA consider issuing to encourage those practices?

5. *Economics of software vulnerabilities.* Software vulnerabilities cost software manufacturers and their customers time, effort, and money. CISA seeks additional information about how software manufacturers measure these costs and how manufacturers respond as costs fluctuate.

a. Impact of vulnerabilities on software manufacturers.

i. How do software manufacturers measure their costs for each vulnerability?

ii. Do software manufacturers measure the financial impact of vulnerabilities over time? If so, what are some examples of common patterns that emerge?

iii. What are the differences in the remediation costs associated with vulnerabilities discovered in-house compared to the costs associated with vulnerabilities found after customers have deployed the product?

iv. How do software manufacturers determine how to remediate vulnerabilities, *e.g.,* whether to patch specific instances of a vulnerability versus making other changes to remove the class of vulnerabilities? Does the size of the company (small versus large) make a difference for these choices? Are there particular cost structures that warrant investments in removing the class of vulnerabilities rather than patching vulnerabilities upon subsequent discovery? What factors or considerations do software manufacturers use to determine the financial decision points?

v. Where in the software manufacturer's organization are tradeoffs made based on this financial data? Are these tradeoffs handled as technical matters or as business matters addressed by senior business leaders?

b. Impact of vulnerabilities on customers.

i. Do software manufactures calculate costs for consumers? If so, how do software manufacturers determine the average cost for customers to deploy software updates to mitigate a software vulnerability?

ii. How do software manufacturers determine the aggregate cost across all customers for patching?

6. *Economics of customer demand.* Software manufacturers generally implement the features customers ask for the most. There is a perception that customers are not asking for security in the products they buy.

a. In what ways do customers ask software manufacturers to make products more secure?

b. In what ways do customers ask for specific security features rather than asking for products that are secure by design?

c. How can customers measure the security of a product? Can they take that measurement and translate it into long-term costs to decision makers in a business?

d. What are the inhibitors to customers creating a strong demand signal that software should be secure by design?

7. *Field studies.* Field studies can illuminate how customers configure and use products in ways that may differ from the developer's expectations. For example, a field study might determine that a significant percentage of customers use unsafe settings when safer ones exist, thus putting them at risk, possibly without their knowledge.

a. Do software manufacturers carry out such field studies? If so, what are some examples of software manufacturers that have implemented formal field studies, and how did those studies affect the design of future versions of that software? How did those studies affect the user experience of the security settings in line with how the software is supposed to function in different sectors (such as healthcare, K–12, etc.)?

b. What are some best practices for conducting field studies and incorporating the results into the SDLC? Are field studies on the user experience of security settings and software function conducted and, if so, what are some best practices?

c. What costs and benefits do field studies have for software manufacturers? For their customers?

8. *Recurring vulnerabilities.* In the news, we frequently see examples of software vulnerabilities for which effective mitigations have been available for years, or even decades. Examples include hard-coded credentials, SQL injection vulnerabilities, and directory path traversal vulnerabilities.

a. What are the barriers to eliminating recurring classes of vulnerability?

b. How can potential customers determine which software manufacturers have been diligent in removing classes of vulnerability rather than patching individual instances of that class of vulnerability?

c. What changes to the Common Vulnerabilities and Exposures (CVE) and Common Weakness Enumeration (CWE) programs might lead to more companies identifying recurring vulnerability types and investing to eliminate them?

9. *Customer upgrade reluctance.* When software manufacturers improve a product, perhaps by implementing a new security feature or network protocol, customers may need to act to take advantage of those improvements. However, customers do not always adopt those security improvements,

particularly if the improvements cost them time or money.

a. What are the primary barriers to customers investing in upgrades that should reduce their risk?

b. What are some examples of security improvements where customer adoption was swift despite those barriers? What factors made customer upgrades more likely? How much did the software manufacturer need to invest in dollars or customer outreach to achieve broad adoption?

10. *Threat modeling.* Threat modeling is a technique used to identify assets and threats and to design, implement, and validate mitigations.

a. What are some examples of threat models that software manufacturers have made public?

b. What are some best practices for publishing a high-level threat model that will demonstrate to customers that the software manufacturer has adopted a robust threat-modeling program as part of its SDLC?

11. *Charging for security features.* Companies often charge more for security features. Companies may choose to include security features only in higher-product tiers, or they may charge for it as a separate line item. For example, some software companies charge customers more when they want to use a single sign-on (SSO) service or if the customer wants access to all security related audit logs. CISA seeks additional information about how software manufacturers might decide to charge for a feature or to include it in the base price.

a. How do software manufacturers decide which pricing model is appropriate?

b. What considerations do they factor into their decision?

12. *Artificial Intelligence (AI).* AI is software and therefore should adhere to the three secure by design principles.

a. What additional security considerations are necessary for the development of secure AI?

13. *Operational Technology (OT).* OT systems can differ significantly from information technology (IT) systems. OT systems operate in different environments in which availability is the main priority. Unlike some IT systems that are refreshed or replaced every few years, some OT systems may operate in the field for a decade or more.

a. Which OT products or companies have implemented some of the core tenants of secure by design engineering?

b. What priority levels do customers place on security features and product attributes? What incentives would likely lead customers to increase their demand for security features, even if it costs more?

c. Where could targeted investments be made to raise and scale security levels across OT?

This notice is issued under the authority of 6 U.S.C. 652 and 659.

Eric Goldstein,

Executive Assistant Director for Cybersecurity, Cybersecurity and Infrastructure Security Agency, Department of Homeland Security.

[FR Doc. 2023–27948 Filed 12–19–23; 8:45 am]

BILLING CODE 9110–9P–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

[Docket No. BOEM–2023–0061]

Notice of Intent To Prepare a Programmatic Environmental Impact Statement for Future Floating Wind Energy Development Related to 2023 Leased Areas Offshore California

AGENCY: Bureau of Ocean Energy Management, Interior.

ACTION: Notice of intent (NOI) to prepare a programmatic environmental impact statement (PEIS); request for comments.

SUMMARY: Consistent with the regulations implementing the National Environmental Policy Act (NEPA), BOEM announces its intent to prepare a PEIS to analyze the potential impacts of floating offshore wind energy development on the five leased areas offshore Humboldt and Morro Bay, California. The PEIS also will identify programmatic protective mitigation measures that if adopted could lessen those impacts. This NOI announces the scoping process BOEM will use to identify significant issues and potential alternatives for consideration in the California offshore wind (OSW) PEIS.

DATES: Comments are due to BOEM by February 20, 2024.

BOEM will hold two virtual public scoping meetings for the California OSW PEIS.

Tentative dates:

Tuesday, February 6, 2024; and

Thursday, February 8, 2024.

Please go to *https://www.boem.gov/california* for meeting dates, times, and registration. Meetings are open to the public and free to attend. Pre-registration is not required to attend.

ADDRESSES: Comments can be submitted in the following ways:

- *By mail or delivery service:* Send comments in an envelope labeled, ''CALIFORNIA OSW PEIS'' and addressed to Chief, Environmental Assessment Section, Office of Environment, Bureau of Ocean Energy Management, 760 Paseo Camarillo, Suite 102, Camarillo, California 93010; or
- Through the *regulations.gov* web portal: Navigate to *https://www.regulations.gov* and search for Docket No. BOEM–2023–0061. Select the document in the search results on which you want to comment, click on the ''Comment'' button, and follow the online instructions for submitting your comment. A commenter's checklist is available on the comment web page. Enter your information and comment, then click ''Submit.''

Detailed information regarding the California OSW PEIS can be found on BOEM's website at: *https://www.boem.gov/california.*

For more information about submitting comments, see ''Comments'' section under **SUPPLEMENTARY INFORMATION** caption.

FOR FURTHER INFORMATION CONTACT: Lisa Gilbane, BOEM Pacific Region Office of Environment, 760 Paseo Camarillo, Suite 102, Camarillo, California 93010, telephone (805) 384–6387, or email *lisa.gilbane@boem.gov.*

SUPPLEMENTARY INFORMATION: In December 2022, through a competitive leasing process under 30 CFR 585.211, BOEM auctioned Renewable Energy Leases OCS–P 0561, 0562, 0563, 0564, and 0565 offshore California. These leases total over 373,000 acres. These are the first wind energy leases offshore California and are anticipated to be commercially developed with floating foundations in waters from 500 to 1,300 meters deep. Three of the leases are offshore central California, near Morro Bay. The other two leases are offshore northern California, near Humboldt Bay. All leases grant the lessees the exclusive right to submit construction and operation plans (COPs) to BOEM proposing the construction, operation, and conceptual decommissioning of offshore wind energy facilities in the lease areas. BOEM identified these lease areas through an extensive data-gathering and engagement process that included the BOEM California Intergovernmental Renewable Energy Task Force, comprised of the State of California, numerous Tribal Nations, Federal agencies, and local governments.

The PEIS will analyze the potential impacts of wind energy development in the five lease areas offshore California and consider measures that can be taken to avoid or reduce those impacts. The PEIS proposed action is the identification of programmatic

mitigation measures [1] to lessen environmental impacts of wind energy development in the lease areas. BOEM may require mitigation measures as conditions of approval for activities proposed by lessees in their COPs. These measures may include the avoidance, minimization, mitigation, and monitoring (AMMM) measures previously used by BOEM in prior offshore wind energy project documents.

BOEM may require all, some, or additional mitigation measures before approving a specific COP if its environmental analysis warrants. The PEIS will neither analyze a specific COP nor result in the approval of any construction and operation activities.

Purpose of and Need for the Proposed Action

The purpose of the Proposed Action is to identify, analyze, and adopt, as appropriate, potential mitigation measures to be applied to the five California leases issued in 2023 in the event a COP is approved and identify minor or negligible impacts so that site-specific reviews can focus on moderate or major impacts and analyze regional cumulative impacts. This approach will allow BOEM to focus subsequent site- and project-specific environmental analyses and consultations on the unique impacts of individual proposed wind energy projects and on cumulative regional impacts. These subsequent analyses and consultations will identify the AMMM measures that are best suited for an individual project. Lessees also may incorporate mitigation measures into their proposed COPs. Project-specific environmental analysis under NEPA for individual project COPs may tier to or incorporate by reference this PEIS.

These steps will help BOEM make timely decisions on COPs submitted by lessees for the Humboldt and Morro Bay lease areas. Timely decisions further the United States' policy to make Outer Continental Shelf energy resources available for expeditious and orderly development, subject to environmental safeguards (43 U.S.C. 1332(3)) and other requirements listed at 43 U.S.C. 1337(p)(4). Wind energy development on the leaseholds will assist with meeting Federal and State renewable energy goals, including the Federal Government's goals of deploying 30 gigawatts (GW) of offshore wind energy capacity by 2030 and 15 GW of floating offshore wind capacity by 2035, and California's goal of 2–5 GW of offshore wind energy generation by 2030.

Proposed Action and Preliminary Alternatives

As noted above, the Proposed Action is the adoption of programmatic mitigation measures that lessees may incorporate or that BOEM may require as conditions of approval in COPs submitted for the California leases. The Proposed Action does not include the approval of any activity, nor does it require any specific action by BOEM or lessees. BOEM may require additional or modified measures based on subsequent site-specific NEPA analysis or the parameters of specific COPs. The analysis of the Proposed Action considers the change in potential impacts resulting from the application of mitigation measures. For purposes of the analysis, BOEM is creating a hypothetical development scenario based on a representative project design envelope. The National Renewable Energy Lab created this design envelope with the input of the lessees that will be submitting the COPs for the California leases.

The PEIS will also include analysis of a no action alternative, which will evaluate the potential impacts of no development of the five lease areas offshore California. The no action alternative will include context that can be used in COP-specific NEPA analyses as a baseline against which proposed actions described in a COP may be compared.

The draft PEIS will also include an alternative that analyzes the impacts of not adopting the programmatic mitigation measures for a representative project offshore California. This alternative will facilitate comparison of the potential impacts from a hypothetical development scenario, developed with input from California lessees, with and without the mitigation measures. This scenario will have a range of parameters that encompasses the technical aspects expected in the potential future COPs. In addition, this alternative will provide analyses that can be incorporated in the COP-specific NEPA analysis, as appropriate, to allow more attention on issues particular to the specific COP.

BOEM also may evaluate additional reasonable alternatives to the Proposed Action identified during the scoping period.

Summary of Potential Impacts

Potential impacts to resources may include adverse or beneficial impacts on air quality, bats, benthic habitat, birds, essential fish habitat, invertebrates, finfish, marine mammals, terrestrial and coastal habitats and fauna, sea turtles, wetlands and other waters of the United States, commercial fisheries and recreational fishing, cultural resources, demographics, employment, economics, environmental justice, land use and coastal infrastructure, navigation and vessel traffic, other marine uses, recreation and tourism, and scenic and visual resources. These potential impacts will be analyzed in the draft and final PEIS.

Based on a preliminary evaluation of these resources, BOEM estimates that potential impacts may occur on certain marine life from underwater noise caused by construction and on marine mammals from collisions with project-related vessel traffic. Structures installed by the projects could permanently change benthic and fish habitats. Commercial fisheries (including Tribal fisheries) and recreational fishing could be impacted. Project structures above the water could affect the visual character defining historic properties, properties of traditional religious and cultural significance, and recreational and tourism areas. Project structures may also pose an allision hazard to vessels. Additionally, the projects could create space-use conflicts with military activities, air traffic, land-based radar services, cables, and scientific surveys. Beneficial impacts are also expected, including the creation of new habitat, job creation, and the potential reduction in carbon emissions when renewable energy replaces carbon-based energy generation.

Anticipated Authorizations and Consultations

Neither the PEIS nor the resulting programmatic record of decision (ROD) will authorize any activities or approve any plans submitted by any lessee. The PEIS and ROD will provide a regional environmental analysis and framework to support future decision-making on individual COPs. When COPs are submitted to BOEM, BOEM will evaluate the site-specific project impacts by preparing additional environmental analyses that may tier from this PEIS or may incorporate it by reference. Based on the site-specific analyses, BOEM may approve, approve with modifications, or disapprove individual COPs. Neither this PEIS nor its associated ROD will result in a final agency action approving individual COPs.

In conjunction with this PEIS, BOEM may undertake various consultations in accordance with applicable Federal laws, such as the Endangered Species Act, Magnuson-Stevens Fishery

[1] See 40 CFR 1508.1(s) for the definition of ''mitigation.''

Conservation and Management Act, National Historic Preservation Act (NHPA), Marine Mammal Protection Act, Rivers and Harbors Act, Clean Water Act, and the Coastal Zone Management Act. However, BOEM may determine that some of these consultations are better suited for the COP-specific analyses. BOEM will also invite Tribal government-to-government consultations.

Decision-Making Schedule

BOEM currently expects to publish the draft PEIS for public comment in September 2024. After the public comment period ends, BOEM will review and respond to the comments and will develop the final PEIS. BOEM currently expects to make the final PEIS available to the public in December 2025. BOEM will issue a ROD no sooner than 30 days after the final PEIS is made available.

The ROD is expected to (1) identify certain programmatic mitigation measures that BOEM may require, if appropriate, as conditions of approval for COPs submitted on these five California leases, (2) identify the mitigation measures that are better analyzed and considered in a COP-specific NEPA analysis, and (3) allow BOEM to use a tiered review process that relies on the PEIS analyses for the COPs submitted on these five California leases.

Scoping Process: This NOI commences the public scoping process to identify issues and potential alternatives for consideration in this PEIS. Please visit *https://www.boem.gov/california* for virtual meeting locations, dates, times, and registration information. The scoping process provides the public, Federal agencies, and Tribal, State, and local governments with the opportunity to help BOEM identify resources, issues, impacts, possible mitigation measures (*e.g.,* project size, geographic location, facility siting, and seasonal or other restrictions on construction), and reasonable alternatives to consider in the PEIS analysis.

BOEM will also use the NEPA process to comply with public participation requirements under section 106 of the NHPA (54 U.S.C. 300101 *et seq.*), as permitted by 36 CFR 800.2(d)(3). Through this notice, BOEM seeks public comment and input regarding the historic properties potentially affected by and the potential effects on those properties from activities associated with approval of wind energy development under these five leases offshore California. Information on cultural resources will help BOEM identify and evaluate impacts from the placement, development, and operation of offshore wind energy.

NEPA Cooperating Agencies: BOEM invites other Federal agencies and Tribal, State, and local governments to consider becoming cooperating agencies in the preparation of this PEIS. The Council on Environmental Quality (CEQ) NEPA regulations specify that qualified cooperating agencies are those with ''jurisdiction by law or special expertise'' over potential environmental impacts of a proposed project. See 40 CFR 1508.1(e). Potential cooperating agencies should consider their authority and capacity to assume the responsibilities of a cooperating agency. A cooperating agency's role in the environmental analysis neither enlarges nor diminishes the final decision-making authority of any other agency involved in the NEPA process.

Upon request, BOEM will provide potential cooperating agencies with a written summary of expectations for cooperating agencies, including schedules, milestones, responsibilities, scope and detail of cooperating agencies' expected contributions, and availability of pre-decisional information. BOEM anticipates this summary will form the basis for a memorandum of agreement between BOEM and any non-Department of the Interior cooperating agency. Agencies also should consider the factors for determining cooperating agency status in the CEQ memorandum entitled ''Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act,'' dated January 30, 2002. This document is available on the internet at: *https://www.energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-CoopAgenciesImplem.pdf.*

BOEM does not typically provide financial assistance to cooperating agencies. Governmental entities that are not cooperating agencies will have opportunities to provide information and comments to BOEM during the public input stages of the NEPA process.

Comments: Federal agencies; Tribal, State, and local governments; and other interested parties are requested to comment on the scope of this PEIS, significant issues that should be addressed, and reasonable alternatives that should be considered. For information on how to submit comments, see the **ADDRESSES** section above.

Personally Identifiable Information (PII): BOEM discourages anonymous comments. Please include your name with your comment. You should be aware that your entire comment, including your name and any other PII included in your comment, may be made publicly available. All comments from individuals, businesses, and organizations will be available for public viewing one *regulations.gov.*

Individuals can request that BOEM withhold their names, addresses, or other PII included in their comment from the public record. However, BOEM cannot guarantee that it will be able to do so. To help BOEM determine whether to withhold your PII from disclosure, you must identify in a cover letter any information contained in your comments that, if released, would constitute a clearly unwarranted invasion of your privacy. You also must briefly describe any possible harmful consequences of the disclosure of information, such as embarrassment, injury, or other harm. Even if BOEM withholds your information in the context of this notice, your submission is subject to the Freedom of Information Act (FOIA). If your submission is requested under FOIA, your information will only be withheld if a determination is made that one of FOIA's exemptions to disclosure applies. Such a determination will be made in accordance with the Department's FOIA regulations and applicable law.

Additionally, under section 304 of the NHPA, BOEM is required, after consultation with the Secretary of the Interior, to withhold the location, character, or ownership of historic resources if it determines that disclosure may, among other things, risk harm to the historic resources or impede the use of a traditional religious site by practitioners. Tribal entities and other parties providing information on historic resources should designate information that falls under section 304 of the NHPA as confidential and provide their reasons.

All submissions from organizations or businesses and from individuals identifying themselves as representatives or officials of organizations or businesses will be made available for public inspection in their entirety.

Request for Identification of Potential Alternatives, Information, and Analyses Relevant to the Proposed Action

BOEM requests data, comments, information, analysis, alternatives, or suggestions relevant to the analysis of the Proposed Action from the public; affected Federal, Tribal, State, and local governments, agencies, and offices; the scientific community; industry; or any other interested party. Specifically,

BOEM requests information on the following topics:

1. Potential programmatic mitigation measures, including wind energy development alternatives offshore California, and the effects these could have on:

- Biological resources, including bats, birds, coastal fauna, finfish, invertebrates, essential fish habitat, marine mammals, and sea turtles;
- Physical resources and conditions including air quality, water quality, and other waters of the United States;
- Socioeconomic and cultural resources, including any resources of concern to Tribal Nations, commercial fisheries and recreational fishing, demographics, employment, economics, environmental justice, land use and coastal infrastructure, navigation and vessel traffic, other uses (marine minerals, military use, aviation), recreation and tourism, and scenic and visual resources, specifically if further visual analyses beyond the existing 2019 California visual simulations (see *https://www.boem.gov/california*) could sufficiently inform potential programmatic mitigation measures without the site-specific project information that would be available to BOEM when it undertakes further viewshed analysis at the construction and operations review phase.

2. Information on other current or planned activities in, or in the vicinity of, the five California wind energy lease areas under analysis.

3. Possible alternatives and the alternatives' possible impacts on planned activities.

4. Other impacts on the human environment from California wind energy development in the five lease areas, including any mitigation measures.

5. Information on the following for the development of the representative project design envelope and activities scenario: layout of turbines (analyze one or more standard layouts); setbacks identified in the leases; size (wind turbine generator nameplate capacity), dimensions (tip height, hub height, and rotor diameter) and number of turbines; offshore substation type, dimensions, number, and location; type of foundation or mooring design; foundation or mooring installation method; scour protection; approach to cable emplacement (installation methods and disturbance corridor width); location of landfalls; onshore substation location; point of grid interconnection; ports, fabrication facilities, and staging areas; timing of onshore and offshore activities; and associated activities such as vessel trips.

6. BOEM also seeks comment and input from the public and consulting parties under section 106 of the NHPA regarding the identification of other potential consulting parties, the identification of historic properties offshore California, the potential effects on those historic properties from California offshore wind energy development alternatives, including any mitigation measures, and any information that supports identification of historic properties under NHPA.

To promote informed decision-making, comments should be as specific as possible and should provide as much detail as necessary to meaningfully and fully inform BOEM of the commenter's position. Comments must explain why the issues raised are important for consideration in the analysis. The draft PEIS will include a summary of all alternatives, information, and analyses submitted during this scoping process.

Authority: 42 U.S.C. 4321 *et seq.,* and 40 CFR 1501.9.

Douglas Boren,

Pacific Regional Director, Bureau of Ocean Energy Management.

[FR Doc. 2023–27930 Filed 12–19–23; 8:45 am]

BILLING CODE 4340–98–P

INTERNATIONAL TRADE COMMISSION

[Investigation. No. 337–TA–1382]

Certain Electronic Computing Devices and Components Thereof; Notice of Institution of Investigation

AGENCY: International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on November 15, 2023, under section 337 of the Tariff Act of 1930, as amended, on behalf of Lenovo (United States) Inc. of Morrisville, North Carolina. A supplement to the complaint was filed on December 4, 2023. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain electronic computing devices and components thereof by reason of the infringement of certain claims of U.S. Patent No. 7,760,189 (''the '189 patent''); U.S. Patent No. 7,792,066 (''the '066 patent''); U.S. Patent No. 8,687,354 (''the '354 patent''); and U.S. Patent No. 10,952,203 (''the '203 patent''). The complaint further alleges that an industry in the United States exists as required by the applicable Federal Statute. The complainant requests that the Commission institute an investigation and, after the investigation, issue a limited exclusion order and cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: Katherine Hiner, Office of Docket Services, U.S. International Trade Commission, telephone (202) 205–1802.

SUPPLEMENTARY INFORMATION:

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2023).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on December 14, 2023, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (2) by reason of infringement of one or more of claims 1, 3, 5, 7, 9, 11, 13 and 15 of the '189 patent; claims 1–21 of the '066 patent; claims 1–11 of the '354 patent; and claims 1–18 of the '203 patent; and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) Pursuant to section 210.10(b)(1) of the Commission's Rules of Practice and Procedure, 19 CFR 210.10(b)(1), the plain language description of the accused products or category of accused products, which defines the scope of the investigation, is ''laptops, notebooks, 2-in-1 tablet computers, tablets, desktop

PCs, tower PCs, workstations, routers, and components thereof'';

(3) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainants are:

Lenovo (United States) Inc., 8001 Development Drive, Morrisville, NC 27560

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

ASUSTeK Computer Inc., No. 15, Li-De Road, Beitou District, Taipei 112, F5, Taiwan

ASUS Computer International, 48720 Kato Road, Fremont, CA 94358

(4) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), as amended in 85 FR 15798 (March 19, 2020), such responses will be considered by the Commission if received not later than 20 days after the date of service by the complainants of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: December 15, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–27998 Filed 12–19–23; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation. No. 337–TA–1381]

Certain Disposable Vaporizer Devices and Components and Packaging Thereof; Notice of Institution of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on October 13, 2023, under section 337 of the Tariff Act of 1930, as amended, on behalf of R.J. Reynolds Tobacco Company of Winston-Salem, North Carolina and R.J. Reynolds Vapor Company of Winston-Salem, North Carolina. A supplement to complaint was filed on November 1, 2023. The complaint, as supplemented, alleges violations of section 337 based upon the importation into the United States, and in the sale of certain disposable vaporizer devices and components and packaging thereof by reason false advertising, false designation of origin, and unfair competition, the threat or effect of which is to destroy or substantially injure an industry in the United States. The complainants request that the Commission institute an investigation and, after the investigation, issue a general exclusion order, or in the alternative a limited exclusion order, and a cease and desist order.

ADDRESSES: The complaint, except for any confidential information contained therein, may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: Pathenia M. Proctor, The Office of Unfair Import Investigations, telephone (202) 205–2560.

SUPPLEMENTARY INFORMATION:

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2023).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on December 14, 2023, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(A) of section 337 in the importation into the United States, or in the sale of certain products identified in paragraph (2) by reason of false advertising under the Lanham Act, 15 U.S.C. 1125(a)(1)(B), stated in paragraphs 137 through 142 of the complaint, false designation of origin under the Lanham Act, 15 U.S.C. 1125(a)(1)(A), stated in paragraphs 143 through 147 of the complaint, and unfair competition based on violations of the Prevent All Cigarette Trafficking (PACT) Act, the threat or effect of which is to destroy or substantially injure an industry in the United States;

(2) Pursuant to section 210.10(b)(1) of the Commission's Rules of Practice and Procedure, 19 CFR 210.10(b)(1), the plain language description of the accused products or category of accused products, which defines the scope of the investigation, is ''disposable vaporizer devices (ENDS devices) and components (specifically e-liquids) and packaging thereof'';

(3) Pursuant to Commission Rule 210.50(b)(1), 19 CFR 210.50(b)(1), the presiding administrative law judge shall take evidence or other information and hear arguments from the parties or other interested persons with respect to the public interest in this investigation, as appropriate, and provide the Commission with findings of fact and a recommended determination on this issue, which shall be limited to the statutory public interest factors set forth in 19 U.S.C. 1337(d)(1), (f)(1), (g)(1);

(4) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainants are:

R.J. Reynolds Tobacco Company, 401 North Main Street, Winston-Salem, NC 27101

R.J. Reynolds Vapor Company, 401 North Main Street, Winston-Salem, NC 27101

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Affiliated Imports, LLC, 13326 Immanuel Road, Pflugerville, TX 78660–8006
American Vape Company, LLC a/k/a American, Vapor Company, LLC, 13326 Immanuel Road, Pflugerville, TX 78660–8006
Breeze Smoke, LLC, 4654 Lilly Court, West Bloomfield, MI 48323
Dongguan (Shenzhen) Shikai Technology Co., Ltd., L5 Block A Shuangjinhui, Tongfuyu Fuyong, Baoan Shenzhen, Guangdong China 518101
EVO Brands, LLC, 251 Little Falls Drive, Wilmington, DE 19808
Flawless Vape Shop Inc., 1021 E Orangethorpe Avenue, Anaheim, CA 92801
Flawless Vape Wholesale & Distribution Inc., 1021 E Orangethorpe Avenue, Anaheim, CA 92801
Guangdong Qisitech Co., Ltd., Fuxing Road, Changan Town, Room 201, Building 3, No. 36, Dongguan City, Guangdong Province, China 523000
iMiracle (Shenzhen) Technology Co. Ltd., Room 1203, Block 1, Wanting Building, Xixiang Substrict, Bao'an District, Shenzhen, China 518126
Magellan Technology Inc., 2225 Kenmore Avenue, Buffalo, NY 14207
Pastel Cartel, LLC, 13326 Immanuel Road, Pflugerville, TX 78660–8006
Price Point Distributors Inc. d/b/a Prince Point NY, 500 Smith Street, Farmingdale, NY 11735
PVG2, LLC, 251 Little Falls Drive, Wilmington, DE 19808
Shenzhen Daosen Vaping Technology Co., Ltd., #501, Building B1, Quanzhi Zhihui Park, Ligang S. Road., Shajin Street, Bao'an Dist., Shenzhen, China 518104
Shenzhen Fumot Technology Co., Ltd., A2907, Building A Longguan Jiuzuan Business, Center, Minzhi Longhua, Shenzhen, China, 518000
Shenzhen Funyin Electronic Co., Ltd., 205 and 401, Building A3, Fuyan Ind. Zone, Tangwei Community, Fuhai St., Bao'an Dist., Shenzhen, Guangdong, China 518000
Shenzhen Han Technology Co., Ltd., Qianwan Hard Technology Park, Baoan, District, Shenzhen, Guangdong, China 518126
Shenzhen Innokin Technology Co., Ltd., Building 6, XinXinTian Industrial Park, Xinsha Road, Shajing, Baoan District, Shenzhen China 518104
Shenzhen IVPS Technology Co., Ltd., 101 Building B8, No. 2, Cengayo Industrial Area, Yuluv Community, Yutang Subdistrict, Guangming District, Shenzhen, Guangdong, China 518001
Shenzhen Noriyang Technology Co., Ltd., Room 303, Building A, Zhonghengsheng High-Tech Park, Xinyu Road, Shajing Town, Baoan District, Shenzhen, Guangdong Province, China 518104
Shenzhen Weiboli Technology Co. Ltd., Room 312, Tianshuzuo, No. 6099 Bao'an Avenue, Bao'an District, Shenzhen, China 518000
SV3 LLC d/b/a Mi-One Brands, 4908 E McDowell Road, Phoenix, AZ 85008
Thesy, LLC d/b/a Element Vape, 10620 Hickson Street, El Monte, CA 91731
Vapeonly Technology Co. Ltd., Room 306–311, Tianshu Building, No. 6099, Bao'an Avenue, Bao'an District, Shenzhen, China 518000
VICA Trading Inc. d/b/a Vapesourcing, 3045 Edinger Avenue, Tustin, CA 92780

(c) The Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street SW, Suite 401, Washington, DC 20436; and

(5) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), as amended in 85 FR 15798 (March 19, 2020), such responses will be considered by the Commission if received not later than 20 days after the date of service by the complainants of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: December 15, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–27996 Filed 12–19–23; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1336]

Certain Semiconductor Devices, Mobile Services Contacting the Same, and Components Thereof; Notice of a Commission Determination Not to Review an Initial Determination Granting a Joint Motion To Terminate the Investigation Due to Settlement; Termination of the Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission (''Commission'') has determined not to review an initial determination (''ID'') (Order No. 78) of the presiding administrative law judge (''ALJ'') granting a joint motion to terminate the investigation due to settlement.

FOR FURTHER INFORMATION CONTACT: Michael Liberman, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–3115. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal, telephone (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on October 19, 2022, based on a complaint filed on behalf of Daedalus Prime LLC (''Daedalus'' or ''Complainant'') of Bronxville, New York. 87 FR 63524–25 (Oct. 19, 2022). The complaint, as supplemented, alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain semiconductor devices, mobile devices containing the same, and components thereof by reason

of the infringement of certain claims of U.S. Patent Nos. 9,831,306 (''the '306 patent''); 10,319,812 (''the '812 patent''); 10,700,178; and 11,251,281. The Commission's notice of investigation named as respondents Samsung Electronics Co., Ltd. of Suwon-si, Gyeonggi-do, Republic of Korea and Samsung Electronics America, Inc. of Ridgefield Park, New Jersey (collectively, ''Samsung''); Taiwan Semiconductor Manufacturing Company Limited of Hsinchu City, Taiwan and TSMC North America of San Jose, California (collectively, ''TSMC''). The Office of Unfair Import Investigations (''OUII'') is also a party in this investigation.

Subsequently, the investigation was terminated with respect to the '306 and the '812 patents. Order No. 35 (June 9, 2023), *unreviewed by* Comm'n Notice (July 10, 2023). Furthermore, the ALJ granted Complainant's motion for summary determination that the TSMC respondents are not licensed to the asserted patents. Order No. 49 (July 17, 2023), *reviewed and, on review, vacated in part and affirmed in part with modified reasoning by* Comm'n Notice (August 23, 2023). Also, the investigation was terminated with respect to the Samsung respondents. Order No. 52 (August 7, 2023), *unreviewed by* Comm'n Notice (Sep. 5, 2023).

On October 18, 2023, Daedalus and the TSMC respondents (Daedalus and TSMC together, the ''Moving Parties'') filed a joint motion to, *inter alia,* terminate the investigation based on settlement. (''Mot.''). On October 24, 2023, OUII filed a response supporting the motion. (''Staff Resp.'').

On November 14, 2023, the ALJ issued an ID (Order No. 78) granting the joint motion. The ID noted that, consistent with Commission Rule 210.21(b)(1), Daedalus and TSMC attach a copy of a Settlement and Patent License Agreement, a Patent Purchase Agreement, and two binding Term Sheets as Exhibits 1–4 to their motion. ID at 2. The ID further noted that, in addition, pursuant to Commission Rule 210.21(b)(1), the motion states that ''[t]here are no other agreements, written or oral, express or implied, between Daedalus and TSMC concerning the subject matter of this Investigation.'' *Id.* (citing Mot. at 2).

The ID further noted that Daedalus and TSMC submit that termination ''will not adversely affect the public interest'' and that ''[t]ermination will also conserve Commission resources, including those of the Administrative Law Judge and the Commission Investigative Staff, as well as those of the Moving Parties.'' *Id.* (citing Mot. at 2–3). The ID noted that in its response to the Moving Parties' motion to terminate, OUII states that ''Staff is not aware of any reason why termination of this investigation on the basis of the Agreements would be contrary to the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, or U.S. consumers[ ]'' and that ''the public interest favors settlement to avoid unnecessary litigation and to conserve public and private resources.'' *Id.* (citing Staff Resp. at 4). The ID found no evidence of any adverse impact on the public interest from the termination of the investigation and granted the motion thus terminating the investigation. *Id.* at 2–3.

The Commission has determined not to review the ID. The investigation is hereby terminated.

The Commission vote for this determination took place on December 14, 2023.

By order of the Commission.

Issued: December 14, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023–27897 Filed 12–19–23; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

[OMB Number 1121–0220]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Extension of a Previously Approved Collection; Bureau of Justice Assistance Application Form: Public Safety Officers Educational Assistance

AGENCY: Bureau of Justice Assistance, Department of Justice.

ACTION: 60-Day notice.

SUMMARY: The Bureau of Justice Assistance, Office of Justice Programs, Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until February 20, 2024.

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Hope D. Janke, Director, Public Safety Officers' Benefits Office, Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice, 810 7th Street NW, Washington, DC 20531, telephone: (202) 307–2858, or email: *hope.d.janke@usdoj.gov.*

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Bureau of Justice Assistance, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and

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

Abstract: BJA's Public Safety Officers' Benefits (PSOB) Office will use the PSOEA Application information to confirm the eligibility of applicants to receive PSOEA benefits. Eligibility is dependent on several factors, including the applicant, as a spouse or child, having received or being eligible to receive a portion of the PSOB Death Benefit, or having a spouse or parent who received the PSOB Disability Benefit. Also considered are the applicant's age and the schools being attended. In addition, information to help BJA identify an individual is collected, such as contact numbers and email addresses.

Overview of This Information Collection

1. *Type of Information Collection:* Extension of a currently approved collection.

2. *The Title of the Form/Collection:* Public Safety Officers' Educational Assistance (PSOEA).

3. *The agency form number, if any, and the applicable component of the*

Department sponsoring the collection: None. The applicable component within the Department of Justice is the Bureau of Justice Assistance, in the Office of Justice Programs.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Dependents of public safety officers who were killed or permanently and totally disabled in the line of duty.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that no more than 300 respondents will apply a year. Each application takes approximately 30 minutes to complete.

6. *An estimate of the total public burden (in hours) associated with the collection:* The estimated public burden associated with this collection is 150 hours. It is estimated that respondents will take 30 minutes to complete an application. The burden hours for collecting respondent data sum to 150 hours (300 respondents × 0.5 hours = 150 hours).

7. *An estimate of the total annual cost burden associated with the collection, if applicable:* No cost burden associated with this collection.

If additional information is required contact: Darwin Arceo, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 4W–218, Washington, DC.

Dated: December 14, 2023.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2023–27945 Filed 12–19–23; 8:45 am]

BILLING CODE 4410–18–P

DEPARTMENT OF JUSTICE

[[OMB Number 1190–0021]

Agency Information Collection Activities; Proposed eCollection eComments Requested; Revision of a Previously Approved Collection; Generic Clearance for Community Relations Service Program Impact Evaluation

AGENCY: Community Relations Service, Department of Justice.

ACTION: 60-Day notice.

SUMMARY: The Community Relations Service, Department of Justice (DOJ), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until February 20, 2024.

FOR FURTHER INFORMATION CONTACT: If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Jordan Mathews, Community Relations Service, 145 N St. NE, Washington, DC 20002, 771–208–9190 or *Jordan.M.Mathews@usdoj.gov.*

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Bureau of Justice Statistics, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and

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

Abstract: Over the next three years, CRS and its evaluation contractor, Mathematica, anticipate collecting program impact evaluation data for assessing ongoing programs across several areas within community outreach. The purpose of these collections is to gather feedback from participants who attended CRS programs and to use that information to assess the impact and outcomes of the programs. The work may entail redesigning and/or modifying existing programs based upon received feedback. CRS envisions using surveys, interviews, and other electronic data collection instruments. In this revision, CRS is requesting an increased level of burden from the previously approved collection to reflect including a larger number of programs in the assessment and collecting information at multiple time points for an individual program to assess change over time.

Overview of This Information Collection

1. *Type of Information Collection:* Revision of a previously approved collection.

2. *The Title of the Form/Collection:* Generic Clearance for Community Relations Service Program Impact Evaluation.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* Form numbers not available for generic clearance. The applicable component within the Department of Justice is the Community Relations Service.

4. *Affected public who will be asked or required to respond, as well as the obligation to respond:* Affected Public: Participants of CRS programs in relevant jurisdictional fields; individuals; facilitators; state and local law enforcement, government officials, faith leaders, and community leaders; students; school administrators; and representatives of advocacy organizations. The obligation to respond is voluntary.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* We estimate that up to 1,227 individuals will be involved in the data collection annually over the three-year clearance period. The average time per response for surveys is 15 minutes, while the average time per response for interviews is 60 minutes.

6. *An estimate of the total annual burden (in hours) associated with the collection:* The total annual burden hours for this collection is 515 hours.

7. *An estimate of the total annual cost burden associated with the collection, if applicable:* $28,100.

TOTAL BURDEN HOURS

Activity	Number of respondents	Frequency (annually)	Total annual responses	Time per response minutes	Total annual burden (hours)
L3 Evaluation surveys	950	1	950	15	238
L3 Evaluation interviews	277	1	277	60	277
Unduplicated totals	1,227		1,227		515

If additional information is required contact: Darwin Arceo, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 4W–218, Washington, DC.

Dated: December 15, 2023.

Darwin Arceo,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2023–27971 Filed 12–19–23; 8:45 am]

BILLING CODE 4410–17–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Exemption Application No. D–12096]

Proposed Exemption for Certain Prohibited Transaction Restrictions Involving TT International Asset Management Ltd (TTI or the Applicant) Located in London, United Kingdom

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Notice of proposed exemption.

SUMMARY: This document provides notice of the pendency before the Department of Labor (the Department) of a proposed individual exemption from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA) and/or the Internal Revenue Code of 1986 (the Code). If this proposed exemption is granted, TT International Asset Management Ltd (TTI) will not be precluded from relying on the exemptive relief provided by Prohibited Transaction Class Exemption 84–14 (PTE 84–14 or the QPAM Exemption), notwithstanding the conviction of SMBC Nikko Securities, Inc. (Nikko Tokyo) in Tokyo District Court for attempting to peg, fix or stabilize the prices of certain Japanese equity securities that Nikko Tokyo was attempting to place in a block offering that occurred on February 13, 2023 (the Conviction).

DATES: If granted, the exemption will be in effect for a period of five years, beginning on February 13, 2024, and ending on February 12, 2029. Written comments and requests for a public hearing on the proposed exemption should be submitted to the Department by February 5, 2024.

ADDRESSES: All written comments and requests for a hearing should be submitted to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, Attention: Application No. D–12096, via email to *e-OED@dol.gov* or online through *http://www.regulations.gov.* Any such comments or requests should be sent by the end of the scheduled comment period. The application for exemption and the comments received will be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1515, 200 Constitution Avenue NW, Washington, DC 20210. See **SUPPLEMENTARY INFORMATION** below for additional information regarding comments.

FOR FURTHER INFORMATION CONTACT: Mr. Joseph Brennan of the Department at (202) 693–8456. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION:

Comments

Persons are encouraged to submit all comments electronically and not to follow with paper copies. Comments should state the nature of the person's interest in the proposed exemption and how the person would be adversely affected by the exemption, if granted. Any person who may be adversely affected by an exemption can request a hearing on the exemption. A request for a hearing must state: (1) the name, address, telephone number, and email address of the person making the request; (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption; and (3) a statement of the issues to be addressed and a general description of the evidence to be presented at the hearing. The Department will grant a request for a hearing made in accordance with the requirements above where a hearing is necessary to fully explore material factual issues identified by the requestor, and a notice of such hearing will be published by the Department in the **Federal Register**. The Department may decline to hold a hearing if: (1) the request for the hearing does not meet the requirements stated above; (2) the only issues identified for exploration at the hearing are matters of law; or (3) the factual issues identified in the request can be fully explored through the submission of evidence in written (including electronic) form.

Warning: All comments received will be included in the public record without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be confidential or information whose disclosure is restricted by statute. If you submit a comment, EBSA recommends that you include your name and other contact information in the body of your comment, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as a Social Security number or an unlisted phone number) or confidential business information that you do not want publicly disclosed. If EBSA cannot read your comment due to technical difficulties and cannot contact you for clarification, EBSA might not be able to consider your comment.

Additionally, the *http://www.regulations.gov* website is an ''anonymous access'' system, which means EBSA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email directly to EBSA without going through *http://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public record and made available on the internet.

Proposed Exemption

This proposed exemption would provide relief from certain restrictions

set forth in ERISA sections 406 and 407.[1] It would not, however, provide relief from any other violation of law. Furthermore, the Department cautions that the relief in this proposed exemption would terminate immediately if, among other things, TTI or an affiliate of TTI (as defined in Section VI(d) of PTE 84–14) [2] is convicted of a crime covered by Section I(g) of PTE 84–14 (other than the Conviction) during the Exemption Period. Although TTI could apply for a new exemption in that circumstance, the Department would not be obligated to grant the exemption.

The terms of this proposed exemption have been specifically designed to permit a plan to terminate its relationship in an orderly and cost-effective fashion in the event of an additional conviction of TTI or a TTI affiliate, or a determination by the plan that it is otherwise prudent to terminate its relationship with TTI.

Summary of Facts and Representations [3]

Background

1. The Sumitomo Mitsui Banking Corporation group (SMBC) is a Japanese financial services firm that conducts activities across a wide range of financial sectors, including banking, asset management, securities trading, leasing, credit card lending, and consumer finance. SMBC provides asset management services through two subsidiaries. The first is TTI, which is managed independently of the broader SMBC group. The second is Sumitomo Mitsui DS Asset Management Company, Limited, an investment manager headquartered in Tokyo. The SMBC group also conducts securities market activities through the SMBC Nikko Securities franchise. As relevant to this proposed exemption, that includes Nikko Tokyo, a Japanese broker-dealer.

2. TTI is a global investment firm headquartered in London, UK that manages approximately $7.1 billion in assets. TTI and its subsidiaries [4] have operations in the United States, Hong Kong, and Japan. TTI was wholly acquired by Sumitomo Mitsui Financial Group, Inc. (SMFG) on February 28, 2020, and is currently a member of the SMBC Group. Since the acquisition, TTI has remained a stand-alone business with distinct reporting lines, governance structures, and control frameworks.

3. TTI is an SEC-registered investment advisor that specializes in managing portfolios for institutional investors, including ERISA-covered Plans (Covered Plans),[5] public retirement plans, and other collective investment vehicles through a variety of equity long-only and long/short strategies across a broad range of industry sectors and geographies.

4. In offering investment management services, TTI operates as a QPAM in reliance on PTE 84–14.[6] TTI advises four segregated ERISA accounts on behalf of the ERISA-covered plans of two major U.S. employers [7] and operates three segregated accounts for public pension plans, which currently hold approximately $466.4 million in assets.[8] TTI also manages three funds as ERISA ''plan asset'' funds: the TT Emerging Markets Opportunities Fund II Limited, which is operational and holds ERISA assets; the TT Environmental Solutions Equity Master Fund II Limited, which is in the process of being launched; and the TT Non-U.S. Equity Master Fund Limited, which is operational but does not hold any ERISA assets.

ERISA and Code Prohibited Transactions and PTE 84–14

5. The rules set forth in ERISA section 406 and Code section 4975(c)(1) proscribe certain ''prohibited transactions'' between plans and certain parties in interest with respect to those plans.[9] ERISA section 3(14) defines parties in interest with respect to a plan to include, among others, the plan fiduciary, a sponsoring employer of the plan, a union whose members are covered by the plan, service providers with respect to the plan, and certain of their affiliates.[10] The prohibited transaction provisions under ERISA section 406(a) and Code section 4975(c)(1) prohibit, in relevant part, (1) sales, leases, loans, or the provision of services between a party in interest and a plan (or an entity whose assets are deemed to constitute the assets of a plan), (2) the use of plan assets by or for the benefit of a party in interest, or (3) a transfer of plan assets to a party in interest.[11]

6. Under the authority of ERISA section 408(a) and Code section 4975(c)(2), the Department has the authority to grant an exemption from such ''prohibited transactions'' in accordance with the procedures set forth in its exemption procedure regulation if the Department finds that an exemption is: (a) administratively feasible, (b) in the interests of the plan and of its participants and beneficiaries, and (c) protective of the rights of the plan's participants and beneficiaries.[12]

7. PTE 84–14 exempts certain prohibited transactions between a party in interest and an ''investment fund'' (as defined in Section VI(b) of PTE 84–14)

[1] For purposes of this proposed exemption, references to specific provisions of ERISA Title I, unless otherwise specified, should be read to refer as well to the corresponding provisions of Code section 4975. Further, this proposed exemption, if granted, does not provide relief from the requirements of, or specific sections of, any law not noted above. Accordingly, TTI is responsible for ensuring compliance with any other laws applicable to the transactions described herein.

[2] Section VI(d) of PTE 84–14 defines the term ''affiliate'' for purposes of Section I(g) as ''(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person, (2) Any director of, relative of, or partner in, any such person, (3) Any corporation, partnership, trust or unincorporated enterprise of which such person is an officer, director, or a 5 percent or more partner or owner, and (4) Any employee or officer of the person who—(A) Is a highly compensated employee (as defined in Section 4975(e)(2)(H) of the Code) or officer (earning 10 percent or more of the yearly wages of such person), or (B) Has direct or indirect authority, responsibility or control regarding the custody, management or disposition of plan assets.''

[3] The Summary of Facts and Representations is based on TTI's representations provided in its exemption application and does not reflect factual findings or opinions of the Department unless indicated otherwise. The Department notes that the availability of this exemption is subject to the express condition that the material facts and representations contained in application D–12096 are true and complete at all times, and accurately describe all material terms of the transactions covered by the exemption. If there is any material change in a transaction covered by the exemption, or in a material fact or representation described in the application, the exemption will cease to apply as of the date of the change.

[4] TTI subsidiaries include TT International Investment Management LLP, TT International (Hong Kong) Ltd, TT Crosby Ltd, and TT International Advisors Inc.

[5] The term ''Covered Plan'' means a plan subject to Part IV of Title I of ERISA (an ''ERISA-covered plan'') or a plan subject to Code section 4975 (an ''IRA''), in each case, with respect to which TTI relies on PTE 84–14, or with respect to which TTI has expressly represented that the manager qualifies as a QPAM or relies on PTE 84–14. A Covered Plan does not include an ERISA-covered plan or IRA to the extent that TTI has expressly disclaimed reliance on QPAM status or PTE 84–14 in entering into a contract, arrangement, or agreement with the ERISA-covered plan or IRA.

[6] Currently, TTI is the only member of the SMBC group that relies on the QPAM Exemption.

[7] Together, these two ERISA-covered plans currently hold approximately $352.7 million in assets.

[8] Although the public pension plans are not statutory ERISA assets, TTI has committed to those plans to follow the same rules and operate under the same restrictions as ERISA plans. Accordingly, these plans are operated in compliance with ERISA and utilize the QPAM exemption.

[9] For purposes of the Summary of Facts and Representations, references to specific provisions of Title I of ERISA, unless otherwise specified, refer also to the corresponding provisions of the Code.

[10] Under the Code, such parties, or similar parties, are referred to as ''disqualified persons.''

[11] The prohibited transaction provisions also include certain fiduciary prohibited transactions under ERISA Section 406(b). These include transactions involving fiduciary self-dealing, fiduciary conflicts of interest, and kickbacks to fiduciaries.

[12] The Department's exemption procedure regulation is codified at 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011).

in which a plan has an interest if the investment manager managing the investment fund satisfies the definition of a ''qualified professional asset manager'' (QPAM) and satisfies additional conditions of the exemption. PTE 84–14 was developed and granted based on the essential premise that broad relief could be afforded for all types of transactions in which a plan engages only if the commitments and the investments of plan assets and the negotiations leading thereto are the sole responsibility of an independent, discretionary manager.[13]

8. Section I(g) of PTE 84–14 prevents an entity that may otherwise meet the QPAM definition from utilizing the exemptive relief provided by the QPAM Exemption for itself and its client plans if that entity, an ''affiliate'' thereof, or any direct or indirect five percent or more owner in the QPAM has been either convicted or released from imprisonment, whichever is later, as a result of criminal activity described in Section I(g) within the 10 years immediately preceding a transaction. Section I(g) was included in PTE 84–14, in part, based on the Department's expectation that a QPAM, and those who may be in a position to influence the QPAM's policies, maintain a high standard of integrity.[14]

Nikko Tokyo Conviction and PTE 84–14 Disqualification

9. On February 13, 2023, Nikko Tokyo and four of its officers and employees were convicted in Tokyo District Court of violating Japan's Financial Instruments and Exchange Act (the FIEA) for attempting to peg, fix, or stabilize[15] the prices of certain Japanese equity securities that Nikko Tokyo was attempting to place in a block offering (the Conviction). Nikko Tokyo was convicted of 10 violations of the FIEA and was ordered to pay a ¥700 million fine (approximately $5.3 million) and a surcharge of approximately ¥4.5 billion (approximately $33.7 million).

A block offering is a type of limited public offering that is common in Japan whereby a dealer typically applies a spread to the price at which it purchases the shares from the seller and the price at which it sells them in the block offering. Between December 2019 and November 2021, Nikko Tokyo, through the actions of relevant officers, purchased shares of five issuers for its own account in an attempt to peg, fix, or stabilize the prices of those securities in anticipation of a block offer. This activity was intended to ensure that the price of the securities being sold through the block offering did not decline significantly, which would have potentially harmed Nikko Tokyo's interests.[16]

Nikko Tokyo Affiliation and Loss of QPAM Status

10. Both TTI and Nikko Tokyo are direct subsidiaries of SMFG and thus are affiliates for the purposes of Section I(g) of the QPAM Exemption. When the Tokyo District Court sentenced Nikko Tokyo in connection with the Conviction, Section I(g) of PTE 84–14 was triggered, and TTI became ineligible to rely on the QPAM Exemption to service its Plan clients, without receiving an individual prohibited transaction exemption from the Department.

PTE 2023–13

11. On October 19, 2022, TTI requested an individual exemption for TTI and its Covered Plan clients to continue to utilize the relief in PTE 84–14, notwithstanding the then-anticipated Conviction of Nikko Tokyo. In support of its exemption request, TTI asserted that: there has always been a complete separation in operations between TTI and Nikko Tokyo; Nikko Tokyo is a remote foreign affiliate of TTI with wholly separate businesses, operations, management, systems, premises, and legal and compliance personnel; TTI was not involved in any way in the Misconduct; and the Misconduct did not involve any ERISA assets. In its exemption application, TTI requested: (1) a five-year term of relief and (2) an exemption that would cover TTI *and* TTI's current and future affiliates and related entities.

12. On April 28, 2023, the Department granted PTE 2023–13,[17] which permitted TTI to continue to rely upon the relief provided in the QPAM exemption for a one-year period from the date of the Conviction. The Department declined TTI's request for a longer five-year exemption term and instead proposed a limited one-year term that applies exclusively to TTI, so the Department retained the ability to review TTI's adherence to the conditions set out in the one-year exemption before considering longer-term relief.

Conditions of PTE 2023–13

13. PTE 2023–13 contains a set of conditions that are designed to protect those Covered Plans that entrust their assets to TTI despite the serious nature of the criminal misconduct underlying the Conviction of Nikko Tokyo. Under PTE 2023–13, TTI must:[18]

- Develop, implement, maintain, and follow written policies (the Policies) that are reasonably designed to ensure that, among other things: the asset management decisions of TTI are conducted independently of Nikko Tokyo; TTI fully complies with ERISA's fiduciary duties; and any filings or statements made by TTI to regulators are materially accurate and complete.
- Develop and implement a training program (the Training) conducted by a prudently selected independent professional that covers the Policies, ERISA and Code compliance, ethical conduct, the consequences for not complying with the conditions of the exemption, and the duty to promptly report wrongdoing.
- Submit to an audit conducted by a prudently selected independent auditor (the Auditor) who completes a written report (the Audit Report) assessing the adequacy of TTI's Policies and Training, TTI's compliance with the Policies and Training, the need, if any, to strengthen the Policies and Training; and any instance(s) of noncompliance by TTI.[19]
- Agree and warrant to Covered Plan clients that it will: (a) comply with ERISA and the Code; (b) refrain from engaging in prohibited transactions that are not otherwise exempt (and promptly correct any inadvertent prohibited transactions); and (c) comply with the standards of prudence and loyalty set forth in ERISA section 404.
- Agree and warrant: (a) to indemnify and hold harmless Covered Plans for certain damages; (b) not to require (or otherwise cause) Covered Plans to

[13] See 75 FR 38837, 38839 (July 6, 2010).

[14] 49 FR 9494 (March 13, 1984), as corrected at 50 FR 41430 (October 10, 1985), as amended at 70 FR 49305 (August 23, 2005), and as amended at 75 FR 38837 (July 6, 2010).

[15] According to the Applicant, the unofficial English-language translation of Article 159, paragraph 3 of the FIEA, available on the Japanese Financial Services Agency website, provides that no person may ''conduct a series of Sales and Purchase of Securities, etc. or make offer, Entrustment, etc. or Accepting an Entrustment, etc. therefore in violation of a Cabinet Order for the purpose of pegging, fixing or stabilizing prices of Listed Financial Instruments, etc. in a Financial Instruments Exchange Market or prices of Over-the-Counter Traded Securities in an Over-the-Counter Securities Market.''

[16] The Tokyo Public Prosecutor alleged that these ''stabilization transactions'' violated Article 197 Paragraph 1, Item 5, Article 159, Paragraph 3, and Article 207, Paragraph 1, Item 1 of the FIEA and Article 60 of the Penal Code.

[17] See PTE 2023–13, 88 FR 26336 (April 28, 2023).

[18] The following paragraphs do not discuss all of the conditions set out in PTE 2023–13. For the complete set of conditions, see PTE 2023–13.

[19] Further, certain TTI senior personnel must review the Audit Report, make certain certifications, and take corrective actions when necessary.

waive, limit, or qualify the liability of TTI for violating ERISA or the Code or engaging in prohibited transactions; (c) not to restrict the ability of Covered Plans to terminate or withdraw from their arrangement with TTI except for reasonable restrictions disclosed in advance; and (d) not to impose any fees, penalties, or charges for such termination or withdrawal, except for reasonable fees.

• Designate a senior compliance officer (the Compliance Officer) to conduct a twelve-month review to determine the adequacy and effectiveness of TTI's implementation of the Policies and Training (the Review).

PTE 2023–13 Compliance

14. TTI states that it has complied with the conditions of PTE 2023–13 and, therefore, should be permitted to continue to rely upon PTE 84–14 through the remainder of its 10-year Section I(g) ineligibility period in order to avoid substantial costs and other disruptions that would occur if TTI no could no longer act as a QPAM. TTI represents that it has taken the following concrete steps to comply with the requirements of PTE 2023–13.

15. *Adoption of Comprehensive Policies.* TTI states that it has developed and implemented specific policies (the ERISA Policies) that ensure that asset management decisions of TTI are conducted independently of Nikko Tokyo. TTI states that its ERISA Policies promote compliance with ERISA's fiduciary duties and prohibited transaction provisions, including with respect to co-fiduciary liability, and ensure accuracy in communications with regulators and Covered Plan clients. TTI further states that its ERISA Policies include required monitoring to ensure compliance with the specific terms of PTE 2023–13 and the prompt identification and correction of any Policy violations.

TTI states that it maintains policies and procedures that are reasonably designed to ensure that all TTI personnel comply with applicable regulations and act in the best interests of TTI's clients, including ERISA plan participants. TTI represents that it does not share trading decisions and investment strategies for its clients with personnel outside of TTI's asset management businesses and does not consult with other parts of the SMBC group in connection with investment decisions it makes on behalf of its clients.

16. *Implementation of a Training Program.* TTI represents that it has implemented a comprehensive, mandatory training program for all relevant TTI asset/portfolio management, trading, legal, compliance, and internal audit personnel (the ERISA Training). TTI submits that initial ERISA Training sessions under PTE 2023–13 have been completed, with mandatory attendance for relevant personnel. Two WilmerHale partners who are experienced in ERISA training and the regulatory compliance of asset managers taught the ERISA Training course on August 8, 2023, with a simultaneous broadcast in TTI's London office. TTI states that required personnel who were unable to attend the live training have completed the training via a recording of the live session. TTI represents further that it has made electronic training modules available for new relevant personnel and that follow-ups are made to ensure that all relevant personnel complete the Training.

17. *Disclosure to Client and Amendment of Client Agreements.* TTI represents that it has provided its Covered Plan clients with a copy of PTE 2023–13, a summary of TTI's written ERISA Policies developed in connection therewith, a summary of the conduct leading to the Conviction, and notice that the requirements of the QPAM Exemption were not satisfied as a result of the Conviction. TTI states further that it has amended its agreements with Covered Plan clients to allow for the termination of the relationship with TTI without penalty to the Covered Plan clients, and to incorporate all other conditions of PTE 2023–13. TTI notes that, throughout this process, no Covered Plan client has decided to terminate its relationship with TTI.

18. *Strengthening of Compliance within TTI.* TTI represents that it has designated its Chief Compliance Officer as the initial Compliance Officer under PTE 2023–13. TTI states that its Chief Compliance Officer now oversees the ERISA Policies and ERISA Training and ensures that each conforms to the requirements set out in PTE 2023–13. TTI states that by designating its Chief Compliance Officer to this role, it is ensuring that the Compliance Officer will have a direct reporting line to senior management.

19. *Strengthening of Compliance within the SMBC Group.* The Applicant states that TTI and the SMBC group have strengthened their group-wide coordination regarding potentially disqualifying conduct, in order to ensure compliance with the conditions of PTE 2023–13, including identification of deferred prosecution or non-prosecution agreements. Further, to prevent the possibility of reoccurrence, Nikko Tokyo has ceased block offerings while completing remedial measures supervised by Japanese regulators, including a verification process to assess whether the root causes of the problems have been addressed.

20. *Note on the Audit.* PTE 2023–13 requires TTI to undergo an audit that covers the one-year period of February 13, 2023, through February 12, 2024. The audit report must be completed by August 12, 2024. TTI represents that it has engaged Newport Trust Company to carry out the independent auditor functions required under PTE 2023–13 and this exemption if it is granted by the Department.

Remedial Efforts by Nikko Tokyo and SMFG

21. According to the Applicant, Nikko Tokyo has taken significant steps to address the issues that led to the Conviction and has enhanced its policies and procedures related to proprietary trading and enhanced its surveillance over that activity, including hiring additional compliance officers. In addition, Nikko Tokyo refused to renew its employment contracts with each of the four executive officers who were alleged to have been involved in the misconduct underlying the Conviction and has dismissed the remaining two employees on disciplinary grounds.

Separation of TTI and Nikko Tokyo

22. TTI states that: none of the misconduct underlying the Nikko Tokyo Conviction involved TTI or the SMBC group's asset management businesses; none of TTI's personnel was involved in the misconduct; and none of the individual officers or employees of Nikko Tokyo had any role at TTI. According to the Applicant, TTI and Nikko Tokyo have separate businesses, operations, management teams, systems, premises, and legal and compliance personnel. Since its acquisition by SMFG on February 28, 2020, TTI has remained a stand-alone business with distinct reporting lines, governance structures, and control frameworks. Further, TTI is not directly owned by or in the same vertical ownership chain as Nikko Tokyo, and TTI and Nikko Tokyo do not share personnel or office space.

23. The Applicant states that although TTI's seven-member board of directors includes four representatives from the SMBC group, TTI's Management Committee provides direct oversight of TTI's business.[20] Day-to-day management at TTI is conducted by a

[20] The board of directors is responsible for, among other things, setting strategic objectives, approving major initiatives, and ensuring the company has adopted and implemented a compliance infrastructure that is reasonably designed to meet its regulatory obligations.

dedicated management team with support from other TTI committees, including the Operations Committee, Product Committee, Valuation Committee, and ESG Committee. In addition, TTI has dedicated independent legal, risk, and compliance teams, as well as its own control framework and compliance infrastructure.[21]

24. According to the Applicant, TTI personnel remain fully and independently responsible for TTI's material functions, including portfolio and risk management activities, investment and trading decisions, compliance, marketing, and the provision of client services. In addition, dedicated TTI personnel perform all day-to-day functions related to TTI's business as an investment adviser, including onboarding customers, managing customer accounts, and executing trading decisions.

25. TTI states that it has detailed policies setting forth its process for handling ERISA assets, identifying and addressing conflicts of interest, best execution, and compliance with applicable anti-money laundering requirements. TTI also states that it has a dedicated Compliance Manual that sets forth, among other things, firm policies related to whistleblowing, handling internal and external complaints, client onboarding, and the process for approving new products or instruments.

26. Finally, TTI states that Nikko Tokyo is not a QPAM, does not manage any ERISA assets, and that no ERISA assets were involved in the Misconduct underlying the Nikko Tokyo Conviction. Further, TTI has not engaged in trading activity with Nikko Tokyo on behalf of ERISA accounts at any point since TTI became affiliated with Nikko Tokyo.

Hardship to Covered Plans

27. TTI represents that Covered Plans would suffer certain hardships if TTI loses its eligibility to rely on the QPAM Exemption. TTI's representations regarding these hardships are set forth below in paragraphs 28 through 37.

28. According to the Applicant, loss of the QPAM Exemption would severely limit the investment transactions available to the accounts that TTI manages on behalf of Covered Plans, hindering TTI's ability to efficiently manage the strategies for which it contracted with Covered Plan clients. Further, if TTI were ineligible to rely on the QPAM Exemption, it could receive less advantageous pricing for transactions it engages in on behalf of Covered Plans.

29. TTI states that it has extensively reviewed its investment activity and concluded that, as a practical matter, the QPAM Exemption is the only exemption available to provide relief for certain types of investment transactions it enters into on behalf of Covered Plans. TTI states that counterparties to the swaps and other transactions in which TTI-managed accounts engage require compliance with, and a representation as to satisfaction of the conditions of, the QPAM Exemption. In light of market reliance on QPAM Exemption, the Applicant submits that it would not be possible for TTI to effectively manage its strategies for ERISA clients, absent the grant of exemptive relief.

TTI states that considering the nature of emerging market investments and swap, options, and other derivative transactions, Covered Plan clients and counterparties are reluctant to utilize more recent alternative exemptions, such as the service provider exemption under ERISA section 408(b)(17). This reluctance is due to uncertainty about the application of the adequate consideration requirements of the statutory exemption and the resulting possibility that the use of the exemption could later be challenged by the Department on those grounds.

30. TTI states that it relies on the QPAM Exemption to conduct a variety of transactions on behalf of Covered Plans, including buying and selling equity securities; preferred stock; American Depository Receipts, and related options; U.S. and foreign fixed-income instruments, including unregistered offerings; various derivatives, including futures, options on futures, and swaps; and foreign exchange products, including spot currencies, forwards, and swaps. TTI also relies upon the QPAM Exemption for the purchase and sale of both foreign and domestic equity securities, registered and sold under Rule 144A or otherwise (*e.g.,* traditional private placement).

31. TTI represents that if it loses its ability to rely upon the QPAM Exemption, it would no longer be able to hedge currency for its private and public plan asset clients, preventing it from managing absolute and relative currency risk for such clients in such clients' best interests. TTI states that it specializes in international and emerging market strategies that depend on TTI's ability to translate and maintain the value of Covered Plan investments from the local currency in which the investment is made into U.S. dollars, the benchmark currency in which performance is measured. To limit plan risk exposure to the underlying securities without simultaneously exposing them to the risk of currency fluctuation, TTI makes substantial use of foreign exchange (FX) hedges by using forward transactions and other FX derivatives. If this proposed exemption is not granted, TTI states that nearly $900 million in ERISA plans and separately managed accounts for private and public employers would likely be affected, either directly or as a result of TTI's inability to effectively hedge risk.

32. For all but one of the ERISA funds that TTI manages, virtually all assets are either actively or dynamically hedged based on exposures and market conditions.[22] As of November 3, 2022, approximately 16% of the assets under management (AUM) in each of the four segregated ERISA accounts that TTI manages on behalf of the ERISA plans of two major U.S. employers are hedged with respect to Indian, Taiwanese, and Chinese currency, which translates to approximately $35 million in hedges. Further, the TT Emerging Markets Opportunities Fund II has over the past year hedged risks associated with British, Indian, Taiwanese, Chinese, Mexican, and Polish currencies. Without these positions, the Applicant states that TT Emerging Markets Opportunities Fund II would have incurred nearly $5.5 million in losses due to unhedged FX exposures, negatively impacting overall returns.

33. TTI represents that the loss of the QPAM Exemption would also impact TTI's agreements with the swap dealers it executes these hedges with pursuant to International Swaps and Derivatives Association Agreements (ISDA Agreements). ISDA agreements require TTI to represent that it meets all conditions of the QPAM Exemption, and a breach of this representation would entitle the counterparty to terminate the transaction. The Applicant states that, as a practical matter, swap dealers would be nearly certain to exercise their right to terminate because TTI's loss of the QPAM Exemption would increase the swap dealers' exposure to risk. Thus, these agreements would be unwound and TTI would no longer be able to employ the hedging activities on which its strategies depend. If these ISDA

[21] This includes TTI's Code of Ethics, which sets forth TTI's expectation that all personnel will ''[o]bserve the highest standards of integrity'' and ensure that TTI maintains its ''strong reputation for regulatory compliance and high professional standards.'' This Code of Ethics also addresses prohibitions on market abuse and restrictions on personal trading.

[22] The actual percentage of AUM in each fund that is hedged at any given time varies.

Agreements were terminated, TTI states that it would immediately need to unwind approximately $73,784,388 million in hedges.[23]

34. TTI submits that if this proposed exemption is not granted, Covered Plans could incur significant costs, including transaction costs, costs associated with finding and evaluating other managers, and costs associated with reinvesting assets with those new managers. TTI states that it has longstanding relationships with its ERISA plan clients and if this exemption were denied, these plans would need to undertake significant work to find an alternative manager.[24] These costs, according to TTI include the following: (a) consultant fees, legal fees, and other due diligence expenses associated with identifying new managers; (b) transaction costs associated with a change in investment manager, including the sale and purchase of portfolio investments to accommodate the investment policies and strategy of the new manager, and the cost of entering into new custodial arrangements; and (c) lost investment opportunities as a result of the change in investment managers.

The Applicant states that, given the sophistication of TTI's investment strategies, Covered Plan clients would likely engage in a full RFP process that could take several months to complete. TTI states that plans generally incur tens of thousands of dollars in consulting and legal fees in connection with a search for a new manager and that consultants may charge more for searches involving specialized strategies, such as TTI's international, emerging markets, and environmentally conscious portfolios.

35. TTI represents that terminating management agreements and liquidating associated positions can have a significant impact on both transaction fees and the market value of the underlying assets. This is particularly true for many of TTI's strategies, which focus on international and emerging markets and may occasionally involve investments in illiquid foreign securities and related derivatives that have large bid-ask spreads, infrequent trading, and/or low trading volumes.

TTI states that for U.S. Equity Strategies, assuming average market conditions, the liquidation costs over a 30-day liquidation timeframe might range from 20 to 40 basis points; for significantly shorter liquidation periods, and depending on the strategy, the range could be 30 to 50 basis points. In addition, commission fees and transactions would likely average an additional 4 basis points.

For International and Emerging Markets Equity, TTI relies on the QPAM Exemption to buy and sell certain international and emerging markets equity securities. International, and particularly emerging, equity markets are typically less liquid than their domestic counterparts and incur higher transaction costs. Assuming average market conditions, the liquidation costs for equity strategies over a 30-day liquidation timeframe might range from 30 to 50 basis points; for significantly shorter liquidation periods, the range could be 40 to 80 basis points, depending on the strategy. In addition, there would also be an additional average of 10 basis points in commission fees on the transactions.

36. For futures, options, and cleared and bilateral swaps, TTI relies on the QPAM Exemption to buy and sell these products, which certain strategies rely on to hedge risk and obtain certain exposures on an economic basis. Without the ability to invest in these instruments, plans would no longer have access to a tool that managers routinely use to protect against losses caused by market volatility. If the QPAM Exemption were lost, TTI estimates that its clients could incur average weighted liquidation costs of approximately 5 basis points of the total market value of these products.

37. In the case of foreign currency exposure, Covered Plans that invest in global strategies would be disadvantaged were they to lose the ability to hedge currency risk. If the QPAM Exemption were lost, TTI estimates that its clients could incur average weighted liquidation costs of approximately 5 basis points of the total market value in fixed income products.

38. TTI also provides estimated liquidation as dollar cost estimates. TTI's estimate of liquidation costs is of the emerging market equity portfolios only, which represents the predominant strategy for ERISA Clients. TTI states that its estimates on equity liquidation costs below are based on the gross values of the portfolio, utilizing the basis point figures, without analysis as to the specific portfolio components.

ERISA client	Emerging market portfolio AUM at 12/7/23	Min. 30-day equity liquidation cost (30 bps)	Max. 30-day liquidation cost (50 bps)	Min. intermediate liquidation cost (40 bps)
1	$54,845,803	164,537	274,229	219,383
2	172,160,384	516,481	860,801	688,641
3	102,787,100	308,361	513,935	411,148
(Plan Asset Fund)	441,117,644	1,323,352	2,205,588	1,764,470
Total	770,910,931	2,312,731	3,854,553	3,083,642

ERISA client	Max. intermediate liquidation cost (80 bps)	Commission fees (10 bps)	Liquidation cost of currency hedge (50 bps)
1	$438,766	$54,845	$27,788
2	1,377,283	172,160	86,914
3	822,296	102,787	51,982
Plan Asset Fund	3,528,941	441,117	202,235
Total	6,167,286	770,909	368,919

[23] The approximate total FX forward exposure of TTI's public and private plan asset accounts as of November 10, 2022, is $330 million.

[24] TTI represents that it has managed ERISA assets for a major U.S. financial institution since at least 2015. TTI also states that it has managed ERISA assets for a large aerospace company since at least 2018.

Term of Relief Requested

39. In its exemption application, TTI requested a nine-year exemption that would carry TTI through the end of the Section I(g) 10-year disqualification period triggered by the Conviction. The Department is declining to include a nine-year term with this exemption and instead has proposed a five-year term. With this limited term of relief, the Department is reserving the right to review TTI's adherence to the conditions set out in this exemption before granting additional relief that would carry TTI through the end of its disqualification period. To continue to rely upon the QPAM Exemption beyond the five-year term of this exemption, TTI will have to submit another exemption application to the Department.

40. In developing administrative exemptions under ERISA section 408(a), the Department implements its statutory directive to grant only exemptions that are appropriately protective and in the interest of affected plans and IRAs. The Department is proposing this exemption with conditions that would protect Covered Plans (and their participants and beneficiaries) and allow them to continue to utilize the services of TTI if they determine that it is prudent to do so. If this proposed exemption is granted as proposed, it would allow Covered Plans to avoid costs and disruption to investment strategies that may arise if such Covered Plans are forced, on short notice, to hire a different QPAM or asset manager because TTI is no longer able to rely on the relief provided by PTE 84–14 due to the Conviction.

41. This proposed exemption includes a suite of conditions that are similar to those conditions set out under PTE 2023–13 and requires TTI to: continue to implement, maintain, and follow its ERISA Policies and ERISA Training; submit to an annual independent audit performed by a prudently selected independent auditor; agree and warrant to Covered Plan clients that it will, among other things, comply with ERISA and the Code and refrain from engaging in prohibited transactions that are not otherwise exempt; agree and warrant to indemnify and hold harmless Covered Plans for certain damages, not to require (or otherwise cause) Covered Plans to waive, limit, or qualify the liability of TTI, and not to restrict the ability of Covered Plans to terminate or withdraw from their arrangement with TTI, except for reasonable restrictions, or impose any fees, penalties, or charges for such termination or withdrawal, except for reasonable fees. This proposed exemption also contains extensive notice requirements and obligates TTI to ensure that a qualified senior compliance officer continues to conduct annual reviews to determine the adequacy and effectiveness of TTI's implementation of the Policies and Training.

42. Finally, the Department notes that relief under this proposed exemption is limited solely to TTI and no other affiliates of TTI, SMBC, or SMFG, as the term affiliate is defined in PTE 84–14.

Statutory Findings

43. Based on the conditions included in this proposed exemption, the Department has tentatively determined that the relief sought by TTI would satisfy the statutory requirements for an exemption under ERISA section 408(a).

44. *The Proposed Exemption is ''Administratively Feasible.''* The Department has tentatively determined that the proposed exemption is administratively feasible for the Department because, among other things, a qualified independent auditor would be required to perform an in-depth audit covering TTI's compliance with the terms of the exemption, and a corresponding written audit report would be provided to the Department and be made available to the public. The Department notes that the independent audit will incentivize TTI to comply with conditions set out herein while reducing the immediate need for direct review and oversight by the Department.

45. *The Proposed Exemption is ''In the Interest of the Covered Plans and their Participants and Beneficiaries.''* The Department has tentatively determined that the proposed exemption is in the interests of the participants and beneficiaries of affected Covered Plans because of the likely costs that plans would incur if the exemption were denied and the benefits of permitting plans to continue to rely upon TTI's services with the additional protections set forth in this exemption.

46. *The Proposed Exemption Is ''Protective of the Rights of Covered Plan Participants and Beneficiaries.''* The Department has tentatively determined that the proposed exemption is protective of the rights of participants and beneficiaries of Covered Plans. As described above, the proposed exemption is subject to a suite of conditions that include, but are not limited to: (a) the maintenance of the Policies; (b) the continued implementation of the Training; (c) a robust audit conducted by a qualified independent auditor; (d) the provision of certain agreements and warranties by TTI to Covered Plans; (e) specific notices and disclosures that inform Covered Plans of the circumstances necessitating the need for exemptive relief and TTI's obligations under this exemption; and (f) the designation of a Compliance Officer who must ensure that TTI continues to comply with the Policies and Training requirements of this exemption. Further, the Department notes that the disqualifying conduct occurred at an entity (Nikko Tokyo) that is completely separate from TTI.

Summary

47. This proposed exemption would provide relief from certain of the restrictions set forth in ERISA section 406 and Code section 4975(c)(1). No relief or waiver of a violation of any other law would be provided by this proposed exemption. The relief set forth in this proposed exemption would terminate immediately if, among other things, an entity within the TTI corporate structure were convicted of any crime covered by Section I(g) of PTE 84–14 (other than the Conviction). While TTI could request a new individual prohibited transaction exemption in that event, the Department would not be obligated to grant such a request. Consistent with this proposed exemption, the Department's consideration of additional exemptive relief is subject to the findings required under ERISA section 408(a) and Code section 4975(c)(2).

48. When interpreting and implementing this exemption, TTI should resolve any ambiguities in favor of the exemption's protective purposes. To the extent additional clarification is necessary, TTI and others should contact EBSA's Office of Exemption Determinations at 202–693–8540.

49. Based on the conditions that are included in this proposed exemption, the Department has tentatively determined that the relief sought by TTI would satisfy the statutory requirements for an individual exemption under ERISA Section 408(a) and Code Section 4975(c)(2).

Notice to Interested Persons

Notice of the proposed exemption will be provided to all interested persons within fifteen (15) days of the publication of the notice of proposed five-year exemption in the **Federal Register**. The notice will be provided to all interested persons in the manner approved by the Department and will contain the documents described therein and a supplemental statement, as required pursuant to 29 CFR 2570.43(a)(2). The supplemental statement will inform interested persons of their right to comment on and to request a hearing with respect to the

pending exemption. All written comments and/or requests for a hearing must be received by the Department within forty-five (45) days of the date of publication of this proposed five-year exemption in the **Federal Register**. All comments will be made available to the public.

Warning

If you submit a comment, EBSA recommends that you include your name and other contact information in the body of your comment, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as a Social Security number or an unlisted phone number) or confidential business information that you do not want publicly disclosed. All comments may be posted on the internet and can be retrieved by most internet search engines.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under ERISA section 408(a) and/or Code section 4975(c)(2) does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of ERISA and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of ERISA section 404, which, among other things, require a fiduciary to discharge their duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with ERISA section 404(a)(1)(B); nor does it affect the requirement of Code section 401(a) that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under ERISA section 408(a) and/or Code section 4975(c)(2), the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemption would be supplemental to, and not in derogation of, any other provisions of ERISA and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is, in fact, a prohibited transaction; and

(4) The proposed exemption would be subject to the express condition that the material facts and representations contained in the application are true and complete at all times and that the application accurately describes all material terms of the transactions that are the subject of the exemption.

Proposed Exemption

The Department is considering granting a five-year exemption under the authority of ERISA section 408(a) and Internal Revenue Code (or Code) section 4975(c)(2), and in accordance with the procedures set forth in the exemption procedure regulation.[25]

Section I. Definitions

(a) The term ''Conviction'' means the judgment of conviction against SMBC Nikko Securities, Inc. (Nikko Tokyo) in Tokyo District Court for attempting to peg, fix or stabilize the prices of certain Japanese equity securities that Nikko Tokyo was attempting to place in a block offering that occurred on February 13, 2023.

(b) The term ''Covered Plan'' means a plan subject to Part IV of title I of ERISA (an ''ERISA-covered plan'') or a plan subject to Code section 4975 (an ''IRA''), in each case, with respect to which TTI relies on PTE 84–14, or with respect to which TTI has expressly represented that the manager qualifies as a QPAM or relies on the QPAM class exemption (PTE 84–14 or the QPAM Exemption). A Covered Plan does not include an ERISA-covered plan or IRA to the extent that TTI has expressly disclaimed reliance on QPAM status or PTE 84–14 in entering into a contract, arrangement, or agreement with the ERISA-covered plan or IRA.

(c) The term ''Exemption Period'' means the five-year period beginning on February 13, 2024, and ending on February 12, 2029.

(d) The term ''TTI'' means TT International Asset Management Ltd, and does not include SMBC Nikko Securities, Inc. (Nikko Tokyo), or any other entity affiliated with TT International Asset Management Ltd.

Section II. Covered Transactions

Under this proposed exemption, TTI would not be precluded from relying on the exemptive relief provided by Prohibited Transaction Class Exemption 84–14 (PTE 84–14 or the QPAM Exemption) notwithstanding the Conviction, as defined in Section I(a), during the Exemption Period, as defined in Section I(c), provided that the conditions set forth in Section III below are satisfied.

Section III. Conditions

(a) TTI (including its officers, directors, agents other than Nikko Tokyo, and employees) did not know of, did not have reason to know of, and did not participate in the criminal conduct that is the subject of the Conviction. Further, any other party engaged on behalf of TTI who had responsibility for or exercised authority in connection with the management of plan assets did not know or have reason to know of and did not participate in the criminal conduct that is the subject of the Conviction. For purposes of this proposed exemption, ''participate in'' refers not only to active participation in the criminal conduct of Nikko Tokyo that is the subject of the Conviction, but also to knowing approval of the criminal conduct or knowledge of such conduct without taking active steps to prohibit it, including reporting the conduct to such individual's supervisors, and to TTI's Board of Directors;

(b) TTI (including its officers, directors, employees, and agents, other than Nikko Tokyo) did not receive direct compensation, or knowingly receive indirect compensation, in connection with the criminal conduct that is the subject of the Conviction. Further, any other party engaged on behalf of TTI who had responsibility for, or exercised authority in connection with the management of plan assets did not receive direct compensation, or knowingly receive indirect compensation, in connection with the criminal conduct that is the subject of the Conviction;

(c) TTI does not currently and will not in the future employ or knowingly engage any of the individuals who participated in the criminal conduct that is the subject of the Conviction;

(d) At all times during the Exemption Period, TTI will not use its authority or influence to direct an ''investment fund'' (as defined in Section VI(b) of PTE 84–14) that is subject to ERISA or the Code and managed by TTI in reliance on PTE 84–14, or with respect to which TTI has expressly represented to a Covered Plan that it qualifies as a QPAM or relies on the QPAM Exemption, to enter into any transaction with Nikko Tokyo, or to engage Nikko Tokyo to provide any service to such

[25] 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, this notice of proposed exemption is issued solely by the Department.

investment fund, for a direct or indirect fee borne by such investment fund, regardless of whether such transaction or service may otherwise be within the scope of relief provided by an administrative or statutory exemption;

(e) Any failure of TTI to satisfy Section I(g) of PTE 84–14 arose solely from the Conviction;

(f) TTI did not exercise authority over the assets of any Covered Plan in a manner that it knew or should have known would further the criminal conduct that is the subject of the Conviction or cause TTI or its affiliates to directly or indirectly profit from the criminal conduct that is the subject of the Conviction;

(g) Other than with respect to employee benefit plans maintained or sponsored for its own employees or the employees of an affiliate, Nikko Tokyo will not act as a fiduciary within the meaning of ERISA section 3(21)(A)(i) or (iii), or Code section 4975(e)(3)(A) and (C), with respect to Covered Plan assets.

(h)(1) TTI must continue to implement, maintain, adjust (to the extent necessary), and follow the written policies and procedures (the Policies). The Policies must require and be reasonably designed to ensure that:

(i) The asset management decisions of TTI are conducted independently of the corporate management and business activities of Nikko Tokyo;

(ii) TTI fully complies with ERISA's fiduciary duties and with ERISA and the Code's prohibited transaction provisions, as applicable with respect to each Covered Plan, and does not knowingly participate in any violation of these duties and provisions with respect to Covered Plans;

(iii) TTI does not knowingly participate in any other person's violation of ERISA or the Code with respect to Covered Plans;

(iv) Any filings or statements made by TTI to regulators, including, but not limited to, the Department of Labor (the Department), the Department of the Treasury, the Department of Justice, and the Pension Benefit Guaranty Corporation, on behalf of or in relation to Covered Plans, are materially accurate and complete to the best of such QPAM's knowledge at that time;

(v) To the best of TTI's knowledge at the time, TTI does not make material misrepresentations or omit material information in its communications with such regulators with respect to Covered Plans or make material misrepresentations or omit material information in its communications with Covered Plans;

(vi) TTI complies with the terms of this exemption; and

(vii) Any violation of or failure to comply with an item in subparagraphs (ii) through (vi) is corrected as soon as reasonably possible upon discovery or as soon after TTI reasonably should have known of the noncompliance (whichever is earlier), and any such violation or compliance failure not so corrected is reported, upon the discovery of such failure to so correct, in writing, to the head of compliance and the general counsel (or their functional equivalent) of TTI, and the independent auditor responsible for reviewing compliance with the Policies. TTI will not be treated as having failed to develop, implement, maintain, or follow the Policies, provided it corrects any instance of noncompliance as soon as reasonably possible upon discovery, or as soon as reasonably possible after TTI reasonably should have known of the noncompliance (whichever is earlier), and provided it adheres to the reporting requirements set forth in this subparagraph (vii);

(2) TTI must continue to implement an annual training program (the Training) during the Exemption Period for all relevant TTI asset/portfolio management, trading, legal, compliance, and internal audit personnel. The Training required under this exemption may be conducted electronically and must: (a) at a minimum, cover the Policies, ERISA and Code compliance (including applicable fiduciary duties and the prohibited transaction provisions), ethical conduct, the consequences for not complying with the conditions of this exemption (including any loss of exemptive relief provided herein), and prompt reporting of wrongdoing; and (b) be conducted by a professional who has been prudently selected and who has appropriate technical training and proficiency with ERISA and the Code to perform the tasks required by this exemption;

(i)(1) TTI must submit to biannual audits conducted by an independent auditor who has been prudently selected and who has appropriate technical training and proficiency with ERISA and the Code, to evaluate the adequacy of and TTI's compliance with the Policies and Training conditions described herein. The audit requirement must be incorporated into the Policies. The first audit covered under this exemption must cover the period of February 13, 2025, through February 12, 2026, and must be completed by August 12, 2026. The second audit covered under this exemption must cover the period of February 13, 2027, through February 12, 2028, and must be completed by August 12, 2028.

(2) Within the scope of the audit and to the extent necessary for the auditor, in its sole opinion, to complete its audit and comply with the conditions for relief described herein, TTI will grant the auditor unconditional access to its businesses, including, but not limited to: its computer systems; business records; transactional data; workplace locations; training materials; and personnel. Such access will be provided only to the extent that it is not prevented by state or federal statute, or involves communications subject to attorney client privilege, and may be limited to information relevant to the auditor's objectives as specified by the terms of this exemption;

(3) The auditor's engagement must specifically require the auditor to determine whether TTI has developed, implemented, maintained, and followed the Policies in accordance with the conditions of the exemption, and has developed and implemented the Training, as required herein;

(4) The auditor's engagement must specifically require the auditor to test TTI's operational compliance with the Policies and Training conditions. In this regard, the auditor must test, for TTI, transactions involving Covered Plans sufficient in size, number, and nature to afford the auditor a reasonable basis to determine TTI's operational compliance with the Policies and Training;

(5) Before the end of the relevant period for completing the audit, the auditor must issue a written report (the Audit Report) to TTI that describes the procedures performed by the auditor during the course of its examination. The Audit Report must include the auditor's specific determinations regarding:

(i) the adequacy of TTI's Policies and Training; TTI's compliance with the Policies and Training conditions; the need, if any, to strengthen such Policies and Training; and any instance of TTI's noncompliance with the written Policies and Training described in Section III(h) above. TTI must promptly address any noncompliance and promptly address or prepare a written plan of action to address any determination by the auditor regarding the adequacy of the Policies and Training and the auditor's recommendations (if any) with respect to strengthening the Policies and Training. Any action taken, or the plan of action to be taken by TTI must be included in an addendum to the Audit Report (and such addendum must be completed before the certification described in Section III(i)(7) below). In the event such a plan of action to address the auditor's recommendation

regarding the adequacy of the Policies and Training is not completed by the time the Audit Report is submitted, the following period's Audit Report must state whether the plan was satisfactorily completed. Any determination by the auditor that TTI has implemented, maintained, and followed sufficient Policies and Training must not be based solely or in substantial part on an absence of evidence indicating noncompliance. In this last regard, any finding that TTI has complied with the requirements under this subparagraph must be based on evidence that TTI has actually implemented, maintained, and followed the Policies and Training required by the exemption. Furthermore, the auditor must not solely rely on the Report created by the compliance officer (the Compliance Officer), as described in Section III(m) below, as the basis for the auditor's conclusions in lieu of independent determinations and testing performed by the auditor, as required by Section III(i)(3) and (4) above; and

(ii) The adequacy of the Review described in Section III(m);

(6) The auditor must notify TTI of any instance of noncompliance identified by the auditor within five (5) business days after such noncompliance is identified by the auditor, regardless of whether the audit has been completed as of that date;

(7) With respect to the Audit Report, the general counsel, or one of the three most senior executive officers of TTI must certify in writing, under penalty of perjury, that the officer has reviewed the Audit Report and the exemption and that to the best of such officer's knowledge at the time, TTI has addressed, corrected or remedied any noncompliance and inadequacy, or has an appropriate written plan to address any inadequacy regarding the Policies and Training identified in the Audit Report. The certification must also include the signatory's determination that the Policies and Training in effect at the time of signing are adequate to ensure compliance with the conditions of this exemption and with the applicable provisions of ERISA and the Code. Notwithstanding the above, no person, including any person identified by Japanese authorities, who knew of, or should have known of, or participated in, any misconduct underlying the Conviction, by any party, may provide the certification required by the exemption, unless the person took active documented steps to stop the misconduct underlying the Conviction;

(8) TTI's Board of Directors must be provided a copy of the Audit Report and the joint general manager of SMFG's Corporate Planning Department must review the Audit Report for TTI and certify in writing, under penalty of perjury, that such officer has reviewed the Audit Report. With respect to this subsection (8), such certifying joint general manager must not have known of, had reason to know of, or participated in, any misconduct underlying the Conviction, unless such person took active documented steps to stop the misconduct underlying the Conviction.

(9) TTI must provide its certified Audit Report, by electronic mail to *e-oed@dol.gov.* This delivery must take place no later than thirty (30) days following completion of the Audit Report. The Audit Report will be made part of the public record regarding this exemption. Furthermore, TTI must make its Audit Report unconditionally available, electronically or otherwise, for examination upon request by any duly authorized employee or representative of the Department, other relevant regulators, and any fiduciary of a Covered Plan;

(10) TTI and the auditor must submit to *e-OED@dol.gov,* any engagement agreement(s) entered into pursuant to the engagement of the auditor under the exemption no later than two (2) months after the execution of any such engagement agreement;

(11) The auditor must provide the Department, upon request, access to all the workpapers it created and utilized in the course of the audit for inspection and review, provided such access and inspection is otherwise permitted by law; and

(12) TTI must notify the Department of a change in the independent auditor no later than 60 days after the engagement of a substitute or subsequent auditor and must provide an explanation for the substitution or change including a description of any material disputes between the terminated auditor and TTI;

(j) Throughout the Exemption Period, with respect to any arrangement, agreement, or contract between TTI and a Covered Plan, TTI agrees and warrants:

(1) To comply with ERISA and the Code, as applicable with respect to such Covered Plan; to refrain from engaging in prohibited transactions that are not otherwise exempt (and to promptly correct any prohibited transactions); and to comply with the standards of prudence and loyalty set forth in ERISA section 404 with respect to each such Covered Plan, to the extent that section is applicable;

(2) To indemnify and hold harmless the Covered Plan with respect to: any actual losses resulting directly from TTI's violation of ERISA's fiduciary duties, as applicable, and of the prohibited transaction provisions of ERISA and the Code, as applicable; a breach of contract by TTI; or any claim arising out of the failure of TTI to qualify for the exemptive relief provided by PTE 84–14 as a result of a violation of Section I(g) of PTE 84–14, other than the Conviction. This condition applies only to actual losses caused by TTI's violations. Actual losses include losses and related costs arising from unwinding transactions with third parties and from transitioning Plan assets to an alternative asset manager as well as costs associated with any exposure to excise taxes under Code section 4975 because of TTI's inability to rely upon the relief in the QPAM Exemption.

(3) Not to require (or otherwise cause) the Covered Plan to waive, limit, or qualify the liability of TTI for violating ERISA or the Code or engaging in prohibited transactions;

(4) Not to restrict the ability of the Covered Plan to terminate or withdraw from its arrangement with TTI with respect to any investment in a separately managed account or pooled fund subject to ERISA and managed by TTI, with the exception of reasonable restrictions, appropriately disclosed in advance, that are specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors. In connection with any of these arrangements involving investments in pooled funds subject to ERISA entered into after the effective date of this exemption, the adverse consequences must relate to a lack of liquidity of the underlying assets, valuation issues, or regulatory reasons that prevent the fund from promptly redeeming a Covered Plan's investment, and the restrictions must be applicable to all such investors and effective no longer than reasonably necessary to avoid the adverse consequences;

(5) Not to impose any fees, penalties, or charges for such termination or withdrawal with the exception of reasonable fees, appropriately disclosed in advance, that are specifically designed to prevent generally recognized abusive investment practices or specifically designed to ensure equitable treatment of all investors in a pooled fund in the event the withdrawal or termination may have adverse consequences for all other investors, provided that such fees are applied consistently and in like manner to all such investors;

(6) Not to include exculpatory provisions disclaiming or otherwise limiting the liability of TTI for a violation of such agreement's terms. To the extent consistent with ERISA section 410, however, this provision does not prohibit disclaimers for liability caused by an error, misrepresentation, or misconduct of a plan fiduciary or other party hired by the plan fiduciary who is independent of TTI and its affiliates, or damages arising from acts outside the control of TTI; and

(7) TTI must provide a notice of its obligations under this Section III(j) to each Covered Plan. For all other prospective Covered Plans, TTI must agree to its obligations under this Section III(j) in an updated investment management agreement between TTI and such clients or other written contractual agreement. Notwithstanding the above, TTI will not violate this condition solely because a Covered Plan refuses to sign an updated investment management agreement;

(k) Within 60 days after the effective date of this exemption, TTI provides notice of the exemption as published in the **Federal Register**, along with a separate summary describing the facts that led to the Conviction (the Summary), which has been submitted to the Department, and a prominently displayed statement (the Statement) that the Conviction results in a failure to meet a condition in PTE 84–14 to each sponsor and beneficial owner of a Covered Plan that has entered into a written asset or investment management agreement with TTI. All prospective Covered Plan clients that enter into a written asset or investment management agreement with TTI after a date that is 60 days after the effective date of this exemption must receive a copy of the notice of the exemption, the Summary, and the Statement before, or contemporaneously with, the Covered Plan's receipt of a written asset or investment management agreement from TTI. The notices may be delivered electronically (including by an email that has a link to the exemption). Notwithstanding the above, TTI will not violate the condition solely because a Covered Plan refuses to sign an updated investment management agreement.

(l) TTI must comply with each condition of PTE 84–14, as amended, with the sole exception of the violation of Section I(g) of PTE 84–14 that is attributable to the Conviction. If an affiliate of TTI (as defined in Section VI(d) of PTE 84–14) is convicted of a crime described in Section I(g) of PTE 84–14 (other than the Conviction) during the Exemption Period, relief in the exemption would terminate immediately;

(m)(1) TTI must continue to designate a senior compliance officer (the Compliance Officer) to be responsible for compliance with the Policies and Training requirements described herein. The Compliance Officer previously designated by TTI under PTE 2023–13 may continue to serve in the role of Compliance Officer provided they meet all the requirements of this Section (m)(1). Notwithstanding the above, no person, including any person referenced in the indictment that gave rise to the Conviction, who knew of, or should have known of, or participated in, any misconduct described in the indictment, by any party, may be involved with the designation or responsibilities required by this condition unless the person took active documented steps to stop the misconduct. The Compliance Officer must conduct a review of the Exemption Period (the Exemption Review), to determine the adequacy and effectiveness of TTI's implementation of the Policies and Training. With respect to the Compliance Officer, the following conditions must be met:

(i) The Compliance Officer must be a professional who has extensive experience with, and knowledge of, the regulation of financial services and products, including under ERISA and the Code; and

(ii) The Compliance Officer must have a direct reporting line to the highest-ranking corporate officer in charge of legal compliance for asset management.

(2) With respect to the Exemption Review, the following conditions must be met:

(i) The Exemption Review must include a review of TTI's compliance with and effectiveness of the Policies and Training and of the following: any compliance matter related to the Policies or Training that was identified by, or reported to, the Compliance Officer or others within the compliance and risk control function (or its equivalent) during the previous year; any material change in the relevant business activities of TTI; and any change to ERISA, the Code, or regulations related to fiduciary duties and the prohibited transaction provisions that may be applicable to the activities of TTI;

(ii) The Compliance Officer prepares a written report for the Exemption Review (an Exemption Report) that (A) summarizes their material activities during the Exemption Period; (B) sets forth any instance of noncompliance discovered during the Exemption Period, and any related corrective action; (C) details any change to the Policies or Training to guard against any similar instance of noncompliance occurring again; and (D) makes recommendations, as necessary, for additional training, procedures, monitoring, or additional and/or changed processes or systems, and management's actions in response to such recommendations;

(iii) In the Exemption Report, the Compliance Officer must certify in writing that to the best of their knowledge at the time: (A) the report is accurate; (B) the Policies and Training are working in a manner which is reasonably designed to ensure that the Policies and Training requirements described herein are met; (C) any known instance of noncompliance during the prior year, and any related correction taken to date, has been identified in the Exemption Report; and (D) TTI complied with the Policies and Training, and/or corrected (or are correcting) any known instances of noncompliance in accordance with Section III(h) above;

(iv) The Exemption Report must be provided to appropriate corporate officers of TTI; the head of compliance and the general counsel (or their functional equivalent) of TTI; and must be made unconditionally available to the independent auditor described above;

(v) The Exemption Review, including the Compliance Officer's written Report, must be completed within 90 days following the end of the period to which it relates.

(n) TTI imposes internal procedures, controls, and protocols to reduce the likelihood of any recurrence of conduct that is the subject of the Conviction;

(o) Nikko Tokyo complies in all material respects with any requirements imposed by a U.S. regulatory authority in connection with the Conviction;

(p) TTI maintains records necessary to demonstrate that the conditions of the exemption have been met for six (6) years following the date of any transaction for which TTI relies upon the relief in this exemption;

(q) During the Exemption Period, TTI must: (1) immediately disclose to the Department any Deferred Prosecution Agreement (a DPA) or Non-Prosecution Agreement (an NPA) with the U.S. Department of Justice, entered into by TTI or any of its affiliates (as defined in Section VI(d) of PTE 84–14) in connection with the conduct described in Section I(g) of PTE 84–14 or ERISA section 411; and (2) immediately provide the Department with any information requested by the Department, as permitted by law, regarding the agreement and/or conduct

and allegations that led to the agreement;

(r) Within 60 days after the effective date of the exemption, TTI, in its agreements with, or in other written disclosures provided to Covered Plans, will clearly and prominently inform Covered Plan clients of their right to obtain a copy of the Policies or a description (Summary Policies) which accurately summarizes key components of TTI's written Policies developed in connection with this exemption. If the Policies are thereafter changed, each Covered Plan client must receive a new disclosure within 180 days following the end of the calendar year during which the Policies were changed. If TTI meets this disclosure requirement through Summary Policies, changes to the Policies shall not result in the requirement for a new disclosure unless, as a result of changes to the Policies, the Summary Policies are no longer accurate. With respect to this requirement, the description may be continuously maintained on a website, provided that such website link to the Policies or Summary Policies is clearly and prominently disclosed to each Covered Plan;

(s) TTI must provide the Department with the records necessary to demonstrate that each condition of this exemption has been met within 30 days of a request by the Department; and

(t) All the material facts and representations set forth in the Summary of Facts and Representations are true and accurate at all times.

Effective Date: If the Department grants this proposed exemption, it would be in effect for a five-year period beginning on February 13, 2024, and ending on February 12, 2029.

Signed at Washington, DC.

George Christopher Cosby,

Director, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 2023–27937 Filed 12–19–23; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Voluntary Demographic Form

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Office of Workers' Compensation Programs (OWCP)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before January 19, 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.

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) if the information will be processed and used in a timely manner; (3) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (4) ways to enhance the quality, utility and clarity of the information collection; and (5) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: Michelle Neary by telephone at 202–693–6312, or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: Historically, the Black Lung Program application forms and other claims processing forms have not collected demographic information. The use of this voluntary demographic form will help identify underserved communities and guide language and outreach strategies, thereby strengthening the customer service experience. Collecting and analyzing demographic data aligns with the following executive orders Executive Orders: Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, signed by President Biden in January 2021; Executive Order 14075, Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals, also signed by President Biden in January 2021; Executive Order 14031, Advancing Equity, Justice, and Opportunity for Asian Americans, Native Hawaiians, and Pacific Islanders, signed in May 2021; and Executive Order 14058, Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in Government, signed in December 2021. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on August 8, 2023 (88 FR 53525).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL–OWCP.

Title of Collection: Voluntary Demographic Form.

OMB Control Number: 1240–0NEW.

Affected Public: Individuals or Households.

Total Estimated Number of Respondents: 18,077.

Total Estimated Number of Responses: 18,077.

Total Estimated Annual Time Burden: 1,506 hours.

Total Estimated Annual Other Costs Burden: $1,550.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Michelle Neary,

Senior PRA Analyst.

[FR Doc. 2023–27936 Filed 12–19–23; 8:45 am]

BILLING CODE 4510–CK–P

DEPARTMENT OF LABOR

Wage and Hour Division

Agency Information Collection Activities; Comment Request; Information Collections: Requirements of a Bona Fide Thrift Savings Plan and Requirements of a Bona Fide Profit-Sharing Plan or Trust

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (Department) is soliciting comments

concerning a proposed extension of the information collection request (ICR) titled ''Requirements of a Bona Fide Thrift Savings Plan and Requirements of a Bona Fide Profit-Sharing Plan or Trust.'' This comment request is part of continuing Departmental efforts to reduce paperwork and respondent burden in accordance with the Paperwork Reduction Act of 1995 (PRA). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. A copy of the proposed information request can be obtained by contacting the office listed below in the **FOR FURTHER INFORMATION CONTACT** section of this Notice.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section below on or before February 20, 2024.

ADDRESSES: You may submit comments identified by Control Number 1235–0013, by either one of the following methods: *Email: WHDPRAComments@dol.gov; Mail, Hand Delivery, Courier:* Division of Regulations, Legislation, and Interpretation, Wage and Hour, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210. *Instructions:* Please submit one copy of your comments by only one method. All submissions received must include the agency name and Control Number identified above for this information collection. Commenters are strongly encouraged to transmit their comments electronically via email or to submit them by mail early. Comments, including any personal information provided, become a matter of public record. They will also be summarized and/or included in the request for Office of Management and Budget (OMB) approval of the information collection request.

FOR FURTHER INFORMATION CONTACT: Robert Waterman, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693–0406 (this is not a toll-free number). Alternative formats are available upon request by calling 1–866–487–9243. If you are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

SUPPLEMENTARY INFORMATION:

I. Background

This extension is for the Requirements of a Bona Fide Thrift or Savings Plan and Requirements of a Bona Fide Profit-Sharing Plan or Trust information collection. The information collection requirements apply to employers claiming the overtime exemption available under Fair Labor Standards Act section 7(e)(3)(b), 29 U.S.C. 207(e)(3)(b). Specifically, in calculating an employee's regular rate of pay, an employer need not include contributions made to a bona fide thrift or savings plan or a bona fide profit-sharing plan or trust—as defined in regulations 29 CFR parts 547 and 549. An employer is required to communicate, or to make available to its employees, the terms of the bona fide thrift, savings, or profit-sharing plan or trust and to retain certain records. Fair Labor Standards Act section 11(c) authorizes this information collection. See 29 U.S.C. 211(c).

Interested parties are encouraged to send comments to the Department at the address shown in the **ADDRESSES** section within 60 days of publication of this notice in the **Federal Register**. To help ensure appropriate consideration, comments should reference OMB Control Number 1235–0013.

II. Review Focus

The Department of Labor is particularly interested in comments which:

- 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;
- Enhance the quality, utility, and clarity of the information to be collected;
- 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;
- 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.

III. Current Actions

The Department of Labor seeks an approval for the extension of this information collection to ensure effective administration of the FLSA as it relates to the Requirements of a Bona Fide Thrift Savings Plan and Requirements of a Bona Fide Profit-Sharing Plan or Trust.

Type of Review: Extension.

Agency: Wage and Hour Division.

Title: Requirements of a Bona Fide Thrift Savings Plan and Requirements of a Bona Fide Profit-Sharing Plan or Trust.

OMB Control Number: 1235–0013.

Affected Public: Business or other for-profit, non-profits.

Total Respondents: 3,254,524.

Total Annual Responses: 4,393,607.

Estimated Total Burden Hours: 2,441.

Estimated Time per Response: 2 seconds.

Frequency: On occasion.

Total Burden Costs: $134,914.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operation/maintenance): $0.

Dated: December 15, 2023.

Amy Hunter,

Director, Division of Regulations, Legislation, and Interpretation.

[FR Doc. 2023–27965 Filed 12–19–23; 8:45 am]

BILLING CODE 4510–27–P

MILLENNIUM CHALLENGE CORPORATION

[MCC FR 23–09]

Report on the Selection of Eligible Countries for Fiscal Year 2024

AGENCY: Millennium Challenge Corporation.

ACTION: Notice.

SUMMARY: This report is provided in accordance with the Millennium Challenge Act of 2003, as amended. The report is set forth in full below.

SUPPLEMENTARY INFORMATION: Report on the Selection of Eligible Countries for Fiscal Year 2024.

Summary

This report is provided in accordance with section 608(d)(1) of the Millennium Challenge Act of 2003, as amended (the Act) (22 U.S.C. 7707(d)(1)).

The Act authorizes the provision of assistance under section 605 of the Act (22 U.S.C. 7704) to countries that enter into compacts with the United States to support policies and programs that advance the progress of such countries in achieving lasting poverty reduction through economic growth and are in furtherance of the Act. The Act requires the Millennium Challenge Corporation (MCC) to determine the countries that will be eligible to receive assistance for

the fiscal year, based on their demonstrated commitment to just and democratic governance, economic freedom, and investing in their people, as well as on the opportunity to reduce poverty through economic growth in the country. The Act also requires the submission of reports to appropriate congressional committees and the publication of notices in the **Federal Register** that identify, among other things:

1. The countries that are ''candidate countries'' for assistance for fiscal year (FY) 2024 based on their per-capita income levels and their eligibility to receive assistance under U.S. law, and countries that would be candidate countries, but for specified legal prohibitions on assistance (section 608(a) of the Act (22 U.S.C. 7707(a)));

2. The criteria and methodology that the Board of Directors of MCC (the Board) used to measure and evaluate the policy performance of the ''candidate countries'' consistent with the requirements of section 607 of the Act in order to determine ''eligible countries'' from among the ''candidate countries'' (section 608(b) of the Act (22 U.S.C. 7707(b))); and

3. The list of countries determined by the Board to be ''eligible countries'' for FY 2024, with justification for eligibility determination and selection for compact negotiation, including with which of the eligible countries the Board will seek to enter into compacts (section 608(d) of the Act (22 U.S.C. 7707(d))).

This is the third of the above-described reports by MCC for FY 2024. It identifies countries determined by the Board to be eligible under section 607 of the Act (22 U.S.C. 7706) for FY 2024 with which MCC seeks to enter into compacts under section 609 of the Act (22 U.S.C. 7708), as well as the justification for such decisions. The report also identifies countries selected by the Board to receive assistance under MCC's threshold program pursuant to section 616 of the Act (22 U.S.C. 7715).

Eligible Countries

The Board met on December 13, 2023, to select those eligible countries with which the United States, through MCC, will seek to enter into a Millennium Challenge Compact pursuant to section 607 of the Act (22 U.S.C. 7706). The Board selected the following eligible country for such assistance for FY 2024: Cabo Verde. Cabo Verde is invited by MCC to develop a compact for the purposes of regional economic integration. The Board also selected the following previously selected countries for compact assistance for FY 2024: Côte d'Ivoire, Senegal, Sierra Leone, The Gambia, Togo, and Zambia.

Criteria

In accordance with the Act and with the ''Report on the Criteria and Methodology for Determining the Eligibility of Candidate Countries for Millennium Challenge Account Assistance in Fiscal Year 2024'' formally submitted to Congress on September 13, 2023, selection was based primarily on a country's overall performance in three broad policy categories: *Ruling Justly, Encouraging Economic Freedom,* and *Investing in People.* The Board relied, to the fullest extent possible, upon transparent and independent indicators to assess countries' policy performance and demonstrated commitment in these three broad policy areas. The Board compared countries' performance on the indicators relative to their income-level peers, evaluating them in comparison to either the group of countries with a GNI per capita equal to or less than $2,145, or the group with a GNI per capita between $2,146 and $4,465.

The criteria and methodology used to assess countries, including the methodology for the annual scorecards, are outlined in the ''Report on the Criteria and Methodology for Determining the Eligibility of Candidate Countries for Millennium Challenge Account Assistance for Fiscal Year 2024.'' [1] Scorecards reflecting each country's performance on the indicators are available on MCC's website at *https://www.mcc.gov/who-we-select/scorecards.*

The Board also considered whether any adjustments should be made for data gaps, data lags, or recent events since the indicators were published, as well as strengths or weaknesses in particular indicators. Where appropriate, the Board considered additional quantitative and qualitative information, such as evidence of a country's commitment to fighting corruption, investments in human development outcomes, or poverty rates. MCC published a Guide to Supplemental Information [2] to increase transparency about the type of supplemental information the Board uses to assess a country's policy performance. MCC also published web pages [3] regarding how MCC assesses performance on the new Education Expenditures and Girls' Lower Secondary Education Completion Rate scorecard indicators. In keeping with statutory requirements, the Board also considered the opportunity to reduce poverty and promote economic growth in a country, in light of the overall information available, as well as the availability of appropriated funds.

The Board sees the selection decision as an annual opportunity to determine where MCC funds can be most effectively used to support poverty reduction through economic growth in well-governed countries with demonstrated development need. The Board carefully considers the appropriate nature of each country partnership—on a case-by-case basis—based on factors related to poverty reduction through economic growth, the sustainability of MCC's investments, and the country's ability to attract and leverage public and private resources in support of development.

This was the sixth year the Board considered the eligibility of countries for concurrent compacts, as permitted under section 609(k) of the Act. In addition to the considerations for compact eligibility detailed above, the Board considered whether a country being considered for a concurrent compact is making considerable and demonstrable progress in implementing the terms of its existing compact.

This was the fifteenth year the Board considered the eligibility of countries for subsequent compacts, as permitted under section 609(l) of the Act. MCC's engagement with partner countries is not open-ended, and the Board is deliberate when selecting countries for follow-on partnerships, particularly regarding the higher bar applicable to subsequent compact countries. The Board considered—in addition to the criteria outlined above—a country's performance implementing its prior compact, including the nature of the country's partnership with MCC, the degree to which the country has demonstrated a commitment and capacity to achieve program results, and the degree to which the country implemented the compact in accordance with MCC's core policies and standards. To the greatest extent possible, these factors are assessed using pre-existing monitoring and evaluation targets and regular quarterly reporting. This information is supplemented with direct surveys and consultation with MCC staff

[1] Available at *https://www.mcc.gov/resources/doc/report-selection-criteria-methodology-fy24.*

[2] Available at *https://www.mcc.gov/resources/doc/guide-to-supplemental-information.*

[3] Available at *https://www.mcc.gov/who-we-select/indicator/education-expenditure-indicator* (Education Expenditures), *https://www.mcc.gov/who-we-select/indicator/girls-lower-secondary-education-completion-rate-indicator* (Girls' Lower Secondary Education Completion Rate) and *https://www.mcc.gov/blog/entry/blog-101723-mcc-girls-education* (both indicators).

responsible for compact implementation, monitoring, and evaluation. MCC published a Guide to the Program Surveys [4] regarding the information collected and assessed for any country with an existing or prior compact or threshold program to ensure transparency about the type of information the Board considers regarding a country's performance on MCC programs, as relevant. The Board also considered a country's commitment to further sector reform, as well as evidence of improved scorecard policy performance.

In addition, this is the eighth year in which the Board considered an explicitly higher bar for countries close to the upper end of the candidate pool. The Board looked closely—in such cases—at a country's access to development financing, the nature of poverty in the country, and its policy performance.

Countries Newly Selected for Compact Assistance

Using the criteria described above, one candidate country under section 606(a) of the Act (22 U.S.C. 7705(a) was newly selected as eligible for assistance under section 607 of the Act (22 U.S.C. 7706): Cabo Verde. Cabo Verde is invited by MCC to develop a compact for the purposes of regional economic integration.

Cabo Verde: Cabo Verde has consistently passed the scorecard for over a decade and has some of the highest Control of Corruption and Democratic Rights scores of any MCC partner. The government was a committed partner during its prior MCC programs and has consistently expressed deep interest in renewing its partnership with MCC. While Cabo Verde has made strides in reducing poverty, recent progress has been hampered by global events and external shocks. MCC's Board selected Cabo Verde for a regional compact as a result of its strong commitment to democracy, its economic development needs and lingering poverty, and the potential opportunities to strengthen regional economic integration and trade in West Africa with a committed and engaged former MCC partner.

Countries Selected To Continue Compact Development

Six of the countries selected as eligible for compact assistance for FY 2024 were previously selected for FY 2023. Côte d'Ivoire (regional), Senegal (regional), Sierra Leone, The Gambia, Togo, and Zambia were selected to continue developing compacts. Selection of these countries for FY 2024 was based on an assessment of their policy performance since their prior selection and their progress in developing programs with MCC.

Countries Selected To Receive Threshold Program Assistance

The Board selected Tanzania and the Philippines to receive threshold program assistance for FY 2024, leveraging MCC's new authority to pursue threshold programs after compacts for countries that have experienced set-backs, but are now on a positive governance trajectory.

Tanzania: A former MCC compact partner, Tanzania offers MCC the opportunity to engage with a country that faces significant challenges to economic growth and that is demonstrating a trajectory of reform. While Tanzania does not pass the MCC scorecard in FY 2024 due to not passing the Democratic Rights ''hard hurdle,'' it passes the Control of Corruption ''hard hurdle,'' and passes 15 of 20 indicators overall. Since taking office in 2021, President Hassan has taken some steps to strengthen democratic governance, including restoring some media freedoms and political rights for opposition groups and initiating a process to identify other key democratic and constitutional reforms. By selecting Tanzania for a threshold program, MCC will work with the government to undertake policy and institutional reforms to address the country's development needs while also encouraging further democratic progress and the advancement of human rights.

Philippines: A former MCC compact partner, the Philippines passes 11 of 20 indicators on the MCC scorecard in FY 2024, including both Democratic Rights indicators, but does not pass the scorecard because it fails the Control of Corruption indicator in the 50th percentile (countries must score above the 50th percentile to pass). President Ferdinand Marcos Jr., elected in May 2022, has committed to advancing critical reforms, pledged to increase transparency, and strengthened judicial independence and the prosecution of human rights violations. By selecting the Philippines for a threshold program, MCC can support the government to undertake policy and institutional reforms to address the country's development needs while also encouraging further progress on advancing labor and human rights and combatting corruption.

Country Selected To Continue Developing a Threshold Program

The Board selected Mauritania to continue developing a threshold program. Selection of Mauritania for FY 2024 was based on its continued commitment to strengthening its policy performance since its prior selection, particularly in its fight against trafficking in persons and hereditary slavery, and its progress toward developing its threshold program.

Ongoing Review of Partner Countries' Policy Performance

The Board emphasized the need for all partner countries to maintain or improve their policy performance. If it is determined during compact implementation that a country has demonstrated a significant policy reversal, MCC can hold it accountable by applying MCC's Suspension and Termination Policy.[5]

(Authority: 22 U.S.C. 7707(d)(2))

Dated: December 15, 2023.

Peter E. Jaffe,

Vice President, General Counsel, and Corporate Secretary.

[FR Doc. 2023–28044 Filed 12–18–23; 8:45 am]

BILLING CODE 9211–03–P

[4] Available at *https://www.mcc.gov/resources/doc/guide-to-program-surveys-fy23.*

[5] Available at *https://www.mcc.gov/who-we-select/suspension-or-termination.*

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA–23–0015; NARA–2024–009]

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice of certain Federal agency requests for records disposition authority (records schedules). We publish notice in the **Federal Register** and on regulations.gov for records schedules in which agencies propose to dispose of records they no longer need to conduct agency business. We invite public comments on such records schedules.

DATES: We must receive responses on the schedules listed in this notice by February 5, 2023.

ADDRESSES: To view a records schedule in this notice, or submit a comment on one, use the following address: *https://*

www.regulations.gov/docket/NARA-23-0015/document. This is a direct link to the schedules posted in the docket for this notice on regulations.gov. You may submit comments by the following method:

• *Federal eRulemaking Portal: https://www.regulations.gov.* On the website, enter either of the numbers cited at the top of this notice into the search field. This will bring you to the docket for this notice, in which we have posted the records schedules open for comment. Each schedule has a 'comment' button so you can comment on that specific schedule. For more information on regulations.gov and on submitting comments, see their FAQs at *https://www.regulations.gov/faq.*

If you are unable to comment via regulations.gov, you may email us at *request.schedule@nara.gov* for instructions on submitting your comment. You must cite the control number of the schedule you wish to comment on. You can find the control number for each schedule in parentheses at the end of each schedule's entry in the list at the end of this notice.

FOR FURTHER INFORMATION CONTACT: Kimberly Richardson, Strategy and Performance Division, by email at *regulation_comments@nara.gov* or at 301–837–2902. For information about records schedules, contact Records Management Operations by email at *request.schedule@nara.gov* or by phone at 301–837–1799.

SUPPLEMENTARY INFORMATION:

Public Comment Procedures

We are publishing notice of records schedules in which agencies propose to dispose of records they no longer need to conduct agency business. We invite public comments on these records schedules, as required by 44 U.S.C. 3303a(a), and list the schedules at the end of this notice by agency and subdivision requesting disposition authority.

In addition, this notice lists the organizational unit(s) accumulating the records or states that the schedule has agency-wide applicability. It also provides the control number assigned to each schedule, which you will need if you submit comments on that schedule.

We have uploaded the records schedules and accompanying appraisal memoranda to the regulations.gov docket for this notice as ''other'' documents. Each records schedule contains a full description of the records at the file unit level as well as their proposed disposition. The appraisal memorandum for the schedule includes information about the records.

We will post comments, including any personal information and attachments, to the public docket unchanged. Because comments are public, you are responsible for ensuring that you do not include any confidential or other information that you or a third party may not wish to be publicly posted. If you want to submit a comment with confidential information or cannot otherwise use the regulations.gov portal, you may contact *request.schedule@nara.gov* for instructions on submitting your comment.

We will consider all comments submitted by the posted deadline and consult as needed with the Federal agency seeking the disposition authority. After considering comments, we may or may not make changes to the proposed records schedule. The schedule is then sent for final approval by the Archivist of the United States. After the schedule is approved, we will post on regulations.gov a ''Consolidated Reply'' summarizing the comments, responding to them, and noting any changes we made to the proposed schedule. You may elect at regulations.gov to receive updates on the docket, including an alert when we post the Consolidated Reply, whether or not you submit a comment. If you have a question, you can submit it as a comment, and can also submit any concerns or comments you would have to a possible response to the question. We will address these items in consolidated replies along with any other comments submitted on that schedule.

We will post schedules on our website in the Records Control Schedule (RCS) Repository, at *https://www.archives.gov/records-mgmt/rcs,* after the Archivist approves them. The RCS contains all schedules approved since 1973.

Background

Each year, Federal agencies create billions of records. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval. Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. The records schedules authorize agencies to preserve records of continuing value in the National Archives or to destroy, after a specified period, records lacking continuing administrative, legal, research, or other value. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

Agencies may not destroy Federal records without the approval of the Archivist of the United States. The Archivist grants this approval only after thorough consideration of the records' administrative use by the agency of origin, the rights of the Government and of private people directly affected by the Government's activities, and whether or not the records have historical or other value. Public review and comment on these records schedules is part of the Archivist's consideration process.

Schedules Pending

1. Department of Defense, Defense Logistics Agency, Records related to Transportation and DLA Energy Research (DAA–0361–2021–0002).

2. Department of Defense, Defense Logistics Agency, Records related to Production and Manufacturing (DAA–0361–2021–0019).

3. Department of Defense, Office of the Secretary of Defense, Conflict Records Research Collection (DAA–0330–2023–0001).

4. Department of Homeland Security, U.S. Citizenship and Immigration Services, G–1580 USCIS Citizenship Ambassadors Initiative (DAA–0566–2022–0005).

5. National Archives and Records Administration, Government-wide, GRS 2.2 Employee Management Records Revision (DAA–GRS–2023–0002).

6. National Archives and Records Administration, Government-wide, GRS 2.3 Employee Relations Records Revision (DAA–GRS–2023–0003).

7. National Archives and Records Administration, Government-wide, GRS 2.4 Employee Compensation and Benefits Records Revision (DAA–GRS–2023–0004).

8. National Archives and Records Administration, Government-wide, GRS 2.6 Employee Training Records Revision (DAA–GRS–2023–0005).

9. National Archives and Records Administration, Government-wide, GRS 5.4 Facility, Equipment, Vehicle, Property, and Supply Records Revision (DAA–GRS–2023–0006).

10. National Archives and Records Administration, Government-wide, GRS

5.6 Security Management Records Revision (DAA–GRS–2023–0007).

Laurence Brewer,

Chief Records Officer for the U.S. Government.

[FR Doc. 2023–27958 Filed 12–19–23; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL CREDIT UNION ADMINISTRATION

[NCUA–2023–0142]

Request for Comment Regarding Overhead Transfer Rate Methodology

AGENCY: National Credit Union Administration (NCUA).

ACTION: Request for comment.

SUMMARY: The NCUA Board (Board) is inviting comment on the methodology used to determine the Overhead Transfer Rate (OTR). The Board applies the OTR to the NCUA's operating budget to determine the portion of the budget that will be funded from the National Credit Union Share Insurance Fund (Share Insurance Fund). In response to industry recommendations, the Board has provided more detail, clarity, and transparency so the public can better understand the OTR methodology.

DATES: Comments must be received on or before February 20, 2024.

ADDRESSES: You may submit written comments, identified by Docket ID NCUA–2023–0142, by any of the following methods (Please send comments by one method only):

Federal eRulemaking Portal: https://www.regulations.gov. Follow the instructions for submitting comments for Docket ID NCUA–2023–0142.

Mail: Address to Melane Conyers-Ausbrooks, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.

Hand Delivery/Courier: Same as mailing address.

Public Inspection: You may view all submitted public comments on the Federal eRulemaking Portal at *https://www.regulations.gov* except for those we cannot post for technical reasons. The NCUA will not edit or remove any identifying or contact information from the public comments submitted. If you cannot access public comments on the internet, you may contact the NCUA for alternative access by calling (703) 518–6360 or emailing *EIMail@ncua.gov.*

FOR FURTHER INFORMATION CONTACT: Amy Ward or Sarah Savoie, Risk Officers, Office of Examination and Insurance at (703) 819–1770 or (571) 451–7204; or by mail at National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314–3428.

SUPPLEMENTARY INFORMATION: The Board is inviting comment on the NCUA's methodology to determine the OTR. The Board applies the OTR to the NCUA's operating budget to determine the portion of the NCUA's budget that will be funded from the Share Insurance Fund. In response to industry recommendations, this request for comment provides added detail, clarity, and transparency to help the public better understand the NCUA's methodology to calculate the OTR. No changes to the existing OTR methodology are being proposed as part of this request for comment. The added transparency and clarity do not constitute a change in methodology.

I. Background

The NCUA charters, regulates, and insures deposits in federal credit unions (FCUs) and insures deposits in federally insured state-chartered credit unions (FISCUs) that have their shares insured through the Share Insurance Fund. To cover the NCUA's task-related expenses, the Board approves a two-year budget and revisits the budget each year. The FCU Act provides two primary sources to fund the budget: (1) requisitions from the Share Insurance Fund, referred to as the OTR; [1] and (2) operating fees charged against FCUs.[2]

The first budget funding source listed above, the OTR, represents the formula the NCUA uses to allocate insurance-related expenses to the Share Insurance Fund under Title II of the FCU Act. There are two statutory provisions that outline the Board's discretion regarding the OTR. First, expenses funded from the Share Insurance Fund must carry out Title II's purposes, which relate to share insurance.[3] Second, the NCUA may not fund its entire budget through charges to the Share Insurance Fund.[4] The NCUA has not imposed regulatory limitations in its discretion for determining the OTR.

The second budget funding source is operating fees assessed to FCUs. Operating fees are required for FCUs under 12 U.S.C. 1755 ''and may be expended by the Board to defray the expenses incurred in carrying out the provisions of the FCU Act, including the examination and supervision of FCUs.'' [5] The Board uses the following OTR methodology to determine an appropriate division of expenses between the operating fee and the OTR.

II. Historical Practice in Determining the Overhead Transfer Rate

The Share Insurance Fund was established under Title II of the FCU Act on October 19, 1970.[6] Section 1783(a) of the FCU Act authorizes the Board to use the Share Insurance Fund to pay for such administrative and other expenses incurred in carrying out this title's purposes as it deems proper.

In 1973, a Government Accountability Office audit recommended the NCUA adopt a method of allocating costs between the operating fund and the newly formed Share Insurance Fund.[7] Between 1973 and 1980, various cost allocation methods were employed, including direct charges to the Share Insurance Fund for insurance expenses such as costs to liquidate or merge credit unions and examiner time spent conducting safety and soundness examinations. Starting in 1981, the OTR ranged between 30 and 34 percent and stayed in that range through 1984.

From 1985 through 1994, the NCUA conducted annual examiner time surveys (ETS) to determine an appropriate factor for apportioning the agency's total operating expenses. The survey results supported a transfer rate between 50.1 percent and 60.4 percent for insurance-related activities; however, the Board maintained the OTR at 50 percent.

After the 1994 survey, the Board approved surveys that were conducted every three years. Three-year surveys covered fiscal years 1995 through 1997 and fiscal years 1998 through 2000. During that time, the OTR was kept at 50 percent. The Board voted to resume the annual ETS in 2000 and expanded the survey to include more examiners. The 2000 survey results supported an

[1] *See, e.g.,* 12 U.S.C. 1783(a) (making the Share Insurance Fund available ''for such administrative and other expenses incurred in carrying out the purpose of [Subchapter II of the FCU Act] as [the Board] may determine to be proper.'').

[2] 12 U.S.C. 1755(a) (''In accordance with rules prescribed by the Board, each Federal credit union shall pay to the Administration an annual operating fee which may be composed of one or more charges identified as to the function or functions for which assessed.'').

[3] 12 U.S.C. 1783(a) (''Money in the fund shall be available upon requisition by the Board, without fiscal year limitation, for making payments of insurance under section 1787 of this title, for providing assistance and making expenditures under section 1788 of this title in connection with the liquidation or threatened liquidation of insured credit unions, *and for such administrative and other expenses incurred in carrying out the purposes of this subchapter as it may determine to be proper.*'').

[4] 12 U.S.C. 1755.

[5] 12 U.S.C. 1755(d).

[6] Public Law 91–468; 12 U.S.C. 1783.

[7] General Accounting Office, *Examination of Financial Statements of the Nat'l Credit Union Admin.* (Sept. 18, 1973), *https://www.gao.gov/assets/b-164031%284%29-096067.pdf.*

OTR of 66.72 percent, and after 15 years of holding the OTR at 50 percent, the Board increased the OTR to 66.72 percent for fiscal year 2001.

In 2001, the Board hired an independent audit and accounting firm to assess the OTR process. The independent audit and accounting firm issued its review of the OTR process on September 5, 2001, and included several recommendations to improve the OTR process.[8] These recommendations were implemented in 2002.

At the November 20, 2003, Board meeting, the Board adopted a revised, comprehensive methodology for calculating the OTR that remained in place until 2017.[9] The methodology used the results of an automated annual ETS process. The following were also factored into the methodology:

- The value to the Share Insurance Fund of the insurance-related work performed by state supervisory authorities or prudential regulator.
- The cost of the NCUA resources and programs with different allocation factors from the examination and supervision program.
- The distribution of insured shares between FCUs and FISCUs.
- The operational costs charged directly to the Share Insurance Fund.

In 2016, the NCUA published in the **Federal Register** the OTR methodology used to calculate the OTR and requested comments from the public.[10] Along with the 2016 **Federal Register** notice, the Board committed to periodically review the methodologies for calculating both the OTR and the operating fee and to propose changes to the methodologies that would result in more equitable alignment of fees to the resource levels required to supervise and regulate both FCUs and FISCUs.

In June 2017, the NCUA published a request for comment[11] in the **Federal Register** regarding a revised OTR methodology based on the Board's internal assessment and comments received from the 2016 notice. At that time, the primary goal of the proposed changes to the OTR methodology was to simplify and streamline the OTR methodology and reduce the resources needed to administer the OTR. The simplified OTR methodology focused on assigning a percentage share of work to insurance costs in four categories of activities.

- *50 percent insurance-related*—Time spent examining and supervising FCUs.
- *100 percent insurance-related*—All time and costs the NCUA spends supervising or evaluating the risks posed by FISCUs or other entities the NCUA does not charter or regulate (*e.g.,* third-party vendors and credit union service organizations).
- *Zero percent insurance-related*—Time and costs related to the NCUA's role granting federal charters and as enforcer of consumer protection and other non-insurance-based laws governing the operation of credit unions; for example, field of membership requirements.
- *100 percent insurance-related*—Time and costs related to the NCUA's role in administering federal share insurance and the Share Insurance Fund.

The Board adopted the current OTR methodology in November 2017.[12] At that time, the Board committed to subjecting the four general principles outlined in the paragraphs below to public comment every three years and when it proposes a change to the methodology.[13]

Clarification of the Four Principles[14]

In response to industry recommendations, the NCUA Board is providing more information in this notice to ensure clear understanding of the four principles used in the OTR calculation and to provide added transparency.

1. *50 percent insurance-related*—The NCUA is the prudential regulator of FCUs and provides federal share insurance to both FCUs and FISCUs. Because the NCUA acts as both prudential regulator and insurer of FCUs, its oversight of these FCUs is equally focused on the statutory requirements applicable to FCUs under Title I of the FCU Act and minimizing losses to the Share Insurance Fund under Title II of the FCU Act.

Historically, the NCUA has referred to its regulator and insurer responsibilities by comparing this dual role to the Federal Deposit Insurance Corporation's (FDIC) practice of alternating examinations with the state regulatory agencies overseeing banks.[15] The NCUA's reference to this 50 percent allocation as ''mathematically'' emulating the alternating FDIC and state regulatory examinations has caused both concern and misunderstanding among industry stakeholders. This statement's intent was to reflect the NCUA's dual role on each examination (that of regulator and that of insurer), not to imply that the NCUA alternates examinations with the state regulatory agencies like the FDIC. For example, the NCUA evaluates the safety and soundness impact of FCU-operational decisions along with the FCUs' operating condition, assessing the impact of these decisions to the FCU individually as well as to the Share Insurance Fund. The NCUA's resource budget reflects the total hours needed to provide the oversight responsibility of both its regulator and insurer roles.[16]

2. *100 percent insurance-related*—The NCUA oversight authority for FISCUs is principally related to insurance activities and the focus on these entities is as an insurer of federally insured credit unions (FICUs). The NCUA also lacks direct oversight authority for credit union service organizations (CUSOs) and third-party vendors. Because the NCUA does not have regulatory oversight of the FISCUs, CUSOs, and third-party vendors, the NCUA's resource budget reflects the hours necessary to provide this responsibility as insurer of FICUs and the risks these entities present to the Share Insurance Fund. The OTR methodology assigns a 100 percent insurance-related allocation factor to this budgeted time.

- CUSOs and third-party vendors provide various services to FICUs (third-party arrangements). Like any

[8] Deloitte & Touche, *Independent Accountant's Report on Applying Agreed Upon Procedures* (Sept 5, 2001), *https://www.ncua.gov/files/publications/budget/2001DeloitteReportonOTRProcess.pdf.*

[9] The Board approved refinements to the methodology in 2013. See NCUA, ''Board Action Memorandum'' (Nov. 20, 2013), *https://ncua.gov/files/agenda-items/AG20131121Item5a.pdf.*

[10] 81 FR 4804 (Jan. 27, 2016).

[11] 82 FR 29935 (June 30, 2017).

[12] 82 FR 55644 (Nov. 22, 2017).

[13] 82 FR 55652.

[14] For additional information on the OTR and further discussion of the principles, please refer to *https://ncua.gov/news/budget-supplementary-materials.*

[15] *See, e.g.,* 82 FR 55651 (''The 50 percent allocation mathematically emulates an examination and supervision program design where the NCUA would alternate examinations, or conduct joint examinations, between its insurance function and its prudential regulator function if they were separate units within the NCUA. It reflects an equal sharing of supervisory responsibilities between NCUA's dual roles as charterer/prudential regulator and insurer given both roles have a vested interest in the safety and soundness of federal credit unions. It is consistent with the alternating examinations FDIC and state regulators conduct for insured state-chartered banks as mandated by Congress.'').

[16] The NCUA's annual resource budget is a comprehensive workload analysis that captures the amount of time budgeted to conduct examinations and supervision of FICUs and other programs necessary to execute the NCUA's dual mission as insurer and regulator. The annual resource budget estimates hours in three major categories. 1. Core Programs include the NCUA's FCU and FISCU examinations and on- and off-site supervision. 2. Special Programs includes the NCUA's specialized examination programs in the areas of capital markets, information systems, and lending; credit union service organization reviews; chartering and field of membership; and small credit union development. 3. Administrative includes NCUA field staff time related to training and staff development, leave, and travel.

outsourced activity, these third-party arrangements present additional risk to the FICUs and the Share Insurance Fund.[17]

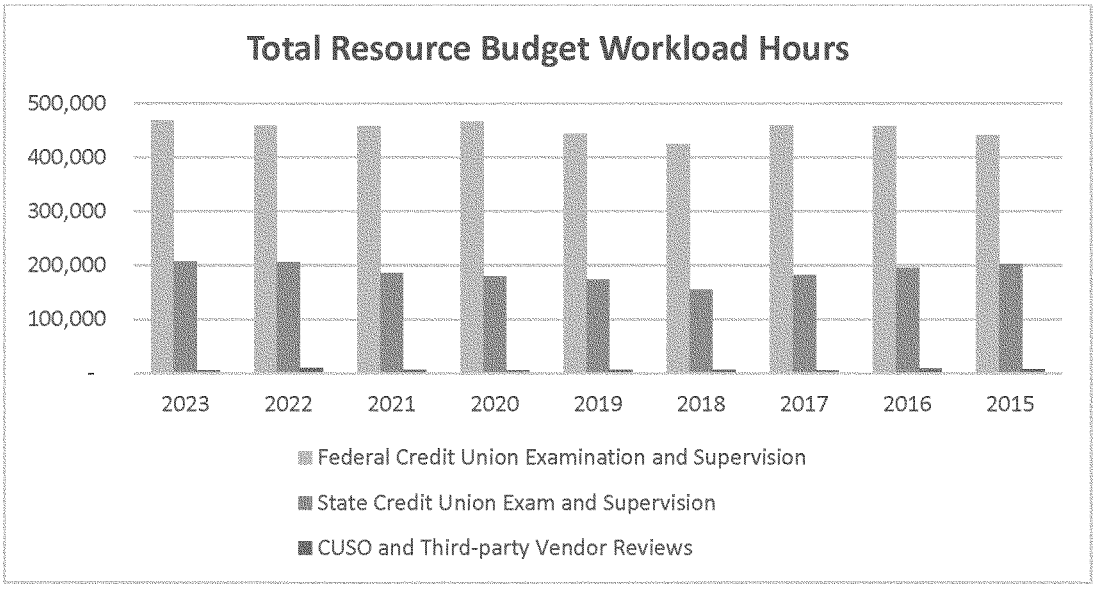
○ As per its regulator and insurer responsibilities under Title I and Title II of the FCU Act, the NCUA performs a limited review of the activities FICUs undertake with CUSOs and third-party vendors during its safety and soundness exams. These limited reviews are captured under Principle 1 for FCUs and Principle 2 for FISCUs, respectively, in the OTR calculation. The NCUA evaluates the FICU controls over the third-party arrangement and the functional and operational risks associated with these third-party arrangements based on the specific services provided to the FICUs (such as accounting, lending, or governance).

○ The NCUA also budgets resource time to review the books, records, and internal controls of a sample of CUSOs.[18] These reviews are captured under Principle 2 of the OTR calculation. The CUSO examination reports generated from these reviews serve as a resource to assist exam staff in conjunction with the normal examination process in their review of the CUSOs' functional impact on FICUs. These reports also alleviate redundant effort, resources, and time among exam staff to perform these reviews at safety and soundness exams.

• Because the NCUA does not charter FISCUs, the NCUA's role with these institutions in the budget process is as their insurer. The NCUA budgets resource time to fulfill its insurance responsibilities for these FISCUs under Title II of the FCU Act, captured under Principle 2 of the OTR methodology.

The NCUA's top priority is to ensure a safe and sound credit union system. As the financial services industry and credit union risk landscape have evolved, the NCUA has improved the efficiency of its processes while maintaining a robust supervision program. One of the objectives of the NCUA's 2016 Exam Flexibility Initiative was to improve coordination with state supervisors in the examination of FISCUs.[19] This initiative provided a higher degree of reliance on the respective state prudential regulator to perform the regulatory oversight function for FISCUs, similar to the functions under Title I that the NCUA performs for FCUs. The Exam Flexibility Initiative extended the frequency of the NCUA's onsite exam time to a 5-year interval for FISCUs that met the eligibility criteria. This initiative resulted in the NCUA budgeting reduced resource time for FISCUs as reflected in the following chart, with a progressive increase in time as FISCUs reached their 5-year interval.

The following chart also shows the resource-budgeted hours for FCUs, FISCUs, and CUSOs for the past nine years. The chart shows that the NCUA has budgeted at least twice as much time for FCU exams as it does for FISCU exams by virtue of its dual role as regulator and insurer of FCUs versus its singular responsibility as insurer of FISCUs.[20] Principle 1 (50 percent allocation) and Principle 2 (100 percent allocation) of the OTR calculation are then applied to this total resource time to determine how much total time in the chart is insurance related and, thus, fundable by a transfer from the Share Insurance Fund.



3. *Zero percent insurance-related*—The NCUA's Office of Credit Union Resources and Expansion (CURE) and Office of Consumer Financial Protection (OCFP) receive a zero percent insurance-related allocation as a starting point in the OTR methodology because the primary function of these offices is not insurance-related.

• CURE supports credit union growth and development; provides support to low-income, minority, and any FICU seeking assistance with chartering; and processes charter conversion applications, bylaw amendments, and field of membership expansions.

• OCFP's primary function includes establishing consumer compliance

[17] NCUA, *Third Party Vendor Authority* (March 2022), *https://ncua.gov/files/publications/regulation-supervision/third-party-vendor-authority.pdf*.

[18] 12 CFR part 712.

[19] NCUA, ''NCUA Exam Flexibility Initiative,'' *https://ncua.gov/regulation-supervision/examination-modernization-initiatives/exam-flexibility-initiative*.

[20] The industry has commented that there are twice as many FCUs as there are FISCUs. The time budgeted under the examination and supervision categories of the OTR methodology accounts for the varying aspects of the financial institutions (number of institutions; asset size; risk profile; staff resources, to include specialists and subject matter examiners; and frequency of onsite examinations and offsite supervision).

policies, programs, and rulemaking; serving as interagency liaison on consumer protection and compliance issues; conducting fair lending examinations; staffing the agency's consumer call center; and providing financial literacy and outreach programs.

Because the primary mission of both offices is not insurance-related, the OTR methodology assigns a zero percent insurance-related allocation for these offices as a starting point. However, a segment of each office's responsibilities is related to insurance. For instance, applications for charter expansions involve risk to both FICUs and the Share Insurance Fund and drive a slightly higher allocation than the initial zero percent. OCFP responds to insurance-related inquiries from credit union members and the public and this, in turn, drives a slightly higher allocation than the initial zero percent. Thus, each office tracks its insurance-related time and adjusts the zero percent allocation factor accordingly.

It is important to distinguish between setting policy and programs for consumer compliance rules and regulations (performed by OCFP) and assessing a FICU's compliance with consumer protection laws and regulations. The NCUA performs the latter along with the normal examination process, and the time for these reviews is factored into the 50 percent allocation for FCUs and 100 percent allocation for FISCUs as per Principles 1 and 2. The former, as discussed, is accounted for as per Principle 3.

4. *100 percent insurance-related*—The sole function of the NCUA's Asset Management Assistance Center (AMAC) is insurance related. AMAC manages liquidation payouts and assets acquired from liquidations on behalf of the Share Insurance Fund, so its OTR allocation factor is 100 percent insurance related.

The Board welcomes all comments regarding all aspects of the OTR methodology, but specifically invites comments on the four principles used to calculate the OTR discussed in the preceding paragraphs.

Overhead Transfer Rate Methodology

To calculate the OTR, the four principles outlined previously are applied to the activities and costs of the agency to arrive at the portion of the agency's budget to be charged to the Share Insurance Fund.

Step 1—Workload Program

Annually, the NCUA develops a workload budget based on the NCUA's examination and supervision program to execute the agency's core mission. The workload budget reflects the needed time to examine and supervise FICUs, along with other related activities and, thus, the level of field staff needed to implement the exam program. Applying Principles 1, 2, and 3 (those relevant to the workload budget) to the applicable elements of the workload budget results in a composite rate that reflects the portion of the agency's overall insurance-related mission program activities.

Step 2—Annual Budget

The annual budget represents the costs of the activities associated with achieving the strategic goals and objectives set forth in the NCUA's Strategic Plan. The annual budget is based on agency priorities and initiatives that drive resulting resource needs and allocations. Information related to the NCUA's budget process, including details on the Board-approved budgets, is available on the agency's website.[21]

The agency achieves its primary mission through the examination and supervision program. The percentage of insurance-related workload hours derived from Step 1 represents the main allocation factor used in Step 2 and is applied to the budgets for the examination and supervision programs to calculate the insurance-related costs of the offices conducting field work (currently the NCUA's three regional offices and the Office of National Examinations and Supervision, or ONES). As discussed in the Clarification of the Four Principles section earlier, a few agency offices (OCFP and CURE) have roles distinct enough to warrant their own allocation factors, which are developed by applying the four principles described previously to their respective activities. Each of these offices tracks its activities annually to determine their respective factors. These factors are then applied to the respective offices' budgets to determine their insurance-related costs.

A weighted average allocation factor, calculated by dividing the aggregate insurance-related costs for the regional offices and ONES conducting the examination and supervision program and the other agency offices with their own unique allocation factors by their aggregate total budgets, is applied to the remaining offices that design and oversee the examination and supervision program or support the agency's overall operations. This factor is then applied to the aggregate budgets for the remaining offices (all other NCUA offices). As such, the proportion of insurance-related activities for the offices is based on a weighted factor of the other offices. The NCUA's total insurance-related costs are calculated by summing the insurance cost calculated for the field offices, the offices with unique allocation factors, and the insurance cost for all other NCUA offices.

Step 3—Calculate the OTR

The OTR represents the percentage of the NCUA budget funded by a transfer from the Share Insurance Fund.[22] The OTR is calculated by dividing the total insurance-related costs determined in Step 2 by the NCUA's total annual budget.

The chart below reflects the most recent NCUA Board-approved OTR used to fund a portion of the 2023 budget.

Table 1

OTR CALCULATION

Operating Costs to be Borne by the Share Insurance Fund	$221.9
÷ Total Operating Budget	$355.4
= OTR	62.4%

[21] NCUA, ''NCUA Budget and Supplementary Materials,'' *https://www.ncua.gov/About/Pages/budget-strategic-planning/supplementary-materials.aspx.*

[22] This means the percentage of actual expenses funded by the Share Insurance Fund as they are incurred each month.

Table 2

Portion of Operating Budget Covered by:	FCUs	FISCUs
FCU Operating Fee	37.6%	0.0%
OTR × Percent of Insured Shares	31.1% (62.4% × 49.9%)	31.3% (62.4% × 50.1%)
Total	68.7%	31.3%

Table 1 reflects the NCUA's annual budget of $355.4 million for the 2023 budget year. The FCU Act authorizes a portion of the NCUA's budget to be funded through a requisition from the Share Insurance Fund (OTR 62.4 percent), while the remaining 37.6 percent will be charged to FCUs as an operating fee in 2023.

The industry has voiced concern about the NCUA's presentation of the OTR in the annual budget posted to the agency's website because it believes the current footnoted reference to the regulatory fees that FISCUs pay their respective prudential regulator is insufficient.[23] The NCUA's intention in presenting the distribution of the operating budget costs in this request for comment is to clarify how the NCUA funds its annual operations between (1) requisition from the Share Insurance Fund and (2) operating fees paid by FCUs.

The NCUA does not intend to discount the fact that FISCUs also pay a regulatory fee to their respective regulators. In presenting this information, the agency welcomes the industry's feedback on the current method.

Commenters also noted that the current cost distribution table (Table 2) uses insured shares to reflect the distribution of the OTR among FCUs versus FISCUs, and while total insured shares are relatively equal among charter type, there are fewer FISCUs than there are FCUs.

First, the NCUA would like to clarify the requisition from the Share Insurance Fund is not allocated based on charter type. The current cost distribution table is for informational purposes only and is used to show how the portion of the NCUA's budget funded by the Share Insurance Fund would be broken down among charter types. The NCUA shows this breakdown using insured shares to reflect that FICUs' economic interest in the insurance fund is *pro-rata* based on insured shares.

The NCUA Board welcomes comment on alternative ways to present this information publicly.

[23] NCUA, *Staff Draft 2023–2024 Budget Justification 50* (Sept. 29, 2022), *https://ncua.gov/files/publications/budget/budget-justification-proposed-2023-2024.pdf*.

Request for Comment on the OTR Methodology

The principles-based OTR methodology has streamlined the OTR calculation process and has reduced the needed resources to gather the cost-center time allocation used in the calculation.[24] It has also made the OTR easier for stakeholders to understand. The methodology additionally has led to reduced variability in the calculated OTR each year.

The added detail, transparency, and clarifying statements in this request for comment aim to address the industry interest regarding transparency and improved understanding of the allocation of insurance-related expenses among charter types. The Board welcomes comment on all aspects of the OTR methodology—including on the four principles, added detail, and clarifying statements discussed in this request for comment—as well as any suggested alternatives.

The Board is also particularly interested in comments on whether it should continue to publish a dedicated notice requesting comment on the OTR methodology every 3 years. Alternatively, in circumstances when the Board does not intend to make changes to the OTR methodology, the NCUA could ask for comments on the OTR methodology triennially along with its long-standing one-third regulatory review process; rely on the public's opportunity to request action under 12 CFR 790.3 or petition the Board for changes under § 791.8(c); or a combination of these opportunities. The Board also now annually publishes, requests comments on, and holds a public hearing on its budget. These comments and hearing, in turn, provide further opportunity for individuals to comment on the OTR methodology as part of the budgeting process. While the specific triennial process dedicated to the OTR has served well over the last number of years, the Board requests input on whether another process may prove more efficient and save resources for both credit unions and the NCUA while still maintaining transparency on the OTR methodology. Whenever the Board considers any changes to the OTR methodology, it would continue to seek comment through a **Federal Register** notice specific to the OTR.

[24] The NCUA included reference to this estimated cost savings in the Notice and Request for Comment dated June 30, 2017. ''Based on the most recent Examination Time Survey results, field staff time would be reduced by approximately 200 hours annually. Central office and regional office staff time devoted to operating, maintaining, and administering the Examination Time Survey and related processes would be reduced by approximately 150 hours annually.'' 82 FR 29943 (June 30, 2017).

By the National Credit Union Administration Board on December 14, 2023.

Melane Conyers-Ausbrooks,

Secretary of the Board.

[FR Doc. 2023–28000 Filed 12–19–23; 8:45 am]

BILLING CODE 7535–01–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Institute of Museum and Library Services

Notice of Proposed Information Collection Requests: Museums for All Program Evaluation

AGENCY: Institute of Museum and Library Services, National Foundation on the Arts and the Humanities.

ACTION: Notice, request for comments, collection of information.

SUMMARY: The Institute of Museum and Library Services (IMLS), as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act. This pre-clearance consultation program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The purpose of this Notice is to solicit comments concerning the proposed IMLS study of the impacts of the IMLS Museums for All Initiative. A copy of the proposed information collection request can be

obtained by contacting the individual listed below in the **ADDRESSES** section of this notice.

DATES: Written comments must be submitted to the office listed in the addressee section below on or before February 18, 2024.

ADDRESSES: Send comments to Sandra Narva, Acting Director of Grants Policy and Management, Office of Grants Policy and Management, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Ms. Narva can be reached by Telephone: 202–653–4634 or by email at *snarva@imls.gov.* Office hours are from 8:30 a.m. to 5 p.m., E.T., Monday through Friday, except Federal holidays.

Persons who are deaf or hard of hearing (TTY users) can contact IMLS at 202–207–7858 via 711 for TTY-Based Telecommunications Relay Service.

FOR FURTHER INFORMATION CONTACT: Helen Wechsler, Supervisory Grants Management Specialist, Office of Museum Services, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Ms. Wechsler can be reached by Telephone: 202–653–4779, or by email at *hwechsler@imls.gov.* Persons who are deaf or hard of hearing (TTY users) can contact IMLS at 202–207–7858 via 711 for TTY-Based Telecommunications Relay Service.

SUPPLEMENTARY INFORMATION: IMLS is especially interested in comments that help the agency to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques, or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

I. Background

IMLS is the primary source of Federal support for the Nation's libraries and museums. We advance, support, and empower America's museums, libraries, and related organizations through grant making, research, and policy development. Our vision is a nation where museums and libraries work together to transform the lives of individuals and communities. To learn more, visit *www.imls.gov.*

II. Current Actions

This Notice is to solicit comments on a program evaluation of the IMLS Museums for All Initiative, which began in 2014. A current IMLS cooperative agreement includes an evaluation of the Museums for All initiative, a program through which participating institutions offer free or reduced-price admission to families facing financial need. The goal is to assess the impact of the Museums for All initiative on participating institutions. As part of this evaluation effort, a questionnaire, which is the subject of this Notice, will be undertaken to solicit information from participating institutions in Museums for All about the initiative's implementation, benefits, and areas for improvement. A small number of participating institution staff will be interviewed virtually or in person as part of case study research. These information collections will be developed based on what is needed to undertake the evaluation. The information IMLS collects will build on, but not duplicate existing or ongoing information collections.

Agency: Institute of Museum and Library Services.

Title: Museums for All Program Evaluation.

OMB Control Number: To be determined.

Agency Number: 3137–NEW.

Affected Public: Museums.

Total Estimated Number of Respondents: TBD.

Frequency of Response: One time.

Average Minutes per Response: TBD.

Total Burden Hours: TBD.

Total Burden (dollars): TBD.

Public Comments Invited: Comments submitted in response to this notice will be summarized and/or included in the request for OMB's clearance of this information collection.

Dated: December 14, 2023.

Suzanne Mbollo,

Grants Management Specialist, Institute of Museum and Library Services.

[FR Doc. 2023–27900 Filed 12–19–23; 8:45 am]

BILLING CODE 7036–01–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for International 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: Advisory Committee for International Science and Engineering (#25104).

Date and Time: January 11, 2024; 12:00 p.m.–5:30 p.m. (Eastern Time).

Place: NSF 2415 Eisenhower Avenue, Alexandria, VA 22314 (Virtual).

Connect to the Virtual Meeting: To attend the virtual meeting participants are required to process the meeting registration via Zoom:

Register in advance for the meeting at the Zoom attendee registration link: *https://nsf.zoomgov.com/webinar/register/WN_wfWGOPM7QS6J2xBeV-lndQ*

After registering, you will receive a confirmation email with a unique link to join the meeting. If you have any login questions, please contact Louis Bailey, OISE IT Specialist: *oiseitsupport@nsf.gov.*

Type of Meeting: Open.

Contact Person: Street, Christopher, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314; Telephone: 703.292.8568/Email: *cstreet@nsf.gov.*

Purpose of Meeting: To provide advice, recommendations and counsel on major goals and policies pertaining to engineering programs and activities.

Agenda:

- Updates on OISE activities
- 2023 OISE COV Report
- OISE's Data Analytics Capabilities
- OISE Program Updates
- Meet with NSF leadership

Dated: December 15, 2023.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2023–27950 Filed 12–19–23; 8:45 am]

BILLING CODE 7555–01–P

NEIGHBORHOOD REINVESTMENT CORPORATION

Sunshine Act Meetings

TIME AND DATE: 2 p.m., Monday, December 18, 2023.

PLACE: 1255 Union Street NE, Suite 500, Washington, DC 20002.

STATUS: Parts of this meeting will be open to the public. The rest of the meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Regular Board of Directors meeting.

The Interim General Counsel of the Corporation has certified that in her opinion, one or more of the exemptions set forth in the Government in the Sunshine Act, 5 U.S.C. 552b(c)(2) and (4) permit closure of the following portion(s) of this meeting:

- Executive (Closed) Session

Agenda

I. Call to Order
II. Sunshine Act Approval of Executive (Closed) Session
III. Executive Session: Report from CEO
IV. Executive Session: Report from CFO
V. Executive Session: GAO Workplan Update
VI. Executive Session: Report from Interim General Counsel
VII. Executive Session: Report from CIO
VIII. Executive Session: NeighborWorks Compass Update
IX. Action Item: Approval of Meeting Minutes—October 2 Audit Committee Meeting and October 19 Regular Board of Directors Meeting
X. Action Item: Election of Deputy Secretary Adrianne Todman as Board Vice Chair
XI. Action Item: Delegation of Authority—Venue Contracts—Philadelphia (February 2025) and New Orleans (August 2025)
XII. Discussion Item: November 29 Audit Committee Meeting
XIII. Discussion Item: Delegation of Authority—Future Venue Contracts
XIV. Discussion Item: Strategic Planning Process
XV. 2024 Board Meeting Schedule
XVI. Management Program Background and Updates
Other Reports
a. 2024 Board Calendar
b. 2024 Board Agenda Planner
c. CFO Report
i. Financials (through 9/30/23)
ii. Single Invoice Approvals $100K and over
iii. Vendor Payments $350K and over
iv. Exceptions
d. Programs Dashboard
e. Housing Stability Counseling Program (HSCP)
f. Strategic Plan Scorecard—FY23 Q3

PORTIONS OPEN TO THE PUBLIC: Everything except the Executive (Closed) Session.

PORTIONS CLOSED TO THE PUBLIC: Executive (Closed) Session.

CONTACT PERSON FOR MORE INFORMATION: Jenna Sylvester, Paralegal, (202) 568–2560; *jsylvester@nw.org.*

Jenna Sylvester,

Paralegal.

[FR Doc. 2023–28202 Filed 12–18–23; 4:15 pm]

BILLING CODE P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–7513; NRC–2021–0193]

Kairos Power, LLC; Hermes Test Reactor Facility

AGENCY: Nuclear Regulatory Commission.

ACTION: Construction permit and record of decision; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is providing notice of the issuance of Construction Permit No. CPTR–6 to Kairos Power LLC (Kairos) and Record of Decision.

DATES: The Construction Permit No. CPTR–6 was issued on December 14, 2023.

ADDRESSES: Please refer to Docket ID NRC–2021–0193 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–2021–0193. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, at 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Matthew Hiser, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2454; email: *Matthew.Hiser@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

Under section 2.106 of title 10 of the *Code of Federal Regulations* (10 CFR), the NRC is providing notice of the issuance of Construction Permit No. CPTR–6, to Kairos and issuance of the Record of Decision (ROD) under 10 CFR 51.102. The construction permit, which is immediately effective, authorizes Kairos to construct a test reactor facility in Oak Ridge, Tennessee, as described in Kairos's construction permit application. With respect to the construction permit application filed by Kairos, the NRC finds that the applicable standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations have been met. The NRC finds that any required notifications to other agencies or bodies have been duly made and that, among other things, there is reasonable assurance that the activities authorized by the permit will be conducted in compliance with the rules and regulations of the Commission, that safety questions will be satisfactorily resolved by the completion of construction, and that, taking into consideration siting criteria, the proposed facility can be constructed and operated at the proposed location without undue risk to public health and safety, subject to the conditions listed in the construction permit. Furthermore, the NRC finds that the licensee is technically and financially qualified to engage in the activities authorized, and that issuance of the license will not be inimical to the common defense and security or to the health and safety of the public. Finally, the NRC finds that the findings required by subpart A of 10 CFR part 51 have been made.

Accordingly, the immediately effective construction permit was issued on December 14, 2023.

II. Further Information

The NRC prepared a Safety Evaluation (SE) and Final Environmental Impact Statement (FEIS) that document the NRC's evaluation of Kairos's construction permit application and its findings. The Commission also issued its Memorandum and Order documenting its final decision on the mandatory hearing held on October 19, 2023, which serves as the ROD in this proceeding. The NRC also prepared a document summarizing the ROD that incorporates by reference materials contained in the FEIS. In accordance with 10 CFR 2.390 of the NRC's

''Agency Rules of Practice and Procedure,'' details with respect to this action, including the SE, FEIS, summary of the ROD, and accompanying documentation included in the construction permit package, as well as the Commission's hearing decision, are available online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* From this site, persons can access the NRC's ADAMS, which provides text and image files of NRC's public documents.

III. Availability of Documents

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

Document description	ADAMS accession No.
Construction Permit No. CPTR–6	ML23338A258.
Commission's Memorandum and Order on the mandatory hearing (ROD)	ML23346A068.
Summary of the Record of Decision	ML23338A257.
Safety Evaluation Related to the Kairos Power LLC Construction Permit Application for the Hermes Test Reactor	ML23158A268.
NUREG–2263, Environmental Impact Statement for the Construction Permit for the Kairos Hermes Test Reactor	ML23214A269.
Kairos Construction Permit Application	ML21272A376. ML21272A377. ML23151A743 (Package). ML22272A598 ML23055A676. ML23089A386 (Package).

Dated: December 14, 2023.

For the Nuclear Regulatory Commission.

Mohamed K. Shams,

Director, Division of Advanced Reactors and Non-Power Production and Utilization Facilities, Office of Nuclear Reactor Regulation.

[FR Doc. 2023–27960 Filed 12–19–23; 8:45 am]

BILLING CODE 7590–01–P

PENSION BENEFIT GUARANTY CORPORATION

Proposed Submission of Information Collection for OMB Review; Comment Request; Special Financial Assistance Information

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of intent to request extension of OMB approval of information collection.

SUMMARY: The Pension Benefit Guaranty Corporation (PBGC) intends to request that the Office of Management and Budget (OMB) extend approval under the Paperwork Reduction Act of a collection of information contained in PBGC's regulation on special financial assistance. The purpose of the information collection is to gather information necessary for PBGC to operate this special financial assistance program. This notice informs the public of PBGC's intent and solicits public comment on the collection of information.

DATES: Comments must be submitted on or before February 20, 2024.

ADDRESSES: Comments may be submitted by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: paperwork.comments@pbgc.gov.* Refer to OMB control number 1212–0074 in the subject line.
- *Mail or Hand Delivery:* Regulatory Affairs Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 445 12th Street SW, Washington, DC 20024–2101.

Commenters are strongly encouraged to submit comments electronically. Commenters who submit comments on paper by mail should allow sufficient time for mailed comments to be received before the close of the comment period.

All submissions received must include the agency's name (Pension Benefit Guaranty Corporation, or PBGC) and refer to OMB control number 1212–0074. All comments received will be posted without change to PBGC's website, *http://www.pbgc.gov,* including any personal information provided. Do not submit comments that include any personally identifiable information or confidential business information.

Copies of the collection of information may be obtained by writing to Disclosure Division (*disclosure@pbgc.gov*), Office of the General Counsel, Pension Benefit Guaranty Corporation, 445 12th Street SW, Washington, DC 20024–2101, or calling 202–229–4040 during normal business hours. If you are deaf or hard of hearing or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

FOR FURTHER INFORMATION CONTACT: Hilary Duke (*duke.hilary@pbgc.gov*), Assistant General Counsel for Regulatory Affairs, Office of the General Counsel, Pension Benefit Guaranty Corporation, 445 12th Street SW, Washington, DC 20024–2101; 202–229–3839. If you are deaf or hard of hearing or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

SUPPLEMENTARY INFORMATION: Section 4262 of the Employee Retirement Income Security Act of 1974 (ERISA) requires PBGC to provide special financial assistance (SFA) to certain financially troubled multiemployer plans upon application for assistance. Part 4262 of PBGC's regulations, ''Special Financial Assistance by PBGC,'' provides guidance to multiemployer pension plan sponsors on eligibility, determining the amount of SFA, content of an application for SFA, the process of applying, PBGC's review of applications, restrictions and conditions, and reporting and notice requirements.

To apply for SFA, a plan sponsor must file an application with PBGC and include information about the plan, plan documentation, and actuarial information, as specified in §§ 4262.6 through 4262.9. Also, if the plan is changing certain assumptions for purposes of demonstrating its requested amount of SFA, then the plan sponsor may use PBGC's SFA assumptions guidance. PBGC needs the application information to review a plan's eligibility for SFA and amount of requested SFA. PBGC estimates that over the next 3 years an annual average of 45 plan sponsors will file applications for SFA with an average annual hour burden of 540 (45 × 12) hours and an average annual cost burden of $1,530,000 (45 × $34,000).

Under § 4262.10(g), a plan sponsor may, but is not required to, file a lock-in application as a plan's initial application. The lock-in application contains basic information about the plan and a statement of intent to lock-in base data. PBGC needs the information in the lock-in application to ensure that a plan sponsor intends to lock-in the plan's data. PBGC estimates that over the next 3 years an annual average of 6 plan sponsors will file lock-in applications for SFA with an average annual hour burden of 6 (6 × 1) hours and an average annual cost burden of $4,800 (6 × $800).

Under § 4262.16(i), a plan sponsor of a plan that has received SFA must file an Annual Statement of Compliance with the restrictions and conditions under section 4262 of ERISA and part 4262 once every year through 2051. PBGC needs the information in the Annual Statement of Compliance to ensure that a plan is compliant with the imposed restrictions and conditions. PBGC estimates that over the next 3 years an annual average of 150 plan sponsors will file Annual Statements of Compliance with an average annual hour burden of 300 (150 × 2) hours and an average annual cost burden of $360,000 (150 × $2,400).

Under § 4262.15(c), a plan sponsor of a plan with benefits that were suspended under sections 305(e)(9) or 4245(a) of ERISA must issue notices of reinstatement to participants and beneficiaries whose benefits were suspended and are being reinstated. Participants and beneficiaries need the notice of reinstatement to better understand the calculation and timing of their reinstated benefits and, if applicable, make-up payments. PBGC estimates that over the next 3 years an average of 2 plans per year will be required to send notices to participants with suspended benefits. PBGC estimates that these notices will impose an average annual hour burden of 4 (2 × 2) hours and average annual cost burden of $4,000 (2 × $2,000).

Finally, under § 4262.16(d), (f), (g) and (h) a plan sponsor must file a request for a determination from PBGC for approval for an exception under certain circumstances for SFA conditions under § 4262.16 relating to reductions in contributions, transfers or mergers, and withdrawal liability. PBGC needs the information required for a request for determination to determine whether to approve an exception from the specified condition of receiving SFA. PBGC estimates that over the next 3 years, PBGC will receive an average of 4.2 requests per year for determinations. PBGC estimates an average annual hour burden of 13.6 hours and average annual cost burden of $33,000.

The estimated aggregate average annual hour burden for the next 3 years for the information collection in part 4262 is 863.6 (540 + 6 + 300 + 4 + 13.6) hours for employer and fund office administrative, clerical, and supervisory time. The estimated aggregate average annual cost burden for the next 3 years for the information collection request in part 4262 is $1,931,800 ($1,530,000 + $4,800 + $360,000 + $4,000 + $33,000) for approximately 4,830 contract hours assuming an average hourly rate of $400 for work done by outside actuaries and attorneys. The actual hour burden and cost burden per plan will vary depending on plan size and other factors.

The collection of information under the regulation has been approved by OMB under control number 1212–0074 (expires May 31, 2024). PBGC intends to request that OMB extend its approval of the collection of information without change for 3 years. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

PBGC is soliciting public comments to—

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodologies and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.* permitting electronic submission of responses.

Issued in Washington, DC.

Hilary Duke,

Assistant General Counsel for Regulatory Affairs, Pension Benefit Guaranty Corporation.

[FR Doc. 2023–27970 Filed 12–19–23; 8:45 am]

BILLING CODE 7709–02–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for Review: Renewal of an Existing Information Collection, USA Staffing's Onboarding Features

AGENCY: Office of Personnel Management.

ACTION: 30-Day notice and request for comments.

SUMMARY: The Office of Personnel Management (OPM) offers the general public and other Federal agencies the opportunity to comment on the renewal of the following existing information collection request (ICR): OMB Control Number 3206–0278, USA Staffing's Onboarding Features.

DATES: Comments are encouraged and will be accepted until January 19, 2024.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection. 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: A copy of this information collection request, with applicable supporting documentation, may be obtained by contacting USA Staffing Program Office, Office of Personnel Management, 1900 E Street NW, Washington, DC 20415, Attention: Bridget Dongarra via email to *Bridget.Dongarra@opm.gov* or by phone at 202–553–1319.

SUPPLEMENTARY INFORMATION: As required by the Paperwork Reduction Act of 1995, as amended (44 U.S.C. chapter 35), OPM is soliciting comments for this collection. This information collection was previously published in the **Federal Register** on March 21, 2023, at 88 FR 17042, allowing for a 60-day public comment period. No comments were received for this information collection. The purpose of this notice is to allow an additional 30 days for public comments.

In accordance with the Paperwork Reduction Act of 1995, this notice announces that OPM intends to submit to the Office of Management and Budget a request for review of a previously approved emergency collection for USA Staffing's Onboarding features. USA Staffing is OPM's talent acquisition solution. Federal agencies use USA Staffing to onboard candidates for

Federal positions while complying with appropriate rules and procedures. Federal agencies purchase the services of USA Staffing through an Interagency Agreement (IAA) under the provisions of the Revolving Fund, 5 U.S.C. 1304(e)(1), which permits OPM to perform human resources management services for Federal agencies on a cost-recovery basis.

USA Staffing's public facing web page for new hires provides a single interface to submit data and forms required during the Federal onboarding process. New Hires are individuals selected for Federal employment but who have not yet entered on duty and who authenticate at USA Staffing using their USAJOBS.gov accounts. USA Staffing captures the essential information Federal agencies require to onboard applicants for Federal jobs under the authority of 5 U.S.C. 1104, 1302, 3301–3320, 3361, 3393, and 3394.

This information collection was initially approved under an emergency authorization in pursuit of compliance with Executive Order (E.O.) 14043, titled ''Requiring Coronavirus Disease 2019 Vaccination for Federal Employees.'' This action seeks to reinstate the information collection independent of that Executive Order and instead focus on the regular business of the USA Staffing Onboarding system—gathering new hire information in pursuit of timely and efficient entry-on-duty actions.

Some New Hire information elements collected by USA Staffing are collected under different OMB control numbers. Information for these elements that have their own approvals (such as the OF 306 and I–9 forms) are not included in this collection. The subject of this information collection includes questions about basic identity, employment and service background, benefits enrollments, and payroll. The initial emergency clearance did not distinguish between these two contexts.

The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

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

Analysis

Agency: Office of Personnel Management.

Title: USA Staffing, Onboarding.

OMB Number: 3206–0278.

Affected Public: Individuals.

Number of Respondents: 570,000.

Estimated Time per Respondent: 20 minutes.

Total Burden Hours: 190,000 hours.

Office of Personnel Management

Kayyonne Marston,

Federal Register Liaison.

[FR Doc. 2023–27985 Filed 12–19–23; 8:45 am]

BILLING CODE 6325–43–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2024–118 and CP2024–124 MC2024–119 and CP2024–125]

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 21, 2023.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*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).:* MC2024–118 and CP2024–124; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 143 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 13, 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 21, 2023.

2. *Docket No(s).:* MC2024–119 and CP2024–125; *Filing Title:* USPS Request

[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).

to Add Priority Mail & USPS Ground Advantage Contract 144 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 13, 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 21, 2023.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2023–27891 Filed 12–19–23; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99167; File No. SR–NYSECHX–2023–24]

Self-Regulatory Organizations; NYSE Chicago, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Connectivity Fee Schedule

December 14, 2023.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on November 30, 2023, the NYSE Chicago, Inc. (''NYSE Chicago'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Connectivity Fee Schedule (the ''Fee Schedule'') to add circuits provided by Fixed Income and Data Services (''FIDS'') for connectivity into and out of the data center in Mahwah, New Jersey (the ''MDC''). The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Connectivity Fee Schedule (the ''Fee Schedule'') to add circuits provided by Fixed Income and Data Services (''FIDS'') [4] for connectivity into and out of the data center in Mahwah, New Jersey (the ''MDC'').

As background, market participants that request to receive colocation services directly from the Exchange (''Users'') require wired circuits [5] to connect into and out of the MDC. A User's equipment in the MDC's colocation hall connects to a circuit leading out of the MDC, which connects to the User's equipment in their back office or another data center.

Before 2013, all such circuits were provided by ICE's predecessor, NYSE Euronext. In response to customer demand for more connectivity options, in 2013, the MDC opened two ''meet-me-rooms'' to telecommunications service providers (''Telecoms''),[6] to enable Telecoms to offer circuits into the MDC in competition with NYSE Euronext. Currently, 16 Telecoms operate in the meet-me-rooms and provide circuit options to Users requiring connectivity into and out of the MDC. As of June 1, 2023, more than 95% of the circuits for which Users contracted were supplied by Telecoms, and all but two of the Users that used FIDS circuits as of that date also connected to Telecom circuits in the MMRs.

The Exchange proposes to add several circuits provided by FIDS to the Fee Schedule. Specifically, the Exchange proposes to amend the Fee Schedule to add two different types of FIDS circuits, each available in three different sizes. Because FIDS is not a telecommunications provider, FIDS would purchase circuits from telecommunications providers, with portions allocated and sold to Users.

First, the Exchange proposes to amend the Fee Schedule to add ''Optic Access'' circuits supplied by FIDS. Users can use an Optic Access circuit to connect between the MDC and the FIDS access centers at the following five third-party owned data centers: (1) 111 Eighth Avenue, New York, NY; (2) 32 Avenue of the Americas, New York, NY; (3) 165 Halsey, Newark, NJ; (4) Secaucus, NJ (the ''Secaucus Access Center''); and (5) Carteret, NJ (the ''Carteret Access Center''). Optic Access circuits are available in 1 Gb, 10 Gb, and 40 Gb sizes.

Second, the Exchange proposes to amend the Fee Schedule to add lower-latency ''Optic Low Latency'' circuits supplied by FIDS that Users can use to connect between the MDC and FIDS's Secaucus Access Center or Carteret Access Center. Optic Low Latency circuits are available in 1 Gb, 10 Gb, and 40 Gb sizes.

The Exchange proposes to add the following chart to the Fee Schedule, under the new heading ''E. FIDS Circuits'':

Type of service	Fees
Optic Access Circuit—1 Gb	$1,500 initial charge plus $650 monthly charge.
Optic Access Circuit—10 Gb	$5,000 initial charge plus $1,900 monthly charge.
Optic Access Circuit—40 Gb	$5,000 initial charge plus $4,000 monthly charge.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] Through its FIDS business (previously ICE Data Services), Intercontinental Exchange, Inc. (''ICE'') operates the MDC. The Exchange is an indirect subsidiary of ICE and is an affiliate of the New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., and NYSE National, Inc. (together, the ''Affiliate SROs''). Each Affiliate SRO has submitted substantially the same proposed rule change. *See* SR–NYSE–2023–48, SR–NYSEAMER–2023–65, SR–NYSEARCA–2023–83, and SR–NYSENAT–2023–29.

[5] In addition to wired fiber optic connections, Users may use FIDS or third-party wireless connections to the MDC. In such a case, the portion of the connection closest to the MDC is wired. Other than Telecoms, Users are the only FIDS customers with equipment physically located in the MDC.

[6] In this filing, telecommunication service providers that choose to provide circuits at the MDC are referred to as ''Telecoms.'' Telecoms are licensed by the Federal Communications Commission (''FCC'') and are not required to be, or be affiliated with, a member of the Exchange or an Affiliate SRO.

Type of service	Fees
Optic Low Latency Circuit—1 Gb	$1,500 initial charge plus $2,750 monthly charge.
Optic Low Latency Circuit—10 Gb	$5,000 initial charge plus $3,950 monthly charge.
Optic Low Latency Circuit—40 Gb	$5,000 initial charge plus $8,250 monthly charge.

Application and Impact of the Proposed Changes

The proposed change is not targeted at, or expected to be limited in applicability to, a specific segment of market participant. The FIDS circuits would be available for purchase for any potential User requiring a circuit between the MDC and the FIDS access centers at the third-party owned data centers listed above. The proposed changes do not apply differently to distinct types or sizes of customers. Rather, they apply to all customers equally.

Use of the services proposed in this filing are completely voluntary and available to all market participants on a non-discriminatory basis.

The proposed changes are not otherwise intended to address any other issues relating to services related to the MDC and/or related fees, and the Exchange is not aware of any problems that market participants would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Section 6(b)(5) of the Act,[8] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in 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 and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange further believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,[9] because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers, or dealers.

The Proposed Change Is Reasonable

The Exchange believes that the proposed rule change is reasonable. In considering the reasonableness of proposed services and fees, the Commission's market-based test considers ''whether the exchange was subject to significant competitive forces in setting the terms of its proposal . . . , including the level of any fees.'' [10] If the Exchange meets that burden, ''the Commission will find that its proposal is consistent with the Act unless 'there is a substantial countervailing basis to find that the terms' of the proposal violate the Act or the rules thereunder.'' [11] Here, the Exchange is subject to significant competitive forces in setting the terms on which it offers its proposal, in particular because substantially similar substitutes are available, and the third-party vendors are not at a competitive disadvantage created by the Exchange.

The proposed FIDS circuits would compete with circuits currently offered by the 16 Telecoms operating in the meet-me-rooms at the MDC. The Telecom circuits are reasonable substitutes for the FIDS circuits. The Commission has recognized that products do not need to be identical or equivalent to be considered substitutable; it is sufficient that they be substantially similar.[12] The circuits provided by FIDS and by the Telecoms all perform the same function: connecting into and out of the MDC. The providers of these circuits design them to perform with particular combinations of latency, bandwidth, price, termination point, and other factors that they believe will attract Users, and Users choose from among these competing services on the basis of their business needs.

The proposed FIDS circuits are sufficiently similar substitutes to the circuits offered by the 16 Telecoms even though the proposed FIDS circuits would all terminate in one of the five data centers mentioned above, while circuits from the 16 Telecoms could terminate in those locations or additional locations. While neither the Exchange nor FIDS knows the end point of any particular Telecom circuit, the Exchange understands that the Telecoms can offer circuits terminating in any location, including the five data center locations where the FIDS circuits would terminate. In addition, Users can choose to configure their pathway leading out of colocation in the way that best suits their business needs, which may include connecting to the User's equipment at one of the five data center locations that serve as termination points for the proposed FIDS circuits, or connecting first to one of those five data centers with a FIDS- or Telecom-supplied circuit and then further connecting to another remote location using a telecommunication provider-supplied circuit.

The proposed FIDS circuits do not have a distance or latency advantage over the Telecoms' circuits within the MDC. FIDS has normalized (a) the distance between the meet-me-rooms and the colocation halls and (b) the distance between the rooms where the FIDS circuits are located and the colocation halls. As a result, a User choosing whether to use the proposed FIDS circuits or Telecom circuits does not face any difference in the distances or latency within the MDC.

The Exchange also believes that the proposed FIDS circuits do not have any latency or bandwidth advantage over the Telecoms' circuits as a whole outside of the MDC. FIDS would purchase the proposed FIDS circuits from third-party telecommunications providers and would allocate and resell portions of them to Users. The Exchange believes that the Telecoms operating in the meet-me-rooms offer circuits with a variety of latency and bandwidth specifications, some of which may exceed the specifications of the

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78f(b)(4).

[10] Securities Exchange Act Release No. 90209 (October 15, 2020), 85 FR 67044, 67049 (October 21, 2020) (Order Granting Accelerated Approval to Establish a Wireless Fee Schedule Setting Forth Available Wireless Bandwidth Connections and Wireless Market Data Connections) (SR–NYSE–2020–05, SR–NYSEAMER–2020–05, SR–NYSEArca–2020–08, SR–NYSECHX–2020–02, SR–NYSENAT–2020–03, SR–NYSE–2020–11, SR–NYSEAMER–2020–10, SR–NYSEArca–2020–15, SR–NYSECHX–2020–05, SR–NYSENAT–2020–08) (''Wireless Approval Order''), citing Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74781 (December 9, 2008) (''2008 ArcaBook Approval Order''). *See NetCoalition* v. *SEC,* 615 F.3d 525 (D.C. Cir. 2010).

[11] Wireless Approval Order, *supra* note 10, at 67049, citing 2008 ArcaBook Approval Order, *supra* note 10, at 74781.

[12] *See* 2008 ArcaBook Approval Order, *supra* note 10, at 74789 and note 295 (recognizing that products need not be identical to be substitutable).

proposed FIDS circuits.[13] The Exchange believes that Users consider these latency and bandwidth factors—as well as other factors, such as price and termination point—in determining which circuit offerings will best serve their business needs.[14]

In sum, the Exchange does not believe that there is anything about the proposed FIDS circuits that would make the Telecoms' circuits inadequate substitutes.

Nor does the Exchange have a meaningful competitive advantage over the Telecoms by virtue of the fact that it owns and operates the MDC's meet-me-rooms. The Exchange understands that Telecoms choose to pay fees to the Exchange for the opportunity to install equipment in the MDC's meet-me-rooms because of the financial benefits those Telecoms can accrue by selling circuits to Users. It is therefore in the Exchange's best interest to set fees at the MDC—including both the meet-me-room fees that Telecoms pay and the FIDS circuit fees that Users would pay—at a level that encourages market participants, including Telecoms, to maximize their use of the MDC.[15]

Setting the FIDS circuit fees at a reasonable level makes it more likely that Users will connect into and out of the MDC. Competitive rates for circuits, whether FIDS circuits or Telecom circuits, help draw more Users and Hosted Customers [16] into the MDC, which directly benefits the Exchange by increasing the customer base to whom the Exchange can sell its colocation services (including cabinets, power, ports, and connectivity to many third-party data feeds) and encouraging greater participation on the Exchange. In other words, by setting the fees for FIDS circuits at a level attractive to Users, the Exchange spurs demand for all of the services it sells at the MDC.

If the Exchange were to set the price of the FIDS circuits too high, Users would likely respond by choosing one of the many alternative options offered by the 16 Telecoms. Conversely, if the Exchange were to offer the FIDS circuits at prices aimed at undercutting comparable Telecom circuits, the Telecoms might reassess whether it makes financial sense for them to continue to participate in the MDC's meet-me-rooms. Their departure might negatively impact User participation in colocation and on the Exchange. As a result, the Exchange is not motivated to undercut the prices of Telecom circuits.

For these reasons, the proposed change is reasonable.

The Proposed Change Is an Equitable Allocation of Fees and Credits

The Exchange believes that its proposal equitably allocates its fees among market participants. The Exchange believes that the proposed change is equitable because it would not apply differently to distinct types or sizes of market participants. Rather, it would apply to all market participants equally.

In addition, the Exchange believes that the proposal is equitable because only market participants that voluntarily select to receive the proposed FIDS circuits would be charged for them. The proposed FIDS circuits are available to all market participants on an equal basis, and all market participants that voluntarily choose to purchase a FIDS circuit are charged the same amount for that circuit as all other market participants purchasing that type of FIDS circuit.

Moreover, any telecommunications service provider licensed by the FCC is eligible to be a Telecom operating in the MRR, irrespective of size and type. The Exchange's MMR services are available to all Telecoms on an equal basis at standardized pricing.

The Proposed Change Is Not Unfairly Discriminatory

The Exchange believes its proposal is not unfairly discriminatory. The proposed change does not apply differently to distinct types or sizes of market participants. Rather, it applies to all market participants equally. The purchase of any proposed service is completely voluntary and the Fee Schedule will be applied uniformly to all market participants.

In addition, the Exchange believes that the proposal is not unfairly discriminatory because only market participants that voluntarily select to receive the proposed FIDS circuits would be charged for them. The proposed FIDS circuits are available to all market participants on an equal basis, and all market participants that voluntarily choose to purchase a FIDS circuit are charged the same amount for that circuit as all other market participants purchasing that type of FIDS circuit.

For these reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that the proposal will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of Section 6(b)(8) of the Act.[17]

The proposed change would not impose a burden on competition among national securities exchanges or among members of the Exchange. The proposed change would enhance competition in the market for circuits transmitting data into and out of colocation at the MDC by adding FIDS as the 17th provider of such circuits, in addition to the 16 Telecoms that also sell such circuits to Users. The proposed FIDS circuits do not have any latency, bandwidth, or other advantage over the Telecoms' circuits. The proposal would not burden competition in the sale of such circuits, but rather, enhance it by providing Users with an additional choice for their circuit needs.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [18] and Rule 19b–4(f)(6) thereunder.[19] Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of

[13] The specifications of FIDS's competitors' circuits are not publicly known. The Exchange understands that FIDS has gleaned any information it has about its competitors through anecdotal communications, by observing customers' purchasing choices in the competitive market, and from its own experience as a purchaser of circuits from telecommunications providers to build FIDS's own networks.

[14] The fact that the FIDS circuits do not have an advantage is reflected by the fact that Users choose to use Telecom circuits for the vast majority of their circuit needs. Whereas before 2013, NYSE Euronext provided 100% of such circuits, today more than 95% of the circuits that Users have contracted for are supplied by third-party Telecoms, with FIDS supplying less than 5%.

[15] *See* Securities Exchange Act Release No. 98001 (July 26, 2023), 88 FR 50196 (August 1, 2023) (SR–NYSECHX–2023–14) (''MMR Notice'').

[16] ''Hosting'' is a service offered by a User to another entity in the User's space within the MDC. The Exchange allows Users to act as Hosting Users for a monthly fee. *See* Securities Exchange Act Release No. 87408 (October 28, 2019), 84 FR 58778 (November 1, 2019) (SR–NYSECHX–2019–12). Hosting Users' customers are referred to as ''Hosted Customers.''

[17] 15 U.S.C. 78f(b)(8).

[18] 15 U.S.C. 78s(b)(3)(A)(iii).

[19] 17 CFR 240.19b–4(f)(6).

investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [20] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include file number SR–NYSECHX–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–NYSECHX–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–NYSECHX–2023–24 and should be submitted on or before January 10, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–27910 Filed 12–19–23; 8:45 am]

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[20] 15 U.S.C. 78s(b)(2)(B).

[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99174; File No. SR–CboeEDGX–2023–076]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Adopt a Low Priced Stock Strike Price Interval Program

December 14, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 7, 2023, Cboe EDGX Exchange, Inc. (''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX Options'') proposes to adopt a Low Priced Stock Strike Price Interval Program. 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 Rule 19.6. Miami International Securities Exchange, LLC (''MIAX'') recently received approval to amend its Rule 404 to implement a new strike interval program for stocks that are priced less than $2.50 and have an average daily trading volume of at least 1,000,000 shares per day for the 3 preceding calendar months.[5] At this time, the Exchange proposes to adopt rules substantively identical to MIAX in proposed Rule 19.6, Interpretation and Policy .08 and amend Rule 19.6, Interpretation and Policy .05(f) to harmonize the table within that Rule to the proposed rule text.

Currently, Rule 19.6 describes the process and procedures for listing and trading series of options on the Exchange. Rule 19.6 provides for a $2.50 Strike Price Program, where the Exchange may select up to 200 option classes on individual stocks for which the interval of strike prices will be $2.50 where the strike price is greater than $25 but less than $50.[6] Rule 19.6, Interpretation and Policy .02 also provides for a $1 Strike Price Program,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Securities Exchange Act Release No. 98917 (November 13, 2023), 88 FR 80361 (November 17, 2023) (SR–MIAX–2023–36) (Order Approving a Proposed Rule Change To Amend Exchange Rule 404, Series of Option Contracts Open for Trading).

[6] *See* Rule 19.6, Interpretation and Policy .03(a).

where the interval between strike prices of series of options on individual stocks may be $1.00 or greater provided the strike price is $50.00 or less, but not less than $1.00.[7] Additionally, Rule 19.6, Interpretation and Policy .06 provides for a ''$0.50 Strike Program.'' The interval of strike prices of series of options on individual stocks may be $0.50 or greater beginning at $0.50 where the strike price is $5.50 or less, but only for options classes whose underlying security closed at or below $5.00 in its primary market on the previous trading day and which have national average daily volume that equals or exceeds 1,000 contracts per day as determined by The Options Clearing Corporation (''OCC'') during the preceding three calendar months. The listing of $0.50 strike prices is limited to options classes overlying no more than 20 individual stocks as specifically designated by the Exchange. The Exchange may list $0.50 strike prices on any other option classes if those classes are specifically designated by other securities exchanges that employ a similar $0.50 Strike Program under their respective rules. A stock shall remain in the $0.50 Strike Program until otherwise designated by the Exchange.[8]

The Exchange proposes to adopt a new strike interval program for stocks that are not in the aforementioned $0.50 Strike Program (or the Short Term Option Series Program)[9] and that close below $2.50 and have an average daily trading volume of at least 1,000,000 shares per day for the three preceding calendar months. The $0.50 Strike Program considers stocks that have a closing price at or below $5.00 whereas the Exchange's proposal will consider stocks that have a closing price below $2.50. Currently, there is a subset of stocks that are not included in the $0.50 Strike Program as a result of the limitations of that program which provides that the listing of $0.50 strike prices is limited to option classes overlying no more than 20 individual stocks as specifically designated by the Exchange and requires a national average daily volume that equals or exceeds 1,000 contracts per day as determined by OCC during the preceding three calendar months.[10] Therefore, the Exchange is proposing to implement a new strike interval program termed the ''Low Priced Stock Strike Price Interval Program.''

To be eligible for the inclusion in the Low Priced Stock Strike Price Interval Program, an underlying stock must (1) close below $2.50 in its primary market on the previous trading day; and (2) have an average daily trading volume of at least 1,000,000 shares per day for the three preceding calendar months. The Exchange notes that there is no limit to the number of classes that will be eligible for inclusion in the proposed program, provided, of course, that the underlying stocks satisfy both the price and average daily trading volume requirements of the proposed program.

The Exchange also proposes that after a stock is added to the Low Priced Stock Strike Price Interval Program, the Exchange may list $0.50 strike price intervals from $0.50 up to $2.00.[11] For the purpose of adding strikes under the Low Priced Stock Strike Price Interval Program, the ''price of the underlying stock'' is measured in the same way as ''the price of the underlying security'' is measured as set forth in Section 3(g) of the Options Listing Procedures Plan (''OLPP''). Further, no additional series in $0.50 intervals may be listed if the underlying stock closes at or above $2.50 in its primary market. Additional series in $0.50 intervals may not be added until the underlying stock again closes below $2.50.

The Exchange's proposal addresses a gap in strike coverage for low priced stocks. The $0.50 Strike Program considers stocks that close below $5.00 and limits the number of option classes listed to no more than 20 individual stocks (provided that the open interest criteria is also satisfied). Whereas, the Exchange's proposal has a narrower focus, with respect to the underlying's stock price, and is targeted on those stocks that close below $2.50 and does not limit the number of stocks that may participate in the program (provided that the average daily trading volume is also satisfied). The Exchange does not believe that any market disruptions will be encountered with the addition of these new strikes. The Exchange represents that it has the necessary capacity and surveillance programs in place to support and properly monitor trading in the proposed Low Priced Stock Strike Price Interval Program.

The Exchange believes that the program's average daily trading volume requirement of 1,000,000 shares is a reasonable threshold to ensure adequate liquidity in eligible underlying stocks as it is substantially greater than the thresholds used for listing options on equities, American Depository Receipts (''ADRs''), and broad-based indexes. Specifically, underlying securities with respect to which put or call option contracts are approved for listing and trading on the Exchange must meet certain criteria as determined by the Exchange. One of those requirements is that trading volume (in all markets in which the underlying security is traded) has been at least 2,400,000 shares in the preceding 12 months.[12] Rule 19.3(f) provides the criteria for listing options on ADRs if they meet certain criteria and guidelines set forth in Rule 19.3. One of the requirements is that the average daily trading volume for the security in the U.S. markets over the three months preceding the selection of the ADR for options trading is 100,000 or more shares.[13] Finally, the Exchange may trade options on a broad-based index pursuant to Rule 19b–4(e) of the Securities Exchange Act of 1934 (the ''Act'') provided a number of conditions are satisfied. One of those conditions is that each component security that accounts for at least 1% of the weight of the index has an average daily trading volume of at least 90,000 shares during the last six-month period.[14]

Additionally, the Exchange proposes to amend the table in Rule 19.6, Interpretation and Policy .05(f) to insert a new column to harmonize the Exchange's proposal to the strike intervals for Short Term Options Series as described in Rule 19.6, Interpretation and Policy .05. The table in Rule 19.6, Interpretation and Policy .05(f) is intended to limit the intervals between strikes for multiply listed equity options within the Short Term Options Series program that have an expiration date more than twenty-one days from the listing date. Specifically, the table defines the applicable strike intervals for options on underlying stocks given the closing price on the primary market on the last day of the calendar quarter, and a corresponding average daily volume of the total number of options contracts traded in a given security for the applicable calendar quarter divided by the number of trading days in the applicable calendar quarter.[15] However,

[7] *See* Rule 19.6, Interpretation and Policy .02(a).

[8] *See* Rule 19.6, Interpretation and Policy .06.

[9] Rule 19.6, Interpretation and Policy .05.

[10] *See* Rule 19.6, Interpretation and Policy .06.

[11] While the Exchange may list new strikes on underlying stocks that meet the eligibility requirements of the new program, the Exchange will exercise its discretion and will not list strikes on underlying stocks the Exchange believes are subject to imminent delisting from their primary exchange.

[12] *See* Rule 19.3(b)(4).

[13] *See* Rule 19.3(f)(3)(B).

[14] *See* Rule 29.3(b)(7).

[15] *See* Securities Exchange Release Act No. 91469 (April 2, 2021), 86 FR 18333 (April 8, 2021) (SR–CboeEDGX–2021–016) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Rule 19.6 (Series of Options Contracts Open for Trading) in Connection With Limiting the

Continued

the lowest share price column is titled ''less than $25.'' The Exchange now proposes to insert a column titled ''Less than $2.50'' and to set the strike interval at $0.50 for each average daily volume tier represented in the table. Also, the Exchange proposes to amend the heading of the column currently titled ''Less than $25,'' to ''$2.50 to less than $25'' as a result of the adoption of the new proposed column, ''Less than $2.50.'' The Exchange believes this change will remove any potential conflict between the strike intervals under the Short Term Options Series Program and those described herein under the Exchange's proposal.

The Exchange recognizes that its proposal will introduce new strikes in the marketplace and further acknowledges that there has been significant effort to curb strike proliferation. For example, the Exchange filed a proposal focused on the removal, and prevention of the listing, of strikes which are extraneous and do not add value to the marketplace (the ''Strike Interval Proposal'').[16] The Strike Interval Proposal was intended to remove repetitive and unnecessary strike listings across the weekly expiries. Specifically, the Strike Interval Proposal aimed to reduce the density of strike intervals that would be listed in the later weeks, by creating limitations for intervals between strikes which have an expiration date more than twenty-one days from the listing date.[17] The Strike Interval Proposal took into account OCC customer-cleared volume, using it as an appropriate proxy for demand. The Strike Interval Proposal was designed to maintain strikes where there was customer demand and eliminate strikes where there was not demand. At the time of its proposal, the Exchange estimated that the Strike Interval Proposal would reduce the number of listed strikes in the options market by approximately 81,000 strikes.[18] The Exchange proposes to amend the table to define the strike interval at $0.50 for underlying stocks with a share price of less than $2.50. The Exchange believes this amendment will harmonize the Exchange's proposal with the Strike Interval Proposal described above.

The Exchange recognizes that its proposal will moderately increase the total number of option series available on the Exchange. However, the Exchange's proposal is designed to only add strikes where there is investor demand[19] which will improve market quality. Under the requirements for the Low Priced Stock Strike Price Interval Program as described herein, the Exchange determined that as of August 9, 2023, 106 symbols met the proposed criteria. Of those symbols, the Exchange notes that 36 were in the $1 Strike Price Interval Program with $1.00 and $2.00 strikes listed. Under the Exchange's proposal, the $0.50 and $1.50 strikes for these symbols would be added for the current expiration terms. The remaining 70 symbols eligible under the proposal would have $0.50, $1.00, $1.50 and $2.00 strikes added to their current expiration terms. Therefore, the Exchange notes that for the 106 symbols eligible for the Low Priced Stock Strike Price Interval Program, a total of approximately 3,250 options would be added. As of August 9, 2023, the Exchange listed 1,106,550 options, and therefore, the additional options that would be listed under this proposal would represent a relatively minor increase of 0.294% in the number of options listed.

The Exchange does not believe that its proposal contravenes any previous efforts to curtail unnecessary strikes. The Exchange's proposal is targeted to only underlying stocks that close at less than $2.50 and that also meet the average daily trading volume requirement. Additionally, because the strike increment is $0.50 there are only a total of four strikes that may be listed under the program ($0.50, $1.00, $1.50, and $2.00) for an eligible underlying stock. Finally, if an eligible underlying stock is in another program (*e.g.,* the $0.50 Strike Program or the $1 Strike Price Interval Program) the number of strikes that may be added is further reduced if there are pre-existing strikes as part of another strike listing program. Therefore, the Exchange does not believe that it will list any unnecessary or repetitive strikes as part of its program, and that the strikes that will be listed will improve market quality and satisfy investor demand.

The Exchange further believes that the Options Price Reporting Authority (''OPRA''), has the necessary systems capacity to handle any additional messaging traffic associated with this proposed rule change. The Exchange also believes that Members will not have a capacity issue as a result of the proposed rule change. Finally, the Exchange believes that the additional options will serve to increase liquidity, provide additional trading and hedging opportunities for all market participants, and improve market quality.

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.[20] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[21] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[22] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes its proposal promotes just and equitable principles of trade and removes impediments to and perfects the mechanisms of a free and open market and a national market system as the Exchange has identified a subset of stocks that are trading under $2.50 and do not have meaningful strikes available. For example, on August 9, 2023, symbol SOND closed at $0.50 and had open interest of over 44,000 contracts and an average daily trading volume in the underlying stock of over 1,900,000 shares for the three preceding calendar months.[23] Currently the lowest strike listed is for $2.50, making the lowest strike 400% away from the closing stock price. Another symbol, CTXR, closed at $0.92 on August 9, 2023, and had open interest of 63,000 contracts and an average daily trading volume in the underlying stock of over 1,900,000 shares for the three preceding

Number of Strikes Listed for Short Term Option Series Which Are Available for Quoting and Trading on the Exchange).

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *See* proposed Rule 19.6, Interpretation and Policy .08(a), which requires that an underlying stock must (1) close below $2.50 in its primary market on the previous trading day; and (2) have an average daily trading volume of at least 1,000,000 shares per day for the three preceding calendar months.

[20] 15 U.S.C. 78f(b).

[21] 15 U.S.C. 78f(b)(5).

[22] *Id.*

[23] *See* Yahoo! Finance, *https://finance.yahoo.com/quote/SOND/history?p=SOND* (last visited August 10, 2023).

calendar months.[24] Similarly, the lowest strike listed is for $2.50, making the lowest strike more than 170% away from the closing stock price. Currently, such products have no at-the-money options, as well as no in-the-money calls or out-of-the-money puts. The Exchange's proposal will provide additional strikes in $0.50 increments from $0.50 up to $2.00 to provide more meaningful trading and hedging opportunities for this subset of stocks. Given the increased granularity of strikes as proposed under the Exchange's proposal out-of-the-money puts and in-the-money calls will be created. The Exchange believes this will allow market participants to tailor their investment and hedging needs more effectively.

The Exchange believes its proposal promotes just and equitable principles of trade and removes impediments to and perfects the mechanisms of a free and open market and a national market system and, in general, protects investors and the public interest by adding strikes that improves market quality and satisfies investor demand. The Exchange does not believe that the number of strikes that will be added under the program will negatively impact the market. Additionally, the proposal does not run counter to any previous efforts to curb strike proliferation as those efforts focused on the removal and prevention of extraneous strikes where there was no investor demand. The Exchange's proposal requires the satisfaction of an average daily trading volume threshold in addition to the underlying stock closing at a price below $2.50 to be eligible for the program. The Exchange believes that the average daily trading volume threshold of the program ensures that only strikes with investor demand will be listed and fills a gap in strike interval coverage as described above. Further, being that the strike interval is $0.50, there are only a maximum of four strikes that may be added ($0.50, $1.00, $1.50, and $2.00). Therefore, the Exchange does not believe that its proposal will undermine any previous efforts to eliminate repetitive and unnecessary strikes in any fashion.

The Exchange believes that the proposed program's average daily trading volume threshold promotes just and equitable principles of trade and removes impediments to and perfects the mechanisms of a free and open market and a national market system and, in general, protects investors and the public interest as it is designed to permit only those stocks with demonstrably high levels of trading activity to participate in the program. The Exchange notes that the proposed program's average daily trading volume requirement is substantially greater than the average daily trading requirement currently in place on the Exchange for options on equity underlyings,[25] ADRs,[26] and broad-based indexes.[27]

The Exchange also believes the proposed rule change is consistent with Section 6(b)(1) of the Act,[28] which provides that the Exchange be organized and have the capacity to be able to carry out the purposes of the Act and to enforce compliance by the Exchange's Members and persons associated with its Members with the Act, the rules and regulations thereunder, and the rules of the Exchange. The proposed rule change allows the Exchange to respond to customer demand to provide meaningful strikes for low priced stocks. The Exchange does not believe that the proposed rule would create any capacity issue or negatively affect market functionality. Additionally, the Exchange represents that it has the necessary systems capacity to support the new options series and handle additional messaging traffic associated with this proposed rule change. The Exchange also believes that its Members will not experience any capacity issues as a result of this proposal. In addition, the Exchange represents that it believes that additional strikes for low priced stocks will serve to increase liquidity available as well as improve price efficiency by providing more trading opportunities for all market participants. The Exchange believes that the proposed rule change will benefit investors by giving them increased opportunities to execute their investment and hedging decisions.

Finally, the Exchange believes its proposal is designed to prevent fraudulent and manipulative acts and practices as options may only be listed on underlyings that satisfy the listing requirements of the Exchange as described in 19.3. Specifically, Rule 19.3(a) requires that underlying securities for which put or call option contracts are approved for listing and trading on the Exchange must meet the following criteria: (1) the security must be registered with the Commission and be an ''NMS stock'' as defined in Rule 600 of Regulation NMS under the Act; (2) the security shall be characterized by a substantial number of outstanding shares that are widely held and actively traded. Additionally, Rule 19.3(b) provides that, subject to other factors the Exchange may consider, an underlying security will not be selected for options transactions unless: (1) there are a minimum of 7,000,000 shares of the underlying security which are owned by persons other than those required to report their stock holdings under Section 16(a) of the Act; (2) there are a minimum of 2,000 holders of the underlying security; (3) the issuer is in compliance with any applicable requirements of the Act; and (4) trading volume (in all markets in which the underlying security is traded) has been at least 2,400,000 shares in the preceding 12 months. The Exchange's proposal does not impact the eligibility of an underlying stock to have options listed on it, but rather addresses only the listing of new additional option classes on an underlying listed on the Exchange in accordance with the Exchange's listings rules. As such, the Exchange believes that the listing requirements described in Rule 19.3 address potential concerns regarding possible manipulation. Additionally, in conjunction with the proposed average daily volume requirement described herein, the Exchange believes any possible market manipulation is further mitigated.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that its proposed rule change will impose any burden on intramarket competition as the Rules of the Exchange apply equally to all Members and all Members may trade the new proposed strikes if they so choose. Specifically, the Exchange believes that investors and market participants will significantly benefit from the availability of finer strike price intervals for stocks priced below $2.50, which will allow them to tailor their investment and hedging needs more effectively. The Exchange's proposal is substantively identical to MIAX Interpretations and Policies .11 and .12 to Rule 404.

The Exchange does not believe that its proposed rule change will impose any burden on intermarket competition, as nothing prevents other options exchanges from proposing similar rules to list and trade options on low priced stocks. Rather the Exchange believes that its proposal will promote intermarket competition, as the

[24] *Id.*

[25] *See supra* note 12.

[26] *See supra* note 13.

[27] *See supra* note 14.

[28] 15 U.S.C. 78f(b)(1).

Exchange's proposal will result in additional opportunities for investors to achieve their investment and trading objectives, to the benefit of investors, market participants, and the marketplace in general.

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

Pursuant to Section 19(b)(3)(A) of the Act [29] and Rule 19b–4(f)(6) [30] thereunder, the Exchange has designated this proposal as one that effects a change that: (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.[31]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii) [32] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requested that the Commission waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission notes it has approved a proposed rule change substantially identical to the one proposed by the Exchange.[33] The proposed change raises no novel legal or regulatory issues. Therefore, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change operative upon filing.[34]

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–CboeEDGX–2023–076 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–2023–076. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeEDGX–2023–076 and should be submitted on or before January 10, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[35]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–27916 Filed 12–19–23; 8:45 am]

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[29] 15 U.S.C. 78s(b)(3)(A).

[30] 17 CFR 240.19b–4(f)(6).

[31] In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[32] 17 CFR 240.19b–4(f)(6)(iii).

[33] *See supra* note 5.

[34] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[35] 17 CFR 200.30–3(a)(12), (59).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99180; File No. SR–PEARL–2023–70]

Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 404, Series of Option Contracts Open for Trading

December 14, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 13, 2023, MIAX PEARL, LLC (''MIAX Pearl'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend Exchange Rule 404, Series of Option Contracts Open for Trading.

The text of the proposed rule change is available on the Exchange's website at *https://www.miaxglobal.com/markets/us-options/pearl-options/rule-filings,* at MIAX Pearl's principal office, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 404, Series of Option Contracts Open for Trading.[3] Specifically, the Exchange proposes to amend Interpretations and Policies .02 to expand the Short Term Option Series Program to permit the listing of two Wednesday expirations for options on United States Oil Fund, LP (''USO''), United States Natural Gas Fund, LP (''UNG''), SPDR Gold Shares (''GLD''), iShares Silver Trust (''SLV''), and iShares 20+ Year Treasury Bond ETF (''TLT'') (collectively ''Exchange Traded Products'' or ''ETPs''). This is a competitive filing based on proposals submitted by Nasdaq ISE, LLC (''Nasdaq ISE''),[4] and the Cboe Options Exchange (''Cboe Exchange'').[5]

Currently, as set forth in Policy .02 of Rule 404, after an option class has been approved for listing and trading on the Exchange, the Exchange may open for trading on any Thursday or Friday that is a business day (''Short Term Option Opening Date'') series of options on that class that expire at the close of business on each of the next five Fridays that are business days and are not Fridays in which monthly options series or Quarterly Options Series expire (''Friday Short Term Option Expiration Dates''). The Exchange may have no more than a total of five Short Term Option Friday Expiration Dates (''Short Term Option Weekly Expirations''). If the Exchange is not open for business on the respective Thursday or Friday, the Short Term Option Opening Date for Short Term Option Weekly Expirations will be the first business day immediately prior to that respective Thursday or Friday. Similarly, if the Exchange is not open for business on a Friday, the Short Term Option Expiration Date for Short Term Option Weekly Expirations will be the first business day immediately prior to that Friday.

Additionally, the Exchange may open for trading series of options on the symbols provided in Table 1 of Policy .02 of Rule 404 that expire at the close of business on each of the next two Mondays, Tuesdays, Wednesdays, and Thursdays, respectively, that are business days and are not business days in which monthly options series or Quarterly Options Series expire (''Short Term Option Daily Expirations''). For those symbols listed in Table 1, the Exchange may have no more than a total of two Short Term Option Daily Expirations for each of Monday, Tuesday, Wednesday, and Thursday expirations at one time.

At this time, the Exchange proposes to expand the Short Term Option Daily Expirations to permit the listing and trading of options on USO, UNG, GLD, SLV, and TLT expiring on Wednesdays. The Exchange proposes to permit two Short Term Option Expiration Dates beyond the current week for each Wednesday expiration at one time.[6] In order to effectuate the proposed changes, the Exchange would add USO, UNG, GLD, SLV, and TLT to Table 1 of Policy .02 of Rule 404, which specifies each symbol that qualifies as a Short Term Option Daily Expiration.

The proposed Wednesday USO, UNG, GLD, SLV, and TLT expirations will be similar to the current Wednesday SPY, QQQ, and IWM Short Term Option Daily Expirations set forth in Policy .02 of Rule 404, such that the Exchange may open for trading on any Tuesday or Wednesday that is a business day (beyond the current week) series of options on USO, UNG, GLD, SLV, and TLT to expire on any Wednesday of the month that is a business day and is not a Wednesday in which Quarterly Options Series expire (''Wednesday USO Expirations,'' ''Wednesday UNG Expirations,'' ''Wednesday GLD Expirations,'' ''Wednesday SLV Expirations,'' and ''Wednesday TLT Expirations'') (collectively, ''Wednesday ETP Expirations'').[7] In the event Short Term Option Daily Expirations expire on a Wednesday and that Wednesday is the same day that a Quarterly Options Series expires, the Exchange would skip that week's listing and instead list the following week; the two weeks would therefore not be consecutive. Today, Wednesday expirations in SPY, QQQ, and IWM similarly skip the weekly listing in the event the weekly listing expires on the same day in the same class as a Quarterly Option Series.

USO, UNG, GLD, SLV, and TLT Friday expirations would continue to have a total of five Short Term Option Expiration Dates provided those Friday expirations are not Fridays in which monthly options series or Quarterly Options Series expire (''Friday Short Term Option Expiration Dates'').

Similar to Wednesday SPY, QQQ, and IWM Short Term Option Daily Expirations within Policy .02 of Rule 404, the Exchange proposes that it may open for trading on any Tuesday or Wednesday that is a business day series of options on USO, UNG, GLD, SLV, and TLT that expire at the close of business on each of the next two Wednesdays that are business days and are not business days in which Quarterly Options Series expire.

The interval between strike prices for the proposed Wednesday ETP Expirations will be the same as those for the current Short Term Option Series for Friday expirations applicable to the Short Term Option Series Program.[8] Specifically, the Wednesday ETP Expirations will have a strike interval of $0.50 or greater for strike prices below $100, $1 or greater for strike prices between $100 and $150, and $2.50 or greater for strike prices above $150.[9] As is the case with other equity options listed pursuant to the Short Term Option Series Program, the Wednesday ETP Expirations series will be P.M.-settled.

Pursuant to Policy .02 of Rule 404, with respect to the Short Term Option Series Program, a Wednesday expiration series shall expire on the first business day immediately prior to that

[3] The Exchange notes that its affiliate exchange, MIAX Options, has submitted a substantively identical proposal.

[4] *See* Securities Exchange Act Release No. 98905 (November 13, 2023) (SR–ISE–2023–11) (Order Approving a Proposed Rule Change to Amend the Short Term Option Series Program to Permit the Listing of Two Wednesday Expirations for Options on Certain Exchange Traded Products) (''Nasdaq ISE Approval'').

[5] *See* Securities Exchange Act Release No. 99035 (November 29, 2023), 88 FR 84367 (December 5, 2023) (SR–Cboe–2023–062).

[6] Consistent with the current operation of the rule, the Exchange notes that if it adds a Wednesday expiration on a Tuesday, it could technically list three outstanding Wednesday expirations at one time. The Exchange will therefore clarify the rule text in Policy .02 of Rule 404 to specify that it can list two Short Term Option Expiration Dates *beyond the current week* for each Monday, Tuesday, Wednesday, and Thursday expiration.

[7] While the relevant rule text in Policy .02 of Rule 404 also indicates that the Exchange will not list such expirations on a Wednesday that is a business day in which monthly options series expire, practically speaking this would not occur.

[8] *See* Policy .02(e) of Rule 404.

[9] *Id.*

Wednesday, *e.g.,* Tuesday of that week if the Wednesday is not a business day.

Currently, for each option class eligible for participation in the Short Term Option Series Program, the Exchange is limited to opening thirty (30) series for each expiration date for the specific class.[10] The thirty (30) series restriction does not include series that are open by other securities exchanges under their respective weekly rules; the Exchange may list these additional series that are listed by other options exchanges.[11] With the proposed changes, this thirty (30) series restriction would apply to Wednesday USO, UNG, GLD, SLV, and TLT Short Term Option Daily Expirations as well. In addition, the Exchange will be able to list series that are listed by other exchanges, assuming that they file similar rules with the Commission to list Wednesday ETP Expirations.

With this proposal, Wednesday ETP Expirations would be treated similarly to existing Wednesday SPY, QQQ, and IWM Expirations. With respect to monthly option series, Short Term Option Daily Expirations will be permitted to expire in the same week in which monthly option series on the same class expire. Not listing Short Term Option Daily Expirations for one week every month because there was a monthly on that same class on the Friday of that week would create investor confusion.

Further, as with Wednesday SPY, QQQ, and IWM Expirations, the Exchange would not permit Wednesday ETP Expirations to expire on a business day in which monthly options series or Quarterly Options Series expire. Therefore, all Short Term Option Daily Expirations would expire at the close of business on each of the next two Wednesdays that are business days and are not business days in which monthly options series or Quarterly Options Series expire. The Exchange believes that it is reasonable to not permit two expirations on the same day in which a monthly options series or a Quarterly Options Series would expire because those options would be duplicative of each other.

The Exchange does not believe that any market disruptions will be encountered with the introduction of Wednesday ETP Expirations. The Exchange has the necessary capacity and surveillance programs in place to support and properly monitor trading in the proposed Wednesday ETP Expirations. The Exchange currently trades P.M.-settled Short Term Option Series that expire on Wednesday for SPY, QQQ, and IWM and has not experienced any market disruptions nor issues with capacity. Today, the Exchange has surveillance programs in place to support and properly monitor trading in Short Term Option Series that expire Wednesday for SPY, QQQ, and IWM.

2. Statutory Basis

The Exchange believes that its 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.[12] Specifically, the Exchange believes that its proposed rule change is consistent with Section 6(b)(5) [13] requirements in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in 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.

Similar to Wednesday expirations in SPY, QQQ, and IWM, the proposal to permit Wednesday ETP Expirations, subject to the proposed limitation of two expirations beyond the current week, would protect investors and the public interest by providing the investing public and other market participants more choice and flexibility to closely tailor their investment and hedging decisions in these options and allow for a reduced premium cost of buying portfolio protection, thus allowing them to better manage their risk exposure.

The Exchange represents that it has an adequate surveillance program in place to detect manipulative trading in the proposed option expirations, in the same way that it monitors trading in the current Short Term Option Series for Wednesday SPY, QQQ and IWM expirations. The Exchange also represents that it has the necessary system capacity to support the new expirations. Finally, the Exchange does not believe that any market disruptions will be encountered with the introduction of these option expirations. As discussed above, the Exchange believes that its proposal is a modest expansion of weekly expiration dates for GLD, SLV, USO, UNG, and TLT given that it will be limited to two Wednesday expirations beyond the current week. Lastly, the Exchange believes its proposal will not be a strain on liquidity providers because of the multi-class nature of GLD, SLV, USO, UNG, and TLT and the available hedges in highly correlated instruments, as described above.

The Exchange believes that the proposal is consistent with the Act as the proposal would overall add a small number of Wednesday ETP Expirations by limiting the addition of two Wednesday expirations beyond the current week. The addition of Wednesday ETP Expirations would remove impediments to and perfect the mechanism of a free and open market by encouraging Market Makers to continue to deploy capital more efficiently and improve market quality. The Exchange believes that the proposal will allow market participants to expand hedging tools and tailor their investment and hedging needs more effectively in USO, UNG, GLD, SLV, and TLT as these funds are most likely to be utilized by market participants to hedge the underlying asset classes.

Similar to Wednesday SPY, QQQ, and IWM expirations, the introduction of Wednesday ETP Expirations is consistent with the Act as it will, among other things, expand hedging tools available to market participants and allow for a reduced premium cost of buying portfolio protection. The Exchange believes that Wednesday ETP Expirations will allow market participants to purchase options on USO, UNG, GLD, SLV, and TLT based on their timing as needed and allow them to tailor their investment and hedging needs more effectively, thus allowing them to better manage their risk exposure. Today, the Exchange lists Wednesday SPY, QQQ, and IWM Expirations.[14]

The Exchange believes the Short Term Option Series Program has been successful to date and that Wednesday ETP Expirations should simply expand the ability of investors to hedge risk against market movements stemming from economic releases or market events that occur throughout the month in the same way that the Short Term Option Series Program has expanded the landscape of hedging. There are no material differences in the treatment of Wednesday SPY, QQQ, and IWM expirations compared to the proposed Wednesday ETP Expirations. Given the similarities between Wednesday SPY, QQQ, and IWM expirations and the proposed Wednesday ETP Expirations, the Exchange believes that applying the

[10] *See* Policy .02(c) of Rule 404.

[11] *Id.*

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

[14] *See* Policy .02 of Rule 404.

provisions in Policy .02 of Rule 404 that currently apply to Wednesday SPY, QQQ, and IWM expirations is justified. For example, the Exchange believes that allowing Wednesday ETP Expirations and monthly ETP expirations in the same week will benefit investors and minimize investor confusion by providing Wednesday ETP Expirations in a continuous and uniform manner.

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. In this regard and as indicated above, the Exchange notes that the rule change is being proposed as a competitive response to filings submitted by Nasdaq ISE [15] and the Cboe Exchange.[16]

While the proposal will expand the Short Term Options Expirations to allow Wednesday ETP Expirations to be listed on the Exchange, the Exchange believes that this limited expansion for Wednesday expirations for options on USO, UNG, GLD, SLV, and TLT will not impose an undue burden on competition; rather, it will meet customer demand. The Exchange believes that market participants will continue to be able to expand hedging tools and tailor their investment and hedging needs more effectively in USO, UNG, GLD, SLV, and TLT given multi-class nature of these products and the available hedges in highly correlated instruments, as described above. Similar to Wednesday SPY, QQQ, and IWM expirations, the introduction of Wednesday ETP Expirations does not impose an undue burden on competition. The Exchange believes that it will, among other things, expand hedging tools available to market participants and allow for a reduced premium cost of buying portfolio protection. The Exchange believes that Wednesday ETP Expirations will allow market participants to purchase options on USO, UNG, GLD, SLV, and TLT based on their timing as needed and allow them to tailor their investment and hedging needs more effectively.

The Exchange does not believe the proposal will impose any burden on inter-market competition, as nothing prevents the other options exchanges from proposing similar rules to list and trade Wednesday ETP Expirations. Further, the Exchange does not believe the proposal will impose any burden on intra-market competition, as all market participants will be treated in the same manner under this proposal.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act [17] and Rule 19b–4(f)(6) [18] thereunder.

A proposed rule change filed under Rule 19b–4(f)(6) [19] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[20] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. According to the Exchange, the proposed rule change is a competitive response to a filing submitted by Nasdaq ISE that was recently approved by the Commission.[21] The Exchange has stated that waiver of the 30-day operative delay would ensure fair competition among the exchanges by allowing the Exchange to permit the listing of two Wednesday expirations for options on the ETPs. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest because the proposed rule change does not raise any new or novel issues. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.[22]

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–2023–70 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–PEARL–2023–70. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10

[15] *See supra* note 4.

[16] *See supra* note 5.

[17] 15 U.S.C. 78s(b)(3)(A)(iii).

[18] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[19] 17 CFR 240.19b–4(f)(6).

[20] 17 CFR 240.19b–4(f)(6)(iii).

[21] *See supra* note 4.

[22] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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–2023–70 and should be submitted on or before January 10, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–27921 Filed 12–19–23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99168; File No. SR–NYSENAT–2023–29]

Self-Regulatory Organizations; NYSE National, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Connectivity Fee Schedule

December 14, 2023.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on December 1, 2023, NYSE National, Inc. (''NYSE National'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Connectivity Fee Schedule (the ''Fee Schedule'') to add circuits provided by Fixed Income and Data Services (''FIDS'') for connectivity into and out of the data center in Mahwah, New Jersey (the ''MDC''). The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Connectivity Fee Schedule (the ''Fee Schedule'') to add circuits provided by Fixed Income and Data Services (''FIDS'') [4] for connectivity into and out of the data center in Mahwah, New Jersey (the ''MDC'').

As background, market participants that request to receive colocation services directly from the Exchange (''Users'') require wired circuits [5] to connect into and out of the MDC. A User's equipment in the MDC's colocation hall connects to a circuit leading out of the MDC, which connects to the User's equipment in their back office or another data center.

Before 2013, all such circuits were provided by ICE's predecessor, NYSE Euronext. In response to customer demand for more connectivity options, in 2013, the MDC opened two ''meet-me-rooms'' to telecommunications service providers (''Telecoms''),[6] to enable Telecoms to offer circuits into the MDC in competition with NYSE Euronext. Currently, 16 Telecoms operate in the meet-me-rooms and provide circuit options to Users requiring connectivity into and out of the MDC. As of June 1, 2023, more than 95% of the circuits for which Users contracted were supplied by Telecoms, and all but two of the Users that used FIDS circuits as of that date also connected to Telecom circuits in the MMRs.

The Exchange proposes to add several circuits provided by FIDS to the Fee Schedule. Specifically, the Exchange proposes to amend the Fee Schedule to add two different types of FIDS circuits, each available in three different sizes. Because FIDS is not a telecommunications provider, FIDS would purchase circuits from telecommunications providers, with portions allocated and sold to Users.

First, the Exchange proposes to amend the Fee Schedule to add ''Optic Access'' circuits supplied by FIDS. Users can use an Optic Access circuit to connect between the MDC and the FIDS access centers at the following five third-party owned data centers: (1) 111 Eighth Avenue, New York, NY; (2) 32 Avenue of the Americas, New York, NY; (3) 165 Halsey, Newark, NJ; (4) Secaucus, NJ (the ''Secaucus Access Center''); and (5) Carteret, NJ (the ''Carteret Access Center''). Optic Access circuits are available in 1 Gb, 10 Gb, and 40 Gb sizes.

Second, the Exchange proposes to amend the Fee Schedule to add lower-latency ''Optic Low Latency'' circuits supplied by FIDS that Users can use to connect between the MDC and FIDS's Secaucus Access Center or Carteret Access Center. Optic Low Latency circuits are available in 1 Gb, 10 Gb, and 40 Gb sizes.

The Exchange proposes to add the following chart to the Fee Schedule, under the new heading ''E. FIDS Circuits'':

[23] 17 CFR 200.30–3(a)(12), (59).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] Through its FIDS business (previously ICE Data Services), Intercontinental Exchange, Inc. (''ICE'') operates the MDC. The Exchange is an indirect subsidiary of ICE and is an affiliate of the New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., and NYSE Chicago, Inc. (together, the ''Affiliate SROs''). Each Affiliate SRO has submitted substantially the same proposed rule change. *See* SR–NYSE–2023–48, SR–NYSEAMER–2023–65, SR–NYSEARCA–2023–83, and SR–NYSECHX–2023–24.

[5] In addition to wired fiber optic connections, Users may use FIDS or third-party wireless connections to the MDC. In such a case, the portion of the connection closest to the MDC is wired. Other than Telecoms, Users are the only FIDS customers with equipment physically located in the MDC.

[6] In this filing, telecommunication service providers that choose to provide circuits at the MDC are referred to as ''Telecoms.'' Telecoms are licensed by the Federal Communications Commission (''FCC'') and are not required to be, or be affiliated with, a member of the Exchange or an Affiliate SRO.

Type of service	Fees
Optic Access Circuit—1 Gb	$1,500 initial charge plus $650 monthly charge.
Optic Access Circuit—10 Gb	$5,000 initial charge plus $1,900 monthly charge.
Optic Access Circuit—40 Gb	$5,000 initial charge plus $4,000 monthly charge.
Optic Low Latency Circuit—1 Gb	$1,500 initial charge plus $2,750 monthly charge.
Optic Low Latency Circuit—10 Gb	$5,000 initial charge plus $3,950 monthly charge.
Optic Low Latency Circuit—40 Gb	$5,000 initial charge plus $8,250 monthly charge.

Application and Impact of the Proposed Changes

The proposed change is not targeted at, or expected to be limited in applicability to, a specific segment of market participant. The FIDS circuits would be available for purchase for any potential User requiring a circuit between the MDC and the FIDS access centers at the third-party owned data centers listed above. The proposed changes do not apply differently to distinct types or sizes of customers. Rather, they apply to all customers equally.

Use of the services proposed in this filing are completely voluntary and available to all market participants on a non-discriminatory basis.

The proposed changes are not otherwise intended to address any other issues relating to services related to the MDC and/or related fees, and the Exchange is not aware of any problems that market participants would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Section 6(b)(5) of the Act,[8] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in 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 and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange further believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,[9] because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers, or dealers.

The Proposed Change Is Reasonable

The Exchange believes that the proposed rule change is reasonable. In considering the reasonableness of proposed services and fees, the Commission's market-based test considers ''whether the exchange was subject to significant competitive forces in setting the terms of its proposal . . . , including the level of any fees.'' [10] If the Exchange meets that burden, ''the Commission will find that its proposal is consistent with the Act unless 'there is a substantial countervailing basis to find that the terms' of the proposal violate the Act or the rules thereunder.'' [11] Here, the Exchange is subject to significant competitive forces in setting the terms on which it offers its proposal, in particular because substantially similar substitutes are available, and the third-party vendors are not at a competitive disadvantage created by the Exchange.

The proposed FIDS circuits would compete with circuits currently offered by the 16 Telecoms operating in the meet-me-rooms at the MDC. The Telecom circuits are reasonable substitutes for the FIDS circuits. The Commission has recognized that products do not need to be identical or equivalent to be considered substitutable; it is sufficient that they be substantially similar.[12] The circuits provided by FIDS and by the Telecoms all perform the same function: connecting into and out of the MDC. The providers of these circuits design them to perform with particular combinations of latency, bandwidth, price, termination point, and other factors that they believe will attract Users, and Users choose from among these competing services on the basis of their business needs.

The proposed FIDS circuits are sufficiently similar substitutes to the circuits offered by the 16 Telecoms even though the proposed FIDS circuits would all terminate in one of the five data centers mentioned above, while circuits from the 16 Telecoms could terminate in those locations or additional locations. While neither the Exchange nor FIDS knows the end point of any particular Telecom circuit, the Exchange understands that the Telecoms can offer circuits terminating in any location, including the five data center locations where the FIDS circuits would terminate. In addition, Users can choose to configure their pathway leading out of colocation in the way that best suits their business needs, which may include connecting to the User's equipment at one of the five data center locations that serve as termination points for the proposed FIDS circuits, or connecting first to one of those five data centers with a FIDS- or Telecom-supplied circuit and then further connecting to another remote location using a telecommunication provider-supplied circuit.

The proposed FIDS circuits do not have a distance or latency advantage

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78f(b)(4).

[10] Securities Exchange Act Release No. 90209 (October 15, 2020), 85 FR 67044, 67049 (October 21, 2020) (Order Granting Accelerated Approval to Establish a Wireless Fee Schedule Setting Forth Available Wireless Bandwidth Connections and Wireless Market Data Connections) (SR–NYSE–2020–05, SR–NYSEAMER–2020–05, SR–NYSEArca–2020–08, SR–NYSECHX–2020–02, SR–NYSENAT–2020–03, SR–NYSE–2020–11, SR–NYSEAMER–2020–10, SR–NYSEArca–2020–15, SR–NYSECHX–2020–05, SR–NYSENAT–2020–08) (''Wireless Approval Order''), citing Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74781 (December 9, 2008) (''2008 ArcaBook Approval Order''). *See NetCoalition* v. *SEC,* 615 F.3d 525 (D.C. Cir. 2010).

[11] Wireless Approval Order, *supra* note 10, at 67049, citing 2008 ArcaBook Approval Order, *supra* note 10, at 74781.

[12] *See* 2008 ArcaBook Approval Order, *supra* note 10, at 74789 and note 295 (recognizing that products need not be identical to be substitutable).

over the Telecoms' circuits within the MDC. FIDS has normalized (a) the distance between the meet-me-rooms and the colocation halls and (b) the distance between the rooms where the FIDS circuits are located and the colocation halls. As a result, a User choosing whether to use the proposed FIDS circuits or Telecom circuits does not face any difference in the distances or latency within the MDC.

The Exchange also believes that the proposed FIDS circuits do not have any latency or bandwidth advantage over the Telecoms' circuits as a whole outside of the MDC. FIDS would purchase the proposed FIDS circuits from third-party telecommunications providers and would allocate and resell portions of them to Users. The Exchange believes that the Telecoms operating in the meet-me-rooms offer circuits with a variety of latency and bandwidth specifications, some of which may exceed the specifications of the proposed FIDS circuits.[13] The Exchange believes that Users consider these latency and bandwidth factors—as well as other factors, such as price and termination point—in determining which circuit offerings will best serve their business needs.[14]

In sum, the Exchange does not believe that there is anything about the proposed FIDS circuits that would make the Telecoms' circuits inadequate substitutes.

Nor does the Exchange have a meaningful competitive advantage over the Telecoms by virtue of the fact that it owns and operates the MDC's meet-me-rooms. The Exchange understands that Telecoms choose to pay fees to the Exchange for the opportunity to install equipment in the MDC's meet-me-rooms because of the financial benefits those Telecoms can accrue by selling circuits to Users. It is therefore in the Exchange's best interest to set fees at the MDC—including both the meet-me-room fees that Telecoms pay and the FIDS circuit fees that Users would pay—at a level that encourages market participants, including Telecoms, to maximize their use of the MDC.[15]

Setting the FIDS circuit fees at a reasonable level makes it more likely that Users will connect into and out of the MDC. Competitive rates for circuits, whether FIDS circuits or Telecom circuits, help draw more Users and Hosted Customers [16] into the MDC, which directly benefits the Exchange by increasing the customer base to whom the Exchange can sell its colocation services (including cabinets, power, ports, and connectivity to many third-party data feeds) and encouraging greater participation on the Exchange. In other words, by setting the fees for FIDS circuits at a level attractive to Users, the Exchange spurs demand for all of the services it sells at the MDC.

If the Exchange were to set the price of the FIDS circuits too high, Users would likely respond by choosing one of the many alternative options offered by the 16 Telecoms. Conversely, if the Exchange were to offer the FIDS circuits at prices aimed at undercutting comparable Telecom circuits, the Telecoms might reassess whether it makes financial sense for them to continue to participate in the MDC's meet-me-rooms. Their departure might negatively impact User participation in colocation and on the Exchange. As a result, the Exchange is not motivated to undercut the prices of Telecom circuits.

For these reasons, the proposed change is reasonable.

The Proposed Change Is an Equitable Allocation of Fees and Credits

The Exchange believes that its proposal equitably allocates its fees among market participants. The Exchange believes that the proposed change is equitable because it would not apply differently to distinct types or sizes of market participants. Rather, it would apply to all market participants equally.

In addition, the Exchange believes that the proposal is equitable because only market participants that voluntarily select to receive the proposed FIDS circuits would be charged for them. The proposed FIDS circuits are available to all market participants on an equal basis, and all market participants that voluntarily choose to purchase a FIDS circuit are charged the same amount for that circuit as all other market participants purchasing that type of FIDS circuit.

Moreover, any telecommunications service provider licensed by the FCC is eligible to be a Telecom operating in the MRR, irrespective of size and type. The Exchange's MMR services are available to all Telecoms on an equal basis at standardized pricing.

The Proposed Change Is Not Unfairly Discriminatory

The Exchange believes its proposal is not unfairly discriminatory. The proposed change does not apply differently to distinct types or sizes of market participants. Rather, it applies to all market participants equally. The purchase of any proposed service is completely voluntary and the Fee Schedule will be applied uniformly to all market participants.

In addition, the Exchange believes that the proposal is not unfairly discriminatory because only market participants that voluntarily select to receive the proposed FIDS circuits would be charged for them. The proposed FIDS circuits are available to all market participants on an equal basis, and all market participants that voluntarily choose to purchase a FIDS circuit are charged the same amount for that circuit as all other market participants purchasing that type of FIDS circuit.

For these reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that the proposal will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of Section 6(b)(8) of the Act.[17]

The proposed change would not impose a burden on competition among national securities exchanges or among members of the Exchange. The proposed change would enhance competition in the market for circuits transmitting data into and out of colocation at the MDC by adding FIDS as the 17th provider of such circuits, in addition to the 16 Telecoms that also sell such circuits to Users. The proposed FIDS circuits do not have any latency, bandwidth, or other advantage over the Telecoms' circuits. The proposal would not burden competition in the sale of such circuits, but rather, enhance it by providing Users with an additional choice for their circuit needs.

[13] The specifications of FIDS's competitors' circuits are not publicly known. The Exchange understands that FIDS has gleaned any information it has about its competitors through anecdotal communications, by observing customers' purchasing choices in the competitive market, and from its own experience as a purchaser of circuits from telecommunications providers to build FIDS's own networks.

[14] The fact that the FIDS circuits do not have an advantage is reflected by the fact that Users choose to use Telecom circuits for the vast majority of their circuit needs. Whereas before 2013, NYSE Euronext provided 100% of such circuits, today more than 95% of the circuits that Users have contracted for are supplied by third-party Telecoms, with FIDS supplying less than 5%.

[15] *See* Securities Exchange Act Release No. 98002 (July 26, 2023), 88 FR 50232 (August 1, 2023) (SR–NYSENAT–2023–12) (''MMR Notice'').

[16] ''Hosting'' is a service offered by a User to another entity in the User's space within the MDC. The Exchange allows Users to act as Hosting Users for a monthly fee. *See* Securities Exchange Act Release No. 83351 (May 31, 2018), 83 FR 26314 (June 6, 2018) (SR–NYSENAT–2018–07). Hosting Users' customers are referred to as ''Hosted Customers.''

[17] 15 U.S.C. 78f(b)(8).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [18] and Rule 19b–4(f)(6) thereunder.[19] Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [20] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–NYSENAT–2023–29 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–NYSENAT–2023–29. 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–NYSENAT–2023–29 and should be submitted on or before January 10, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–27911 Filed 12–19–23; 8:45 am]

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[18] 15 U.S.C. 78s(b)(3)(A)(iii).

[19] 17 CFR 240.19b–4(f)(6).

[20] 15 U.S.C. 78s(b)(2)(B).

[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99179; File No. SR–NYSEAMER–2023–65]

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change To Amend the Connectivity Fee Schedule

December 14, 2023.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on November 30, 2023, NYSE American LLC (''NYSE American'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Connectivity Fee Schedule (the ''Fee Schedule'') to add circuits provided by Fixed Income and Data Services (''FIDS'') for connectivity into and out of the data center in Mahwah, New Jersey (the ''MDC''). The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Connectivity Fee Schedule (the ''Fee Schedule'') to add circuits provided by Fixed Income and Data Services (''FIDS'') [4] for connectivity into and out

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] Through its FIDS business (previously ICE Data Services), Intercontinental Exchange, Inc. (''ICE'') operates the MDC. The Exchange is an indirect subsidiary of ICE and is an affiliate of the New York Stock Exchange LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc. (together, the ''Affiliate SROs''). Each Affiliate SRO has submitted substantially the same proposed rule change. *See* SR–NYSE–2023–48, SR–NYSEARCA–2023–83, SR–NYSECHX–2023–24, and SR–NYSENAT–2023–29.

of the data center in Mahwah, New Jersey (the ''MDC'').

As background, market participants that request to receive colocation services directly from the Exchange (''Users'') require wired circuits [5] to connect into and out of the MDC. A User's equipment in the MDC's colocation hall connects to a circuit leading out of the MDC, which connects to the User's equipment in their back office or another data center.

Before 2013, all such circuits were provided by ICE's predecessor, NYSE Euronext. In response to customer demand for more connectivity options, in 2013, the MDC opened two ''meet-me-rooms'' to telecommunications service providers (''Telecoms''),[6] to enable Telecoms to offer circuits into the MDC in competition with NYSE Euronext. Currently, 16 Telecoms operate in the meet-me-rooms and provide circuit options to Users requiring connectivity into and out of the MDC. As of June 1, 2023, more than 95% of the circuits for which Users contracted were supplied by Telecoms, and all but two of the Users that used FIDS circuits as of that date also connected to Telecom circuits in the MMRs.

The Exchange proposes to add several circuits provided by FIDS to the Fee Schedule. Specifically, the Exchange proposes to amend the Fee Schedule to add two different types of FIDS circuits, each available in three different sizes. Because FIDS is not a telecommunications provider, FIDS would purchase circuits from telecommunications providers, with portions allocated and sold to Users.

First, the Exchange proposes to amend the Fee Schedule to add ''Optic Access'' circuits supplied by FIDS. Users can use an Optic Access circuit to connect between the MDC and the FIDS access centers at the following five third-party owned data centers: (1) 111 Eighth Avenue, New York, NY; (2) 32 Avenue of the Americas, New York, NY; (3) 165 Halsey, Newark, NJ; (4) Secaucus, NJ (the ''Secaucus Access Center''); and (5) Carteret, NJ (the ''Carteret Access Center''). Optic Access circuits are available in 1 Gb, 10 Gb, and 40 Gb sizes.

Second, the Exchange proposes to amend the Fee Schedule to add lower-latency ''Optic Low Latency'' circuits supplied by FIDS that Users can use to connect between the MDC and FIDS's Secaucus Access Center or Carteret Access Center. Optic Low Latency circuits are available in 1 Gb, 10 Gb, and 40 Gb sizes.

The Exchange proposes to add the following chart to the Fee Schedule, under the new heading ''E. FIDS Circuits'':

Type of service	Fees
Optic Access Circuit—1 Gb	$1,500 initial charge plus $650 monthly charge.
Optic Access Circuit—10 Gb	$5,000 initial charge plus $1,900 monthly charge.
Optic Access Circuit—40 Gb	$5,000 initial charge plus $4,000 monthly charge.
Optic Low Latency Circuit—1 Gb	$1,500 initial charge plus $2,750 monthly charge.
Optic Low Latency Circuit—10 Gb	$5,000 initial charge plus $3,950 monthly charge.
Optic Low Latency Circuit—40 Gb	$5,000 initial charge plus $8,250 monthly charge.

Application and Impact of the Proposed Changes

The proposed change is not targeted at, or expected to be limited in applicability to, a specific segment of market participant. The FIDS circuits would be available for purchase for any potential User requiring a circuit between the MDC and the FIDS access centers at the third-party owned data centers listed above. The proposed changes do not apply differently to distinct types or sizes of customers. Rather, they apply to all customers equally.

Use of the services proposed in this filing are completely voluntary and available to all market participants on a non-discriminatory basis.

The proposed changes are not otherwise intended to address any other issues relating to services related to the MDC and/or related fees, and the Exchange is not aware of any problems that market participants would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Section 6(b)(5) of the Act,[8] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in 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 and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange further believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,[9] because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers, or dealers.

The Proposed Change Is Reasonable

The Exchange believes that the proposed rule change is reasonable. In considering the reasonableness of proposed services and fees, the Commission's market-based test considers ''whether the exchange was subject to significant competitive forces in setting the terms of its proposal . . . , including the level of any fees.'' [10] If the Exchange meets that burden, ''the Commission will find that

[5] In addition to wired fiber optic connections, Users may use FIDS or third-party wireless connections to the MDC. In such a case, the portion of the connection closest to the MDC is wired. Other than Telecoms, Users are the only FIDS customers with equipment physically located in the MDC.

[6] In this filing, telecommunication service providers that choose to provide circuits at the MDC are referred to as ''Telecoms.'' Telecoms are licensed by the Federal Communications Commission (''FCC'') and are not required to be, or be affiliated with, a member of the Exchange or an Affiliate SRO.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78f(b)(4).

[10] Securities Exchange Act Release No. 90209 (October 15, 2020), 85 FR 67044, 67049 (October 21, 2020) (Order Granting Accelerated Approval to Establish a Wireless Fee Schedule Setting Forth Available Wireless Bandwidth Connections and Wireless Market Data Connections) (SR–NYSE–2020–05, SR–NYSEAMER–2020–05, SR–NYSEArca–2020–08, SR–NYSECHX–2020–02, SR–NYSENAT–2020–03, SR–NYSE–2020–11, SR–NYSEAMER–2020–10, SR–NYSEArca–2020–15, SR–NYSECHX–2020–05, SR–NYSENAT–2020–08) (''Wireless Approval Order''), citing Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74781 (December 9, 2008) (''2008 ArcaBook Approval Order''). *See NetCoalition* v. *SEC,* 615 F.3d 525 (D.C. Cir. 2010).

its proposal is consistent with the Act unless 'there is a substantial countervailing basis to find that the terms' of the proposal violate the Act or the rules thereunder.'' [11] Here, the Exchange is subject to significant competitive forces in setting the terms on which it offers its proposal, in particular because substantially similar substitutes are available, and the third-party vendors are not at a competitive disadvantage created by the Exchange.

The proposed FIDS circuits would compete with circuits currently offered by the 16 Telecoms operating in the meet-me-rooms at the MDC. The Telecom circuits are reasonable substitutes for the FIDS circuits. The Commission has recognized that products do not need to be identical or equivalent to be considered substitutable; it is sufficient that they be substantially similar.[12] The circuits provided by FIDS and by the Telecoms all perform the same function: connecting into and out of the MDC. The providers of these circuits design them to perform with particular combinations of latency, bandwidth, price, termination point, and other factors that they believe will attract Users, and Users choose from among these competing services on the basis of their business needs.

The proposed FIDS circuits are sufficiently similar substitutes to the circuits offered by the 16 Telecoms even though the proposed FIDS circuits would all terminate in one of the five data centers mentioned above, while circuits from the 16 Telecoms could terminate in those locations or additional locations. While neither the Exchange nor FIDS knows the end point of any particular Telecom circuit, the Exchange understands that the Telecoms can offer circuits terminating in any location, including the five data center locations where the FIDS circuits would terminate. In addition, Users can choose to configure their pathway leading out of colocation in the way that best suits their business needs, which may include connecting to the User's equipment at one of the five data center locations that serve as termination points for the proposed FIDS circuits, or connecting first to one of those five data centers with a FIDS- or Telecom-supplied circuit and then further connecting to another remote location using a telecommunication provider-supplied circuit.

The proposed FIDS circuits do not have a distance or latency advantage over the Telecoms' circuits within the MDC. FIDS has normalized (a) the distance between the meet-me-rooms and the colocation halls and (b) the distance between the rooms where the FIDS circuits are located and the colocation halls. As a result, a User choosing whether to use the proposed FIDS circuits or Telecom circuits does not face any difference in the distances or latency within the MDC.

The Exchange also believes that the proposed FIDS circuits do not have any latency or bandwidth advantage over the Telecoms' circuits as a whole outside of the MDC. FIDS would purchase the proposed FIDS circuits from third-party telecommunications providers and would allocate and resell portions of them to Users. The Exchange believes that the Telecoms operating in the meet-me-rooms offer circuits with a variety of latency and bandwidth specifications, some of which may exceed the specifications of the proposed FIDS circuits.[13] The Exchange believes that Users consider these latency and bandwidth factors—as well as other factors, such as price and termination point—in determining which circuit offerings will best serve their business needs.[14]

In sum, the Exchange does not believe that there is anything about the proposed FIDS circuits that would make the Telecoms' circuits inadequate substitutes.

Nor does the Exchange have a meaningful competitive advantage over the Telecoms by virtue of the fact that it owns and operates the MDC's meet-me-rooms. The Exchange understands that Telecoms choose to pay fees to the Exchange for the opportunity to install equipment in the MDC's meet-me-rooms because of the financial benefits those Telecoms can accrue by selling circuits to Users. It is therefore in the Exchange's best interest to set fees at the MDC—including both the meet-me-room fees that Telecoms pay and the FIDS circuit fees that Users would pay—at a level that encourages market participants, including Telecoms, to maximize their use of the MDC.[15]

Setting the FIDS circuit fees at a reasonable level makes it more likely that Users will connect into and out of the MDC. Competitive rates for circuits, whether FIDS circuits or Telecom circuits, help draw more Users and Hosted Customers [16] into the MDC, which directly benefits the Exchange by increasing the customer base to whom the Exchange can sell its colocation services (including cabinets, power, ports, and connectivity to many third-party data feeds) and encouraging greater participation on the Exchange. In other words, by setting the fees for FIDS circuits at a level attractive to Users, the Exchange spurs demand for all of the services it sells at the MDC.

If the Exchange were to set the price of the FIDS circuits too high, Users would likely respond by choosing one of the many alternative options offered by the 16 Telecoms. Conversely, if the Exchange were to offer the FIDS circuits at prices aimed at undercutting comparable Telecom circuits, the Telecoms might reassess whether it makes financial sense for them to continue to participate in the MDC's meet-me-rooms. Their departure might negatively impact User participation in colocation and on the Exchange. As a result, the Exchange is not motivated to undercut the prices of Telecom circuits.

For these reasons, the proposed change is reasonable.

The Proposed Change Is an Equitable Allocation of Fees and Credits

The Exchange believes that its proposal equitably allocates its fees among market participants. The Exchange believes that the proposed change is equitable because it would not apply differently to distinct types or sizes of market participants. Rather, it would apply to all market participants equally.

In addition, the Exchange believes that the proposal is equitable because only market participants that voluntarily select to receive the proposed FIDS circuits would be charged for them. The proposed FIDS circuits are available to all market participants on an equal basis, and all

[11] Wireless Approval Order, *supra* note 10, at 67049, citing 2008 ArcaBook Approval Order, *supra* note 10, at 74781.

[12] *See* 2008 ArcaBook Approval Order, *supra* note 10, at 74789 and note 295 (recognizing that products need not be identical to be substitutable).

[13] The specifications of FIDS's competitors' circuits are not publicly known. The Exchange understands that FIDS has gleaned any information it has about its competitors through anecdotal communications, by observing customers' purchasing choices in the competitive market, and from its own experience as a purchaser of circuits from telecommunications providers to build FIDS's own networks.

[14] The fact that the FIDS circuits do not have an advantage is reflected by the fact that Users choose to use Telecom circuits for the vast majority of their circuit needs. Whereas before 2013, NYSE Euronext provided 100% of such circuits, today more than 95% of the circuits that Users have contracted for are supplied by third-party Telecoms, with FIDS supplying less than 5%.

[15] *See* Securities Exchange Act Release No. 97999 (July 26, 2023), 88 FR 50190 (August 1, 2023) (SR–NYSEAMER–2023–36) (''MMR Notice'').

[16] ''Hosting'' is a service offered by a User to another entity in the User's space within the MDC. The Exchange allows Users to act as Hosting Users for a monthly fee. *See* Securities Exchange Act Release No. 76009 (September 29, 2015), 80 FR 60213 (October 5, 2015) (SR–NYSEMKT–2015–67). Hosting Users' customers are referred to as ''Hosted Customers.''

market participants that voluntarily choose to purchase a FIDS circuit are charged the same amount for that circuit as all other market participants purchasing that type of FIDS circuit.

Moreover, any telecommunications service provider licensed by the FCC is eligible to be a Telecom operating in the MRR, irrespective of size and type. The Exchange's MMR services are available to all Telecoms on an equal basis at standardized pricing.

The Proposed Change Is Not Unfairly Discriminatory

The Exchange believes its proposal is not unfairly discriminatory. The proposed change does not apply differently to distinct types or sizes of market participants. Rather, it applies to all market participants equally. The purchase of any proposed service is completely voluntary and the Fee Schedule will be applied uniformly to all market participants.

In addition, the Exchange believes that the proposal is not unfairly discriminatory because only market participants that voluntarily select to receive the proposed FIDS circuits would be charged for them. The proposed FIDS circuits are available to all market participants on an equal basis, and all market participants that voluntarily choose to purchase a FIDS circuit are charged the same amount for that circuit as all other market participants purchasing that type of FIDS circuit.

For these reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that the proposal will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of Section 6(b)(8) of the Act.[17]

The proposed change would not impose a burden on competition among national securities exchanges or among members of the Exchange. The proposed change would enhance competition in the market for circuits transmitting data into and out of colocation at the MDC by adding FIDS as the 17th provider of such circuits, in addition to the 16 Telecoms that also sell such circuits to Users. The proposed FIDS circuits do not have any latency, bandwidth, or other advantage over the Telecoms' circuits. The proposal would not burden competition in the sale of such circuits, but rather, enhance it by providing Users with an additional choice for their circuit needs.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[18] and Rule 19b–4(f)(6) thereunder.[19] Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[20] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–NYSEAMER–2023–65 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–NYSEAMER–2023–65. 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–NYSEAMER–2023–65 and should be submitted on or before January 10, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–27920 Filed 12–19–23; 8:45 am]

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[17] 15 U.S.C. 78f(b)(8).

[18] 15 U.S.C. 78s(b)(3)(A)(iii).

[19] 17 CFR 240.19b–4(f)(6).

[20] 15 U.S.C. 78s(b)(2)(B).

[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99177; File No. SR–CboeEDGX–2023–075]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule

December 14, 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 1, 2023, Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') 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 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fee Schedule.[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 17 options venues to which market participants may direct their order flow. Based on publicly available information, no single options exchange has more than 16% of the market share.[4] Thus, in such a low-concentrated and highly competitive market, no single options exchange, including the Exchange, possesses significant pricing power in the execution of option order flow. The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to fee changes. Accordingly, competitive forces constrain the Exchange's transaction fees, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable.

The Exchange's Fee Schedule sets forth standard rebates and rates applied per contract. For example, the Exchange provides standard rebates ranging from $0.01 up to $0.21 per contract for Customer orders in both Penny and Non-Penny Securities. The Fee Codes and Associated Fees section of the Fees Schedule also provides for certain fee codes associated with certain order types and market participants that provide for various other fees or rebates. For example, the Exchange assesses a fee of $0.24 per contract for Market Maker orders that remove liquidity in Non-Penny Securities, yielding fee code NT; provides a rebate of $0.01 per contract for Customer-to-Non-Customer (*i.e.,* ''Customer (contra Non-Customer)'') orders (that both add and remove liquidity) and Customer-to-Customer (*i.e.,* ''Customer (contra Customer)'') orders that remove liquidity, in Non-Penny Securities, yielding fee code NC; and provides a rebate of $0.01 per contract for Customer (contra Non-Customer) orders and Customer (contra Customer) orders that remove liquidity, in Penny Securities, yielding fee code PC. Customer (contra Customer) orders that add liquidity receive no rebate.

Fee Codes

The Exchange proposes to amend its Fee Schedule to adopt new fee code CA, which will apply to Customer (contra Non-Customer) orders that add liquidity; the proposed fee code provides a rebate of $0.01 per contract.[5] This is the same rebate these orders currently receive pursuant to fee codes NC and PC.

The Exchange also proposes to amend the definition of current fee code NC to provide that such fee code (and corresponding standard rebate of $0.01 per contract) applies to all Simple Customer (*i.e.,* Customer (contra Non-Customer) and Customer (contra Customer)) orders that remove liquidity in Non-Penny Securities. Similarly, the Exchange proposes to amend the definition of current fee code PC to provide that such fee code (and corresponding standard rebate of $0.01 per contract) applies to all Simple Customer (*i.e.,* Customer (contra Non-Customer) and Customer (contra Customer)) orders that remove liquidity in Penny Securities. These rebates currently apply to these orders today; the proposed amendments to these definitions merely reflect the removal of Customer (contra Non-Customer) orders that add liquidity from fee codes NC and PC (and moving such orders to proposed fee code CA). The Exchange also proposes to increase the standard fee for Market Maker orders that remove liquidity in Non-Penny Securities (*i.e.,* yield fee code NT) from $0.24 to $0.70.

Customer Volume Tiers

The Exchange proposes to amend Footnote 1 (Customer Volume Tiers), applicable to orders yielding fee codes PC and NC. Pursuant to Footnote 1 of the Fee Schedule, the Exchange currently offers four Customer Volume Tiers that provide rebates between $0.10 and $0.21 per contract for qualifying customer orders yielding fee codes PC and NC where a Member meets required criteria. The Exchange proposes to amend this Customer Volume Tier program to add orders yielding fee code CA to the list of qualifying customer

[3] The Exchange initially filed the proposed fee changes on December 1, 2023 (SR–CboeEDGX–2023–073). On December 1, 2023, the Exchange withdrew that filing and submitted SR–CboeEDGX–2023–075.

[4] *See* Cboe Global Markets U.S. Options Market Monthly Volume Summary (November 29, 2023), available at *https://markets.cboe.com/us/options/market_statistics/*.

[5] The Exchange proposes to amend Footnote 5 (Orders Submitted with a Designated Give Up) to include orders yielding fee code CA.

orders that may be eligible for the Customer Volume Tier program.

The Exchange also proposes to amend the required criteria for Tiers 3 and 4. Currently, to qualify for Tier 3, a Member must have (1) an ADV[6] in Customer orders greater than or equal to 1.00% of average OCV;[7] and (2) an ADV in Customer Non-Crossing orders of greater than or equal to 0.40% of average OCV. To qualify for Tier 4, a Member must have (1) an ADV in Customer orders greater than or equal to 0.75% of average OCV; (2) an ADV in Customer or Market Maker orders greater than or equal to 1.50% of average OCV; (3) an ADV in Customer Non-Crossing orders greater than or equal to 0.50% of average OCV; and (4) an ADAV[8] in Customer Non-Crossing orders greater than or equal to 0.40% of average OCV.

The Exchange proposes to amend Tier 3 required criteria to state that a Member must have (1) an ADV in Customer orders greater than or equal to 1.00% of average OCV; (2) an ADV in Customer Non-Crossing orders of greater than or equal to 0.75% of average OCV; and (3) an ADAV in Simple Customer Non-Crossing orders (*i.e.,* yielding fee code CA) greater than or equal to 0.45% of average OCV. The Exchange proposes to amend Tier 4 required criteria to state that a Member must have (1) an ADV in Customer orders greater than or equal to 1.50% of average OCV; and (2) an ADAV in Simple Customer Non-Crossing orders (*i.e.,* yielding fee code CA) greater than or equal to 0.65% of average OCV.

Additionally, the Exchange proposes to change the rebate for Tier 4. Specifically, the Exchange proposes to amend the Tier 4 rebate from $0.21 per contract to $0.18 per contract.[9] The rebates for Tiers 1, 2, and 4 remain unchanged.

Finally, the Exchange proposes to add new Customer Volume Tier 5 to provide a rebate of $0.22 per contract if a Member has (1) an ADV in Customer orders of greater than or equal to 2.00% of average OCV; (2) an ADAV in Simple Customer Non-Crossing orders (*i.e.,* yielding fee code CA) greater than or equal to 1.25% of average OCV; and (3) a QCC agency Volume of greater than or equal to 2,000,000 contracts per month, with both sides of each transaction being Non-Customer, Non-Professional.[10]

The Exchange believes that the proposed changes to the Customer Volume Tier program are designed overall to incentivize more Customer order flow and to direct an increase of order flow to the EDGX Options Order Book. The Exchange believes that an increase in Customer order flow and overall order flow to the Exchange's Book creates more trading opportunities, which, in turn attracts Market Makers. A resulting increase in Market Maker activity may facilitate tighter spreads, which may lead to an additional increase of order flow from other market participants, further contributing to a deeper, more liquid market to the benefit of all market participants by creating a more robust and well-balanced market ecosystem.

Supplemental AIM Tiers

The Exchange proposes to amend the Supplemental AIM[11] Tiers set forth in Footnote 9 (Automated Improvement Mechanism (''AIM'') Penny Tiers). The Exchange currently offers two tiers related to Customer volume under Footnote 9 applicable to orders yielding fee code ''BC'', which fee code is appended to Customer Agency orders executed in AIM. The AIM Tiers currently provide enhanced rebates of $0.09 and $0.10 per contract for qualifying orders that yield fee code BC where a Member meets the respective tier's volume threshold.

The Exchange also offers two Supplemental AIM Tiers under Footnote 9 which provide additional rebates (*i.e.,* in addition to the standard rebate or enhanced rebates Members may receive for Customer Agency orders executed in AIM). The tiers are applicable to fee code BC and applied on an order-by-order basis.

Supplemental AIM Tier 1 provides an additional rebate of $0.02 per contract where (i) a Member has an ADV in Customer Orders greater than or equal to 0.50% of average OCV and (ii) the order has an Interaction Rate greater than or equal to 51% and less than 80%. Supplemental AIM Tier 2 provides an additional rebate of $0.05 per contract where (i) a Member has an ADV in Customer Orders greater than or equal to 0.50% of average OCV and (ii) the order has an Interaction Rate greater than or equal to 0% and less than 51%. The ''Interaction Rate'' of an order refers to the percentage of the Agency Order that traded against the Initiating Order.[12]

The Exchange proposes to amend Supplemental AIM Tier 1 criteria to require that (1) Member has an ADV in Customer Orders greater than or equal to 0.50% of average OCV; and (2) the order has an Interaction Rate greater than or equal to 51% and less than 70%. The Exchange also proposes to amend Supplemental AIM Tier 2 criteria to require that (1) Member has an ADV in Customer Orders greater than or equal to 0.50% of average OCV; and (2) the order has an Interaction Rate greater than or equal to 30% and less than 51%. The Exchange also proposes to reduce the current rebate for Supplemental AIM Tier 2 from $0.05 per contract to $0.03 per contract.

Finally, the Exchange proposes to add new Supplemental AIM Tier 3, which would provide an additional rebate of $0.05 per contract where (i) Member has an ADV in Customer Orders greater than or equal to 0.50% of average OCV; and (ii) the order has an Interaction Rate greater than or equal to 0% and less than 30%.

The proposed changes to the Supplemental AIM Tiers are designed to incentivize order flow providers to continue to route AIM orders to the Exchange, notwithstanding the potential for such orders to be broken up.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[13] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[14] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in

[6] ''ADV'' means average daily volume calculated as the number of contracts added or removed, combined, per day.

[7] ''OCV'' means the total equity and ETF options volume that clears in the Customer range at the Options Clearing Corporation (''OCC'') for the month for which the fees apply, excluding volume on any day that the Exchange experiences an Exchange System Disruption and on any day with a scheduled early market close.

[8] ''ADAV'' means average daily added volume calculated as the number of contracts added, per day.

[9] The Exchange proposes to amend this tier rebate as described in the table in Footnote 1 and amend the amounts of the rebates in the Standard Rates table.

[10] The Exchange proposes to add this tier rebate as described in the table in Footnote 1 and add to the rebates in the Standard Rates table.

[11] The term ''AIM'' refers to Automated Improvement Mechanism.

[12] An Options Member may electronically submit for execution in AIM an order it represents as agent (''Agency Order'') against principal interest or a solicited order(s) (except for an order for the account of any Options Market Maker registered in the applicable series on the Exchange) (an ''Initiating Order''). *See* EDGX Options Rule 21.19.

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(5).

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) [15] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with Section 6(b)(4) of the Act,[16] which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities.

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 proposed rule change 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 market participants. The Exchange is only one of several options venues to which market participants may direct their order flow, and it represents a small percentage of the overall market. The proposed fee changes reflect a competitive pricing structure designed to incentivize market participants to direct their order flow, which the Exchange believes would enhance market quality to the benefit of all Members.

Fee Codes

The Exchange believes its proposed adoption of new fee code CA, which applies to Customer (contra Non-Customer) orders that add liquidity and which provides a rebate of $0.01 per contract, and its proposal to amend the definition of current fee code NC and PC is consistent with Section 6(b)(4) of the Act in that the proposed changes are reasonable, equitable and not unfairly discriminatory. Previously, Customer (contra Non-Customer) orders that add liquidity were assigned fee code PC or NC, depending on whether the order was in Penny Securities or Non-Penny Securities, respectively, and received a rebate of $0.01 per contract. Under the proposed changes, Customers executing an order in Penny and Non-Penny Securities with a Non-Customer on the liquidity adding side of orders executed in Penny and Non-Penny Securities will still be eligible for a rebate of $0.01 per contract, merely using a different fee code. Thus, the Exchange believes that the proposed change will continue to incentivize Customer order flow in Penny and Non-Penny Securities, which may lead to an increase in liquidity on the Exchange. An overall increase in liquidity benefits all market participants by providing more trading opportunities, which attracts Market Makers. An increase in Market Maker activity in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants. The Exchange believes the proposed changes are equitable and not unfairly discriminatory because they will apply equally to all liquidity adding sides of Customer-to-Non-Customer transactions in Penny and Non-Penny Securities, *i.e.* all Customers will continue to receive a $0.01 rebate for these transactions. Further, the changes to fee codes NC and PC are reasonable, as the Exchange will, under the proposed rule changes, still offer a rebate of $0.01 for Simple Customer orders (including both Customer (contra Non-Customer) and Customer (contra-Customer), as is currently the case) that remove liquidity in Non-Penny and Penny Securities, respectively.[17]

The Exchange also believes the proposed change to increase the standard fee for Market Maker orders that remove liquidity in Non-Penny Securities (*i.e.,* yield fee code NT) from $0.24 to $0.70 is reasonable, equitable, and not unfairly discriminatory. The Exchange believes the proposed rate change is reasonable because, as stated above, in order to operate in the highly competitive options markets, the Exchange and its competing exchanges seek to offer similar pricing structures, including assessing comparable rates for various types of orders. Thus, the Exchange believes the proposed rates are reasonable as they are generally aligned with and competitive with the amounts assessed for similar Market Maker orders on other options exchanges.[18] The Exchange also believes that amending the standard fee amount associated with fee code NT represents an equitable allocation of fees and is not unfairly discriminatory because the fee will continue to automatically and uniformly apply to all Members' respective qualifying Market Maker orders.

Customer Volume Tiers

The Exchange believes the proposed changes to the Customer Volume Tier program are reasonable because they continue to provide opportunities for Members to receive higher rebates by providing for incrementally increasing volume-based criteria they can reach for. The Exchange believes the tiers, as modified, continue to serve as a reasonable means to encourage Members to increase their liquidity on the Exchange, particularly in connection with additional Customer Order flow to the Exchange in order to benefit from the proposed enhanced rebates. The Exchange also notes that any overall increased liquidity that may result from the proposed tier incentives benefits all investors by offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency and improving investor protection.

The Exchange believes that the proposed changes to the Customer Volume Tier program represent an equitable allocation of fees and is not unfairly discriminatory because Members will be eligible for these tiers and the corresponding enhanced rebates will apply uniformly to all Members that reach the proposed tier criteria. The Exchange believes that a number of market participants have a reasonable opportunity to satisfy the tiers' criteria as modified. While the Exchange has no way of knowing whether this proposed rule change would definitively result in any particular Member qualifying for the tiers as amended, the Exchange anticipates at least one Member meeting, or being reasonably able to meet, the revised Tier 1 criteria; approximately three Members being reasonably able to meet the revised Tier 2 criteria; approximately one Member being reasonably able to meet the revised Tier 3 criteria; approximately two Members being reasonably able to meet the revised Tier 4 criteria; and currently no Members meeting the revised Tier 5 criteria. However, the proposed tiers, as amended, are open to any Member that satisfies the tier's criteria. The Exchange also notes that the proposed changes will not adversely impact any Member's pricing or their ability to qualify for other rebate tiers. Rather, should a Member not meet the proposed criteria, the Member will

[15] *Id.*

[16] 15 U.S.C. 78f(b)(4).

[17] Customer (contra Customer) trades that add liquidity in Penny and Non-Penny Securities will continue to not be subject to fees. *See* EDGX Options Fee Schedule, Fee Codes and Associated Fees, Fee Codes TP and TN.

[18] *See e.g.,* MEMX Options Exchange Fee Schedule, Transactions Fees, which assesses a charge of $1.10 for Market Maker orders that remove liquidity in Non-Penny Securities.

merely not receive the corresponding enhanced rebates.

Supplemental AIM Tiers

The Exchange believes its proposed changes related to the Supplemental AIM Tiers are reasonable, equitable and not unfairly discriminatory. The Exchange believes the proposed changes to Supplemental AIM Tiers 1 and 2 for orders yielding fee code BC are reasonable because the tiers continue to provide an enhanced rebate opportunity (albeit at a lower amount in the case of Supplemental AIM Tier 2), which the Exchange believes is still commensurate with the amended criteria. The Exchange also believes the proposed rule change to adopt new Supplemental AIM Tier 3 is reasonable because it provides an additional opportunity for Members to receive enhanced rebates for meeting certain thresholds, based on the Interaction Rate of the AIM order. The Exchange also believes the proposed enhanced rebate is commensurate with the proposed criteria. The proposed rule change is equitable and unfairly discriminatory as the amended criteria for Supplemental AIM Tiers 1 and 2, the amended rebate amount for Supplemental AIM Tier 2, and new Supplemental AIM Tier 3 apply uniformly to all Members submitting AIM Agency Orders to the Exchange. While the Exchange has no way of knowing whether this proposed rule change would definitively result in any particular Member qualifying for the tiers, as amended, the Exchange anticipates at least six Members meeting, or being reasonably able to meet, the revised Tier 1 criteria; at least six Members meeting, or being reasonably able to meet, the revised Tier 2 criteria; and at least six Members meeting, or being reasonably able to meet, new Tier 3 criteria. However, the proposed tiers are open to any Member that satisfies the tiers' criteria.

Overall, the Exchange believes the proposal encourages the use of AIM. As noted, the Exchange believes that the proposed changes would incentivize Agency Order flow to AIM Auctions, notwithstanding the potential for such orders to be broken up. Additional auction order flow provides market participants with additional trading opportunities at improved prices.

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. Particularly, the proposed fee code changes apply uniformly and automatically to all Members' respective qualifying orders. As noted above, under the proposed changes, Customers executing an order in Penny and Non-Penny Securities with a Non-Customer on the liquidity adding side of orders executed in Penny and Non-Penny Securities will still be eligible for a rebate of $0.01 per contract, merely using a different fee code. Further, the Exchange will, under the proposed rule changes, still offer a rebate of $0.01 for Simple Customer orders (including both Customer (contra Non-Customer) and Customer (contra-Customer), as is currently the case) that remove liquidity in Non-Penny and Penny Securities, respectively. Thus, orders assigned to current fee code NC and PC will continue to receive the same rebate of $0.01, under fee codes CA, NC, and PC. Additionally, the proposed Customer Volume Tier and Supplement AIM Tier changes apply to all Members equally in that all Members are eligible to achieve the tiers' proposed criteria, have a reasonable opportunity to meet the tiers' proposed criteria and will all receive the corresponding enhanced rebates (existing and as amended) if such criteria is met. Overall, the proposed change is designed to attract additional Customer order flow to the Exchange and overall order flow directly to the Exchange's Book. The Exchange believes that the modified and new tier criteria will incentivize market participants to strive to increase such order flow to the Exchange to receive the corresponding enhanced rebates and, as a result, increase trading opportunities, attract further Market Maker activity, further incentivize the provision of liquidity and continued order flow to the Book, and improve price transparency on the Exchange. Greater overall order flow and pricing transparency benefits all market participants on the Exchange by generally providing a cycle of more trading opportunities, enhancing market quality, and continuing to encourage Members to submit order flow and continue to contribute towards a robust and well-balanced market ecosystem to the benefit of all market participants.

Next, the Exchange believes the proposed rule change 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 16 other options exchanges and 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 options exchange has more than 16% of the market share.[19] 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.'' [20] 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'. . . .''.[21] 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.

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.

[19] *See supra* note 3.

[20] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[21] *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)).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [22] and paragraph (f) of Rule 19b–4 [23] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include file number SR–CboeEDGX–2023–075 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–2023–075. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeEDGX–2023–075 and should be submitted on or before January 10, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

Sherry R. Haywood,

Assistant Secretary.

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[22] 15 U.S.C. 78s(b)(3)(A).

[23] 17 CFR 240.19b–4(f).

[24] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99169; File No. SR–OCC–2023–008]

Self-Regulatory Organizations; the Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Concerning Amendments to the Options Clearing Corporation's Collateral Risk Management Policy and Margin Policy

December 14, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'' or ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 4, 2023, The Options Clearing Corporation (''OCC'' or ''Corporation'') 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 primarily by OCC. OCC filed the proposed rule change pursuant to Section 19(b)(3)(A)(i) [3] of the Act and Rule 19b–4(f)(1) [4] thereunder, such that the proposed rule change was immediately effective upon filing with the Commission. 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.

[3] 15 U.S.C. 78s(b)(3)(A)(i).

[4] 17 CFR 240.19b–4(f)(1).

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

This proposed rule change would amend OCC's Collateral Risk Management Policy (''CRM Policy'') and Margin Policy (collectively, ''OCC Policies''). The proposed changes are designed to update the OCC Policies to better align the descriptions therein with OCC's current practices, delete extraneous information, and make other non-substantive clarifying, conforming and administrative changes.

The proposed changes to the OCC Policies are included in confidential Exhibits 5A and 5B to File No. SR–OCC–2023–008. Material proposed to be added to the OCC Policies as currently in effect is underlined and material proposed to be deleted is marked in strikethrough text. All capitalized terms not defined herein have the same meaning as set forth in the OCC By-Laws and Rules.[5]

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC 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. OCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

As the sole clearing agency for standardized equity options listed on national securities exchanges registered with the Commission (''listed options''), OCC is exposed to certain risks, including credit risk arising from its relationships with the Clearing Members for which OCC becomes the buyer to every seller and the seller to ever buyer with respect to listed options. In order to manage counterparty credit risk and mitigate related systemic risks, OCC requires Clearing Members to collateralize financial obligations that result from maintaining options, futures and stock loan positions at OCC.

OCC maintains policies filed with the Commission as OCC rules that are designed to address such credit risk,

[5] OCC's By-Laws and Rules can be found on OCC's public website: *https://www.theocc.com/Company-Information/Documents-and-Archives/By-Laws-and-Rules.*

including the CRM Policy and the Margin Policy. The CRM Policy identifies OCC's approach for managing the risks associated with accepting collateral deposits.[6] Specifically, the CRM Policy sets the governance processes for establishing and maintaining standards used to determine acceptable forms of collateral, as well as the methodology for establishing the valuation practices, including applicable haircuts and concentration limits to effectively manage OCC's credit exposure.[7] In addition, the CRM Policy describes the requirements for periodically evaluating the forms of accepted collateral and the ongoing adequacy of the valuation processes.[8] The Margin Policy describes OCC's approach to managing credit exposure presented by its Clearing Members by requiring Clearing Members to deposit margin, which OCC would use to cover losses if a member defaults.[9] The Margin Policy addresses positions considered for margin calculations, cross-margining, treatment of collateral included in margin calculations, key margin assumptions, OCC's margin methodologies, protocols for margin calls and adjustments, and margin monitoring, including through daily backtesting and model validation that OCC conducts to assess the performance of its margin methodologies.[10]

Consistent with regulatory obligations,[11] OCC and its Board reviews these risk management policies at least annually. Through these annual reviews, OCC has identified proposed revisions intended to revise certain descriptions to better reflect current practices, remove extraneous information and make other non-substantive, clarifying and administrative changes to the text of those policies. These changes are designed to enhance the clarity of OCC's internal governance arrangements and are not expected to have any impact on OCC's Clearing Members or other market participants.

(1) Purpose

OCC proposes to make the following changes to the CRM Policy and Margin Policy to better reflect current practices, remove extraneous information and make other non-substantive, clarifying and administrative changes to the text of those policies.

1. CRM Policy

OCC proposes to add a statement in the *Purpose* section that the CRM Policy sets forth processes to establish and maintain standards used to ''maintain a collateral system that is well-designed and operationally flexible.'' OCC's Collateral Management system meets this standard today and no changes to its operations would be required. The proposed revision would merely clarify that OCC's collateral system conforms to the standard established at Principle 5, Key Consideration 6 of the Principles for Financial Market Infrastructures.[12]

OCC proposes to insert an *Applicability and Scope* section that, consistent with other recently filed policies,[13] would identify the primary OCC business units that support OCC's approach to managing the risks associated with accepting collateral deposits, including but not limited to Pricing and Margins (''P&M''), Collateral Services, and Quantitative Risk Management (''QRM'').

OCC proposes to retitle the *Policy Detail* section as the *Policy Content* section to conform with current OCC titling conventions as reflected in other policies. OCC also proposes to amend a statement therein that Clearing Members must maintain sufficient collateral at OCC to meet their margin and clearing fund obligations ''at all times.'' OCC proposes to remove this phrase that could imply that a Clearing Member's failure to maintain sufficient collateral would constitute a violation of OCC's Rules (*i.e.,* if the value of the collateral on deposit fell below the Clearing Member's margin requirement). Such a reading would be inconsistent with OCC operations and the implicit intent behind OCC Rules 601 and 1001, which establish OCC's ability to call for margin and Clearing Fund collateral as needed. The revised statement would better describe OCC's long-standing requirements and practices.

OCC proposes to remove lists of acceptable margin and Clearing Fund collateral types from the *Margin* and *Clearing Fund* sections. OCC Rules 604 and 610 describe asset types that OCC accepts as margin collateral and OCC Rule 1002 describes Clearing Fund collateral. Because the list of acceptable collateral to be removed is appropriately reflected in the Rulebook, it need not be duplicated in the CRM Policy. Similarly, OCC proposes to delete a statement regarding the current composition of sovereign debt accepted by OCC in the *Sovereign Credit Risk* section. This text provides background information regarding the current composition of OCC's sovereign debt collateral and maintaining this description in the CRM Policy text raises the risk of inaccuracy should OCC's collateral composition change over time. The statement does not establish a stated policy, practice or interpretation of OCC regarding the forms of Government securities acceptable to OCC, which are established by OCC Rules 604 and 1002.

OCC proposes to restate Financial Risk Management's (''FRM'') stated obligation in the *Market Risk* section to value collateral ''continuously,'' to ''throughout regular market trading hours.'' The modifier ''continuously'' could imply that FRM is required to value collateral on a 24/7 basis. OCC's policies and procedures are designed to set and enforce appropriately conservative haircuts for the collateral it accepts,[14] but OCC does not believe this would require it to adhere to a standard of continuous and ongoing revaluation of collateral. Accordingly, OCC proposes these revisions to more clearly reflect its long-standing practices. Similarly, OCC proposes to restate the obligation in the *Valuations* section from requiring P&M to perform its collateral valuation processes ''on a continuous basis'' to ''during regular market trading hours.'' In each case the revised statements are fairly and reasonably implied by OCC's rules.[15]

OCC proposes to amend the description of its approach to concentration risk in the *Concentration Risk* section. The current description focuses on OCC's measures to mitigate

[6] S*ee* Exchange Act Release No. 82311 (Dec. 13, 2017), 82 FR 60252, 60252–53 (Dec. 19, 2017) (SR–OCC–2017–008).

[7] *See id.*

[8] *See id.* at 60253.

[9] *See* Exchange Act Release No. 82658 (Feb. 7, 2018), 83 FR 6646, 6646 (Feb. 14, 2018) (SR–OCC–2017–007).

[10] *See id.* at 6647.

[11] *See* 17 CFR 240.17Ad–22(e)(3)(i) (requiring, among other things, that a covered clearing agency subject its risk management policies, procedures and systems to review on a specified periodic basis and approval by the board of directors annually).

[12] *See* Committee on Payment and Settlement Systems and Technical Committee of the International Organization of Securities Commissions (''CPSS–IOSCO''), Principles for financial market infrastructures (Apr. 16, 2012) (stating that ''[a]n FMI should use a collateral management system that is well-designed and operationally flexible''), available at *http://www.bis.org/publ/cpss101a.pdf.* In 2014, the CPSS became the Committee on Payments and Market Infrastructures (''CPMI'').

[13] *See* Exchange Act Release No. 93916 (Jan. 6, 2022), 87 FR 1819, 1820 (Jan. 12, 2022) (SR–OCC–2021–014) (discussing the applicability and scope of OCC's Cash and Investment Management Policy).

[14] *See* 17 CFR 240.17Ad-22(e)(5).

[15] For example, the CRM Policy explains that OCC's approach to valuation includes that the maximum period between collateral revaluations is at least daily. *See* Exchange Act Release No. 82009 (Nov. 3, 2017), 82 FR 52079, 52080–81 (Nov. 9, 2017) (SR–OCC–2017–008).

concentration risk in relatively limited scenarios, including where appropriate to limit the aggregation or concentration of large positions in a single security or mitigate price dislocation when selling a large position into a thin market. This description does not address other relevant instances where OCC could face or seek to mitigate concentration risk. As such, OCC proposes to more broadly describe its approach to mitigating concentration risk, which consists of restrictions for certain assets intended to allow OCC to liquidate collateral quickly without adverse price effects. The proposed revisions would more fully describe OCC's approach to mitigating concentration risk without altering the substance or requirements of the CRM Policy as they relate to OCC's core risk management activities.

The *Systems and Processing* section describes OCC's collateral management system as highly automated yet flexible enough to accept a variety of collateral types. While this description of the system's flexibility is accurate, it does not establish a rule, standard or interpretation with respect to OCC's operation of the system. OCC proposes to replace the extraneous discussion of flexibility with a statement indicating that the system supports the maintenance and processing of various asset types, which more objectively conveys similar information. This section further provides that the collateral management system maintains the same performance, efficiency and effectiveness for each collateral type OCC accepts. OCC proposes to delete this provision because different processing methods for collateral types and associated timelines could render that statement inaccurate and the discussion of the collateral system's capabilities likewise does not establish a stated policy, practice or interpretation and should not be considered a rule per se. The proposed revisions would clarify the description of OCC's collateral management system in accordance with current OCC operations.

In the *Reconciliation* section, OCC intends to clarify that the information it uses in the daily balancing of collateral against activity and inventory reports is not limited to end-of-day reports provided by custody banks and depositories. Accordingly, OCC proposes to remove the ''end-of-day'' modifier and include OCC's internal systems within the description of potential sources of information and reports used for daily balancing activity. These revisions are intended to better reflect the sources of information OCC uses when conducting its daily balancing activity.

The *Reconciliation* section also provides exceptions to the daily monitoring requirement concerning certain collateral for which OCC's daily balancing activities previously were impractical. OCC believes these reviews and associated exceptions to the daily monitoring requirement are no longer necessary. Specifically, OCC would delete reference to the monthly reviews of collateral deposited pursuant to letters of credit or depository receipts and security agreements. With respect to letters of credit, the monthly reviews date to when documentation for such collateral was maintained in physical files. Currently, OCC verifies and electronically retains documentation for letters of credit on the date a letter of credit is processed consistent with the CRM Policy's daily monitoring requirement, making the monthly review exception for letters of credit redundant and unnecessary. With respect to depository receipts and security agreements, the processing of Canadian Government securities, to which those monthly reviews apply, no longer rely on such documentation. In any event, Collateral Services conducts a daily inventory reconciliation of Canadian Government securities, which is reasonably and fairly implied by the generally applicable daily balancing requirement under the *Reconciliation* section, discussed above. Accordingly, OCC proposes to delete the reference to these monthly reviews from the CRM Policy because the monthly reviews no longer serve any practical purpose.

Similarly, OCC proposes to remove the CRM Policy's discussion of the requirement that Collateral Services regularly review escrow deposit banks to ensure acceptable and sufficient collateral is maintained. This review dates to a time when OCC did not have daily visibility into the actual collateral holdings held at the banks as supporting collateral.[16] OCC would review a collateral listing supplied by the banks on a quarterly basis. Currently, all non-cash collateral is pledged to OCC through the Depository Trust Company (''DTC''), which not only provides OCC with visibility into the holdings but allows OCC to validate and value the collateral in an automated fashion prior to giving credit to such deposits.[17] OCC reconciles the non-cash inventory daily and performs a daily audit of any cash collateral maintained at the escrow banks against what OCC maintains in its systems. These daily reconciliation activities are reasonably and fairly implied by the generally applicable daily balancing requirement under the *Reconciliation* section, discussed above.

The *Reconciliation* section also requires OCC's Collateral Services team to ''immediately address'' any discrepancies identified during its activity reviews and inventory balancing. How Collateral Services addresses such discrepancies is addressed in procedures maintained by Collateral Services. OCC proposes to revise the text of this section to recognize that Collateral Services maintains procedures to satisfy this obligation.

OCC proposes to remove the entirety of the *Margin Offset* section, which consists of a description of margin collateral assets that are permitted to directly offset cleared positions (*i.e.,* deposits in lieu of margin) and a statement that cleared positions can be fully covered by such assets and thus excluded from margin calculations. OCC Rules 610 and 601(f)(2) authorize such offsets and describe the collateral assets permitted to be offset. As such, OCC believes it is unnecessary to duplicate this information in the CRM Policy.

The *Governance and Annual Review* section provides that a recommendation to add a new collateral type for margin or clearing fund purposes must address whether the collateral should be subject to a haircut or modeled within the System for Theoretical Analysis and Numerical Simulation (''STANS''). OCC proposes to specify in the CRM Policy that when the collateral type will be subject to haircuts, such haircuts will be expressed as percentages, as is consistent with current OCC practice.

In addition, OCC proposes to make clarifying, conforming and other non-substantive changes to the CRM Policy. The proposed changes discussed below would not substantively alter the meaning of the revised provisions or the substance or requirements of the CRM Policy as they relate to OCC's core clearance, settlement, and risk management activities. The following conforming revisions are intended to align the text of the CRM Policy with existing provisions of the Rulebook, By-Laws or other documents, as applicable, and to update the titles of documents referenced in the CRM Policy:

- In the section to be renamed as *Policy Content,* and again in the subsequent *Margin* section, OCC proposes to insert references to Rule 610. Rule 610 establishes the rules around deposits in lieu of margin,

[16] *See* Exchange Act Release No. 79094 (Oct. 13, 2016), 81 FR 72129 (Oct. 19, 2016) (SR–OCC–2016–009) (approving changes to OCC's escrow deposit program).

[17] *Id.* at 72129.

which are a form of margin collateral. These changes would ensure alignment between the text of the CRM Policy and the Rulebook with respect to acceptable forms of margin collateral. In the amended *Policy Content* section, OCC also proposes to add that Clearing Fund collateral can be used to meet OCC liquidity needs for settlement. This change is also consistent with existing practice, as codified in OCC Rule 1006(f).

• OCC would revise two references to chapter 2 of the ''STANS Margin Methodology document'' to instead refer to the ''STANS Methodology Description,'' which replaced the legacy STANS Margin Methodology as the description of the STANS Methodology filed with the Commission.[18]

The following clarifying revisions are intended to restate existing provisions for improved clarity and accuracy:

• In the *Purpose* section, OCC proposes to replace collateral that ''OCC has determined exhibits low credit, market and liquidity risks'' with collateral that ''is of low risk based on credit, market, and liquidity characteristics.'' These revisions would not alter currently existing standards or practices but more clearly state what OCC's definition of high quality collateral is based on.

• In the *Margin* section, OCC proposes to replace ''price'' with ''value'' in reference to the liquidation of margin assets at a price that reasonably approximates the value given to the asset as a collateral deposit, which would be consistent with the term ''value'' that is used later in the sentence.

• In the *Risk Considerations* section, OCC proposes to insert the word ''collateral'' after ''margin'' to align with the term ''Clearing Fund collateral'' used immediately thereafter. In light of this alignment, OCC also proposes to insert ''or both'' to make clear that the Credit and Liquidity Risk Working Group (''CLRWG'') [19] determines which assets are considered acceptable for each category of collateral, or both categories, as applicable.

• In the *Sovereign Credit Risk* section, OCC proposes to delete ''particular'' as a qualifier preceding ''foreign sovereign's debt.'' The qualifier is unnecessary as OCC reviews each form of collateral prior to accepting it as collateral, so the revision does not substantively alter the meaning of the provision.

• In the *Valuations* section, OCC proposes to restate how the haircut determination and review process informs OCC's approach to addressing procyclicality. The current policy states that such process also ''protects against potential pro-cyclical concerns'' by considering stressed market conditions. OCC proposes to delete ''potential'' and instead state that the process ''shall also protect against pro-cyclical concerns'' by considering stressed market conditions. The revisions would not substantively alter existing processes but make more definitive OCC's intent to address pro-cyclicality through its existing haircut determination and review process. OCC proposes to remove ''in order'' from the same sentence as it is a redundant statement of OCC's purpose, which is adequately reflected in the statement.

• The *Haircuts* section provides that changes to applicable haircut rates shall be made in accordance with applicable authority under Rule 604. OCC proposes to delete ''applicable authority under'' Rule 604 as it is redundant in the context of this sentence.

• The *Collateral Re-hypothecation and Substitution* section refers to ''Clearing Fund securities.'' OCC proposes to revise the reference to ''Clearing Fund collateral'' for greater consistency with the section header and discussion in the preceding sentence, which refers to rehypothecation of ''margin collateral.''

Finally, OCC proposes to make typographical and administrative changes to the CRM Policy intended to correct spelling, capitalization, punctuation and grammar, remove unnecessary verbiage, and conform the CRM Policy's format to OCC's latest policy template.

2. Margin Policy

OCC proposes the following changes to the Margin Policy identified through its annual reviews of the policy.

In the *Purpose* section of the Margin Policy, OCC proposes to delete ''assure performance'' of Clearing Members as a stated purpose for collecting margin. The act of collecting margin recognizes that no counterparty's performance can be fully assured. The proposed revisions would merely clarify the discussion in the Margin Policy without any impact on the substance or requirements of OCC's margin collection practices or Clearing Member obligations.

OCC proposes to insert an *Applicability and Scope* section, which, similar to the change to the CRM Policy discussed above, would identify the primary OCC business units that support OCC's approach to managing margin and credit exposure presented by its Clearing Members, including but not limited to P&M, Collateral Services, and QRM.

In the *Net/Gross Margining Accounts* section, OCC proposes to revise the discussion of net and gross margining to focus on OCC's calculation of margin rather than OCC's approach to liquidating positions in the event of a default. The current text provides that two approaches under applicable regulations to liquidating a Clearing Member's positions include the immediate liquidation of positions that are margined on a net omnibus basis and the porting of customer positions that are margined on a gross basis. OCC believes it would be more appropriate to frame this discussion in the Margin Policy in terms of margin calculation considerations rather than position liquidation considerations, which are covered in other OCC policies and procedures.[20] Accordingly, OCC proposes to restate this section in terms of two approaches under applicable regulations for calculating margin, which include margining positions on a net omnibus basis and margining positions on a gross individual customer basis. The proposed revision would more accurately reflect the nature of the applicable regulatory provision while more clearly stating OCC's approach to margin calculation in a manner that is consistent with its current operations and margin calculation processes. At the same time, OCC proposes to state in the Margin Policy that it calculates margin on a customer gross basis for select accounts, which facilitates the porting of futures Customer accounts in accordance with OCC's Rules or By-Laws. The gross margin calculation is consistent with OCC's current practice for customer segregated futures positions in accordance with U.S. Commodity Futures Trading Commission (''CFTC'') Regulation 39.13(g)(8)(i)(A),[21] which applies to OCC by virtue of its registration as a derivatives clearing organization (''DCO''). Lastly, OCC proposes to delete

[18] *See* Exchange Act Release No. 91079 (Feb. 8, 2021), 86 FR 9410 (Feb. 12, 2021) (SR–OCC–2020–016) (approving the establishment of the STANS Methodology Description).

[19] CLRWG is a cross-functional group responsible for assisting OCC's Management Committee in overseeing and governing OCC's credit and liquidity risk management activities and currently consists of representatives from Financial Risk Management—including Credit Risk Management and Stress Testing and Liquidity Risk Management—Corporate Risk Management, Treasury, and Operations.

[20] OCC's Default Management Policy outlines the steps that OCC may take in the event of a Clearing Member's suspension, including the close-out of positions. *See* Exchange Act Release No. 82310 (Dec. 13, 2017), 82 FR 60265 (Dec. 19, 2017) (SR–OCC–2017–010).

[21] *See* 17 CFR 39.13(g)(8)(i)(A).

a statement from this section indicating that the methodology used to liquidate a customer account directly influences the manner in which OCC margins the account. Liquidation methodology is but one of numerous factors (*e.g.,* position risk, concentration of positions, correlations and offsets, and regulatory standards) influencing the manner in which an account is margined. Each of the above revisions would be consistent with OCC's current operations and margin calculation processes.

In the same section, OCC proposes to revise how it describes its approach to liquidating and/or porting a suspended Clearing Member's accounts. The Margin Policy currently provides that OCC's primary approach with respect to the positions of a suspended Clearing Member shall be immediate liquidation of net omnibus positions and porting of futures customer positions margined on a gross basis. The Margin Policy further specifies that accounts utilizing a net margining approach shall be liquidated on a net omnibus basis either through market transactions or an auction format. As above, OCC proposes to reframe the discussion in the Margin Policy to focus on the calculation of margin rather than considerations around liquidating positions, by noting instead that the calculation of margin on a net basis is consistent with OCC's primary approach for liquidating a Clearing Member's positions. In light of this revised focus on margin calculation rather than liquidation, OCC proposes to delete the statement regarding how net margin accounts will be liquidated. The proposed changes are intended to clarify the relationship between OCC's margin calculation approach and its decisions to port or liquidate positions in a default scenario, in accordance with applicable regulations and OCC's existing Rules.[22]

The same section provides that gross margining of accounts ''shall permit'' OCC to port individual customer accounts and associated margin to a solvent futures commission merchant (''FCM''). This text could be read to imply that gross margining ensures that OCC will be able to port individual customer accounts and associated margin in all cases, which cannot be guaranteed in advance. Accordingly, OCC proposes to revise this statement to instead focus on the effect of gross margining on OCC's decision-making by clarifying that gross margining permits OCC to ''identify'' individual customer positions and margin deposits, which facilitates porting along with associated margin deposits. As provided in OCC Rule 1106 and implied by the proposed revision to this statement, and to further ensure that OCC retains an appropriate and necessary degree of flexibility to manage risk arising from a Clearing Member default, OCC further proposes to state that utilizing gross margining would not preclude OCC from liquidating those positions on a net basis. Each of these proposed revisions would align the discussion in the Margin Policy to be consistent with OCC's currently contemplated approach to porting considerations as reflected in the Rules, and other policies and procedures governing OCC's default management process, and would not alter the substance or requirements of the Margin Policy as they relate to OCC's core clearance, settlement, and risk management activities.

In the *Segregated Futures Customer Gross Margining* section, the Margin Policy provides that OCC margins customer segregated futures accounts on a gross margin basis to facilitate the porting of futures customers in the event of an FCM default. As noted above, the requirement to collect gross margin for customer futures accounts is established at CFTC Regulation 39.13(g)(8)(i)(A),[23] which applies to OCC by virtue of its registration as a DCO. This is a requirement that applies to OCC by operation of law and does not need to be restated in the Margin Policy.[24] Lastly, the statement could be interpreted to be contradictory to a later statement in the same section that OCC will require the larger of the gross or net margin requirement calculated for the account. For these reasons, OCC proposes to delete the statement in its entirety.

In the *Stock Loan Positions* section, OCC proposes to revise its discussion of add-on charges for stock loan positions to enhance clarity. The Margin Policy currently provides that OCC will include add-on margin charges as needed based on pricing and corporate action conventions. Because there are not different conventions to how corporate actions are applied to stock loan contracts, OCC proposes to instead provide that add-on margin charges will be included based on pricing conventions and corporate action entitlements of the applicable stock loan program. OCC would remove the phrase ''as needed'' from the current text since the relevant add-on margin charges are driven by the pricing conventions and cash entitlements of the program, making that phrase redundant in the context. The proposed revisions would update and clarify the description of OCC's approach to add-on charges in the Margin Policy without impacting current OCC operations. In addition, OCC would change an ''*i.e.,*'' to ''*e.g.,*'' in the same section because the subsequent list of risk calculations is non-exhaustive.

In the *Cross-Margin* section, OCC proposes to expressly state that margin requirements for cross-margin accounts shall be calculated in accordance with OCC's margin methodology, while taking into account any provisions of the applicable cross-margin agreement. The revised text would conform with what is reflected in OCC Rule 704(a), which provides that margin in respect of cross-margin accounts shall be determined by OCC in accordance with that rule and the relevant cross-margin agreement. In a footnote to the same section, OCC notes that the establishment, implementation, maintenance and review of cross-margin agreements is governed by the rule-filed Third-Party Risk Management Framework [25] and a list of underlying procedures that support that Framework. OCC proposes to streamline this footnote by instead cross-referencing the ''Third-Party Risk Management Framework and underlying procedures.'' Reference to each of the underlying procedures was not intended to be a rule per se, and eliminating this information from the Margin Policy would encourage OCC staff to use OCC's internal system of record to identify the procedures that are related to the specific purpose or function that they are performing instead of relying on a list that may be outdated or underinclusive.

In the *Collateral* section, the Margin Policy states that margin deposits are due on ''the morning'' following the trade date. OCC proposes to amend reference to the generally applicable deadline, which could vary in certain circumstances (*e.g.,* with respect to trades that clear on dates preceding a

[22] *See* OCC Rule 1106(c) (providing that OCC shall close open futures positions of a suspended Clearing Member in the most orderly manner practicable).

[23] 17 CFR 39.13(g)(8)(i)(A).

[24] Because this margin calculation requirement is codified in a regulation it would be potentially confusing to continue stating that OCC margins customer futures accounts on a gross basis ''to facilitate the porting of customers.'' While this may be the intended outcome of the gross margin minimum requirement, it is more accurate that OCC collects the required amount primarily to meet its risk management obligations in accordance with applicable regulations.

[25] *See* Exchange Act Release No. 90797 (Dec. 23, 2020), 85 FR 86592, 86593 (Dec. 30, 2020) (SR–OCC–2020–014) (''The [Third-Party Risk Management Framework] describes OCC's framework for managing risk throughout the relationship lifecycle (*i.e.,* at on-boarding, monitoring and off-boarding) for Clearing Members, Financial Institutions, and vendors.'').

weekend or a bank holiday or where OCC issues an intra-day margin call). The reference would be updated to the ''morning of the business day'' following the trade date, as provided by OCC Rule 601(a). The reference would be further updated to provide that with respect to intraday margin calls, margin deposits are due at such other time as provided by OCC Rule 609 and the section of the CRM Policy that addresses intra-day margin calls. The proposed revisions would update and clarify the description of OCC's practices in the Margin Policy to better reflect a wider range of circumstances than are currently contemplated therein, and would not entail any changes to current OCC operations or margin collection practices.

The *Collateral in Margins* section provides that OCC shall promote incentives to hedge by including certain forms of margin within the STANS margin calculation, as specified in referenced rules approved by the Commission pursuant to section 19(b) of the Exchange Act.[26] OCC proposes to delete extraneous information regarding the content of OCC's rules, including that OCC's rules include scenarios that could impact Clearing Member exposures as a result of the collateral deposited. This information is implied by the beginning of the sentence, which explains that OCC intends to achieve the desired result by including margin collateral as specified in the referenced documents, and need not be duplicated in the Margin Policy.

The same section currently requires QRM to perform an analysis, in accordance with referenced procedures, to confirm that risk interactions between derivative and cash market positions are being appropriately recognized. OCC proposes to update the reference to conform to the current name of the referenced procedures. In addition, to remove potential ambiguity regarding the scope of the required analysis, OCC proposes to specify that the analyses performed by QRM in accordance with the referenced procedures should confirm that the STANS margin model is effectively modeling the risk interactions. This addition would clarify that the Margin Policy requires QRM's analyses to confirm the effectiveness of STANS' modeling of the risk interactions, but does not establish a requirement that QRM separately confirm the appropriate recognition of risk interactions between derivative and cash markets outside of the STANS margin model. The scope of QRM's obligation to confirm that risk interactions are being appropriately recognized in STANS is reasonably and fairly implied in the context of the paragraph, which discusses collateral that is included in STANS margin calculations, but OCC proposes to add specificity to enhance clarity regarding QRM's obligations.

In the *Risk Factors* section, OCC proposes to change the description of its evaluation of the appropriateness of risk factors considered within its models to strike ''on an ongoing basis'' and replace it with ''on a regular basis.'' That section lists several types of periodic reviews designed to achieve this aim, including reviews of Exchange proposals to list new products pursuant to referenced procedures, FRM's daily backtesting, monthly reporting of such backtesting results to the Model Risk Working Group (''MRWG''),[27] and QRM's review of OCC's margin methodology in accordance with referenced procedures to reasonably ensure that the margin methodology incorporates all significant risk factors and supports the robustness of OCC's margin resources, which QRM performs monthly or more frequently as required by regulations applicable to OCC.[28] In addition, as discussed elsewhere in the Margin Policy, OCC's Model Risk Management business unit performs an annual review of the overall performance of the STANS margin methodology and its associated models. The periodicity of such reviews is discussed elsewhere in the Margin Policy. This revised text would be consistent with similar revisions noted above,[29] as well as the timeline for periodic reviews of risk model performance conducted under applicable policies and procedures. The proposed rule change would not entail a change to current OCC operations.

The same paragraph also provides that FRM shall continually evaluate the effectiveness of specified risk models. OCC proposes to delete the modifier ''continually'' as it could be read to create an expectation that OCC conducts 24/7 evaluations of its models. The revisions would only change the description of OCC's practices in the Margin Policy to enhance consistency with regard to its current model performance review process and would not impact OCC operations.

In the same section, OCC proposes to delete text indicating that QRM is responsible for reasonably ensuring that margin methodologies incentivize Clearing Members to be aware of their own risks and mitigate their exposures. One of QRM's primary responsibilities, as discussed above, is to establish, implement, maintain and review margin methodologies to reasonably ensure that they incorporate all significant risk factors and support the robustness of OCC's margin resources. The measure of any incentive effect from OCC's margin methodology on Clearing Members' awareness of risk or mitigation of exposures is inherently qualitative and falls outside of QRM's ordinary remit. OCC further believes that well-designed margin methodologies would naturally support the creation of incentives at each Clearing Member to be aware of and mitigate their risks. Accordingly, OCC proposes to remove QRM's responsibility to monitor indirect and qualitative effects of the methodology at third-party Clearing Members while retaining that team's primary responsibilities with respect to quantitative aspects of margin model design, implementation, monitoring and review processes.

The *Market Data and Pricing Considerations* section provides that P&M shall transmit pricing data to both OCC's primary and back-up data centers, pursuant to a referenced procedure. OCC proposes to delete this operational detail with respect to OCC's current data infrastructure from the Margin Policy. Changes in OCC's data infrastructure could render that statement inaccurate and the reference to OCC's current primary and back-up data centers is not intended to be a rule per se.[30] In any event, the statement about transmission of data is reasonably and fairly implied by the existing text of the section, which provides that P&M shall review the quality and completeness of market data ''prior to distribution [to] downstream systems and external consumers.''

The same section also provides that OCC shall rely upon real-time market data in order to continually evaluate the value of Clearing Member portfolios.

[26] 15 U.S.C. 78s(b).

[27] The MRWG is a cross-functional group responsible for assisting OCC's Management Committee in overseeing and governing OCC's model-related risk issues and currently consists of representatives from FRM, including QRM, and from Corporate Risk Management, including Model Risk Management.

[28] *See* 17 CFR 240.17Ad–22(e)(6)(vi)(C) (requiring a clearing agency to conduct sensitivity analysis of its margin model and a review of its parameters and assumptions for backtesting more frequently than monthly during periods of time when the products cleared or markets served display high volatility or become less liquid, or when the size or concentration of positions held by the covered clearing agency's participants increases or decreases significantly).

[29] *See supra* notes 14–15 and accompanying text.

[30] *See* Exchange Act Release No. 96113 (Oct. 20, 2022), 87 FR 64824 (Oct. 26, 2022) (SR–OCC–2021–802) (SEC notice of no objection to OCC's proposed adoption of cloud infrastructure for OCC's new clearing, risk management, and data management applications).

OCC proposes to remove the ''real-time'' qualifier for enhanced accuracy because other market data beyond real-time data is also relevant to OCC's evaluation process. The proposed rule change would clarify that OCC may use intraday data. As above, the statement that OCC ''continually'' evaluates the value of portfolios could be read to imply that OCC values portfolios on a 24/7 basis. OCC proposes to revise this statement to say that it evaluates portfolios ''during market hours,'' which OCC believes to be consistent with its regulatory and risk management obligations. These revisions are for clarification only and would not entail any changes to current OCC operations.

The following paragraph in the same section provides that P&M shall systemically process and manually validate referenced settlement values in accordance with a referenced procedure. OCC proposes to delete ''systemically'' with regard to processing and ''manually'' with regard to validations in order to provide OCC with an appropriate degree of flexibility in determining how it shall process and validate the referenced values. Operational details regarding the conduct of such processes and validations are contemplated in the referenced procedure. OCC believes it is unnecessary to duplicate those operational terms in the Margin Policy as doing so creates the risk of inaccuracy in the Margin Policy should the relevant processes be amended in the future in accordance with applicable governance requirements. The proposed revisions would remove from the Margin Policy constraints on the mechanical processes OCC could use to process and validate referenced settlement values, but would not significantly impact OCC's core clearance, settlement or risk management activities.

In the *Recalibration* section, OCC proposes to update the discussion of the recalibration process for STANS econometric models to reflect its automation. The revised text would provide that recalibrations are to be performed systemically as reflected in the current STANS Methodology Description.[31] P&M would retain responsibility for monitoring outputs of the process and escalating issues and the stated timeline for the processing would not need to change. The proposed revisions would update the description of OCC's mechanical process for recalibrations to reflect the automation of certain components, but would not otherwise impact its overall method for recalibrations or OCC's core clearance, settlement, and risk management activities.

In the same section, OCC proposes to add a footnote to explain that synthetic futures represent an exception to the 10-year lookback period for univariate parameters. This revision does not impact OCC's operations as it merely conforms the discussion in the Margin Policy to be consistent with what is reflected in the STANS Methodology Description.[32]

The *Stress Test Components* section of the Margin Policy currently provides that FRM is required to continually evaluate the portion of stress losses that are not collected as margin against the Clearing Member's net capital, in accordance with referenced procedures, and require the Clearing Member to deposit additional margin, in accordance with Rules 601 and 609, in an amount equal to the exposure in excess of its net capital where FRM determines that the uncollateralized exposure exceeds the Clearing Member's ability to absorb the loss based on its current capitalization. For clarity, OCC proposes to add that OCC's policy of calling for additional margin in such circumstances does not preclude OCC from taking other protective measures under OCC's recently amended Rule 307 if FRM determines a Clearing Member's uncollateralized exposure presents elevated risk to OCC, including restrictions on distributions under Rule 307A, restrictions on certain transactions, positions and activities under Rule 307B, and additional operational, personnel, financial resource and risk management requirements under Rule 307C.[33]

The *SPAN* section states that the System for Portfolio Analysis of Risk (''SPAN'')[34] is used to assess risk for a wide variety of financial instruments, including futures, options, physicals, equities or any combination thereof. OCC proposes to delete such informational background on SPAN's capabilities as it is irrelevant to the discussion of how OCC uses SPAN to calculate margin requirements, which is the focus of this section, and OCC does not use SPAN to assess risk for all the instruments listed in that sentence. OCC also proposes to relocate a statement regarding OCC's use of SPAN to compute gross margin for all segregated futures customers' accounts within the paragraph in order to enhance clarity.

OCC also proposes to revise the *Scan Ranges* section of the Margin Policy, which details certain functions related to the SPAN methodology. While this section accurately describes OCC's use of scan ranges to establish margin covered under SPAN, OCC also performs recalibration of spread rates and other parameters under the SPAN methodology. For completeness, OCC proposes to specify parameters in addition to scan ranges that are used to calculate SPAN margin requirements. These changes would align the text of the Margin Policy with existing practices. OCC also proposes to delete the *Scan Ranges* section header in light of the expanded scope of parameters addressed thereunder. In the same section, OCC proposes to extend P&M's recalibration responsibilities beyond scan ranges to include the additional parameters. These changes are reasonably and fairly implied by the *SPAN* section of the Margin Policy, which requires OCC to compute gross margin for all segregated futures customers' accounts using SPAN.

In the same section, OCC proposes to revise its description of maintenance and initial margin calculations. These proposed changes are descriptive only and would not substantively alter OCC's margin calculation process or the ratio between the calculated amounts. This section currently provides that minimum scan ranges used to satisfy the initial speculator margin and spread rates shall exceed 110% of the 99% VaR of the daily historical observations. To enhance clarity around its initial and maintenance margin calculations and the ratio between the two values and update terminology with the latest conventions, OCC proposes to provide that the scan ranges established for the calculation of maintenance margin shall exceed the 99% VaR of the daily historical observations, and further provide that the scan ranges established for heightened risk profile margin calculations shall be at least 110% of that maintenance margin amount. These revisions only change the description of the two rates and the ratio between them to enhance clarity and are consistent with OCC's current calculation practices for maintenance

[31] *See* Exchange Act Release No. 91079 (Feb. 8, 2021), 86 FR 9410 (Feb. 12, 2021) (SR–OCC–2020–016) (approving the establishment of the STANS Methodology Description).

[32] *See id.*

[33] *See* Exchange Act Release No. 97439 (May 5, 2023), 88 FR 30373, 30376 (May 11, 2023) (SR–OCC–2023–002) (approving amendments to OCC's membership standards).

[34] SPAN is a methodology developed by the Chicago Mercantile Exchange and used by many clearinghouses and exchanges around the world to calculate margin requirements on futures and options on futures.

and initial margin and the latest terminology used by the CFTC.[35]

In the same section, OCC proposes to add that inter-month spread charges, in addition to SPAN scan ranges, incorporate a long-run historical estimate or look to periods of heightened volatility to guard against pro-cyclicality. The added reference to ''inter-month spread charges'' is consistent with OCC's current process for calculating margin requirements under SPAN. OCC also proposes to add that the standard historical data look-back period used to establish scan ranges shall be ''at least'' 500 business days, except as provided in a referenced procedure. The addition of ''at least'' would be clarifying and would not impact OCC's current approach to the SPAN margin calculations. OCC also proposes to remove ''volatility'' from the phrase ''long-run historical volatility estimate,'' which is only a textual change and would not impact OCC's current approach to SPAN margin calculations.

In the same section, OCC also proposes to remove the parenthetical example of unique risk characteristics attributable to particular products. The single example provided is not exhaustive and the referenced procedure includes additional detail regarding risk characteristics. Duplicating this information in the Margin Policy is unnecessary and creates the risk of inaccuracy in the Margin Policy should the relevant processes be amended in the future in accordance with applicable governance requirements.

In the *Intraday Margin Calls* section, OCC proposes to change references to a ''window'' for issuing margin calls to a ''standard time for processing'', or similar term. This change would enhance the clarity of the discussion in the Margin Policy by adopting uniform, clear language to refer to margin calls issued during the standard processing timeline, without impacting OCC operations associated with issuing margin calls.

In the *Extended Trading Hours Margin Calls* section, OCC proposes to insert a reference to a ''standard time for processing'' an extended trading hours margin call and provide that OCC will establish such standard time in the referenced procedure. The use of the ''standard time for processing'' term is intended to align with the adoption of similar language in the immediately preceding *Intraday Margin Calls* section, as discussed above. The establishment of the deadline in a referenced procedure is consistent with and reasonably and fairly implied by OCC Rule 601(a), which authorizes OCC to specify the time by which Clearing Members are required to deposit margin with the Corporation. The proposed revision would not impact the operations of OCC as it relates to OCC's core clearance, settlement, and risk management activities. In the same section OCC proposes to remove a reference to the 9:00 a.m. CT deadline for OCC to issue an extended trading hours margin call. Rule 601(a) authorizes OCC to specify the time by which every Clearing Member shall be obligated to deposit margin assets. OCC believes that reflecting such operational terms in the Margin Policy creates the risk of inaccuracy in OCC's Margin Policy, which is filed as a rule with the Commission, should the specified deadline be amended or extended in accordance with applicable governance requirements. Accordingly, OCC has determined to remove the specific reference within OCC's internal Margin Policy and instead refer to applicable procedures to establish the relevant timeline by which the margin call must be issued. OCC's authority to amend or extend the deadline to deposit margin is fairly and reasonably implied by the text of Rule 601(a), and the proposed revisions would better enable OCC to give effect to this authority.

The *Holiday Margin Calls* section requires OCC to issue holiday margin calls in specified amounts and circumstances. Currently, that section provides that when an account is subject to both a holiday and position risk margin call on the same day, OCC applies the larger of the two. Subsequent to the addition of this provision to the Margin Policy, OCC amended its rules to reflect Clearing Fund margin calls—that is, margin calls for a Clearing Member Group when an estimate of its Clearing Fund Draw [36] exceeds 75% of the amount of the current Clearing Fund.[37] Pursuant to OCC's authority under OCC Rules 601(c) [38] and 609,[39] it is OCC's practice to issue a Clearing Fund margin call in situations where a Clearing Member is subject to these other types of margin calls and the Clearing Fund margin call is the largest of the three. OCC proposes to update the Margin Policy to reflect this practice. Specifying Clearing Fund calls as an additional category of margin call would align the discussion in the Margin Policy with the types of calls OCC issues today and would not entail a change to current OCC operations or margin collection processes.

The *Review of Margin Methodology* section outlines Model Risk Management's responsibilities for evaluating the overall performance of STANS at least annually, in accordance with referenced policies and procedures, and for reporting its findings to the Risk Committee, which is tasked with reviewing the adequacy of OCC's margin and clearing fund methodology, including the STANS margin methodology, at least once every twelve months. OCC proposes to delete a duplicative reference in the Margin Policy regarding Model Risk Management's obligation to produce an annual report of the STANS margin methodology, which is fairly and reasonably implied in the preceding sentence as well as the Risk Committee Charter.[40] OCC also proposes to delete references to Model Risk Management's obligations to present its validation findings and annual report of the STANS margin methodology to the Risk Committee. Model Risk Management is the primary group responsible for ensuring the completion of the annual validation, which it conducts in accordance with applicable procedures, and reporting of its findings. Because the requirement to validate STANS is established in OCC's rules and applicable procedures establish how Model Risk Management plans and conducts its validation and reports any findings to the Risk Committee, OCC believes it is unnecessary to duplicate such details in the Margin Policy as doing so creates the risk of inaccuracy

[35] *See* Final Rule, Derivatives Clearing Organization General Provisions and Core Principles (Dec. 20, 2019), 85 FR 4800 (Jan. 27, 2020) (amending CFTC Rule 39.13(g)(8)(ii)).

[36] The term ''Clearing Fund Draw'' refers to an estimated stress loss exposure in excess of margin requirements.

[37] *See* Exchange Act Release No. 83735 (July 27, 2018), 83 FR 37855 (Aug. 2, 2018) (SR–OCC–2018–008) (amending Rule 609 related to intra-day margin).

[38] *See* OCC Rule 601(c) (''Notwithstanding any other provision of this Rule 601, [OCC] may fix the margin requirement for any account or any class of cleared contracts at such amount as it deems necessary or appropriate under the circumstances to protect the respective interests of Clearing Members, [OCC], and the public.'')

[39] *See* OCC Rule 609 (''The Corporation may require the deposit of additional margin ('intra-day margin') by any Clearing Member in any account at any time during any business day to . . . protect [OCC], other Clearing Members or the general public.'').

[40] *See* OCC Risk Committee Charter, *available at https://www.theocc.com/company-information/documents-and-archives/board-charters* (last revised May 26, 2022).

in the Margin Policy should the relevant requirements or processes be amended in the future in accordance with applicable governance requirements.

Like the changes to the CRM Policy discussed above, OCC proposes to make clarifying, conforming and other non-substantive changes to the Margin Policy. The proposed changes discussed below would not substantively alter the meaning of the revised provisions or the substance or requirements of the Margin Policy as they relate to OCC's core clearance, settlement, and risk management activities. The following conforming revisions are intended to align the text of the Margin Policy with existing provisions of the Rulebook, By-Laws or other documents, as applicable, and to update the titles of documents referenced in the Margin Policy:

• The *STANS* section describes STANS as modeling the volatility of individual products and the correlation amongst products. OCC proposes to replace references to ''products'' in this sentence with references to ''risk factors.'' These proposed revisions would align references in the Margin Policy and the STANS Methodology Description without impacting OCC's operations or risk management activities.

• The *Recalibration* section provides that recalibrations will incorporate a long-run historical volatility estimate, which serves as a floor during periods of low market volatility to reduce pro-cyclicality in OCC's margin estimates. OCC proposes to replace ''reduce'' with ''control,'' to more affirmatively state OCC's intent in adopting volatility floors.

• The Margin Policy currently contains references to certain related policies, procedures and other documents that OCC maintains in support of the Margin Policy. These documents are reviewed and updated on a periodic basis, which at times may result in the consolidation of certain related policies, procedures and documents or changes in their names. OCC proposes to revise the Margin Policy to update internal policy and procedure names to reflect any changes resulting from these periodic reviews to ensure the accuracy, consistency, and clarity of the Margin Policy. The proposed changes are administrative in nature and are not intended to change the substance of the Margin Policy.

The following clarifying revisions are intended to restate existing provisions for improved clarity and accuracy:

• In the *Segregated Futures Customer Gross Margining* section, OCC proposes to insert ''for these accounts'' to clarify that OCC will effect gross margining for customer segregated futures accounts. The revision is only intended to clarify the applicability of the statement.

• In the *Collateral in Margins* section, OCC proposes to revise ''certain forms of margin'' within the STANS margin calculation to ''certain forms of collateral'' instead. This change is to enhance clarity in the description of OCC's operations but does not change the meaning of the provision or OCC's operations. The same section provides that OCC's Management Committee shall be ultimately responsible for determining which types of collateral are included in STANS margin calculations. OCC proposes to remove ''ultimately'' to enhance clarity, as the Management Committee's authority to make such determinations derives from the Board, which implies that the Board has ''ultimate'' responsibility for such decisions. OCC also proposes to change a reference to ''exchange traded fund[s]'' in a parenthetical providing examples of deposits of collateral eligible for inclusion in STANS to ''exchange traded product[s]'' because collateral-in-margin treatment also extends to exchange traded notes.

• In the *Market Data and Pricing Considerations* section, the Margin Policy establishes that P&M shall reasonably ensure that measures are taken to review the quality and completeness of market data prior to its distribution. OCC proposes to remove the qualifying language and establish that P&M is responsible for reviewing the quality and completeness of market data, as opposed to reasonably ensuring that measures are taken to review the data, prior to its distribution. This deletion would clarify P&M's obligation for reviewing market data quality and completeness before it is distributed to downstream systems and external consumers. The proposed revision would add clarity to the Margin Policy and better ensure the integrity of market data at the critical stage prior to its downstream or external consumption.

• In the *Recalibration* section, the Margin Policy provides that where P&M has ''reasonable grounds for believing (*e.g.,* with a newly created passive ETF tracking a longstanding index) that a suitable proxy exists,'' such proxy may be used in place of the default distribution pursuant to the referenced procedure. OCC proposes to restate this section for additional clarity. The revised text would state that where P&M has ''reasonable grounds for assigning a suitable proxy (*e.g.,* a newly created passive ETF tracking a longstanding index),'' such proxy may be used in place of the default distribution pursuant to the referenced procedure. These revisions would more clearly state P&M's obligations as well as the circumstances in which P&M may exercise its discretion. In addition, OCC would amend a reference to the Model Risk Management business unit (formerly known as the Model Validation Group or ''MVG'') to reflect the current name of that department, consistent with changes that OCC made to other such references in a prior rule filing.[41]

• In the *Add-on Charges* section, the Margin Policy states that in some instances, exposures that may be modeled outside of STANS through the use of add-on charges may not require sophisticated models to be derived. OCC proposes to remove ''in some instances'' as it is implied by the beginning of the sentence, which states that these exposures ''may'' not require sophisticated models to be derived, as well as language in the next sentence referring to ''other instances.'' In addition, the Margin Policy states that consistent with the referenced procedure, MRWG has the discretion to recommend approval of add-on margin charges to the Management Committee. OCC proposes to delete the reference to MRWG's discretion as it is implied by the language that MRWG ''may'' recommend approval.

• In the *Margin Monitoring* section, OCC proposes to clarify that FRM conducts the backtests that are designed by QRM. This division of labor is implied in the preceding statements of that section and is appropriately reflected in the relevant procedures.

Finally, OCC proposes to make typographical and administrative changes to the Margin Policy intended to correct spelling, punctuation and grammar and remove unnecessary verbiage in the Margin Policy.

(2) Statutory Basis

OCC believes the proposed rule change is consistent with Section 17A of the Act[42] and the rules thereunder applicable to OCC by improving the accuracy, clarity, and consistency of the OCC Policies so that they remain reasonably designed to achieve the standards and requirements thereunder. Section 17A(b)(3)(F) of the Act[43] requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities

[41] *See* Exchange Act Release No. 95842 (Sept. 20, 2022), 87 FR 58409, 58419 (Sept. 26, 2022) (SR–OCC–2022–010) (proposing conforming changes to OCC's risk management policies regarding the name of OCC's Model Risk Management business unit).

[42] 15 U.S.C. 78q–1.

[43] 15 U.S.C. 78q–1(b)(3)(F).

transactions and, to the extent applicable, derivative agreements, contracts, and transactions and to assure the safeguarding of securities and funds which are in the custody or control of the clearing or agency or for which it is responsible. In turn, Exchange Act Rule 17Ad–22(e)(1) through (3) require OCC to maintain written policies and procedures reasonably designed to, among other things:

- ensure a well-founded, clear, transparent, and enforceable legal basis for each aspect of OCC's activities; [44]
- provide for governance arrangements that are clear and transparent and specify clear and direct lines of responsibility; [45] and
- maintain a risk management framework that includes policies, procedures and systems that are designed to manage risks and which are subject to periodic review and annual approval by the Board.[46]

OCC believes that the proposed changes, which are intended to better reflect current practices, remove extraneous information, and make other non-substantive, clarifying and administrative changes to the text of those policies, are consistent with the Exchange Act and these requirements for the following reasons.

1. Update Descriptions To Better Align With Current Practices

The proposed rule changes are designed to align the text of the OCC Policies with current practices and to otherwise enhance accuracy, clarity and consistency in the documents. The OCC Policies, including descriptions of practices and processes therein, are subject to periodic review. The proposed rule change would apply recommendations made as part of OCC's annual review of the OCC Policies and which are intended to ensure the OCC Policies maintain accurate descriptions of OCC practices and operations. These changes are primarily clarifying in nature and would not significantly alter the substance or requirements of the OCC Policies as they relate to core clearing, settlement or risk management activities. OCC believes improving the clarity of the descriptions in the OCC Policies, which are central to OCC's clearance and settlement activities, will, in turn, promote the accurate clearance and settlement of securities transactions and the safeguarding of securities and funds, in accordance with Section 17A(b)(3)(F) of the Exchange Act.[47]

The proposed rule change would also update descriptions of processes and governance requirements in the OCC Policies to align with current practices and requirements. OCC believes these proposed revisions would thus support clarity in OCC's governance arrangements and better ensure that OCC's lines of responsibility are clear and direct, in accordance with Exchange Act Rule 17Ad–22(e)(2).[48]

The proposed rule change would apply updates to the OCC Policies that were recommended pursuant to annual reviews by the Board. The proposed revisions would not significantly impact the practices relating to OCC's core clearance, settlement, and risk management activities. Accordingly, OCC believes the proposed rule changes would support its obligation to maintain a sound risk management framework that is subject to periodic review and annual approval by the Board in accordance with 17Ad–22(e)(3).[49]

2. Delete Extraneous Information

The proposed rule change would remove extraneous information, including certain provisions that are substantively duplicative of provisions that are reasonably and fairly implied by other OCC rules or that do not independently meet the criteria of rules, stated policies, practices or interpretations. Certain provisions to be removed consist of background information that does not establish an OCC requirement or impact its practices. These proposed changes would enhance clarity by deleting provisions from the OCC Policies that do not create OCC obligations or substantively impact its practices or operations. Other provisions to be removed consist of text that duplicates provisions found in OCC's By-Laws and Rules or other documentation filed with the Commission. OCC believes that it can avoid potential future confusion by removing from the OCC Policies information that is appropriately maintained in other documentation. Removing this information from the OCC Policies will eliminate inconsistencies that could arise from maintaining it in multiple places with different approval processes. Accordingly, OCC believes that removal of these extraneous provisions would facilitate the effective administration of OCC's policies and procedures, which support the prompt and accurate clearance and settlement of securities transactions and the safeguarding of securities and funds, and thus is consistent with the requirements of Section 17A(b)(3)(F) of the Exchange Act.[50] OCC also believes that removing these duplicative provisions from the OCC Policies would enhance clarity around OCC's governance arrangements, better ensure clear and direct lines of responsibility and prioritize efficient governance processes for the relevant provisions, in accordance with the requirements of Exchange Act Rule 17Ad–22(e)(2).[51]

3. Non-Substantive, Clarifying and Administrative Changes

OCC proposes to make other non-substantive, clarifying and administrative changes to the OCC Policies to enhance their accuracy, clarity and consistency with other OCC rules. By correcting typographical errors, updating references to documentation, and conforming references with other documentation and descriptions, the proposed revisions would help facilitate the administration of existing rules that are intended to promote the prompt and accurate clearance and settlement of securities and derivatives transactions, in accordance with Section 17A(b)(3)(F) of the Exchange Act.[52] In addition, correcting errors, making clarifications and conforming references and descriptions within the OCC Policies would improve their clarity, in accordance with the requirements of Exchange Act Rule 17Ad–22(e)(1).[53]

(B) Clearing Agency's Statement on Burden on Competition

Section 17A(b)(3)(I) of the Act [54] requires that the rules of a clearing agency not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. OCC does not believe that the proposed rule change would have any impact or impose a burden on competition. The proposed rule change is intended to update internal policies to better reflect OCC's current practices, remove duplicative provisions that could result in overlap or inconsistencies with other OCC documentation and to make other administrative updates that would have no impact on Clearing Members or other market participants. None of the proposed updates to the OCC Policies would affect Clearing Members' access to OCC's services or impose any direct burdens on Clearing Members.

[44] 17 CFR 240.17Ad–22(e)(1).
[45] 17 CFR 240.17Ad–22(e)(2).
[46] 17 CFR 240.17Ad–22(e)(3).
[47] 15 U.S.C. 78q–1(b)(3)(F).
[48] 17 CFR 240.17Ad–22(e)(2).
[49] 17 CFR 240.17Ad–22(e)(3).
[50] 15 U.S.C. 78q–1(b)(3)(F).
[51] 17 CFR 240.17Ad–22(e)(2).
[52] 15 U.S.C. 78q–1(b)(3)(F).
[53] 17 CFR 240.17Ad–22(e)(1).
[54] 15 U.S.C. 78q–1(b)(3)(I).

Accordingly, the proposed rule change would not unfairly inhibit access to OCC's services or disadvantage or favor any particular user in relationship to another user.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were not and are not intended to be solicited with respect to the proposed rule change, and none have been 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) of the Act [55] and paragraph (f) of Rule 19b–4 [56] 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.

The proposal shall not take effect until all regulatory actions required with respect to the proposal are completed.[57]

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–OCC–2023–008 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–OCC–2023–008. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of OCC and on OCC's website at *https://www.theocc.com/Company-Information/Documents-and-Archives/By-Laws-and-Rules.* 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–OCC–2023–008 and should be submitted on or before January 10, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[58]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–27912 Filed 12–19–23; 8:45 am]

BILLING CODE 8011–01–P

[55] 15 U.S.C. 78s(b)(3)(A).

[56] 17 CFR 240.19b–4(f).

[57] Notwithstanding its immediate effectiveness, implementation of this rule change will be delayed until this change is deemed certified under CFTC Regulation 40.6.

[58] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99182; File No. SR–CboeBZX–2023–097]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Provide a Discount on the Purchase of Historical Equity Short Volume and Trade Reports

December 14, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 1, 2023, Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') 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 also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to update its Fee Schedule to provide a discount on fees assessed to BZX Members (''Members'') [3] and non-Members that purchase $20,000 or more of U.S. Equity Short Volume and Trades Reports (''Short Volume Reports''), effective

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Rule 1.5(n) (''Member''). The term ''Member'' shall mean any registered broker or dealer that has been admitted to membership in the Exchange. A Member will have the status of a ''member'' of the Exchange as that term is defined in Section 3(a)(3) of the Act. Membership may be granted to a sole proprietor, partnership, corporation, limited liability company or other organization which is a registered broker or dealer pursuant to Section 15 of the Act, and which has been approved by the Exchange.

December 1, 2023 through December 31, 2023.

By way of background, the Short Volume Report is an end-of-day report that summarizes certain equity trading activity on the Exchange, including trade date,[4] total volume,[5] short volume,[6] and sell short exempt volume,[7] by symbol.[8] The Short Volume Report also includes an end-of-month report that provides a record of all short sale transactions for the month, including trade date and time (in microseconds),[9] trade size,[10] trade price,[11] and type of short sale execution,[12] by symbol and exchange.[13] The Short Volume Report is a completely voluntary product, in that the Exchange is not required by any rule or regulation to make this data available and that potential customers may purchase it on an ad-hoc basis only if they voluntarily choose to do so.

Cboe LiveVol, LLC (''LiveVol''), a wholly owned subsidiary of the Exchange's parent company, Cboe Global Markets, Inc., makes the Short Volume Report available for purchase to Users on the LiveVol DataShop website (*datashop.cboe.com*). Both the end-of-day report and end-of-month report are included in the cost of the Short Volume Report and are available for purchase by both Members as well as non-Members on an annual or monthly [14] basis. The monthly fee is $750 per Internal Distributor [15] and $1,250 per External Distributor.[16] Additionally, the Exchange offers historical reports containing both the end-of-day volume and end-of-month trading activity. The fee per month of historical data is $500. The Short Volume Report provided on a historical basis is only for display use redistribution (*e.g.,* the data may be provided on the User's platform). Therefore, Users of the historical data may not charge separately for data included in the Short Volume Report or incorporate such data into their product. The Exchange notes that the Short Volume Report is subject to direct competition from other exchanges, as other exchanges offer similar products for a fee.[17]

The Exchange proposes to provide a temporary pricing incentive program in which Members or Non-Members that purchase historical Short Volume Reports will receive a percentage fee discount where specific purchase thresholds are met. Specifically, the Exchange proposes to provide a 20% discount for ad-hoc purchases of historical Short Volume Reports of $20,000 or more.[18] The proposed program will apply to all market participants irrespective of whether the market participant is a new or current purchaser; however, the discount cannot be combined with any other discounts offered by the Exchange. The Exchange intends to introduce the discount program beginning December 1, 2023, with the program remaining in effect through December 31, 2023.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[19] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [20] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [21] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with Section 6(b)(4) of the Act,[22] which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

In adopting Regulation NMS, the Commission granted self-regulatory organizations (''SROs'') and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. The Exchange believes that the proposed fee changes will further broaden the availability of U.S. equity market data to investors consistent with the principles of Regulation NMS. The Exchange believes the dissemination of historical short volume data via historical Short Volume Reports benefits investors through increased transparency and may promote better informed trading, as well as research and studies of the equities industry. Nevertheless, the Exchange notes that such data is not necessary for trading and as noted above, is entirely optional. Moreover, several other exchanges offer a similar data product which offer the

[4] ''Trade date'' is the date of trading activity in yyyy–mm–dd format.

[5] ''Total volume'' is the total number of shares transacted.

[6] ''Short volume'' is the total number of shares sold short.

[7] ''Short exempt volume'' is the total number of shares sold short classified as exempt.

[8] ''Symbol'' refers to the Cboe formatted symbol in which the trading activity occurred. *See https://cdn.cboe.com/resources/membership/US_Symbology_Reference.pdf.*

[9] ''Trade date and time'' is the date and time of trading activity in yyyy–mm–dd hh:mm:ss.000000 ET format.

[10] ''Trade size'' is the number of shares transacted.

[11] ''Trade price'' is the price at which shares were transacted.

[12] ''Short type'' is a data field that will indicate whether the transaction was a short sale or short sale exempt transaction. A short sale transaction is a transaction in which a seller sells a security which the seller does not own, or the seller has borrowed for its own account (*see* 17 CFR 242.200). A short sale exempt transaction is a short sale transaction that is exempt from the short sale price test restrictions of Regulation SHO Rule 201 (*see* 17 CFR 242.201(c)).

[13] ''Exchange'' is the market identifier (Z = BZX, Y = BYX, X = EDGX, A = EDGA).

[14] The monthly fees for the Report are assessed on a rolling period based on the original subscription date. For example, if a User subscribes to the Report on October 24, 2023, the monthly fee will cover the period of October 24, 2023, through November 23, 2023. If the User cancels its subscription prior to November 23, 2023, and no refund is issued, the User will continue to receive both the end-of-day and end-of-month components of the Report for the subscription period.

[15] An Internal Distributor of an Exchange Market Data product is a Distributor that receives the Exchange Market Data product and then distributes that data to one or more Users within the Distributor's own entity. *See* Cboe BZX U.S. Equities Exchange Fee Schedule.

[16] An External Distributor of an Exchange Market Data product is a Distributor that receives the Exchange Market Data product and then distributes that data to a third party or one or more Users outside the Distributor's own entity. *See* Cboe BZX U.S. Equities Exchange Fee Schedule.

[17] *See* the Nasdaq Fee Schedule, Equity 7, Section 152. *See also,* the TAQ Group Short Sales (Monthly File) and Short Volume product, offered by the New York Stock Exchange LLC (''NYSE'') and affiliated equity markets (the ''NYSE Group'') at NYSE Exchange Proprietary Market Data | TAQ NYSE Group Short Sales.

[18] The discount will apply on an order-by-order basis. The discount will apply to the total purchase price, once the $20,000 minimum purchase is satisfied (for example, a qualifying order of $25,000 would be discounted to $20,000, *i.e.,* receive a 20% discount of $5,000).

[19] 15 U.S.C. 78f(b).

[20] 15 U.S.C. 78f(b)(5).

[21] *Id.*

[22] 15 U.S.C. 78f(b)(4).

same type of data content through similar reports.[23]

The Exchange operates in a highly competitive environment. Indeed, there are currently 16 registered equities exchanges that trade equities. Based on publicly available information, no single equities exchange has more than 13% of the equity market share.[24] The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Particularly, 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.'' [25] Making similar data products available to market participants fosters competition in the marketplace, and constrains the ability of exchanges to charge supercompetitive fees. In the event that a market participant views one exchange's data product as more attractive than the competition, that market participant can, and often does, switch between similar products. The proposed fees are a result of the competitive environment of the U.S. equities industry as the Exchange seeks to adopt fees to attract purchasers of historical Short Volume Reports.

The Exchange believes that the proposed incentive program for any Member or non-Member who purchases historical Short Volume Reports is reasonable because such purchasers would receive a 20% discount for purchasing $20,000 or more worth of historical Short Volume Reports. The Exchange believes the proposed discount is reasonable as it will give purchasers the ability to use and test the historical Short Volume Reports at a discounted rate, prior to purchasing additional months or a monthly subscription, and will therefore encourage users to purchase historical Short Volume Reports. Further, the proposed discount is intended to promote increased use of the Exchange's historical Short Volume Reports by defraying some of the costs a purchaser would ordinarily have to expend before using the data product. The Exchange believes that the proposed discount is equitable and not unfairly discriminatory because it will apply equally to all Members and non-Members who purchase historical Short Volume Reports. Lastly, the purchase of this data product is discretionary and not compulsory. Indeed, no market participant is required to purchase the historical Short Volume Reports, and the Exchange is not required to make historical Short Volume Reports available to all investors. Potential purchasers may request the data at any time if they believe it to be valuable or may decline to purchase such data.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange operates in a highly competitive environment in which the Exchange must continually adjust its fees to remain competitive. 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. As discussed above, the Exchange's historical Short Volume Reports offering is subject to direct competition from several other options exchanges that offer similar data products. Moreover, purchase of historical Short Volume Reports is optional. It is designed to help investors understand underlying market trends to improve the quality of investment decisions, but is not necessary to execute a trade.

The proposed rule changes are grounded in the Exchange's efforts to compete more effectively. In this competitive environment, potential purchasers are free to choose which, if any, similar product to purchase to satisfy their need for market information. As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges. Further, the Exchange believes that these changes will not cause any unnecessary or inappropriate burden on intermarket competition, as the proposed incentive program applies uniformly to any purchaser of historical Short Volume Reports.

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 [26] and paragraph (f) of Rule 19b–4 [27] 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–CboeBZX–2023–097 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–CboeBZX–2023–097. 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

[23] *See supra* note 17.

[24] *See* Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (November 16, 2023), available at *https://www.cboe.com/us/equities/market_statistics/*.

[25] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[26] 15 U.S.C. 78s(b)(3)(A).

[27] 17 CFR 240.19b–4(f).

communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeBZX–2023–097 and should be submitted on or before January 10, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–27923 Filed 12–19–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99181; File No. SR–CboeBYX–2023–017]

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Provide a Discount on the Purchase of Historical Equity Short Volume and Trade Reports

December 14, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 1, 2023, Cboe BYX Exchange, Inc. (the ''Exchange'' or ''BYX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BYX Exchange, Inc. (the ''Exchange'' or ''BYX'') 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 also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/byx/*), 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 update its Fee Schedule to provide a discount on fees assessed to BYX Members (''Members'') [3] and non-Members that purchase $20,000 or more of U.S. Equity Short Volume and Trades Reports (''Short Volume Reports''), effective December 1, 2023 through December 31, 2023.

By way of background, the Short Volume Report is an end-of-day report that summarizes certain equity trading activity on the Exchange, including trade date,[4] total volume,[5] short volume,[6] and sell short exempt volume,[7] by symbol.[8] The Short Volume Report also includes an end-of-month report that provides a record of all short sale transactions for the month, including trade date and time (in microseconds),[9] trade size,[10] trade price,[11] and type of short sale execution,[12] by symbol and exchange.[13] The Short Volume Report is a completely voluntary product, in that the Exchange is not required by any rule or regulation to make this data available and that potential customers may purchase it on an ad-hoc basis only if they voluntarily choose to do so.

Cboe LiveVol, LLC (''LiveVol''), a wholly owned subsidiary of the Exchange's parent company, Cboe Global Markets, Inc., makes the Short Volume Report available for purchase to Users on the LiveVol DataShop website (*datashop.cboe.com*). Both the end-of-day report and end-of-month report are included in the cost of the Short Volume Report and are available for purchase by both Members as well as non-Members on an annual or monthly [14] basis. The monthly fee is $750 per Internal Distributor [15] and $1,250 per External Distributor.[16]

[28] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Rule 1.5(n) (''Member''). The term ''Member'' shall mean any registered broker or dealer that has been admitted to membership in the Exchange. A Member will have the status of a ''member'' of the Exchange as that term is defined in section 3(a)(3) of the Act. Membership may be granted to a sole proprietor, partnership, corporation, limited liability company or other organization which is a registered broker or dealer pursuant to section 15 of the Act, and which has been approved by the Exchange.

[4] ''Trade date'' is the date of trading activity in yyyy-mm-dd format.

[5] ''Total volume'' is the total number of shares transacted.

[6] ''Short volume'' is the total number of shares sold short.

[7] ''Short exempt volume'' is the total number of shares sold short classified as exempt.

[8] ''Symbol'' refers to the Cboe formatted symbol in which the trading activity occurred. *See https://cdn.cboe.com/resources/membership/US_Symbology_Reference.pdf.*

[9] ''Trade date and time'' is the date and time of trading activity in yyyy-mm-dd hh:mm:ss.000000 ET format.

[10] ''Trade size'' is the number of shares transacted.

[11] ''Trade price'' is the price at which shares were transacted.

[12] ''Short type'' is a data field that will indicate whether the transaction was a short sale or short sale exempt transaction. A short sale transaction is a transaction in which a seller sells a security which the seller does not own, or the seller has borrowed for its own account (*see* 17 CFR 242.200). A short sale exempt transaction is a short sale transaction that is exempt from the short sale price test restrictions of Regulation SHO Rule 201 (*see* 17 CFR 242.201(c)).

[13] ''Exchange'' is the market identifier (Z = BZX, Y = BYX, X = EDGX, A = EDGA).

[14] The monthly fees for the Report are assessed on a rolling period based on the original subscription date. For example, if a User subscribes to the Report on October 24, 2023, the monthly fee will cover the period of October 24, 2023, through November 23, 2023. If the User cancels its subscription prior to November 23, 2023, and no refund is issued, the User will continue to receive both the end-of-day and end-of-month components of the Report for the subscription period.

[15] An Internal Distributor of an Exchange Market Data product is a Distributor that receives the Exchange Market Data product and then distributes that data to one or more Users within the Distributor's own entity. *See* Cboe BYX U.S. Equities Exchange Fee Schedule.

[16] An External Distributor of an Exchange Market Data product is a Distributor that receives the Exchange Market Data product and then distributes that data to a third party or one or more Users

Additionally, the Exchange offers historical reports containing both the end-of-day volume and end-of-month trading activity. The fee per month of historical data is $500. The Short Volume Report provided on a historical basis is only for display use redistribution (*e.g.,* the data may be provided on the User's platform). Therefore, Users of the historical data may not charge separately for data included in the Short Volume Report or incorporate such data into their product. The Exchange notes that the Short Volume Report is subject to direct competition from other exchanges, as other exchanges offer similar products for a fee.[17]

The Exchange proposes to provide a temporary pricing incentive program in which Members or Non-Members that purchase historical Short Volume Reports will receive a percentage fee discount where specific purchase thresholds are met. Specifically, the Exchange proposes to provide a 20% discount for ad-hoc purchases of historical Short Volume Reports of $20,000 or more.[18] The proposed program will apply to all market participants irrespective of whether the market participant is a new or current purchaser; however, the discount cannot be combined with any other discounts offered by the Exchange. The Exchange intends to introduce the discount program beginning December 1, 2023, with the program remaining in effect through December 31, 2023.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.[19] Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5) [20] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the section 6(b)(5) [21] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with section 6(b)(4) of the Act,[22] which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

In adopting Regulation NMS, the Commission granted self-regulatory organizations (''SROs'') and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. The Exchange believes that the proposed fee changes will further broaden the availability of U.S. equity market data to investors consistent with the principles of Regulation NMS. The Exchange believes the dissemination of historical short volume data via historical Short Volume Reports benefits investors through increased transparency and may promote better informed trading, as well as research and studies of the equities industry. Nevertheless, the Exchange notes that such data is not necessary for trading and as noted above, is entirely optional. Moreover, several other exchanges offer a similar data product which offer the same type of data content through similar reports.[23]

The Exchange operates in a highly competitive environment. Indeed, there are currently 16 registered equities exchanges that trade equities. Based on publicly available information, no single equities exchange has more than 13% of the equity market share.[24] The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Particularly, 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.'' [25] Making similar data products available to market participants fosters competition in the marketplace, and constrains the ability of exchanges to charge supercompetitive fees. In the event that a market participant views one exchange's data product as more attractive than the competition, that market participant can, and often does, switch between similar products. The proposed fees are a result of the competitive environment of the U.S. equities industry as the Exchange seeks to adopt fees to attract purchasers of historical Short Volume Reports.

The Exchange believes that the proposed incentive program for any Member or non-Member who purchases historical Short Volume Reports is reasonable because such purchasers would receive a 20% discount for purchasing $20,000 or more worth of historical Short Volume Reports. The Exchange believes the proposed discount is reasonable as it will give purchasers the ability to use and test the historical Short Volume Reports at a discounted rate, prior to purchasing additional months or a monthly subscription, and will therefore encourage users to purchase historical Short Volume Reports. Further, the proposed discount is intended to promote increased use of the Exchange's historical Short Volume Reports by defraying some of the costs a purchaser would ordinarily have to expend before using the data product. The Exchange believes that the proposed discount is equitable and not unfairly discriminatory because it will apply equally to all Members and non-Members who purchase historical Short Volume Reports. Lastly, the purchase of this data product is discretionary and not compulsory. Indeed, no market participant is required to purchase the historical Short Volume Reports, and the Exchange is not required to make historical Short Volume Reports available to all investors. Potential purchasers may request the data at any

outside the Distributor's own entity. *See* Cboe BYX U.S. Equities Exchange Fee Schedule.

[17] *See* the Nasdaq Fee Schedule, Equity 7, Section 152. *See also,* the TAQ Group Short Sales (Monthly File) and Short Volume product, offered by the New York Stock Exchange LLC (''NYSE'') and affiliated equity markets (the ''NYSE Group'') at NYSE Exchange Proprietary Market Data | TAQ NYSE Group Short Sales.

[18] The discount will apply on an order-by-order basis. The discount will apply to the total purchase price, once the $20,000 minimum purchase is satisfied (for example, a qualifying order of $25,000 would be discounted to $20,000, *i.e.,* receive a 20% discount of $5,000).

[19] 15 U.S.C. 78f(b).

[20] 15 U.S.C. 78f(b)(5).

[21] *Id.*

[22] 15 U.S.C. 78f(b)(4).

[23] *See supra* note 17.

[24] *See* Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (November 16, 2023), available at *https://www.cboe.com/us/equities/market_statistics/.*

[25] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

time if they believe it to be valuable or may decline to purchase such data.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange operates in a highly competitive environment in which the Exchange must continually adjust its fees to remain competitive. 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. As discussed above, the Exchange's historical Short Volume Reports offering is subject to direct competition from several other options exchanges that offer similar data products. Moreover, purchase of historical Short Volume Reports is optional. It is designed to help investors understand underlying market trends to improve the quality of investment decisions, but is not necessary to execute a trade.

The proposed rule changes are grounded in the Exchange's efforts to compete more effectively. In this competitive environment, potential purchasers are free to choose which, if any, similar product to purchase to satisfy their need for market information. As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges. Further, the Exchange believes that these changes will not cause any unnecessary or inappropriate burden on intermarket competition, as the proposed incentive program applies uniformly to any purchaser of historical Short Volume Reports.

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 [26] and paragraph (f) of Rule 19b–4 [27] 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–CboeBYX–2023–017 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–CboeBYX–2023–017. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and 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–CboeBYX–2023–017 and should be submitted on or before January 10, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–27922 Filed 12–19–23; 8:45 am]

BILLING CODE 8011–01–P

[26] 15 U.S.C. 78s(b)(3)(A).

[27] 17 CFR 240.19b–4(f).

[28] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99166; File No. SR–NYSEARCA–2023–83]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Connectivity Fee Schedule

December 14, 2023.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on November 30, 2023, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Connectivity Fee Schedule (the ''Fee Schedule'') to add circuits provided by Fixed Income and Data Services (''FIDS'') for connectivity into and out of the data center in Mahwah, New Jersey (the ''MDC''). The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of,

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Connectivity Fee Schedule (the ''Fee Schedule'') to add circuits provided by Fixed Income and Data Services (''FIDS'') [4] for connectivity into and out of the data center in Mahwah, New Jersey (the ''MDC'').

As background, market participants that request to receive colocation services directly from the Exchange (''Users'') require wired circuits [5] to connect into and out of the MDC. A User's equipment in the MDC's colocation hall connects to a circuit leading out of the MDC, which connects to the User's equipment in their back office or another data center.

Before 2013, all such circuits were provided by ICE's predecessor, NYSE Euronext. In response to customer demand for more connectivity options, in 2013, the MDC opened two ''meet-me-rooms'' to telecommunications service providers (''Telecoms''),[6] to enable Telecoms to offer circuits into the MDC in competition with NYSE Euronext. Currently, 16 Telecoms operate in the meet-me-rooms and provide circuit options to Users requiring connectivity into and out of the MDC. As of June 1, 2023, more than 95% of the circuits for which Users contracted were supplied by Telecoms, and all but two of the Users that used FIDS circuits as of that date also connected to Telecom circuits in the MMRs.

The Exchange proposes to add several circuits provided by FIDS to the Fee Schedule. Specifically, the Exchange proposes to amend the Fee Schedule to add two different types of FIDS circuits, each available in three different sizes. Because FIDS is not a telecommunications provider, FIDS would purchase circuits from telecommunications providers, with portions allocated and sold to Users.

First, the Exchange proposes to amend the Fee Schedule to add ''Optic Access'' circuits supplied by FIDS. Users can use an Optic Access circuit to connect between the MDC and the FIDS access centers at the following five third-party owned data centers: (1) 111 Eighth Avenue, New York, NY; (2) 32 Avenue of the Americas, New York, NY; (3) 165 Halsey, Newark, NJ; (4) Secaucus, NJ (the ''Secaucus Access Center''); and (5) Carteret, NJ (the ''Carteret Access Center''). Optic Access circuits are available in 1 Gb, 10 Gb, and 40 Gb sizes.

Second, the Exchange proposes to amend the Fee Schedule to add lower-latency ''Optic Low Latency'' circuits supplied by FIDS that Users can use to connect between the MDC and FIDS's Secaucus Access Center or Carteret Access Center. Optic Low Latency circuits are available in 1 Gb, 10 Gb, and 40 Gb sizes.

The Exchange proposes to add the following chart to the Fee Schedule, under the new heading ''E. FIDS Circuits'':

Type of service	Fees
Optic Access Circuit—1 Gb	$1,500 initial charge plus $650 monthly charge.
Optic Access Circuit—10 Gb	$5,000 initial charge plus $1,900 monthly charge.
Optic Access Circuit—40 Gb	$5,000 initial charge plus $4,000 monthly charge.
Optic Low Latency Circuit—1 Gb	$1,500 initial charge plus $2,750 monthly charge.
Optic Low Latency Circuit—10 Gb	$5,000 initial charge plus $3,950 monthly charge.
Optic Low Latency Circuit—40 Gb	$5,000 initial charge plus $8,250 monthly charge.

Application and Impact of the Proposed Changes

The proposed change is not targeted at, or expected to be limited in applicability to, a specific segment of market participant. The FIDS circuits would be available for purchase for any potential User requiring a circuit between the MDC and the FIDS access centers at the third-party owned data centers listed above. The proposed changes do not apply differently to distinct types or sizes of customers. Rather, they apply to all customers equally.

Use of the services proposed in this filing are completely voluntary and available to all market participants on a non-discriminatory basis.

The proposed changes are not otherwise intended to address any other issues relating to services related to the MDC and/or related fees, and the Exchange is not aware of any problems that market participants would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Section 6(b)(5) of the Act,[8] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in 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 and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange further believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,[9] because it

[4] Through its FIDS business (previously ICE Data Services), Intercontinental Exchange, Inc. (''ICE'') operates the MDC. The Exchange is an indirect subsidiary of ICE and is an affiliate of the New York Stock Exchange LLC, NYSE American LLC, NYSE Chicago, Inc., and NYSE National, Inc. (together, the ''Affiliate SROs''). Each Affiliate SRO has submitted substantially the same proposed rule change. *See* SR–NYSE–2023–48, SR–NYSEAMER–2023–65, SR–NYSECHX–2023–24, and SR–NYSENAT–2023–29.

[5] In addition to wired fiber optic connections, Users may use FIDS or third-party wireless connections to the MDC. In such a case, the portion of the connection closest to the MDC is wired. Other than Telecoms, Users are the only FIDS customers with equipment physically located in the MDC.

[6] In this filing, telecommunication service providers that choose to provide circuits at the MDC are referred to as ''Telecoms.'' Telecoms are licensed by the Federal Communications Commission (''FCC'') and are not required to be, or be affiliated with, a member of the Exchange or an Affiliate SRO.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78f(b)(4).

provides for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers, or dealers.

The Proposed Change Is Reasonable

The Exchange believes that the proposed rule change is reasonable. In considering the reasonableness of proposed services and fees, the Commission's market-based test considers ''whether the exchange was subject to significant competitive forces in setting the terms of its proposal . . . , including the level of any fees.'' [10] If the Exchange meets that burden, ''the Commission will find that its proposal is consistent with the Act unless 'there is a substantial countervailing basis to find that the terms' of the proposal violate the Act or the rules thereunder.'' [11] Here, the Exchange is subject to significant competitive forces in setting the terms on which it offers its proposal, in particular because substantially similar substitutes are available, and the third-party vendors are not at a competitive disadvantage created by the Exchange.

The proposed FIDS circuits would compete with circuits currently offered by the 16 Telecoms operating in the meet-me-rooms at the MDC. The Telecom circuits are reasonable substitutes for the FIDS circuits. The Commission has recognized that products do not need to be identical or equivalent to be considered substitutable; it is sufficient that they be substantially similar.[12] The circuits provided by FIDS and by the Telecoms all perform the same function: connecting into and out of the MDC. The providers of these circuits design them to perform with particular combinations of latency, bandwidth, price, termination point, and other factors that they believe will attract Users, and Users choose from among these competing services on the basis of their business needs.

The proposed FIDS circuits are sufficiently similar substitutes to the circuits offered by the 16 Telecoms even though the proposed FIDS circuits would all terminate in one of the five data centers mentioned above, while circuits from the 16 Telecoms could terminate in those locations or additional locations. While neither the Exchange nor FIDS knows the end point of any particular Telecom circuit, the Exchange understands that the Telecoms can offer circuits terminating in any location, including the five data center locations where the FIDS circuits would terminate. In addition, Users can choose to configure their pathway leading out of colocation in the way that best suits their business needs, which may include connecting to the User's equipment at one of the five data center locations that serve as termination points for the proposed FIDS circuits, or connecting first to one of those five data centers with a FIDS- or Telecom-supplied circuit and then further connecting to another remote location using a telecommunication provider-supplied circuit.

The proposed FIDS circuits do not have a distance or latency advantage over the Telecoms' circuits within the MDC. FIDS has normalized (a) the distance between the meet-me-rooms and the colocation halls and (b) the distance between the rooms where the FIDS circuits are located and the colocation halls. As a result, a User choosing whether to use the proposed FIDS circuits or Telecom circuits does not face any difference in the distances or latency within the MDC.

The Exchange also believes that the proposed FIDS circuits do not have any latency or bandwidth advantage over the Telecoms' circuits as a whole outside of the MDC. FIDS would purchase the proposed FIDS circuits from third-party telecommunications providers and would allocate and resell portions of them to Users. The Exchange believes that the Telecoms operating in the meet-me-rooms offer circuits with a variety of latency and bandwidth specifications, some of which may exceed the specifications of the proposed FIDS circuits.[13] The Exchange believes that Users consider these latency and bandwidth factors—as well as other factors, such as price and termination point—in determining which circuit offerings will best serve their business needs.[14]

In sum, the Exchange does not believe that there is anything about the proposed FIDS circuits that would make the Telecoms' circuits inadequate substitutes.

Nor does the Exchange have a meaningful competitive advantage over the Telecoms by virtue of the fact that it owns and operates the MDC's meet-me-rooms. The Exchange understands that Telecoms choose to pay fees to the Exchange for the opportunity to install equipment in the MDC's meet-me-rooms because of the financial benefits those Telecoms can accrue by selling circuits to Users. It is therefore in the Exchange's best interest to set fees at the MDC—including both the meet-me-room fees that Telecoms pay and the FIDS circuit fees that Users would pay—at a level that encourages market participants, including Telecoms, to maximize their use of the MDC.[15]

Setting the FIDS circuit fees at a reasonable level makes it more likely that Users will connect into and out of the MDC. Competitive rates for circuits, whether FIDS circuits or Telecom circuits, help draw more Users and Hosted Customers [16] into the MDC, which directly benefits the Exchange by increasing the customer base to whom the Exchange can sell its colocation services (including cabinets, power, ports, and connectivity to many third-party data feeds) and encouraging greater participation on the Exchange. In other words, by setting the fees for FIDS circuits at a level attractive to Users, the Exchange spurs demand for all of the services it sells at the MDC.

If the Exchange were to set the price of the FIDS circuits too high, Users would likely respond by choosing one of the many alternative options offered by the 16 Telecoms. Conversely, if the

[10] Securities Exchange Act Release No. 90209 (October 15, 2020), 85 FR 67044, 67049 (October 21, 2020) (Order Granting Accelerated Approval to Establish a Wireless Fee Schedule Setting Forth Available Wireless Bandwidth Connections and Wireless Market Data Connections) (SR–NYSE–2020–05, SR–NYSEAMER–2020–05, SR–NYSEArca–2020–08, SR–NYSECHX–2020–02, SR–NYSENAT–2020–03, SR–NYSE–2020–11, SR–NYSEAMER–2020–10, SR–NYSEArca–2020–15, SR–NYSECHX–2020–05, SR–NYSENAT–2020–08) (''Wireless Approval Order''), citing Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74781 (December 9, 2008) (''2008 ArcaBook Approval Order''). *See NetCoalition* v. *SEC*, 615 F.3d 525 (D.C. Cir. 2010).

[11] Wireless Approval Order, *supra* note 10, at 67049, citing 2008 ArcaBook Approval Order, *supra* note 10, at 74781.

[12] *See* 2008 ArcaBook Approval Order, *supra* note 10, at 74789 and note 295 (recognizing that products need not be identical to be substitutable).

[13] The specifications of FIDS's competitors' circuits are not publicly known. The Exchange understands that FIDS has gleaned any information it has about its competitors through anecdotal communications, by observing customers' purchasing choices in the competitive market, and from its own experience as a purchaser of circuits from telecommunications providers to build FIDS's own networks.

[14] The fact that the FIDS circuits do not have an advantage is reflected by the fact that Users choose to use Telecom circuits for the vast majority of their circuit needs. Whereas before 2013, NYSE Euronext provided 100% of such circuits, today more than 95% of the circuits that Users have contracted for are supplied by third-party Telecoms, with FIDS supplying less than 5%.

[15] *See* Securities Exchange Act Release No. 98000 (July 26, 2023), 88 FR 50244 (August 1, 2023) (SR–NYSEARCA–2023–47) (''MMR Notice'').

[16] ''Hosting'' is a service offered by a User to another entity in the User's space within the MDC. The Exchange allows Users to act as Hosting Users for a monthly fee. *See* Securities Exchange Act Release No. 76010 (September 29, 2015), 80 FR 60197 (October 5, 2015) (SR–NYSEArca–2015–82). Hosting Users' customers are referred to as ''Hosted Customers''.

Exchange were to offer the FIDS circuits at prices aimed at undercutting comparable Telecom circuits, the Telecoms might reassess whether it makes financial sense for them to continue to participate in the MDC's meet-me-rooms. Their departure might negatively impact User participation in colocation and on the Exchange. As a result, the Exchange is not motivated to undercut the prices of Telecom circuits.

For these reasons, the proposed change is reasonable.

The Proposed Change Is an Equitable Allocation of Fees and Credits

The Exchange believes that its proposal equitably allocates its fees among market participants. The Exchange believes that the proposed change is equitable because it would not apply differently to distinct types or sizes of market participants. Rather, it would apply to all market participants equally.

In addition, the Exchange believes that the proposal is equitable because only market participants that voluntarily select to receive the proposed FIDS circuits would be charged for them. The proposed FIDS circuits are available to all market participants on an equal basis, and all market participants that voluntarily choose to purchase a FIDS circuit are charged the same amount for that circuit as all other market participants purchasing that type of FIDS circuit.

Moreover, any telecommunications service provider licensed by the FCC is eligible to be a Telecom operating in the MRR, irrespective of size and type. The Exchange's MMR services are available to all Telecoms on an equal basis at standardized pricing.

The Proposed Change Is Not Unfairly Discriminatory

The Exchange believes its proposal is not unfairly discriminatory. The proposed change does not apply differently to distinct types or sizes of market participants. Rather, it applies to all market participants equally. The purchase of any proposed service is completely voluntary and the Fee Schedule will be applied uniformly to all market participants.

In addition, the Exchange believes that the proposal is not unfairly discriminatory because only market participants that voluntarily select to receive the proposed FIDS circuits would be charged for them. The proposed FIDS circuits are available to all market participants on an equal basis, and all market participants that voluntarily choose to purchase a FIDS circuit are charged the same amount for that circuit as all other market participants purchasing that type of FIDS circuit.

For these reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that the proposal will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of Section 6(b)(8) of the Act.[17]

The proposed change would not impose a burden on competition among national securities exchanges or among members of the Exchange. The proposed change would enhance competition in the market for circuits transmitting data into and out of colocation at the MDC by adding FIDS as the 17th provider of such circuits, in addition to the 16 Telecoms that also sell such circuits to Users. The proposed FIDS circuits do not have any latency, bandwidth, or other advantage over the Telecoms' circuits. The proposal would not burden competition in the sale of such circuits, but rather, enhance it by providing Users with an additional choice for their circuit needs.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[18] and Rule 19b–4(f)(6) thereunder.[19] Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[20] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include file number SR–NYSEARCA–2023–83 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–NYSEARCA–2023–83. 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;

[17] 15 U.S.C. 78f(b)(8).

[18] 15 U.S.C. 78s(b)(3)(A)(iii).

[19] 17 CFR 240.19b–4(f)(6).

[20] 15 U.S.C. 78s(b)(2)(B).

you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–NYSEARCA–2023–83 and should be submitted on or before January 10, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–27909 Filed 12–19–23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99185; File No. SR–CboeEDGX–2023–072]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Provide a Discount on the Purchase of Historical Equity Short Volume and Trade Reports

December 14, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 1, 2023, Cboe EDGX Exchange, Inc. (the ''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.

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 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 update its Fee Schedule to provide a discount on fees assessed to EDGX Members (''Members'') [3] and non-Members that purchase $20,000 or more of U.S. Equity Short Volume and Trades Reports (''Short Volume Reports''), effective December 1, 2023 through December 31, 2023.

By way of background, the Short Volume Report is an end-of-day report that summarizes certain equity trading activity on the Exchange, including trade date,[4] total volume,[5] short volume,[6] and sell short exempt volume,[7] by symbol.[8] The Short Volume Report also includes an end-of-month report that provides a record of all short sale transactions for the month, including trade date and time (in microseconds),[9] trade size,[10] trade price,[11] and type of short sale execution,[12] by symbol and exchange.[13] The Short Volume Report is a completely voluntary product, in that the Exchange is not required by any rule or regulation to make this data available and that potential customers may purchase it on an ad-hoc basis only if they voluntarily choose to do so.

Cboe LiveVol, LLC (''LiveVol''), a wholly owned subsidiary of the Exchange's parent company, Cboe Global Markets, Inc., makes the Short Volume Report available for purchase to Users on the LiveVol DataShop website (*datashop.cboe.com*). Both the end-of-day report and end-of-month report are included in the cost of the Short Volume Report and are available for purchase by both Members as well as non-Members on an annual or monthly [14] basis. The monthly fee is $750 per Internal Distributor [15] and $1,250 per External Distributor.[16] Additionally, the Exchange offers historical reports containing both the end-of-day volume and end-of-month trading activity. The fee per month of historical data is $500. The Short Volume Report provided on a historical basis is only for display use redistribution (*e.g.,* the data may be provided on the User's platform). Therefore, Users of the historical data may not charge separately for data included in the Short Volume Report or incorporate such data into their product. The Exchange notes that the Short

[21] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Rule 1.5(n) (''Member''). The term ''Member'' shall mean any registered broker or dealer that has been admitted to membership in the Exchange. A Member will have the status of a ''member'' of the Exchange as that term is defined in section 3(a)(3) of the Act. Membership may be granted to a sole proprietor, partnership, corporation, limited liability company or other organization which is a registered broker or dealer pursuant to section 15 of the Act, and which has been approved by the Exchange.

[4] ''Trade date'' is the date of trading activity in yyyy–mm–dd format.

[5] ''Total volume'' is the total number of shares transacted.

[6] ''Short volume'' is the total number of shares sold short.

[7] ''Short exempt volume'' is the total number of shares sold short classified as exempt.

[8] ''Symbol'' refers to the Cboe formatted symbol in which the trading activity occurred. *See https://cdn.cboe.com/resources/membership/US_Symbology_Reference.pdf.*

[9] ''Trade date and time'' is the date and time of trading activity in yyyy–mm–dd hh:mm:ss.000000 ET format.

[10] ''Trade size'' is the number of shares transacted.

[11] ''Trade price'' is the price at which shares were transacted.

[12] ''Short type'' is a data field that will indicate whether the transaction was a short sale or short sale exempt transaction. A short sale transaction is a transaction in which a seller sells a security which the seller does not own, or the seller has borrowed for its own account (*see* 17 CFR 242.200). A short sale exempt transaction is a short sale transaction that is exempt from the short sale price test restrictions of Regulation SHO Rule 201 (*see* 17 CFR 242.201(c)).

[13] ''Exchange'' is the market identifier (Z = BZX, Y = BYX, X = EDGX, A = EDGA).

[14] The monthly fees for the Report are assessed on a rolling period based on the original subscription date. For example, if a User subscribes to the Report on October 24, 2023, the monthly fee will cover the period of October 24, 2023, through November 23, 2023. If the User cancels its subscription prior to November 23, 2023, and no refund is issued, the User will continue to receive both the end-of-day and end-of-month components of the Report for the subscription period.

[15] An Internal Distributor of an Exchange Market Data product is a Distributor that receives the Exchange Market Data product and then distributes that data to one or more Users within the Distributor's own entity. *See* Cboe EDGX U.S. Equities Exchange Fee Schedule.

[16] An External Distributor of an Exchange Market Data product is a Distributor that receives the Exchange Market Data product and then distributes that data to a third party or one or more Users outside the Distributor's own entity. *See* Cboe EDGX U.S. Equities Exchange Fee Schedule.

Volume Report is subject to direct competition from other exchanges, as other exchanges offer similar products for a fee.[17]

The Exchange proposes to provide a temporary pricing incentive program in which Members or Non-Members that purchase historical Short Volume Reports will receive a percentage fee discount where specific purchase thresholds are met. Specifically, the Exchange proposes to provide a 20% discount for ad-hoc purchases of historical Short Volume Reports of $20,000 or more.[18] The proposed program will apply to all market participants irrespective of whether the market participant is a new or current purchaser; however, the discount cannot be combined with any other discounts offered by the Exchange. The Exchange intends to introduce the discount program beginning December 1, 2023, with the program remaining in effect through December 31, 2023.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.[19] Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5) [20] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the section 6(b)(5) [21] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with section 6(b)(4) of the Act,[22] which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

In adopting Regulation NMS, the Commission granted self-regulatory organizations (''SROs'') and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. The Exchange believes that the proposed fee changes will further broaden the availability of U.S. equity market data to investors consistent with the principles of Regulation NMS. The Exchange believes the dissemination of historical short volume data via historical Short Volume Reports benefits investors through increased transparency and may promote better informed trading, as well as research and studies of the equities industry. Nevertheless, the Exchange notes that such data is not necessary for trading and as noted above, is entirely optional. Moreover, several other exchanges offer a similar data product which offer the same type of data content through similar reports.[23]

The Exchange operates in a highly competitive environment. Indeed, there are currently 16 registered equities exchanges that trade equities. Based on publicly available information, no single equities exchange has more than 13% of the equity market share.[24] The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Particularly, 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.'' [25]

Making similar data products available to market participants fosters competition in the marketplace, and constrains the ability of exchanges to charge supercompetitive fees. In the event that a market participant views one exchange's data product as more attractive than the competition, that market participant can, and often does, switch between similar products. The proposed fees are a result of the competitive environment of the U.S. equities industry as the Exchange seeks to adopt fees to attract purchasers of historical Short Volume Reports.

The Exchange believes that the proposed incentive program for any Member or non-Member who purchases historical Short Volume Reports is reasonable because such purchasers would receive a 20% discount for purchasing $20,000 or more worth of historical Short Volume Reports. The Exchange believes the proposed discount is reasonable as it will give purchasers the ability to use and test the historical Short Volume Reports at a discounted rate, prior to purchasing additional months or a monthly subscription, and will therefore encourage users to purchase historical Short Volume Reports. Further, the proposed discount is intended to promote increased use of the Exchange's historical Short Volume Reports by defraying some of the costs a purchaser would ordinarily have to expend before using the data product. The Exchange believes that the proposed discount is equitable and not unfairly discriminatory because it will apply equally to all Members and non-Members who purchase historical Short Volume Reports. Lastly, the purchase of this data product is discretionary and not compulsory. Indeed, no market participant is required to purchase the historical Short Volume Reports, and the Exchange is not required to make historical Short Volume Reports available to all investors. Potential purchasers may request the data at any time if they believe it to be valuable or may decline to purchase such data.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange operates in a highly competitive environment in which the Exchange must continually adjust its fees to remain competitive. Because competitors are free to modify their own fees in response, the Exchange believes that the degree to which fee changes in

[17] *See* the Nasdaq Fee Schedule, Equity 7, Section 152. *See also,* the TAQ Group Short Sales (Monthly File) and Short Volume product, offered by the New York Stock Exchange LLC (''NYSE'') and affiliated equity markets (the ''NYSE Group'') at NYSE Exchange Proprietary Market Data | TAQ NYSE Group Short Sales.

[18] The discount will apply on an order-by-order basis. The discount will apply to the total purchase price, once the $20,000 minimum purchase is satisfied (for example, a qualifying order of $25,000 would be discounted to $20,000, *i.e.*, receive a 20% discount of $5,000).

[19] 15 U.S.C. 78f(b).

[20] 15 U.S.C. 78f(b)(5).

[21] *Id.*

[22] 15 U.S.C. 78f(b)(4).

[23] *See supra* note 17.

[24] *See* Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (November 16, 2023), available at *https://www.cboe.com/us/equities/market_statistics/.*

[25] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

this market may impose any burden on competition is extremely limited. As discussed above, the Exchange's historical Short Volume Reports offering is subject to direct competition from several other options exchanges that offer similar data products. Moreover, purchase of historical Short Volume Reports is optional. It is designed to help investors understand underlying market trends to improve the quality of investment decisions, but is not necessary to execute a trade.

The proposed rule changes are grounded in the Exchange's efforts to compete more effectively. In this competitive environment, potential purchasers are free to choose which, if any, similar product to purchase to satisfy their need for market information. As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges. Further, the Exchange believes that these changes will not cause any unnecessary or inappropriate burden on intermarket competition, as the proposed incentive program applies uniformly to any purchaser of historical Short Volume Reports.

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 [26] and paragraph (f) of Rule 19b–4 [27] 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–2023–072 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–2023–072. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeEDGX–2023–072 and should be submitted on or before January 10, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–27926 Filed 12–19–23; 8:45 am]

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[26] 15 U.S.C. 78s(b)(3)(A).

[27] 17 CFR 240.19b–4(f).

[28] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99176; File No. SR–NASDAQ–2023–053]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Equity 7, Section 114(f)

December 14, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 1, 2023, The Nasdaq Stock Market LLC (''Nasdaq'' 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 schedule of rebates at Equity 7, Section 114(f) as described further below. The text of the proposed rule change is available on the Exchange's website at *https://istingcenter.nasdaq.com/rulebook/nasdaq/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

The purpose of the proposed rule change is to amend the Exchange's schedule of credits at Equity 7, Section

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

114(f) applicable to the Designated Liquidity Provider (''DLP'') [3] Program. Specifically, the Exchange proposes to amend the Additional Tape C ETP Incentives at Equity 7, Section 114(f).

Currently, the Additional Tape C ETP Incentives in Equity 7, Section 114(f)(5)(B) are provided to an eligible member for each displayed share that adds liquidity in a Tape C ETP that meets the criteria of Equity 7, Section 114(f)(1)(A) and only apply to the MPID where a member is a DLP. In addition, Equity 7, Section 114(f)(4) provides monthly performance criteria related to Additional Tape C ETP Incentives, which requires that the average time the DLP is at the NBBO for each assigned ETP averages at least 20%, and the average liquidity provided by the DLP for each assigned ETP average at least 5% of the liquidity provided on the Exchange in the respective ETP.

As set forth in in Equity 7, Section 114(f)(5)(B), the Exchange provides an Incremental Tape C ETP Rebate for Tier 1 (applicable to members with a minimum monthly average of 10 assigned ETPs as a DLP) of $0.0002 per executed share. The Exchange provides an Incremental Tape C ETP Rebate for Tier 2 (applicable to members with a minimum monthly average of 25 assigned ETPs as a DLP) of $0.0003 per executed share. The Exchange provides an Incremental Tape C ETP Rebate for Tier 3 (applicable to members with a minimum monthly average of 50 assigned ETPs as a DLP) of $0.0004 per executed share. Finally, the Exchange provides an Incremental Tape C ETP Rebate for Tier 4 (applicable to members with a minimum monthly average of 100 assigned ETPs as a DLP) of $0.0005 per executed share.

The Exchange proposes to limit the category of DLPs that may qualify for the Additional Tape C ETP Incentives to Primary DLPs. Under the proposed rule change, Secondary DLPs [4] would not be eligible for Additional Tape C ETP Incentives.

In order to effectuate this proposed modification, the Exchange proposes to modify Equity 7, Section 114(f)(4) to indicate that the Additional Tape C ETP Incentives are for Primary DLPs and relatedly, update the performance criteria related to such rebates by adding ''Primary'' where DLP is referenced. In addition, the Exchange proposes to modify Equity 7, Section 114(f)(5) to specify, in both the introductory language as well as in Section 114(f)(5)(B), that the DLP must be a Primary DLP to qualify for the Additional Tape C ETP Incentives.

The Exchange believes it is appropriate to update the Tape C ETP Incentives to apply solely to Primary DLPs because Primary DLPs bear the majority of the responsibility for providing high quality markets in the ETPs, whereas Secondary DLPs provide additional support. In return for serving as Primary DLPs, the Exchange believes it is appropriate to compensate Primary DLPs with incentives reserved for Primary DLPs. The Exchange has limited resources to devote to incentive programs, and it is appropriate for the Exchange to reallocate these incentives periodically in a manner that best achieves the Exchange's overall mix of objectives, including by maximizing the net impact of such incentives on the Exchange, market quality, and participants.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[5] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[6] in particular, 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 Exchange also notes that its ETP listing business operates in a highly competitive market in which market participants, which include both DLPs and ETP issuers, can readily transfer their listings or opt not to participate, respectively, if they deem fee levels, liquidity incentive programs, or any other factor at a particular venue to be insufficient or excessive. The DLP Program, including the proposed rule change, reflects a competitive pricing structure designed to incentivize issuers to list new products and transfer existing products to the Exchange and market participants to enroll and participate as DLPs on the Exchange.

The Exchange believes it is reasonable, equitable, and not unfairly discriminatory to limit the category of DLPs that may qualify for the Additional Tape C ETP Incentives to Primary DLPs. The Exchange believes it is appropriate to update the Tape C ETP Incentives to apply solely to Primary DLPs because Primary DLPs bear the majority of the responsibility for providing high quality markets in the ETPs, whereas the Secondary DLPs provide additional support. The Exchange has limited resources to devote to incentive programs, and it is appropriate for the Exchange to reallocate these incentives periodically in a manner that best achieves the Exchange's overall mix of objectives. In return for serving as Primary DLPs, the Exchange believes it is appropriate to compensate Primary DLPs with incentives reserved exclusively for Primary DLPs. The Exchange believes that the proposed revisions to the Additional Tape C ETP Incentives are an equitable allocation and are not unfairly discriminatory because the Exchange will apply the same criteria for the Additional Tape C ETP Incentives to all Primary DLPs. The Exchange also believes that amending the DLP Program as proposed is an equitable allocation of rebates and is not unfairly discriminatory because it will allocate its rebates fairly among its market participants (*i.e.,* the Exchange will offer more rebates to Primary DLPs that are responsible for providing high quality markets in the ETPs).

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. The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem rebates or fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its rebates and 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 rebates and fees in

[3] Equity 7, Section 114(f)(2) defines a ''Designated Liquidity Provider'' or ''DLP'' as a registered Nasdaq market maker for a Qualified Security that has committed to maintain minimum performance standards. A DLP shall be selected by Nasdaq based on factors including, but not limited to, experience with making markets in exchange-traded products, adequacy of capital, willingness to promote Nasdaq as a marketplace, issuer preference, operational capacity, support personnel, and history of adherence to Nasdaq rules and securities laws. Nasdaq may limit the number of DLPs in a security, or modify a previously established limit, upon prior written notice to members.

[4] Equity 7, Section 114(f)(4) provides that, if there are two DLP assignments for a Nasdaq-listed ETP, the Secondary DLP will be determined by using the factors in Section 114(f)(2). Such factors include experience with making markets in exchange-traded products, adequacy of capital, willingness to promote Nasdaq as a marketplace, issuer preference, operational capacity, support personnel, and history of adherence to Nasdaq rules and securities laws.

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(4) and (5).

response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which rebate and fee changes in this market may impose any burden on competition is extremely limited.

In this instance, the Exchange is proposing to limit the category of DLPs that may qualify for the Additional Tape C ETP Incentives in the DLP Program to Primary DLPs in an effort to exclusively reward Primary DLPs with such incentives. The proposal is reflective of the greater responsibility borne by Primary DLPs.

The Exchange uses incentives, such as the rebates of the DLP program, to incentivize market participants to improve the market. The Exchange must, from time to time, assess the effectiveness of incentives and adjust them when they are not as effective as the Exchange believes they could be. Moreover, the Exchange is ultimately limited in the amount of rebates it may offer. The proposal is reflective of such an analysis.

The Exchange notes that participation in the DLP program is entirely voluntary and, to the extent that registered market makers determine that the rebates are not in line with the level of market-improving behavior the Exchange requires, a DLP may elect to deregister as such with no penalty. The Exchange does not believe that the proposed change places an unnecessary burden on competition and, in sum, if the changes proposed herein are unattractive to market makers, it is likely that the Exchange will lose participation in the DLP program as a result. Thus, the Exchange does not believe that the proposal represents a burden on competition among Exchange members, or that the proposal will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were 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.[7]

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–NASDAQ–2023–053 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–NASDAQ–2023–053. 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–NASDAQ–2023–053 and should be submitted on or before January 10, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–27918 Filed 12–19–23; 8:45 am]

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[7] 15 U.S.C. 78s(b)(3)(A)(ii).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99175; File No. SR–PEARL–2023–69]

Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the MIAX Pearl Equities Fee Schedule

December 14, 2023.

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 12, 2023, MIAX PEARL, LLC (''MIAX Pearl'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the fee schedule (the ''Fee Schedule'') applicable to MIAX Pearl Equities, an equities trading facility of the Exchange.

The text of the proposed rule change is available on the Exchange's website at *https://www.miaxglobal.com/markets/us-options/pearl-options/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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to: (1) amend Section 1)d) to modify the volume requirement in Tier 1 of the Remove Volume Tiers [3] applicable to executions of orders in securities priced at or above $1.00 per share that remove liquidity from the Exchange (''Removed Volume'') and eliminate Remove Volume Tier 2 and the corresponding fee; and (2) amend Section 1)f) to modify the expiration month (referred to herein as the ''sunset period'') for the Step-Up Added Liquidity Rebate. The Exchange originally filed this proposal on November 30, 2023 (SR–PEARL–2023–67). On December 12, 2023, the Exchange withdrew SR–PEARL–2023–67 and refiled this proposal with minor changes.

Remove Volume Tiers Table Changes

Currently the Exchange charges a fee of $0.00295 per share for executions of Removed Volume on the Exchange in securities priced at or above $1.00 per share, except for executions of Removed Volume that execute at the midpoint for non-displayed Midpoint Peg Orders [4] in all Tapes.[5] The Exchange also offers a tiered pricing structure in Section 1)d) of the Fee Schedule, Remove Volume Tiers, which provides reduced fees for executions of Removed Volume on the Exchange in securities priced at or above $1.00 per share based on certain volume thresholds achieved by Equity Members.[6] To achieve the reduced fees of the Remove Volume Tiers, Equity Members must, (i) for Tier 1, achieve an average daily volume (''ADV'') [7] that is equal to or greater than 0.10% of the total consolidated volume (''TCV'') [8] and execute at least 1,000 shares of added liquidity during the month; and (ii) for Tier 2, achieve an ADV that is equal to or greater than 0.15% of TCV and execute at least 1,000 shares of added liquidity during the month. Equity Members that qualify for the discounted rates of the Remove Volume Tiers in a particular month will be charged the lower fee according to the threshold tier achieved instead of the standard Remove Volume fee of $0.00295 per share for executions of orders in securities priced at or above $1.00 per share in that particular month.

The Exchange proposes to increase the ADV requirement in Remove Volume Tier 1 from 0.10% to now be 0.20% of TCV. The Exchange also proposes to eliminate Remove Volume Tier 2 from the Fee Schedule. Accordingly, with the proposed changes, to achieve the reduced fee of Remove Volume Tier 1, Equity Members must achieve an ADV that is equal to or greater than 0.20% of TCV and execute at least 1,000 shares of added liquidity during the month.

The purpose of this change is for business and competitive reasons. The Exchange notes that despite the modest increase in volume ADV requirement and elimination of Remove Volume Tier 2, the Exchange's reduced fee and requirements to achieve Remove Volume Tier 1 remain competitive with the fees to remove liquidity in securities priced at or above $1.00 per share charged by other equity exchanges, including other equity exchanges that also have reduced fees for meeting certain criteria for removing liquidity.[9]

Step-Up Added Liquidity Rebate

The Exchange currently provides a standard rebate of ($0.0024) [10] per share for executions of orders in securities priced at or above $1.00 per share that add displayed liquidity to the Exchange. The Exchange also currently offers various volume-based tiers and incentives through which an Equity Member may receive an enhanced rebate for executions of orders that add displayed liquidity to the Exchange by achieving the specified criteria that corresponds to a particular tier/incentive.

In particular, the Exchange adopted a volume based pricing incentive, referred to as the ''Step-Up Added Liquidity Rebate,'' in which qualifying Equity Members receive an enhanced rebate of ($0.0031) per share for executions of orders in securities priced at or above $1.00 per share that add displayed liquidity to the Exchange.[11] The enhanced rebate provided by the Step-Up Added Liquidity Rebate applies to Liquidity Indicator Codes AA (adds liquidity, displayed order, Tape A), AB (adds liquidity, displayed order, Tape B) and AC (adds liquidity, displayed order, Tape C).[12]

Equity Members qualify for the Step-Up Added Liquidity Rebate by achieving a ''Step-Up ADAV as a % of TCV'' [13] of at least 0.03% over the baseline month of May 2023. Average daily added volume (''ADAV'') means average daily added volume calculated as the number of shares added per day.[14] For example, if an Equity Member had an ADAV as a percent of TCV of 0.01% in May 2023, then that Equity Member has to achieve an ADAV as a percent of TCV equal to or greater

[3] *See* Fee Schedule, Section 1)d).

[4] *See* 2614(a)(3)(i)(A) for the definition of Midpoint Peg Order.

[5] *See* Fee Schedule, Section 1)a) and Liquidity Indicator Codes RA, Ra, RB, Rb, RC, Rc, Rp, RR, Rr, RT, and Rt.

[6] The term ''Equity Member'' is a Member authorized by the Exchange to transact business on MIAX Pearl Equities. *See* Exchange Rule 1901.

[7] ''ADV'' means average daily volume calculated as the number of shares added or removed, combined, per day. ADV is calculated on a monthly basis. *See* the Definitions Section of the Fee Schedule. The Exchange excludes from its calculation of ADV shares added or removed on any day that the Exchange's system experiences a disruption that lasts for more than 60 minutes during regular trading hours, on any day with a scheduled early market close, and on the ''Russell Reconstitution Day'' (typically the last Friday in June). Routed shares are also not included in the ADV calculation. *See id.*

[8] ''TCV'' means total consolidated volume calculated as the volume in shares reported by all exchanges and reporting facilities to a consolidated transaction reporting plan for the month for which the fees apply. The Exchange excludes from its calculation of TCV volume on any given day that the Exchange's system experiences a disruption that lasts for more than 60 minutes during Regular Trading Hours, on any day with a scheduled early market close, and on the ''Russell Reconstitution Day'' (typically the last Friday in June). *See* the Definitions Section of the Fee Schedule.

[9] *See* MEMX LLC (''MEMX'') Equities Fee Schedule, *available at https://info.memxtrading.com/equities-trading-resources/us-equities-fee-schedule/* (providing standard remove volume fee of $0.0030 per share and reduced Liquidity Removal Tier fee of $0.00295 per share so long as a member achieves an ADV greater than or equal to 0.60% of TCV and a Removed Volume ADV greater than or equal to 0.30% of TCV); *see also* Cboe EDGX Equities Fee Schedule, *available at https://www.cboe.com/us/equities/membership/fee_schedule/edgx/* (providing a standard fee of $0.0030 per share to remove liquidity in securities priced at or above $1.00 per share, Remove Volume Tier 1 fee of $0.0029 per share to remove liquidity in securities priced at or above $1.00 per share so long as the member achieves an ADAV greater than or equal to 0.25% of TCV).

[10] Rebates are indicated by parentheses. *See* the General Notes Section of the Fee Schedule.

[11] *See* Securities Exchange Act Release No. 95614 (August 26, 2022), 87 FR 53813 (September 1, 2022) (SR–PEARL–2022–33).

[12] *See* Fee Schedule, Section 1)f), Step-Up Added Liquidity Rebate, and Section 1)b), Liquidity Indicator Codes and Associated Fees.

[13] The term ''Step-Up ADAV as a % of TCV'' means ADAV as a percent of TCV in the relevant baseline month subtracted from the current month's ADAV as a percent of TCV. *See* the Definitions Section of the Fee Schedule. The Exchange notes that the Step-Up Added Liquidity Rebate does not apply to executions of orders in securities priced below $1.00 per share or executions of orders that constitute added non-displayed liquidity.

[14] *See* the Definitions Section of the Fee Schedule. ADAV and ADV are calculated on a monthly basis. *See id.*

than 0.04% in any subsequent month in order to qualify for the Step-Up Added Liquidity Rebate. Currently, the Step-Up Added Liquidity Rebate will expire no later than November 30, 2023.[15]

The Exchange now proposes to amend Section 1)f) of the Fee Schedule so that the criteria to qualify for the Step-Up Added Liquidity Rebate will expire no later than December 31, 2023.[16] The Exchange will issue an alert to market participants should the Exchange determine that the Step-Up Added Liquidity Rebate will expire earlier than December 31, 2023, or if the Exchange determines to amend the criteria or rate applicable to the Step-Up Added Liquidity Rebate prior to the end of the sunset period. The Exchange notes that at least one other competing equities exchange provides a similar ''sunset period'' for one of its enhanced rebates subject to the same baseline month as the Exchange proposes.[17]

The Exchange does not propose any other changes to the qualifying criteria for Equity Members to receive the Step-Up Added Liquidity Rebate. The Exchange also does not propose to amend the amount of the enhanced rebate of ($0.0031) per share for Equity Members that qualify for the Step-Up Added Liquidity Rebate. Finally, the Exchange does not propose to change the baseline ADAV of 0.00% of TCV used for firms that become Equity Members of the Exchange after May 2023 for the purpose of the Step-Up Added Liquidity Rebate calculation.

This change simply extends the sunset period from November 30, 2023 until December 31, 2023. The Exchange believes that the Step-Up Added Liquidity Rebate will continue to provide an incentive for Equity Members to strive for higher ADAV on the Exchange (above their ADAV in the baseline month of May 2023) to receive the enhanced rebate for qualifying executions of orders in securities priced at or above $1.00 per share that add displayed liquidity to the Exchange. The Exchange believes that with the extension of the sunset period the Step-Up Added Liquidity Rebate will continue to encourage the submission of additional displayed added liquidity to the Exchange, thereby promoting price discovery and contributing to a deeper and more liquid market, which benefits all market participants and enhances the attractiveness of the Exchange as a trading venue.

The purpose of this change is for business and competitive reasons. Several competing equities exchanges continue to use a baseline month's volume for their members as the requirements for higher rebates/lower fees that is an older month than the Exchange's baseline month of May 2023 and many of those exchanges do not have a sunset provision.[18] By extending the sunset period, the Exchange will be able to continue to compete with the enhanced rebates offered by competing exchanges that use older baseline months' volume in their requirements for the higher rebates/lower fees.

Implementation

The proposed changes are immediately effective.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act[19] in general, and furthers the objectives of Section 6(b)(4) of the Act[20] in particular, in that it is an equitable allocation of reasonable fees and other charges among its Equity Members and issuers and other persons using its facilities and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange operates in a highly fragmented and competitive market in which market participants can readily direct their 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 sixteen registered equities exchanges, and there are a number of alternative trading systems and other off-exchange venues, to which market participants may direct their order flow. Based on publicly available information, no single registered equities exchange had more than approximately 15.58% of the total market share of executed volume of equities trading for the month of November 2023.[21] Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow, and the Exchange represented approximately 2.08% of the overall equities market share for the month of November 2023.[22] The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. 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.''[23]

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to new or different pricing structures being introduced into the market. Accordingly, competitive forces constrain the Exchange's transaction fees and rebates, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. The Exchange believes the proposal reflects a reasonable and competitive pricing structure designed to continue to incentivize market participants to direct additional orders that add liquidity to the Exchange in securities priced at or above $1.00 per share, which the Exchange believes would deepen liquidity and promote market quality on the Exchange to the benefit of all market participants.

The Exchange notes that volume-based incentives and discounts (such as tiers) have been widely adopted by exchanges (including the Exchange), and believes they are reasonable, equitable and not unfairly discriminatory because they are available to all Equity Members on an equal basis, provide additional benefits or discounts that are reasonably related

[15] *See* Fee Schedule, Section 1)f).

[16] The Exchange notes that at the end of the sunset period, the Step-Up Added Liquidity Rebate will no longer apply unless the Exchange files another 19b–4 Filing with the Commission to amend the criteria terms.

[17] *See* MEMX Equities Fee Schedule, Liquidity Provision Tiers table and corresponding footnotes ''*'' through ''***'', *supra* note 9.

[18] *See* NYSE Arca Equities Fee Schedule, Section VII, Step Up Tiers table, footnote ''(b),'' *available at https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_Marketplace_Fees.pdf* (providing enhanced rebate of $0.0036 per share on all LMM add volume if the ETP Holder, together with its affiliates, executes Tape B adding ADV that is at least 40% over the ETP Holder's adding ADV in Q3 2019, as a percentage of Tape B CADV with no sunset provision); Cboe BYX Equities Fee Schedule, Step-Up Tier table, *available at https://www.cboe.com/us/equities/membership/fee_schedule/byx/* (providing reduced fee if the member has a combined Step-Up Auction ADV and Step-Up ADAV from April 2022 greater than or equal to 3,000,000 and the member has a combined Auction ADV and ADAV greater than or equal to 0.25% of TCV with no sunset provision).

[19] 15 U.S.C. 78f(b).

[20] 15 U.S.C. 78f(b)(4).

[21] *See* the ''Market Share'' section of the Exchange's website, *available at https://www.miaxglobal.com/* (last visited December 12, 2023).

[22] *See id.*

[23] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37499 (June 29, 2005).

to the value of an exchange's market quality associated with higher levels of market activity (such as higher levels of liquidity provision and/or growth patterns), and the introduction of higher volumes of orders into the price and volume discovery process.

The Exchange believes its proposal to increase the ADV requirement in Remove Volume Tier 1 and eliminate Remove Volume Tier 2 from the Fee Schedule is reasonable, equitably allocated and not unfairly discriminatory because the reduced fee for Remove Volume Tier 1 will continue to be available to all Equity Members on an equal basis, and is reasonably designed to encourage Equity Members to maintain or increase their order flow. The Exchange believes that even with this proposal, the reduced fee of Remove Volume Tier 1 will continue to promote price discovery, enhance liquidity and market quality, and contribute to a more robust and well-balanced market ecosystem on the Exchange to the benefit of all Equity Members and market participants.

Further, the Exchange believes its proposal to increase the ADV requirement in Remove Volume Tier 1 from 0.10% to now be 0.20% of TCV and eliminate Remove Volume Tier 2 is reasonable, equitably allocated and not unfairly discriminatory because, despite the modest increase in ADV requirement and elimination of Remove Volume Tier 2, the Exchange's reduced fee and requirements to achieve Remove Volume Tier 1 remain competitive with the fees to remove liquidity in securities priced at or above $1.00 per share charged by other equity exchanges, including other equity exchanges that also have reduced fees for meeting certain criteria for removing liquidity.[24]

The Exchange believes that the Step-Up Added Liquidity Rebate, as modified by the proposed change to the sunset period, is reasonable, equitable and not unfairly discriminatory as the Step-Up Added Liquidity Rebate will continue to be available to all Equity Members on an equal basis, and is reasonably designed to encourage Equity Members to maintain or increase their order flow in liquidity-adding volume. The Exchange believes this will continue to promote price discovery, enhance liquidity and market quality, and contribute to a more robust and well-balanced market ecosystem on the Exchange to the benefit of all Equity Members and market participants.

In addition, the Exchange believes its proposal is reasonable because several competing equities exchanges continue to use a baseline month's volume for their members as the requirement for higher rebates/lower fees that is an older month than the Exchange's baseline month of May 2023 and many of those exchanges do not have a sunset provision.[25] By extending the sunset period, the Exchange will be able to continue to compete with the enhanced rebates offered by competing exchanges that use older baseline months' volume in their requirements for the higher rebates/lower fees.

The Exchange believes it is reasonable, equitable and not unfairly discriminatory to amend the sunset period in the Fee Schedule for the Step-Up Added Liquidity Rebate because it will provide clarity to Equity Members that, unless the Exchange determines to amend or otherwise modify the Step-Up Added Liquidity Rebate, the Step-Up Added Liquidity Rebate will expire at the end of the sunset period. This will allow Equity Members to take into account that the enhanced rebate provided for by the Step-Up Added Liquidity Rebate may be discontinued at the end of sunset period unless the Exchange announces otherwise and files a revised proposal with the Commission. The Exchange further notes that it will issue an alert to market participants should the Exchange determine that the Step-Up Added Liquidity Rebate will expire earlier than December 31, 2023, or if the Exchange determines to amend the criteria or rate applicable to the Step-Up Added Liquidity Rebate prior to the end of the sunset period.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that the proposed change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intramarket Competition

The Exchange believes that its proposal will not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes the Step-Up Added Liquidity Rebate, as modified by this proposal, will continue to incentivize Equity Members to submit additional orders that add liquidity to the Exchange, thereby contributing to a deeper and more liquid market and promoting price discovery and market quality on the Exchange to the benefit of all market participants and enhancing the attractiveness of the Exchange as a trading venue, which the Exchange believes, in turn, would continue to encourage market participants to direct additional order flow to the Exchange. Greater liquidity benefits all Equity Members by providing more trading opportunities and encourages Equity Members to send additional orders to the Exchange, thereby contributing to robust levels of liquidity, which benefits all market participants. As described above, the Exchange believes its proposal to increase the ADV requirement in Remove Volume Tier 1 from 0.10% to now be 0.20% of TCV and eliminate Remove Volume Tier 2 allows the Exchange's reduced Removed Volume fee to remain competitive with the fees to remove liquidity in securities priced at or above $1.00 per share charged by other equity exchanges, including other equity exchanges that also have reduced fees for meeting certain criteria for removing liquidity.[26] Similarly, the opportunity to qualify for the proposed new Step-Up Added Liquidity Rebate, and thus receive the proposed rebate for qualifying executions of orders in securities priced at or above $1.00 per share that add displayed volume will continue to be available to all Equity Members that meet the associated volume requirement, and the Exchange believes the proposed extension of the sunset period is reasonably related to the enhanced market quality that the Step-Up Added Liquidity Rebate is designed to promote. Accordingly, the Exchange does not believe the proposed changes would impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purpose of the Act.

The Exchange believes its proposal to extend the sunset period in the Fee Schedule for the Step-Up Added Liquidity Rebate will not impose any burden on intramarket competition not necessary or appropriate in furtherance of the purposes of the Act because it will provide clarity to Equity Members that, unless the Exchange determines to amend or otherwise modify the Step-Up Added Liquidity Rebate, the Step-Up Added Liquidity Rebate will be discontinued at the end of the sunset period. This will allow Equity Members to take into account that the enhanced rebate provided for by the Step-Up Added Liquidity Rebate may be discontinued at the end of the sunset period unless the Exchange announces otherwise. The Exchange further notes that it will issue an alert to market participants should the Exchange determine that the Step-Up Added

[24] *See supra* note 9.

[25] *See supra* note 18.

[26] *See supra* note 9.

Liquidity Rebate will expire earlier than December 31, 2023, or if the Exchange determines to amend the criteria or rate applicable to the Step-Up Added Liquidity Rebate prior to the end of the sunset period.

Intermarket Competition

The Exchange believes its proposal will benefit competition, and the Exchange notes that it operates in a highly competitive market. Equity Members have numerous alternative venues they may participate on and direct their order flow to, including fifteen other equities exchanges and numerous alternative trading systems and other off-exchange venues. As noted above, based on publicly available information, no single registered equities exchange had more than approximately 15.58% of the total market share of executed volume of equities trading for the month of November 2023.[27] Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow, and the Exchange represented approximately 2.08% of the overall market for the month of November 2023.[28] Moreover, the Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow in response to new or different pricing structures being introduced to the market. Accordingly, competitive forces constrain the Exchange's transaction fees and rebates generally, including with respect to the criteria for Equity Members to achieve Remove Volume Tier 1 and the Step-Up Added Liquidity Rebate, and market participants can readily choose to send their orders to other exchanges and off-exchange venues if they deem rebate criteria at those other venues to be more favorable.

As described above, the proposed changes represent a competitive proposal through which the Exchange is seeking to continue to encourage additional order flow to the Exchange through a volume-based incentive that is comparable to the criteria for volume-based incentives adopted by at least one other competing exchange that has a similar sunset period for a specific enhanced rebate that adds liquidity to that market.[29] Accordingly, the Exchange believes that its proposal would not burden, but rather promote, intermarket competition by enabling it to better compete with other exchanges that offer similar pricing incentives to market participants that achieve certain volume criteria and thresholds.

Additionally, 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.'' [30] 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: ''[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 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' . . .''.[31] Accordingly, the Exchange does not believe its proposed pricing changes impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[32] and Rule 19b–4(f)(2) [33] 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–2023–69 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–2023–69. 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

[27] *See supra* note 21.

[28] *See id.*

[29] *See supra* note 17.

[30] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[31] *See 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–NYSE–2006–21)).

[32] 15 U.S.C. 78s(b)(3)(A)(ii).

[33] 17 CFR 240.19b–4(f)(2).

submissions should refer to file number SR–PEARL–2023–69 and should be submitted on or before January 10, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[34]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–27917 Filed 12–19–23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99186; File No. SR–Phlx–2023–56]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Options 7, Section 9

December 14, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 5, 2023, Nasdaq PHLX LLC (''Phlx'' 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 its Rules at Options 7, Section 9, Other Member Fees.[3]

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/phlx/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

The Exchange proposes to amend Options 7, Section 9, B, Port Fees, to increase the SQF Port [4] Fee cap.

Today, Phlx assesses $1,250 per port, per month up to a maximum of $42,000 per month for an SQF Port that receives inbound quotes at any time within that month.[5] Today, member organizations are not assessed an active SQF Port Fee for additional ports acquired for ten business days for the purpose of transitioning technology.[6] The Exchange proposes to add the words ''active port'' in parenthesis at the end of the description of SQF Port Fee to tie the definition of an active port to the description for the port.[7]

At this time, the Exchange proposes to increase the maximum SQF Port Fee of $42,000 per month to $50,000 per month. The Exchange is not amending the $1,250 per port, per month fee. As is the case today, the Exchange would not assess a member organization an SQF Port Fee beyond the monthly cap once the member organization has exceeded the monthly cap for the respective month. Despite increasing the maximum SQF Port Fee from $42,000 per month to $50,000 per month, the Exchange will continue to offer member organizations the opportunity to cap their SQF Port Fees so that they would not be assessed these fees beyond the cap. A Phlx Market Maker requires only one SQF Port to submit quotes in its assigned options series into Phlx. A Phlx Market Maker may submit all quotes through one SQF Port. While a Phlx Market Maker may elect to obtain multiple SQF Ports to organize its business,[8] only one SQF Port is necessary for a Phlx Market Maker to fulfill its regulatory quoting obligations.[9]

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[11] 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 pricing change to increase the maximum SQF Port Fee is reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for options securities transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has 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';

[34] 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 November 28, 2023 (SR–Phlx–2023–52). On December 5, 2023, the Exchange withdrew that filing and submitted this filing.

[4] ''Specialized Quote Feed'' or ''SQF'' is an interface that allows Lead Market Makers, Streaming Quote Traders (''SQTs'') and Remote Streaming Quote Traders (''RSQTs'') to connect, send, and receive messages related to quotes, Immediate-or-Cancel Orders, and auction responses into and from the Exchange. Features include the following: (1) options symbol directory messages (*e.g.,* underlying and complex instruments); (2) system event messages (*e.g.,* start of trading hours messages and start of opening); (3) trading action messages (*e.g.,* halts and resumes); (4) execution messages; (5) quote messages; (6) Immediate-or-Cancel Order messages; (7) risk protection triggers and purge notifications; (8) opening imbalance messages; (9) auction notifications; and (10) auction responses. The SQF Purge Interface only receives and notifies of purge requests from the Lead Market Maker, SQT or RSQT. Lead Market Makers, SQTs and RSQTs may only enter interest into SQF in their assigned options series. Immediate-or-Cancel Orders entered into SQF are not subject to the Order Price Protection, the Market Order Spread Protection, or Size Limitation in Options 3, Section 15(a)(1), (a)(2) and (b)(2), respectively. *See* Options 3, Section 7(a)(i)(B).

[5] An active port shall mean that the port was utilized to submit a quote to the System during a given month. *See* Options 7, Section 9, B.

[6] The member organization is required to provide the Exchange with written notification of the transition and all additional ports, provided at no cost, will be removed at the end of the ten business days. *See* Options 7, Section 9, B.

[7] The Exchange also proposes a technical amendment to add a comma between ''per port'' and ''per month'' for the SQF Port Fee in Options 7, Section 9, B.

[8] For example, a Phlx Market Maker may desire to utilize multiple SQF Ports for accounting purposes, to measure performance, for regulatory reasons or other determinations that are specific to that member organization.

[9] Phlx Market Makers have various regulatory requirements as provided for in Options 2, Section 4. Additionally, Phlx Market Makers have certain quoting requirements with respect to their assigned options series as provided in Options 2, Section 5. SQF Ports are the only quoting protocol available on Phlx and only Market Makers may utilize SQF Ports.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(4) and (5).

[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'. . . .'' [12]

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining 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.'' [13]

Numerous indicia demonstrate the competitive nature of this market. Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules.

The proposed pricing change to increase the maximum SQF Port Fee from $42,000 to $50,000 per month is reasonable because despite the increase in the maximum SQF Port Fee, the Exchange will continue to offer member organizations the opportunity to cap their SQF Port Fees so that they would not be assessed SQF Port Fees beyond the cap. Additionally, a Phlx Market Maker requires only one SQF Port to submit quotes in its assigned options series into Phlx. A Phlx Market Maker may submit all quotes through one SQF Port. While a Phlx Market Maker may elect to obtain multiple SQF Ports to organize its business,[14] only one SQF Port is necessary for a Phlx Market Maker to fulfill its regulatory quoting obligations.[15]

The proposed pricing change to increase the maximum SQF Port Fee from $42,000 to $50,000 per month is equitable and not unfairly discriminatory because the Exchange would uniformly not assess any Market Makers that exceeded the maximum SQF Port Fee any SQF Port Fees beyond the maximum amount. Market Makers are the only market participants that are assessed an SQF Port Fee because they are the only market participants that are permitted to quote on the Exchange.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

Intermarket Competition

The proposal does not impose an undue burden on intermarket competition. The Exchange believes its proposal remains competitive with other options markets who also offer order entry protocols. 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. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

Intramarket Competition

The proposed pricing change to increase the maximum SQF Port Fee from $42,000 to $50,000 per month does not impose an undue burden on competition because the Exchange would uniformly not assess any Market Makers that exceeded the maximum SQF Port Fee any SQF Port Fees beyond the maximum amount. Market Makers are the only market participants that are assessed an SQF Port Fee because they are the only market participants that are permitted to quote on the Exchange.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were 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.[16]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include file number SR–Phlx–2023–56 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–Phlx–2023–56. 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,

[12] *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)).

[13] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[14] For example, a Phlx Market Maker may desire to utilize multiple SQF Ports for accounting purposes, to measure performance, for regulatory reasons or other determinations that are specific to that member organization.

[15] Phlx Market Makers have various regulatory requirements as provided for in Options 2, Section 4. Additionally, Phlx Market Makers have certain quoting requirements with respect to their assigned options series as provided in Options 2, Section 5. SQF Ports are the only quoting protocol available on Phlx and only Market Makers may utilize SQF Ports.

[16] 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–Phlx–2023–56 and should be submitted on or before January 10, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–27927 Filed 12–19–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99184; File No. SR–CboeEDGA–2023–021]

Self-Regulatory Organizations; Cboe EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Provide a Discount on the Purchase of Historical Equity Short Volume and Trade Reports

December 14, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 1, 2023, Cboe EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') 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 also available on the Exchange's website (*http://markets.cboe.com/us/equities/regulation/rule_filings/edga/*), 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 update its Fee Schedule to provide a discount on fees assessed to EDGA Members (''Members'')[3] and non-Members that purchase $20,000 or more of U.S. Equity Short Volume and Trades Reports (''Short Volume Reports''), effective December 1, 2023 through December 31, 2023.

By way of background, the Short Volume Report is an end-of-day report that summarizes certain equity trading activity on the Exchange, including trade date,[4] total volume,[5] short volume,[6] and sell short exempt volume,[7] by symbol.[8] The Short Volume Report also includes an end-of-month report that provides a record of all short sale transactions for the month, including trade date and time (in microseconds),[9] trade size,[10] trade price,[11] and type of short sale execution,[12] by symbol and exchange.[13] The Short Volume Report is a completely voluntary product, in that the Exchange is not required by any rule or regulation to make this data available and that potential customers may purchase it on an ad-hoc basis only if they voluntarily choose to do so.

Cboe LiveVol, LLC (''LiveVol''), a wholly owned subsidiary of the Exchange's parent company, Cboe Global Markets, Inc., makes the Short Volume Report available for purchase to Users on the LiveVol DataShop website (*datashop.cboe.com*). Both the end-of-day report and end-of-month report are included in the cost of the Short Volume Report and are available for purchase by both Members as well as non-Members on an annual or monthly[14] basis. The monthly fee is $750 per Internal Distributor[15] and $1,250 per External Distributor.[16] Additionally, the Exchange offers historical reports containing both the end-of-day volume and end-of-month trading activity. The fee per month of historical data is $500. The Short Volume Report provided on a historical basis is only for display use redistribution (*e.g.,* the data may be provided on the User's platform).

[17] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Rule 1.5(n) (''Member''). The term ''Member'' shall mean any registered broker or dealer that has been admitted to membership in the Exchange. A Member will have the status of a ''member'' of the Exchange as that term is defined in Section 3(a)(3) of the Act. Membership may be granted to a sole proprietor, partnership, corporation, limited liability company or other organization which is a registered broker or dealer pursuant to Section 15 of the Act, and which has been approved by the Exchange.

[4] ''Trade date'' is the date of trading activity in yyyy-mm-dd format.

[5] ''Total volume'' is the total number of shares transacted.

[6] ''Short volume'' is the total number of shares sold short.

[7] ''Short exempt volume'' is the total number of shares sold short classified as exempt.

[8] ''Symbol'' refers to the Cboe formatted symbol in which the trading activity occurred. *See https://cdn.cboe.com/resources/membership/US_Symbology_Reference.pdf.*

[9] ''Trade date and time'' is the date and time of trading activity in yyyy-mm-dd hh:mm:ss.000000 ET format.

[10] ''Trade size'' is the number of shares transacted.

[11] ''Trade price'' is the price at which shares were transacted.

[12] ''Short type'' is a data field that will indicate whether the transaction was a short sale or short sale exempt transaction. A short sale transaction is a transaction in which a seller sells a security which the seller does not own, or the seller has borrowed for its own account (*see* 17 CFR 242.200). A short sale exempt transaction is a short sale transaction that is exempt from the short sale price test restrictions of Regulation SHO Rule 201 (*see* 17 CFR 242.201(c)).

[13] ''Exchange'' is the market identifier (Z = BZX, Y = BYX, X = EDGX, A = EDGA).

[14] The monthly fees for the Report are assessed on a rolling period based on the original subscription date. For example, if a User subscribes to the Report on October 24, 2023, the monthly fee will cover the period of October 24, 2023, through November 23, 2023. If the User cancels its subscription prior to November 23, 2023, and no refund is issued, the User will continue to receive both the end-of-day and end-of-month components of the Report for the subscription period.

[15] An Internal Distributor of an Exchange Market Data product is a Distributor that receives the Exchange Market Data product and then distributes that data to one or more Users within the Distributor's own entity. *See* Cboe EDGA U.S. Equities Exchange Fee Schedule.

[16] An External Distributor of an Exchange Market Data product is a Distributor that receives the Exchange Market Data product and then distributes that data to a third party or one or more Users outside the Distributor's own entity. *See* Cboe EDGA U.S. Equities Exchange Fee Schedule.

Therefore, Users of the historical data may not charge separately for data included in the Short Volume Report or incorporate such data into their product. The Exchange notes that the Short Volume Report is subject to direct competition from other exchanges, as other exchanges offer similar products for a fee.[17]

The Exchange proposes to provide a temporary pricing incentive program in which Members or Non-Members that purchase historical Short Volume Reports will receive a percentage fee discount where specific purchase thresholds are met. Specifically, the Exchange proposes to provide a 20% discount for ad-hoc purchases of historical Short Volume Reports of $20,000 or more.[18] The proposed program will apply to all market participants irrespective of whether the market participant is a new or current purchaser; however, the discount cannot be combined with any other discounts offered by the Exchange. The Exchange intends to introduce the discount program beginning December 1, 2023, with the program remaining in effect through December 31, 2023.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[19] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [20] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [21] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with Section 6(b)(4) of the Act,[22] which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

In adopting Regulation NMS, the Commission granted self-regulatory organizations (''SROs'') and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. The Exchange believes that the proposed fee changes will further broaden the availability of U.S. equity market data to investors consistent with the principles of Regulation NMS. The Exchange believes the dissemination of historical short volume data via historical Short Volume Reports benefits investors through increased transparency and may promote better informed trading, as well as research and studies of the equities industry. Nevertheless, the Exchange notes that such data is not necessary for trading and as noted above, is entirely optional. Moreover, several other exchanges offer a similar data product which offer the same type of data content through similar reports.[23]

The Exchange operates in a highly competitive environment. Indeed, there are currently 16 registered equities exchanges that trade equities. Based on publicly available information, no single equities exchange has more than 13% of the equity market share.[24] The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Particularly, 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.'' [25] Making similar data products available to market participants fosters competition in the marketplace, and constrains the ability of exchanges to charge supercompetitive fees. In the event that a market participant views one exchange's data product as more attractive than the competition, that market participant can, and often does, switch between similar products. The proposed fees are a result of the competitive environment of the U.S. equities industry as the Exchange seeks to adopt fees to attract purchasers of historical Short Volume Reports.

The Exchange believes that the proposed incentive program for any Member or non-Member who purchases historical Short Volume Reports is reasonable because such purchasers would receive a 20% discount for purchasing $20,000 or more worth of historical Short Volume Reports. The Exchange believes the proposed discount is reasonable as it will give purchasers the ability to use and test the historical Short Volume Reports at a discounted rate, prior to purchasing additional months or a monthly subscription, and will therefore encourage users to purchase historical Short Volume Reports. Further, the proposed discount is intended to promote increased use of the Exchange's historical Short Volume Reports by defraying some of the costs a purchaser would ordinarily have to expend before using the data product. The Exchange believes that the proposed discount is equitable and not unfairly discriminatory because it will apply equally to all Members and non-Members who purchase historical Short Volume Reports. Lastly, the purchase of this data product is discretionary and not compulsory. Indeed, no market participant is required to purchase the historical Short Volume Reports, and the Exchange is not required to make historical Short Volume Reports available to all investors. Potential purchasers may request the data at any time if they believe it to be valuable or may decline to purchase such data.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange operates in a highly

[17] *See* the Nasdaq Fee Schedule, Equity 7, Section 152. *See also,* the TAQ Group Short Sales (Monthly File) and Short Volume product, offered by the New York Stock Exchange LLC (''NYSE'') and affiliated equity markets (the ''NYSE Group'') at NYSE Exchange Proprietary Market Data | TAQ NYSE Group Short Sales.

[18] The discount will apply on an order-by-order basis. The discount will apply to the total purchase price, once the $20,000 minimum purchase is satisfied (for example, a qualifying order of $25,000 would be discounted to $20,000, *i.e.,* receive a 20% discount of $5,000).

[19] 15 U.S.C. 78f(b).

[20] 15 U.S.C. 78f(b)(5).

[21] *Id.*

[22] 15 U.S.C. 78f(b)(4).

[23] *See supra* note 17.

[24] *See* Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (November 16, 2023), available at *https://www.cboe.com/us/equities/market_/_statistics/.*

[25] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

competitive environment in which the Exchange must continually adjust its fees to remain competitive. 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. As discussed above, the Exchange's historical Short Volume Reports offering is subject to direct competition from several other options exchanges that offer similar data products. Moreover, purchase of historical Short Volume Reports is optional. It is designed to help investors understand underlying market trends to improve the quality of investment decisions, but is not necessary to execute a trade.

The proposed rule changes are grounded in the Exchange's efforts to compete more effectively. In this competitive environment, potential purchasers are free to choose which, if any, similar product to purchase to satisfy their need for market information. As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges. Further, the Exchange believes that these changes will not cause any unnecessary or inappropriate burden on intermarket competition, as the proposed incentive program applies uniformly to any purchaser of historical Short Volume Reports.

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 [26] and paragraph (f) of Rule 19b–4 [27] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include file number SR–CboeEDGA–2023–021 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–CboeEDGA–2023–021. 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–CboeEDGA–2023–021 and should be submitted on or before January 10, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–27925 Filed 12–19–23; 8:45 am]

BILLING CODE 8011–01–P

[26] 15 U.S.C. 78s(b)(3)(A).

[27] 17 CFR 240.19b–4(f).

[28] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99172; File No. SR–GEMX–2023–20]

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Fees for Options on the Nasdaq 100 Index in the Exchange's Pricing Schedule at Options 7

December 14, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 8, 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 and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the transaction fees for Nasdaq 100 Index options in the Exchange's Pricing Schedule at Options 7, Section 3. While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on December 1, 2023.

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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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 purpose of the proposed rule change is to amend the transaction fees for NDX [3] in Options 7, Section 3. The Exchange initially filed the proposed pricing changes on November 30, 2023 (SR–GEMX–2023–18). On December 8, 2023, the Exchange withdrew that filing and submitted this filing.

Today, the Exchange assesses a transaction fee of $0.75 per contract for all Non-Priority Customer [4] orders in NDX. Priority Customers [5] currently receive free executions in NDX. The Exchange now proposes to begin assessing Priority Customer NDX orders a $0.25 per contract transaction fee. The Exchange notes that the proposed fee amount is in line with customer transaction fees assessed on other index products.[6]

The Exchange also proposes a change in Options 7, Section 1(c) to add ''Non-Priority Customers'' as a defined term. The Exchange notes that this term is already used in its Pricing Schedule,[7] and aligns with how it is currently used in the Pricing Schedule as well as with the definition in the pricing schedule of its affiliate, Nasdaq ISE, LLC (''ISE'').[8] The Exchange will also capitalize the current reference to ''non-Priority Customer'' in Options 7, Section 3, footnote 11 to align with the proposed change to add Non-Priority Customer as a defined term. The Exchange also proposes to alphabetize the definitions in Options 7, Section 1(c) for better readability.

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 Exchange believes it is reasonable to begin assessing Priority Customer orders in NDX a $0.25 per contract fee because the proposed pricing reflects the proprietary nature of this product. Similar to other proprietary products, the Exchange seeks to recoup the operational costs of listing such products.[11] Also, pricing by symbol is a common practice on many U.S. options exchanges as a means to incentivize order flow to be sent to an exchange for execution in particular products. Other options exchanges price by symbol.[12] Further, the Exchange notes that market participants are offered different ways to gain exposure to the Nasdaq 100 Index, whether through the Exchange's proprietary products like NDX options, or separately through multi-listed options overlying Invesco QQQ Trust (''QQQ'').[13] Offering such products provides market participants with a variety of choices in selecting the product they desire to utilize in order to gain exposure to the Nasdaq 100 Index. When exchanges are able to recoup costs associated with offering proprietary products, it incentivizes growth and competition for the innovation of additional products.

While the transaction fee for Priority Customer NDX orders is increasing under this proposal, the Exchange believes that the proposal is reasonable and would continue to incentivize market participants to transaction in Priority Customer NDX orders because Priority Customers would continue to be assessed a lower fee for NDX than Non-Priority Customers (*i.e.,* $0.25 versus $0.75 per contract). As a result, the Exchange believes that the proposed pricing is structured in a way that continues to encourage market participants, especially Priority Customers, to transact in NDX on GEMX. As noted above, the proposed fee amount is in line with customer transaction fees assessed on other index products at another options exchange.[14]

The Exchange's proposal to assess a $0.25 per contract transaction fee to Priority Customer NDX orders is equitable and not unfairly discriminatory it will apply uniformly to all similarly situated market participants. The Exchange believes it is equitable and not unfairly discriminatory to continue charging Priority Customers a lower transaction fee because Priority Customer orders bring valuable liquidity to the market by providing more trading opportunities, which, in turn, attracts Market Makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow to the benefit of all market participants.

Lastly, the Exchange believes that the proposed changes in Options 7, Section 1(c) to add ''Non-Priority Customers'' as a defined term, to capitalize the reference to ''non-Priority Customer'' in footnote 11 of Options 7, Section 3, and to alphabetize the definitions are reasonable, equitable and not unfairly discriminatory. As noted above, the term ''Non-Priority Customers'' is already used in the Exchange's Pricing Schedule and codifying this definition in the manner it is used today will bring greater clarity to the Exchange's rules to the benefit of all market participants. The Exchange likewise believes that alphabetizing the definitions in Options 7, Section 1(c) for better readability will add more clarity to the Pricing Schedule.

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 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, or rebate opportunities available at other venues to be more favorable. As noted above, market participants are offered

[3] NDX represents A.M. settled options on the full value of the Nasdaq 100 Index traded under the symbol NDX.

[4] ''Non-Priority Customers'' include Market Makers, Non-Nasdaq GEMX Market Makers (FarMMs), Firm Proprietary/Broker-Dealers, and Professional Customers. As discussed later in this filing, the Exchange will codify this definition in Options 7, Section 1.

[5] A ''Priority Customer'' is a person or entity that is not a broker/dealer in securities, and does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s), as defined in Nasdaq GEMX Options 1, Section 1(a)(36).

[6] For example, Cboe Options (''Cboe'') currently assesses a $0.25 per contract customer transaction fee for MXEA and MXEF options, $0.35 per contract for OEX and XEO options, and $0.36 per contract (if premium <$1.00) or $0.45 per contract (if premium >= $1.00) for SPX and SPESG options. *See* Cboe Fees Schedule.

[7] *See e.g.,* Options 7, Section 3, footnotes 4 and 11.

[8] *See* ISE Options 7, Section 1(c).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4) and (5).

[11] By way of example, in analyzing an obvious error, the Exchange would have additional data points available in establishing a theoretical price for a multiply listed option as compared to a proprietary product, which requires additional analysis and administrative time to comply with Exchange rules to resolve an obvious error.

[12] *See supra* note 6.

[13] QQQ is an exchange-traded fund based on the same Nasdaq 100 Index as NDX.

[14] *See supra* note 6.

an opportunity to transact in NDX or separately execute options overlying QQQ. Offering these products provides market participants with a variety of choices in selecting the product they desire to use to gain exposure to the Nasdaq 100 Index. Furthermore, the proposed fee amount is in line with customer transaction fees assessed on other index products at another options exchange.[15]

Further, the Exchange does not believe that its proposal to begin assessing a $0.25 per contract transaction fee for Priority Customer NDX orders will impose an undue burden on intra-market competition because Priority Customers will continue to be assessed lower fees than Non-Priority Customers for NDX orders. As discussed above, Priority Customer order flow enhances liquidity on the Exchange for the benefit of all market participants.

Finally, the Exchange believes that the proposed changes in Options 7 to add Non-Priority Customers as a defined term, to capitalize the reference to ''non-Priority Customer,'' and to alphabetize the Pricing Schedule definitions do not impose an undue burden on competition because these are non-competitive changes that are intended to bring clarity to the Exchange's Pricing Schedule.

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[16] and Rule 19b–4(f)(2)[17] 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: (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–2023–20 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–2023–20. 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–GEMX–2023–20 and should be submitted on or before January 10, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–27915 Filed 12–19–23; 8:45 am]

BILLING CODE 8011–01–P

[15] *See supra* note 6.

[16] 15 U.S.C. 78s(b)(3)(A)(ii).

[17] 17 CFR 240.19b–4(f)(2).

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99183; File No. SR–Phlx–2023–57]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Exchange's Proprietary Data Fees for Top of PHLX Options (''TOPO''), PHLX Orders, and TOPO Plus Orders at Options 7, Section 10

December 14, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 5, 2023, Nasdaq PHLX LLC (''Phlx'' 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 proprietary data fees for Top of PHLX Options (''TOPO''), PHLX Orders, and TOPO Plus Orders at Options 7, Section 10, as described further below.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/phlx/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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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 purpose of the proposed rule change is to amend the Exchange's proprietary data fees for Top of PHLX Options (''TOPO''), PHLX Orders, and TOPO Plus Orders at Options 7, Section 10.[3]

Top of PHLX Options (''TOPO'')

TOPO is a direct data feed that provides subscribers with PHLX Best Bid and Offer (''BBO'')[4] and last sale information.[5] The data distributed on TOPO is identical to the data simultaneously sent to the Options Price Reporting Authority (''OPRA'').[6] The TOPO feed also provides administrative information to facilitate trading on the Exchange such as, for example, the list of symbols trading on a particular day.[7] TOPO reduces the transmission and processing latencies for top of book information relative to the OPRA feed by avoiding the latencies generated by the latter in consolidating data.

Monthly fees for TOPO are currently $2,000 for Internal Distributors,[8] $2,500 for External Distributors,[9] $1 for a Non-Professional Subscriber,[10] and $40 for a Professional Subscriber.[11] None of these fees have changed for over a decade, since January 2013.[12]

PHLX Orders

PHLX Orders is a real-time order book feed with pricing information for displayed orders on the PHLX order book.[13] The data provided for each options series includes the symbols (series and underlying security), a put or call indicator, expiration date, and the strike price of the series. It also provides the real-time status of simple and complex orders [14] on the order book, including new orders and changes to orders resting on the PHLX book for all PHLX-listed options.[15] The PHLX Orders feed includes data on the opening imbalance, Price Improvement XL (PIXL),[16] and Complex Order Live Auction (COLA).[17] A notification message is sent for symbols entering an auction.[18] PHLX Orders also furnishes an historical record of all simple and complex order message data from the PHLX Orders data feed. PHLX Orders information is not sent to OPRA.[19]

PHLX Orders is an alternative to PHLX Depth of Market. It is an optimized technical channel designed to lower technology costs, reduce processing time, and facilitate the ingestion of data while still providing customers insight beyond the top of book by viewing active buy and sell orders. PHLX Orders excludes quotations by market makers and other authorized entities that is included in PHLX Depth of Market.[20]

In October 2023, the one millisecond average peak for PHLX Depth of Market was approximately 13.5 million messages. PHLX Orders transmitted only about 2.6 million messages on average over the same period.[21] In that month, purchase of PHLX Orders in lieu of PHLX Depth of Market would have lowered the bandwidth required for peak messaging by over 80 percent. This would have decreased the load on the customer's information processing infrastructure, reduced processing time, and facilitated the ingestion of Exchange information, while still providing the customer with a view of active buy and sell orders.

Purchase of PHLX Orders is optional. Customers can obtain all of the data contained in PHLX Orders from PHLX Depth of Market feed, and may purchase the latter if they do not realize the cost savings offered by PHLX Orders.

[3] The proposed changes were initially filed on November 16, 2023, as SR–Phlx–2023–51. On December 5, 2023, SR–Phlx–2023–51 was withdrawn and replaced with the instant filing to provide additional detail regarding the proposal.

[4] The Best Bid and Offer includes aggregate size information based on displayable order and quoting interest on the Exchange.

[5] *See* PHLX, ''Top of Phlx Options,'' available at *https://www.nasdaqtrader.com/Micro.aspx?id=TOPO#:~:text=Top%20of%20PHLX%20Options%20(TOPO,in%20the%20consolidated%20market%20feed.*

[6] *See* Options 3 (Options Trading Rules), Section 23(a)(1) (Data Feeds and Trade Information) (''The data contained in the TOPO data feed is identical to the data simultaneously sent to the processor for the OPRA and subscribers of the data feed.'').

[7] *See, e.g.,* Nasdaq, ''Top of Phlx Options Interface Specifications, Version 3.4'' Section 4.3 available at *https://www.nasdaqtrader.com/content/technicalsupport/specifications/dataproducts/topofphlx.pdf* (describing the start of day options directory message, which lists all symbols eligible for the auction process).

[8] *See* Options 7, Section 10 (Proprietary Data Feed Fees) (Top of PHLX Options) (''A 'distributor' of Nasdaq PHLX data is any entity that receives a feed or data file . . . directly from Nasdaq PHLX or indirectly through another entity and then distributes it either internally (within that entity) or externally (outside that entity). All distributors execute a Nasdaq PHLX distributor agreement.'').

[9] *See id.*

[10] *See id.* (''A Non-Professional Subscriber is a natural person who is neither: (i) registered or qualified in any capacity with the Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (ii) engaged as an 'investment adviser' as that term is defined in Section 201(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that Act); nor (iii) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt. A Non-Professional Subscriber may only use the data provided for personal purposes and not for any commercial purpose.'').

[11] *See id.* (''A Professional Subscriber is any Subscriber that is not a Non-Professional Subscriber. If the Nasdaq Subscriber agreement is signed in the name of a business or commercial entity, such entity would be considered a Professional Subscriber.'').

[12] *See* Securities Exchange Act Release No. 68576 (January 3, 2013), 78 FR 1886 (January 9, 2013) (SR–Phlx–2012–145).

[13] *See* Options 3 (Options Trading Rules), Section 23(a)(2) (Data Feeds and Trade Information).

[14] *See* Options 3 (Options Trading Rules), Section 23(a)(2) (Data Feeds and Trade Information); Section 14(a)(i) (''Complex Order. For purposes of the electronic trading of Complex Orders, a Complex Order is an order involving the simultaneous purchase and/or sale of two or more different options series in the same underlying security, priced as a net debit or credit based on the relative prices of the individual components, for the same account, for the purpose of executing a particular investment strategy.'').

[15] *See* Nasdaq, ''PHLX Orders,'' available at *https://www.nasdaqtrader.com/Micro.aspx?id=PHLXOrders.*

[16] *See* Options 3 (Options Trading Rules), Section 23(a)(2); Section 13 (Price Improvement XL) (''A member may electronically submit for execution an order it represents as agent on behalf of a Public Customer, broker-dealer, or any other entity ('PIXL Order') against principal interest or against any other order (except as provided in sub-paragraph (a)(6) below) it represents as agent (an 'Initiating Order') provided it submits the PIXL Order for electronic execution into the PIXL Auction ('Auction') pursuant to this Rule.'').

[17] *See* Options 3, Section 14(e) (describing the process for the Complex Order Live Auction (''COLA'')).

[18] Nasdaq, ''PHLX Orders Interface Specification,'' (Version 1.92) available at *https://www.nasdaqtrader.com/content/technicalsupport/specifications/dataproducts/topoplusorders.pdf* (describing auction notification message).

[19] *See* Limited Liability Company Agreement of Options Price Reporting Authority, LLC Article V, Section 5.2(c)(i) (January 1, 2010), available at *https://assets.website-files.com/5ba40927ac854d8c97bc92d7/5d0bd57d87d3ccca102102d7_OPRA%20Plan%20with%20Updated%20Exhibit%20A%20-%2006-19-2019.pdf* (describing last sale and best bid and offer information disseminated by OPRA).

[20] *See* Options 3 (Options Trading Rules), Section 23(a)(3) (Data Feeds and Trade Information) (''PHLX Depth of Market is a data product that provides: (i) order *and quotation* information for *individual quotes* and orders on the order book . . .'') (emphasis added); Section 4(b) (Entry and display of Quotes) (identifying the market participants authorized to submit quotes to the Exchange).

[21] *See* Nasdaq, ''October 2023 Bandwidth,'' available at *https://view.officeapps.live.com/op/view.aspx?src=http%3A%2F%2Fwww.nasdaqtrader.com%2Fcontent%2Ftechnicalsupport%2Fspecifications%2Fdataproducts%2Fbandwidthreport.xls&wdOrigin=BROWSELINK.*

PHLX Orders is a derivative product designed as a lower-cost alternative to a depth of book feed. It is not a complement to any other product offered by the Exchange or any of its competitors. Customers are free to purchase PHLX Orders or not, and can reject the feed for any reason, including the fee charged.

Current monthly fees for PHLX Orders are $3,000 for Internal Distributors, $3,500 for External Distributors, $1 for a Non-Professional Subscriber, and $40 for a Professional Subscriber. None of these fees have changes for over a decade, since January 2013.[22]

TOPO Plus Orders

TOPO Plus is a direct market data product that offers subscribers both TOPO and PHLX Orders for a consolidated fee that is less than the combined fee of the two products.[23]

Monthly fees for TOPO Plus Orders are currently $4,500 for Internal Distributors, $5,000 for External Distributors, $1 for a Non-Professional Subscriber, and $40 for a Professional Subscriber.

Internal Distributor fees for TOPO Plus Orders were modified in January 2018, over five years ago,[24] but the other TOPO Plus Orders fees have not changed since January 2013.[25]

Proposed Changes

For TOPO, the Exchange proposes to increase the monthly charge for Internal Distributors from $2,000 to $2,500, and the monthly charge for External Distributors from $2,500 to $3,000. No changes are proposed for Non-Professional and Professional Subscriber fees.

For PHLX Orders, the Exchange proposes to increase the monthly charge for Internal Distributors from $3,000 to $3,500, and the monthly charge for External Distributors from $3,500 to $4,000. No changes are proposed for Non-Professional and Professional Subscriber fees.

For TOPO Plus Orders, the Exchange proposes to increase the monthly charge for Internal Distributors from $4,500 to $5,500, and the monthly charge for External Distributors from $5,000 to $6,000. No changes are proposed for Non-Professional and Professional Subscriber fees.

The proposed changes are designed to update data fees to reflect their current value, rather than their value when these fees were set 5 or 10 years ago.

2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act,[26] in general, and furthers the objectives of sections 6(b)(4) and 6(b)(5) of the Act,[27] 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.

This belief is based on several factors.

First, exchange fees are constrained because market participants can choose among seventeen different venues for options trading, and therefore no single venue can charge excessive fees without losing customers and market share.

Second, fees for TOPO are constrained because the identical top of book data is sent to OPRA, and certain market participants may choose to rely exclusively on OPRA rather than purchasing the proprietary data product.

Third, the purchase of PHLX Orders is optional. It is designed as a lower-cost alternative to depth of book, and, as such, is not a complement to any other product offered by the Exchange or any of its competitors. Customers may purchase PHLX Orders or not, and can reject the feed for any reason, including the fee charged.

Fourth, the proposed fees are comparable to, and in some cases less than, those of similarly-situated exchanges.

Fifth, the current fees do not properly reflect the value of the underlying product, as fees for the products in question have been static in nominal terms, and therefore falling in real terms (due to inflation), while the amount of information transmitted in those fees have more than doubled in just the past five years, reflecting a substantial increase in customer value due to the significantly higher levels of liquidity currently available on the Exchange.

Sixth, higher fees for the external distribution of TOPO, PHLX Orders, and TOPO Plus Orders are based on the additional value vendors receive from distributing data to their own customers and typically charging for the service.

Customers Have a Choice in Trading Venue

Customers face many choices in where to trade options. Until recently, sixteen exchanges have offered options trading services,[28] and they are now being joined by a 17th member.[29] Not a single options exchange trades more than 11 percent of the options market by volume.[30] PHLX, the second largest options exchange by volume, only has 9 percent of the options market.[31] Only one of the 17 options exchanges have a market share over 10 percent.[32] This broad dispersion of market share demonstrates that market participants can and do exercise choice in options trading venues. As the number of exchanges continues to grow, competition will become fiercer and customer choice will continue to expand.

In light of the number of trading venues available to customers, the Exchange must price its products, including TOPO, PHLX Orders, and TOPO Plus Orders (as well as other products), competitively. If not, customers would move to other venues. ''If competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior.'' [33] 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.'' [34]

[22] *See* Securities Exchange Act Release No. 68576 (January 3, 2013), 78 FR 1886 (January 9, 2013) (SR–Phlx–2012–145).

[23] *See* PHLX, TOPO Plus PHLX Orders, available at *https://www.nasdaqtrader.com/Micro.aspx?id=TOPOPlusOrders.*

[24] *See* Securities Exchange Act Release No. 82495 (January 12, 2018), 83 FR 2839 (January 19, 2018) (SR–Phlx–2018–08).

[25] *See* Securities Exchange Act Release No. 68576 (January 3, 2013), 78 FR 1886 (January 9, 2013) (SR–Phlx–2012–145).

[26] 15 U.S.C. 78f(b).

[27] 15 U.S.C. 78f(b)(4) and (5).

[28] *See* OPRA Plan, list of OPRA Participant Exchanges, available at *https://www.opraplan.com/faqs.* (All options exchanges are members of the OPRA Plan.).

[29] *See* Securities Exchange Act Release No. 98388 (September 14, 2023), 88 FR 64963 (September 20, 2023) (File No. 4–443) (''Joint Industry Plan; Notice of Filing and Immediate Effectiveness of Amendment to the Plan for the Purpose of Developing and Implementing Procedures Designed To Facilitate the Listing and Trading of Standardized Options To Add MEMX LLC as a Plan Sponsor'').

[30] *See* Nasdaq, Options Market Statistics (Last updated November 3, 2023), available at *https://www.nasdaqtrader.com/Trader.aspx?id=OptionsVolumeSummary.* On November 3, 2023, the total percentage of options market volume by exchange was as follows: ARCA: 11%; PHLX: 9%; CBOE: 9%; BOX: 8%; ISE: 7%; EDGX: 7%; AMEX: 7%; MIAX: 7%; MPRL: 7%; NOM: 6%; BATS: 6%; C2: 5%; EMLD: 4%; MRX: 3%; GEMX: 3%; BXOP: 3%; MEMX: 0%.

[31] *See id.*

[32] *See id.*

[33] *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74,770 (December 9, 2008) (SR–NYSEArca–2006–21).

[34] *Id.*

The Top of Book Data in TOPO Is Sent to OPRA

The top of book data in TOPO is sent to OPRA; under OPRA rules, proprietary options information is available to customers that have equivalent access to OPRA information, and therefore is supplementary to the OPRA feed.[35] Specifically, Section 5.2(c)(iii) of the OPRA Plan provides that ''[a] Member [of the OPRA Plan] may disseminate its Proprietary Information,'' provided that ''such dissemination is limited to other Members and to persons who also have equivalent access to consolidated Options Information disseminated by OPRA for the same classes or series of options that are included in the Proprietary Information. . . .'' [36] ''Consolidated Options Information'' refers to ''consolidated Last Sale Reports combined with either consolidated Quotation Information or the BBO furnished by OPRA.'' [37] Access is deemed to be ''equivalent'' ''if both if both kinds of information are equally accessible on the same terminal or work station. . . .'' [38]

Any customer that purchases proprietary options data from the Exchange, including TOPO and TOPO Plus Orders, must also have equivalent access to the OPRA Plan. As noted above, the best bid and offer and last sale information available from TOPO and TOPO Plus Orders fees is identical to the information simultaneously sent to OPRA by the Exchange.[39] OPRA provides NBBO and last sale information on options transactions. TOPO and TOPO Plus Orders provide additional administrative information unique to trading on the Exchange, and also reduce the transmission and processing latencies generated through the process of consolidating data into the OPRA feed.[40] Because top of book and last sale information is available on OPRA as well as TOPO, and customers who purchase TOPO have equivalent access to the OPRA feed, certain customers may choose to rely on the OPRA feed in lieu of purchasing PHLX data, thereby limiting the ability of the Exchange from charging excessive fees for its TOPO and TOPO Plus Orders feeds.

The Purchase of PHLX Orders Is Optional

Purchase of PHLX Orders is optional. As explained above, customers can obtain all of the data contained in PHLX Orders from PHLX Depth of Market feed, and may purchase the latter if they do not realize the cost savings offered by PHLX Orders. PHLX Orders is not a complement to any other product offered by the Exchange or any of its competitors; customers are free to purchase PHLX Orders or not, and can reject the feed for any reason, including the fee charged.

The Proposed Fees Are Comparable to Those of Other Exchanges

The proposed fees are comparable to, and in some cases less than, those of other similarly-situated exchange fees. Options market statistics show that PHLX has a market share of approximately 9%. ARCA, with an 11% market share, and CBOE, with a 9% market share, are its closest competitors.[41]

To obtain top of book and depth of book information for internal distribution (including both simple and complex options) from ARCA, a customer would be required to pay an Access Fee of $3,000 per month, a Non-Display fee of at least $5,000 per month for simple options, and a Non-Display fee of $1,000 for Complex Options, for a total of $9,000 per month.[42] To obtain the same information from PHLX under the new proposal, a customer would pay the Internal Distributor fee of $2,500 for TOPO, and an Internal Distributor fee of $4,000 for PHLX Depth Data,[43] for a total of $6,500 per month.

To obtain comparable information for Cboe Options, a customer would be required to pay a combined fee of $9,000 per month.[44] As noted above, a PHLX customer would pay the Internal Distributor fee of $2,500 for TOPO, and an Internal Distributor fee of $4,000 for PHLX Depth Data,[45] for a total of $6,500 per month.

As such, the proposed fees are comparable to fees charged by industry peers, and therefore presumptively reasonable.

Real Exchange Fees Have Fallen While Traffic Has Increased

As explained above, the Internal Distributor fee for TOPO Plus Orders was increased in 2018,[46] while none of the other fees have changed for over a decade, since January 2013.[47] This means that fees for TOPO, PHLX Orders, and TOPO Plus Orders have fallen in real terms due to inflation. At the same time, the average daily message count of PHLX has more than doubled in just five years, from approximately 3.0 billion messages per day in 2018 to approximately 8.2 billion messages in 2023.[48] The proposal is reasonable in light of the substantial increase in customer value generate by the higher levels of liquidity now available on the Exchange.

External Distributors Receive Additional Value

External Distributors receive additional value not available to Internal Distributors by disseminating information externally and typically charging for the service. This additional value supports higher fees for external distribution for TOPO, PHLX Orders, and TOPO Plus Orders. Higher fees for external distribution of data are common throughout the industry, and

[35] *See* Limited Liability Company Agreement of Options Price Reporting Authority, LLC § 5.2(c)(iii) (January 1, 2010), available at *https://assets.website-files.com/5ba40927ac854d8c97bc92d7/5d0bd57d87d3ccca102102d7_OPRA%20Plan%20with%20Updated%20Exhibit%20A%20-%2006-19-2019.pdf* (''OPRA Plan'').

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] As noted above, the TOPO feed includes administrative information (but not data) that is not provided on the OPRA feed, such as symbol directory messages. *See* Nasdaq, ''Top of Phlx Options Interface Specifications, Version 3.4'' Section 4.3 available at *https://www.nasdaqtrader.com/content/technicalsupport/specifications/dataproducts/topofphlx.pdf* (describing the start of day options directory message, which lists all symbols eligible for the auction process).

[40] The bid and offer and last sale information provided with the TOPO Plus Orders product is identical to the data sent to OPRA, although the ''orders'' component of TOPO Plus Orders is not.

[41] *See* Nasdaq, Options Market Statistics (Last updated November 3, 2023), available at *https://www.nasdaqtrader.com/Trader.aspx?id=OptionsVolumeSummary.*

[42] *See,* NYSE Arca Options Proprietary Market Data Fees (as of July 3, 2023), available at *https://www.nyse.com/publicdocs/nyse/data/NYSE_Arca_Options_Proprietary_Data_Fee_Schedule.pdf.*

[43] *See* Options 7, Section 10 (Proprietary Data Feed Fees) (PHLX Depth Data). ARCA does not charge separately for top of book and depth of book. Although PHLX is not proposing to change fees for depth of book information, PHLX depth of book information is included here to maintain comparability.

[44] *See* Cboe Data Services (CDS), Market Data Product Price List (updated July 1, 2023), available at *https://cdn.cboe.com/resources/membership/US_Market_Data_Product_Price_List.pdf.*

[45] *See* Options 7, Section 10 (Proprietary Data Feed Fees) (PHLX Depth Data). ARCA does not charge separately for top of book and depth of book. Although PHLX is not proposing to change fees for depth of book information, PHLX depth of book information is included here to ensure comparability.

[46] *See* Securities Exchange Act Release No. 82495 (January 12, 2018), 83 FR 2839 (January 19, 2018) (SR–Phlx–2018–08).

[47] *See* Securities Exchange Act Release No. 68576 (January 3, 2013), 78 FR 1886 (January 9, 2013) (SR–Phlx–2012–145).

[48] PHLX Data (Average Daily Message Count was 2,979,919,551.32 in 2018, and 8,243,516,029.17 thus far in 2023). The significant increases in data traffic has also required technological upgrades to manage the larger traffic volume and to respond to overall technological change in the industry. *See, e.g.,* Securities Exchange Act Release No. 82495 (January 12, 2018), 83 FR 2839 (January 19, 2018) (SR–Phlx–2018–08) (discussing a number of functional enhancements to both TOPO and PHLX Orders).

nearly universal among exchanges. The difference in value between internal and external distribution is also reflected in the current fee schedule, which has previously been shown to be consistent with the Exchange Act.

* * * * *

In summary, the proposal represents an equitable allocation of reasonable dues, fees and other charges because: (i) customers have a choice in trading venue, and will exercise that choice and trade at another venue if exchange fees are not set competitively; (ii) the top of book data sent in the TOPO feed are also sent to OPRA, and customers have the option of relying on OPRA data; (iii) the purchase of PHLX Orders is entirely optional as it is a low-cost alternative to the PHLX Depth of Market product; (iv) the proposed fees are comparable to those of other exchanges; (v) exchange fees have fallen in real terms while the amount of liquidity available on the exchange has increased, and (vi) external vendors receive additional value from distributing data to their own customers and typically charging for the service, and therefore charging higher fees for external distribution is fair and reasonable.

No Unfair Discrimination

The Proposal is not unfairly discriminatory. The three market data feeds at issue here—TOPO, PHLX Orders, and TOPO Plus Orders—are used by a variety of market participants for a variety of purposes. Users include regulators, market makers, competing exchanges, media, retail, academics, portfolio managers. Market data feeds will be available to members of all of these groups on a non-discriminatory basis.

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.

Nothing in the Proposal burdens inter-market competition (the competition among self-regulatory organizations) because approval of the Proposal does not impose any burden on the ability of other options exchanges to compete. PHLX fees are comparable to, and in some cases less than, those of other exchanges, as discussed above.

Nothing in the Proposal burdens intra-market competition (the competition among consumers of exchange data) because PHLX market data is available to any customer under the same fee schedule as any other customer, and any market participant that wishes to purchase PHLX market data 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.[49]

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–Phlx–2023–57 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–Phlx–2023–57. 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–Phlx–2023–57 and should be submitted on or before January 10, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[50]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–27924 Filed 12–19–23; 8:45 am]

BILLING CODE 8011–01–P

[49] 15 U.S.C. 78s(b)(3)(A)(ii).

[50] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99170; File No. SR–NYSEARCA–2023–85]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 6.62P–O

December 14, 2023.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on December 8, 2023, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. 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] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 6.62P–O to provide for the use of ALO Reserve Orders. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 6.62P–O (Orders and Modifiers) (the ''Rule'') to provide for the use of ALO Reserve Orders.

ALO Orders

Rule 6.62P–O(e)(2) defines an ALO Order as a Non-Routable Limit Order that will not remove liquidity from the Consolidated Book. As described below, an ALO Order can be designated to be cancelled if it would be displayed at a price other than its limit price for any reason.

As described in Rule 6.62P–O(e)(2)(A)(ii), an ALO Order to buy (sell) will be displayed at its limit price if it locks non-displayed orders or quotes to sell (buy) on the Consolidated Book. However, per Rule 6.62P–O(e)(2)(A), an ALO Order will not be displayed at a price that would: lock or cross the ABBO, would lock or cross displayed interest in the Consolidated Book, or would cross non-displayed interest in the Consolidated Book.

Rule 6.62P–O(e)(2)(A)(i) provides that an ALO Order may be designated to cancel if it would be displayed at a price other than its limit price. If an ALO Order is not so designated, it will be repriced as follows (per Rules 6.62P–O (e)(2)(B)(i)–(iii)):

- If the limit price of an ALO Order to buy (sell) would lock or cross displayed orders or quotes to sell (buy) on the Consolidated Book, it will be repriced to have a working price and display price one MPV below (above) the lowest (highest) priced displayed order or quote to sell (buy) on the Consolidated Book;
- If the limit price of an ALO Order to buy (sell) would lock or cross the ABO (ABB), it will be repriced to have a working price equal to the ABO (ABB) and a display price one MPV below (above) that ABO (ABB);
- If the limit price of an ALO Order to buy (sell) would cross non-displayed orders or quotes on the Consolidated Book, it will be repriced to have a working price and display price equal to the lowest (highest) priced non-displayed order or quote to sell (buy) on the Consolidated Book.

Rule 6.62P–O(e)(2)(C) provides that, once resting on the Consolidated Book, the display price of an ALO Order to buy (sell) that has been repriced will be repriced higher (lower) only one additional time. If, after that repricing, the display price could be repriced higher (lower) again, the order can be designated to either remain at its last working price and display price or be cancelled, provided that a resting ALO Order that is a quote cannot be designated to be cancelled.

- Per Rule 6.62P–O(e)(2)(C)(i), if the limit price of an ALO Order to buy (sell) that has been repriced no longer locks or crosses displayed orders or quotes in the Consolidated Book, locks or crosses the ABBO, or crosses non-displayed orders or quotes in the Consolidated Book, it will be assigned a working price and display price equal to its limit price.

Rule 6.62P–O(e)(2)(D) provides that the working price of a resting ALO Order to buy (sell) that has been repriced will be adjusted to be equal to its display price, if:

- the ABO (ABB) re-prices to be equal to or lower (higher) than the display price of the resting ALO Order to buy (sell) (per Rule 6.62P–O(e)(2)(D)(i)); or
- an ALO Order or Day ISO ALO to sell (buy) is displayed on the Consolidated Book at a price equal to the working price of the resting ALO Order to buy (sell) (per Rule 6.62P–O(e)(2)(D)(ii)).

Rule 6.62P–O(e)(2)(E) provides that when the working price and display price of an ALO Order to buy (sell) are the same, the working price will be adjusted higher (lower) only if the display price of the order is adjusted.

Finally, per Rule 6.62P–O(e)(2)(F), the ALO designation will be ignored for ALO Orders that participate in an Auction.

Reserve Orders

Rule 6.62P–O(d)(1) provides for Reserve Orders, which are Limit Orders with a quantity of the size displayed and with a reserve quantity of the size (''reserve interest'') that is not displayed. The displayed quantity of a Reserve Order is ranked Priority 2—Display Orders, and the reserve interest is ranked Priority 3—Non-Display Orders. Both the display quantity and the reserve interest of an arriving marketable Reserve Order are eligible to trade with resting interest in the Consolidated Book or to route to Away Markets, unless they are designated as a Non-Routable Limit Order. The working price of the reserve interest of a resting Reserve Order to buy (sell) will be adjusted in the same manner as a Non-Displayed Limit Order, as provided for in paragraph (d)(2)(A) of this Rule, provided that it will never be priced higher (lower) than the working price of the display quantity of the Reserve Order.[4]

- Rule 6.62P–O(d)(1)(A) provides that the displayed portion of a Reserve Order will be replenished when the display quantity is decremented to zero. The replenish quantity will be the minimum display size of the order or the remaining quantity of the reserve interest if it is less than the minimum display quantity.
- Rule 6.62P–O(d)(1)(B) provides that each time the display quantity of a Reserve Order is replenished from reserve interest, a new working time will be assigned to the replenished quantity.
- Rule 6.62P–O(d)(1)(C) provides that a Reserve Order may be designated as a Non-Routable Limit Order. If so designated, the reserve interest that replenishes the display quantity will be assigned a display price and working price consistent with the instructions for the order.
- Rule 6.62P–O(d)(1)(D) provides that a routable Reserve Order will be evaluated for routing both on arrival and each time the display quantity is replenished.[5]

[4] *See infra* regarding the proposed non-substantive change to Rule 6.62P–O(d)(1) to remove the cross-reference to paragraph (d)(2)(A) of Rule 6.62P–O and replace it with the specific text from that paragraph regarding how the working price for resting interest is adjusted. *See* proposed Rule 6.62P–O(d)(1).

[5] *See* Rule 6.62P–O(d)(1)(D)(i)–(ii) (providing that for a routable Reserve Order, ''[i]f routing is required, the Exchange will route from reserve interest before publishing the display quantity'' and that ''[a]ny quantity of a Reserve Order that is returned unexecuted will join the working time of

• Rule 6.62P–O(d)(1)(E) provides that a request to reduce the size of a Reserve Order will cancel the reserve interest before cancelling the display quantity.

• Finally, Rule 6.62P–O(d)(1)(F) provides that a Reserve Order may be designated Day or GTC; this provision also currently provides that a Reserve Order may not be designated as an ALO Order.

Proposed ALO Reserve Orders

The Exchange proposes to amend Rule 6.62P–O to provide for the use of ALO Reserve Orders. The proposed change is not intended to introduce any new functionality or modify any current functionality, but rather to facilitate the combination of two order types currently offered by the Exchange. As proposed, ALO Reserve Orders would operate consistent with current Rule 6.62P–O (d)(1) regarding Reserve Orders and current Rule 6.62P–O(e)(2) regarding ALO Orders. To allow for the use of ALO Reserve Orders, the Exchange first proposes to amend Rule 6.62P–O(d)(1)(F) to delete the clause in the latter half of the sentence of such rule, which currently provides that a Reserve Order may not be designated as an ALO Order.

The proposed change is intended to allow ALO Orders, as described in Rule 6.62P–O(e)(2) and the paragraphs thereunder, to have a displayed quantity, along with non-displayed reserve interest, as described in Rule 6.62P–O(d)(1). The display quantity of an ALO Reserve Order would be replenished as provided in Rule 6.62P–O(d)(1)(A) and (B). For an ALO Reserve Order that is designated as a Non-Routable-Limit Order, per Rule 6.62P–O(d)(1)(C), the replenish quantity of such non-routable ALO Reserve Order would be assigned a display price and working price consistent with the behavior of ALO Orders as described in current Exchange rules. The Exchange proposes to modify Rule 6.62P–O(d)(1)(C) to add a cross reference to the paragraphs (*i.e.,* to paragraphs (e)(1)(A) and (e)(2)(A)-(B) of the Rule) that describe how the working price and display price of Non-Routable Limit Orders and ALO Orders—which are a subset of Non-Routable Limit Orders are assigned, which would benefit investors by making the rule easier to navigate and comprehend.[6]

The proposed change is intended to facilitate the combined use of two existing order types available on the Exchange, thereby providing OTP Holders and OTP Firms with enhanced flexibility and optionality when trading on the Exchange. The proposed change could also promote increased liquidity and trading opportunities on the Exchange, to the benefit of all market participants. The Exchange also believes the proposed change would permit the Exchange to offer functionality already available on the Exchange's affiliated (five) equities exchanges and at least one other (non-NYSE) equities exchange, thereby promoting uniformity in order types/functionality across our equity and options markets.[7]

Because of the technology changes associated with this proposed rule change, the Exchange will announce the implementation date by Trader Update, which, subject to effectiveness of this proposed rule change, will be in the fourth quarter of 2023.

Proposed Non-Substantive Change To Reserve Orders

The Exchange proposes to modify Rule 6.62P–O(d)(1) to add rule text specifying how the reserve interest of a resting Reserve Order to buy (sell) will be adjusted, which text would replace the existing text that directs the reader to another rule provision. Specifically, Rule 6.62P–O(d)(1) states that ''[t]he working price of the reserve interest of a resting Reserve Order to buy (sell) will be adjusted in the same manner as a Non-Displayed Limit Order, as provided for in paragraph (d)(2)(A) of this Rule, provided that it will never be priced higher (lower) than the working price of the display quantity of the Reserve Order.'' The Exchange proposes to replace the cross reference to ''paragraph (d)(2)(A) of the Rule'' with the relevant text from that paragraph (*i.e.,* that the working price for the reserve interest of a resting Reserve Order to buy (sell) will be adjusted ''to be the lower (higher) of the limit price, or the NBO (NBB) . . . .'' [8] The Exchange deems this proposed change as non-substantive because it merely copies the text that is being cross-referenced in the approved rule without any changes.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Section 6(b)(5),[10] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to remove impediments to and perfect the mechanism of a free and open market because it would allow for the combined use of two existing order types available on the Exchange and permit the Exchange to offer functionality similar to that already available on the Exchange's (five) affiliated equities exchanges and at least one other (non-NYSE) equities exchange.[11] The Exchange believes that offering ALO Reserve Orders on the Exchange would promote uniformity in order types and functionality across the NYSE equity and options markets. OTP Holders and OTP Firms would be free to choose to use the proposed ALO Reserve Order type or not, and the proposed change would not otherwise impact the operation of the Reserve Order or ALO Order as described in current Exchange rules. The Exchange also believes that the proposed rule change would remove impediments to and perfect the mechanism of a free and open market, as well as protect investors and the public interest, by expanding the options available to OTP Holders

the reserve interest. If there is no reserve interest to join, the returned quantity will be assigned a new working time'', respectively.)''

[6] *See* proposed Rule 6.62P–O(d)(1)(C) (providing that for Reserve Orders designated as Non-Routable Limit Orders (inclusive of ALO Orders), ''the reserve interest that replenishes the display quantity will be assigned a display price and working price consistent with the instructions for the order, *as provided for in paragraphs (e)(1)(A) and (e)(2)(A)–(B) of this Rule.*'' (emphasis added).

[7] *See* Securities Exchange Act Release Nos.; 98892 (November 8, 2023), 88 FR 78398 (November 15, 2023) (SR–NYSEAmer–2023–56) (adopting ALO Reserve Orders on immediately effective basis); 98899 (November 9, 2023), 88 FR 78413 ((November 15, 2023) SR–NYSEArca–2023–77) (same); and 98891 (November 8, 2023), 88 FR 78407 (November 15, 2023) (SR–NYSE–2023–40) (same); 98893 (November 9, 2023), 88 FR 78401(November 15, 2023) (SR–NYSENAT–2023–25) (same); 98901 (November 9, 2023), 88 FR 78422 (November 15, 2023) (SR–NYSECHX–2023–21) (same). *See, e.g.,* MEMX Rules 11.8(b)(4) and (7) (providing that a Limit Order may include a reserve quantity and may be designated with a Post Only instruction); *see also* MEMX User Manual, available at *https://info.memxtrading.com/wp-content/uploads/2023/03/MEMX-User-Manual-03.10.23.pdf,* at p. 9 (providing that a Limit Order designated Day may have both reserve quantity and Post Only instructions).

[8] *See* proposed Rule 6.62P–O(d)(1) (providing, in relevant part, that ''[t]he working price of the reserve interest of a resting Reserve Order to buy (sell) will be adjusted *to be the lower (higher) of the limit price, or the NBO (NBB),* provided that it will never be priced higher (lower) than the working price of the display quantity of the Reserve Order.). (emphasis added).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] *See* note 7, *supra* (citing to equities markets that offer this functionality).

and OTP Firms when trading on the Exchange and promoting increased liquidity and additional trading opportunities for all market participants.

The proposed non-substantive change to Rule 6.62P–O(d)(1) to specify how the working price of the reserve interest of a resting Reserve Order is adjusted would add clarity and transparency to Exchange rules to the benefit of investors.

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. Specifically, the Exchange's proposal to adopt Reserve ALO Orders—which combine two existing orders available on the Exchange—would not impose a burden on intramarket competition because the proposed ALO Reserve Order is available to all market participants that trade on the Exchange.

The Exchange believes that the proposed change would enhance inter-market competition as other options exchanges that do not currently offer this functionality are free to do so. The Exchange also believes that, to the extent the proposed change increases opportunities for order execution, the proposed change would promote competition by making the Exchange a more attractive venue for order flow and enhancing market quality for all market participants.

The Exchange believes the proposed non-substantive change to Rule 6.62P–O(d)(1) to specify how the working price of the reserve interest of a resting Reserve Order is adjusted, would not impose an undue burden on competition. This proposed change is not meant to be competitive but is instead designed to add clarity, transparency, and internal consistency to Exchange rules.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[12] and Rule 19b–4(f)(6) thereunder.[13]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)(iii)[14] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that it may implement the ALO Reserve order type without delay. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because the proposal raises no novel or controversial issues in permitting the proposed combination of two order types already in use on the Exchange, as well as replacing a cross-reference to improve clarity in the Exchange's rules. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[15]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–NYSEARCA–2023–85 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–NYSEARCA–2023–85. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–NYSEARCA–2023–85 and should be submitted on or before January 10, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–27913 Filed 12–19–23; 8:45 am]

BILLING CODE 8011–01–P

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[14] 17 CFR 240.19b–4(f)(6)(iii).

[15] For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–XXX, OMB Control No. 3235–XXXX]

Submission for OMB Review; Comment Request; Rule 211(h)(2)–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.*) (''PRA''), the Securities and Exchange Commission (''Commission'') submitted an information collection request to the Office of Management and Budget (''OMB'') for review and clearance for the collection of information associated with the new Rule 211(h)(2)–1 17 CFR 275.211(h)(2)–1) under the Investment Advisers Act of 1940 that was adopted by the Commission on August 23, 2023.[1] The title for this collection of information is: ''Rule 211(h)(2)–1 under the Investment Advisers Act of 1940.''

Final rule 211(h)(2)–1 prohibits all private fund advisers from, directly or indirectly, engaging in the following activities, unless they provide written disclosure to investors and, in some cases, obtain investor consent regarding such activities: charging the private fund for fees or expenses associated with an investigation of the adviser or its related persons by any governmental or regulatory authority (other than fees and expenses related to an investigation that results or has resulted in a court or governmental authority imposing a sanction for a violation of the Investment Advisers Act of 1940 or the rules promulgated thereunder); charging the private fund for any regulatory or compliance fees or expenses, or fees or expenses associated with an examination, of the adviser or its related persons; reducing the amount of any adviser clawback by actual, potential, or hypothetical taxes applicable to the adviser, its related persons, or their respective owners or interest holders; charging or allocating fees and expenses related to a portfolio investment on a non-pro rata basis when more than one private fund or other client advised by the adviser or its related persons have invested in the same portfolio company; and borrowing money, securities, or other private fund assets, or receiving a loan or extension of credit, from a private fund client.

In the Proposing Release, we solicited comment on whether rule 211(h)(2)–1 should include disclosure and/or consent requirements.[2] In response to comments received, we have decided to adopt such a requirement. Accordingly, the final rule generally will provide either a disclosure-based exception or a disclosure- and consent-based exception for each restricted activity. We believe that investors will be better informed and receive enhanced protection as a result, while still potentially benefiting from these activities when they are carried out in the interests of the fund, if investors are provided with disclosures and, in some cases, consent rights regarding these activities. The collection of information is necessary to provide private fund investors with information about their private fund investments. We believe that many advisers fail to provide disclosure of the activities covered by the restrictions or, when disclosure is provided, it is often insufficient.

Each requirement to disclose information, offer to provide information, or adopt policies and procedures constitutes a ''collection of information'' requirement under the PRA. This collection of information is found at 17 CFR 275.211(h)(2)–1 and is mandatory if the adviser engages in the restricted activity. The respondents to these collections of information requirements will be all investment advisers that advise one or more private funds. Based on IARD data, as of December 31, 2022, there were 12,234 investment advisers (including both registered and unregistered advisers but excluding advisers managing solely securitized asset funds (''SAFs'')) that provide advice to private funds.[3] We estimate that these advisers, on average, each provide advice to 8 private funds (excluding SAFs). We further estimate that these private funds will, on average, each have a total of 63 investors. As a result, an average private fund adviser will have a total of 504 investors across all private funds it advises. Because the information collected pursuant to final rule 211(h)(2)–1 requires disclosures to private fund investors, these disclosures 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 OMB control number.

We have made certain estimates of this data solely for this PRA analysis. The table below summarizes the initial and ongoing annual burden estimates associated with the rule.

TABLE 3—RULE 211(h)(2)–1 PRA ESTIMATES

	Internal initial burden hours	Internal annual burden hours	Wage rate [1]	Internal time cost	Annual external cost burden
Proposed Estimates					
Preparation of written notices	15	10 hours [2]	$422 (blended rate for compliance attorney ($425), accounting manager ($337), senior portfolio manager ($383) and assistant general counsel ($543)).	$4,220	$3,178.[3]

[1] *See* Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, Investment Advisers Act Release No. IA–6383 (August 23, 2023) [88 FR 63206 (September 14, 2023)] (''Adopting Release''); the Adopting Release solicited comment on the ''collection of information'' requirements and associated burdens. The Commission received no comments in response to this request in the Adopting Release; however, we have adjusted certain of the estimates upwards to reflect updated data/figures for certain estimates.

[2] Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, Investment Advisers Act Release No. 5955 (Feb. 9, 2022) [87 FR 16886 (Mar. 24, 2022)] (''Proposing Release'').

[3] The following types of private fund advisers (excluding advisers managing solely SAFs), among others, will be subject to the rule: unregistered advisers (*i.e.,* advisers that may be prohibited from registering with us), foreign private advisers, and advisers that rely on the intrastate exemption from SEC registration and/or the *de minimis* exemption from SEC registration; However, we are unable to estimate the number of advisers in certain of these categories because these advisers do not file reports or other information with the SEC and we are unable to find reliable, public information; as a result, the above estimate is based on information from SEC-registered advisers to private funds, exempt reporting advisers (at the State and Federal levels), and State-registered advisers to private funds, in each instance excluding advisers that manage solely SAFs; these figures are approximate, exclude in each instance advisers that manage solely SAFs, and assume that all exempt reporting advisers are advisers to private funds; the breakdown is as follows: 5,248 SEC-registered advisers to private funds; 5,234 exempt reporting advisers (at the Federal level); 562 State-registered advisers to private funds; and 1,922 State exempt reporting advisers.

TABLE 3—RULE 211(h)(2)–1 PRA ESTIMATES—Continued

	Internal initial burden hours	Internal annual burden hours	Wage rate [1]	Internal time cost	Annual external cost burden
Provision, distribution, collection, and tracking of written notices and consents.	9	6 hours [4]	$73 (rate for general clerk)	$438.	
Total new annual burden per private fund.		16 hours		$4,658	$3,178.
Avg. number of private funds per adviser.		8 private funds		8 private funds	8 private funds.
Number of advisers		12,234 advisers		12,234 advisers	9,176 advisers.[5]
Total new annual burden		1,565,952 hours		$455,887,776	$233,290,624.

Notes:

[1] The hourly wage rates in these estimates are based on (1) SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified by SEC staff to account for an 1,800-hour work-year and inflation, and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead; and (2) SIFMA's Office Salaries in the Securities Industry 2013, modified by SEC staff to account for an 1,800-hour work-year and inflation, and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead.

[2] This includes the internal initial burden estimate annualized over a three-year period, plus 5 hours of ongoing annual burden hours and assumes notices and consent forms will be issued once a quarter to investors; the estimates assume that most private fund advisers will rely on the disclosure-based or investor consent exceptions to the rules and thus distribute written notices and consent forms to investors (and collect, retain, and track consent forms); however, the estimates also take into account that certain fund agreements may not permit or otherwise contemplate the activity restricted by the rule (*e.g.,* liquid funds may not contemplate an adviser clawback of performance compensation) and, accordingly, the estimates take into account that advisers to those funds will not prepare written notices (or, if applicable, prepare, collect, retain, and track consent forms) as contemplated by the rule. The estimate of 10 hours is based on the following calculation: ((15 initial hours/3 years) + 5 hours of additional ongoing burden hours) = 10 hours.

[3] This estimated burden is based on the estimated wage rate of $565/hour, for 5 hours, for outside legal services and $353/hour, for one hour, for outside accounting services, at the same frequency as the internal burden hours estimate; the Commission's estimates of the relevant wage rates for external time costs, such as outside legal services, take into account staff experience, a variety of sources including general information websites, and adjustments for inflation.

[4] This includes the internal initial burden estimate annualized over a three-year period, plus 3 hours of ongoing annual burden hours; the estimate of 6 hours is based on the following calculation: ((9 initial hours/3 years) + 3 hours of additional ongoing burden hours) = 6 hours.

[5] We estimate that 75% of advisers will use outside legal services for these collections of information; this estimate takes into account that advisers may elect to use outside legal services (along with in-house counsel), based on factors such as adviser budget and the adviser's standard practices for using outside legal services, as well as personnel availability and expertise.

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 19, 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 14, 2023.

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–27887 Filed 12–19–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–99171; File No. SR–ISE–2023–36]

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Fees for Options on the Nasdaq 100 Index in the Exchange's Pricing Schedule at Options 7

December 14, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 8, 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 and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the fees for Nasdaq 100 Index options in the Exchange's Pricing Schedule at Options 7, Section 5A. While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on December 1, 2023.

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

The purpose of the proposed rule change is to amend the fees for NDX [3]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] For purposes of the Pricing Schedule, ''NDX'' means A.M. or P.M. settled options on the full value of the Nasdaq 100® Index. *See* Options 7, Section 1(c).

in Options 7, Section 5A. The Exchange initially filed the proposed pricing changes on November 30, 2023 (SR–ISE–2023–34). On December 8, 2023, the Exchange withdrew that filing and submitted this filing.

Today, the Exchange assesses a transaction fee of $0.75 per contract for all Non-Priority Customer [4] regular NDX orders. Priority Customers [5] currently receive free executions in regular NDX orders. In accordance with note 1 of Options 7, Section 5.A, the applicable complex order fees for Non-Select Symbols [6] in Options 7, Section 4 apply to all executions in complex NDX orders.[7] As such, Priority Customers currently receive free executions in complex NDX orders.[8]

The Exchange now proposes to begin assessing all Priority Customer NDX executions (*i.e.,* regular and complex) a $0.25 per contract transaction fee. In connection with this change, the Exchange also proposes to amend note 1 of Options 7, Section 5.A to exclude Priority Customer complex NDX executions from the Section 4 complex fees, and to make clear that Priority Customer complex NDX executions will now be assessed a $0.25 per contract fee instead. As amended, note 1 will provide that for all executions in complex NDX orders for Non-Priority Customers, the applicable complex order fees for Non-Select Symbols in Section 4 will apply. Further, for all executions in complex NDX orders for Priority Customers, the fee will be $0.25 per contract. The Exchange notes that the proposed $0.25 per contract fee amount is in line with customer transaction fees assessed on other index products.[9] The Exchange also proposes to assess a surcharge of $0.25 per contract to all Priority Customer complex executions in NDX.[10] As such, Priority Customer complex executions in NDX will be assessed a total of $0.50 per contract (*i.e.,* the base $0.25 per contract fee plus the $0.25 per contract surcharge). The Exchange notes that the proposed surcharge amount is within the range of surcharges assessed for customer transactions in other products at other options exchanges.[11]

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[12] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[13] 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 Exchange believes it is reasonable to begin assessing a $0.25 per contract transaction fee to all Priority Customer executions (*i.e.,* regular and complex) in NDX and a $0.25 per contract surcharge to complex Priority Customer executions in NDX because the proposed pricing reflects the proprietary nature of this product. Similar to other proprietary products like options overlying the Nasdaq 100 Reduced Value Index (''NQX'') and the Nasdaq 100 Micro Index (''XND''), the Exchange seeks to recoup the operational costs of listing proprietary products.[14] Also, pricing by symbol is a common practice on many U.S. options exchanges as a means to incentivize order flow to be sent to an exchange for execution in particular products. Other options exchanges price by symbol.[15] Further, the Exchange notes that market participants are offered different ways to gain exposure to the Nasdaq 100 Index, whether through the Exchange's proprietary products like options overlying NDX, NQX, or XND, or separately through multi-listed options overlying Invesco QQQ Trust (''QQQ'').[16] Offering such products provides market participants with a variety of choices in selecting the product they desire to utilize in order to gain exposure to the Nasdaq 100 Index. When exchanges are able to recoup costs associated with offering proprietary products, it incentivizes growth and competition for the innovation of additional products.

The Exchange further believes that the proposed pricing described above is reasonable because the proposal is designed to update fees for the Exchange's services to reflect their current value—rather than their value when the Exchange last updated NDX pricing five years ago [17]—based on the Exchange's ability to deliver value to its customers by offering proprietary products on its market like NDX.

While the pricing for Priority Customer NDX orders is increasing under this proposal, the Exchange believes that the proposal is reasonable and would continue to incentivize market participants to transact in Priority Customer NDX orders because Priority Customers would continue to be charged at a lower rate for NDX than Non-Priority Customers. As a result, the Exchange believes that the proposed pricing is structured in a way that continues to encourage market participants, especially Priority Customers, to transact in NDX on ISE. An increase in Priority Customer order flow would benefit all market participants through quality of order interaction and increased trading opportunities. As noted above, the proposed fee and surcharge amounts are in line with customer fees and surcharges assessed on other index products at other options exchanges.[18]

The Exchange's proposal to assess a $0.25 per contract transaction fee to all Priority Customer NDX orders and to assess a $0.25 per contract surcharge to complex Priority Customer NDX orders is equitable and not unfairly discriminatory it will apply uniformly to all similarly situated market

[4] ''Non-Priority Customers'' include Market Makers, Non-Nasdaq ISE Market Makers (FarMMs), Firm Proprietary/Broker-Dealers, and Professional Customers.

[5] A ''Priority Customer'' is a person or entity that is not a broker/dealer in securities, and does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s), as defined in Nasdaq ISE Options 1, Section 1(a)(37).

[6] ''Non-Select Symbols'' are options overlying all symbols excluding Select Symbols. ''Select Symbols'' are options overlying all symbols listed on the Nasdaq ISE that are in the Penny Interval Program.

[7] *See generally* Options 7, Section 4 (setting forth maker/taker fees for Non-Select Symbols, including NDX, pursuant to which Priority Customers are assessed no fees today). In addition, the Exchange does not offer the tiered Priority Customer complex order rebates in Section 4 for orders in NDX. *See* Options 7, Section 4, note 4.

[8] *Id.*

[9] For example, Cboe Options (''Cboe'') currently assesses a $0.25 per contract customer transaction fee for MXEA and MXEF options, $0.35 per contract for OEX and XEO options, and $0.36 per contract (if premium <$1.00) or $0.45 per contract (if premium >= $1.00) for SPX and SPESG options. *See* Cboe Fees Schedule.

[10] *See* proposed note 2 of Options 7, Section 5.A.

[11] For example, Cboe currently assesses customers a $0.25 per contract exotic surcharge and a $0.21 per contract execution surcharge in SPX and SPESG options. *See* Cboe Fees Schedule. In addition, the Exchange's affiliate, Nasdaq Phlx LLC (''Phlx'') current assesses customers a $0.25 per contract complex surcharge for executions in singly-listed U.S. dollar-settled foreign currency options. *See* Phlx Options 7, Section 5.D.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(4) and (5).

[14] By way of example, in analyzing an obvious error, the Exchange would have additional data points available in establishing a theoretical price for a multiply listed option as compared to a proprietary product, which requires additional analysis and administrative time to comply with Exchange rules to resolve an obvious error.

[15] *See supra* note 9.

[16] QQQ is an exchange-traded fund based on the same Nasdaq 100 Index as NDX, NQX, and XND.

[17] The Exchange has not amended NDX transaction fees since 2018, so the fees have remained at $0.75 per contract for Non-Customers and $0.00 for Priority Customers during this time. *See* Securities Exchange Act Release No. 83144 (May 1, 2018), 83 FR 20107 (May 7, 2018) (SR–ISE–2018–38).

[18] *See supra* note 9 and 11.

participants. The Exchange believes it is equitable and not unfairly discriminatory to continue charging Priority Customers NDX orders at a generally lower rate than Non-Priority Customers NDX orders [19] as the Exchange has historically provided more favorable pricing to Priority Customers in its Pricing Schedule.[20] Priority Customer orders bring valuable liquidity to the market by providing more trading opportunities, which, in turn, attracts Market Makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow to the benefit of all market participants.

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 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, or rebate opportunities available at other venues to be more favorable. As noted above, market participants are offered an opportunity to transact in NDX, NQX, or XND, or separately execute options overlying QQQ. Offering these products provides market participants with a variety of choices in selecting the product they desire to use to gain exposure to the Nasdaq 100 Index. Furthermore, the proposed fee amounts are in line with customer transaction fees and surcharges assessed on other products at another options exchange.[21]

Further, the Exchange does not believe that its proposal to begin assessing a $0.25 per contract transaction fee for all Priority Customer NDX orders and $0.25 per contract surcharge for complex Priority Customer NDX orders will impose an undue burden on intra-market competition because Priority Customers will continue to be assessed more favorable pricing than Non-Priority Customers for NDX orders, which is in line with how the Exchange historically assessed fees for these market participants. As discussed above, Priority Customer order flow enhances liquidity on the Exchange for the benefit of all market participants.

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 [22] and Rule 19b–4(f)(2) [23] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (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–2023–36 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–2023–36. 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–2023–36 and should be submitted on or before January 10, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–27914 Filed 12–19–23; 8:45 am]

BILLING CODE 8011–01–P

[19] As described above, regular Priority Customer NDX executions will be assessed $0.25 per contract under this proposal, and complex Priority Customer NDX executions will be assessed a total of $0.50 per contract under this proposal (*i.e.,* base fee plus complex surcharge). Regular Non-Priority Customer NDX executions will continue to be assessed $0.75 per contract. As it relates to complex Non-Priority Customer NDX executions, the Exchange notes that in certain instances, Non-Priority Customers may be assessed a lower complex fee in Section 4 than the $0.50 complex fee proposed for Priority Customers. Specifically, Non-Priority Customers could be assessed the $0.20 per contract complex Maker Fee for Non-Select Symbols (NDX is a Non-Select Symbol). However, the Non-Priority Customer complex Taker Fee for Non-Select Symbols still remains at a much higher level ($1.10) than the $0.50 complex fee proposed for Priority Customer NDX executions. *See* Options 7, Section 4.

[20] For example, Priority Customers presently receive free executions in regular and complex orders, as discussed earlier in this filing.

[21] *See supra* notes 9 and 11.

[22] 15 U.S.C. 78s(b)(3)(A)(ii).

[23] 17 CFR 240.19b–4(f)(2).

[24] 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 20, 2024.

ADDRESSES: Send all comments to Renee Mascarenas, Accountant, Denver Finance Center, Small Business Administration, Denver, CO 80202.

FOR FURTHER INFORMATION CONTACT: Renee Mascarenas, Accountant, Denver Finance Center, *renee.mascarenas@sba.gov,* 303–844–7179, or Curtis B. Rich, Agency Clearance Officer, 202–205–7030, *curtis.rich@sba.gov.*

SUPPLEMENTARY INFORMATION: SBA Form 172 is only used by lenders for loans that have been purchased by SBA and are being serviced by approved SBA lending partners. The lenders use the SBA Form 172 to report loan payment data to SBA within 15 business days of receipt of payment. The purpose of this reporting is to (1) show the remittance due SBA on a loan serviced by participating lending institutions (2) update the loan receivable balances.

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: 3245–0131.

(1) Title: Transaction Report on Loans Serviced by Lender.

Description of Respondents: SBA Lenders.

Form Number: SBA Form 172.

Total Estimated Annual Responses: 1,012.

Total Estimated Annual Hour Burden: 9,636.

Curtis Rich,

Agency Clearance Officer.

[FR Doc. 2023–27903 Filed 12–19–23; 8:45 am]

BILLING CODE 8026–09–P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2023–0047]

Rate for Assessment on Direct Payment of Fees to Representatives in 2024

AGENCY: Social Security Administration.

ACTION: Notice.

SUMMARY: The Social Security Administration (SSA) is announcing the assessment percentage rate under the Social Security Act (Act) is 6.3 percent for 2024.

FOR FURTHER INFORMATION CONTACT: Mona B. Ahmed, Associate General Counsel for Program Law, Office of the General Counsel, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235–6401. Phone: (410) 965–0600, email: *Mona.Ahmed@ssa.gov.*

SUPPLEMENTARY INFORMATION: A claimant may appoint a qualified individual as a representative to act on their behalf in matters before the SSA. If the claimant is entitled to past-due benefits and was represented either by an attorney or by a non-attorney representative who has met certain prerequisites, the Act provides that we shall withhold up to 25 percent of the past-due benefits and use that money to pay the representative's approved fee directly to the representative.

When we pay the representative's approved fee directly to the representative, we must collect from that fee payment an assessment to recover the costs we incur in determining and paying representatives' fees. The Act provides that the assessment we collect will be the lesser of two amounts: a specified dollar limit; or the amount determined by multiplying the fee we are paying by the assessment percentage rate.[1]

The Act initially set the dollar limit at $75 in 2004 and provides that the limit will be adjusted annually based on changes in the cost-of-living.[2] Currently, the maximum dollar limit for the assessment is $117, as we announced in the **Federal Register** on October 23, 2023 (88 FR 72803).

The Act requires us, each year, to set the assessment percentage rate at the lesser of 6.3 percent or the percentage rate necessary to achieve full recovery of the costs we incur to determine and pay representatives' fees.[3] Based on the best available data, we have determined that the current rate of 6.3 percent will continue for 2024. We will continue to review our costs for these services on a yearly basis.

Chad Poist,

Deputy Commissioner, Office of Budget, Finance, and Management, Social Security Administration.

[FR Doc. 2023–27955 Filed 12–19–23; 8:45 am]

BILLING CODE 4191–02–P

[1] 42 U.S.C. 406(d), 406(e), and 1383(d)(2).

[2] 42 U.S.C. 406(d)(2)(A) and 1383(d)(2)(C)(ii)(I).

[3] 42 U.S.C. 406(d)(2)(B)(ii) and 1383(d)(2)(C)(ii)(II).

DEPARTMENT OF STATE

[Public Notice: 12288]

Designation of Mohamed Ali Nkalubo and Ahmed Mahamud Hassan Aliyani as Specially Designated Global Terrorists

Acting under the authority of and in accordance with section 1(a)(ii)(B) of Executive Order 13224, as amended (''E.O. 13224'' or ''Order''), I hereby determine that the persons known as Mohamed Ali Nkalubo (also known as Meddie Nkalubo and Meddie Lee) and Ahmed Mahamud Hassan Aliyani (also known as Ahmed Mahmoud Hassan and Ahmad Mahmoud Hassan) are leaders of ISIS–DRC, an entity whose property and interests in property are currently blocked pursuant to a determination by the Secretary of State pursuant to E.O. 13224.

Consistent with the determination in section 10 of E.O. 13224 that prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously, I determine that no prior notice needs to be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.

This notice shall be published in the **Federal Register**.

Dated: December 6, 2023.

Antony J. Blinken,

Secretary of State.

[FR Doc. 2023–27995 Filed 12–19–23; 8:45 am]

BILLING CODE 4710–AD–P

SURFACE TRANSPORTATION BOARD

30-Day Notice of Intent To Seek Extension of Approval of Collection: Demurrage Liability Disclosure Requirements

AGENCY: Surface Transportation Board.

ACTION: Notice and request for comments.

SUMMARY: As required by the Paperwork Reduction Act of 1995 (PRA), the Surface Transportation Board (STB or Board) gives notice of its intent to seek approval from the Office of Management and Budget (OMB) for an extension of the collection of Demurrage Liability Disclosure Requirements, as described below.

DATES: Comments on this information collection should be submitted by January 19, 2024.

ADDRESSES: Written comments should be identified as ''Paperwork Reduction Act Comments, Demurrage Liability Disclosure Requirements.'' Written comments for this information collection should be submitted via *www.reginfo.gov/public/do/PRAMain.* This information collection can be accessed by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. As an alternative, written comments may be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Michael J. McManus, Surface Transportation Board Desk Officer: via email at *oira_submission@omb.eop.gov;* by fax at (202) 395–1743; or by mail to Room 10235, 725 17th Street NW, Washington, DC 20503.

Please also direct all comments to Chris Oehrle, PRA Officer, Surface Transportation Board, 395 E Street SW, Washington, DC 20423–0001, or to *PRA@stb.gov.* When submitting comments, please refer to ''Paperwork Reduction Act Comments, Demurrage Liability Disclosure Requirements.'' For further information regarding this collection, contact Pedro Ramirez at (202) 245–0333 or *pedro.ramirez@stb.gov.* If you require an accommodation under the Americans with Disabilities Act, please call (202) 245–0245.

SUPPLEMENTARY INFORMATION: The Board previously published a notice about this collection in the **Federal Register** (88 FR 65419 (September 22, 2023)). That notice allowed for a 60-day public review and comment period. No comments were received.

Comments are requested concerning each collection as to (1) whether the particular collection of information is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate. Submitted comments will be included and summarized in the Board's request for OMB approval.

Description of Collection

Title: Demurrage Liability Disclosure Requirements.

OMB Control Number: 2140–0021.

Form Number: None.

Type of Review: Extension without change.

Respondents: Freight railroads subject to the Board's jurisdiction.

Number of Respondents: Approximately 620 (including six Class I carriers).

Estimated Time per Response: One hour for each disclosure.

Frequency: On occasion. The existing demurrage liability disclosure requirement is triggered in two circumstances: (1) when a shipper initially arranges with a railroad for transportation of freight pursuant to the rail carrier's tariff; or (2) when a rail carrier changes the terms of its demurrage tariff.

Total Burden Hours (annually including all respondents): 1,330.7 hours. Consistent with the existing, approved information collection, Board staff estimates that: (1) six Class I carriers would each take on 18 new customers each year (108 hours); (2) each of the six Class I carriers would update its demurrage tariffs annually (6 hours); (3) 620 non-Class I carriers (which are already subject to the existing collection requirements, but which will not be subject to the new requirements) would each take on one new customer a year (620 hours); and (4) each of the non-Class I carriers would update its demurrage tariffs every three years (206.7 hours annualized). For the requirement that Class I carriers must directly bill the shipper for demurrage when the shipper and warehouseman agree to the arrangement and so notify the rail carrier, Board staff estimates that annually six Class I carriers would each receive 65 direct-billing agreements per year at one hour per agreement (390 hours).

The total hourly burdens are also set forth in the table below.

TABLE—TOTAL BURDEN HOURS

[Per year]

Respondents	New customer burden (hours)	Tariff update burden (hours)	Burden for invoicing agreement (hours)	Total annual burden hours
6 Class I Carriers	108	6	390	504
620 Non-Class I Carriers	620	206.7	.....	826.7
Totals	728	212.7	390	1,330.7

Total ''Non-hour Burden'' Cost: There are no other costs identified. Any submissions may be submitted electronically.

Needs and Uses: Demurrage is subject to Board regulation under 49 U.S.C. 10702, which requires railroads to establish reasonable rates and transportation-related rules and practices, and under 49 U.S.C. 10746, which requires railroads to compute demurrage charges, and establish rules related to those charges, in a way that will fulfill the national needs related to freight car use and distribution and maintenance of an adequate car supply. Demurrage is a charge that serves principally as an incentive to prevent undue car detention and thereby encourage the efficient use of rail cars in the rail network, while also providing compensation to rail carriers for the expense incurred when rail cars are unduly detained beyond a specified period of time (*i.e.,* ''free time'') for loading and unloading. *See Pa. R.R.* v. *Kittaning Iron & Steel Mfg. Co.,* 253 U.S. 319, 323 (1920) (''The purpose of demurrage charges is to promote car efficiency by penalizing undue detention of cars.''); 49 CFR 1333.1; *see also* 49 CFR pt. 1201, category 106.

Under 49 CFR 1333.3, a railroad's ability to charge demurrage pursuant to its tariff is conditional on its having given, prior to rail car placement, actual notice of the demurrage tariff to the person receiving rail cars for loading and unloading. Once a shipper receives a notice as to a particular tariff, additional notices are required only when the tariff changes materially. The parties rely on the information in the demurrage tariffs to avoid demurrage disputes, and the Board uses the tariffs

to adjudicate demurrage disputes that come before it. Class I carriers are required to include certain minimum information on or with demurrage invoices, take appropriate action to ensure that demurrage charges are accurate and warranted, and directly bill the shipper for demurrage when the shipper and warehouseman agree to that arrangement and so notify the rail carrier. This collection and use of this information by the Board enable the Board to meet its statutory duties.

Under the PRA, a federal agency that conducts or sponsors a collection of information must display a currently valid OMB control number. A collection of information, which is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c), includes agency requirements that persons submit reports, keep records, or provide information to the agency, third parties, or the public. Section 3507(b) of the PRA requires, concurrent with an agency's submitting a collection to OMB for approval, a 30-day notice and comment period through publication in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information.

Dated: December 15, 2023.

Kenyatta Clay,

Clearance Clerk.

[FR Doc. 2023–27946 Filed 12–19–23; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD

30-Day Notice of Intent To Seek Extension of Approval of Collection: Waybill Sample

AGENCY: Surface Transportation Board.

ACTION: Notice and request for comments.

SUMMARY: As required by the Paperwork Reduction Act of 1995 (PRA), the Surface Transportation Board (STB or Board) gives notice of its intent to seek approval from the Office of Management and Budget (OMB) for an extension of the collection of Waybill Sample, as described below.

DATES: Comments on this information collection should be submitted by January 19, 2024.

ADDRESSES: Written comments should be identified as ''Paperwork Reduction Act Comments, Surface Transportation Board, Waybill Sample.'' Written comments for the proposed information collection should be submitted via *www.reginfo.gov/public/do/PRAMain.* This information collection can be accessed by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. As an alternative, written comments may be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Michael J. McManus, Surface Transportation Board Desk Officer: via email at *oira_submission@omb.eop.gov;* by fax at (202) 395–1743; or by mail to Room 10235, 725 17th Street NW, Washington, DC 20503.

Please also direct all comments to Chris Oehrle, PRA Officer, Surface Transportation Board, 395 E Street SW, Washington, DC 20423–0001, and to *PRA@stb.gov.* When submitting comments, please refer to ''Paperwork Reduction Act Comments, Waybill Sample.'' For further information regarding this collection, contact Pedro Ramirez at (202) 245–0333 or *pedro.ramirez@stb.gov.* If you require an accommodation under the Americans with Disabilities Act, please call (202) 245–0245.

SUPPLEMENTARY INFORMATION: The Board previously published a notice about this collection in the **Federal Register** (88 FR 65421 (Sept. 22, 2023)). That notice allowed for a 60-day public review and comment period. No comments were received.

Comments are requested concerning each collection as to (1) whether the particular collection of information is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate. Submitted comments will be included and summarized in the Board's request for OMB approval.

Subjects: In this notice, the Board is requesting comments on the extension of the following information collection:

Description of Collection

Title: Waybill Sample.

OMB Control Number: 2140–0015.

Form Number: None.

Type of Review: Extension without change.

Respondents: Respondents include any railroad that is subject to the Interstate Commerce Act and that terminated at least 4,500 carloads on its line in any of the three preceding years or that terminated at least 5% of the revenue carloads terminating in any state in any of the three preceding years. For the purposes of this analysis, the Board categorizes railroads required to report Waybill Sample data as either quarterly or monthly and as either sampling their own waybills or having a third party conduct their sampling. As a result, there are four categories of respondents, as shown in Table below.

TABLE—RESPONDENTS

Categories of respondents	Number of respondents
Railroads that conduct their own sampling and report monthly	5
Railroads that conduct their own sampling and report quarterly	3
Railroads that have a third party sample their waybills and report monthly	2
Railroads that have a third party sample their waybills and report quarterly	43
Total Respondents	53

Number of Respondents: 53.

Estimated Time per Response: The estimated hourly burden for waybill samples submitted to the Board varies depending on each respondent's particular circumstances. (Note: respondents that are identified as reporting monthly (Class I carriers) report monthly, quarterly, and annually (or 17 times per year). All other respondents (non-Class I carriers) report quarterly and annually (five times a year).

Frequency of Response: Six respondents report monthly; and 46 other respondents report quarterly.

Total Burden Hours (annually including all respondents): 420 hours.

This estimated total burden hours is shown in the Table below.

TABLE—TOTAL BURDEN HOURS

Categories of respondents	Total annual hours for samples submitted
Railroads that conduct their own sampling and report monthly	150
Railroads that conduct their own sampling and report quarterly	20
Railroads that have a third party sample their waybills and report monthly	30
Railroads that have a third party sample their waybills and report quarterly	220
Total Annual Burden Hours	420

Total Annual ''Non-Hour Burden'' Cost: There are no other costs identified because filings are submitted electronically to the Board.

Needs and Uses: The Board is, by statute, responsible for the economic regulation of common carrier rail transportation in the United States and collects rail-carload waybills for this purpose. The Board has authority to collect these waybills under 49 U.S.C. 11144, 11145, and the Board often uses the information in rail-carload waybills to carry out its responsibilities.

A rail-carload waybill is a ''document or instrument prepared from the bill of lading contract or shipper's instructions as to the disposition of the freight, and [is] used by the railroad(s) involved as the authority to move the shipment and as the basis for determining the freight charges and interline settlements.'' 49 CFR 1244.1(c). From these carload waybills, the Board creates an aggregate compilation of the sampled waybills of all reporting carriers, referred to as the Waybill Sample. The Waybill Sample is the Board's principal source of data about freight rail shipments. The information in the Waybill Sample is used by the Board, other federal and state agencies, and industry stakeholders to monitor traffic flows and rate trends in the industry, and to develop testimony in Board proceedings. The Board's collection and use of this data enables it to meet its statutory duty to regulate the rail industry.

Under the PRA, a federal agency that conducts or sponsors a collection of information must display a currently valid OMB control number. A collection of information, which is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c), includes agency requirements that persons submit reports, keep records, or provide information to the agency, third parties, or the public. Section 3507(b) of the PRA requires, concurrent with an agency's submitting a collection to OMB for approval, a 30-day notice and comment period through publication in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information.

Information from certain schedules contained in these reports is available at the Board's website at *www.stb.gov* by navigating to ''Reports & Data'' and clicking on ''Economic Data.'' Information in these reports is not available from any other source.

Dated: December 15, 2023.

Kenyatta Clay,

Clearance Clerk.

[FR Doc. 2023–27947 Filed 12–19–23; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[FMCSA–2014–0383; FMCSA–2014–0385; FMCSA–2014–0387; FMCSA–2018–0139; FMCSA–2019–0109; FMCSA–2019–0110; FMCSA–2021–0015]

Qualification of Drivers; Exemption Applications; Hearing

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to renew exemptions for 13 individuals from the hearing requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) for interstate commercial motor vehicle (CMV) drivers. The exemptions enable these hard of hearing and deaf individuals to continue to operate CMVs in interstate commerce.

DATES: The exemptions were applicable on November 19, 2023. The exemptions expire on November 19, 2025.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, FMCSA, DOT, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001, (202) 366–4001, *fmcsamedical@dot.gov.* Office hours are 8:30 a.m. to 5 p.m. ET Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Viewing Comments

To view comments go to *www.regulations.gov.* Insert the docket number (FMCSA–2014–0383, FMCSA–2014–0385, FMCSA–2014–0387, FMCSA–2018–0139, FMCSA–2019–0109, FMCSA–2019–0110, or FMCSA–2021–0015) in the keyword box and click ''Search.'' Next, sort the results by ''Posted (Newer-Older),'' choose the first notice listed, and click ''Browse Comments.'' If you do not have access to the internet, you may view the docket online by visiting Dockets Operations on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m. ET Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

B. Privacy Act

In accordance with 49 U.S.C. 31315(b)(6), DOT solicits comments from the public on the exemption requests. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov.* As described in the system of records notice DOT/ALL 14 (Federal Docket Management System), which can be reviewed at *https://www.transportation.gov/individuals/privacy/privacy-act-system-records-notices,* the comments are searchable by the name of the submitter.

II. Background

On October 31, 2023, FMCSA published a notice announcing its decision to renew exemptions for 13 individuals from the hearing standard in 49 CFR 391.41(b)(11) to operate a CMV in interstate commerce and requested comments from the public (88 FR 74560). The public comment period ended on November 30, 2023, and no comments were received.

FMCSA has evaluated the eligibility of these applicants and determined that renewing these exemptions would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved by complying with § 391.41(b)(11).

The physical qualification standard for drivers regarding hearing found in § 391.41(b)(11) states that a person is physically qualified to drive a CMV if that person first perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5—1951.

This standard was adopted in 1970 and was revised in 1971 to allow drivers to be qualified under this standard while wearing a hearing aid (35 FR 6458, 6463 (Apr. 22, 1970) and 36 FR 12857 (July 8, 1971), respectively).

III. Discussion of Comments

FMCSA received no comments in this proceeding.

IV. Conclusion

Based upon its evaluation of the 13 renewal exemption applications, FMCSA announces its decision to exempt the following drivers from the hearing requirement in § 391.41(b)(11).

As of November 19, 2023, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following 13 individuals have satisfied the renewal conditions for obtaining an exemption from the hearing requirement in the FMCSRs for interstate CMV drivers (88 FR 74561):

Jeffrey Barbuto (NH)
Wayne Crowl (IN)
Debbie Gaskill (GA)
Jason Gensler (OH)
Emil Iontchev (IL)
Jerrell McCrary (NC)
Danny McGowan (WV)
Matthew Moore (TX)
Abdiwahab Olow (MN)
Stuart Randles (FL)
Anthony Saive (TN)
Jennifer Valentine (TX)
Donald Weyand (MI)

The drivers were included in docket numbers FMCSA–2014–0383, FMCSA–2014–0385, FMCSA–2014–0387, FMCSA–2018–0139, FMCSA–2019–0109, FMCSA–2019–0110, or FMCSA–2021–0015. Their exemptions were applicable as of November 19, 2023 and will expire on November 19, 2025.

In accordance with 49 U.S.C. 31315(b), each exemption will be valid for 2 years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) the person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136, 49 U.S.C. chapter 313, or the FMCSRs.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2023–27994 Filed 12–19–23; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket No. FTA–2023–0032]

Proposed General Directive 24–1: Required Actions Regarding Assaults on Transit Workers

AGENCY: Federal Transit Administration (FTA), Department of Transportation (DOT).

ACTION: Notice of proposed general directive; request for comments.

SUMMARY: The Federal Transit Administration (FTA) is proposing a General Directive to address the significant and continuing national-level safety risk related to assaults on transit workers. The General Directive would require each transit agency subject to FTA's Public Transportation Agency Safety Plans (PTASP) regulation to conduct a safety risk assessment, identify safety risk mitigations or strategies, and provide information to FTA on how it is assessing, mitigating, and monitoring the safety risk associated with assaults on transit workers. As required by the Bipartisan Infrastructure Law, each transit agency serving a large urbanized area must involve the joint labor-management Safety Committee when identifying safety risk mitigations.

DATES: Comments should be filed by February 20, 2024. FTA will consider comments received after that date to the extent practicable.

ADDRESSES: You may send comments, identified by docket number FTA–2023–0032, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for sending comments.
- *Fax:* (202) 493–2251.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery/Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

Instructions: All submissions received must include the agency name (Federal Transit Administration and Docket Number (FTA–2023–0032). All comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

Docket: For internet access to the docket to read background documents and comments received, go to *https://www.regulations.gov.* Background documents and comments received may also be viewed at the U.S. Department of Transportation, 1200 New Jersey Ave. SE, Docket Operations, M–30, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001, between 9 a.m. and 5 p.m. EST, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: For program matters, contact Stewart Mader, Office of Transit Safety and Oversight, (202) 366–9677 or *stewart.mader@dot.gov.* For legal matters, contact Heather Ueyama, Office of Chief Counsel, (202) 366–7374 or *heather.ueyama@dot.gov.*

Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: FTA is seeking comment on a proposed General Directive to address the significant and continuing nationwide safety risk associated with assaults on transit workers.[1] This General Directive is part of FTA's ongoing comprehensive efforts to improve transit worker safety. FTA is also undertaking other actions related to

[1] For purposes of this General Directive, transit worker means any employee, contractor, or volunteer working on behalf of a transit agency, who comes into contact with the public while performing their duties.

transit worker safety, including funding research, sponsoring training, soliciting public input, providing technical assistance. FTA intends to use information submitted to it pursuant to the General Directive and other FTA initiatives to inform future FTA actions, including rulemakings such as the planned Transit Worker and Public Safety rule.

Assaults on Transit Workers: National-Level Hazard

From 2008 to 2021, the National Transit Database (NTD) documented an average of 241 assaults on transit workers major events [2] per year, including 192 per year occurring on transit vehicles, 44 per year occurring in transit revenue facilities, and five per year occurring in other non-public locations, such as maintenance shops and yards. The number of reported assaults on transit workers per 100 million vehicle revenue miles (VRM) increased by an average of eight percent per year from 2008 to 2021—a 121 percent total increase from the 2008 rate of assaults on transit workers.

The NTD data collected and published in this period does not reflect the number and rate of all assaults on transit workers because it does not include assaults on transit workers that did not require medical attention. In the past, NTD reporting requirements focused on the most serious events that met the NTD ''major event'' reporting threshold, as defined by the NTD reporting manual. The Bipartisan Infrastructure Law, enacted as the Infrastructure Investment and Jobs Act (Pub. L. 117–58), significantly expands the data that FTA will collect through the NTD on assaults on transit workers. To implement this requirement, FTA recently finalized new NTD reporting requirements regarding assaults on transit workers on February 23, 2023, (88 FR 11506) and has begun collecting expanded data.

While FTA does not collect data on precursor events to assaults, industry experts cite anecdotal evidence that assaults on operators are a product of direct interaction with the public [3] and that disputes over fares and other policy enforcement activities are a significant contributor to assaults on operators.[4] The Occupational Safety and Health Administration states that workers who exchange money as part of their job duties, work in customer service or public service, and work alone are at higher risk for workplace violence.[5] Similarly, the National Institute for Occupational Safety and Health found that risk factors for workplace assault include interaction with the public, exchanging money, delivering passengers, having a mobile workplace, working alone, working late or early hours, and working in high-crime areas or community settings.[6] Many transit workers who perform their duties on transit vehicles and in revenue facilities, such as vehicle operators, station agents, and maintenance workers, perform their duties in such conditions.

Respondents to FTA's 2021 Request for Information (RFI) on transit worker safety [7] proposed numerous actions applicable across various types of agencies to protect transit workers from assault. These proposals included reducing bus operator involvement in fare and other policy enforcement; increasing frontline worker training on customer service, policy enforcement, and de-escalation; and changing bus designs to use barriers, among other mitigations. Responses also indicated that any new requirements for safety risk mitigations should be broad and flexible enough to work for transit agencies of all sizes and across all modes.

Based on this information, FTA has determined that there is a national-level hazard [8] that transit workers must interact with the public, and, at times, must clarify or enforce agency policies, which presents a risk of transit workers being assaulted on transit vehicles and in revenue facilities.

Previous FTA Efforts To Address Assaults on Transit Workers

In a 2019 **Federal Register** notice (84 FR 24196) FTA highlighted that in cases where a transit agency identifies hazards associated with assaults on transit operators, the PTASP regulation (49 CFR part 673) requires the agency to use the SMS Safety Risk Management (SRM) processes documented in its Agency Safety Plan (ASP) to assess the associated safety risk and, based on the results of the safety risk assessment, identify safety risk mitigations or strategies as necessary to address the safety risk.

In 2021, concerned about the continued rise in reported assaults on transit workers, FTA analyzed through its internal SRM process the hazard that transit workers must interact with the public, and, at times, must clarify or enforce agency policies. FTA conducted a safety risk assessment to determine the likelihood and severity of two potential consequences of this hazard: assaults on transit workers on board transit vehicles, and assaults on transit workers in revenue facilities.

The SRM process helps FTA determine effective and appropriate risk mitigations, such as technical assistance or regulatory responses, to support transit agencies in cultivating safer environments for their workers and riders. To support this SRM process, FTA established a likelihood scale, severity scale, and risk matrix for conducting a safety risk assessment for each identified potential consequence of a hazard. FTA uses these scales and risk matrix to determine a risk rating that helps FTA, if needed, develop its recommendations for safety risk mitigation.

FTA's Sample Safety Risk Assessment Matrices for Bus Transit Agencies [9] and Sample Safety Risk Assessment Matrices for Rail Transit Agencies [10] illustrate how a safety risk assessment matrix provides a structured approach to assess the likelihood and severity of the consequences of identified hazards, determine if the safety risk is acceptable with existing mitigations, or if additional action is needed, and prioritize hazards based on the safety risk of their potential consequences. FTA's risk matrix is depicted in Figure 1 below.

[2] A major event reported as an assault, defined in the NTD at the time the data was collected is an unlawful attack by one person upon another, or homicide where a transit worker received immediate medical attention away from the scene or died within 30 days of the event. This includes NTD reporters that are required to report detailed safety and security data to the NTD (full reporters). Full reporters include all rail transit agencies and all urban transit providers with more than 30 vehicles operated in maximum service. Full reporters account for approximately 86% of all public transit service reported to the NTD (as measured by vehicle revenue miles).

[3] *https://www.transit.dot.gov/sites/fta.dot.gov/files/Final_TRACS_Assaults_Report_14-01_07_06_15_pdf_rv6.pdf.*

[4] *https://www.cutr.usf.edu/wp-content/uploads/2012/10/TCRP-Synthesis-93-Report.pdf.*

[5] *https://www.osha.gov/workplace-violence.*

[6] *https://www.cdc.gov/niosh/docs/96-100/default.html.*

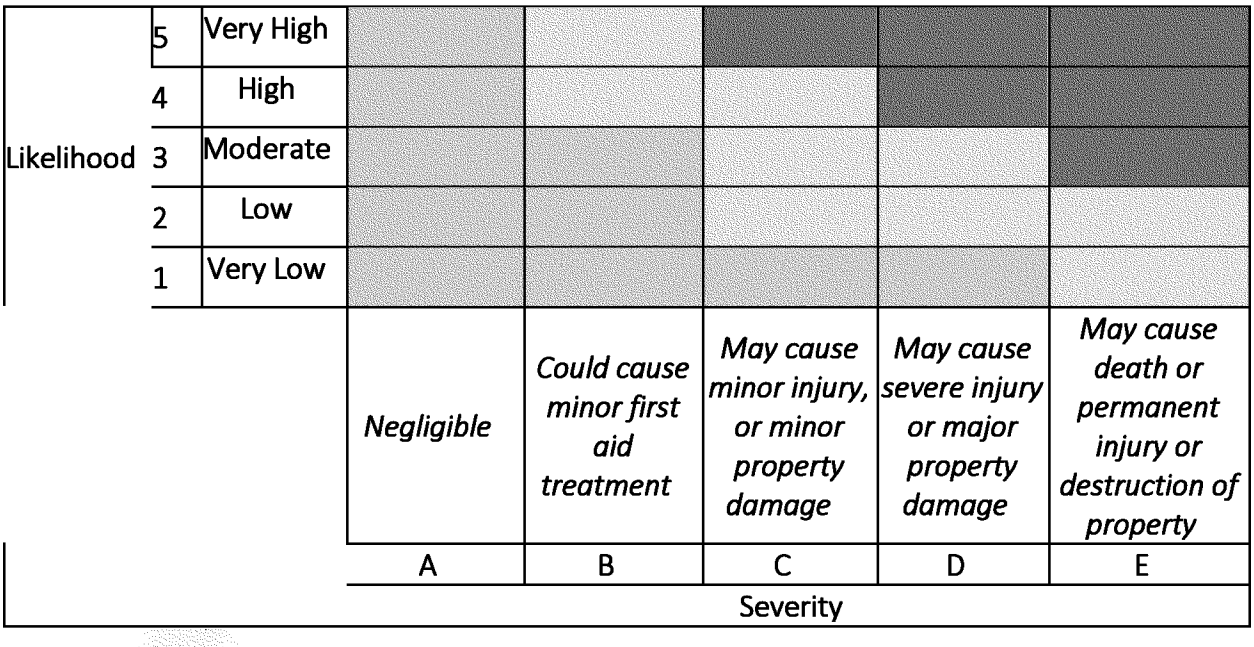
[7] *https://www.regulations.gov/docket/FTA-2021-0012/comments.*

[8] FTA has defined hazard to mean any real or potential condition that can cause injury, illness, or death; damage to or loss of the facilities, equipment, rolling stock, or infrastructure of a public transportation system; or damage to the environment. 49 CFR 673.5. A national-level hazard is one that exists at transit agencies across the country.

[9] *https://www.transit.dot.gov/regulations-and-guidance/safety/public-transportation-agency-safety-program/sample-safety-risk.*

[10] *https://www.transit.dot.gov/regulations-and-guidance/safety/public-transportation-agency-safety-program/sample-safety-risk-0.*

Figure 1: Risk Matrix used in FTA Safety Risk Assessment



Potential Consequence 1: Transit Workers Are Assaulted on Transit Vehicles

The first potential consequence of the hazard discussed above is that transit workers are assaulted on transit vehicles. To assess likelihood, FTA reviewed NTD major event reports from 2008 through 2020 that involved assaults on transit workers on transit vehicles throughout the country. Over the twelve-year period of 2008–2019,[11] there were 2,225 major event reports matching the potential consequence, an average of 185 events per year. 1,805 (81 percent) of these occurred at bus modes, with the remaining 420 (19 percent) at rail modes. Due to the frequency of occurrence, the FTA determined a likelihood rating of Very High (5).

To assess severity, FTA reviewed the severity of the events referenced in the likelihood analysis. These events resulted in three fatalities and 2,232 injuries.[12] All three fatalities and 1,806 (81 percent) of injuries resulted from assaults on transit workers on buses, while the remaining 426 injuries (19 percent) resulted from assaults on transit workers on rail vehicles. NTD event data from 2017 and later include information on the severity of injuries when rail modes reported assaults; over 98 percent of injuries from these assaults were minor. Because of this, FTA determined a severity rating of C. While there have been some instances of worker homicides and severe injuries in vehicles, the majority of these events result in a minor injury.

Potential Consequence 2: Transit Workers Are Assaulted in Revenue Facilities

The second potential consequence of the hazard discussed above is that transit workers are assaulted in revenue facilities. To assess likelihood, FTA reviewed NTD major event reports from 2008 through 2020 that involved assaults on transit workers in revenue facilities throughout the country. Over the twelve-year period of 2008–2019,[13] there were 674 major event reports matching this potential consequence, an average of 56.17 events per year. 549 (81 percent) of these occurred at rail modes, with the remaining 125 (19 percent) at bus modes. Due to the rate of occurrence, FTA determined a likelihood rating of Very High (5).

To assess severity, FTA reviewed the severity of the events referenced in the likelihood analysis. These events resulted in two fatalities and 732 injuries. A single fatality and 599 (82 percent) of injuries resulted from assaults on transit workers in rail revenue facilities, while the remaining 133 injuries (18 percent) and one fatality resulted from assaults on transit workers in bus revenue facilities. NTD event data from 2017 and later include information on the severity of injuries from assaults on transit workers in rail revenue facilities; over 95 percent of injuries from these assaults were minor. Because of this, FTA determined a severity rating of C. While there have been some instances of transit worker homicides and severe injuries in revenue facilities, the majority of these events resulted in a minor injury.

Based on the risk ratings of the two identified potential consequences, FTA determined an overall risk rating of 5C, as noted in Figure 2. This risk rating reflects that the safety risk associated with assaults on transit workers is high.

[11] 2020 NTD safety and security data was preliminary and subject to revision at the time of FTA's review. Therefore, the analysis results presented here do not include 2020 data.

[12] The number of injuries (2,232) exceeds the number of assault major events (2,225) because an assault event can result in multiple injuries.

[13] 2020 NTD safety and security data was preliminary and subject to revision at the time of FTA's review. Therefore, the analysis results presented here do not include 2020 data.

Figure 2: FTA Risk Rating for Assaults on Transit Workers

Hazard	Consequence	Risk Rating	Overall Risk Rating
Transit workers must interact with the public and, at times, must clarify or enforce agency policies.	Transit Workers Are Assaulted on Transit Vehicles	5C	5C
	Transit Workers Are Assaulted in Revenue Facilities	5C	

In addition, as part of FTA's overall goal of reducing assaults on transit workers, FTA analyzed data on assaults on transit workers reported to the NTD between 2016 and 2021. Through this analysis, FTA determined that nine transit agencies accounted for 79% of all assaults on transit workers reported to the NTD. FTA issued Special Directives [14] to these agencies on October 4, 2023, to determine whether and how these agencies are addressing safety risk related to assaults on transit workers using their SMS processes and to determine if additional FTA intervention is necessary to mitigate the safety risk related to assaults on transit workers.

FTA reviewed and analyzed the information received from these agencies. Of the nine agencies that received the Special Directives, only four reported the completion of a safety risk assessment prior to issuance of the Special Directives. This is troubling because, as noted above, FTA has previously alerted transit agencies of the need to address the risk of assaults on transit operators when identified through SMS. If these agencies have not completed a safety risk assessment, FTA is concerned that other transit agencies may not have done so either, despite the presence of the risk of assaults on transit workers on the systems they operate.

Safety risk assessment is a required step of a transit agency's SRM process.[15] Moreover, safety risk assessment is a critical tool to understand the risk associated with assaults on transit workers and to help each agency and joint-labor management Safety Committee prioritize and develop safety risk mitigations. The importance of the safety risk assessment step of SRM is further underscored by its use by FTA to assess national-level safety risk. Now, based on the available safety data, FTA's determination of a 5C risk rating reflecting a high nationwide risk of assaults on transit workers, and the results of the Special Directives, FTA has concluded that additional FTA intervention is necessary to address the safety risk related to assaults on transit workers nationwide.

Purpose of General Directive

As discussed above, FTA has determined that there is a national-level hazard that transit workers must interact with the public, and, at times, must clarify or enforce agency policies. FTA has identified that the potential consequences of this hazard are that transit workers may be assaulted on transit vehicles and in revenue facilities. Pursuant to 49 CFR 673.25(b), a transit agency must consider, as a source for hazard identification, data and information provided by FTA.

FTA has determined that the national-level hazard and potential consequences discussed above constitute an unsafe condition or practice presenting a risk of death or personal injury for transit workers. Accordingly, pursuant to 49 CFR 670.25, FTA proposes issuing a General Directive that directs agencies to take action to address the identified national-level hazard and the potential consequences.

FTA proposes that the General Directive require each transit agency that is required to have an Agency Safety Plan (ASP) under the PTASP regulation (49 CFR part 673) to use the Safety Risk Management (SRM) processes documented in its ASP to conduct a safety risk assessment related to assaults on transit workers on the public transportation system it operates. FTA is proposing that if a transit agency has conducted a safety risk assessment related to assaults on transit workers in the twelve months preceding the date of issuance of the final General Directive, and if the transit agency continues to believe that the results of that safety risk assessment are relevant, the transit agency need not conduct a new assessment. FTA also proposes to require each transit agency to use the SRM processes documented in its ASP to identify safety risk mitigations or strategies necessary as a result of the agency's safety risk assessment. As required by the Bipartisan Infrastructure Law at 49 U.S.C. 5329(d)(5), each transit agency serving a large urbanized area must involve the joint labor-management Safety Committee when identifying safety risk mitigations to reduce the likelihood and severity of consequences identified through the agency's safety risk assessment. The General Directive would also require each transit agency to provide information to FTA on how it is assessing, mitigating, and monitoring the safety risk associated with assaults on transit workers within 60 days of issuance of the final General Directive. FTA notes that this proposed directive is intended to work in conjunction with OSHA protections and is not intended to preempt OSHA's standards or other enforcement authority.

FTA is proposing this approach as it is grounded in SMS principles and methods, which FTA has adopted as the basis for enhancing public transportation safety. See 49 CFR 670.3. Further, FTA believes this approach will ensure that each transit agency is taking a formal look at the safety risk related to assaults on transit workers on their system. FTA also believes this approach will contribute to transit agencies and their joint labor-management Safety Committees identifying scalable and effective mitigations across the range of services they provide and situations that contribute to the risk of assaults on transit workers. FTA proposes that each transit agency provides FTA

[14] *https://www.transit.dot.gov/regulations-and-guidance/safety/fta-special-directives#SDTWA.*

[15] 49 CFR 673.25(c).

information on how it is assessing, mitigating, and monitoring the safety risk associated with assaults on transit workers, which FTA may use to inform future Federal action to protect transit workers.

FTA is proposing to issue this General Directive to all transit agencies required to have an ASP under the PTASP regulation because FTA has determined that the hazard that transit workers must interact with the public, and, at times, must clarify or enforce agency policies, exists at transit agencies of all sizes and across all modes of public transportation, not just those in large urbanized areas.

The proposed General Directive contains proposed binding obligations, which 49 U.S.C. 5334(k) defines as ''a substantive policy statement, rule, or guidance document issued by the Federal Transit Administration that grants rights, imposes obligations, produces significant effects on private interests, or effects a significant change in existing policy.'' Under 49 U.S.C. 5334(k) FTA may issue binding obligations if it follows notice and comment rulemaking procedures under 5 U.S.C. 553.

FTA requests public comment on this proposed General Directive, which is available on the FTA website at *https://www.transit.dot.gov/regulations-and-guidance/safety/fta-general-directives* and in Docket No. FTA–2023–0032. Following an analysis of the public comments, FTA will publish a notice in the **Federal Register** that includes both a response to comments and announces a final General Directive or a statement rescinding or revising the proposed General Directive.

Authority: 49 U.S.C. 5329; 49 CFR 1.91, 670.25.

Veronica Vanterpool,

Deputy Administrator.

[FR Doc. 2023–28002 Filed 12–19–23; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket ID Number: DOT–OST–2018–0068]

Agency Request for Emergency Clearance To Extend Information Collection Request Related to Traveling by Air With Service Animals

AGENCY: Office of the Secretary (OST), Department of Transportation (Department or DOT).

ACTION: Notice of request for emergency OMB approval.

SUMMARY: In accordance with the *Paperwork Reduction Act of 1995,* this notice announces DOT's intention to seek emergency clearance to extend the information collection request (ICR) under Office of Management and Budget (OMB) Control Number 2105–0576, ''U.S. Department of Transportation Service Animal Air Transportation Form'' and ''U.S. Department of Transportation Service Animal Relief Attestation Form.'' We are seeking emergency clearance to temporarily extend the ICR to ensure that airlines may continue to collect service animal forms from passengers with disabilities, which provide assurances to the airline that the service animal does not pose a safety threat to passengers and crew onboard aircraft. DOT requests that OMB approve this extension request within 7 days.

DATES: Written comments must be submitted on or before December 27, 2023.

ADDRESSES: You may file comments identified by the docket number DOT–OST–2018–0068 by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for submitting comments. (You may access comments received for this notice at *http://www.regulations.gov* by searching docket DOT–OST–2018–0068.)
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE, West Building Ground Floor Room W12–140, Washington, DC 20590–0001;
- *Hand delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Ave. SE, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

Instructions: You must include the agency name and docket number DOT–OST–2010–0054 at the beginning of your comment. All comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

Privacy Act: Anyone is able to search the electronic form of all comments received in any of DOT's dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

FOR FURTHER INFORMATION CONTACT: Maegan Johnson or Livaughn Chapman, Jr., Office of Aviation Consumer Protection, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590, telephone number (202) 366–9342 (voice), (202) 366–7152 (fax); *maegan.johnson@dot.gov* or *livaughn.chapman@dot.gov* (email). Arrangements to receive this document in an alternative format may be made by contacting the above-named individuals.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2105–0576.

Title: Traveling by Air with Service Animals.

Type of Request: Request for emergency extension of existing information collections.

Background: The U.S. Department of Transportation (Department or DOT) published a final rule to amend the Department's Air Carrier Access Act (ACAA) regulation on the transport of service animals by air in the **Federal Register** on December 10, 2020 (85 FR 79742). 14 CFR 382.75 allows airlines to require passengers traveling with service animals to provide airlines with the following two forms of documentation developed by the Department as a condition of travel. The first form published in the rule, the U.S. Department of Transportation Service Animal Air Transportation Form (''Behavior and Health Attestation Form''), is designed to ensure and inform airlines of the service animal's good health, disability-related task training, and good behavior; to educate passengers traveling with service animals on how service animals in air transportation are expected to behave; and to inform passengers traveling with service animals of the consequences of service animal misbehavior. The second form published in the rule, the U.S. Department of Transportation Service Animal Relief Attestation Form (''Relief Attestation Form''), may only be required by airlines when a passenger is traveling with service animals on a flight segment scheduled to take 8 hours or more. The purpose of this form is to provide assurances to airlines that the service animal will not need to relieve itself on the flight or that the animal can relieve itself in a way that does not create a health or sanitation issue, and to educate passengers of the consequences should an animal relieve itself on the aircraft in an unsanitary way.

The Behavior and Health Attestation Form and the Relief Attestation Form are the only forms that airlines are permitted to require from passengers traveling with service animals as a condition of transport, except in rare

circumstances when additional documentation may be necessary to comply with requirements on transport of animals by a Federal agency, a U.S. territory, or a foreign jurisdiction. Currently, OMB authorization of the information collections expire on December 31, 2023.

1. Requirement To Prepare and Submit to Airlines the DOT Air Transportation Service Animal Behavior and Health Attestation Form

Respondents: Passengers with disabilities traveling on aircraft with service animals.

Number of Respondents: The Department estimates that 310,145 respondents will complete the Service Animal Health and Attestation form. This estimate was calculated by using the same analysis used by the Department in its 2021 Service Animal Regulatory Impact Analysis (RIA), where the Department estimated that 319,000 respondents would use the Service Animal Health and Attestation Form.

In the RIA, the Department relied on 2017 passenger data and estimates provided from Airlines for America on the number of service animals transported by U.S. air carriers in 2017 [1] to estimate the number of respondents that would use the Service Animal Health and Attestation form. DOT estimated that in 2017, 281,000 service animals were transported by U.S. carriers on flights to, within, and from the United States, and 38,000 were transported by foreign air carriers on flights to and from the United States.[2] Assuming that only one passenger with a disability travels with a service animal, the Department determined in 2021 that 319,000 respondents (281,000 + 38,000) would use the service animal form.

For the purposes of this renewal, the Department relied on 2022 enplanement data to estimate the number of respondents that would complete the service animal forms. In 2022, U.S. passenger enplanements increased by .5 percent and foreign carrier enplanements decreased by 27 percent.[3] Thus, DOT estimates that 282,405 service animals were transported by U.S. carriers to, from, or within the U.S. in 2022 and, if foreign carriers had a similar proportion of passengers traveling with service animals, foreign carriers transported 27,740 service animals to or from the U.S. in 2022. Assuming that only one passenger with a disability travels with a service animal, 310,145 respondents (282,405 + 27,740) would complete the service animal behavior and health attestation form.

Estimated Total Annual Burden on Respondents: We estimate that completing the form would require 15 minutes (.25 hours) per response, including the time it takes to retrieve an electronic or paper version of the form from the carrier's website, reviewing the instructions, and completing the questions. Passengers would spend a total of 77,536 hours annually (0.25 hours $\times$ 310,145 passengers) to retrieve and complete an accessible version of the form. Passengers would fill out the forms on their own time without pay. To estimate the value of this uncompensated activity, we use median wage data from the Bureau of Labor Statistics.[4] We use a post-tax wage estimate of $18.48 ($22.26 median for all occupations minus a 17% percent estimated tax rate). The estimated annual value of this time is $1,432,865 ($18.48 $\times$ 77,536 hours).[5]

2. Requirement To Prepare and Submit to Airlines the DOT Service Animal Relief Attestation Form

Respondents: Passengers with disabilities traveling on aircraft with service animals on flight segments scheduled to take 8 hours or more.

Number of Respondents: The Department estimates that 5 percent of service animal users would be on flight segments scheduled to take 8 hours or more and would also have to complete the Relief Attestation Form, for a total of 15,507 respondents (310,145 $\times$ 0.05).

Estimated Total Annual Burden on Respondents: We estimate that completing the form would require 15 minutes (.25 hours) per response, including the time it takes to retrieve an electronic or paper version of the form from the carrier's website, reviewing the instructions, and completing the questions. Passengers would spend a total of 3,877 hours annually (0.25 hours $\times$ 15,507 passengers) to retrieve an accessible version of the form and complete the form. Passengers would fill out the forms on their own time without pay, as they would with the Animal Behavior and Health Attestation Form. The estimated annual value of this time is $71,647 ($18.48 $\times$ 3,877 hours).

Comments Invited

We invite comments on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (b) the accuracy of the Department's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents.

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 on the docket.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended; and 59 CFR 1.48.

Issued in Washington, DC.

Livaughn Chapman Jr.,

Deputy Assistant General Counsel, Office of Aviation Consumer Protection.

[FR Doc. 2023–27956 Filed 12–19–23; 8:45 am]

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[1] Comment from A4A, *https://www.regulations.gov/document?D=DOT-OST-2018-0068-4288.* A4A estimates that 281,000 service animals were transported on U.S. airlines in 2017. DOT estimates that 38,000 service animals were transported by foreign airlines on flights to and from the U.S. in 2017 based on air carrier passenger data from the Bureau of Transportation Statistics, available at *https://www.bts.gov/newsroom/2017-traffic-data-us-airlines-andforeign-airlines-us-flights.*

[2] See, Traveling by Air with Service Animals (FR)—Regulatory Impact Analysis (November 2020); *https://www.regulations.gov/document/DOT-OST-2018-0068-32399.*

[3] Bureau of Transportation Statistics (2022). ''2022 Traffic Data for U.S. Airlines and Foreign Airlines U.S. Flights.'' *https://www.transtats.bts.gov/Data_Elements.aspx?Data=4.* The number of passengers on foreign carriers (84.5 million) was 9.9 percent of the number on domestic carriers (852.8 million).

[4] For a discussion of estimating the value of uncompensated activities, see ''Valuing Time in U.S. Department of Health and Human Services Regulatory Impact Analyses: Conceptual Framework and Best Practices'' from the Department of Health and Human Services, available at *https://aspe.hhs.gov/system/files/pdf/257746/VOT.pdf.*

[5] Bureau of Labor Statistics (2022). ''May 2022 National Occupational Employment and Wage Estimates: United States.'' *https://www.bls.gov/oes/current/oes_nat.htm#00-0000.*

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request Relating to Recommendation for Juvenile Employment With the Internal Revenue Service

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden,

invites the general public and other Federal agencies to take this opportunity to comment on continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning recommendation for juvenile employment with the Internal Revenue Service.

DATES: Written comments should be received on or before February 20, 2024 to be assured of consideration.

ADDRESSES: Direct all written comments to Andres Garcia, Internal Revenue Service, room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or by email to *pra.comments@irs.gov*. Include OMB control number 1545–1746 or Recommendation for Juvenile Employment with the Internal Revenue Service.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the forms should be directed to Kerry Dennis at (202) 317–5751, or at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet, at *Kerry.L.Dennis@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Recommendation for Juvenile Employment with the Internal Revenue Service.

OMB Number: 1545–1746.

Form Numbers: 13094.

Abstract: The Form ''Recommendation for Juvenile Employment with the Internal Revenue Service'', is used by 13 Delegated Examining Units and 16 Area Personnel Offices throughout the IRS as a mechanism to screen out questionable applicants when considering juveniles for employment in taxpayers remittance and submission processing functions.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 2,500.

Estimated Time per Response: 5 minutes.

Estimated Total Annual Burden Hours: 208 hours.

The following paragraph applies to all the collections of information covered by this notice.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained if their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. 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 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.

Approved: December 15, 2023.

Kerry L. Dennis,

Tax Analyst.

[FR Doc. 2023–27957 Filed 12–19–23; 8:45 am]

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