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The President

National Health Center Week, 2021

By the President of the United States of America

A Proclamation

In 1965, our Nation launched its first community health centers to improve the lives and well-being of Americans regardless of their ability to pay. These health centers were a key component of President Lyndon B. Johnson's "Great Society" series of policy initiatives to eliminate poverty and racial injustice, and today serve as the bedrock on which our public health system was built. Today, health centers are one of the largest health care providers in the country and provide high-quality affordable, accessible, and value-based primary health care services to 29 million Americans each year—approximately 1 in 11 people across the country. They have also been a vital part of our Nation's response to the COVID-19 pandemic. Over the course of National Health Center Week, we recognize the importance of federally-supported health centers and the role they play as a beacon of strength, service, and care in our communities.

Health centers integrate medical, dental, and behavioral health care services into a single "health home" and consistently yield strong patient outcomes. Health centers also play a critical role in reducing racial and ethnic, geographic, socioeconomic, and other health disparities in the United States. They are invaluable to ensuring that our Nation's underserved populations, especially individuals and families living in poverty, rural communities, and communities of color are able to receive the care they need and deserve.

Our Nation's recovery from the COVID-19 pandemic is stronger because of our health centers, and the tireless, dedicated health center employees who continue to deliver critical services such as COVID-19 testing, treatment, and prevention services on the front lines. As we ramped up the distribution of COVID-19 vaccines over the past several months, health centers, through the Health Center COVID-19 Vaccine Program, have vaccinated and built vaccine confidence in millions of Americans from hard-hit and high-risk communities. Two-thirds of individuals vaccinated at health centers so far identify as racial and ethnic minorities. Health centers have also offered greater flexibility during the pandemic by expanding telehealth services to those in need.

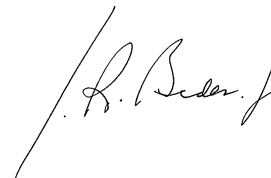
I believe that health care in America should be a right, not a privilege. No one should have to lay awake at night staring at the ceiling wondering what they are going to do to get the care they need or to pay the bills if a family member gets sick. That is why I will do everything in my power to ensure that all Americans have access to the quality, affordable health care they deserve—and the peace of mind it brings.

In support of that goal, my Administration is committed to expanding health centers and increasing access to their life-saving services. That is why we invested more than \$7.6 billion to help health centers prevent and respond to COVID-19 and improve health care services—including over \$1 billion for major infrastructure and renovation projects at health centers across the country through the American Rescue Plan. I am also committed to doubling the Federal investment in community health centers to further expand access to care and make strides in our pursuit of health equity.

During National Health Center Week, we recognize the importance of health centers and their staff who heal and strengthen our local communities. We salute their dedication and service. As our Nation builds back better, we commit to working together to bring about a stronger, healthier Nation for all.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim the week of August 8 through August 14, 2021, as National Health Center Week.

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

A handwritten signature in black ink, appearing to read "J. R. Biden Jr.", with a long, sweeping diagonal line extending upwards and to the left from the start of the signature.

Presidential Documents

Executive Order 14038 of August 9, 2021

Blocking Property of Additional Persons Contributing to the Situation in Belarus

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*) (NEA), section 212(f) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1182(f)), and section 301 of title 3, United States Code,

I, JOSEPH R. BIDEN JR., President of the United States of America, hereby expand the scope of the national emergency declared in Executive Order 13405 of June 16, 2006 (Blocking Property of Certain Persons Undermining Democratic Processes or Institutions in Belarus), finding that the Belarusian regime's harmful activities and long-standing abuses aimed at suppressing democracy and the exercise of human rights and fundamental freedoms in Belarus—including illicit and oppressive activities stemming from the August 9, 2020, fraudulent Belarusian presidential election and its aftermath, such as the elimination of political opposition and civil society organizations and the regime's disruption and endangering of international civil air travel—constitute an unusual and extraordinary threat to the national security and foreign policy of the United States.

Accordingly, I hereby order:

Section 1. (a) All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in: any person determined by the Secretary of the Treasury, in consultation with the Secretary of State:

(i) to be or have been a leader, official, senior executive officer, or member of the board of directors of:

(A) an entity that has, or whose members have, engaged in any of the activities described in subsections (v)(A)–(E) of this section or section 1(a)(ii)(A)–(C) of Executive Order 13405; or

(B) an entity whose property and interests in property are blocked pursuant to this order or Executive Order 13405;

(ii) to be a political subdivision, agency, or instrumentality of the Government of Belarus;

(iii) to be or have been a leader or official of the Government of Belarus;

(iv) to operate or have operated in the defense and related materiel sector, security sector, energy sector, potassium chloride (potash) sector, tobacco products sector, construction sector, or transportation sector of the economy of Belarus, or any other sector of the Belarus economy as may be determined by the Secretary of the Treasury, in consultation with the Secretary of State;

(v) to be responsible for or complicit in, or to have directly or indirectly engaged or attempted to engage in, any of the following:

(A) actions or policies that threaten the peace, security, stability, or territorial integrity of Belarus;

(B) actions or policies that prohibit, limit, or penalize the exercise of human rights and fundamental freedoms (including freedoms of expression, peaceful assembly, association, religion or belief, and movement) by individuals in Belarus, or that limit access to the internet or print, online, or broadcast media in Belarus;

(C) electoral fraud or other actions or policies that undermined the electoral process in a Republic of Belarus election;

(D) deceptive or structured transactions or dealings to circumvent any United States sanctions by or for or on behalf of, or for the benefit of, directly or indirectly, the Government of Belarus or any person whose property and interests in property are blocked pursuant to this order or Executive Order 13405; or

(E) public corruption related to Belarus.

(vi) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, any activity described in subsections (v)(A)–(E) of this section or any person whose property and interests in property are blocked pursuant to this order; or

(vii) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, the Government of Belarus or any person whose property and interests in property are blocked pursuant to this order.

(b) The prohibitions in subsection (a) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted before the date of this order.

Sec. 2. The prohibitions in section 1 of this order include:

(a) the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to this order; and

(b) the receipt of any contribution or provision of funds, goods, or services from any such person.

Sec. 3. I hereby determine that the making of donations of the types of articles specified in section 203(b)(2) of IEEPA (50 U.S.C. 1702(b)(2)) by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to section 1(a) of this order would seriously impair my ability to deal with the national emergency declared in Executive Order 13405 and expanded in this order, and I hereby prohibit such donations as provided by section 1 of this order.

Sec. 4. (a) The unrestricted immigrant and nonimmigrant entry into the United States of noncitizens determined to meet one or more of the criteria in section 1 of this order would be detrimental to the interests of the United States, and the entry of such persons into the United States, as immigrants or nonimmigrants, is hereby suspended, except when the Secretary of State or the Secretary of Homeland Security, as appropriate, determines that the person's entry would not be contrary to the interests of the United States, including when the Secretary of State or the Secretary of Homeland Security, as appropriate, so determines, based on a recommendation of the Attorney General, that the person's entry would further important United States law enforcement objectives.

(b) The Secretary of State shall implement this order as it applies to visas pursuant to such procedures as the Secretary of State, in consultation with the Secretary of Homeland Security, may establish.

(c) The Secretary of Homeland Security shall implement this order as it applies to the entry of noncitizens pursuant to such procedures as the Secretary of Homeland Security, in consultation with the Secretary of State, may establish.

(d) Such persons shall be treated by this section in the same manner as persons covered by section 1 of Proclamation 8693 of July 24, 2011 (Suspension of Entry of Aliens Subject to United Nations Security Council Travel Bans and International Emergency Economic Powers Act Sanctions).

Sec. 5. (a) Any transaction that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set forth in this order is prohibited.

(b) Any conspiracy formed to violate any of the prohibitions set forth in this order is prohibited.

Sec. 6. For the purposes of this order:

(a) the term “entity” means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization;

(b) The term “Government of Belarus” means the Government of Belarus, any political subdivision, agency, or instrumentality thereof, including the National Bank of the Republic of Belarus, and any person owned, controlled, or directed by, or acting for or on behalf of, the Government of Belarus;

(c) the term “noncitizen” means any person who is not a citizen or noncitizen national of the United States;

(d) the term “person” means an individual or entity; and

(e) the term “United States person” means any United States citizen, lawful permanent resident, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States.

Sec. 7. For those persons whose property and interests in property are blocked pursuant to this order who might have a constitutional presence in the United States, I find that because of the ability to transfer funds or other assets instantaneously, prior notice to such persons of measures to be taken pursuant to this order would render those measures ineffectual. I therefore determine that for these measures to be effective in addressing the national emergency declared in Executive Order 13405 and expanded in this order, there need be no prior notice of a listing or determination made pursuant to this order.

Sec. 8. The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to the President by IEEPA as may be necessary to carry out the purposes of this order. The Secretary of the Treasury may, consistent with applicable law, redelegate any of these functions within the Department of the Treasury. All executive departments and agencies of the United States shall take all appropriate measures within their authority to implement this order.

Sec. 9. Nothing in this order shall prohibit transactions for the conduct of the official business of the Federal Government by employees, grantees, or contractors thereof.

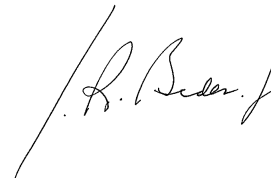
Sec. 10. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

A handwritten signature in black ink, appearing to read "D. Trump", with a long, sweeping diagonal stroke extending upwards and to the left from the start of the signature.

THE WHITE HOUSE,
August 9, 2021.

[FR Doc. 2021-17253
Filed 8-10-21; 8:45 am]
Billing code 3295-F1-P

Rules and Regulations

Federal Register

Vol. 86, No. 152

Wednesday, August 11, 2021

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

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2021-0652; Project Identifier MCAI-2020-00271-R; Amendment 39-21683; AD 2021-16-20]

RIN 2120-AA64

Airworthiness Directives; PZL Swidnik S.A. Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain PZL Swidnik S.A. Model PZL W-3A helicopters. This AD requires visually inspecting the bonding on a certain part-numbered fairing installed on a certain part-numbered vibration absorber, improving the bonding if necessary, using improved installation procedures to secure the fairing to the vibration absorber, and removing certain parts from service. This AD also prohibits installing the affected part unless it is inspected and installed per the AD requirements. This AD was prompted by a report of a broken bolt securing the fairing to the vibration absorber that resulted from an incorrect torque value for the nut used to secure the fairing to the vibration absorber. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD becomes effective August 26, 2021. The FAA must receive comments on this AD by October 12, 2021.

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

- *Federal eRulemaking Portal:* Go to <https://www.regulations.gov>. Follow the instructions for submitting comments.
- *Fax:* (202) 493-2251.

- *Mail:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590.

- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this final rule, contact WSK "PZL-Swidnik" S.A., Al. Lotników Polskich 1, 21-045 Świdnik, Poland; telephone (+48) 81722 5716; fax (+48) 81722 5625; email: PL-CustomerSupport.AW@leonardocompany.com; or at <https://www.pzlswidnik.pl/en/home>. You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N-321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222-5110.

Examining the AD Docket

You may examine the AD docket at <https://www.regulations.gov> by searching for and locating Docket No. FAA-2021-0652; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the European Union Aviation Safety Agency (EASA) AD, any comments received, and other information. The street address for Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT: Kristi Bradley, Program Manager, COS Program Management Section, Operational Safety Branch, Compliance & Airworthiness Division, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone (817) 222-5110; email kristin.bradley@faa.gov.

SUPPLEMENTARY INFORMATION:

Background

EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2020-0038, dated February 27, 2020 (EASA AD 2020-0038), to correct an unsafe condition for all serial-numbered Wytwórnia Sprzętu Komunikacyjnego (WSK) "PZL-Swidnik" Spółka Akcyjna (S.A.) Model PZL W-3A and PZL W-3AS helicopters. EASA AD 2020-0038 advises that a bolt part number (P/N) 3003A-6-16-3 was found broken on fairing P/N 30.23.015.00.03 installed on

vibration absorber P/N 30.23.000.00.04. EASA states further investigations identified that the maintenance instructions detailing how to secure the affected parts did not include the torque value information to tighten the castellated nut P/N 3336A-6. EASA further states that this condition, if not corrected, could lead to detachment of the affected part from the helicopter and its subsequent contact with helicopter stationary or rotary parts, possibly resulting in damage to, and consequent reduced control of, the helicopter.

Accordingly, EASA AD 2020-0038 requires the use of improved installation instructions to secure the affected fairing to the vibration absorber.

FAA's Determination

These helicopters have been approved by EASA and are approved for operation in the United States. Pursuant to the FAA's bilateral agreement with the European Union, EASA has notified the FAA about the unsafe condition described in its AD. The FAA is issuing this AD after evaluating all known relevant information and determining that the unsafe condition described previously is likely to exist or develop on other helicopters of the same type design.

Related Service Information

The FAA reviewed WYTWÓRNIA SPRZĘTU KOMUNIKACYJNEGO "PZL-Swidnik" Spółka Akcyjna Alert Service Bulletin No. ASB-37-19-307, dated January 27, 2020. This service information specifies checking (inspecting) the bonding between the fairing and vibration absorber star for any nonconformity and improving the bonding if necessary. This service information also specifies the specific torque to be used to tighten the castellated nuts during installation of the fairing onto the vibration absorber.

AD Requirements

This AD requires, within 300 hours time-in-service after the effective date of this AD, removing from service each bolt P/N 3003A-6-16-3, washer P/N 3402A-1, and castellated nut P/N 3336A-6 that secure fairing P/N 30.23.015.00.03 to vibration absorber P/N 30.23.000.00.04, and inspecting the bonding between the fairing and vibration absorber to determine if there is any anodic coating. If there is anodic coating, this AD requires polishing the

surface of the fairing where the washers make contact, burnishing the affected area using abrasive paper, and washing the surface with a cleaning solution. This AD then requires installing a new bolt, new washer, and new nut to connect the fairing to the vibration absorber. Additionally, this AD requires using a specified torque, torquing each nut, locking each nut with a cotter pin, and if the specified torque cannot be accomplished, removing the washer and nut from service, installing airworthy parts, and reapplying torque. Finally, this AD prohibits installing an affected fairing or vibration absorber unless they meet the inspection and installation requirements of this AD.

Differences Between This AD and the EASA AD

EASA AD 2020–0038 applies to all serial-numbered Model PZL W–3A and PZL W–3AS helicopters, whereas this AD only applies to Model PZL W–3A helicopters with fairing part number (P/N) 30.23.015.00.03 installed on vibration absorber P/N 30.23.000.00.04 installed. This AD does not apply to Model PZL W–3AS helicopters because that model is not FAA type-certificated.

Justification for Immediate Adoption and Determination of the Effective Date

Section 553(b)(3)(B) of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) authorizes agencies to dispense with notice and comment procedures for rules when the agency, for “good cause,” finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.” Under this section, an agency, upon finding good cause, may issue a final rule without providing notice and seeking comment prior to issuance. Further, section 553(d) of the APA authorizes agencies to make rules effective in less than thirty days, upon a finding of good cause.

There are no helicopters with this type certificate on the U.S. Registry. Accordingly, notice and opportunity for prior public comment are unnecessary, pursuant to 5 U.S.C. 553(b)(3)(B). In addition, for the foregoing reasons, the FAA finds that good cause exists pursuant to 5 U.S.C. 553(d) for making this amendment effective in less than 30 days.

Comments Invited

The FAA invites you to send any written data, views, or arguments about this final rule. Send your comments to an address listed under **ADDRESSES**. Include “Docket No. FAA–2021–0652; Project Identifier MCAI–2020–00271–R” at the beginning of your comments. The

most helpful comments reference a specific portion of the final rule, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this final rule because of those comments.

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

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this AD contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this AD, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as “PROPIN.” The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this AD. Submissions containing CBI should be sent to Kristi Bradley, Program Manager, COS Program Management Section, Operational Safety Branch, Compliance & Airworthiness Division, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone (817) 222–5110; email kristin.bradley@faa.gov. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Regulatory Flexibility Act

The requirements of the Regulatory Flexibility Act (RFA) do not apply when an agency finds good cause pursuant to 5 U.S.C. 553 to adopt a rule without prior notice and comment. Because the FAA has determined that it has good cause to adopt this rule without prior notice and comment, RFA analysis is not required.

Costs of Compliance

There are no costs of compliance with this AD because there are no helicopters with this type certificate on the U.S. Registry.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed, I certify that this AD:

(1) Is not a “significant regulatory action” under Executive Order 12866, and

(2) Will not affect intrastate aviation in Alaska.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2021–16–20 PZL Swidnik S.A.:

Amendment 39–21683; Docket No. FAA–2021–0652; Project Identifier MCAI–2020–00271–R.

(a) Effective Date

This airworthiness directive (AD) is effective August 26, 2021.

(b) Affected ADs

None.

(c) Applicability

This AD applies to PZL Swidnik S.A. Model PZL W-3A helicopters, certificated in any category, with fairing part number (P/N) 30.23.015.00.03 installed on vibration absorber P/N 30.23.000.00.04 installed.

(d) Subject

Joint Aircraft Service Component (JASC) Code: 6200, Main Rotor System.

(e) Unsafe Condition

This AD defines the unsafe condition as improper torque of a bolt securing the fairing to the vibration absorber due to lack of information regarding torque value for the nut. This condition could result in detachment of the fairing, causing damage to the main and tail rotor, and subsequent reduced control of the helicopter.

(f) Compliance

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

(g) Required Actions

Within 300 hours time in service after the effective date of this AD:

(1) Remove from service each bolt P/N 3003A-6-16-3, washer P/N 3402A-1, and castellated nut P/N 3336A-6 that secure the fairing to the vibration absorber.

(2) Visually inspect the bonding between the fairing and the vibration absorber for anodic coating. If there is any anodic coating, before further flight,

(i) Polish the surface of the fairing and vibration absorber in all areas where washers make contact to remove all anodic coating.

(ii) Using 180-220 grit abrasive paper, burnish the surface to improve bonding.

(iii) Wash the surface with extraction naphtha, or equivalent cleaning solution.

(3) Insert a new bolt P/N 3003A-6-16-3 and a new washer P/N 3402A-1 into each hole connecting the fairing to the vibration absorber.

(4) At the vibration absorber star side, install a new washer P/N 3402A-1, and a new castellated nut P/N 3336A-6 onto each bolt. Torque each castellated nut to 5.4 ± 1.0 Nm (0.55 ± 0.10 kGm) and lock each castellated nut with a cotter pin. If the specified torque range cannot be accomplished, remove the washer, bolt, and nut from service, replace these parts with airworthy parts, and reapply torque.

(5) As of the effective date of this AD, do not install vibration absorber P/N 30.23.000.00.04 with a fairing P/N 30.23.015.00.03 on any helicopter unless they are inspected as required by paragraph (g)(2) of this AD and installed as required by paragraphs (g)(3) and (4) of this AD.

(h) Alternative Methods of Compliance (AMOCs)

(1) The Manager, International Validation Branch, FAA, has the authority to approve

AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the International Validation Branch, send it to the attention of the person identified in paragraph (i)(1) of this AD. Information may be emailed to: 9-AVS-AIR-730-AMOC@faa.gov.

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

(i) Related Information

(1) For more information about this AD, contact Kristi Bradley, Program Manager, COS Program Management Section, Operational Safety Branch, Compliance & Airworthiness Division, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone (817) 222-5110; email kristin.bradley@faa.gov.

(2) WYTWORKIA SPRZETU KOMUNIKACYJNEGO "PZL-Swidnik" Spółka Akcyjna Alert Service Bulletin No. ASB-37-19-307, dated January 27, 2020, which is not incorporated by reference, contains additional information about the subject of this AD. For service information identified in this AD, contact WSK "PZL-Swidnik" S.A., Al. Lotników Polskich 1, 21-045 Swidnik, Poland; telephone (+48) 81722 5716; fax (+48) 81722 5625; email: PL-CustomerSupport.AW@leonardocompany.com; or at <https://www.pzlswidnik.pl/en/home>.

(3) The subject of this AD is addressed in European Union Aviation Safety Agency (EASA) AD 2020-0038, dated February 27, 2020. You may view EASA AD 2020-0038 at <https://www.regulations.gov> in Docket No. FAA-2021-0652.

(j) Incorporation by Reference

None.

Issued on July 30, 2021.

Ross Landes,

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

[FR Doc. 2021-17025 Filed 8-10-21; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 71**

[Docket No. FAA-2021-0275; Airspace Docket No. 20-AAL-39]

RIN 2120-AA66

Modification of Class E Airspace; Gulkana, AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action modifies the Class E airspace, designated as a surface area at Gulkana Airport, Gulkana, AK. This action also modifies the Class E airspace extending upward from 700 feet above the surface. The NPRM for this action proposed a modification to the Class E airspace extending upward from 1,200 feet above the surface, however, the proposed change has been removed from the Final Rule. Additionally, this action removes the Gulkana VORTAC and the Glenallen NDB from the Class E2 text header and airspace description. Further, this action removes the Gulkana VOR/DME from the Class E5 text header and airspace description. Lastly, this action implements administrative updates to the Class E2 and E5 text headers and the Class E2 airspace description. The airspace is designed to support instrument flight rules (IFR) operations at the airport.

DATES: Effective 0901 UTC, December 2, 2021. The Director of the Federal Register approves this incorporation by reference action under 1 CFR part 51, subject to the annual revision of FAA Order 7400.11 and publication of conforming amendments.

ADDRESSES: FAA Order 7400.11E, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at https://www.faa.gov/air_traffic/publications/. For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267-8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11E at NARA, email fr.inspection@nara.gov or go to <https://www.archives.gov/federal-register/cfr/ibr-locations.html>.

FOR FURTHER INFORMATION CONTACT: Matthew Van Der Wal, Federal Aviation Administration, Western Service Center, Operations Support Group, 2200 S 216th Street Des Moines, WA 98198; telephone (206) 231-3695.

SUPPLEMENTARY INFORMATION:**Authority for This Rulemaking**

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that

section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it modifies the Class E airspace at Gulkana Airport, Gulkana, AK, to ensure the safety and management of IFR operations at the airport.

History

The FAA published a notice of proposed rulemaking in the **Federal Register** (86 FR 22366; April 28, 2021) for Docket No. FAA–2021–0275 to modify the Class E airspace at Gulkana Airport, Gulkana, AK. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

After the publication of the NRPM, the FAA identified a change to the RNAV (GPS) RWY 15 approach, affecting the Class E airspace extending upward from 1,200 feet above the surface. As a result, the FAA is removing the proposed change to this Class E airspace area from the Final Rule. The airspace will remain within a 76-mile radius of Gulkana Airport.

Class E2 and Class E5 airspace designations are published in paragraphs 6002 and 6005, respectively, of FAA Order 7400.11E, dated July 21, 2020, and effective September 15, 2020, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

Availability and Summary of Documents for Incorporation by Reference

This document amends FAA Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020, and effective September 15, 2020. FAA Order 7400.11E is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11E lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This amendment to 14 CFR part 71 modifies the Class E airspace, designated as a surface area, at Gulkana Airport, Gulkana, AK. The areas extending north and south of the 4-mile radius are removed, the areas are no longer required to contain IFR aircraft descending below 1,000 feet above the surface. This action also removes the following verbiage from this airspace area “to and including 4,100 feet MSL”. The ceiling of this airspace area is now

aligned to the floor of the overlying controlled airspace, which begins at 700 feet above the surface.

This action also modifies the Class E airspace extending upward from 700 feet above the surface. This airspace is designed to contain IFR departures to 1,200 feet above the surface and IFR arrivals descending below 1,500 feet above the surface. To properly contain IFR aircraft arriving and departing from the airport, the circular radius of the airspace is reduced from 6.5 miles to 5 miles. The area extending south of the 5-mile radius is enlarged to contain aircraft holding for the RNAV (GPS) RWY 33R approach. The area extending north of the 5-mile radius is also modified slightly; this modification accounts for using the airport as the sole reference for the airspace’s description.

Additionally, this action removes the Gulkana VORTAC and the Glenallen NDB from the Class E2 text header and airspace description. This action also removes the Gulkana VOR/DME from the Class E5 text header and airspace description. The navigational aids (NAVAID) are not needed to define the airspace and removal of the NAVAIDs simplifies the airspaces’ descriptions.

Lastly, the action implements administrative updates to the airspaces’ text headers and airspace descriptions. On the second line of the Class E5 text header, the redundant use of Gulkana has been removed. On the third line of the Class E2 and E5 text headers, the geographic coordinates are updated to “lat. 62°09’16” N, long. 145°27’19” W”. In the last sentence of the Class E2 airspace description, the term “Airport/Facility Directory” is updated to “Chart Supplement.”

FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial, and unlikely to result in adverse or negative comments. It, therefore: (1) Is not a “significant regulatory action” under Executive Order 12866; (2) is not a “significant rule” under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when

promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1F, “Environmental Impacts: Policies and Procedures,” paragraph 5–6.5a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant the preparation of an environmental assessment.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11E, Airspace Designations and Reporting Points, dated July 21, 2020, and effective September 15, 2020, is amended as follows:

Paragraph 6002 Class E Airspace Areas Designated as Surface Areas.

* * * * *

AAL AK E2 Gulkana, AK [Amended]

Gulkana Airport, AK
(Lat. 62°09’16” N, long. 145°27’19” W)

That airspace extending upward from the surface within a 4-mile radius of the airport. This Class E airspace area is effective during specific dates and times established in advance by Notice to Airmen. The effective date and time will thereafter be continuously published in the Chart Supplement.

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

AAL AK E5 Gulkana, AK [Amended]

Gulkana Airport, AK
(Lat. 62°09’16” N, long. 145°27’19” W)

That airspace extending upward from 700 feet above the surface within a 5-mile radius of the airport, and within 5 miles each side of the 169° bearing from the airport, extending from the 5-mile radius to 24 miles south of the airport, and within 4 miles each side of the 351° bearing from the airport, extending from the 5-mile radius to 12.5 miles north of the airport; and that airspace extending upward from 1,200 feet above the surface within a 67-mile radius of the airport.

Issued in Des Moines, Washington, on August 2, 2021.

B.G. Chew,

Acting Group Manager, Operations Support Group, Western Service Center.

[FR Doc. 2021-16831 Filed 8-10-21; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket Number USCG-2021-0550]

RIN 1625-AA08

Special Local Regulation; Ohio River, Owensboro, KY

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary special local regulation on the Ohio River mile 754.0-760.0 in Owensboro, KY on August 12-15, 2021. This special local regulation is needed to protect personnel, vessels, and the marine environment from potential hazards created during the Owensboro Air Show. Entry into this zone is prohibited unless specifically authorized by the Captain of the Port Sector Ohio Valley (COTP).

DATES: This rule is effective from 10:30 a.m. 6:30 p.m. on August 12, 2021 through August 15, 2021.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to <https://www.regulations.gov>, type USCG-2021-0550 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 MST3 Christopher Matthews, U.S. Coast Guard; telephone 502-779-5334, email Christopher.S.Matthews@uscg.mil.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is impractical. This special local regulation must be established by August 12, 2021, and we lack sufficient time to provide a reasonable comment period and then consider those comments before issuing this rule. The NPRM process would delay the establishment of the special local regulation until after the scheduled date of the air show and compromise public safety.

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 ensure the safety of the participants and spectators in the Owensboro Air Show on August 12, 2021 through August 15, 2021.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231). The Captain of the Port Sector Ohio Valley (COTP) has determined that potential hazards associated with the Owensboro Air Show, will be a safety concern for anyone within the area. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the special local regulated area for the duration of the marine event.

IV. Discussion of the Rule

This rule establishes a temporary special local regulation from 10:30 a.m. through 6:30 p.m. on August 12, 2021 through August 15, 2021. The special

local regulation will cover all navigable waters of the Ohio River, extending the entire width, from mile marker 754.0 to mile marker 760.0. The duration of the zone is intended to protect personnel, vessels, and the marine environment in these navigable waters while the Owensboro Air Show is taking place. No vessel or person will be permitted to enter the special local regulation 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 Executive Order 12866. Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the size, location, duration, and time-of-day of the special local regulation. This special local regulation restricts transit on the Ohio River between mile marker 754.0 and mile marker 760.0. This area will have limited access for a period of eight hours on August 12, 2021 through August 15, 2021. Moreover, the Coast Guard would issue Broadcast Notices to Mariners (BNMs), Local Notices to Mariners (LNMs), and Marine Safety Information Bulletins (MSIBs), as appropriate, about this special local regulation so that waterway users may plan accordingly for this short restriction on transit, and the rule would allow vessels to request permission to enter the zone.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601-612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C.

605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the 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 special local regulation lasting eight hours for four days that will prohibit entry on a six mile stretch of the Ohio River. It is categorically excluded from further review under paragraph L61 of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1.

G. Protest Activities

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

List of Subjects in 33 CFR Part 100

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 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

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

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

■ 2. Add § 100.T08–0550 to read as follows:

§ 100.T08–0550 Owensboro, KY. Ohio River.

(a) *Regulated area.* The regulations in this section apply to the following area: All navigable waters of the Ohio River between mile 754.0 and 760.0

(b) *Regulations.* (1) All non-participants are prohibited from entering, transiting through, anchoring in, or remaining within the regulated area described in paragraph (a) of this section unless authorized by the Captain of the Port Sector Ohio Valley or their designated representative.

(2) To seek permission to enter, contact the COTP or the COTP's representative by Sector Ohio Valley command center at 502–779–5422. Those in the regulated area must comply with all lawful orders or directions given to them by the COTP or the designated representative.

(3) The COTP will provide notice of the regulated area through advanced notice via broadcast notice to mariners and by on-scene designated representatives.

(c) *Enforcement period.* This section will be enforced from 10:30 a.m. through 6:30 p.m. on August 12, 2021 through August 15, 2021.

Dated: August 3, 2021.

A.M. Beach,

Captain, U.S. Coast Guard, Captain of the Port Sector Ohio Valley.

[FR Doc. 2021–16999 Filed 8–10–21; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket Number USCG–2020–0034]

RIN 1625–AA09

Drawbridge Operation Regulation; Chicago River, Chicago, IL; Correction

AGENCY: Coast Guard, DHS.

ACTION: Final rule; correction.

SUMMARY: The Coast Guard is correcting a final rule that appeared in the **Federal Register** on July 30, 2021. The final rule announced changes to the Amtrak Railroad Bridge, mile 3.77, across the South Branch of the Chicago River, at Chicago, Illinois. The rule has an effective date of August 30, 2021. This correction fixes an incorrect amendatory

instruction within that final rule that deleted existing regulatory text that should not have been deleted.

DATES: This correction is effective on August 30, 2021.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Mr. Lee D. Soule, Bridge Management Specialist, Ninth Coast Guard District; telephone 216-902-6085, email Lee.D.Soule@uscg.mil.

SUPPLEMENTARY INFORMATION:

Correction

On July 30, 2021 the Coast Guard published a final rule titled “Drawbridge Operation Regulation; Chicago River, Chicago, IL” (86 FR 40957). In this document, FR Doc. 2021-15986, appearing on page 40959, in the first and second columns, the final rule inadvertently deleted what was in paragraph (d) and replaced it with new text. The Coast Guard did not intend to delete the existing text and requirements in 117.391(d). Therefore, we are correcting the final rule to instead add a new paragraph (e) with the same regulatory text as was issued in the final rule and preserve what has been in existing paragraph (d).

On page 40959, in the first column, in part 117, amendatory instruction number 2 is corrected to read as follows:

■ 2. Amend § 117.391 by adding paragraph (e) to read as follows:

§ 117.391 Chicago River.

* * * * *

(e) The Amtrak Bridge, mile 3.77, is authorized to operate remotely and open to the intermediate position on signal, unless a request for a full opening is received by the drawtender. The bridge is required to operate a marine radio.

* * * * *

M. T. Cunningham,

Chief, Office of Regulations and Administrative Law.

[FR Doc. 2021-17103 Filed 8-10-21; 8:45 am]

BILLING CODE 9110-04-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Parts 127, 154, and 156

[Docket No. USCG-2020-0315]

RIN 1625-AC61

Electronic Submission of Facility Operations and Emergency Manuals

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: This final rule enables regulated facilities to electronically submit Operations Manuals and Emergency Manuals and electronically communicate with the Coast Guard. This rule also allows facility operators to submit one electronic or printed copy of the manuals and one electronic or printed copy of the amendments to the manuals. Finally, this rule requires the regulated facilities to maintain either an electronic or a printed copy of each required manual in the marine transfer area of the facility during transfer operations.

DATES: This rule is effective September 10, 2021.

ADDRESSES: To view comments and documents mentioned in this preamble as being available in the docket, go to <https://www.regulations.gov>, type USCG-2020-0315 in the search box and click “Search.” Next, in the Document Type column, select “Supporting & Related Material.”

FOR FURTHER INFORMATION CONTACT: For information about this document, call or email Lieutenant Commander Benjamin Mazyck, Coast Guard Division of Cargo and Facilities; telephone 202-372-1130, email benjamin.d.mazyck@uscg.mil.

SUPPLEMENTARY INFORMATION:

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I. Abbreviations

BLS Bureau of Labor Statistics
 CFR Code of Federal Regulations
 CG-FAC U.S. Coast Guard Office of Port and Facility Compliance
 COTP Captain of the Port
 DHS Department of Homeland Security
 FR Federal Register

FWPCA Federal Water Pollution Control Act
 IT Information technology
 LHG Liquefied Hazardous Gas
 LNG Liquefied Natural Gas
 MISLE Marine Information for Safety and Law Enforcement
 MTR facilities Marine Transportation-Related facilities that transfer oil or hazardous material in bulk
 NAICS North American Industry Classification System
 NEPA National Environmental Policy Act
 NPRM Notice of proposed rulemaking
 OMB Office of Management and Budget
 PIC Person in Charge
 RA Regulatory analysis
 SBA Small Business Administration
 § Section
 SME Subject matter expert
 UPS United Parcel Service
 U.S.C. United States Code

II. Basis and Purpose, and Regulatory History

Section 70011 of Title 46 of the United States Code (U.S.C.) authorizes the Secretary of the Department of Homeland Security (DHS) to establish procedures, standards, and measures for the handling of dangerous substances, including oil and hazardous material, to prevent damage to any structure on or in the navigable waters of the United States. Additionally, the Federal Water Pollution Control Act (FWPCA), as amended and codified in 33 U.S.C. 1321(j)(5), requires the President to establish regulations requiring response plans for the prevention of discharges of oil and hazardous substances from vessels, onshore facilities, and offshore facilities. The FWPCA functions in 33 U.S.C. 1321(j)(5) have been delegated from the President to the Secretary of the DHS by Executive Order 12777 Sec. 2(d)(2) (Volume 56 of the **Federal Register** (FR) at Page 54757, Oct. 23, 1991), as amended by Executive Order 13286 (68 FR 10619, March 5, 2003). The authorities in 33 U.S.C. 1321(j)(5) and 46 U.S.C. 70011 (formerly 33 U.S.C. 1225) have been delegated to the Coast Guard under section II, paragraphs 70 and 73, of DHS Delegation No. 00170.1, Revision No. 01.2.

Title 33 of the Code of Federal Regulations (CFR) part 127 requires facilities that transfer liquefied natural gas (LNG), or liquefied hazardous gas (LHG) in bulk, to or from a vessel, to maintain both an Operations Manual and an Emergency Manual. Similarly, part 154 requires facilities that transfer oil or hazardous materials in bulk (MTR facilities), to or from a vessel with a capacity of 39.75 cubic meters (250 barrels) or more, to maintain an Operations Manual. According to 33 CFR 127.019, 154.300, and 154.325, two copies each of the Operations Manual

and the Emergency Manual must be submitted to the Captain of the Port (COTP) of the zone in which the facility is located for examination before a facility may operate. Lastly, part 156 describes the requirements for transferring of oil or other hazardous materials on the navigable waters or contiguous zone of the United States to, from, or within each vessel with a capacity of 39.75 cubic meters (250 barrels) or more.

The COTP evaluates whether the operations and safety procedures outlined in the manuals meet the requirements for applicable facilities in 33 CFR part 127 (for LNG and LHG) or parts 154 and 156 (for the transfer operations of oil or hazardous material). If the procedures in the manuals meet the requirements, then the COTP returns one copy of each manual, marked "Examined by the Coast Guard."

As stated in the notice of proposed rulemaking (NPRM) titled "Electronic Submission of Facility Operations and Emergency Manuals," published November 27, 2020 (85 FR 75972), the purpose of this rulemaking is to allow facility operators to submit and maintain the Operations Manual and Emergency Manual in either print or electronic format. The comment submissions received on the NPRM expressed general support for allowing electronic submissions and the proposed changes. Therefore, this final rule implements the changes proposed in the NPRM with clarifying edits, as explained in section III of this rule.

Although the previous regulations did not explicitly state that the manuals had to be printed, the previous regulatory requirement for the owner or operator to submit two copies and for the COTP to return one marked copy suggested the use of printed documents. The Coast Guard issued the two-copy requirement for LNG and LHG facilities in 1988 (53 FR 3370, February 5, 1988) and for oil and hazardous materials facilities in 1996 (61 FR 41458, August 8, 1996), when electronic mail and electronic storage were not common practice. This final rule removes the two-copy requirement and allows facility operators to submit one printed or electronic copy of each required manual to the COTP for examination. It also allows facilities to maintain either a printed or an electronic copy of the most recently examined manual(s) in the marine transfer area of the facility.

III. Discussion of Comments and Changes From the Proposed Rule

The Coast Guard received four comment submissions during the NPRM's 60-day comment period that

ended January 27, 2021. All four of the commenters supported the proposed change to allow electronic submission and communication regarding Facility Operations Manuals and Emergency Manuals.

Three of the commenters requested that we consider expanding the use of electronic submission, digital tools, and electronic storage to other documents required by regulation. Currently, electronic submission capability exists for the submission of Facility Security Plans for facilities regulated under 33 CFR part 105. The NPRM only proposed and requested comments on allowing electronic submission of Facility Operations Manuals and Emergency Manuals under parts 127 and 154. The Coast Guard is exploring the long-term feasibility of expanding this capability beyond the current requirements, but that is beyond the scope of this rulemaking.

One commenter concurred that all manuals and other written material could be sent electronically, but recommended keeping a printed version readily available and accessible for team members carrying out assignments at the facility. The Coast Guard wants to allow flexibility for facility operators to choose which format is appropriate based on the physical characteristics and operating procedures of their specific facility. While this commenter did not provide reasons why allowing electronic copies at the facility would be inadequate or unsafe, the Coast Guard wants to make it clear that there are existing electrical safety standards that apply to the electronic devices used to display electronic copies of the manuals. In response to this comment, and upon further deliberation, we realize that the text allowing electronic manuals in the marine transfer area could benefit from clarification to help the facilities safely adopt the electronic viewing option. This final rule adds an additional statement to the proposed regulatory text that electronic devices used to display electronic manuals must meet applicable electrical safety standards in the applicable CFR part.

Parts 127 and 154 have electrical safety standards for these facilities that are applicable to electronic devices used in a facility. By adding this regulatory text, we are clarifying that allowing electronic viewing and storage of the Facility Operations Manuals or Emergency Manuals does not circumvent those safety requirements. The Coast Guard anticipates that some facilities will still have printed manuals at their operations stations; those facilities will not be required to maintain an electronic copy under this

final rule. We have taken this into account in our cost savings calculations by using data on how many facilities will use electronic and printed manuals.

We are making three changes to the regulatory text we proposed in the NPRM. First, as noted above, in paragraphs 127.309(a), 127.1309(a), and 154.300(f), we add a statement that electronic devices used to display the electronic manuals must meet applicable safety standards in the part. Second, we specify that the requirement for facilities to include identifying information on manual submissions must be revision-specific identifying information, to help the Coast Guard and the facility identify the most recently examined manual. In paragraphs 127.019(c) and (d), 154.300(a)(4) and (e), 154.320(e), and 154.325(c), we changed the proposed text, "identifying information generated by the facility," to "revision-specific identifying information." With respect to the revision-specific identifying information, we are also removing the proposed text, "generated by the facility." The Coast Guard does not intend to limit who can create the revision-specific identifying information. As we discuss in section IV of this preamble, the purpose of requiring facilities to include the publication date, revision date, or other revision-specific identifying information on the manual submissions is so that the Coast Guard and the facility can identify the most recently examined version of the manual. Requiring the identifying information to be revision-specific will help achieve that purpose.

The third change from the NPRM regulatory text is in paragraph 156.120(t)(2), which is the existing requirement for maintaining Facility Operations Manuals and vessel transfer procedures at the facility. After publication of the NPRM, we realized that the proposed text inadvertently allowed electronic copies of vessel transfer procedures, which is in conflict with existing § 155.740. Section 155.740, paragraphs (b) and (c), require that vessel transfer procedures be printed and posted for viewing. The NPRM only discussed allowing electronic copies for the Facility Operations Manuals; we do not intend to allow electronic copies for vessel transfer procedures. Because print or electronic copies of the Facility Operations Manuals will be expressly permitted by new § 154.300, this final rule revises paragraph 156.120(t)(2) from the version in the NPRM to say that "copies" instead of "print or electronic copies" of the Facility Operations Manual and vessel transfer

procedures must be available for viewing in the marine transfer area. This change in text will ensure the section does not conflict with the printed copy requirement for vessel transfer procedures in § 155.740.

IV. Discussion of the Final Rule

This final rule amends the following sections in title 33 of the CFR: 127.019, 127.309, 127.1309, 154.300, 154.320, 154.325, and 156.120. A section-by-section explanation of the new requirements follows.

A. Part 127—Waterfront Facilities Handling Liquefied Natural Gas and Liquefied Hazardous Gas

Section 127.019 Operations Manual and Emergency Manual: Procedures for examination

This section will allow owners and operators of facilities that transfer LNG and LHG, in bulk, to or from a vessel to submit one print or electronic copy of their Operations Manual and Emergency Manual to the COTP for examination.

Additionally, to codify current practices, manuals submitted after the effective date of the final rule must include a date, revision date, or other revision-specific identifying information. All manuals currently contain unique identifying information. Paragraph (c) of this section will allow them to continue to use their own identifying information or to use a revision date. The date, revision date, or other revision-specific identifying information, such as document control numbers, will allow the facility operator and the Coast Guard to determine quickly if the most recent version of the manual is being used.

As specified in paragraph (d) of this section, the COTP will respond to the facilities electronically to reduce paperwork-processing costs. Under this rule, the COTP will provide notice to the facility that the manual has been examined, and will no longer return a marked copy of the manual to the facility.

The COTP will determine the best method to return the notice to the facility operator by considering the facility's available contact information and the method in which the manuals were submitted. We expect the COTP's notice will initially take the form of a printed or electronically submitted letter to the facility operator, but could eventually include an electronic certification with the information. The COTP's notice will also include the manual's date, revision date, or other revision-specific identifying information so that the Coast Guard and facility

operators can verify which manual is the most recently examined.

Per paragraph (e), the COTP will notify a facility with an explanation of why a manual does not meet the requirements of this part, without having to return a printed copy. This enables electronic communication between the Coast Guard and a facility while reducing associated printing and mailing costs for the Coast Guard. The COTP retains the discretion to send the letters and manuals via mail to the facility when appropriate.¹

Finally, within § 127.019, as proposed in the NPRM, this rule removes the word "existing" where it appears in the context of "existing facility" in paragraphs (a) and (b). "Existing," as applied to a waterfront facility, is defined in § 127.005, but the definition is limited to facilities that were constructed before June 2, 1988 for LNG facilities, and before January 30, 1996 for LHG facilities. The specific dates used within the definition of "existing" were never intended to apply to the use of "existing" in this section. To avoid confusion, we are removing "existing" from this section. The requirements in paragraph (a) will continue to apply to all active facilities, and the requirements of paragraph (b) will continue to apply to all new or inactive facilities.

Section 127.309 Operations Manual and Emergency Manual: Use

Paragraph (a), in subpart B for waterfront facilities handling LNG, will require the operator to ensure that the person in charge (PIC) has either a printed or an electronic copy of the most recently examined Operations Manual and Emergency Manual readily available in the marine transfer area. In this paragraph, we added a statement beyond what was proposed in the NPRM to clarify that electronic devices used to view an electronic copy of the manuals must comply with applicable electrical safety requirements in part 127.

In § 127.309, the phrase "readily available in the marine transfer area" means that a printed or electronic copy of the manual is available for viewing within the operating station of the PIC. The PIC is not expected to keep the manual in their possession while conducting routine rounds during a transfer operation.

¹ We use the term "mail" throughout this final rule to refer to the delivery method used by the COTP or the facility to send and receive printed copies of letters and manuals. These methods include, but are not limited to, the United States Postal Service, FedEx, United Parcel Service (UPS), and courier.

While PICs must know the contents of the manuals under paragraph 127.301(a)(4), the Coast Guard recognizes that it is difficult for a PIC to instantly recall every step of every procedure outlined in these manuals. Because both paragraphs 127.309(b) and (c) require each transfer and emergency operation to be conducted in accordance with the examined Operations Manuals and Emergency Manuals, respectively, it has been common practice for PICs to have a copy of the Operations Manual and Emergency Manual in the marine transfer area during transfer operations to reference when needed. Therefore, adding a requirement that a printed or electronic copy of the most recently examined Operations Manual and Emergency Manual must be readily available to the PIC in the marine transfer area does not add a significant burden to facility operators.

Section 127.1309 Operations Manual and Emergency Manual: Use

Section 127.1309(a) in subpart C for waterfront facilities handling LHG requires that the facility operators ensure the facility's PIC has a printed or electronic copy of the most recently examined Operations Manual and Emergency Manual readily available in the marine transfer area. This requirement in paragraph (a) will help ensure that PICs have access to the manuals when needed, since there may be fewer printed copies available when facilities opt into electronic manual submission. For the purpose of this section, the phrase "readily available in the marine transfer area" means a printed or electronic copy of the manual is available for viewing within the operating station of the PIC, but the PIC is not expected to keep the manual in their possession. With this final rule, we also added a statement to paragraph (a) to clarify that electronic devices used to view the electronic copy of the manuals must comply with applicable electrical safety requirements in part 127.

B. Part 154—Facilities Transferring Oil or Hazardous Materials in Bulk

Section 154.300 Operations Manual; General

The revised § 154.300 allows facility operators to submit one printed or electronic copy of the Operations Manual to the COTP with a date, a revision date, or other revision-specific identifying information such as a document control number generated by the facility. This allows the facility and the COTP to determine quickly during inspections if the facility is using the most recent version of the manual. As

the inclusion of such information is current practice, we are only codifying this current practice.

As proposed in the NPRM, in paragraph (a) we clarify that the facility operator must submit the manuals to the COTP of the zone in which the facility operates. The clarification will align the text with current practice.

This rule implements the proposed changes to how the COTP notifies the facility that the Operations Manual has been examined in paragraph (e). Previously, after examination and determination that the manual meets the requirements of this part, the COTP marked the manual “Examined by the Coast Guard” and returned one copy to the facility operator. Now the COTP will notify the facility that the manual has been examined and will not return a copy of the manual to the facility. We expect this notice to initially take the form of a printed or emailed letter, with the revision date or other revision-specific identifying information on the letter, but could eventually include an electronic certification with this information.

Paragraph (f) of § 154.300 allows either a printed or electronic copy of the most recently examined Operations Manual to be readily available for each facility’s PIC while conducting a transfer operation. The facility may store the manual in print or electronic format. In this paragraph, this final rule adds a new statement over what we originally proposed in the NPRM, specifying that electronic devices used to view an electronic copy of the manual must comply with applicable electrical safety requirements in part 154. The facility may have either printed or electronic copies of the manual in any translations required under existing paragraph (a)(3).

In § 154.300(d), “products transferred” will also be part of the list of items the COTP considers when determining whether the manual meets the requirements of part 154 and part 156. Information about the products transferred, meaning the type of oil and hazardous material, is already required to be included in the Operation Manuals under § 154.310(a)(5), and knowledge of the products being transferred is important to reviewing the adequacy of the Operations Manual. The facility develops their capabilities based, in part, on the characteristics of the oil or hazardous material they want to transfer. Including “products transferred” in the list of considerations increases transparency regarding the manual examination process.

Section 154.320 Operations Manual: Amendment

This section addresses amendments to Operations Manuals. Paragraph (a) of this section previously stated that the COTP may require the facility operator to amend their Operations Manual if the manual does not meet the requirements of this part. This rule replaces “requirements of this part” with “requirements of this subchapter” because there are other regulations in the subchapter that apply to the Operations Manual. The applicable subchapter is subchapter O, titled “Pollution,” which includes 33 CFR parts 151 through 159.

Section 154.320(a)(1) allows facility operators to submit to the Coast Guard any information, views, arguments, and proposed amendments in response to the inadequacies identified by the COTP. To align with other revisions, we added language to this section allowing facility operators to send their information, views, arguments, and proposed amendments to the COTP in print or electronically.

Per paragraph (b)(1), facilities may submit amendments to the manuals to the COTP either in print or electronically. Paragraphs (b)(2) and (c) require the COTP to examine the amendments to an Operations Manual for compliance with the subchapter and then notify the facility that the Coast Guard has examined the amendments. If the amendments do not meet the requirements for Operations Manuals in subchapter O, the COTP will notify the facility operator of the inadequacies and explain why the amendments do not meet the requirements of the subchapter. The COTP notice may be a printed or emailed letter, or even an electronic certification, with the revision date or other revision-specific identifying information included.

Paragraph (e) describes how facility operators may submit amendments and the procedures to follow in the event the entire manual is submitted for amendments. This rule gives the facility operator the choice of page or whole-manual replacement, but requires them to include the date, revision date, or other revision-specific identifying information on the submission. If a facility submits the entire manual with the proposed amendments, this rule requires that the changes since the last examined manual be highlighted, or otherwise annotated. It may be easier for a facility to submit the entire manual with the amendments highlighted or annotated, rather than isolating individual pages that were amended. Examples of ways facility operators

could highlight or annotate the amendments include, but are not limited to, use of an electronic or ink highlighting tool, comment or text boxes noting where the changes are, or noting the changes in correspondence or a document. Ultimately, the method that the facility operator uses can be anything that identifies all the changes, and is not limited to the methods mentioned in this preamble. The purpose of highlighting or annotating the amendments is to assist the COTP in understanding what changes are being made and to reduce the resources required to examine amendments. After the COTP examines the amendments, the facility must maintain the Operations Manual with the most recently examined changes, but there is no requirement to keep the changes highlighted or annotated after they are examined.

Section 154.325 Operations Manual: Procedures for Examination

This rule removes paragraph (a) of § 154.325, so that the facility operator is no longer required to submit two copies of the Operations Manual. To align with other changes in part 154, the facility operator of a new facility will be able to submit one electronic or printed copy of the Operations Manual to the COTP.

In re-designated paragraphs (a) and (b) of this section, this rule replaces the previous text, “any transfer operation” with, “the first transfer operation” to make the regulatory text more precise. This clarifies that the facility must submit the Operations Manual prior to a new facility’s first transfer or the first transfer after a facility is removed from caretaker status.

We also amended the process in § 154.325 to require the COTP to notify the facility operator when the manual has been examined. Because we are allowing electronic submission in this final rule, the COTP will no longer send back a marked printed copy of the manual stating it has been examined by the Coast Guard. The COTP’s notice will restate the manual’s date, revision date, or other identifying information provided by the facility. If the manual does not meet the requirements of subchapter O, the COTP will notify the facility with an explanation of why the manual does not meet the requirements of that subchapter.

In paragraph (d) of § 154.325 (previously paragraph (e) of § 154.325), this final rule replaces the text “requirements of this chapter” with “requirements of this subchapter” because referencing the entire chapter is too broad. The applicable regulations

are in this subchapter O, which includes 33 CFR parts 151 through 159.

C. Part 156—Oil and Hazardous Material Transfer Operations

Section 156.120 Requirements for Transfer

Part 156 contains regulations related to oil and hazardous material transfer operations. In accordance with other changes made by this rule, in paragraph 156.120(t)(2), the PIC must have a copy of the most recently examined facility Operations Manual readily available in the marine transfer area. For the purpose of this section, “readily available in the marine transfer area” means that a printed or electronic copy of the manual is available for viewing within the operating station of the PIC. The PIC is not expected to keep the manual in their possession while conducting routine rounds during the transfer operation.

D. Technical Revisions Within Part 127 and Part 154

As proposed in the NPRM, we replace uses of the word “shall” with “must” when specifying the actions facility operators are required to perform. This helps align the regulations with plain language guidelines. Additionally, where the COTP is required to respond to or notify a facility, we replace “the COTP shall” with “the COTP will” to state clearly what the COTP will do in certain cases. This helps clarify what the facility operators can expect from the COTP and aligns the regulations with plain language guidelines. These technical revisions do not change the requirements for facility operators or the Coast Guard.

V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive orders related to rulemaking. A summary of the analysis based on these statutes and Executive orders follows.

A. Regulatory Planning and Review

Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review) 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 (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing

costs, harmonizing rules, and promoting flexibility.

The Office of Management and Budget (OMB) has not designated this rule a significant regulatory action under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed it. A regulatory analysis (RA) follows. The first section of this RA covers the alternatives considered, the second covers the affected population, the third covers the costs, the fourth covers the cost savings components, and the fifth provides a summary of the costs savings.

As stated previously under our discussion of public comments, we received four comments. Three of these comments supported the implementation of electronic documentation in the proposed rulemaking as well as in other rulemakings. An anonymous fourth commenter stated that they would like to see all documents submitted electronically and kept in that form until approved by the Coast Guard, but kept in printed form after approval.² In response to this, the final rule gives the facility operators, *at their discretion*, the flexibility to keep that documentation in either print or electronic form. We believe that the facility operators would best be suited to decide which format they would prefer, based on the particular circumstances of their specific facilities. Forcing facilities to use only printed documentation prevents facilities from realizing any cost savings from the use of digital documentation. Hence, in this final rule, we allow facility operators the choice.

There are four differences in this RA from the RA in the NPRM that have a quantified monetary impact. The first two involve updated financial data. The NPRM used the most up-to-date wage data available when it was written and what were then current costs to mail documents. More up-to-date wage data are now available,³ and the costs of mailing documents has changed

²The commenter wrote, “I would recommend that all Manuals and others [sic] written material to be submitted electronically (including if the written material needs to be amended) until the final approval of the Manuals and/or other documents, which then could be printed for the required establishments. I also recommend keeping a printed version (not electronic) readily available and accessible for team members that are carrying out assignments.”

³For example, wage data for the NPRM was taken from the May 2019 National Industry-Specific Occupational Employment and Wage Estimates, while for the final rule the data were taken from the May 2020 National Industry-Specific Occupational Employment and Wage Estimates. The fully burdened wages of in-scope employees rose from \$30.28 for LNG/LHG employees and \$100.03 for MTR facility employees in the NPRM, to \$32.19 and \$106.82, respectively, in the final rule.

between the time the NPRM was written and this final rule. A detailed breakdown of mailing costs, labor handling costs associated with mailing those documents, and aggregated shipping and handling costs (the combined cost of both) can be found in table 9. That table shows mailing costs have changed in a mixed manner, with the cost associated with mailing some documents going up and others going down. The price of labor associated with mailing documents has increased across all document groups, and aggregated shipping and handling costs (the combination of both) have increased in four of the six document categories. In aggregate, private sector cost savings associated with shipping and handling, costs have increased from \$14,530 in the NPRM to \$15,323 in the final rule.⁴

The other two differences involve the handling of manuals and amendments that the COTP finds to be inadequate. We now estimate that, under current regulations, when the COTP finds an Operations Manual or Emergency Manual or amendment to be inadequate, the facility operator sends two copies of the document back to the COTP instead of the one copy originally assumed by the NPRM.⁵ The final difference is that in this final rule we estimate that, under current regulations, the COTP sends a facility one stamped copy of an Operations Manual or Emergency Manual or amendment after it has been modified to remedy an inadequacy and been deemed acceptable by the COTP. In the NPRM economic analysis, we incorrectly stated that no copies were sent back in such cases, when, in fact, the COTP does send back one copy.⁶ We discuss these four new in more detail in the cost savings section of this RA.

Other than these four modifications, there are no substantive changes to the requirements and calculations originally proposed in the NPRM. We made clarifying edits to the regulatory text, as noted in the Discussion of Comments and Changes from the Proposed Rule section of this preamble, which do not have any impact on the costs or benefits from what we proposed in the NPRM.

This rule provides administrative paperwork burden relief for operators of LNG/LHG and MTR facilities, as the use of electronic documentation (as opposed

⁴ See table 2, specifically the aggregate of the rows “savings from not having to mail manuals (and amendments) to the COTP” by LNG/LHG facilities and MTR facilities.

⁵ This change, from one copy to two copies, was made due to new information provided by Coast Guard subject matter experts (SMEs).

⁶ This change, from zero copies to one copy, was made due to new input from Coast Guard SMEs.

to print) for Operations Manuals and Emergency Manuals, as well as associated amendments, will permit facilities to satisfy regulatory requirements at a lower cost. LNG and LHG facilities are required to submit Operations Manuals and Emergency Manuals and amendments, while MTR facilities are required to submit only Operations Manuals and amendments.

Under current regulations, facility operators are required to send two printed copies of each manual and set of amendments to the COTP. The final rule will permit these documents to be submitted electronically, at the discretion of the facility operators. Facility operators exercising this option will no longer need to assemble and mail printed versions, resulting in administrative cost savings. The final rule will also permit facility operators sending their documentation in print format to submit only one copy of their documents, resulting in further administrative cost savings.

Additionally, current regulations require those facility operators whose documents were not approved by the COTP to resubmit two copies of revised documents to the COTP in print format. As stated previously, in the NPRM's economic analysis we erroneously estimated that in the current regulations the facility only mailed back one revised copy to the COTP. This has been corrected in the economic analysis of the final rule.⁷ The annual cost associated with the additional manual that must be sent by those LNG/LHG and MTR facilities, which includes the costs of manufacturing the additional manuals and amendments as well as the shipping and handling associated, is \$1,056 per year and \$10,563.30 over a 10-year period (in nominal terms). The final rule will permit facility operators to resubmit their documents in either electronic or print format. Facility operators exercising the option to use an electronic format will no longer need to assemble and mail two printed versions, while those who decide to instead send printed documentation will only need to send one copy instead of two to the COTP. This reduction in paper documentation will result in additional administrative cost savings.

Finally, the final rule permits facilities to keep documentation at their

facility's marine transfer area in either electronic or print format. Currently, this documentation must be kept in print format at these locations. According to Coast Guard SMEs from the Office of Port and Facility Compliance (CG-FAC), the typical facility has, on average, two marine transfer areas.⁸ LNG and LHG facilities are required to keep one copy of an Operations Manual and one copy of an Emergency Manual (and to keep each manual up-to-date with amendments) at each of their marine transfer areas. MTR facility operators are required to keep one Operations Manual (and amendments) at each marine transfer area. Those facility operators that exercise the option to use electronic documents instead of print will experience a benefit, in the form of a cost savings, resulting from no longer having to assemble these printed documents (one copy for each marine transfer area),⁹ as well as not having to physically place this documentation at the two marine transfer areas.¹⁰

The final rule also results in administrative cost savings to the Coast Guard. Currently, when the COTP examines an Operations Manual or Emergency Manual and finds it meets the regulatory requirements (or is "adequate"), they must return a stamped copy to the facility. Under the final rule, the COTP will not return a printed copy of the manual via mail. Instead, the COTP will send either a printed or an electronic message back to the facility stating that the Coast Guard has examined the manual.¹¹ As a result, the Coast Guard will experience cost savings from not having to handle and mail back to the facility a stamped, printed version of the manual when the facility sends electronic documentation to the Coast Guard.

On the other hand, if the COTP finds "inadequacies" in the submitted manual, meaning the manual does not

meet the regulatory requirements, the COTP must currently mail back a copy of the manual, or provide a notification, with annotations or comments specifying how to correct the manual.¹² Based on the requirements in the final rule, the COTP will be allowed to send an electronic or printed message, instead of only a notification in written form, explaining why the manual does not meet the requirements of the part. The COTP will not be obligated to send back any copies of the manual with their explanation for why the manual does not meet the requirements.

In addition, when the COTP receives corrected versions of the manual back from facilities, under current regulations, the COTP must send back to the facility one printed copy of the document. In the economic analysis contained in the NPRM, we had erroneously estimated that no printed copies of the corrected manual were sent back to the facility when the COTP finds the corrected manual adequate. This is corrected in the economic analysis contained in this final rule. As the final rule permits the Coast Guard to electronically notify facilities regarding whether their manuals are adequate or inadequate the Coast Guard will experience a cost savings.

In table 1, we show a summary of the impacts of the final rule. As a result of the previously discussed changes between this RA and the NPRM, the projected cost savings to industry and Coast Guard have increased from the analysis in the NPRM. The annualized and 10 year cost savings to industry, both discounted 7 percent, increased approximately 9 percent from the NPRM estimates of \$36,307 and \$255,007 to \$39,394 and \$276,689, respectively. The annualized and 10-year cost savings to the Coast Guard, both discounted 7 percent, increased approximately 16 percent, from the NPRM estimates of \$7,426 and \$52,160 to \$8,616 and \$60,512, respectively. As a result, the aggregated annual and 10-year cost savings for both the private sector and the Coast Guard, discounted at 7 percent, increased approximately 10 percent, from \$43,734 and \$307,167 to \$48,010 and \$337,200, respectively.

¹² The word "inadequacies" is used on numerous occasions in the text of the current regulation. Sections where the word is explicitly cited include paragraphs 154.320(a)(1) and 154.320(c)(2).

⁷ The cost difference between the NPRM and the final rule, accounted for by correctly estimating two manuals instead of erroneously estimating one, is \$1,056.33 per year (and \$10,563.30 over a 10-year period, in nominal terms).

⁸ Based on an SME assessment from CG-FAC. All Coast Guard SME input assessments mentioned in this final rule, unless stated otherwise, are from CG-FAC.

⁹ Each marine transfer area is saved one copy. However, as each facility has, on average, two marine transfer areas, each facility is saved two copies total.

¹⁰ These areas are not the same as the administrative offices of the facilities; hence, labor time needs to be expended to place manuals at the transfer areas after they are assembled.

¹¹ The Coast Guard envisions sending back an electronic format of the manual with an electronically stamped watermark, notification, or similar method.

TABLE 1—SUMMARY OF THE IMPACTS OF THE FINAL RULE ¹

Category	Summary
Applicability	<ul style="list-style-type: none"> • Updates 33 CFR parts 127 and 154 to permit regulated facilities to submit Operations Manuals and Emergency Manuals and amendments in electronic or printed format. • Updates 33 CFR parts 127 and 154 to permit regulated facilities that submit printed Operations Manuals and Emergency Manuals and amendments to submit only one copy in that format. • Updates 33 CFR parts 127 and 154 to permit the Coast Guard to send notices of adequacy or inadequacy to facilities electronically. • Updates 33 CFR parts 127, 154, and 156 to permit regulated facilities to store electronic² or printed versions of their Operations Manuals and Emergency Manuals and amendments at the marine transfer areas of their facilities.
Affected Population (Annually)	60 facilities that transfer LNG and LHG and 703 MTR facilities (total of 763 facilities). ³
Cost savings to Industry (\$2020, 7% discount rate)	10-year cost savings: \$276,689; Annualized: \$39,394.
Cost savings to the Coast Guard (\$2020, 7% discount rate).	10-year cost savings: \$60,512; Annualized: \$8,616.
Total Cost Savings (\$2020, 7% discount rate)	10-year cost savings: \$337,200; Annualized: \$48,010.

¹ All dollar figures rounded to the closest whole dollar.

² Electronic versions at the marine transfer areas of facilities will be on electronic devices that must comply with applicable electrical safety standards. For more details, please see the earlier sections of the preamble to this final rule that discuss paragraphs 127.309(a), 127.1309(a), and 154.320(f).

³ Of the 60 LNG/LHG facilities, we assume 54 will submit their documentation in electronic format and 6 in print. Of the 703 MTR facilities, 527 are expected to submit their documents in electronic format and 176 in print. For a detailed discussion of these estimates and calculations, refer to the “Affected Population” section of this RA.

Note: Numbers may not sum due to rounding.

A more detailed set of tables comparing the cost savings between the NPRM and the final rule is provided below. Table 2 shows a specific breakdown by each subset of cost savings between the NPRM and the final rule. Table 3 shows the differences between the two, on an aggregated basis (for the full 10-year period looking forward after the implementation of the rulemaking). Specific details on the derivation of the numbers for the final rule are discussed later in the RA under

the specific section for each cost element.

As can be seen in table 2, the factor most contributing to the private sector aggregate cost savings increase was, for MTR facilities, the savings from not having to produce printed manuals (and amendments) to mail to the COTP. This one cost savings element, \$1,944, accounted for approximately 63 percent of the aggregate increase in total private sector costs (of \$3,088). With respect to total cost savings for both the private sector and the government, \$4,278, two

cost elements accounted for the overwhelming majority of the cost increase. Those two cost elements were, for MTR facilities, the cost savings from not having to produce printed manuals (and amendments) to mail to the COTP (accounting for 45 percent of the total increase of \$4,278) and, for the Coast Guard, the cost savings from not having to mail printed manuals (and amendments) back to facilities (accounting for 28 percent of the increase).

TABLE 2—ANNUAL COST SAVINGS OF FINAL RULE AND NPRM COMPARED

Population	Cost savings element	Final rule annual cost savings	NPRM cost savings	Difference
LNG/LHG Facilities	Savings from not having to produce printed manuals (and amendments) to mail to the COTP.	\$579	\$498	\$81
	Savings from not having to produce printed manuals (and amendments) for placement at facility marine transfer areas.	242	234	8
	Savings from not having to mail manuals (and amendments) to the COTP.	1,011	994	17
	Savings from not having to place printed manuals (and amendments) at facility marine transfer areas.	1,634	1,605	29
Total Annual LNG/LHG Facility Cost Savings.	.....	3,466	3,331	135
MTR Facility	Savings from not having to produce printed manuals (and amendments) to mail to the COTP.	11,839	9,895	1,944
	Savings from not having to produce printed manuals (and amendments) for placements at facility marine transfer areas.	2,120	2,023	97
	Savings from not having to mail manuals (and amendments) to the COTP.	14,312	13,536	776
	Savings from not having to place printed manuals (and amendments) at facility marine transfer areas.	7,658	7,522	136
Total Annual MTR Facility Cost Savings.	.....	35,929	32,976	2,953

TABLE 2—ANNUAL COST SAVINGS OF FINAL RULE AND NPRM COMPARED—Continued

Population	Cost savings element	Final rule annual cost savings	NPRM cost savings	Difference
Total Private Sector Cost Savings.	.....	39,395	36,307	3,088
Coast Guard	Savings from not having to mail printed manuals (and amendments) back to facilities.	8,616	7,426	1,190
Total Annual Coast Guard Cost Savings.	.....	8,616	7,426	1,190
Total Private + Government Sector.	.....	48,011	43,733	4,278

Note: All numbers rounded to nearest whole number. Figures may not sum exactly due to rounding.

Table 3 shows the aggregated nominal and discounted (at 7%) differences, as well as cost savings on a discounted annualized rate (discounted 7%) by type of facility, for the entire private sector, the Coast Guard, and the private sector and Coast Guard combined. Cost savings differ between the final rule and NPRM for these aggregated figures from approximately 4 percent for LNG/LHG facilities to 9 percent for MTR facilities to 16 percent for the Coast Guard. For the entire private sector the difference is 9 percent, and for the combined private and public sectors it is 10 percent.

TABLE 3—ANNUAL COST SAVINGS OF FINAL RULE AND NPRM COMPARED

	Final rule	NPRM	Difference	% Difference (from NPRM)
LNG/LHG Facilities:				
10-Year Nominal Cost Savings	\$34,652	\$33,309	\$1,343	4
10-Year Cost Savings Discounted (7%)	24,338	23,394	944	4
Annualized Cost Savings (Discounted at 7%)	3,465	3,331	134	4
MTR Facilities:				
10-Year Nominal Cost Savings	359,290	329,764	29,526	9
10-Year Cost Savings Discounted (7%)	252,350	231,612	20,738	9
Annualized Cost Savings (Discounted at 7%)	35,929	32,976	2,953	9
Total Private Sector:				
10-Year Nominal Cost Savings	393,942	363,073	30,869	9
10-Year Cost Savings Discounted (7%)	276,689	255,007	21,682	9
Annualized Cost Savings (Discounted at 7%)	39,394	36,307	3,087	9
Coast Guard:				
10-Year Nominal Cost Savings	86,155	74,264	11,891	16
10-Year Cost Savings Discounted (7%)	60,512	52,160	8,352	16
Annualized Cost Savings (Discounted at 7%)	8,616	7,426	1,190	16
Total Private Sector + Government Sector:				
10-Year Nominal Cost Savings	480,097	437,337	42,760	10
10-Year Cost Savings Discounted (7%)	337,200	307,167	30,033	10
Annualized Cost Savings (Discounted at 7%)	48,010	43,734	4,276	10

Note: All numbers and percentages rounded to nearest whole number or percentage. Figures may not sum exactly due to rounding.

Alternatives Considered

We considered three alternatives. The first is a continuation of current regulations (no change). The second is a modification to the current regulations that would require all regulated facilities to submit their required Operations Manuals, Emergency Manuals, and amendments electronically. The third is giving regulated facilities flexibility to submit documentation in either electronic or printed format. We discuss each alternative in more detail in the following sections.

Alternative 1—No Change

This alternative would require regulated facility operators to continue to submit two printed copies of the

Operations Manuals and Emergency Manuals, and the COTP to continue to examine these manuals and return them by mail. This alternative would also require facility operators to maintain the manuals in a printed format near the marine transfer areas of their facilities. This alternative would not result in any cost savings to either industry or the Coast Guard. Therefore, we rejected alternative 1.

Alternative 2—All Electronic Format Submissions

This alternative would amend regulations to require regulated facility operators to submit only electronic copies of the Operations Manuals and Emergency Manuals, and the COTP to examine these manuals (and amendments) and return them only

through email or other electronic means. Facility operators would not be permitted the option of submitting printed documents. Facilities would have the discretion to keep Operations Manuals and Emergency Manuals in either printed or electronic format at their marine transfer areas.¹³

Facility operators may experience cost savings greater than projected under alternative 1 or the alternative chosen in this final rule (alternative 3) because they would be required to submit their documentation electronically and to maintain electronic copies of all their manuals in the marine transfer areas. Savings from this alternative would

¹³ Electronic versions at the marine transfer areas of facilities will be on electronic devices that must comply with applicable electrical safety standards.

result from the facilities not having to assemble and mail printed documentation to the COTP. Cost savings would also result from facilities no longer needing to assemble and physically place printed documentation for the marine transfer areas. Alternative 2 would result in greater cost savings related to printing and mailing than alternative 1, as all regulated facilities would submit documents electronically.

However, alternative 2 also has the highest potential cost associated with its implementation. This is because a number of facilities may not currently have the required information technology (IT) infrastructure to permit the use of electronic documentation at their marine transfer areas. For those facilities without the pre-existing IT infrastructure, building the infrastructure could prove expensive compared to the cost savings from reducing the amount of printed manuals and amendments. Factors affecting the building of such IT infrastructure (not all inclusively) include the following:

- The size of the facility;
- How many marine transfer areas there are (each area must have an Operations Manual, and transfer areas in LNG and LHG facilities must also have an Emergency Manual);
- The number and type of products transferred at the facility;
- The types of transfer operations occurring at the facility; and
- Any pre-existing infrastructure that can already facilitate accessing and using electronic documentation (such as “Wi-Fi” or hardwired broadband connections).

Based on these factors, for some facilities the total costs required to access electronic documents could exceed the cost savings from switching to electronic documentation. In addition, these IT costs could disproportionately affect facilities that are relatively small in terms of revenue. We believe that imposing these additional costs on such small entities would be financially burdensome; therefore, we rejected alternative 2.

Alternative 3—Option To Use Either Printed or Electronic Manuals

Alternative 3 is the selected alternative for this rulemaking. This alternative explicitly states that facility operators may submit the required Operations Manuals, Emergency Manuals, and amendments either in print or electronic format. In addition, in submitting the required documents in print, only one copy is required. In this alternative, facilities facing higher IT improvement costs could continue to use printed manuals and submissions.

Hence, this alternative will lead to the highest net cost savings of the three alternatives.

For these reasons, alternative 3 is the preferred alternative. We provide a discussion of this alternative below.

Affected Population

We identified 121 LNG and LHG facilities that could be potentially impacted by this regulation, based on a search of the Coast Guard’s Marine Information for Safety and Law Enforcement (MISLE) database.¹⁴ We also identified 2,497 MTR facilities that could be potentially impacted. A discussion follows describing how the impacted population itself was reached.

LNG and LHG facilities transfer liquefied natural gas and liquefied hazardous gas from vessels to the shore or from the shore to vessels. MTR facilities transfer oil or hazardous material in bulk from vessels to the shore or from the shore to vessels. Operations Manuals provide information relating to LNG, LHG, and MTR facilities, such as physical characteristics (including plans and maps), descriptions of transfer systems and mooring areas, and diagrams of piping, electrical systems, control rooms, and security systems.¹⁵ Emergency Manuals include information relating to, among other items, emergency shutdown procedures, descriptions of and operating procedures for fire and other emergency equipment, first-aid procedures and stations, and emergency response procedures.¹⁶ Operations Manuals and Emergency Manuals vary in terms of size, anywhere from 0.5-inch, three-ring binders containing 50 pages, to 3-inch, three-ring binders.¹⁷ We have estimated the 3-inch, three-ring binders to be an average of 514 pages in length.¹⁸ The

¹⁴ The search of MISLE was conducted on November 18, 2019.

¹⁵ A full list of what Operations Manuals need to cover for LNG and LHG facilities is in 33 CFR 127.305 and 127.1305, and for MTR facilities in 33 CFR 154.310.

¹⁶ The full list of items that Emergency Manuals need to cover for LNG facilities can be found in 33 CFR 127.307, and for LHG facilities in 33 CFR 127.1307.

¹⁷ This information was obtained from Coast Guard SMEs in CG–FAC.

¹⁸ The estimate of 514 was based on the maximum size capacity of five 3-inch three-ring binders found at five office supply stores on the internet. The mean capacity of these five binders was calculated by CG–FAC to come to 514 pages. The five stores included the following: (1) Office Depot (<https://www.officedepot.com/a/products/502062/Wilson-Jones-Binder-3-Rings-36percent/>); (2) Staples (https://www.staples.com/Simply-3-Inch-Round-3-Ring-Binder-Black-26857/product_1319200, accessed November 5, 2019, 460 pages); (3) Walmart (<https://www.walmart.com/ip/Universal-Economy-Round-Ring-View-Binder-3->

0.5-inch manuals are the most common size, accounting for the majority of manuals.¹⁹ Therefore, in our cost savings estimate, we assumed that all manuals are 0.5-inch, three-ring binders of 50 pages.

Amendments to both Operations Manuals and Emergency Manuals are intended to keep those manuals up to date.²⁰ Their length depends on the information required to be updated. If the information is significant, these amendments may be as long as the original document submitted to the COTP. If the change is relatively minor, the amendments may only be a few pages. If the amendments are only a few pages, they are submitted to the COTP as individual pages. The COTP then examines those pages and, after determining their adequacy, inserts them into the previous edition of the Operations Manual or Emergency Manual.²¹ If the facility sends the amendment in electronic form, the new pages that supersede the old can be inserted into the electronic document that the COTP has (much the same way that pages can be inserted into PDF documents). On the other hand, if the amendment is sent in paper format and the COTP deems it “adequate,” the COTP can insert new pages into the previous edition of the manual to replace the pages that were originally deemed “inadequate.” Coast Guard SMEs estimated that 80 percent of amendments to Operations Manuals and Emergency Manuals consist of 5-page inserts, while 20 percent consist of documents that are as long as full-length Operations Manuals or Emergency Manuals. In our cost savings estimate, we assumed that all amendments would be five pages.

We examined MISLE data between 2009 and 2019 (inclusively) to determine that an annual average of 60

Capacity-Black-UNV20991/21454956); (4) Target (<https://www.target.com/p/avery-3-34-one-touch-slant-rings-600-sheet-capacity-heavy-duty-view-binder-white/-/A-14432722>); and (5) Amazon (https://www.amazon.com/Wilson-Jones-Binder-Basic-W362-49W/dp/B0001N9WM8/ref=sr_1_5?keywords=3+ring+3+inch+binder&qid=1573433167&sr=8-5, accessed on November 5, 2019, 550 pages).

¹⁹ This information was obtained from Coast Guard SMEs in CG–FAC.

²⁰ A complete list of items that must be kept current can be found in 33 CFR 127.1305 for LHG facilities Operations Manuals. For LNG facilities, the complete list can be found in 33 CFR 127.305 for Operations Manuals, and in 33 CFR 127.307 for Emergency Manuals. For MTR facilities, 33 CFR 154.300(b) and 154.300(b)(1) state, “the facility operator shall maintain the operations manual so that it is . . . current.”

²¹ The original pages that the newly submitted pages replace, assuming the document was in paper format, are disposed of by the COTP.

instances²² of Emergency Manuals, Operations Manuals, and amendments are filed by LNG and LHG facilities per year, representing an average of 18 instances for manuals and 42 for amendments.²³ These numbers differ from the numbers shown in appendices A and B in the Collection of Information Under Review by the Office of Management and Budget; OMB Control Number: 1625–0049.²⁴ That information collected, titled “Waterfront Facilities Handling Liquefied Natural Gas (LNG) and Liquefied Hazardous Gas (LHG),” shows 8 instances of manuals and 14 instances of amendments, for a total of 22 instances of manuals and amendments filed.²⁵ This difference (60 versus 22) is attributable to the fact that the MISLE data for the collection of information and this RA were pulled on different dates. We performed the MISLE pull for this RA on November 18, 2019, while the MISLE pull for the collection of information occurred prior to its date of publication, August 30,

2019. As a result, the total LNG and LHG facility populations, as well as the individual manual and amendment numbers, were different. The collection of information found a combined LNG and LHG population of 108, while we found 121. Hence, this RA projects larger numbers of manuals and amendments than did the collection of information.²⁶ Coast Guard SMEs estimated that 90 percent of LNG/LHG facilities will submit their documentation to the Coast Guard electronically. Thus, of the annual impacted population of 60 LNG/LHG facilities, we estimate the affected annual population of LNG/LHG facilities to be 54 per year submitting their documentation in electronic form, with the remaining 10 percent, or 6 facilities, submitting their documentation in print form. The MISLE pull for this RA found the average number of instances of Operations Manuals and amendments filed by MTR facilities for the same period (2009–2019) to be 703.²⁷ MTR

facilities are only required to file Operations Manuals and amendments, not Emergency Manuals and amendments. Of those 703 instances of manuals and amendments, there were an average of 261 instances of manuals and 442 amendments annually. Assuming each submission is for a unique facility (for an annually impacted MTR population of 703), and since Coast Guard SMEs in CG–FAC estimated that 75 percent of MTR facilities will submit their documentation in an electronic format, we estimated a regulated population of 527 MTR facilities electing electronic submission annually, with 25 percent of MTR facilities, or another 176 facilities,²⁸ projected to submit their documentation in print form annually. The number of annually impacted facilities, by LNG/LHG and MTR facility, as well as the number of different types of manuals and amendments by facility type, is summarized in table 4.

TABLE 4—AFFECTED POPULATION AND NUMBER OF INSTANCES OF MANUALS AND AMENDMENTS FILED ANNUALLY

Facility type	Total instances of operations and emergency manuals filed	Total instances of operations and emergency manual amendments filed	Total instances of documents filed	Total instances of operations and emergency manuals filed electronically	Total instances of operations and emergency manual amendments filed electronically	Total instances of manuals filed electronically	Total instances of operations and emergency manuals filed in print form	Total instances of operations and emergency manual amendments filed in print form	Total instances of manual amendments filed in print form
LNG/LHG	18	42	60	16	38	54	2	4	6
MTR	261	442	703	196	332	527	65	111	176

Note: all “total” numbers rounded to the closest whole number

Cost Savings Components

Tables 5 and 6 summarize the final rule’s cost savings for the private sector and for the Coast Guard. Table 5

provides the private sector’s cost savings for the pertinent maritime facilities of the affected population (LNG/LHG and MTR facilities) as well

as by the four different cost savings categories estimated. Table 6 summarizes the Coast Guard’s cost savings.

TABLE 5—ANNUAL COST SAVINGS OF FINAL RULE TO PRIVATE SECTOR BY POPULATION AND COST SAVINGS ELEMENT

Population	Cost savings element	Annual cost savings (\$2020) ¹
LNG/LHG Facilities	Savings from not having to produce printed manuals (and amendments) to mail to the COTP. ²	³ \$579

²² An instance is when a document is filed. It does not necessarily correspond to the number of copies of manuals filed. The reason we use instances instead of the number of copies filed is that instances serve as a better basis to estimate the number of copies of documents required by different scenarios later in this RA. For example, under current regulations two copies of each type of document must be filed in printed format, but under this final rule facility operators will have the option to submit only one copy if they submit in printed format, or zero if they submit in electronic format.

²³ This number is rounded to the nearest whole number, as are all population numbers provided below.

²⁴ This Collection of Information was published in the **Federal Register** at 84 FR 45783 on August 30, 2019.

²⁵ In the collection of information, there were instances of 6 manuals and 12 amendments filed for LHG facilities and instances of 2 manuals and 2 amendments for LNG facilities, for a total of 8 instances of manuals and 14 instances of amendments and a total of 22 documents overall.

²⁶ The reason for the difference between the number of facilities in Collection of Information Under Review by Office of Management and Budget; OMB Control Number: 1625–0049 and that calculated in this rulemaking (22 versus 60) rests with the differing methods the numbers of manuals and amendments were estimated between the collection of information and the rulemaking. In the collection of information, the number of

amendments was estimated to grow at an annual rate of 3 percent of the rate of facilities and the number of amendments was estimated to grow at 6 percent the rate of facilities. In the rulemaking, the number of amendments and manuals was based on the actual number that was in the MISLE database. Once the final rule is published, the Coast Guard plans to synchronize the method used to estimate the number of amendments and manuals for the collection of information with that used in the rulemaking (*i.e.*, the 3 percent and 6 percent growth rates will be replaced with data from the MISLE database).

²⁷ We conducted this search of MISLE on November 18, 2019.

²⁸ This number is rounded up to the closest whole number.

TABLE 5—ANNUAL COST SAVINGS OF FINAL RULE TO PRIVATE SECTOR BY POPULATION AND COST SAVINGS ELEMENT—Continued

Population	Cost savings element	Annual cost savings (\$2020) ¹
	Savings from not having to produce printed manuals (and amendments) for placement at facility marine transfer areas. ⁴	⁵ 242
	Savings from not having to mail manuals (and amendments) to the COTP	⁶ 1,011
	Savings from not having to place printed manuals (and amendments) at facility marine transfer areas.	⁷ 1,634
Total Annual LNG/LHG Facility Cost Savings.	.....	⁸ 3,466
MTR Facilities	Savings from not having to produce printed manuals (and amendments) to mail to the COTP. ⁹	¹⁰ 11,839
	Savings from not having to produce printed manuals (and amendments) for placements at facility marine transfer areas. ¹¹	¹² 2,120
	Savings from not having to mail manuals (and amendments) to the COTP	¹³ 14,312
	Savings from not having to place printed manuals (and amendments) at facility marine transfer areas.	¹⁴ 7,658
Total Annual MTR Facility Cost Savings.	.....	¹⁵ 35,929
Total .....	.....	¹⁶ 39,395

¹ Rounded to closest whole dollar.

² Includes cost of binder, paper, printing and labor required to assemble.

³ From table 10.

⁴ Includes cost of binder, paper, printing and labor required to assemble. It is also assumed that each facility, as per Coast Guard SME assessment, has an average of two marine transfer areas.

⁵ From table 14.

⁶ From table 12.

⁷ From table 16.

⁸ Total figure may not be exact due to rounding.

⁹ Includes cost of binder, paper, printing, and labor required to assemble.

¹⁰ From table 11.

¹¹ Includes cost of binder, paper, printing and labor required to assemble. It is also assumed that each facility, as per Coast Guard SME assessment, has an average of two marine transfer areas.

¹² From table 15.

¹³ From table 13.

¹⁴ From table 17.

¹⁵ Total figure may not be exact due to rounding.

¹⁶ Total figure may not be exact due to rounding.

TABLE 6—ANNUAL COST SAVINGS OF FINAL RULE TO COAST GUARD

Population	Administrative cost savings element	Annual cost savings (\$2020) ¹
Coast Guard	Savings from not having to mail printed manuals (and amendments) back to facilities.	² \$8,616

¹ Rounded to closest whole dollar.

² From table 2.

Cost Savings Methodology, Calculations, and Estimates

We separated the analysis of cost savings for this rulemaking into three sections. The first examines the cost savings for the private sector. The second discusses the cost savings for the Coast Guard. The third provides an aggregated summary of the cost savings as well as the estimates on a discounted basis.

Private Sector Cost Savings

We separated cost savings for the private sector into two categories. The first involves the cost savings associated

with facility operators having the option to submit Operations Manuals and Emergency Manuals (and amendments) in electronic format. The second involves the option to place electronic versions of their Operations Manuals and Emergency Manuals (and amendments) at their marine transfer areas.

Cost Savings From the Reduced Numbers of Operations Manuals and Emergency Manuals (and Amendments) Sent to the Coast Guard

LNG and LHG facility operators are currently required to submit two copies

of their Operations Manuals and Emergency Manuals and amendments to the COTP.²⁹ Generally, they are not sent at the same time.³⁰ MTR facility operators are currently required to submit two copies of their Operations Manuals and amendments.³¹ Although current regulations do not explicitly state that the copies submitted must be printed, the wording and context suggest the use of printed documents,

²⁹ 33 CFR 127.019(a) and (b).

³⁰ As these documents are usually written by different personnel and do not need to be received simultaneously, they are generally not sent together.

³¹ 33 CFR 154.300(a).

and current industry practice is to submit printed documents.³²

The cost savings components that make up the 0.5-inch binders consist of the actual cost of the empty 0.5-inch, 3-ring binder, the cost of 50 pages of paper, the cost of printing those 50 pages, and the labor required to put the manual together. The cost of all these elements, with the notable exception of labor, is the same whether the manual is for an LNG or LHG facility or an MTR facility. In the NPRM, we estimated that the cost of the empty 0.5-inch binders in 2019 dollars is \$3.66, based on the mean for 0.5-inch binders from 5 different websites selling this item.³³ Converting to 2020 dollars, using the seasonally adjusted Consumer Price Index for All Urban Consumers, the figure is \$3.71.³⁴

In the NPRM, we estimated the cost of 50 sheets of copier paper to be 62.5 cents, based on the mean for boxes of 500 pages from 5 different supply stores.³⁵ Converting to 2020 dollars, we

³² The current regulation regarding the two-copy requirement was issued in 1988 for LNG and LHG facilities (53 FR 3370, Feb. 5, 1988), and in 1996 for MTR facilities (61 FR 41452, Aug. 8, 1996). At that time, it was not possible to electronically send a document as large and complicated as a complete Operations Manual or Emergency Manual as an attachment via email or other electronic means

³³ The five different websites were: (1) Office Depot (<https://www.officedepot.com/a/products/765530/Aurora-EarthView-Round-Ring-Organization-Binder/>) (\$5.99), (2) Staples (https://www.staples.com/Simply-5-inch-Light-Use-Round-3-Ring-Binder-Red-26852/product_1337664) (\$3.29), (3) Walmart (<https://www.walmart.com/ip/Pen-Gear-0-5-inch-Durable-Binder-Clearview-Cover-White/945565181>) (\$2.47), (4) Target (<https://www.target.com/p/avery-120-sheet-0-5-34-durable-view-ring-binder-black/-/A-16978071>) (\$2.59), and (5) Amazon (https://www.amazon.com/Avery-Economy-Binder-0-5-Inch-Round/dp/B0006SWEEG/ref=sr_1_6?qid=1583117388&refinements=p_n_feature_keywords_two_browse-bin%3A7103303011&s=office-products&sr=1-6) (\$4.60). The mean of all these figures is \$3.66. All websites cited were accessed on Nov. 10, 2019.

³⁴ The specific series used was CUSR0000SA0 (seasonally adjusted), downloaded from the BLS's Consumer Price Index seasonally adjusted tables (<https://www.bls.gov/cpi/tables/seasonal-adjustment/home.htm>, accessed July 6, 2021), specifically from the link associated with "Revised seasonally adjusted indexes and factors, 2016–2029." From the downloaded Excel sheet, the mean index for 2020 was calculated at 258.8441 and for 2019 at 255.6525. Using these two figures as the basis to estimate a price multiplier, we derive $(258.8441/255.6525 = 1.013)$. Multiplying the 2019 dollar terms \$3.66 by 1.013, the figure in 2020 dollar terms is derived $(\$2.66 \times 1.013 = \$3.708)$, rounded to \$3.71.

³⁵ The websites were: (1) Office Depot (<https://www.officedepot.com/a/products/841195/Office-Depot-Copy-And-Print-Paper/>) (\$8.29), (2) Staples (https://www.staples.com/500-ream+paper/directory_500%20ream%20paper?sb=1) (\$5.79), (3) Walmart (<https://www.walmart.com/ip/Pen-Gear-Copy-Paper-8-5x11-92-Bright-20-lb-1-ream-500-Sheets/487634010>) (\$3.97), (4) Amazon (https://www.amazon.com/Hammermill-Recycled-Printer-Letter-086790R/dp/B009ZMP31K/ref=sr_1_

obtain \$0.63.³⁶ In the NPRM, we found the cost to print 50 pages in black and white to be \$2.23.³⁷ Converting to 2020 terms, the figure is \$2.26.³⁸ Combining the 2020 dollar terms, the sum is \$6.60.³⁹

As the labor costs between LNG/LHG and MTR facilities are different, the labor component of assembling these manuals also differ. According to Coast Guard SMEs, as well as the collection of information, OMB Control Number 1625–0049, "Waterfront Facilities Handling Liquefied Natural Gas and Liquefied Hazardous Gas," clerical workers assemble manuals at LNG and LHG facilities. The BLS website has no specific labor category for clerical workers under North American Industry Classification System (NAICS) industry 483000 (Water Transportation). The closest we were able to find was "Office Clerks, General" (Occupational Code 43–9061).⁴⁰ The BLS gave the mean hourly wage for this category of labor as \$21.32.⁴¹ As wages account for only a portion of total employee costs (employee benefits account for the other part), we adjusted wages to take benefits into account. Using the BLS U.S. Department of Labor News Release for March 18, 2021 (USDL–21–0437), benefits for employees in the "Production, Transportation and

⁶⁷ keywords=500+ream+paper&qid=1573437715&sr=8-6) (\$9.20), and (5) Target (<https://www.target.com/p/avery-120-sheet-0-5-34-durable-view-ring-binder-black/-/A-16978071>) (\$3.99). The mean of these five figures is \$6.25. Dividing \$6.25 by 500 pages results in a figure of .0125 cents per page. That amount multiplied by 50 pages gives us a cost of 62.5 cents.

³⁶ $\$0.625 \times 1.013 = \0.633 , rounded to \$0.63.

³⁷ This cost is found in "Ink-onomics: Can you Save Money by Spending More on Your Printer," PCWorld, May 2, 2012 (https://www.pcworld.com/article/254899/ink_onomics_can_you_save_money_by_spending_more_on_your_printer.html) was found to be 3.9 cents per page for printers costing over \$200. This May 2012 dollar figure was converted to 2019 using the Bureau of Economic Analysis, National Income and Product Accounts, Table 1.1.4 Price Indexes for Gross Domestic Product, Annual Series, last revised on April 29, 2020 (<https://www.bea.gov/iTable/iTableHtml.cfm?reqid=19&step=3&isuri=1&1910=x&0=99&1921=survey&1903=4&1904=2009&1905=2018&1906=a&1911=0>) as a gross domestic product. This calculation can be accessed by the "modify" button on the right, choosing "annual" series, and then "refresh table." The GDP deflator for 2012 was 100, and for 2019, 112.348. Hence, 3.9 cents was increased by 12.348 percent to yield a figure of 4.45 cents (rounded to closest whole cent). Multiplying this figure by 50 (for the number of pages) yields, in turn, \$2.23 for 50 pages (rounded to closest whole cent).

³⁸ $\$2.23 \times 1.013 = \2.258 , rounded to \$2.26.

³⁹ $\$3.71 + \$0.63 + \$2.26 = \6.60 .

⁴⁰ "May 2020 National Industry-Specific Occupational Employment and Wage Estimates, NAICS 483000-Water Transportation," (https://www.bls.gov/oes/2020/May/naics3_483000.htm), downloaded April 16, 2021.

⁴¹ Ibid.

Material Moving" sector of the economy, private sector, accounted for \$10.92 per hour, or 51 percent of wages.⁴² Thus, we estimated the fully burdened or loaded wage rate, at \$32.19 per hour for LNG/LHG facilities.⁴³ In the NPRM, we estimated the fully burdened wage rate at \$30.28, a difference of \$1.91.

According to Coast Guard SMEs, as well as the latest collection of information, OMB Control Number 1625–0093, "Facilities Transferring Oil and Hazardous Material in Bulk—Letter of Intent and Operations Manual," MTR facilities use general and operations managers to assemble Operations Manuals. The BLS website, under NAICS industry 483000 (Water Transportation), reports an hourly mean wage of \$70.65 for general and operations managers (Occupational Code 11–1021).⁴⁴ As stated previously, according to the BLS, employees in the "Production, Transportation and Material Moving" sector of the economy, private sector, have benefits corresponding to 51 percent of wages in that industry.⁴⁵ Hence, the loaded wage rate for general and operations managers is \$106.82 per hour.⁴⁶ In the NPRM, we estimated the fully burdened wage rate at \$100.03, a difference of \$6.79.

With respect to the assembly of a 0.5-inch, 50-page manual, we performed the task ourselves and found that it took an average of 5.12 minutes (or 0.09 hours).⁴⁷ As a result, the labor cost of assembling a manual for an LNG or LHG facility came to \$2.90.⁴⁸ For an MTR

⁴² Bureau of Labor Statistics Employer Costs for Employee Compensation news release (USDL–21–0437), March 18, 2021 (<https://www.bls.gov/news.release/pdf/ecec.pdf>), table 5, page 9, referenced April 18, 2021. According to this document, for the "production, transportation and material moving" industry, benefits were \$10.92 per hour while wages were \$21.36 (for a ratio of benefits to wages of 51 percent).

⁴³ $\$21.32$ plus $(\$21.32$ multiplied by 51%) equals \$32.19.

⁴⁴ "May 2020 National Industry-Specific Occupational Employment and Wage Estimates, NAICS 483000-Water Transportation," (https://www.bls.gov/oes/2020/May/naics3_483000.htm), downloaded April 16, 2021.

⁴⁵ Bureau of Labor Statistics Employer Costs for Employee Compensation news release (USDL–21–0437), March 18, 2021 (<https://www.bls.gov/news.release/pdf/ecec.pdf>), table 5, page 9, referenced April 18, 2021. According to this document, for the "production, transportation and material moving" industry, benefits were \$10.92 per hour while wages were \$21.36 (for a ratio of benefits to wages of 51 percent). $\$21.32$ plus $(\$21.32$ multiplied by 51%) equals \$32.19.

⁴⁶ $\$70.65$ plus $(\$70.65$ multiplied by 51%) equals \$106.82.

⁴⁷ This time estimate is based on the average amount of time the Coast Guard consumed to print 50 pages and assemble them in a 0.5-inch 3-ring binder.

⁴⁸ 0.09 hours multiplied by \$32.19 equals \$2.90.

facility, the cost came to \$9.61.⁴⁹ Thus, for an LNG or LHG facility, we estimated the total cost of assembling a 0.5-inch binder for an Operations Manual or Emergency Manual to be \$9.50.⁵⁰ These are the costs associated

with producing one copy of an Operations Manual or an Emergency Manual (we estimated that they cost the same to assemble). For an MTR facility Operations Manual, we estimated the total cost to assemble to be \$16.21.⁵¹ All

binder assembly costs are shown in table 7. In the NPRM, in contrast, we estimated the cost to assemble an LNG/LHG binder at \$9.25 and the cost to assemble the MTR facility binder at \$15.52.⁵²

TABLE 7—COST TO ASSEMBLE 0.5-INCH BINDERS FOR LNG/LHG AND MTR FACILITIES

0.5-Inch binder assembly costs					
	Binder	Print	Printing	Labor	Total
LNG/LHG	\$3.71	\$0.63	\$2.26	\$2.90	\$9.50
MTR	3.71	0.63	2.26	9.61	16.21

As amendments to both Operations Manuals and Emergency Manuals are usually 5 pages, in the NPRM we estimated the cost of paper to total \$0.06⁵³ and the cost of printing to total \$0.22.⁵⁴ Due to rounding, those figures do not change when expressed in 2020 dollar terms.⁵⁵ The estimated total cost of amendments, other than labor and shipping, is \$0.28 per amendment. These costs are the same regardless of

whether the amendment is for an LNG or LHG facility or an MTR facility. Due to the difference in labor costs between LNG/LHG facilities and MTR facilities, the labor costs for assembling amendments differs for facilities of different types. As stated previously, we found the labor cost to be \$70.65 per hour for LNG/LHG facilities and \$106.82 for MTR facilities. We found that printing 5 pages and assembling

them for mailing took 1.25 minutes (0.02 hours). Hence, we estimated the labor costs for LNG/LHG facilities at \$1.41 and for MTR facilities at \$2.14.^{56 57} The total cost of creating a 5-page amendment for an LNG/LHG facility is \$1.69 per document and for MTR facility is \$2.42.^{58 59} These costs are detailed in table 8. In the NPRM, we estimated the associated costs at \$1.60 and \$2.28.⁶⁰

TABLE 8—COST TO ASSEMBLE 5-PAGE AMENDMENTS FOR LNG/LHG AND MTR FACILITIES

5-Page amendment assembly costs				
Facility type	Paper	Printing	Labor	Total
LNG/LHG	\$0.06	\$0.22	\$1.41	\$1.69
MTR	0.06	0.22	2.14	2.42

In addition to the cost of assembling each manual and amendment, we also considered shipping and handling costs. We calculated shipping and handling costs for both scenarios because, currently, there are situations when only one copy of a document needs to be mailed and other situations when two are needed.⁶¹

Because it is a legal requirement for these facilities to send their documents

to the COTP, we assumed that the manuals and amendments are sent with a mail service that permits tracking. We also assumed that facilities use a cost-effective ground shipping method.⁶² As of June 7, 2021, there were 41 COTP zones.⁶³ All of these sites are clustered around shipping points in order to ensure COTPs can perform their functions. Hence, no facility should be very far, geographically, from a shipping

point. We assumed that the manuals and amendments are sent via a shipping service such as UPS or FedEx. We assumed shipping distances to correspond to zone 2 distances in the UPS and FedEx pricing guides, as this is the closest shipping distance price point.⁶⁴ Current regulations require that two copies be submitted to the COTP.

⁴⁹ 0.09 hours multiplied by \$106.82 equals \$9.61.
⁵⁰ \$3.71 (cost of binder) + \$0.63 (cost of blank paper) + \$2.26 (printing cost) + \$2.90 (labor cost of assembly) = \$9.50.

⁵¹ \$3.71 (cost of binder) + \$0.63 (cost of blank paper) + \$2.26 (printing cost) + \$9.61 (labor cost of assembly) = \$16.21.

⁵² These numbers can be found in table 5 of the NPRM.

⁵³ The mean cost of a 500-page ream of paper based on 5 prices at different retailers was found to be \$6.25. Dividing \$6.25 by 500 yields a per-sheet price of 1.25 cents per page. Multiplying 1.25 by 5 yields 6.25 cents, which is rounded down to 6 cents.

⁵⁴ From table 6 in the NPRM.

⁵⁵ \$0.06 × 1.013 = \$0.06078, rounded to \$0.06. \$0.22 × 1.013 = \$0.22286, rounded to \$0.22.

⁵⁶ \$70.65 multiplied by 0.02 equals \$1.41.

⁵⁷ \$106.82 multiplied by 0.02 equals \$2.14.

⁵⁸ \$0.06 (cost of paper) plus \$0.22 (cost to print pages) plus \$1.41 (labor cost to assemble) equals \$1.69.

⁵⁹ \$0.06 (cost of paper) plus \$0.22 (cost to print pages) plus \$2.00 (labor cost to assemble) equals \$2.42.

⁶⁰ From table 6 in the NPRM.

⁶¹ For example, currently, when documents are initially submitted to the Coast Guard, two copies of each are currently required to be sent, but when documents are required to be re-submitted to the Coast Guard to correct inadequacies, only one copy of a document needs to be sent.

⁶² The exact amount of time depends on the relevant applicable section of the regulations: 33 CFR 127.019(b) and 145.325(c) give facilities a time

period of 30 days to file, 33 CFR 145.320(a)(1) and 145.320(b)(1) give facilities 45 days to file, and 33 CFR 145.325(b) gives facilities 60 days to file.

⁶³ ArcGIS has a website listing the full set of 41 zones (<https://hub.arcgis.com/datasets/geoplatform::us-coast-guard-uscg-captain-of-the-port-zones/explore?showTable=true>, downloaded July 6, 2021).

⁶⁴ The UPS pricing guide used was “2020 UPS Rate and Service Guide, Daily Rates, updated October 5, 2020” (https://www.ups.com/assets/resources/media/daily_rates.pdf, downloaded July 8, 2021); the FedEx price guide was “Federal Express Service Guide, January 6, 2020, updated September 28, 2020” (https://www.fedex.com/content/dam/fedex/us-united-states/services/Service_Guide_2020.pdf, downloaded July 7, 2021).

Therefore, we calculated the shipping cost for two 0.5-inch binders.⁶⁵ The two 0.5-inch binders with 50 pages each have a total estimated weight of 2.8 pounds, for a total of 5.6 pounds for a package of two. Based on a 6-pound package, the average cost for these shipping services was \$10.19.⁶⁶ In the NPRM, we estimated the cost at \$10.11.⁶⁷

Currently, facilities send back two copies of the revised version of the Operations Manual or Emergency Manual when the COTP determines that the manual is inadequate. Under the final rule, only one copy of the document must be sent back to the COTP, in either print or electronic format.

We calculated the shipping costs for mailing a single 0.5-inch Operations Manual or Emergency Manual. We estimated that a single 0.5-inch manual weighs 2.8 pounds. For mailing purposes, UPS and FedEx charge the cost associated with a 3-pound item. The average cost of these mailing services is \$9.25.⁶⁸ In the NPRM, we estimated the cost at \$9.56.⁶⁹

With respect to shipping costs associated with amendments, we made many of the same assumptions as for shipping and handling 0.5-inch manuals. For example, we assumed that UPS or FedEx ground shipping is the selected service. As either one or two 5-page amendments weigh less than 1 pound, the shipping cost is the same whether one or two are mailed together. The cost is \$8.23 for both UPS and FedEx (for a mean of \$8.23).⁷⁰ In the NPRM, we estimated the associated cost for shipping one or two amendments at \$8.88.⁷¹

Additionally, facilities must handle these manuals as part of the shipping process. As stated previously, labor costs differ between LNG/LHG facilities and MTR facilities. For LNG/LHG facilities, the loaded hourly labor rate is \$70.65, and for MTR facilities it is \$106.82. We estimated the time required to assemble manuals to be 5 minutes (0.08 hours),⁷² rounded to the closest whole minute, for assembling either one manual or two.⁷³ From this, we estimated labor time for assembling manuals to mail to the COTP to cost

\$5.65⁷⁴ for LNG/LHG facilities and \$8.55 for MTR facilities.⁷⁵ In the NPRM, the associated numbers were \$5.27 for LNG/LHG facilities and \$8.00 for MTR facilities.⁷⁶

Labor handling costs for amendments are also slightly different due to the labor cost differences between LNG/LHG and MTR facilities. We estimated that handling a package that contains either one or two 5-page amendments, rounded to the nearest whole minute, takes 4 minutes (0.07 hours), regardless of facility type. As a result, we estimated labor handling costs for packages that hold one or two amendments to be \$4.95⁷⁷ for LNG/LHG facilities and \$7.48 for MTR facilities.⁷⁸ In the NPRM, the associated figures were \$4.61 for LNG/LHG facilities and \$7.00 for MTR facilities.⁷⁹

The shipping and handling costs for all types of documents by both LNG/LHG facilities and MTR facilities are summarized in table 9. Table 9 includes not only these costs for the final rule but also the NPRM. The NPRM numbers are in parentheses immediately beneath the final rule figures.

TABLE 9—SHIPPING AND HANDLING COSTS BY FACILITY AND DOCUMENT TYPE [Final Rule and NPRM]

Document type	Shipping cost	Handling (labor costs)	Total
LNG/LHG Facility Documents			
Operations Manuals and Emergency Manuals (one 0.5-inch binder) for LNG/LHG facilities.	\$9.25 (NPRM: \$9.56)	\$5.65 (NPRM: \$5.27)	\$14.90 (NPRM: \$14.83).
Operations Manuals and Emergency Manuals (two 0.5-inch binders) for LNG/LHG facilities.	\$10.19 (NPRM: \$10.11)	\$5.65 (NPRM: \$5.27)	\$15.84 (NPRM: \$15.38).
Amendments (one or two 5-page amendments) for LNG/LHG facilities.	\$8.23 (NPRM: \$8.88)	\$4.95 (NPRM: \$4.61)	\$13.18 (NPRM: \$13.49).

⁶⁵ We estimated the weight of an empty 0.5-inch binder at 13 ounces, based on the mean weight of the same 5 binders used to determine the mean cost of 0.5-inch binders. For the web pages for those binders, where weight data was available, the mean was estimated. The web pages were as follows: (1) <https://www.officedepot.com/a/products/765530/Aurora-EarthView-Round-Ring-Organization-Binder/>; (2) https://www.staples.com/Simply-5-inch-Light-Use-Round-3-Ring-Binder-Red-26852/product_1337664; (3) <https://www.walmart.com/ip/Pen-Gear-0-5-inch-Durable-Binder-Clearview-Cover-White/945565181>; (4) <https://www.target.com/p/avery-120-sheet-0-5-34-durable-view-ring-binder-black/-/A-16978071>; and (5) https://www.amazon.com/Avery-Economy-Binder-0-5-Inch-Round/dp/B0006SWEEG/ref=sr_1_6?keywords=1583117388&refinements=p_n_feature_keywords_two_browse-bin%3A7103303011&s=office-products&sr=1-6. We estimated the weight of the 50 pages at 32 ounces, based on the five web pages that we used to determine the average price of paper. The weight of a 500-page ream of paper, on each of these websites, was 320 ounces (50/500 × 320 = 32 ounces). Those five websites were: (1) <https://www.officedepot.com/a/products/841195/Office-Depot-Copy-And-Print-Paper/>; (2) https://www.staples.com/500+ream+paper/directory_500%20ream%20paper?sby=1; (3) [https://www.walmart.com/ip/Pen-Gear-Copy-Paper-8-5x11-](https://www.walmart.com/ip/Pen-Gear-Copy-Paper-8-5x11-92-Bright-20-lb-1-ream-500-Sheets/487634010)

[92-Bright-20-lb-1-ream-500-Sheets/487634010](https://www.walmart.com/ip/Pen-Gear-Copy-Paper-8-5x11-92-Bright-20-lb-1-ream-500-Sheets/487634010); (4) <https://www.target.com/p/500ct-letter-printer-paper-white-up-up-153/-/A-75001545>; (5) https://www.amazon.com/Hammernill-Recycled-Printer-Letter-086790R/dp/B009ZMP31K/ref=sr_1_6?keywords=500+ream+paper&qid=1573437715&sr=8-6. Therefore, the weight of a single 0.5-inch manual is as follows: 32 ounces + 13 = 45 ounces = 2.8 pounds.

⁶⁶ “2020 UPS Rate and Service Guide, Daily Rates, updated October, 5 2020,” p. 68 (https://www.ups.com/assets/resources/media/daily_rates.pdf, downloaded July 8, 2021), shows UPS charged \$10.19; “Federal Express Service Guide, January 6, 2020, updated September 28, 2020,” p. 107 (https://www.fedex.com/content/dam/fedex/us-united-states/services/Service_Guide_2021.pdf) shows that FedEx charged \$10.19. Hence, the average was \$10.19.

⁶⁷ See table 7 of the NPRM.

⁶⁸ “2020 UPS Rate and Service Guide, Daily Rates, updated October, 5 2020,” p. 68 (https://www.ups.com/assets/resources/media/daily_rates.pdf, downloaded July 8, 2021), shows UPS charged \$9.25; “Federal Express Service Guide, January 6, 2020, updated September 28, 2020,” p. 107 (https://www.fedex.com/content/dam/fedex/us-united-states/services/Service_Guide_2021.pdf) shows that FedEx charged \$9.25. Hence, the average was \$9.25.

⁶⁹ See table 7 of the NPRM.

⁷⁰ “2020 UPS Rate and Service Guide, Daily Rates, updated October, 5 2020,” p. 68 (https://www.ups.com/assets/resources/media/daily_rates.pdf, downloaded July 8, 2021), shows UPS charged \$8.23; “Federal Express Service Guide, January 6, 2020, updated September 28, 2020,” p. 107 (https://www.fedex.com/content/dam/fedex/us-united-states/services/Service_Guide_2021.pdf) shows that FedEx charged \$8.23. Hence, the average was \$8.23.

⁷¹ See table 7 in the NPRM.

⁷² This includes time to obtain a box, package up the manual or manuals, complete the required mailing paperwork, and place it into the office “out” mailbox.

⁷³ Based on time samples we ran, we estimated that 4.8 minutes were needed to remove the paper from the copier, put it in an envelope, fill out the documentation and place it in the office “out” mailbox for one manual. To package and complete 2 manuals, we estimated that 5.1 minutes will be required. Rounding both to 5 minutes, this totals an estimated 0.08 hours.

⁷⁴ \$70.65 multiplied by 0.08 equals \$5.65.

⁷⁵ \$106.82 multiplied by 0.08 equals \$8.55.

⁷⁶ See table 8 of the NPRM.

⁷⁷ 0.07 multiplied by \$70.65 equals \$4.95.

⁷⁸ 0.07 multiplied by \$106.82 equals \$7.48.

⁷⁹ See table 8 of NPRM.

TABLE 9—SHIPPING AND HANDLING COSTS BY FACILITY AND DOCUMENT TYPE—Continued
[Final Rule and NPRM]

Document type	Shipping cost	Handling (labor costs)	Total
MTR Facility Documents			
Operations Manuals (one 0.5-inch binder) for MTR facilities	\$9.25 (NPRM: \$9.56)	\$8.55 (NPRM: \$8.00)	\$17.80 (NPRM: \$17.56).
Operations Manuals (two 0.5-inch binders) for MTR facilities	\$10.19 (NPRM: \$10.11)	\$8.55 (NPRM: \$8.00)	\$18.74 (NPRM: \$18.11).
Amendments (one or two 5-page amendments) for MTR facilities.	\$8.23 (NPRM: \$8.88)	\$7.48 (NPRM: \$7.00)	\$15.71 (NPRM: \$15.88).

The final component of the cost savings estimate to industry is the quantity of manuals and amendments that facilities are sending to the COTP. LNG and LHG facilities are currently required to submit two copies of their Operations Manuals and Emergency Manuals and amendments to the COTP, and MTR facilities are currently required to submit two copies of their Operations Manuals (and amendments).⁸⁰ The final rule permits facilities to submit their documents in either print or electronic format. Facility operators submitting electronically will save the cost of assembling and shipping two copies of their documents.

The final rule also permits those facility operators submitting printed documents to submit one copy instead of two. Hence, those facilities will save the costs associated with producing and mailing one copy of their manuals. Coast Guard SMEs estimated that 90 percent of LNG/LHG facilities will submit their manuals and amendments electronically, and 75 percent of MTR facilities will submit their manuals and amendments electronically. The reason for this difference is that LNG/LHG facilities are much more likely to be owned by large multi-national conglomerates than MTR facilities. LNG/LHG facilities are, therefore, more likely to fully utilize modern IT systems and be able to submit their documents electronically.

During the review process of the initially submitted documents, the COTP may reject submitted manuals and amendments due to inadequacies in meeting the regulatory requirements put forth in 33 CFR part 127 for LNG and LHG facilities, or part 154 for MTR facilities. Coast Guard SMEs estimated that 30 percent of the total number of all manuals (not amendments) sent by facilities are inadequate and must be returned for corrections. For amendments, Coast Guard SMEs estimated that the rejection rate is 15 percent. The reason for the lower

rejection rate is that amendments are based on previously approved documents and are shorter, having a lower chance of containing inadequacies.

Under current regulations, facilities send back to the COTP two copies, in printed format, to address an inadequacy. Under this rule, facilities will instead, at their discretion, respond to an inadequacy in either electronic or printed format. If they respond in printed format, they will send only one copy instead of two and will save the costs associated with producing and mailing one copy of the manual or amendment. If they submit in electronic format, they will save the costs associated with producing and mailing two copies of the document.

In summary, the cost savings for the private sector stem from the following:

- LNG/LHG facilities initially printing and mailing fewer printed Operations Manuals and Emergency Manuals (0.5-inch binders) and amendments (5 pages) to the Coast Guard.
- LNG/LHG facilities printing and mailing fewer printed Operations Manuals and Emergency Manuals (0.5-inch binders) and amendments (5 pages) that have to be resubmitted to the COTP.
- LNG/LHG facilities storing fewer printed Operations Manuals and Emergency Manuals (0.5-inch binders) and amendments (5 pages) at marine transfer areas.
- MTR facilities initially printing and mailing fewer printed Operations Manuals (0.5-inch binders) and amendments (5 pages) to the COTP.
- MTR facilities printing and mailing fewer printed Operations Manuals (0.5-inch binders) and amendments that have to be resubmitted to the COTP.
- MTR facilities storing fewer printed Operations Manuals (0.5-inch binders) and amendments (5 pages) at marine transfer areas.

We calculated the cost savings by taking the annual population of facilities, multiplied by the number of manuals or amendments per facility, multiplied by the probability of the facility of transitioning to electronic

submissions, multiplied by production and shipping costs. The cost savings from the changes are the same each year. Tables 10 through 17 show the annual cost savings to facilities by activity.

We predicted that 90 percent of LNG/LHG facilities will convert their Operations Manuals and Emergency Manuals to an electronic format. The remaining 10 percent of LNG/LHG facilities will still experience some cost savings since they will only be required to assemble one copy of their manuals to initially mail to the COTP (instead of the current two). Because these 10 percent of LNG/LHG facilities will continue to send the same number of “corrected” printed manuals back to the COTP, they will not experience cost savings with respect to these. The cost elements to produce manuals and amendments were previously shown in tables 7 and 8.

Table 10 shows the administrative cost savings to LNG/LHG facilities from producing fewer Operations Manuals and Emergency Manuals that are mailed to the Coast Guard. A brief summary of the components of that table follows.

The term “Instances of Documents Forecast to be Submitted” is an annual average of the instances of manuals and amendments that have been submitted over the past 10 years, based on MISLE data. A more thorough discussion of these numbers can be found in the “Affected Population” section of this preamble.

The “Expected Rate of Electronic Documents Submitted” is the percentage of documents expected to be submitted in electronic format instead of print. As stated previously, we based the terms on Coast Guard SME input. The 27 percent figure reflects the SME estimate that 90 percent of manuals will be submitted in electronic format and that 30 percent of all manuals submitted to the COTP are found inadequate.⁸¹ For this 27 percent of documents, there will be a cost savings associated with the cost of producing and mailing two printed manuals. Similarly, the 3

⁸¹ 90 percent multiplied by 30 percent equals 27 percent.

⁸⁰ Currently, two copies must be sent in initially, but if copies of manuals or amendments need to be sent in again because they were found inadequate by the Coast Guard, only one copy needs to be sent.

percent figure represents the estimated 10 percent of manuals that will be submitted to the COTP in printed format, 30 percent of which will be found inadequate.⁸² In this case, one printed document will be mailed as opposed to the two under the current regulation, so these facilities will save the cost of producing and mailing one printed copy.

Likewise, for amendments submitted electronically, the 14 percent figure reflects the 90 percent estimate combined with the SME estimate that 15

percent of all amendments submitted are found to not be adequate.⁸³ In this case, the cost savings would arise from no longer having to produce and mail two printed copies. For amendments submitted in printed format, the analogous percentage is 2 percent.⁸⁴ In this case, the associated cost savings would come from only needing to produce and mail one printed copy instead of the previous two.

The “Reduction in Printed Documents Needed” column reflects the documents no longer needed as a result of the

actions in the first column (compared to current regulations). For example, in the first row, when LNG/LHG facilities submit their manuals in electronic form, as opposed to print, they will not need to submit two copies of electronic manuals. As a result, these facilities will experience a cost savings that is equal to the cost of assembling the documents. In the second row, the facilities that continue to submit printed manuals (instead of electronic) will experience a cost savings from having to submit one document instead of two.⁸⁵

TABLE 10—ANNUAL LNG/LHG FACILITY PRODUCTION COST SAVINGS ¹

LNG/LHG production cost savings from:	Instances of documents forecast to be submitted	Expected rate of electronic documents submitted (%)	Reduction in printed documents needed	Production costs (each) ²	Total production cost savings
Manuals Submitted Electronically	18	90	2	\$9.50	\$307.80
Manuals Submitted in Printed Form		10	1	9.50	17.10
Amendments Submitted Electronically	42	90	2	1.69	127.76
Amendments Submitted in Printed Form		10	1	1.69	7.10
Inadequate Manuals Submitted Electronically	18	27	2	9.50	92.34
Inadequate Manuals Submitted in Printed Form		3	1	9.50	5.13
Inadequate Amendments Submitted Electronically	42	14	2	1.69	19.87
Inadequate Amendments Submitted in Printed Form		2	1	1.69	1.42
Total					578.52

¹ All figures rounded to the nearest whole cent.

² All production cost figures cited in this column can be found in tables 7 and 8.

Table 11 presents the administrative cost savings to MTR facilities from producing fewer Operations Manuals. Of MTR facilities, Coast Guard SMEs estimated that 75 percent will convert their Operations Manuals to an electronic format. The remaining 25 percent of MTR facilities will still experience some administrative cost savings, since they will only be required to produce and mail in one copy of their manuals (instead of the current two).

With respect to inadequate documents that have been returned to facilities by the COTP, facilities’ cost savings will depend on whether they send these back to the COTP in electronic or printed format. If they send documents back in electronic format, facilities will experience the cost savings associated with not having to produce and mail two copies. If they send documents back in printed format, they will only

experience the cost savings associated with not having to produce and mail one copy, as they will be sending one printed document as opposed to the two required in the current regulations.

Table 11 shows that the instances of Operations Manuals forecast to be required annually is 261 and the instances of amendments is 442, based on MISLE data. A more thorough discussion of these numbers can be found in the “Affected Population” section of this final rule.

The “Expected Rate of Electronic Documents Submitted” column shows the percentage of documents expected to be submitted in electronic format as opposed to print. For the manuals, this was 75 percent, and for the amendments, 25 percent. As stated previously, these numbers were based on Coast Guard SME input.

We derived the 23 percent figure from SME estimates that 30 percent of the

manuals submitted electronically will require correction.⁸⁶ We derived the 8 percent figure in an analogous manner.⁸⁷ Similarly, we derived the 11 percent and 4 percent figures from the SME estimate that 15 percent of all amendments submitted are found to be inadequate.^{88 89}

The “Reduction in Paper Documents Needed” column reflects, analogously to table 10, the decrease in each type of document required in paper form. For inadequate documents that are submitted electronically to the COTP, the cost of two paper documents is saved as they will no longer need to send a printed copy. Those submitting printed documents in response to inadequacies pointed out by the COTP will experience a cost savings associated with one printed document, as they will only be sending in one copy as opposed to the currently required two.

⁸² 10 percent multiplied by 30 percent is 3 percent.

⁸³ 90 percent multiplied by 15 percent equals 13.5 percent, rounded up to 14 percent.

⁸⁴ 10 percent multiplied by 15 percent equals 1.5 percent, rounded to 2 percent.

⁸⁵ The current regulations require the submission of two documents, while the final rule requires those facilities submitting printed documentation to submit only one copy of each document instead of two.

⁸⁶ 30 percent multiplied by 75 percent equals 23 percent (rounded to closest whole percentage).

⁸⁷ 30 percent multiplied by 25 percent equals 7.5 percent, rounded to 8 percent.

⁸⁸ 15 percent multiplied by 75 percent equals 11 percent (rounded to closest whole percentage).

⁸⁹ 15 percent multiplied by 25 percent equals 3.75 percent, rounded to 4 percent.

TABLE 11—ANNUAL MTR FACILITY PRODUCTION COST SAVINGS

MTR facility production cost savings from:	Instances of documents forecast to be submitted	Expected rate of electronic documents submitted (%)	Reduction in printed documents needed	Production costs (each) ¹	Total production cost savings
Manuals Submitted Electronically	261	75	2	\$16.21	\$6,346.22
Manuals Submitted in Printed Form		25	1	16.21	1,057.70
Amendments Submitted Electronically	442	75	2	2.42	1,604.46
Amendments Submitted in Printed Form		25	1	2.42	267.41
Inadequate Manuals Submitted Electronically	261	23	2	16.21	1,946.17
Inadequate Manuals Submitted in Printed Form		8	1	16.21	338.46
Inadequate Amendments Submitted Electronically	442	11	2	2.42	235.32
Inadequate Amendments Submitted in Printed Form		4	1	2.42	42.79
Total					11,838.53

¹ All production cost figures in this column can be found in tables 5 and 6.

In addition to the cost savings associated with the need to manufacture and assemble less documentation, there will also be a cost savings associated with having to mail fewer documents to the COTP. Tables 12 and 13 capture

these savings by facility and document type.

The “Instances of Documents Forecast to be Submitted” column represents the total number of each type of document expected to be submitted to the COTP. The “Expected Rate of Electronic

Documents” column shows the percentage of each type of document that is expected to be submitted in electronic format. The “Shipping Costs” column shows the costs associated with mailing and handling each type of document.

TABLE 12—ANNUAL LNG/LHG FACILITY SHIPPING AND HANDLING COST SAVINGS

LNG/LHG facility shipping cost savings from:	Instances of documents forecast to be submitted	Expected rate of electronic documents submitted	Shipping and handling costs (each package) ¹	Total annual shipping cost savings
Manuals Submitted Electronically	18	0.9	\$15.84	\$256.61
Manuals Submitted in Printed Form		0.1	14.90	26.82
Amendments Submitted Electronically	42	0.9	13.18	498.20
Amendments Submitted in Printed Form		0.1	13.18	55.36
Inadequate Manuals Submitted Electronically	18	0.27	15.84	76.98
Inadequate Manuals Submitted in Printed Form		0.03	14.90	8.05
Inadequate Amendments Submitted Electronically	42	0.14	13.18	77.50
Inadequate Amendments Submitted in Printed Form		0.02	13.18	11.07
Total				1,010.59

¹ It should be noted that this is the cost per document set, not per document. For example, in the first row, when manuals are submitted electronically, the cost of producing and mailing two documents would be saved (\$15.84). In the second row, when a document is submitted in printed format, the cost of producing and mailing only one document would be saved (\$14.90). All numbers in this column are from table 9.

TABLE 13—ANNUAL MTR FACILITY SHIPPING AND HANDLING COST SAVINGS

MTR facility shipping cost savings from:	Instances of documents forecast to be submitted	Expected rate of electronic documents submitted	Shipping costs (each package) ¹	Total annual shipping cost savings
Manuals Submitted Electronically	261	0.75	\$18.74	\$3,668.36
Manuals Submitted in Printed Form		0.25	17.80	1,161.45
Amendments Submitted Electronically	442	0.75	15.71	5,207.87
Amendments Submitted in Printed Form		0.25	15.71	1,735.96
Inadequate Manuals Submitted Electronically	261	0.23	18.74	1,124.96
Inadequate Manuals Submitted in Printed Form		0.08	17.80	371.66
Inadequate Amendments Submitted Electronically	442	0.11	15.71	763.82
Inadequate Amendments Submitted in Printed Form		0.04	15.71	277.75
Total				14,311.83

¹ All numbers in this column are from table 9.

In tables 14 and 15, we show the cost savings to facilities that maintain required documentation at marine transfer areas in electronic format.⁹⁰ These savings stem from assembling fewer Operations Manuals and Emergency Manuals.⁹¹ According to Coast Guard SMEs, a facility typically has two marine transfer areas. Each facility is currently required to keep a copy of their manuals at each marine transfer area in printed format, as the regulations that established this requirement were published before it was commonly accepted practice (or even possible) to access electronic records in a portable fashion.

Coast Guard SMEs projected that LNG/LHG facilities have a 50-percent likelihood of storing their manuals and amendments in electronic format at marine transfer areas, and MTR facilities have a 20-percent likelihood of storing them electronically.

The reason these percentages are low is because the adoption of electronic documents at these areas requires a facility to already be equipped to access electronic documentation at marine transfer areas.⁹² The cost of purchasing the new IT equipment for these purposes greatly offsets the cost savings from using electronic documentation, as facilities must have the necessary IT

infrastructure in place to experience the cost savings. As LNG/LHG facilities are typically more capital-intensive and modernized in terms of IT infrastructure than MTR facilities, they are more likely to use electronic documentation.

As stated previously, the costs to assemble manuals and amendments for LNG/LHG facilities was \$9.50 and \$1.69 (each).⁹³ Additionally, we have estimated the affected population for LNG/LHG facilities at 18 for manuals and 42 for amendments.⁹⁴ Multiplying these numbers with an average of two marine transfer areas per facility resulted in the annual production cost savings figures shown in table 14.

TABLE 14—ANNUAL LNG/LHG FACILITY PRODUCTION COST SAVINGS FOR MARINE TRANSFER AREAS

Marine transfer area cost savings:	Instances of documents per year	Electronic document use at marine transfer areas (%)	Marine transfer areas per facility	Production costs (each)	Annual production costs savings
Manuals	18	50	2	\$9.50	\$171.00
Amendments	42	50	2	1.69	70.98
Total					241.98

As stated previously, we estimated the costs to assemble manuals and amendments, for MTR facilities, at \$16.21 and \$2.42 (each).⁹⁵ We have also

estimated the affected population at 261 manuals and 442 amendments for MTR facilities.⁹⁶ Multiplying these numbers with an average of two marine transfer

areas per facility resulted in the annual production cost savings figures shown in table 15.

TABLE 15—ANNUAL MTR FACILITY PRODUCTION COST SAVINGS FOR MARINE TRANSFER AREAS

Marine transfer area cost savings:	Instances of documents per year	Electronic document use at marine transfer areas (%)	Marine transfer areas per facility	Production costs (each)	Annual production costs savings
Manuals	261	20	2	\$16.21	\$1,692.32
Amendments	442	20	2	2.42	427.86
Total					2,120.18

Cost Savings From Placing Electronic Versions of Operations Manuals at Marine Transfer Areas

In tables 16 and 17, we show the labor cost savings to facilities that choose to retain electronic documents instead of printed documents at marine transfer areas. According to Coast Guard SMEs, normally a PIC (or someone with a

similar background) would place the printed copies at a facility's marine transfer areas. Coast Guard SMEs estimated that it takes an hour to perform this function, due to the size of the facilities. The occupation best corresponding to the role of a PIC in the BLS occupational code series is "First Line Supervisors of Production and

Operating Workers" (Occupational Code 51-1011), under NAICS 325000 (Chemical Manufacturing).⁹⁷ We found the mean wage for this occupation to be \$36.07.⁹⁸ We estimated the loaded wage rate to be \$54.47.⁹⁹

Using the estimated loaded labor rate of \$54.47 per hour, multiplied by the affected populations discussed

⁹⁰ This electronic documentation will be accessed via a device such as an electronic tablet.

⁹¹ LNG/LHG facilities must have Operations Manuals and Emergency Manuals at these locations, and MTR facilities have Operations Manuals only.

⁹² For example, through Wi-Fi or hardware connection.

⁹³ See tables 5 and 6 and the discussions accompanying them.

⁹⁴ See discussion under the "Affected Population" section of this RA.

⁹⁵ See tables 7 and 8 and the discussions accompanying them.

⁹⁶ See discussion under the "Affected Population" section of this RA.

⁹⁷ There is no comparable BLS occupational code 51-1011 under the BLS's NAICS 483000 (Water Transportation).

⁹⁸ May 2020 National Industry-Specific Occupational Employment and Wage Estimates, NAICS 325000, (https://www.bls.gov/oes/2020/May/naics3_325000.htm), downloaded April 16, 2021.

⁹⁹ We estimated the loaded rate by accessing the latest available Bureau of Labor Statistics Employer Costs for Employee Compensation News Release (USDLE-21-0437), March 18, 2021 (<https://www.bls.gov/news.release/pdf/ecec.pdf>), referenced April 18, 2021, table 5, page 9. According to this document, for the "production, transportation and material moving" industry, benefits were \$10.92 per hour while wages were \$21.36 (for a ratio of benefits to wages of 51 percent). $\$36.07 + (\$36.07 \times 0.51 = \$18.40) = \54.47 .

previously under the “Affected Population” portion of this RA (18 manuals for LNG/LHG facilities and 261 for MTR facilities; 42 amendments for

LNG/LHG facilities and 442 for MTR facilities) and the estimated rate of electronic document use at marine transfer areas discussed previously (50

percent at LNG/LHG facilities and 20 percent at MTR facilities), we derived the annual labor cost savings shown in tables 16 and 17.

TABLE 16—ANNUAL LNG/LHG FACILITY LABOR COST SAVINGS WITH RESPECT TO ELECTRONIC AND OPERATIONS MANUALS (AND AMENDMENTS) THAT WILL NOT HAVE TO BE PLACED AT MARINE TRANSFER AREAS

Labor of storing manuals and amendments	Instances of documents per year	Electronic document use at marine transfer areas (%)	Labor costs	Total annual labor cost savings
Manuals	18	50	54.47	\$490.23
Amendments	42	50	54.47	1,143.87
Total				1,634.10

TABLE 17—ANNUAL MTR FACILITY LABOR COST SAVINGS WITH RESPECT TO OPERATIONS MANUALS (AND AMENDMENTS) THAT WILL NOT HAVE TO BE PLACED AT MARINE TRANSFER AREAS

Labor of storing manuals and amendments	Instances of documents per year	Electronic document use at marine transfer areas	Labor costs	Total annual labor cost savings
Manuals	261	20	54.47	\$2,843.33
Amendments	442	20	54.47	4,815.15
Total				7,658.48

Tables 18 and 19 show the total annual cost savings for LNG/LHG and MTR facilities in both nominal and

discounted terms. We found these savings estimates by summing the

previous tables for the total number of facilities by respective facility type.

TABLE 18—ANNUAL COST SAVINGS FOR LNG/LHG FACILITIES ON A NOMINAL BASIS AND DISCOUNTED AT 7%

LNG/LHG cost savings	Nominal terms ¹	7% discounted rate
Year 1	\$3,465.19	\$3,238.50
Year 2	3,465.19	3,026.63
Year 3	3,465.19	2,828.63
Year 4	3,465.19	2,643.58
Year 5	3,465.19	2,470.63
Year 6	3,465.19	2,309.00
Year 7	3,465.19	2,157.95
Year 8	3,465.19	2,016.77
Year 9	3,465.19	1,884.83
Year 10	3,465.19	1,761.53
Total	34,651.90	24,338.04
Annualized		3,465.19

¹ Sum of tables 16 (\$1,634.10), table 14 (\$241.98), table 12 (\$1,010.59) and table 10 (\$578.52) equals \$3,465.19.

TABLE 19—ANNUAL COST SAVINGS FOR MTR FACILITIES ON A NOMINAL BASIS AND DISCOUNTED AT 7%

MTR cost savings	Nominal terms ¹	7% discounted rate
Year 1	\$35,929.02	\$33,578.53
Year 2	35,929.02	31,381.80
Year 3	35,929.02	29,328.78
Year 4	35,929.02	27,410.08
Year 5	35,929.02	25,616.90
Year 6	35,929.02	23,941.02
Year 7	35,929.02	22,374.79
Year 8	35,929.02	20,911.02
Year 9	35,929.02	19,543.01
Year 10	35,929.02	18,264.49

TABLE 19—ANNUAL COST SAVINGS FOR MTR FACILITIES ON A NOMINAL BASIS AND DISCOUNTED AT 7%—Continued

MTR cost savings	Nominal terms ¹	7% discounted rate
Total	359,290.22	252,350.42
Annualized		35,929.02

¹ Sum of tables 17 (\$7,658.48), table 15 (\$2,120.18), table 13 (\$14,311.83) and table 11 (\$11,838.53) equals \$35,929.02.

Table 20 shows the total private sector cost savings.

TABLE 20—TOTAL PRIVATE SECTOR COST SAVINGS ON A NOMINAL BASIS AND DISCOUNTED AT 7%

Total private sector cost savings	Nominal terms	7% discounted rate
Year 1	\$39,394.21	\$36,817.02
Year 2	39,394.21	34,408.43
Year 3	39,394.21	32,157.41
Year 4	39,394.21	30,053.66
Year 5	39,394.21	28,087.53
Year 6	39,394.21	26,250.03
Year 7	39,394.21	24,532.74
Year 8	39,394.21	22,927.79
Year 9	39,394.21	21,427.84
Year 10	39,394.21	20,026.02
Total	393,942.12	276,688.46
Annualized		39,394.21

Coast Guard Cost Savings

Under current regulations, the COTP examines the Operations Manuals, Emergency Manuals, and amendments that are submitted by LNG and LHG facilities, and the Operations Manuals and amendments that are submitted by MTR facilities. After examining LNG and LHG documentation, the COTP finds the document either adequate or inadequate. If the document is found adequate, the current regulation requires that “the Captain of the Port returns one copy to the [facility] owner or operator marked ‘Examined by the Coast Guard.’”¹⁰⁰ The same applies to MTR facility documentation. If the document is found to be adequate, the current regulation requires that “the COTP . . . return one copy of the manual marked ‘Examined by the Coast Guard.’”¹⁰¹ All these copies are currently submitted to the COTP by facilities in the form of two printed copies.

Cost Savings From the Option for the COTP To Return Electronic Documents to Facility Operators if Those Documents Were Electronically Submitted

The COTP will return a notification explaining why a given manual does not meet the requirements of the part and any suggested corrections needed to the

facilities in either electronic or printed format, depending on the format in which the document was received.¹⁰² In rare cases when there are extensive suggested edits, the COTP may choose to send back a copy of the manual with the corrections noted. If a document was received from a facility in printed format, then it likely will not be returned to the facility in electronic format. As previously stated, Coast Guard SMEs estimated that 90 percent of LNG/LHG facility documents will be received in electronic format, and 75 percent of MTR facility documents will be. We estimated that this is the same percentage the COTP will return to the facilities in electronic format.

The cost savings the Coast Guard will experience from returning electronic responses will be the shipping and handling costs saved by not having to mail back the printed editions of the Operations Manuals, Emergency Manuals, and amendments. The Coast

¹⁰² The regulatory text in title 33 of the CFR (127.019(e), 154.320(c)(2), and 154.325(d) through (e)) states that the COTP will notify the facility with an explanation of why it does not meet this part. The form of the notification will depend on the complexity and/or of the inadequacies that need to be addressed. If there are many that need to be addressed it may prove more logical to return a marked copy of the manual to the facility owner or operator. Some types of inadequacies, for example diagrams, illustrations, and/or maps that may need to be modified may also prove easier to communicate with a manual that is marked, as opposed to a notification.

Guard, like the private sector, will likely use a mailing service such as UPS or FedEx Ground shipping. Since the same packages will be returned to the facilities, the Coast Guard’s mailing costs will likely be the same as the private sector’s. For a 0.5-inch manual, this is estimated to total \$9.25, and for a 5-page amendment, this is estimated to total \$8.23.¹⁰³

Because labor costs differ between the Coast Guard and the private sector, labor-handling costs do also. The Coast Guard personnel expected to package documents to return to facilities will be either E-4s or E-5s. According to the latest available Commandant Instruction, the fully loaded hourly rate for an E-4 is \$45.00, and for an E-5 \$54.00.¹⁰⁴ We assumed that it takes the Coast Guard the same amount of time to pack and prepare a 0.5-inch manual and a 5-page amendment for shipping as it takes the private sector: 5 Minutes, rounded to the closest whole minute, for a 0.5-inch manual, and 4 minutes for a 5-page amendment.¹⁰⁵ ¹⁰⁶ We estimated labor costs at \$3.60 for an E-4 and \$4.32

¹⁰³ Source: Table 9.

¹⁰⁴ Commandant Instruction 7310.1U, dated 27 February 2020, page 2 under the “Hourly Standard Rates for Personnel” section, https://media.defense.gov/2020/Mar/04/2002258826/-1/-1/0/CI_7310_1U.PDF. As of April 19, 2021, this was the latest edition of this document available.

¹⁰⁵ 5 divided by 60 equals 0.08 hours.

¹⁰⁶ 4 divided by 60 equals 0.07 hours.

¹⁰⁰ 33 CFR 127.019(c).

¹⁰¹ 33 CFR 154.300(e).

for an E-5 to mail a 0.5-inch manual.¹⁰⁷ We estimated that it costs \$3.15 for an E-4 and \$3.78 for an E-5 to mail a 5-page amendment.¹⁰⁸ We took an average of the E-4 and E-5 rates, thus deriving an estimated labor cost of \$3.96 per 0.5-inch manual and \$3.47 per 5-page amendment.¹⁰⁹ Thus, the average total cost to mail a 0.5-inch manual is \$13.21, and to mail a 5-page amendment is \$11.70. These costs are summarized in table 21.

TABLE 21—COAST GUARD SHIPPING AND HANDLING COSTS

Shipping and handling costs			
	Mailing costs	Handling (labor costs)	Total
Manuals	\$9.25	\$3.96	\$13.21
Amendments	8.23	3.47	11.70

In addition to the documents that have been found adequate, there is the issue of those documents that are deemed inadequate by the COTP. The current regulations require the COTP to notify the facility in writing.¹¹⁰ This notification usually comes in the form of a marked-up copy of the document, showing what needs to be corrected.

This final rule provides the COTP the option to respond electronically or in print to either electronic or printed copies from the facility operators. The COTP will not be obligated to respond in the same format that the manual is submitted.

In summary, the cost savings for the Coast Guard will arise from the reduced

number of printed Operations Manuals, Emergency Manuals, and amendments returned to LNG, LHG, and MTR facilities. These savings can be broken out into the labor costs and the shipping costs. Table 22 shows these annual cost saving calculations.

TABLE 22—COAST GUARD ANNUAL COST SAVINGS FROM SHIPPING AND HANDLING COSTS FOREGONE

Cost savings to the coast guard	Instances of documents per year ¹	Expected rate of electronic documents production (%)	Shipping and handling costs	Annual cost savings
LNG/LHG Manuals Submitted	18	90	\$13.21	\$214.00
LNG/LHG Amendments Submitted	42	90	11.70	442.26
MTR Manuals Submitted	261	75	13.21	2,585.86
MTR Amendments Submitted	442	75	11.70	3,878.55
LNG/LHG Manuals Found Inadequate	18	² 27	13.21	64.20
LNG/LHG Amendments Found Inadequate	42	³ 14	11.70	68.80
MTR Manuals Found Inadequate	261	⁴ 23	13.21	793.00
MTR Amendments Found Inadequate	442	⁵ 11	11.70	568.85
Total				8,615.52

¹ See tables 12 and 13.

² 90% (percentage of LNG/LHG manuals sent electronically) times 30% (percentage of LNG/LHG manuals found inadequate) equals 27%.

³ 90% (percentage of LNG/LHG amendments sent electronically) times 15% (percentage of LNG/LHG amendments found inadequate) equals 14%.

⁴ 75% (percentage of MTR manuals sent electronically) times 30% (percentage of MTR manuals found inadequate) equals 23%.

⁵ 75% (percentage of MTR amendments sent electronically) times 15% (percentage of MTR amendments found inadequate) equals 11%.

The summary of these calculations for 10 years is provided in table 23.

TABLE 23—COAST GUARD COSTS SAVINGS ON A NOMINAL BASIS AND DISCOUNTED AT 7%

Coast guard cost savings	Nominal terms	7% Discounted rate ¹
Year 1	\$8,615.52	\$8,051.89
Year 2	8,615.52	7,525.13
Year 3	8,615.52	7,032.83
Year 4	8,615.52	6,572.74
Year 5	8,615.52	6,142.75
Year 6	8,615.52	5,740.88
Year 7	8,615.52	5,365.31
Year 8	8,615.52	5,014.31

¹⁰⁷ 0.08 multiplied by \$45 equals \$3.60 and 0.08 multiplied by \$54 equals \$4.32.

¹⁰⁸ 0.07 multiplied by \$45 equals \$3.15 and 0.07 multiplied by \$54 equals \$3.78.

¹⁰⁹ Both of these figures are rounded to the nearest whole cent.

¹¹⁰ 33 CFR 154.320(a)(1) states, "The COTP will notify the facility operator [of an MTR facility] in writing of any inadequacies." 33 CFR 127.019(d)

states, "If the COTP finds that the Operations Manual or the Emergency Manual does not meet this part, the Captain of the Port will return the manual with an explanation of why it does not meet this part [to the LNG or LHG facility]."

TABLE 23—COAST GUARD COSTS SAVINGS ON A NOMINAL BASIS AND DISCOUNTED AT 7%—Continued

Coast guard cost savings	Nominal terms	7% Discounted rate ¹
Year 9	8,615.52	4,686.27
Year 10	8,615.52	4,379.69
Total	86,155.20	60,511.81
Annualized .....	.....	8,615.52

¹ In 2020 dollar terms.

Summary of Cost Savings in nominal and discounted terms, in table 24.
 We show the total cost savings, for both the private sector and government,

TABLE 24—TOTAL COST SAVINGS (PRIVATE SECTOR PLUS GOVERNMENT) ON A NOMINAL BASIS AND DISCOUNTED AT 7%

Total private sector + coast guard cost savings	Nominal terms	7% Discounted rate ¹
Year 1	\$48,009.73	\$44,868.91
Year 2	48,009.73	41,933.56
Year 3	48,009.73	39,190.24
Year 4	48,009.73	36,626.39
Year 5	48,009.73	34,230.28
Year 6	48,009.73	31,990.91
Year 7	48,009.73	29,898.05
Year 8	48,009.73	27,942.10
Year 9	48,009.73	26,114.11
Year 10	48,009.73	24,405.71
Total	480,097.32	337,200.27
Annualized .....	.....	48,009.73

¹ In 2020 dollar terms.

B. Small Entities

Under the Regulatory Flexibility Act, we have considered whether this final rule will have a significant economic impact on a substantial number of small entities. 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 will allow MTR facilities and LNG and LHG facilities to submit their Operations Manuals, Emergency Manuals, and amendments in electronic format. These facilities will experience a cost savings. We estimate that this final rule will provide cost savings to 703 MTR facilities, and 60 LNG and LHG facilities.

This final rule will reduce the time and cost burden for regulated LNG, LHG, and MTR facilities to submit Operations Manuals and Emergency Manuals and amendments for the purposes of 33 CFR parts 127, 154, and 156. The final rule enables these facilities to submit the required documentation electronically, enabling facilities to save time associated with mailing and processing printed

manuals. In addition, it permits facilities to place electronic copies of their manuals and amendments at their marine transfer areas, resulting in a savings to facilities that choose this route because they will not have to print manuals and amendments and place them physically at those locations.

We examined the LNG/LHG and MTR facility populations separately to provide a detailed analysis. With respect to the LNG/LHG population, we estimate that 54 facilities a year will be impacted by the final rule, or 45 percent of the 121 total number of LNG and LHG facilities.¹¹¹ A search of the MISLE database revealed a total of 85 unique owners for these 121 LNG and LHG facilities.¹¹² Of these unique owners, 15 were found to be small businesses, as defined by the Small Business Administration (SBA) “Table of Small

¹¹¹ Of the 60 LNG/LHG facilities, we assume 54 will submit their documentation in electronic format and 6 in print. Of the 703 MTR facilities, 527 are expected to submit their documents in electronic format and 176 in print. See the discussion under the “Affected Population” section of this RA. 54 divided by 121 equals 45 percent.

¹¹² We conducted this search of the MISLE database in mid-December 2020.

Size Standards.”¹¹³ We were unable to find employee or revenue information for 16 entities. Entities for which data was not available were assumed to be small entities. Assuming that the proportion of owners is directly related to the number of impacted owners, taking 45 percent of the 85 unique owners yields a total of 38 unique owners who will be affected by the final rule.¹¹⁴ We estimate total nominal cost savings per year for LNG/LHG facilities to be \$3,465 per year, as shown in table 18.¹¹⁵ This totals \$91.18 per owner per year.¹¹⁶ There were no small LNG/LHG facilities for which gross sales data existed for which costs savings exceeded 1 percent of gross revenue.

With respect to the MTR facility population, we estimate that 527

¹¹³ As of the latest available SBA “Table of Size Standards” at the time we performed this analysis. That table was effective as of Aug. 19, 2019 and is available at <https://www.sba.gov/document/support-table-size-standards>.

¹¹⁴ Rounded to nearest whole number. 85 multiplied by 45 percent equals 38.25 (rounded to 38).

¹¹⁵ From table 18, rounded to closest whole dollar.

¹¹⁶ \$3,465 divided by 38 equals \$91.18 per impacted owner per year.

facilities will be impacted per year.¹¹⁷ As we found the total number of MTR facilities to be 2,497, the proportion of impacted facilities is 21 percent.¹¹⁸ Our search of the MISLE database found 1,390 unique owners of all MTR facilities.¹¹⁹ We reduced the 1,390 to a representative sample.¹²⁰ Applying this formula, while assuming a 95-percent confidence interval, yielded a sample size of 385. We base our small business analysis on this sample size.¹²¹ Of the 385 facilities, we estimate that 276 should be considered small. Of those 276 facilities, 145 were small (in terms of either gross sales or number of employees) according to the definition provided by the SBA. Sales and employee data was not available for the remaining 131 facilities, so we assumed that these facilities were also small.

We estimate the total number of impacted unique MTR facility operators at 292.¹²² We estimate the total cost savings, as shown in table 19, to be \$35,929 per year for all MTR facilities per year.¹²³ Hence, we estimate that the projected cost savings per impacted facility will be \$123.05 per year.¹²⁴ Assuming that the proportion of small facilities among the 292 total impacted facilities reflects the ratio of small facilities in the sample derived by the application of the sample size estimated (72 percent), we estimate a total population of 210 small facilities.¹²⁵ For the 145 small MTR facilities for which gross sales data existed, there were no

¹¹⁷ See the discussion under the “Affected Population” section of this RA.

¹¹⁸ Rounded to closest whole percentage point (527 divided by 2,497 equals 21.1 percent). This assumes that this ratio, based on historical MISLE data over the past 10 years, remains constant over the future.

¹¹⁹ We conducted this search of the MISLE database in Mid-December 2020.

¹²⁰ We used two equations and then took the higher value, as derived from them, rounded up to the nearest whole number. The two equations are as follows: $[Z^2 * p * q] / (e^2)$ and $(N / [1 + (N * (e^2))])$. Each term in these equations is defined as follows: $Z=1.96$, $e=0.05$, $p=0.5$, $q=0.5$, $N = X$, the relevant number of observations. The application of the two equations yields the following numbers: $[(1.96^2) * 0.5 * 0.5] / (0.05^2) = 310.6$ (rounded to 311) and $1,390 / [1 + (1,390 * (0.05^2))] = 384.16$ (rounded to 385). As 385 is the higher number we select it as our relevant sample size.

¹²¹ We picked the 385 from the 1,390 by assigning the 1,390 a randomly selected number between 0 and 1 using the random number generator in Excel and then picking the first 385 facilities, from highest to lowest, based on the number the random number generator created for each.

¹²² 1,390 multiplied by 21 percent equals 291.9.

¹²³ From table 19, rounded to closest whole dollar.

¹²⁴ \$35,929 divided by 292 equals \$123.05.

¹²⁵ 276 divided by 385 equals 71.7 percent. 292 multiplied by 72 percent equals 210.24.

facilities for which costs savings exceeded 1 percent of gross revenue.

Based on the information provided above, the Coast Guard certifies under 5 U.S.C. 605(b) that this final rule will not have a significant economic impact on a substantial number of small entities.

C. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, we want to assist small entities in understanding this final rule so that they can better evaluate its effects on them and participate in the rulemaking. The Coast Guard will not retaliate against small entities that question or complain about this final rule or any policy or action of the Coast Guard.

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).

D. Collection of Information

This final rule calls for a revision to two collections of information under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520. As defined in 5 CFR 1320.3(c), “collection of information” comprises reporting, recordkeeping, monitoring, posting, labeling, and other similar actions. The title and description of the collections of information, a description of those who must collect the information, and an estimate of the total annual burden follow. The estimate covers the time for reviewing instructions, searching existing sources of data, gathering and maintaining the data needed, and completing and reviewing the collection.

This final rule changes the collections of information required for waterfront facilities handling LNG and LHG, described in OMB Control Number 1625–0049, and facilities transferring oil or hazardous materials in bulk, described in OMB Control Number 1625–0093. This final rule does not change the content of responses, nor the estimated burden of each response, but decreases the total annual burden for both of these collections of information. The Coast Guard will submit this collection of information amendments to OMB for its review.

Title: Waterfront Facilities Handling Liquefied Natural Gas (LNG) and Liquefied Hazardous Gas (LHG).

OMB Control Number: 1625–0049.

Summary of the Collection of Information: LNG and LHG present a risk to the public when transferred at waterfront facilities. Title 33 CFR part 127 prescribes safety standards for the design, construction, equipment, operations, maintenance, personnel training, and fire protection at waterfront facilities handling LNG or LHG. The facility operators must submit Operational Manuals, Emergency Manuals, and amendments to the Coast Guard.

Need for Information: The information in an Operations Manual is used by the Coast Guard to ensure the facility follows proper and safe procedures for handling LNG and LHG and to ensure facility personnel are trained and follow proper and safe procedures for transfer operations. The Emergency Manual is used by the Coast Guard to ensure the facility follows proper procedures in the event of an emergency during transfer operations. These procedures include actions in the event of a release, fire, or other event that requires an emergency shutdown, first aid, or emergency mooring or unmooring of a vessel. Operations Manuals and Emergency Manuals are updated periodically by amendments to ensure they are kept current to reflect changes in procedures, equipment, personnel, and telephone number listings.

Use of Information: The Coast Guard uses this information to monitor compliance with the rule.

Description of the Respondents: Waterfront Facilities Handling LNG and LHG.

Number of Respondents: This final rule will not have any impact on the number of respondents. Based on the Coast Guard’s MISLE database, there are currently 121 LNG and LHG facilities operating in the United States and its territories.¹²⁶ The final rule will reduce the number of hours spent assembling manuals and amendments, submitting them to the COTP, updating numerous copies of each manual that is amended, and ensuring that the most recent version of the manual with all amendments is available to the PIC.

¹²⁶ In the most current collection of information, the number of LNG and LHG facilities was 108. The current figure of 121 reflects an increase in this population; it is not due to a change made by the final rule. The relevant collection of information, 1625–0049, can be found in *Regulations.Gov* (<https://www.regulations.gov/docket?D=USCG-2019-0353>).

Frequency of Response: The number of responses per year for this final rule will vary by participating facilities. The Coast Guard anticipates that each new participant will submit an Operations Manual and Emergency Manual once when the new facility becomes operational. The operator will submit updates, in the form of amendments, to the manual whenever there is a significant change.

The final rule does not increase the number of annual responses. The number of responses since the last collection of information, however, has increased, because the population size since that time has increased. The most recently approved collection of information estimates 3,356 annual responses for all LNG and LHG facilities.¹²⁷ Under the final rule, the annual responses are estimated to be 3,502.¹²⁸ This difference is due to a change in the populations as opposed to other impacts of the rulemaking.

Burden of Response: The burden of response will decrease due to the fact that facility operators will no longer need to print the manuals that will be submitted, mail them to the COTP, and place them at the marine transfer areas of the facilities (for those manuals and amendments that will be kept at marine transfer areas in electronic format).

In the latest available collection of information, using the new LNG and LHG population of 121 instead of 108, along with the per-response burden hours in that collection, the total burden hours for both LNG and LHG facilities, per year, is 6,768. The hours per response for the development of an Operations Manual or Emergency Manual is 150 hours, and the hours per response for Operations Manual or Emergency Manual amendments is 2 hours.¹²⁹ The final rule will reduce the burden hours for Operations Manuals and Emergency Manuals and amendments for facility operators submitting their documents to the COTP

¹²⁷ Annual responses are defined as not only the number of Operations Manuals and Emergency Manuals and amendments but also other documentation such as letters of intent and declarations of intent. The full list of documents that constitute responses can be found in the collection of information (1625-0049).

¹²⁸ Ibid.

¹²⁹ The relevant collection of information is 1625-0049. The 150- and 2-hour figures can be seen in *Regulations.Gov* (specifically under <https://www.regulations.gov/docket?D=USCG-2019-0353>), in the supporting document "1625-0049_SS_r0_2019_calcs-sheet_App-A-to-C", pages 2-3. In that document, it can be seen that the total hours per response, for both LNG and LHG facilities, is 150 hours for development of Operations Manuals and Emergency Manual Amendments and 2 hours for Operations Manual and Emergency Manual amendments.

and storing their documentation at their marine transfer areas in electronic format. This total time saved time is estimated at 33 hours per year. Thus, the Coast Guard estimates that 33 burden hours will be eliminated per year.

Estimate of Total Annual Burden: The final rule will decrease the total burden by 33 hours, from 6,768 hours to 6,735.

Title: Facilities Transferring Oil or Hazardous Materials in Bulk.

OMB Control Number: 1625-0093.

Summary of the Collection of Information: The Operations Manual regulations in 33 CFR 154.300 through 154.325 establish procedures for facilities that transfer oil or hazardous materials, in bulk, to or from a vessel with a capacity of 39.75 cubic meters (250 barrels) or more. The facility operator must submit Operations Manuals and associated amendments to the Coast Guard.

Need for Information: The Coast Guard uses the information in an Operations Manual to ensure that facility personnel follow proper and safe procedures for transferring oil or hazardous materials and to ensure facility personnel follow proper and safe procedures for dealing with any spills that occur during a transfer. Operations Manuals are updated periodically by amendments to ensure they are kept current to reflect changes in procedures, equipment, personnel, and telephone number listings.

Use of Information: The Coast Guard uses this information to monitor compliance with the rule.

Description of the Respondents: Facilities transferring oil or hazardous materials in bulk.

Number of Respondents: This final rule will not have any impact on the number of respondents. Based on the Coast Guard's MISLE database, there are currently 2,497 oil and hazardous material facilities operating in the United States and its territories. The electronic submission opportunity in this final rule will reduce the number of hours spent printing the manuals and amendments, submitting them to the COTP, updating numerous copies of each manual following amendment, and ensuring the most recent printed version of the manual, with all amendments, is available to the PIC.

Frequency of Response: The number of responses per year for this final rule will vary by participating facilities. The Coast Guard anticipates that each new participant will submit an Operations Manual once when the new facility becomes operational. The operator will submit updates to the manual whenever

there is a significant change. Based on historical information, the Coast Guard expects facilities to submit 261 new Operations Manuals and 442 amendments per year. The number of Letters of Intent submissions is 261, equivalent to the number of Operations Manuals. The current collection of information assumes that the number of Letters of Intent equals the number of Operations Manual submissions. These figures are derived from the MISLE database. Hence, the total number of responses is 964 per year.

Burden of Response: The final rule gives regulated facilities the option of submitting Operations Manuals and associated amendments to the COTP, at their discretion, in either print or electronic format. For those facilities submitting documentation in electronic format, the burden of response will decrease due to eliminating the need to print and mail these manuals. For facility operators placing electronic copies of their documents at their marine transfer areas, costs associated with printing copies and labor time related to placing them there will be saved.

According to the latest collection of information, 115 hours are required to prepare an Operations Manual; 16 hours are required to prepare an amendment; and 2 hours are required to submit a Letter of Intent.¹³⁰ Assuming that there are 261 Operations Manual submissions, 442 amendment submissions, and 261 Letters of Intent, the total of annual burden hours in that collection of information is 37,609.¹³¹

This final rule will reduce the burden hours for facilities because it will permit them to submit their documentation in electronic format and permit them to store their documents at their marine transfer areas in electronic format. The estimated burden hours reduced as a result is 249 hours per year.

Estimate of Total Annual Burden: The final rule will decrease the total burden hours by 249, from 37,609 hours to 37,360 per year.

As required by 44 U.S.C. 3507(d), we submitted a copy of the proposed rule to OMB for its review of the reduction in the total annual burden for OMB Control Number 1625-0049. The Coast Guard did not receive any comments on the proposed rule regarding either collection of information request; accordingly no changes have been made. We will submit a copy of the published final rule to OMB for their

¹³⁰ OMB Control Number: 1625-0093.

¹³¹ The existing collection of information states that the Letters of Intent submissions equal the number of Operation Manual submissions.

review and approval of the changes to both existing collections of information. You are not required to respond to a collection of information unless it displays a currently valid OMB control number.

E. Federalism

A rule has implications for federalism under Executive Order 13132 (Federalism) if it has a substantial direct effect on 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 Executive Order 13132 and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132. Our analysis follows.

This final rule amends the Operations Manual and Emergency Manual submission procedures and COTP approval process for facilities that transfer LNG, LHG, oil, or hazardous material, in bulk, to or from a vessel. These changes involve procedural requirements for the Coast Guard's own approval process, safety risk analysis, and appeal process for a facility that transfers LNG, LHG, oil, or hazardous material in bulk. The changes in this final rule do not conflict with State interests. For individual States, or their political subdivisions, any requirements for facilities to submit their Operations Manuals or Emergency Manuals to them for review or approval will be unaffected by this rule.

Pursuant to 46 U.S.C. 70011(b)(1), Congress has expressly authorized the Coast Guard to establish "procedures, measures and standards for the handling, loading, unloading, storage, stowage and movement on a structure of explosives or other dangerous articles and substances, including oil or hazardous material." The Coast Guard affirmatively preempts any State rules related to these procedures, measures, and standards (*See United States v. Locke*, 529 U.S. 89, 109–110 (2000)). Therefore, because the States may not regulate within these categories, this rule is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

F. Unfunded Mandates

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 million (adjusted for inflation) or more in any one year. Although this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

G. Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630 (Governmental Actions and Interference with Constitutionally Protected Property Rights).

H. Civil Justice Reform

This final rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, (Civil Justice Reform), to minimize litigation, eliminate ambiguity, and reduce burden.

I. Protection of Children

We have analyzed this final rule under Executive Order 13045 (Protection of Children from Environmental Health Risks and Safety Risks). This rule is not an economically significant rule and will not create an environmental risk to health or risk to safety that might disproportionately affect children.

J. Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), because it will 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.

K. Energy Effects

We have analyzed this rule under Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use). We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

L. Technical Standards

The National Technology Transfer and Advancement Act, codified as a note to 15 U.S.C. 272, directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through OMB, with an explanation of why using

these standards will be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (for example, specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This final rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

M. Environment

We have analyzed this final rule under Department of Homeland Security Management Directive 023–01, Rev. 1, associated implementing instructions and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. 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.

This rule is categorically excluded under paragraphs A3 (part d) and L54 of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. Paragraph A3 (part d) pertains to the promulgation of rules, issuance of rulings or interpretations, and the development and publication of policies, orders, directives, notices, procedures that interpret or amend an existing regulation without changing its environmental effect, and paragraph L54 pertains to regulations which are editorial or procedural. This rule allows facilities that transfer oil, hazardous materials, LNG, or LHG in bulk to submit and maintain the facility Operations Manuals and Emergency Manuals electronically or in print, and amends the COTP examination procedures for those documents, thus enabling electronic communication between the facility operators and the Coast Guard, which will reduce the time and cost associated with mailing printed manuals. This action is consistent with the Coast Guard's port and waterway security and marine safety missions.

List of Subjects

33 CFR Part 127

Fire prevention, Harbors, Hazardous substances, Natural gas, Reporting and recordkeeping requirements, Security measures.

33 CFR Part 154

Alaska, Fire prevention, Hazardous substances, Oil pollution, Reporting and recordkeeping requirements.

33 CFR Part 156

Hazardous substances, Oil pollution, Reporting and recordkeeping requirements, Water pollution control.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR parts 127, 154, and 156 as follows:

PART 127—WATERFRONT FACILITIES HANDLING LIQUEFIED NATURAL GAS AND LIQUEFIED HAZARDOUS GAS

■ 1. The authority citation for part 127 is revised to read as follows:

Authority: 46 U.S.C. 70034; 46 U.S.C. Chapter 701; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.2.

■ 2. Revise § 127.019 to read as follows:

§ 127.019 Operations Manual and Emergency Manual: Procedures for examination.

(a) The owner or operator of an active facility must submit an Operations Manual and Emergency Manual in printed or electronic format to the COTP of the zone in which the facility is located.

(b) At least 30 days before transferring LHG or LNG, the owner or operator of a new or an inactive facility must submit an Operations Manual and Emergency Manual in printed or electronic format to the Captain of the Port of the zone in which the facility is located, unless the manuals have been examined and there have been no changes since that examination.

(c) Operations Manuals and Emergency Manuals submitted after September 10, 2021 must include a date, revision date or other revision-specific identifying information.

(d) If the COTP finds that the Operations Manual meets § 127.305 or § 127.1305 and that the Emergency Manual meets § 127.307 or § 127.1307, the COTP will provide notice to the facility stating each manual has been examined by the Coast Guard. This notice will include the revision date of the manual or other revision-specific identifying information.

(e) If the COTP finds that the Operations Manual or the Emergency

Manual does not meet this part, the COTP will notify the facility with an explanation of why it does not meet this part.

■ 3. In § 127.309, revise the introductory text and paragraph (a) to read as follows:

§ 127.309 Operations Manual and Emergency Manual: Use.

The operator must ensure that— (a) LNG transfer operations are not conducted unless the person in charge of transfer for the waterfront facility handling LNG has in the marine transfer area a readily available printed or electronic copy of the most recently examined Operations Manual and Emergency Manual. Electronic devices used to display the manuals must comply with applicable electrical safety standards in this part;

■ 4. In § 127.1309, revise the introductory text and paragraph (a) to read as follows:

§ 127.1309 Operations Manual and Emergency Manual: Use.

The operator must ensure that— (a) LHG transfer operations are not conducted unless the person in charge of transfer for the waterfront facility handling LHG has a printed or electronic copy of the most recently examined Operations Manual and Emergency Manual readily available in the marine transfer area. Electronic devices used to display the manuals must comply with applicable electrical safety standards in this part;

PART 154—FACILITIES TRANSFERRING OIL OR HAZARDOUS MATERIAL IN BULK

■ 5. The authority citation for part 154 is revised to read as follows:

Authority: 33 U.S.C. 1321(j)(1)(C), (j)(5), (j)(6), and (m)(2); 46 U.S.C. 70011, 70034; sec. 2, E.O. 12777, 56 FR 54757; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.2. Subpart F is also issued under 33 U.S.C. 2735. Vapor control recovery provisions of Subpart P are also issued under 42 U.S.C. 7511b(f)(2).

■ 6. Amend § 154.300 as follows: ■ a. Revise paragraph (a) introductory text and add paragraph (a)(4); ■ b. In paragraphs (b) and (c), remove the word “shall” and add, in its place, the word “must”; and ■ c. Revise paragraphs (d), (e), and (f). The additions and revisions read as follows:

§ 154.300 Operations manual: General.

(a) The facility operator of each facility to which this part applies must

submit to the COTP of the zone(s) in which the facility operates, with the letter of intent, an Operations Manual in printed or electronic format that:

(4) After September 10, 2021, includes a date, revision date, or other revision-specific identifying information.

(d) In determining whether the manual meets the requirements of this part and part 156 of this chapter, the COTP will consider the products transferred, and the size, complexity, and capability of the facility.

(e) If the manual meets the requirements of this part and part 156 of this chapter, the COTP will provide notice to the facility stating the manual has been examined by the Coast Guard as described in § 154.325. The notice will include the date, revision date of the manual, or other revision-specific identifying information.

(f) The facility operator must ensure printed or electronic copies of the most recently examined Operations Manual, including any translations required by paragraph (a)(3) of this section, are readily available for each facility person in charge while conducting a transfer operation. Electronic devices used to display the manual must comply with applicable electrical safety standards in this part;

■ 7. Amend § 154.320 as follows: ■ a. Revise paragraphs (a), (b), and (c); and ■ b. Add paragraph (e).

The additions and revisions read as follows:

§ 154.320 Operations manual: Amendment.

(a) Using the following procedures, the COTP may require the facility operator to amend the operations manual if the COTP finds that the operations manual does not meet the requirements in this subchapter:

(1) The COTP will notify the facility operator in writing of any inadequacies in the Operations Manual. The facility operator may submit information, views, and arguments regarding the inadequacies identified, and proposals for amending the Manual, in print or electronically, within 45 days from the date of the COTP notice. After considering all relevant material presented, the COTP will notify the facility operator of any amendment required or adopted, or the COTP will rescind the notice. The amendment becomes effective 60 days after the facility operator receives the notice, unless the facility operator petitions the

Commandant to review the COTP's notice, in which case its effective date is delayed pending a decision by the Commandant. Petitions to the Commandant must be submitted in writing via the COTP who issued the requirement to amend the Operations Manual.

(2) If the COTP finds that there is a condition requiring immediate action to prevent the discharge or risk of discharge of oil or hazardous material that makes the procedure in paragraph (a)(1) of this section impractical or contrary to the public interest, the COTP may issue an amendment effective on the date the facility operator receives notice of it. In such a case, the COTP will include a brief statement of the reasons for the findings in the notice. The owner or operator may petition the Commandant to review the amendment, but the petition does not delay the amendment.

(b) The facility operator may propose amendments to the operations manual by:

(1) Submitting any proposed amendment and reasons for the amendment to the COTP in printed or electronic format not less than 30 days before the requested effective date of the proposed amendment; or

(2) If an immediate amendment is needed, requesting the COTP to examine the amendment immediately.

(c) The COTP will respond to proposed amendments submitted under paragraph (b) of this section by:

(1) Notifying the facility operator that the amendments have been examined by the Coast Guard; or

(2) Notifying the facility operator of any inadequacies in the operations manual or proposed amendments, with an explanation of why the manual or amendments do not meet the requirements of this subchapter.

* * * * *

(e) Amendments may be submitted as page replacements or as an entire manual. When an entire manual is submitted, the facility operator must highlight or otherwise annotate the changes that were made since the last version examined by the Coast Guard. A revision date or other revision-specific identifying information must be included on the page replacements or amended manual.

■ 8. Amend § 154.325 as follows:

- a. Remove paragraph (a);
- b. Redesignate paragraphs (b) through (g) as paragraphs (a) through (f), respectively; and
- c. Revise newly redesignated paragraphs (a) through (d) to read as follows:

§ 154.325 Operations manual: Procedures for examination.

(a) Not less than 60 days prior to the first transfer operation, the operator of a new facility must submit, with the letter of intent, an Operations Manual in printed or electronic format to the COTP of the zone(s) in which the facility is located.

(b) After a facility is removed from caretaker status, not less than 30 days prior to the first transfer operation, the operator of that facility must submit an Operations Manual in printed or electronic format to the COTP of the zone in which the facility is located, unless the manual has been previously examined and no changes have been made since the examination.

(c) If the COTP finds that the Operations Manual meets the requirements of this part and part 156 of this chapter, the COTP will provide notice to the facility stating the manual has been examined by the Coast Guard. The notice will include the date, revision date of the manual, or other revision-specific identifying information.

(d) If the COTP finds that the Operations Manual does not meet the requirements of this part or part 156 of this subchapter, the COTP will notify the facility with an explanation of why the manual does not meet the requirements of this subchapter.

* * * * *

PART 156—OIL AND HAZARDOUS MATERIAL TRANSFER OPERATIONS

■ 9. The authority citation for part 156 is revised to read as follows:

Authority: 33 U.S.C. 1321(j); 46 U.S.C. 3703, 3703a, 3715, 70011, 70034; E.O. 11735, 3 CFR 1971–1975 Comp., p. 793; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.2.

■ 10. Revise § 156.120(t)(2) to read as follows:

§ 156.120 Requirements for transfer.

* * * * *

(t) * * *

(2) Has readily available in the marine transfer area a copy of the most recently examined facility operations manual or vessel transfer procedures, as appropriate; and

* * * * *

Dated: August 3, 2021.

J.W. Mauger,
Rear Admiral, U.S. Coast Guard, Assistant Commandant for Prevention Policy.

[FR Doc. 2021–16869 Filed 8–10–21; 8:45 am]

BILLING CODE 9110–04–P

POSTAL SERVICE

39 CFR Part 121

Revised Service Standards for Market-Dominant Mail Products

AGENCY: Postal Service™.

ACTION: Final rule.

SUMMARY: The Postal Service is adding one to two days to the service standards for certain First-Class Mail and Periodicals.

DATES: Effective October 1, 2021.

FOR FURTHER INFORMATION CONTACT: Twana Barber, Strategic Communications Business Partner, at 202–714–3417.

SUPPLEMENTARY INFORMATION:

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I. Introduction

On April 23, 2021, the Postal Service published proposed revisions to First-Class Mail and Periodicals service standards in the **Federal Register** and sought public comment (the Proposed Rule). Service Standards for Market-Dominant Mail Products, 86 FR 21675 (Apr. 23, 2021). These proposed service standards constitute a central element of the Postal Service's *Delivering for America* strategic plan to achieve service excellence and financial sustainability, which was announced on March 23, 2021. The comment period for the Proposed Rule closed on June 22, 2021. Current service standards require the Postal Service to rely heavily on air transportation, using air cargo transportation carriers and commercial passenger air carriers. Air transportation is subject to a number of factors that make it less reliable than surface transportation, such as weather delays, network congestion, and air traffic control ground stops; air transportation also tends to cost significantly more than surface transportation. The basic logic of the changes is that the addition of one or two days to current service standards for First-Class Mail and Periodicals would enable the Postal Service to convey a greater volume of mail within the contiguous United States by surface transportation, thereby achieving a better balance of on-time reliability and cost-effectiveness. It would also enable the Postal Service to

enhance the efficiency of its surface transportation network.

The scope of the changes is also limited. Most First-Class Mail (61 percent) would stay at its current standard, and overall 70 percent of First-Class Mail would be subject to a standard of 3 days or less, consistent with the current standards within the contiguous United States. For the minority of volume that is subject to a shift in service standard, the standard would only change by 1 or 2 days (with most of such volume experiencing a 1-day change). At the same time, the Postal Service would be positioned to provide service on a significantly more predictable basis.

On April 21, 2021, the Postal Service submitted a request to the Postal Regulatory Commission (PRC) for an advisory opinion on these service standard changes proposed for First-Class Mail and Periodicals, in accordance with 39 U.S.C. 3661(b). The PRC initiated Docket No. N2021–1, in which it conducted formal hearings with testimony on the record in order to consider the Postal Service’s request. A number of interested persons and entities intervened and conducted discovery to probe the Postal Service’s request and evidence; the PRC’s Presiding Officer and its appointed Public Representative also actively examined the evidence through the discovery and hearing process. Some intervenors introduced their own rebuttal testimony and other evidence into the record. Several intervenors submitted arguments to the PRC in the form of post-hearing briefs, and many other interested persons did the same through submission of statements of position. The supporting evidence in that proceeding advanced by the Postal Service demonstrated a number of significant benefits from implementing the service standard changes consistent with the policies enumerated in Title 39 of the United States Code: more reliable, predictable, and consistent service for mailers; significant cost savings due to the creation of a more efficient transportation network; longer-term financial sustainability; and further operational benefits in the future.

The proceeding culminated in an advisory opinion issued by the PRC on July 20, 2021, which concluded that the Postal Service’s proposed changes, in principle, are rational and not inconsistent with statutory requirements. The PRC did make a number of recommendations for how the Postal Service should implement its changes. The Postal Service does not concur with many portions of the PRC’s advisory opinion, including how the

PRC analyzed aspects of the evidence presented by the Postal Service. That said, the Postal Service largely agrees with the PRC’s recommendations, and will be following most of them as these new service standards are implemented.

Specifically, the Postal Service agrees with the principle of setting realistic performance targets based on actual operating conditions. The Postal Service has not claimed that it will achieve the 95 percent service performance target set forth in the *Delivering for America* plan instantaneously with the service standard change; rather, the implementation of this change is a necessary step towards ultimately achieving that target, in conjunction with other elements in the plan. Interim targets will be set as the plan is implemented. The Postal Service also agrees with the principles of closely monitoring the implementation process to ensure that the new transportation network is achieving the Postal Service’s goals, measuring customer satisfaction with the changes, and working closely with customers. Successful implementation not only of this service standard change, but of the plan generally, requires careful and systematic operational planning and execution, as well as customer engagement. On the other hand, the Postal Service continues to believe that the econometric analysis that it presented in Docket No. N2021–1—in response to a PRC recommendation in an earlier advisory opinion—constitutes a robust and objective approach to understanding how these service standard changes may impact mail volumes, and therefore the Postal Service does not agree with the PRC’s new recommendation to disregard that analysis.

II. Comments

The Postal Service received about 136,317 comments in response to the Proposed Rule. These responses came overwhelmingly from individuals using very similar, if not verbatim, language, but also from a small variety of other sources, including the Attorneys General of a group of states together with cities, a union, and public advocacy groups. Some of the comments submitted in the Proposed Rule, including those by the Attorneys General and others, are simply copies of the same briefs or statements of position that they had filed in the PRC proceeding, re-submitted to the Postal Service as their comments for this rulemaking. The Postal Service likewise incorporates by reference its Initial Brief and Reply Brief as filed publicly in the PRC proceeding. Initial Brief of the

United States Postal Service, PRC Docket No. N2021–1 (June 21, 2021), <https://go.usa.gov/xF5n4>; Reply Brief of the United States Postal Service, PRC Docket No. N2021–1 (June 25, 2021), <https://go.usa.gov/xF5n2>. While almost all commenters express some form of opposition to the changes, they do not offer clear alternative proposals or revisions.

Many comments raise issues that fall outside the scope of this proceeding. For example, such non-germane issues included:

- Pensions and retiree health benefits;
- Postal banking;
- Appropriations;
- Service standards and/or service performance regarding packages;
- Removal of sorting machines and collection boxes;
- Tenure of the current Postmaster General;
- Potential changes to the retail network; and
- “Privatization” of aspects of (or indeed the entirety of) the Postal Service.

None of these issues, irrespective of their importance, properly fall within the scope of this rulemaking. Changes to the service standards for First-Class Mail and end-to-end Periodicals do fall within the scope of this rulemaking, and comments that focused on such changes were taken into closer account and are addressed below.

Many commenters predict that the changes to service standards for First-Class Mail and end-to-end Periodicals will degrade service, disrupting the provision of goods and services while leaving vulnerable customers and financially stressed business with no viable recourse. By way of support, many of these commenters relate anecdotes of service failures that have impacted them negatively. Other comments raise various concerns that bear at least some relation to the service standard changes at issue, such as the following:

- Impacts of the proposed changes on rural customers;
- The appropriateness of the proposed changes during the pendency of the COVID–19 pandemic;
- The impact of the proposed changes on election mail;
- The purportedly illegitimate prioritizing of cost reduction over delivery speed;
- Loss of mail volume; and
- An alleged strategy to deemphasize First-Class Mail in favor of packages.

As noted, most of the comments are in the form of short letters, using very similar or identical verbiage. Frequently, these form letters stated that

they were opposed to the proposed service standard changes, which they alleged would “permanently” slow down the delivery of much of the mail; that the Postal Service’s focus should be on improving the delays that “plagued” service during the past year; that the Postal Service is “critical” to keeping all citizens connected; and that the commenters “depend on reliable and affordable postal services.” These last views, expressed repeatedly in over 100,000 submissions, confirm that the American public overwhelmingly depends upon reliable and affordable postal services.

To be clear, this does not mean that many comments do not also express an interest in more expeditious service. Yet the comments undeniably recognize that reliability is significant. Further, what they express clearly was the “essential” nature of postal services to the public, and that they want to see these essential services both maintained and improved for years to come. The comments highlight the many aspects of what quality postal services include: reliability and affordability, as well as fast delivery. These sometimes competing qualities must be balanced when designing service standards. 39 U.S.C. 3691(b)(1)(C).

The Postal Service has taken the comments into account, and has determined that they do not furnish a reasonable basis to deviate from the initial set of proposed changes to the service standards in question. In particular, the comments do not present any compelling explanation for why adding a day or two to a minority of First-Class Mail and end-to-end Periodicals volume would make postal services insufficiently speedy, let alone negate the benefits of enhanced reliability, cost effectiveness, and financial sustainability that will inure to all. The Postal Service therefore considers that these new standards properly balance the various statutory policies regarding the design of service standards, and should be implemented.

III. Response to Comments

A. Representative Concerns

To the extent that anecdotes of performance failures relate to First-Class Mail and end-to-end Periodicals, the Postal Service has concluded that the changes will help to ameliorate, rather than worsen, service performance and customer satisfaction. By enacting these service standards, the Postal Service will be able to increase service reliability and thus ensure that its service standards provide customers with more meaningful service

expectations compared to the current standards.

As an initial matter, the Postal Service notes that over 60 percent of First-Class Mail volume will remain unaffected by the changes, and that 70 percent of First-Class Mail volume will continue to have a service standard of 3 days or less. The Postal Service further notes that it has been unable to achieve its service performance targets for many years, and that these service failures illustrate the weakness of the current transportation model. Indeed, the commenters who cite these failures make a strong case for the changes. Bills do not, in general, arrive late due to the insufficient speed of surface transportation, but rather because a mailer relied on a service standard that failed to materialize: had the mailer known that delivery would take longer, the mailer could have mailed sooner. Many of the commenters’ frustrations, in other words, appear to have arisen from the lack of reliability currently ingrained in the transportation network. Service standards that are reliably achieved can be planned around; service failures of fluctuating duration often cannot.

Numerous commenters related anecdotes of service performance failures, complaining of slow delivery times and occasional lost items, which resulted in missed payments on bills, delayed receipt of prescription medications, and other inconveniences. These commenters frequently misconstrue service changes as an attempt to enshrine and regularize the service failures of the past year. As noted above, to the extent that these anecdotes relate to First-Class Mail and end-to-end Periodicals, the Postal Service submits that the changes will help to ameliorate, rather than worsen, service performance and customer satisfaction. Many of the items about which customers express concern, such as bills, tend to ship from locations of relatively close geographical proximity, and as such, they will figure among the group of unaffected mailings. Further, the Postal Service aims, with the new service standards, to deploy a transportation network capable of delivering on time and with consistency, one on which customers can count. Vulnerable customers who rely on the Postal Service for predictable delivery would particularly stand to benefit from the enhanced service reliability that will result from these changes.

Some comments express skepticism of surface transportation. For example, one commenter asserts that “[t]he justification/rationale . . . that airplanes are less reliable than trucks

driving across country is beyond absurd,” and speculated that “[d]elivering [F]irst-[C]lass [M]ail cross country by using only trucks realistically would need a standard ‘maximum’ of 12 days,” and that “[e]ven then the actual could exceed 15 days.” One individual commenter, who intervened in the PRC docket and then re-submitted a copy of his brief from that case, comments that air and surface transportation are comparably reliable, and that, moreover, non-transportation root causes of delay make a 95 percent service performance target impossible. However, experience indicates both that the air transportation network is less reliable than surface transportation, and that by beneficially exploiting the capabilities of the surface transportation network, the Postal Service can achieve a greater degree of reliability. With regard to root causes of delay, the changes afford additional time to rectify certain handling errors and transit failures. Furthermore, these changes form but one part of a broader strategy, set forth in the Postal Service’s comprehensive *Delivering for America* strategic plan, to achieve 95 percent success in the metric of service performance; the Postal Service has not portrayed these changes as sufficient to achieve that end, but rather as a necessary component, among others, to ultimately achieving a 95 percent service level.

The same commenter references certain service standard changes implemented in the years 2000 and 2001, pursuant to which “the Postal Service defined a service standard to match a range of truck driving time.” The commenter then asserts that these former changes did not yield an increase in improved reliability, and suggests that the current changes will likewise fail to realize their stated goal. Nonetheless, the commenter offers little evidence to legitimize any such comparison between two different service standard changes occurring in two vastly different contexts. The current changes are different from and more extensive than the changes implemented two decades ago.

At least one commenter alleges that “[i]f one can plan for 95 percent on-time delivery within a five-day timeframe, one can make a plan for 95 percent on-time delivery within a three-day timeframe.” Actual experience, though, overwhelmingly indicates that the Postal Service cannot, in a cost-effective manner, achieve 95 percent on-time delivery within a 3-day timeframe. The Postal Service has not met its First-Class Mail service targets in years, and these service failures have been particularly

pronounced for mail subject to a 3-day standard. This is because the current First-Class Mail standards require delivery in 3 days or less throughout the continental United States regardless of the distance between origin and destination, a short timeframe that necessitates excessive use of less reliable air transportation. The short timeframe also results in tight timelines for processing and transporting mail, further increasing the risk of service failures caused by contingencies that arise in the normal course of business.

One commenter contends that, if service standards are lengthened, some mail will be delivered early, thereby undercutting the Postal Service's goal of consistency. This type of "inconsistency," however, is not a cause for criticism. The Postal Service seeks to deliver more mail within its stated service performance targets, and thus to avoid delays—especially of the sort of which so many commenters complain.

Some commenters suggest that the Postal Service has illegitimately prioritized cost reduction over speed of delivery. In particular, joint comments by advocacy groups state that "[t]he Postal Service proposal . . . puts costs above the 'expeditious' delivery of mail" in violation of 39 U.S.C. 101(a) and 101(e). The Postal Service stresses that projected cost savings, while important, do not constitute the sole factor motivating the changes. The service standard changes will both reduce cost and improve service reliability, with minimal impact on delivery speed, particularly in light of recent actual performance. Furthermore, the cost savings associated with this plan are not envisioned as ends in themselves; rather, they are intended to ensure that universal service, provided at least 6 days a week at affordable rates, remains financially sustainable into the future. The Postal Service has discretion to balance service reliability, speed, and delivery frequency in light of reasonable rates and best business practices and to account for costs, existing service levels, and various factors that affect the financial viability of the universal service network. The changes represent a considered and reasonable effort to strike an appropriate balance among these considerations.

Numerous commenters question the projected financial benefit associated with the new service standards. These comments frequently predict that the changes will precipitate a "downward spiral," whereby declining service leads to declining demand and thus to declining revenue that outstrips the cost savings. In a similar vein, joint comments by public advocacy groups

conjecture that "by potentially decreasing mail volumes or harming the Postal Service brand, the proposal may not result in cost savings for the Postal Service." An industry mailer in financial services likewise speculates that "the Postal Service may experience significantly more volume loss as a result of the proposed changes than it expects as companies shift to faster, more reliable, and easier to manage electronic channels in response" to the changes. An individual commenter echoes this by stating his belief that the Postal Service has underestimated the volume loss associated with the changes.

No commenter offers evidence to corroborate these suppositions. On the other hand, the Postal Service has, in its proceeding before the PRC, developed record evidence about potential demand effects in the form of an expert econometric analysis. While that analysis forecasts a decline in volume, the forecasted decline is not anticipated to spark a negative feedback loop or to swallow all concomitant benefits. Bolstering this analysis is evidence, in the form of regular customer survey data presented before the PRC, that customers generally place higher value on service reliability than speed. To the extent that some customers may prefer delivery speed faster than these standards, the evidence does not support a conclusion that these customers will prompt a cascade of demand decline, but rather that customer satisfaction will remain stable, if not improve, with more reliable service. Rather than harm the Postal Service's brand, then, the changes should help to alleviate the reputational damage accruing to late and missed deliveries.

Some commenters question the appropriateness of the changes during the pendency of the COVID-19 pandemic, observing the role played by the Postal Service in delivering prescription medications, food and pantry staples, stimulus checks, and coupons. First, package deliveries—including those of prescription medications and food—are not affected by the changes at issue in this rulemaking, which are limited to First-Class Mail and Periodicals. Further, many of the service performance failures raised by other commenters have been exacerbated by the effects of the COVID-19 pandemic on air transportation and by the strain on the Postal Service's surface transportation networks in attempting to shoulder the resulting burden of meeting current service standards. See Postal Regulatory Comm'n, Annual Compliance

Determination Report, Fiscal Year 2020 (Mar. 29, 2021), at 109–16. The evidence indicates that the new changes will help to ameliorate, rather than worsen, these performance failures. The pendency of COVID-19, its disruption of air transportation, and the resultant burden on surface transportation to meet current service standards therefore makes these corrective measures more, not less, urgent.

Many commenters express concern that the changes might negatively impact the delivery of election mail. For example, joint comments by public advocacy groups aver that "[d]elaying mail delivery risks significant numbers of completed ballots that might not be counted because they are delivered after states' deadlines for receipt of mail-in ballots." The Postal Service notes the limited scope of these service standard changes, as well as the distinction between lengthened service standards and delays. The changes will add one or two days to the current service standards for certain mail volume, particularly mail traveling long distances, but intrastate mail volume will be largely unaffected: Local mail (*i.e.*, First-Class Mail that is traveling 3 hours or less between origin and destination) will remain subject to a 2-day standard, and First-Class Mail traveling within a State will, with the exception of certain mail in Alaska, still be subject to a standard of 3 days or less. Indeed, as for election mail specifically, based on November 2020 general election data and the use of the ballot Service Type ID (STID) in the Intelligent Mail Barcode (IMB), only approximately 3.84 percent of inbound First-Class Mail ballot volume would experience a slight downward change in service standards—to which affected mailers can respond by adjusting their mailing times accordingly. Indeed, the enhanced reliability should provide ballot mailers with more, not less, assurance that their mailings will be delivered within the expected service standard.

In order to mitigate any impact on election mail, the Postal Service has already held two briefings with election officials since the release of its *Delivering for America* Plan. At both briefings, the proposed service standards changes were discussed, and feedback was received. The Postal Service will continue to work closely with national election associations, federal organizations, state election executives, and local election officials regarding these changes.

A public advocacy group on behalf of prison populations contends that the changes "vitiates the value and utility of First-Class Mail to incarcerated

customers,” a subset of customers who “depend on First-Class Mail perhaps more extensively than any other constituency in today’s world.” The Postal Service acknowledges the unique challenges faced by incarcerated mailers. Far from undermining the value and utility of First-Class Mail for these mailers, however, the changes are highly unlikely to affect them negatively and will counterbalance any marginal inconveniences with a higher degree of reliability.

The advocacy group suggests that the changes ignore “the needs of Postal Service customers, including those with physical impairments.” See 39 U.S.C. 3691(c)(3). To this end, it invokes the scenario of an incarcerated person, subject to a civil action, who suffers prejudice due to a 5-day service standard. The advocacy group also, and on similar grounds, contends that the changes infringe 39 U.S.C. 3691(b)(1)(B), which mandates that service standards for market-dominant products be designed to “preserve regular and effective access to postal services in all communities.”

The Postal Service acknowledges that, to the extent that incarcerated customers generally lack access to electronic means of communication, they may be more reliant on First-Class Mail for sending and receiving tax documents, court filings, and other correspondence. It does not follow, however, that the changes would impair those activities. First, most Single-Piece First-Class Mail would retain its current service standard, and the operational changes enabled by the new service standards will significantly increase the probability that that mail will be delivered on time. Second, most incarcerated persons are in state or local facilities, many of these incarcerated persons are presumably residents of the states where they are incarcerated, and the courts with jurisdiction over their incarceration are presumably located in the same state. None of this intrastate correspondence will be subject to a 5-day service standard. With limited exception, all intrastate Single-Piece First-Class Mail will continue to have a service standard of 2 or 3 days. Only Alaska will have a 4-day service standard for some intrastate Single-Piece First-Class Mail. Third, even if some Single-Piece First-Class Mail to or from incarcerated persons were subject to materially longer service standards or actual delivery times, the prevalence of postmark rules minimizes the impact of longer delivery times on incarcerated persons’ business and legal matters. See, e.g., 26 U.S.C. 7502; Federal Rules of Civil Procedure 5(b)(2)(C), 6(d); Federal

Rules of Criminal Procedure 45(c), 49(a)(4)(C); California Code of Civil Procedure section 1013(a). Other common rules withhold legal completion of service of a mailed summons until the recipient has executed a written acknowledgment of receipt within some period extending far beyond even a 5-day First-Class Mail service standard—and not before. See, e.g., California Code of Civil Procedure section 415.30; North Carolina Rules of Civil Procedure 4(j)(1); South Carolina Rules of Civil Procedure 4(d)(8). Because the service of court documents is not sensitive to the time between mailing and receipt, the advocacy group’s scenario, referenced above, is unlikely to materialize.

The advocacy group also disputes that the Postal Service took customer satisfaction into account, on the theory that the Postal Service’s customer satisfaction surveys do not include incarcerated people among potential participants. However, the advocacy group offers no contrary evidence of incarcerated people’s preferences to support its hypothesis of divergence from the preferences of the general mailing populace. Absent such evidence, there is no basis on which to conclude that incarcerated persons do not value reliability and consistency over speed, as the Postal Service’s customer survey data indicate for postal customers generally. The advocacy group itself appears to agree that reliability is of paramount importance to incarcerated persons, given its fear that “the proposed 1–5 day delivery range leaves incarcerated mailers utterly unable to reliably estimate the time in which it will take for First-Class Mail to be delivered.” In fact, the changes will demonstrably improve incarcerated mailers’ ability to rely on standard delivery times.

Finally, the advocacy group contends that the changes violate 39 U.S.C. 3691(c)(7), which requires that service standards take into account “the effect of changes in technology, demographics, and population distribution on the efficient and reliable operation of the postal delivery system.” For this claim, the advocacy group adduces two grounds: That with these changes, the Postal Service “arbitrarily ignores the nation’s robust and extensive air network that has routinely been used to transport First-Class Mail”; and that the “1–5 day delivery range leaves incarcerated mailers utterly unable to reliably estimate the time in which it will take for First-Class Mail to be delivered.” This characterization of the air network as “robust” is belied by evidence showing that, in terms of

transporting mail, it is actually less reliable and resilient than surface transportation. As mentioned above, all intrastate mailings (with the exception of some Alaska ZIP Code pairs) will fall within the 1–3 day delivery range; and the changes, by enabling superior service performance, will better allow incarcerated persons to estimate the time it will take First-Class Mail to be delivered, since the delivery standards will be more reliably achieved.

A financial services company expresses concern that the changes will cause certain impacts on its mailing operations. The company relates that it recently consolidated the facilities from which it processes mailings and avers that the changes will reverse its cost savings associated with that consolidation. The company further notes that, currently, it can send mailings to its geographically diverse accountholders on a single timeline, and that the changes will oblige it to account for differing travel times. “Mailpieces in the same advertising campaign,” it explains, “will need to be entered at different times to achieve similar in-home dates.” Invoices on the same billing cycles and with the same due dates may likewise need to be staggered. While the Postal Service acknowledges that the new standards may require adjustments on the part of business mailers, mailers will also benefit from enhanced reliability. Such mailers may find that the benefits of increased reliability, which will enable customers to have more confidence in the specific date of delivery, offset any costs associated with staggered mailing invoices and mailing campaigns. Furthermore, such mailers have a vested interest in the Postal Service’s ability to achieve long-term financial sustainability while maintaining affordable rates, and the changes will enable progress toward that end.

A postal labor organization opposes the changes on several grounds. First, it alleges that the changes will hinder the distribution of local dues reimbursements, reduce the timeliness of its communications regarding collective bargaining and union activities, and compromise the value of its monthly periodical. Second, it observes that “the American public have expressed strong opposition to the changes proposed as measured by the high number of public comments submitted.” Finally, it opines that putative harm to the Postal Service’s brand will outweigh the projected cost savings, and suggests, in lieu of the changes, and as a measure of brand protection, that the Postal Service adopt “more realistic performance targets (to

less than 95 percent) for cross-country mail.”

With regard to the first point, the Postal Service notes that the union itself, in its comments, affirms its commitment to and support of improved reliability. The Postal Service further observes that the enhanced reliability enabled by the changes can counterbalance any marginal impact on the union’s mailing activities that the standards may cause. With regard to the second point, it bears mentioning that approximately 98 percent of the comments received consisted of short form letters that were prompted by critics of the proposed change; it is not the case that such letters are indicative of opposition by “the American public” generally of this proposal. Moreover, evidence suggests that customers typically value reliability above speed, and that—as the numerous anecdotes of service performance failures further attest—delayed or missed deliveries inflict at least as much, and likely more, damage to the Postal Service’s brand than would a slightly lengthened service standard affecting less than 40 percent of First-Class Mail. The Postal Service therefore disagrees with the suggestion that, by maintaining the current standards while setting forth lower service targets, the Postal Service could more effectively protect its current high approval rating among the American public.

At least one commenter claims that with the changes comes a higher risk that time-sensitive Periodicals will arrive late at their destination. The Postal Service observes that, when subject to delays, time-sensitive Periodicals may lose value to customers. As such delays cannot be planned around, customers who ship and receive Periodicals will stand to benefit from the greater degree of reliability enabled by the changes, which will also only extend the standard by one or two days. In addition, this change affects only end-to-end Periodicals, which represent a very small portion of overall Periodicals volume, and are more likely to be quarterly or monthly publications that are less time-sensitive than Periodicals generally.

Numerous comments were submitted by, or on behalf of, customers domiciled in Alaska. First, a group of Alaskan state legislators allege that the changes “would grossly violate the Universal Service Obligation.” The Postal Service notes, in response, that the PRC’s Report on Universal Postal Service and Postal Monopoly, Dec. 19, 2008, at 197–98, finds service quality to be an attribute of the universal service obligation, and further finds the statutory requirement

to seek an advisory opinion before changing service quality nationwide to be a necessary component of service quality. For the changes at issue in this rulemaking, the Postal Service has already sought an advisory opinion; the changes, moreover, aim to rebalance speed and reliability, in order to address well-documented concerns about the latter and thereby to maintain and indeed improve service quality.

Further, some business owners express concern that the changes will affect their ability to ship products (such as smoked salmon) to locations within the 48 contiguous states. Others worry that the changes will compromise their ability to receive food and prescription medications via the Postal Service. Several commenters note that the Alaska Public Guardian manages the shelter, food, medical and financial needs of approximately 1,700 incapacitated Alaskans, and that the Postal Service is the only method available to the Public Guardian to send checks and documents to these individuals, their landlords, service providers, and families. These commenters note the time-sensitive nature of many such mailings; observe that they “are already routinely late, many times already arriving on the date information is due or after deadlines have passed”; and voice the concern that “[c]hanging the delivery standards will . . . exacerbate these issues.”

The Postal Service acknowledges the unique challenges faced by incapacitated Alaskans, and further acknowledges that customers in rural Alaska may rely on the Postal Service for prescription medications and foodstuffs. However, it bears repeating that the changes under review in this rulemaking will affect only First-Class Mail and Periodicals—not the packages which bear items like food, prescription medications, and other merchandise. With regard to the Public Guardian and its clients, it also bears mentioning that mailings can—and often do—arrive earlier than the deadlines indicated by service standards. Furthermore, as discussed, the changes will help ameliorate, rather than exacerbate, the service performance failures which these commenters note. Thus, the increase in reliability enabled by these changes should counterbalance inconveniences which result from the addition of one day to the service standards for First Class Mail originating in and destined for Alaska.

Two farmers’ organizations draw attention to the special challenges faced by their members. These commenters note that farmers rely on the Postal Service to ship and receive seeds,

fertilizer, pesticides, tools, and other essential products, as well as to receive live animals like chicks and bees. They also note that, as their members tend to live in rural areas not covered by private carriers and frequently not equipped with broadband internet, they rely on the Postal Service for prescription medications and for purposes of general communication. In opposing the changes, these commenters appear to operate under the misimpression that the service standards for all First-Class Mail will be lengthened from 1–3 days to 5 days.

The Postal Service reiterates that the changes at issue here concern only First-Class Mail letters and flats and Periodicals, and not the packages used for conveying the supplies, seeds, and animals listed by these commenters as matters of special concern. Moreover, with respect to the non-package mail at issue, the Postal Service reiterates that over 60 percent of First-Class Mail will remain unaffected by the changes, and that, of the affected mailings, only a fraction (approximately 10 percent) will see service standards lengthened to 5 days. Most First-Class Mail (70 percent) will remain subject to a service standard of 3 days or less. The Postal Service also notes that the increased reliability accruing to the changes should counterbalance any inconveniences associated with longer delivery times.

Numerous commenters cite or allude to Article I, Section 8, of the U.S. Constitution, which grants Congress the power to “establish Post Offices and post Roads.” Many, though perhaps not all, of these commenters either suggest or claim outright that the changes would somehow violate this clause. This claim is premised on the view that the changes amount to a wholesale “destruction” or “sabotage” of the postal system.

The Postal Service disagrees. Far from acting contrary to Congress’s design, the service standard changes flow from Congressional delegations of authority to establish and revise service standards and to plan, develop, promote, and provide adequate and efficient postal services. 39 U.S.C. 101(a), 403(a), (b)(1), 2010, 3691(a). Moreover, these changes reasonably balance the various policies that those statutory delegations require the Postal Service to achieve or take into account when designing service standards. The changes will leave unaffected approximately 60 percent of First-Class Mail mailings; will enable higher levels of satisfactory service performance and operational efficiency; and will help put the Postal Service on a sounder financial footing, so that it may continue to serve its customers

with universal postal services for many years to come. As such, the changes are designed to preserve, and not to undermine, the Postal Service.

Some commenters assert that the Postal Service did not, in conceptualizing the new service standards, conduct “impact studies.” The Postal Service notes that it modelled the impacts of the new service standards on customers across the country, as well as on the Postal Service’s transportation network. And it has employed various methodologies to project the costs savings and volume declines that the new service standards are anticipated to produce.

B. Other Statutory Concerns

Some of the comments—particularly those that merely incorporate by reference the identical briefs or statements of position that had been filed in the PRC proceeding—raise concerns that the proposed service standard changes are inconsistent with relevant statutory criteria. Upon considering these comments, the Postal Service remains convinced that the service standard changes are consistent with all applicable statutory provisions, especially when considering the provisions together. The Postal Service has taken into account the factors of 39 U.S.C. 3691(c), and has concluded that the service standard changes should serve and help it to achieve the objectives of 39 U.S.C. 3691(b). These provisions require that the Postal Service balance of number of considerations. The Postal Service has evaluated these factors and objectives holistically, and believes that these service standard changes reflect a reasonable balance that, on the whole, will benefit the American public in the near and long term. In addition, the PRC extensively considered this issue and concluded that the proposed service standard changes in principle are not inconsistent with any statutory requirements.

In a statement of position filed with the PRC on June 21, 2021 (and incorporated by reference in this proceeding), the Attorneys General for 21 States, together with several cities (collectively, the “States”), suggest that the Postal Service has short-circuited the process of planning and seeking an advisory opinion by avoiding “consultation” with the PRC under 39 U.S.C. 3691(a) before submitting its request or issuing its Proposed Rule. However, the Postal Service has fully complied with the regulatory requirements applicable to this process. The “consultations” envisaged in 39 U.S.C. 3691(a) concerned the initial

establishment of the service standards regulations in 2007, rather than subsequent modifications of the service standards.

That subsection 3691(a) provides that “the Postal Service shall, in consultation with the Postal Regulatory Commission, by regulation establish (and may from time to time thereafter by regulation revise) a set of service standards for market-dominant products.” Importantly, the phrase about PRC consultation follows “shall”: as such, it applies only to that modal clause (“shall . . . establish”), and not to the separate modal clause set forth in the parentheses (“may . . . revise”). Had Congress intended otherwise, the framers would have structured the sentence so that the consultation clause would modify both “shall . . . establish” and “may . . . revise,” rather than only the former. In any event, the Postal Service’s formal request for an advisory opinion under 39 U.S.C. 3661(b) would satisfy any arguably applicable “consultation” obligation in this instance.

With respect to substance, one statute reflects the variety of policies that the Postal Service must address, including providing service that is “prompt, reliable, and efficient” with “prompt and economical delivery,” while also “emphasiz[ing]” other priorities including the “control of costs.” See 39 U.S.C. 101(a), (f), (g); see also 39 U.S.C. 403(a), (b)(1), 2010, 3661(a), 3691(b)(1)(C). Many commenters fixate narrowly on promptness and would relegate reliability, efficiency, economy, and control of costs to second-tier policy objectives. Yet the statute does not offer a basis for such a ranking. The Postal Service must balance achievement of all policy objectives in a manner that is operationally and financially sustainable. That cannot be done under current service standards.

The States, without concrete suggestions, contend that the Postal Service should consider “chang[ing] its service standard to address long-term trends” only after it “reliably meet[s] its [current] performance targets[.]” And the States suggest that the Postal Service is intentionally sacrificing market-dominant volume to bolster package capabilities. To the contrary, adopting the States’ position would straightjacket the Postal Service because meeting current service standards in a reliable manner is not feasible, as evidenced by the fact that the Postal Service has not met its service performance targets for years. Waiting to achieve the infeasible would prevent the Postal Service from ever implementing necessary reforms.

The States contend that the new service standards will increase the delivery time for some mail from government entities, including election mail, government payments, and applications for government benefits programs. They recognize that the Postal Service has not met existing service standards “for some time” but aver that, rather than adjust them, the Postal Service should simply begin meeting them. Similarly, the Association for Postal Commerce (PostCom) contends that, even if the Postal Service must incur additional costs to meet service standards, it should simply do so because it “is not a profit-seeking business.”

While such criticisms repeatedly argue that the Postal Service has a responsibility under Title 39 to deliver First-Class Mail quickly, they ignore the fact that the Postal Service must balance speed of delivery with other statutory considerations. One such consideration is the Postal Service’s obligation to be self-sustaining. Given this self-sufficiency mandate, the Postal Service must ensure that it provides services in a cost-effective manner, particularly if it is to ensure affordable rates. As the States note in passing, 39 U.S.C. 101(a) states that the Postal Service will be “supported by the people.” But, beyond operational challenges unrelated to cost, they ignore that, if the Postal Service is unable to recoup the costs of operations through revenues, its essential services cannot be provided. 39 U.S.C. 101(d).¹

The very services that many critics of the service standards emphasize are essential are at risk due to the Postal Service’s present unsustainable position. It is no solution to this problem to say that the Postal Service should simply deliver mail more reliably within the existing service standards: This not only ignores the infeasibility of the task under the current standards, but also the Postal Service’s dire financial situation. Given the Postal Service’s long-standing service performance, operational, and financial problems and its statutory obligations to provide adequate, efficient, and economical services, it is certainly no solution to say that the Postal Service should simply expend more resources on unreliable, inefficient transportation providers in an attempt to meet the current standards.

It is also incorrect to claim that the Postal Service has not considered the potential impact of the service standards on election mail. As noted above, the

¹ The Postal Service’s operations are generally funded by revenues, not by taxpayer appropriations. See 39 U.S.C. 2401.

Postal Service has used Intelligent Mail® barcode tracking specifically to evaluate the amount of inbound ballot volume that would experience a downward change and concluded that it was only 3.84 percent of such volume. The Postal Service has already held briefings to discuss the changes with election officials to enable them to align their mailings with service standards and will continue to conduct outreach during and after any implementation. Finally, none of the changes is specific to election mail or implicates the kinds of measures the Postal Service has taken during past elections to expedite election mail.

Before the PRC, the Postal Service explained how it has reasonably balanced the various 39 U.S.C. 3691 objectives and factors and the statutory policies set forth in 39 U.S.C. 101, 403, 2010, and 3661(a), and the PRC concluded that the proposed changes do not facially conflict with any statutes. The service standards would enhance the value of postal services by improving reliability and consistency, while minimizing the tradeoffs in terms of lengthened service standards. This balancing of reliability, speed, and frequency is also consistent with reasonable rates and best business practices, both of which require efficient cost management, and with various other statutes that require a balance between efficiency and service. Congress committed to the Postal Service the discretion to perform this balancing of numerous and sometimes competing policies. Other parties may favor one statutory policy or another in their own narrower interests, or may wish for a different balance amongst the various policies, but only the Postal Service bears the statutory responsibility of accounting for all of the relevant policies in weighing initiatives. In furtherance of this duty, the Postal Service has set forth a reasonable balance regarding these new service standards.

The States compare the operational changes at issue to other changes challenged in certain federal lawsuits from 2020, but this comparison is entirely misplaced. First, the substance of the alleged operational changes in those cases had nothing to do with either these service standard changes or their operational motivations (such as the planned shift from air transportation to surface). Instead, those cases concerned alleged operational changes from July 2020, including alleged changes to policies regarding late and extra surface transportation trips and overtime, among other claims, particularly in the unusual context of

the pandemic and the 2020 election. The courts therefore did not review the Postal Service's balancing of the various statutory policies in designing the then-existing service standards, let alone those proposed well after the events at issue in the 2020 lawsuits. Second, the statutory challenges in those cases arose largely from procedural allegations that the Postal Service had not sought proper regulatory review of the alleged operational changes prior to implementation. Irrespective of whether such regulatory review was required in connections with those matters, here it is beyond dispute that the Postal Service formally sought precisely the ex ante regulatory review that litigants in those cases had suggested was lacking there. To the extent those federal lawsuits have any bearing on this case, they merely support the process that the Postal Service has employed here.

The States mischaracterize the Postal Service's motivation as seeking to favor package performance at the expense of First-Class Mail. That is not what the *Delivering for America* Plan says or implies; to the contrary, the Plan explicitly and repeatedly emphasizes the Postal Service's intent to improve reliability for both mail and packages, not favoring the latter at the expense of the former. *E.g.*, Plan at 6, 8, 24, 27, 30, 34, 40. Indeed, a fundamental goal of the Plan is to ensure the reliable delivery of all mail 6 days a week, at affordable rates, meaning the Plan fully recognizes the centrality of mail to the Postal Service's statutory mission. (At the same time, the States express concerns about the delivery of prescription medications; as noted earlier, however, such packages are not at issue in this rulemaking.)

The States' concerns about First-Class Mail used for their governments' mailings to their own residents are unfounded. It is only reasonable to infer that a substantial proportion of governmental-to-individual mailings is mailed from somewhere in the same general region; indeed, the States admit that "much of [such mailings] involves in-state mail." In other words, the likelihood that the service standards would lengthen the delivery time of these mailings—particularly that any would now be subject to 4- or 5-day service standards—is low. Only between 1 and 27 percent (depending on the state) of 2-day mail in only 28 contiguous states would move to a 3-day standard; further, no First-Class Mail would actually shift to a 5-day standard for pairs originating and destinating within the same state, and Alaska is the only state in which some 3-day could

shift to a 4-day standard for pairs within the state.

The States criticize the proposal as if its motivation were to degrade service. It is incorrect, however, to suggest that, because the Postal Service has failed to meet service performance targets in the past, the proposal amounts to nothing more than "simply moving the goalposts." It is not only rational, but critical, that the Postal Service take steps to address its longstanding service performance, operational efficiency, and financial problems, in order to provide the American public with reliable service through a financially sustainable postal system. This is the goal of the *Delivering for America* Plan, of which this proposal is a (but far from the only) critical element. The principal purposes of the changes are to enable operations to provide more reliability for customers and a more cost-effective network to help sustain the Postal Service's long-term financial stability by shifting some volume from air to surface transportation. Similarly, for offshore delivery, the changes would enable a shift from air cargo to commercial air.

The new service standards balance promptness with reliability, efficiency, and economy by preserving current service standards for the majority of First-Class Mail and end-to-end Periodicals, and by tailoring the service standard changes to increase the use of more reliably prompt and cost-effective surface transportation. The changes will also enable other measures to improve the promptness and efficiency of the surface transportation network. These measures include modern methods of transporting mail by containerization, as the changes would allow the Postal Service to directly containerize trays where volume warrants. See 39 U.S.C. 101(f).

Furthermore, most First-Class Mail would continue to be delivered within 3 days, and while certain long-distance customers would receive a service standard that is 1 or 2 days longer, they would be assured of consistent and predictable delivery within those service standards. For those customers who need faster delivery than would be provided under these service standards for their letters, Priority Mail Express and Priority Mail would continue to be available. See *id.* at (e). Similarly, Priority Mail Express and Priority Mail will continue to rely on modern methods of containerization and systems designed to achieve expeditious, overnight transportation and delivery of important letter mail to all parts of the Nation where it is economical to do so. *Id.* at (f).

The Postal Service has reasonably balanced the relevant statutory objectives and factors. The revised service standards would enhance value for customers, providing greater reliability and consistency. *Id.* at 3691(b)(1)(A), (b)(1)(C), (c)(2). Customers would have a better ability to predict when to expect First-Class Mail delivery, based on objective criteria. The Postal Service has reasonably determined that the service standards would improve both delivery reliability and efficiency, while minimizing the extent of impact on delivery speed. *Id.* at 3691(b)(1)(C), (c)(1), (c)(6). But, contrary to the view portrayed by the States, the Postal Service is not merely “moving the goal posts” of the service standards. The service standards are necessary to facilitate much more concrete operational initiatives to improve delivery reliability and transportation efficiency.

Several commenters argue that the changes violate 39 U.S.C. 101, but fail to recognize how the changes appropriately balance the various policies set forth in that provision. The States, for example, quote 39 U.S.C. 101(e), but never mention subsection (f) of that section. An individual commenter argues that the proposed service standards are contrary to 39 U.S.C. 101(e) and (f) (“Congress generally considered ‘faster’ delivery to be ‘better’ delivery”), without reconciling the statutory mandate to balance both “prompt” and “economical” delivery in selecting modes of transportation. The Postal Service notes that the “economical” prong cannot be relegated to some lesser aspirational goal, given the longstanding expectation that the Postal Service be financially self-sufficient. See generally 39 U.S.C. 101(a), 2401; H.R. Rep. 91–1104, at 17 (1970). The Postal Service cannot simply incur huge costs to ensure a narrower conception of speed, particularly one that experience shows is not consistently achievable in practice.

First, 39 U.S.C. 101(e) does not say that all letter mail must be delivered in the fastest manner at all costs, nor does it define “important.” Similarly, the second sentence of subsection (f) does not require overnight delivery of all mail, and instead recognizes that only certain important letter mail may warrant overnight treatment. In that regard, the Postal Service is not changing the current service standard for First-Class Mail subject to an overnight standard. The Postal Service also has other options for speedier delivery available to customers who want their important letter mail to travel

overnight, even for long distances: Specifically, Priority Mail Express and Priority Mail.

By contrast, the first sentence of subsection (f) does address “all mail” and thus is much more relevant to the present initiative, which will affect First-Class Mail and end-to-end Periodicals based on distance of transportation. Subsection (f) also focuses specifically on “modes of transportation”—the underlying issue with respect to the changes here at issue. Prompt and economical, when considered together, cannot mean speediest in all instances, but necessarily entails reasonably fast speeds to the extent that they can be achieved at reasonable costs. The Postal Service’s current usage of air transportation has proven inadequate to meet that test, and so the Postal Service is taking measured steps to improve the selected modes of transportation. To do so, however, the service standards need to be adjusted.

Moreover, the proposed changes are limited in scope, and are designed to address the consequences of the current standards that result in an unreliable, inefficient service, while also mitigating the impact on speed of delivery. In this regard, most mail volume will remain at its current standard, and overall, most mail volume will continue to be subject to a standard of 3 days or less. All mail will also receive much more reliable service, meaning actual service performance will be better aligned with the service standards, rather than having consistent performance failures (a problem particularly pronounced for mail currently subject to a 3-day standard). Hence, and regardless of how one might choose to define the scope of “important letter mail,” the Postal Service has given appropriate consideration to the interest in ensuring expeditious delivery of First-Class Mail letters generally, and has appropriately balanced that interest to the extent possible with the other policies of the statute, including reliability, efficiency, and affordability.

Some commenters suggest that the changes would be inconsistent with 39 U.S.C. 101(b), which requires the Postal Service to “provide a maximum degree of effective and regular postal services to rural areas, communities, and small towns where post offices are not self-sustaining.” The Postal Service notes that, by distinguishing on the basis of mailing distance and not on the nature of the origin or destination, the service standards would affect urban and rural mailers similarly. Moreover, the service standards are measured only after acceptance at a postal facility, and

would not alter that status quo. Accordingly, whether post offices are present in a community—and hence 39 U.S.C. 101(b)—is irrelevant to the present changes.

Various commenters suggest that the changes may infringe 39 U.S.C. 403(c), which bars the Postal Service, in providing services, from “mak[ing] any undue or unreasonable discrimination among users of the mails” or “grant[ing] any undue or unreasonable preferences to any such user.” Notably, upon consideration of detailed briefs on both sides of this precise question, the PRC concluded that the service standard changes are not unreasonable and do not facially violate 39 U.S.C. 403(c). The Postal Service certainly agrees with the PRC’s assessment in that important respect. Nevertheless, it is important to examine carefully the nature of the comments alleging discriminatory impact of the changes.

In accord with PRC precedent, three conditions must be met to establish a claim of unreasonable discrimination: (1) One or more mailers must be offered less favorable rates or terms and conditions than those offered to other mailers; (2) the two sets of mailers must be similarly situated; and (3) there must be no rational or legitimate basis for differing treatment. Order No. 718, Order on Complaint, PRC Docket No. C2009–1 (Apr. 20, 2011), at 28. Several commenters suggest that the service standards would implicate these conditions, but the Postal Service does not find this argument persuasive.

Most broadly, some commenters seem to suggest that any geographical disparities resulting from the service standards will suffice to satisfy the first two 39 U.S.C. 403 (c) criteria. However, the relevant question is not where customers live, but how far their mailings travel. The Postal Service is not degrading service standards in selected states or for selected mailers, but rather is lengthening the service standards for all mailings that traverse longer distances based on objective distance criteria that will apply nationwide. Furthermore, the Postal Service notes that when considering whether First-Class Mail service, as a whole, would inappropriately discriminate among customers following this service standard change, longer-distance mailers will continue to benefit from the uniform First-Class Mail rate, whereby they pay less per mile than shorter-distance mailers. Moreover, with respect to expected delivery times, many longer-distance mailers subject to lengthened service standards will continue to enjoy a delivery speed (*i.e.*, distance traveled

per day) that is significantly faster than that for shorter-distance mail, even if longer-distance mail's speed advantage will now be somewhat less. Initial Brief of the United States Postal Service, PRC Docket No. N2021-1 (June 21, 2021), at 47-49.

As for the third prong in the 39 U.S.C. 403 (c) analysis, the Postal Service notes that both courts and the PRC have granted it broad latitude in distinguishing between different mailers, given the Postal Service's statutory responsibility to provide universal service in an economical and efficient manner. *See, e.g., Egger v. USPS*, 436 F. Supp. 138, 142 (W.D. Va. 1977) (declaring it "obvious that the Postal Service may provide different levels of delivery service to different groups of mail users so long as the distinctions are reasonable"); *UPS Worldwide Forwarding, Inc. v. U.S. Postal Serv.*, 66 F.3d 621, 634-35 (3d Cir. 1995) (noting that Postal Service may treat mailers differently so long as that different treatment is reasonable); Order No. 4294, Order Granting the Postal Service's Motion to Dismiss, PRC Docket No. C2019-1 (Dec. 12, 2018), at 10 ("the Postal Service may differentiate among customers where the differences have a rational basis"); Order No. 5491, Order Granting the Postal Service's Motion to Dismiss Complaint with Prejudice, PRC Docket No. C2020-2 (Apr. 28, 2020), at 9.

The Postal Service has adduced a rational, non-arbitrary basis for the differences in standards: namely, to improve service performance by enhancing reliability through greater use of surface transportation, which in turn depends on designing standards that predicate days of delivery on geographic distances. Moreover, courts have recognized that objective geographic disparities can serve as a rational justification for different levels of service in connection with 39 U.S.C. 403(c). *UPS Worldwide Forwarding*, 66 F.3d at 634-35.

Some commenters suggest that 39 U.S.C. 101(a) and 404(c) constrain the interpretation of the phrase "undue or unreasonable discrimination," in support of the broader view that any geographical disparities in service standards would, by definition, trigger a 39 U.S.C. 403(c) violation. One commenter, for instance, discusses the uniform-rate requirement under 39 U.S.C. 404(c) and then speculatively asserts that the scope of "discrimination" under 39 U.S.C. 403(c) should likewise bar geographically-based differentials in service standards. This argument is inapposite: 39 U.S.C. 404(c) speaks to rates, not to service

standards, and nothing in the statutory text ties the two provisions together in the manner suggested by the commenter. Another commenter purports to read, in 39 U.S.C. 101(a)'s stated goal of "binding the nation together," an obligation to impose uniform service standards across the United States. The Postal Service further notes, though, that geographically-tiered service distinctions already exist in the prior service standards upheld by this and other commenters. If such distinctions do not give the commenters pause in regard to the prior service standards, then it cannot be that the mere occurrence of a geographical disparity constitutes undue discrimination in connection with the new service standards, either.

Some commenters contend that the changes would result in discrimination with respect to certain demographic groups. The States thus express concern over the changes' impact on rural, low-income, elderly, and disabled customers. The Postal Service notes, however, that the States do not assert that the changes will fall unequally on such customers; in other words, they neither claim nor purport to demonstrate that these changes would target a disproportionately large percentage of mailings conveyed by vulnerable populations. Furthermore, even assuming for the sake of argument that rural, low-income, disabled, and/or other vulnerable customers may be disproportionately reliant on First-Class Mail, they likewise prove particularly vulnerable to the unreliable air network and to the resulting service failures that have persisted for years, both of which the changes aim to relieve.

Certain commenters likewise express concerns about the possible impact of the changes on their own interests as veterans, rural customers, disabled customers, elderly customers, small businesses, and other vulnerable customers. With regard to rural communities in particular, joint comments by public advocacy groups suggest that the changes violate 39 U.S.C. 101(b), which requires that the Postal Service "provide a maximum degree of effective and regular postal services to rural areas, communities, and small towns where post offices are not self sustaining" and to ensure "effective postal services . . . to residents of both urban and rural communications." However palpable their policy interests as a general matter, none of these commenters present evidence that they disproportionately align with the minority of mail volume affected by the service standard changes (for example, that a greater percentage of

rural customers' mail will have a changed service standard than for non-rural customers). As noted earlier, the service standard changes are based on distance traveled by a mailpiece, without further distinction as to the location or nature of the mailer or recipient. Moreover, the Postal Service notes that insofar as persons in vulnerable communities—including rural communities—currently experience delivery delays and other service failures, they stand to benefit from the changes, which aim to provide more reliable deliveries and therefore consistent customer expectations. Moreover, and as discussed above, the service standards are limited in scope.

One commenter, a public advocacy group for prisoners, claims that the current changes would violate 39 U.S.C. 404(c). First-Class Mail, on its theory, fulfills the mandate that the "Postal Service shall maintain one or more classes of mail for the transmission of letters sealed against inspection[, one of which] shall provide for the most expeditious handling and transportation afforded mail matter by the Postal Service." It asserts that, under the proposed service standards, First-Class letters would "categorically" be excluded from air transportation, even though other classes of mail would continue to be transported by air; and that "this discrepancy plainly violates the requirement that First-Class letters be provided the most expeditious handling and transportation." As an initial matter, it is incorrect to state that First-Class Mail would be "categorically" excluded from air transportation under this proposal; much long-distance First-Class Mail would continue to be transported by air. In any event, the Postal Service notes that 39 U.S.C. 404(c) requires only that *one* class of sealed letters receive "most expeditious" treatment, not that each class of sealed letters do so. Thus, the "most expeditious" type of sealed mail has long been understood to mean what is now Priority Mail Express, which is handled and transported more expeditiously than First-Class Mail.

In sum, the service standard changes do not conflict with any statutory obligations; to the contrary, considering those obligations as a whole, the changes properly balance the policies of the statute. Consequently, modifications to the Proposed Rule in light of the comments received are unwarranted.

IV. Explanation of Final Rules

The Postal Service's market-dominant service standards are contained in 39 CFR part 121. The revised version of 39 CFR part 121 appears at the end of this

Notice. The following is a summary of the revisions. In addition to the changes described below, minor edits are made to (i) conform to product name changes for USPS Marketing Mail®, (ii) correct a clerical error in the subsection on Destination Entry Periodicals, (iii) delete expired provisions, and (iv) refer to common or defined terms in a more consistent manner throughout the rules. What was previously known as “Standard Mail” has been rebranded as “USPS Marketing Mail,” see generally 81 FR 93,606 (2017), and therefore Part 121 (including section 121.3 and Appendix A) has been updated to refer to the current name of this product.

A. Service Standards Generally

Service standards contain two components: (1) A delivery day range within which mail in a given product is expected to be delivered; and (2) business rules that determine, within a product’s applicable day range, the specific number of delivery days after acceptance of a mail piece by which a customer can expect that piece to be delivered, based on the 3-Digit ZIP Code prefixes associated with the piece’s point of entry into the mail stream and its delivery address.

Business rules are based on critical entry times (CETs). The CET is the latest time on a particular day that a mail piece can be entered into the postal network and still have its service standard calculated based on that day (this day is termed “day-zero”). In other words, if a piece is entered before the CET, its service standard is calculated from the day of entry, whereas if it is entered after the CET, its service standard is calculated from the following day. (If the following day is a Sunday or holiday, then the service standard is calculated from the next Postal Service delivery day.) For example, if the applicable CET is 5:00 p.m., and a letter is entered at 4:00 p.m. on a Tuesday, its service standard will be calculated from Tuesday, whereas if the letter is entered at 6:00 p.m. on a Tuesday, its service standard will be calculated from Wednesday. CETs are not contained in 39 CFR part 121, because they vary based on where mail is entered, the mail’s level of preparation, and other factors.

B. First-Class Mail

The Postal Service is changing some of the service standards applicable to certain First-Class Mail with respect to both of the two components of the standards. First, the Postal Service is promulgating modifications to the delivery day ranges within which mail in a given product is expected to be

delivered. Second, the Postal Service is promulgating modifications to the business rules, changing the maximum number of hours of drive time that corresponds to the specific number of delivery days after acceptance of a mail piece by which a customer can expect that piece to be delivered (within a product’s applicable delivery day range).

In particular, the changes to service standards include the delivery-day range for certain First-Class Mail. Currently, a one-day (overnight) service standard is applied to intra-SCF Presort First-Class Mail pieces properly accepted at the SCF before the day-zero CET. A two-day service standard is applied to intra-SCF single-piece First-Class Mail properly accepted before the day-zero CET, as well as to inter-SCF domestic First-Class Mail pieces properly accepted before the day-zero CET if the drive time between the origin P&DC/F and destination SCF is 6 hours or less. A three-day service standard is applied to inter-SCF domestic First-Class Mail pieces properly accepted before the day-zero CET if the drive time between the origin P&DC/F and destination SCF is more than 6 hours and the origin and the destination are within the contiguous 48 states.

Under the new service standards, the delivery day range for First-Class Mail within the contiguous United States will expand from the current 1–3 days, to 1–5 days. The overnight service standard does not change. Among the changes detailed below, a two-day service standard will apply to intra-SCF First-Class Mail where the SCF is also the origin P&DC/F, and to intra-SCF and inter-SCF domestic First-Class Mail where the combined drive time between the origin P&DC/F, destination ADC, and destination SCF is 3 hours or less; a three-day service standard for inter-SCF First-Class Mail would apply where the combined drive time between the origin P&DC/F, destination ADC, and destination SCF is 20 hours or less (but over 3 hours) within the contiguous United States, and the same three-day standard would also apply for intra-SCF single-piece First-Class Mail if the combined drive time exceeds 3 hours and the SCF is not the origin P&DC/F; a four-day service standard for inter-SCF First-Class Mail would apply where the combined drive time between the origin P&DC/F, destination ADC, and destination SCF is 41 hours or less (but over 20 hours) within the contiguous United States; and combined drive times between the origin P&DC/F, destination ADC, and destination SCF in excess of 41 hours would result in a service standard of five days.

Furthermore, the Postal Service’s regulations pertaining to the current service standards for First-Class Mail do not expressly account for the combined drive time between origin P&DC/Fs, ADCs, and SCFs, though often distribution routes encompass several such facilities. In order to clarify these service standards, the final rule specifies, in the new service standards for First-Class Mail, that the combined drive time encompasses all such P&DC/Fs, ADCs, and SCFs.

In addition, among the changes detailed below, the Postal Service is promulgating certain changes to the service standards for mail originating from or destined to areas outside of the contiguous United States. The Postal Service will apply a 4-day standard for First-Class Mail originating in the contiguous 48 states destined to the city of Anchorage, Alaska, the 968 3-digit ZIP Code area in Hawaii, or the 006, 007, or 009 3-digit ZIP Code areas in Puerto Rico; for First-Class Mail originating in the 006, 007, or 009 3-digit ZIP Code areas in Puerto Rico and destined to the contiguous 48 states; for First-Class Mail originating in Hawaii and destined to Guam, or vice versa; for First-Class Mail originating in Hawaii and destined to American Samoa, or vice versa; and for other First-Class Mail that has both its origin and its destination within Alaska. The Postal Service will apply a 5-day standard for other First-Class Mail originating from and/or destined to the non-contiguous states and territories.

C. Periodicals

Certain Periodicals are merged with First-Class Mail, and their service standards are consequently tied to the respective First-Class Mail service standards. In other words, the changes to First-Class Mail service standards will result in similar changes to the corresponding service standards of the merged Periodicals.

The Postal Service is therefore promulgating a related change concerning certain Periodicals. Under current service standards, for end-to-end Periodicals, a three-to-four-day service standard is applied to Periodicals pieces properly accepted before the day-zero CET and merged with First-Class Mail pieces for surface transportation, with the service standard specifically equaling the sum of one day plus the applicable First-Class Mail service standard (*i.e.*, either two or three days, depending on whether the drive time is more than 6 hours). Under the new service standard, a three-to-six-day service standard will be applied to Periodicals pieces properly accepted

before the day-zero CET and merged with First-Class Mail pieces for surface transportation, with the service standard specifically equaling the sum of 1 day plus the applicable First-Class Mail service standard.

List of Subjects in 39 CFR Part 121

Administrative practice and procedure, Postal Service.

Accordingly, for the reasons stated, the Postal Service adopts the following revisions to 39 CFR part 121:

PART 121—SERVICE STANDARDS FOR MARKET-DOMINANT MAIL PRODUCTS

■ 1. The authority citation for Part 121 continues to read as follows:

Authority: 39 U.S.C. 101, 401, 403, 404, 1001, 3691.

■ 2. Section 121.1 is revised to read as follows:

§ 121.1 First-Class Mail.

(a) A 1-day (overnight) service standard is applied to intra-Sectional Center Facility (SCF) domestic Presort First-Class Mail pieces properly accepted at the SCF before the day-zero Critical Entry Time (CET), except for mail between Puerto Rico and the U.S. Virgin Islands, and mail destined to American Samoa and the following 3-digit ZIP Code areas in Alaska (or designated portions thereof): 995 (5-digit ZIP Codes 99540 through 99599), 996, 997, 998, and 999.

(b) A 2-day service standard is applied to:

(1) Intra-SCF single-piece domestic First-Class Mail properly accepted before the day-zero CET if:

(i) The SCF is also the origin Processing & Distribution Center or Facility (P&DC/F), or

(ii) the combined drive time between the origin P&DC/F, destination Area Distribution Center (ADC), and destination SCF is 3 hours or less;

(2) inter-SCF domestic First-Class Mail pieces properly accepted before the day-zero CET if the combined drive time between the origin P&DC/F, destination ADC, and destination SCF is 3 hours or less;

(3) Presort First-Class Mail properly accepted before the day-zero CET with an origin and destination that are separately in Puerto Rico and the U.S. Virgin Islands; and

(4) intra-SCF Presort First-Class Mail properly accepted before the day-zero CET with an origin or destination that is in American Samoa or one of the following 3-digit ZIP Code areas in Alaska (or designated portions thereof):

995 (5-digit ZIP Codes 99540 through 99599), 996, 997, 998, and 999.

(c) A 3-day service standard is applied to domestic First-Class Mail pieces properly accepted before the day-zero CET, if the 1-day and 2-day service standards do not apply, the combined drive time between the origin P&DC/F, destination ADC, and destination SCF is 20 hours or less, and both the origin and the destination are within the contiguous 48 states.

(d) A 4-day service standard is applied to domestic First-Class Mail pieces properly accepted before the day-zero CET, if the 1-day, 2-day, and 3-day service standards do not apply, and:

(1) The combined drive time between the origin P&DC/F, destination ADC, and destination SCF is 41 hours or less, and both the origin and the destination are within the contiguous 48 states;

(2) The origin is in the contiguous 48 states, and the destination is in any of the following: The city of Anchorage, Alaska (5-digit ZIP Codes 99501 through 99539); the 968 3-digit ZIP Code area in Hawaii; or the 006, 007, or 009 3-digit ZIP Code areas in Puerto Rico;

(3) The origin is in the 006, 007, or 009 3-digit ZIP Code areas in Puerto Rico, and the destination is in the contiguous 48 states;

(4) The origin is in Hawaii, and the destination is in Guam, or vice versa;

(5) The origin is in Hawaii, and the destination is in American Samoa, or vice versa; or

(6) Both the origin and destination are within Alaska.

(e) A 5-day service standard is applied to all remaining domestic First-Class Mail pieces properly accepted before the day-zero CET.

(f) The service standard for Outbound Single-Piece First-Class Mail International™; pieces properly accepted before the day-zero CET is equivalent to the service standard for domestic First-Class Mail pieces originating from the same 3-digit ZIP Code area and destined to the 3-digit ZIP Code area in which the designated International Service Center is located.

(g) The service standard for Inbound Letter Post pieces properly accepted before the day-zero CET is equivalent to the service standard for domestic First-Class Mail pieces destined to the same 3-digit ZIP Code area and originating from the 3-digit ZIP Code area in which the designated International Service Center is located.

■ 3. Section 121.2 is amended by revising paragraphs (a)(1) and (2) and (b)(2)(ii) to read as follows:

§ 121.2 Periodicals.

(a) *End-to-End.* (1) A 3- to 6-day service standard is applied to Periodicals pieces properly accepted before the day-zero Critical Entry Time (CET) and merged with First-Class Mail pieces for surface transportation (as per the Domestic Mail Manual (DMM)), with the standard specifically equaling the sum of 1 day plus the applicable First-Class Mail service standard.

(2) A 3-day service standard is applied to Periodicals pieces properly accepted before the day-zero CET if: The origin and destination are separately in Puerto Rico and the U.S. Virgin Islands; or if the origin is in Alaska, the service standard set forth in paragraph (a)(1) does not apply, and the destination is in the following 3-digit ZIP Code areas in Alaska (or designated portions thereof): 995 (5-digit ZIP Codes 99540 through 99599), 996, 997, 998, and 999.

* * * * *

(b) * * *

(2) * * *

(ii) A 3-day service standard is applied to Periodicals pieces that qualify for a DSCF rate and are properly accepted before the day-zero CET at the designated DSCF, if they are entered at the DSCF in Puerto Rico and destined to the U.S. Virgin Islands, entered at the DSCF in Hawaii and destined to American Samoa, or destined to the following 3-digit ZIP Code areas in Alaska (or designated portions thereof): 995 (5-digit ZIP Codes 99540 through 99599), 996, 997, 998, and 999.

* * * * *

■ 4. Section 121.3 is revised to read as follows:

§ 121.3 USPS Marketing Mail.

(a) *End-to-End.* (1) The service standard for Sectional Center Facility (SCF) turnaround USPS Marketing Mail® pieces accepted at origin before the day-zero Critical Entry Time is 3 days when the origin Processing & Distribution Center/Facility (origin P&DC/F) and the SCF are the same building, except for mail between the territories of Puerto Rico and the U.S. Virgin Islands.

(2) The service standard for Area Distribution Center (ADC) turnaround USPS Marketing Mail pieces accepted at origin before the day-zero Critical Entry Time is 4 days when the origin P&DC/F and the ADC are the same building, unless the ADC is in the contiguous 48 states and the delivery address is not, or the mail is between Puerto Rico and the U.S. Virgin Islands, or the mail is between Hawaii and American Samoa.

(3) The service standard for intra-Network Distribution Center (NDC)

USPS Marketing Mail pieces accepted at origin before the day-zero Critical Entry Time is 5 days for each remaining 3-digit ZIP Code origin-destination pair within the same Network Distribution Center service area if the origin and destination are within the contiguous 48 states; the same standard applies to mail that is intra-Alaska or between the state of Hawaii and the territory of Guam or American Samoa.

(4) For each remaining 3-digit ZIP Code origin-destination pair within the contiguous 48 states, the service standard for USPS Marketing Mail pieces accepted at origin before the day-zero Critical Entry Time is the sum of 5 or 6 days plus the number of additional days (from 1 to 4) required for surface transportation between each 3-digit ZIP Code origin-destination pair.

(5) For each remaining 3-digit ZIP Code origin-destination pair, the service standard for USPS Marketing Mail pieces accepted at origin before the day-zero Critical Entry Time is the sum of 5 or 6 days plus the number of additional days (from 7 to 21) required for intermodal (highway, boat, air-taxi) transportation outside the contiguous 48 states for each 3-digit ZIP Code origin-destination pair.

(b) *Destination entry.* (1) USPS Marketing Mail pieces that qualify for a Destination Delivery Unit (DDU) rate and that are accepted before the day-zero Critical Entry Time at the proper DDU have a 2-day service standard.

(2) USPS Marketing Mail pieces that qualify for a Destination Sectional

Center Facility (DSCF) rate and that are accepted before the day-zero Critical Entry Time at the proper DSCF have a 3-day service standard when accepted on Sunday through Thursday and a 4-day service standard when accepted on Friday or Saturday, except for mail dropped at the SCF in the territory of Puerto Rico and destined to the territory of the U.S. Virgin Islands, or mail destined to American Samoa.

(3) USPS Marketing Mail pieces that qualify for a DSCF rate and that are accepted before the day zero Critical Entry Time at the SCF in the territory of Puerto Rico and destined to the territory of the U.S. Virgin Islands, or are destined to American Samoa, have a 4-day service standard when accepted on Sunday through Thursday and a 5-day service standard when accepted on Friday or Saturday.

(4) USPS Marketing Mail pieces that qualify for a Destination Network Distribution Center (DNDC) rate, and that are accepted before the day-zero Critical Entry Time at the proper DNDC have a 5-day service standard, if both the origin and the destination are in the contiguous 48 states.

(5) USPS Marketing Mail pieces that qualify for a DNDC rate, and that are accepted before the day-zero Critical Entry Time at the proper DNDC in the contiguous 48 states for delivery to addresses in the states of Alaska or Hawaii or the territories of Guam, American Samoa, Puerto Rico, or the U.S. Virgin Islands, have a service

standard of 12–14 days, depending on the 3-digit origin-destination ZIP Code pair. For each such pair, the applicable day within the range is based on the number of days required for transportation outside the contiguous 48 states.

■ 5. Appendix A to part 121 is revised to read as follows:

Appendix A to Part 121—Tables Depicting Service Standard Day Ranges

The following tables reflect the service standard day ranges resulting from the application of the business rules applicable to the market-dominant mail products referenced in §§ 121.1 through 121.4 (for purposes of Part 121, references to the contiguous states also include the District of Columbia):

Table 1. End-to-end service standard day ranges for mail originating and destinating within the contiguous 48 states and the District of Columbia.

TABLE 1—CONTIGUOUS UNITED STATES

Mail class	End-to-end range (days)
First-Class Mail	1–5
Periodicals	3–9
USPS Marketing Mail	3–10
Package Services	2–8

Table 2. End-to-end service standard day ranges for mail originating and/or destinating in non-contiguous states and territories.

TABLE 2—NON-CONTIGUOUS STATES AND TERRITORIES

Mail class	End-to-end								
	Intra state/territory			To/from contiguous 48 states			To/from states of Alaska and Hawaii, and the territories of Guam, Puerto Rico (PR), American Samoa (AS), Northern Mariana Islands (MP), and U.S. Virgin Islands (USVI)		
	Alaska	Hawaii, Guam, MP, & AS	PR & USVI	Alaska	Hawaii, Guam, MP, & AS	PR & USVI	Alaska	Hawaii, Guam, MP, & AS	PR & USVI
First-Class Mail	1–4	1–4	1–2	4–5	4–5	4–5	5	5	5
Periodicals	3–5	3–5	3	13–19	12–22	11–16	21–25	21–26	23–26
USPS Marketing Mail	3–5	3–5	3–4	14–20	13–23	12–17	23–26	23–27	24–27
Package Services	*2–4	2–4	2–3	12–18	11–21	10–15	21–26	20–26	20–24

* Excluding bypass mail.

Table 3. Destination-entry service standard day ranges for mail to the contiguous 48 states and the District of Columbia.

TABLE 3—DESTINATION ENTRY SERVICE STANDARD DAY RANGES FOR MAIL TO THE CONTIGUOUS 48 STATES AND THE DISTRICT OF COLUMBIA

Mail class	Contiguous United States Destination entry (at appropriate facility)			
	DDU (days)	SCF (days)	ADC (days)	NDC (days)
Periodicals	1	1	1–2	2–3
USPS Marketing Mail	2	3–4	.....	5
Package Services	1	2	.....	3

Table 4. Destination entry service standard day ranges for mail to non-contiguous states and territories.

TABLE 4—DESTINATION ENTRY SERVICE STANDARD DAY RANGES FOR MAIL TO NON-CONTIGUOUS STATES AND TERRITORIES

Mail class	Destination entry (at appropriate facility)									
	DDU (days)	SCF (days)			ADC (days)			NDC (days)		
		Alaska	Hawaii, Guam, MP, & AS	PR & USVI	Alaska	Hawaii, Guam, MP, & AS	PR & USVI	Alaska	Hawaii, Guam, MP, & AS	PR & USVI
Periodicals	1	1–3	1	1–3	1–4 (AK) 11 (JNU) 11 (KTN)	1 (HI) 2 (GU)	1–4	10–11	10	8–10
USPS Marketing Mail	2	3–4	3–5	3–5	.....	.....	.....	14	13	12
Package Services	1	2	2–3	2–3	.....	.....	.....	12	11	11

AK = Alaska 3-digit ZIP Codes 995–997; JNU = Juneau AK 3-digit ZIP Code 998; KTN = Ketchikan AK 3-digit ZIP Code 999; HI = Hawaii 3-digit ZIP Codes 967 and 968; GU = Guam 3-digit ZIP Code 969.

Ruth Stevenson,
Chief Counsel, Ethics and Legal Compliance.
[FR Doc. 2021–17127 Filed 8–6–21; 4:15 pm]
BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R10–OAR–2021–0212; FRL–8738–02–R10]

Air Plan Approval; OR; Updates to Adoption by Reference of Federal Provisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a revision to the Oregon State Implementation Plan (SIP) submitted on January 29, 2021. The revision updates the date by which Federal provisions are adopted by reference into the Oregon SIP, making air quality requirements more current.

DATES: This final rule is effective September 10, 2021.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R10–OAR–2021–0212. All

documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information or other information the disclosure of which is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available at <https://www.regulations.gov>, or please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Kristin Hall (15–H13), EPA Region 10, 1200 Sixth Avenue (Suite 155), Seattle, WA 98101, (206) 553–6357, hall.kristin@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document wherever “we” or “our” is used, it refers to the EPA.

Table of Contents

- I. Background
- II. Response to Comments
- III. Final Action
- IV. Incorporation by Reference
- V. Statutory and Executive Order Reviews

I. Background

On January 29, 2021, the Oregon Department of Environmental Quality submitted a SIP revision to the EPA for approval. The revision, State effective January 21, 2021, updates the adoption by reference of Federal requirements used throughout the Oregon air quality rules. Oregon’s air quality rules are codified in Divisions 200 through 268 of Chapter 340 of the Oregon Administrative Rules (OAR).

We proposed to approve the revisions on April 5, 2021 (86 FR 17569). The reasons for our proposed approval were included in the proposal and will not be restated here. The public comment period for our proposal closed on May 5, 2021. We received two public comments.

II. Response to Comments

Comments

The commenters raised a wide range of concerns, including but not limited to the importance of human rights, legal recourse for victims of crimes, and just compensation for personal injury and loss of property. Most of the concerns raised by the commenters are broad in nature and do not identify any specific requirements that are inconsistent with Clean Air Act (CAA) requirements.

Therefore, we consider them outside the scope of this action. However, we have determined that one issue raised is within the scope of this action and requires a response. Specifically, one commenter alleged, generally, that incorporation by reference is illegal.

Response

We disagree with the commenter's assertion that incorporation by reference is illegal. On the contrary, section 552(a) of title 5, United States Code provides that reasonably available materials are considered published in the **Federal Register** when those materials are incorporated by reference therein and approved by the Director of the Federal Register. The Code of Federal Regulations (CFR) at 1 CFR part 51 sets forth the requirements that agencies must follow to incorporate materials by reference. In this rulemaking, the EPA is complying with the law by adhering to the requirements of 1 CFR part 51, as authorized by section 552(a) of title 5, United States Code.

To the extent the commenter has concerns about Oregon's incorporation of certain Federal regulations by reference into State rules, Oregon promulgated the rule revisions in accordance with State and CAA procedural requirements. Documentation of Oregon's rulemaking process is included in the docket for this action. Also, in approving SIPs under section 110 of the Clean Air Act (CAA), Congress gave states the lead in developing plans to implement, maintain, and enforce the national ambient air quality standards (NAAQS)—standards designed to protect public health and welfare from air pollution. In reviewing state plans, the EPA's role is to approve state choices, provided that they meet the criteria of the CAA. *See* 42 U.S.C. 7410(k) and 40 CFR 52.02(a). In this case, Oregon submitted State administrative rules to the EPA and requested that the EPA approve the rules into the Oregon SIP. Our action on the January 29, 2021 Oregon submission, with which the commenter takes issue, approves State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. Therefore, we are finalizing our action as proposed.

III. Final Action

The EPA is approving, and incorporating by reference, revisions to the Oregon SIP submitted on January 29, 2021. Upon the effective date of this action, the Oregon SIP will include the

following regulations, State effective January 21, 2021:

- OAR 340–200–0035, Reference Materials; and
- OAR 340–244–0030, General Provisions for Stationary Sources: Definitions, only to the extent needed to implement the requirements for gasoline dispensing facilities in Division 244 that are approved into the SIP for the purposes of regulating VOC emissions.

IV. Incorporation by Reference

In this document, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, we are finalizing the incorporation by reference of Oregon regulatory provisions as described in the amendments to 40 CFR part 52 set forth below. The EPA has made, and will continue to make, these materials generally available through <https://www.regulations.gov> and at the EPA Region 10 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by the EPA for inclusion in the SIP, have been incorporated by reference by the EPA into that plan, are fully federally-enforceable under sections 110 and 113 of the CAA as of the effective date of the final rule of the EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.¹

V. Statutory and Executive Order Reviews

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

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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 it will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States

¹62 FR 27968 (May 22, 1997).

Court of Appeals for the appropriate circuit by October 12, 2021. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. See section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference,

Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

Dated: August 3, 2021.

Michelle L. Pirzadeh,

Acting Regional Administrator, Region 10.

For the reasons set forth in the preamble, 40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

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

Subpart MM—Oregon

■ 2. In § 52.1970, paragraph (c), amend table 2 by revising the entries for “200–0035” and “244–0030” and revising footnote number 3 to read as follows:

§ 52.2470 Identification of plan.

* * * * *
(c) * * *

TABLE 2—EPA APPROVED OREGON ADMINISTRATIVE RULES (OAR)¹

State citation	Title/subject	State effective date	EPA approval date	Explanations
CHAPTER 340—DEPARTMENT OF ENVIRONMENTAL QUALITY				
*	*	*	*	*
Division 200—General Air Pollution Procedures and Definitions				
*	*	*	*	*
200–0035	Reference Materials	1/21/2021	8/11/2021, [Insert Federal Register citation].	
*	*	*	*	*
Division 244—Oregon Federal Hazardous Air Pollutant Program^{2,3}				
General Provisions for Stationary Sources				
*	*	*	*	*
244–0030	Definitions	1/21/2021	8/11/2021, [Insert Federal Register citation].	
*	*	*	*	*

³ The EPA approves Division 244 only to the extent needed to implement the requirements for gasoline dispensing facilities that are approved into the SIP for the purpose of regulating VOC emissions.

* * * * *
[FR Doc. 2021–16947 Filed 8–10–21; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R02–OAR–2020–0324, FRL–8832–02–R2]

Approval and Promulgation of Implementation Plans; New York; Ozone Season NO_x Controls for Simple Cycle and Regenerative Combustion Turbines

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a revision to the New York State Implementation Plan (SIP) as a SIP-strengthening measure that is expected to further control emissions of oxides of nitrogen (NO_x) to contribute to attainment and maintenance of ozone standards. This SIP strengthening measure goes beyond what has already been approved as satisfying the RACT requirements for the 2008 ozone NAAQS. The EPA is approving a SIP revision of a New York regulation that lowers allowable NO_x emissions from simple cycle and regenerative combustion turbines during the ozone season. The intended effect of this action is to approve control

strategies that will reduce emissions and help New York State attain and maintain the national ambient air quality standards for ozone.

DATES: This final rule is effective on September 10, 2021.

ADDRESSES: The EPA has established a docket for this action under Docket ID Number EPA–R02–OAR–2020–0324. All documents in the docket are listed on the <http://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly

available only in hard copy form. Publicly available docket materials are available electronically through <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Fausto Taveras, Environmental Protection Agency, 290 Broadway, New York, New York 10007-1866, at (212) 637-3378, or by email at Taveras.Fausto@epa.gov.

SUPPLEMENTARY INFORMATION: The SUPPLEMENTARY INFORMATION section is arranged as follows:

Table of Contents:

- I. What is the background for this action?
- II. What comments were received in response to the EPA's proposed action?
- III. What action is the EPA taking?
- IV. Incorporation by Reference
- V. Statutory and Executive Order Reviews

I. What is the background for this action?

On February 26, 2021, the EPA published a Notice of Proposed Rulemaking that proposed to approve a revision to the New York SIP submitted by the State of New York on May 18, 2020. See 86 FR 11688. The SIP revision includes a newly-adopted regulation, Title 6 of the New York Code of Rules and Regulations (NYCRR), Subpart 227-3, "Ozone Season Oxides of Nitrogen (NO_x) Emission Limits for Simple Cycle and Regenerative Combustion Turbines" (Subpart 227-3), meant to reduce NO_x emissions from simple cycle and regenerative combustion turbines during the ozone season. New York's May 2020 SIP submittal applies to major sources of NO_x as a SIP-strengthening measure for New York's ozone SIP.

The EPA is also approving the removal of New York's previous 6 NYCRR Subpart 227-3, "Pre-2003 Nitrogen Oxides Emissions Budget and Allowance Program" (New York's 227-3 Trading Program Regulation) from New York's SIP.¹ New York's 227-3

¹ In the February 26, 2021 Notice of Proposed Rulemaking (NPRM), the EPA mistakenly wrote that it was "also proposing to approve into the SIP the new version of 6 NYCRR Subpart 227-3, "Pre-2003 Nitrogen Oxides Emissions Budget and Allowance Program" (New York's 227-3 Trading Program Regulation)." (Emphases added). The EPA, as stated above, intended to propose to remove this previous version of Subpart 227-3 from New York's SIP. The EPA's intention to remove this version from New York's SIP was made clear by, for example, the section of the NPRM entitled "Removal of New York's Nitrogen Oxides Emissions Budget and Allowance Program (Ozone Control Periods 1999-2002)" (86 FR at 11690-11691). The EPA received no comments on this issue. Because the agency's intention was made clear, it has determined the language in the NPRM provided adequate notice of EPA's intended proposal with respect to this provision. Thus, the EPA is finalizing the removal of New York's 227-3 Trading Program Regulation from New York's SIP.

Trading Program Regulation contained a NO_x emissions budget and allowance trading system that is no longer in effect and that New York repealed from the New York Code of Rules and Regulations on September 5, 2014.

The specific details of New York's SIP submittals and the rationale for the EPA's approval action are explained in the EPA's proposed rulemaking and are not restated in this final action. For this detailed information, the reader is referred to the EPA's February 26, 2021 proposed rulemaking. See 86 FR 11688.

II. What comments were received in response to the EPA's proposed action?

In response to EPA's February 26, 2021 proposed rulemaking on New York's SIP revision, the EPA received four comments during the 30-day public comment period. The specific comments may be viewed under Docket ID Number EPA-R02-OAR-2020-0324 on the <http://www.regulations.gov> website.

Comment 1: A Washington State citizen commenter supports the EPA's proposed approval of New York's SIP revision since ". . . high levels of nitrogen oxides are extremely detrimental . . . and [the commenter believes] that it would be in the best interest of public health to lower the allowable levels of the nitrogen oxides allowed in NYC."

Response 1: The EPA acknowledges the commenter's support of the EPA's proposed rule.

Comment 2: An anonymous citizen provided extensive comments regarding the establishment of the Clean Air Act and the impact of NO_x emissions to the environment. The commenter voices support of the EPA's proposed approval since ". . . these turbines would be beneficial when it comes to lowering nitrous oxide emissions during the warmer periods, and ozone seasons."

Response 2: The EPA acknowledges the commenter's support of the EPA's proposed rule.

Comment 3: A New York State citizen provides extensive comments, in which the commenter asks if the COVID-19 pandemic has impacted studies concerning NO_x. The commenter provides a range of data about COVID-19 and its impacts globally and across the country.

Response 3: The EPA has determined that this comment is outside the scope of our proposed action. This comment does not make specific claims about how EPA should modify its proposed action, and therefore the EPA will not provide a specific response to this comment.

Comment 4: The Midwest Ozone Group (MOG) submitted comprehensive comments that urge the EPA to require New York to impose all emission controls for Simple Cycle Combustion Turbines (SCCTs) units by 2023, instead of the adopted 2025 final phase year. MOG stated that a 2023 implementation will "be consistent with the nonattainment obligations of the [New York Metropolitan Nonattainment Area, or] NYMA." MOG also provided details on how NO_x emissions from New York's SCCTs adversely impact upwind states like Connecticut and argued that EPA's proposed approval fails to recognize the impact on those upwind states and the Good Neighbor Provisions of the Clean Air Act. In addition, MOG provided the following comments, and extensive details for each, as follows:

1. In 2023, the only remaining ozone monitor modeled to show nonattainment in the Northeast is located in the Connecticut portion of the NYMA.

2. It has been well-established that residual nonattainment in Connecticut and the NYMA is being caused by SCCT units in New York.

3. EPA should not allow, therefore, New York to delay the implementation of those controls beyond the Moderate nonattainment date for the 2015 ozone NAAQS.

MOG's comment letter also included: (1) Presentation slides distributed by the EPA on the analysis of ozone trends in the east in relation to interstate transport, (2) MOG's December 14, 2020 comment letter to the EPA regarding the proposal of the Revised Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, and (3) a data analysis presentation conducted by the Stationary and Area Sources Committee on high emitting Electric Generating Units during High Electric Demand Days throughout states within the Ozone Transport Region. MOG referred to these attachments throughout its comment on EPA's proposed action.

Response 4: The EPA reviewed NYSDEC's SIP revision to examine if similar comments were presented during the department's assessment of public comments for the proposal of Subpart 227-3. Representatives from the EPA, state agencies, environmental organizations, and sustainable energy organizations each submitted comments that requested NYSDEC to have the proposed 2025 NO_x limits on SCCTs take effect sooner. In the EPA's case, this is because the EPA wanted the SIP-strengthening provision to begin as expeditiously as possible to enhance New York's ozone SIP. NYSDEC responded to the comments by stating

that it has consulted with stakeholders—including environmental justice organizations, environmental groups, impacted source owners, the NYISO, the Department of Public Service, and the New York State Energy Research and Development Authority—during the development of the regulation. NYSDEC stated that it chose the 2025 timeframe to take into account considerations of improving air quality and maintaining electric system reliability. NYSDEC has also factored in the time demands for permitting and implementing other requirements, such as stack testing, and believes that the compliance schedule in the regulation is appropriate. After review, the EPA concurs with NYSDEC's assessment because the compliance schedule will provide adequate timing for owners or operators of impacted SCCTs to retrofit control technology, determine compliance options, and replace or retire older units in order to comply with the more stringent emission limits. The EPA also agrees with NYSDEC that the chosen timeframe provides owners and operators of SCCTs designated as a reliability source, which represents a significant amount of the impacted SCCTs, an appropriate timeframe to comply with the control requirements of Subpart 227–3.

Further, the EPA finds the 2025 timeframe is appropriate because it builds upon existing protections in other New York regulations applicable to SCCTs. For example, on July 12, 2013, the EPA published a final approval that revised New York's SIP for ozone concerning the control of NOx. *See* 78 FR 41846. The SIP revision consisted of amendments to Title 6 of the NYCRR, Subpart 227–2, “Reasonably Available Control Technology (RACT) For Major Facilities of Oxides of Nitrogen (NOx).” The purpose of that SIP revision was to impose more stringent emission limits on major stationary sources of NOx that contribute to regional and local nonattainment of the 1997 and 2008 ozone standards. Included within this EPA-approved regulation are emission limits and system averaging for SCCTs that apply year-round. Units applicable to Subpart 227–3 already comply with federally approved presumptive RACT emission limits. And SCCTs that are subject to Subpart 227–3 must also comply with the provisions set in Subpart 227–2 outside the ozone season.² When the EPA published the

final approval of New York's Subpart 227–2, the EPA agreed that the emission limits detailed for SCCTs were deemed as RACT NOx limits. *See* 78 FR 41846, (July 12, 2013). The purpose of Subpart 227–3 is to incorporate additional emission requirements (beyond RACT NOx limits) for SCCTs during the ozone season only. The phased-in approach outlined within Subpart 227–3 does not create undue delay in emission reductions because applicable SCCTs comply with the EPA-approved NOx RACT limits detailed in Subpart 227–2 year-round. The emission limits and compliance schedule outlined in Subpart 227–3 will result in further NOx reductions throughout the NYMA as expeditiously as practicable. The EPA believes, therefore, that the additional emission requirements listed within Subpart 227–3 will strengthen New York's ozone SIP and help the state attain the 2008 and 2015 national ambient air quality standards for ozone.

III. What action is the EPA taking?

The EPA is approving New York's SIP revision submittal dated May 18, 2020, for purposes of incorporating 6 NYCRR Subpart 227–3, “Ozone Season Oxides of Nitrogen (NOx) Emission Limits for Simple Cycle and Regenerative Combustion Turbines,” with a state effective date of January 16, 2020. After evaluating Subpart 227–3 for consistency with the CAA, EPA regulations, and EPA policy, the EPA finds that the submission strengthens New York's ozone SIP and, as an added benefit, will help New York State attain and maintain the national ambient air quality standards for ozone.

The EPA is also approving the removal of New York's previous 6 NYCRR Subpart 227–3, “Pre-2003 Nitrogen Oxides Emissions Budget and Allowance Program”, from New York's SIP. In addition to finding that New York's 227–3 Trading Program Regulation is no longer in effect and that New York repealed it from the New York Code of Rules and Regulations, the EPA has determined, as discussed in the proposed rulemaking (*see* 86 FR 11688), that New York's 227–3 Trading Program Regulation has been superseded by other state and federal regulations that required additional NOx ozone season emission reductions. As the EPA determined regarding New York's CAIR trading program rule (*see* 86 FR 11688), the EPA does not believe that the removal of New York's 227–3 Trading

Program Regulation from New York's SIP will interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the NAAQS. And as discussed in the proposed rulemaking, New York's 227–3 Trading Program Regulation predates more stringent rules and tighter NOx ozone season budgets under the NOx SIP call, CAIR, and CSAPR trading programs, as well as New York NOx RACT rules; it is not applicable to the current federal or state regulatory framework. New York also does not rely on emission reductions from New York's 227–3 Trading Program Regulation in any of its nonattainment planning elements required under CAA sections 110, 172, or 182 and the EPA no longer operates the NOx Budget Trading Program allowing for the allocation and trading of allowances.

Moreover, the removal of New York's 227–3 Trading Program Regulation from New York's SIP will have no consequences for the attainment and maintenance of the NAAQS in any area, now or in the future. Consistent with CAA section 110(l), the EPA has determined that the removal of New York's 227–3 Trading Program Regulation will not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of the NAAQS.

Accordingly, the EPA finds that it is appropriate to approve the removal of New York's 227–3 Trading Program Regulation from the New York SIP.

The EPA is approving New York's May 18, 2020 SIP submittal as it applies to major sources of NOx, as a SIP-strengthening measure for New York's ozone SIP.

IV. Incorporation by Reference

In this document, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of 6 NYCRR Part 227–3, “Ozone Season Oxides of Nitrogen (NOx) Emission Limits for Simple Cycle and Regenerative Combustion Turbines,” the regulation described in the amendments to 40 CFR part 52 set forth below. EPA has made, and will continue to make, these materials generally available through www.regulations.gov and at the EPA Region 2 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in New

² Under 6 NYCRR Subpart 227–2, applicable owners or operators of gas-fired SCCTs must comply with a RACT NOx emission limit of 50 ppmvd outside the ozone season. While owners or

operators of oil-fired SCCTs must comply with a RACT NOx limit of 100 ppmvd outside the ozone season. The NOx emission limits are on a part per million dry volume basis (ppmvd), corrected to 15% oxygen.

York’s SIP, have been incorporated by reference by EPA into that SIP, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA’s approval, and will be incorporated by reference in the next update to the SIP compilation.³

V. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735 (October 4, 1993)) and 13563 (76 FR 3821 (January 21, 2011));
- Is not an Executive Order 13771 (82 FR 9339 (February 2, 2017)) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255 (August 10, 1999));

- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885 (April 23, 1997));
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355 (May 22, 2001));
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629 (February 16, 1994)).

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

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 12, 2021. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen Dioxide, Intergovernmental Relations, Ozone, Reporting and recordkeeping requirements, Volatile Organic Compounds.

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

Dated: August 03, 2021.

Walter Muggan,

Acting Regional Administrator, Region 2.

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

- 1. The authority citation for part 52 continues to read as follows:

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

Subpart HH—New York

- 2. In § 52.1670, the table in paragraph (c) is amended by revising the entry “Title 6, Part 227, Subpart 227–3” to read as follows:

§ 52.1670 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED NEW YORK STATE REGULATIONS AND LAWS

State citation	Title/subject	State effective date	EPA approval date	Comments
* * * * *	* * * * *	* * * * *	* * * * *	* * * * *
Title 6, Part 227, Subpart 227–3.	Ozone Season Oxides of Nitrogen (NOx) Emission Limits for Simple Cycle and Regenerative Combustion Turbines.	January 16, 2020 ...	August 11, 2021 [Federal Register page citation] EPA approval finalized at [insert Federal Register citation].	
* * * * *	* * * * *	* * * * *	* * * * *	* * * * *

³ 62 FR 27968 (May 22, 1997).

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[FR Doc. 2021-16939 Filed 8-10-21; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 52**

[EPA-R07-OAR-2021-0365; FRL-8705-02-R7]

Interstate Transport Prongs 1 and 2 for the 2010 Sulfur Dioxide (SO₂) Standard for Kansas and Nebraska**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to approve State Implementation Plan (SIP) submissions from Kansas and Nebraska addressing the Clean Air Act (CAA or Act) interstate transport SIP requirements for the 2010 Sulfur Dioxide (SO₂) National Ambient Air Quality Standards (NAAQS). These submissions address the requirement that each SIP contain adequate provisions prohibiting air emissions that will have certain adverse air quality effects in other states. The EPA is approving portions of these infrastructure SIPs for the aforementioned states as containing adequate provisions to ensure that air emissions in the states will not significantly contribute to nonattainment or interfere with maintenance of the 2010 SO₂ NAAQS in any other state.

DATES: This final rule is effective on September 10, 2021.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-R07-OAR-2021-0365. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information may not be publicly available, *i.e.*, Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the Atmospheric Programs Section, Air Quality Planning Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 7, 11201 Renner Boulevard, Lenexa, Kansas 66219. The EPA requests that if at all possible, you contact the person listed

in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday 8:30 a.m. to 4:30 p.m., excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Ashley Keas, Environmental Protection Agency, Region 7 Office, Air Quality Planning Branch, 11201 Renner Boulevard, Lenexa, Kansas 66219 at (913) 551-7629, or by email at keas.ashley@epa.gov.

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

Table of Contents

- I. What is being addressed in this document?
- II. Have the requirements for approval of a SIP revisions been met?
- III. What are the actions the EPA is taking?
- IV. Statutory and Executive Order Reviews

I. What is being addressed in this document?

In this action, the EPA is approving the prong 1 and prong 2 portions of infrastructure SIP submissions submitted by Kansas on April 7, 2020, and Nebraska on October 27, 2020, as demonstrating that the SIP contains adequate provisions to ensure that air emissions from sources in these states will not significantly contribute to nonattainment or interfere with maintenance of the 2010 SO₂ NAAQS in any other state or each other. All other applicable infrastructure SIP requirements for these SIP submissions are addressed in separate rulemakings.

As discussed in Section IV of the proposed action (see 86 FR 31645), the EPA first reviewed each state's analysis to assess how the state evaluated the transport of SO₂ to other states, the types of information used in the analysis and the conclusions drawn by the state. The EPA then conducted a weight of evidence analysis, including review of each state's submission and other available information, including air quality, emission sources and emission trends within the state and in bordering states to which it could potentially contribute or interfere.¹

¹ This approval action is based on the information contained in the administrative record for this action and does not prejudice any other future EPA action that may make other determinations regarding any of the subject state's air quality status. Any such future actions, such as area designations under any NAAQS, will be based on their own administrative records and the EPA's analyses of information that becomes available at those times. Future available information may include, and is not limited to, monitoring data and modeling analyses conducted pursuant to the EPA's SO₂ Data Requirements Rule (80 FR 51052, August 21, 2015) and information submitted to the EPA by states, air

Please see the EPA's proposed rule for the full analysis of the state submittals.

The public comment period on the EPA's proposed rule opened on June 15, 2021, the date of its publication in the **Federal Register** and closed on July 15, 2021. During this period, the EPA received no comments.

II. Have the requirements for approval of a SIP revision been met?

The State submissions have met the public notice requirements for SIP submissions in accordance with 40 CFR 51.102. The submissions also satisfied the completeness criteria of 40 CFR part 51, appendix V. Kansas provided public notice on its SIP revision from January 16, 2020, to February 17, 2020, and received no comments. Nebraska provided public notice on its SIP revision from September 14, 2020, to October 16, 2020, and received no comments. In addition, the revision meets the substantive SIP requirements of the CAA, including section 110 and implementing regulations.

III. What are the actions the EPA is taking?

The EPA is taking final action to approve the following submittals as meeting the interstate transport requirements of CAA section 110(a)(2)(D)(i)(I) for the 2010 SO₂ NAAQS: Kansas' April 7, 2020 submittal and Nebraska's October 27, 2020 submittal. The EPA is finalizing this approval based on our review of the information and analysis provided by each state, as well as additional relevant information, as detailed in the EPA's proposed rule, which indicates that in-state air emissions will not contribute significantly to nonattainment or interfere with maintenance of the 2010 SO₂ NAAQS in any other state. This action is being taken under section 110 of the CAA.

IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, these proposed actions merely approve state law as meeting federal requirements and do not impose additional requirements beyond those

agencies, and third party stakeholders such as citizen groups and industry representatives.

imposed by state law. For that reason, these proposed actions:

- Are not significant regulatory actions subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Are 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.*);
- Do 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);
- Do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Are not economically significant regulatory actions based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Are not significant regulatory actions subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Are 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 this action does not involve technical standards; and
- Do not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible

methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, these SIPs are 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).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 12, 2021. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it

extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Sulfur dioxide, Volatile organic compounds.

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

Dated: July 30, 2021.

Edward H. Chu,

Acting Regional Administrator, Region 7.

For the reasons stated in the preamble, the EPA amends 40 CFR part 52 as set forth below:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

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

Subpart R Kansas

■ 2. In § 52.870, the table in paragraph (e) is amended by adding an entry for “(46)” in numerical order to read as follows:

§ 52.870 Identification of plan.

* * * * *
(e) * * *

EPA-APPROVED KANSAS NONREGULATORY PROVISIONS

Name of nonregulatory SIP provision	Applicable geographic or non-attainment area	State submittal date	EPA approval date	Explanation
*	*	*	*	*
(46) Section 110(a)(2)(D)(i)(I)—significant contribution to nonattainment (prong 1), and interfering with maintenance of the NAAQs (prong 2) (Interstate Transport Infrastructure Requirements for the 2010 SO ₂ NAAQS.	Statewide	4/7/2020	8/11/2021, [Federal Register citation].	[EPA–R07–OAR–2021–0365; FRL–8705–02–Region 7]. This action addresses the following CAA elements: 110(a)(2)(D)(i)(I)—prongs 1 and 2.

Subpart CC—Nebraska

■ 3. In § 52.1420, the table in paragraph (e) is amended by adding an entry for

“(37)” in numerical order to read as follows:

§ 52.1420 Identification of plan.

* * * * *
(e) * * *

EPA-APPROVED NEBRASKA NONREGULATORY PROVISIONS

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State submittal date	EPA approval date	Explanation
(37) Section 110(a)(2)(D)(i)(I)—significant contribution to nonattainment (prong 1), and interfering with maintenance of the NAAQs (prong 2) (Interstate Transport Infrastructure Requirements for the 2010 SO ₂ NAAQS.	Statewide	10/27/2020	8/11/2021, [Federal Register citation].	[EPA-R07-OAR-2021-0365; FRL-8705-02-Region 7]. This action addresses the following CAA elements: 110(a)(2)(D)(i)(I)—prongs 1 and 2.

[FR Doc. 2021-16759 Filed 8-10-21; 8:45 am]
BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R05-OAR-2018-0694; FRL-8823-02-R5]

Air Plan Approval; Ohio; Infrastructure SIP Requirements for the 2015 Ozone NAAQS

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving elements of a State Implementation Plan (SIP) submission from Ohio regarding the infrastructure requirements of section 110 of the Clean Air Act (CAA) for the 2015 Ozone National Ambient Air Quality Standards (NAAQS). The infrastructure requirements are designed to ensure that the structural components of each state’s air quality management program are adequate to meet the state’s responsibilities under the CAA. EPA proposed to approve this action on March 9, 2021, and received no adverse comments.

DATES: This final rule is effective on September 10, 2021.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-R05-OAR-2018-0694. All documents in the docket are listed on the *www.regulations.gov* web site. Although listed in the index, some information is not publicly available, *i.e.*, Confidential Business Information (CBI) or other information whose

disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either through *www.regulations.gov* or at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays and facility closures due to COVID-19. We recommend that you telephone Rachel Rineheart, Environmental Engineer, at (312) 886-7017 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Rachel Rineheart, Environmental Engineer, Air Permits Section, Air Programs Branch (AR18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886-7017, *rineheart.rachel@epa.gov*.

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

I. Background Information

On March 9, 2021, EPA proposed to approve elements of a SIP submission from Ohio regarding the infrastructure requirements of CAA section 110 for the 2015 ozone NAAQS. The infrastructure requirements are designed to ensure that the structural components of each state’s air quality management program are adequate to meet the state’s responsibilities under the CAA. An explanation of the CAA requirements, a detailed analysis of the revisions, and

EPA’s reasons for proposing approval were provided in the notice of proposed rulemaking and will not be restated here.

The public comment period for this proposed rule ended on April 9, 2021. During the comment period, EPA received 3 comments that covered a variety of topics including: Support of the proposed action and questions regarding how EPA ensures that states are complying with the approved SIP; what other measures beyond the SIP states must follow; how EPA determines if emissions from one state impact air quality in another state; and how EPA informs the public of adverse air quality conditions. All of the comments received are included in the docket for this action.

We do not consider these comments to be germane or relevant to the specifics of this action and therefore not adverse to this action. The comments lack the required specificity to the proposed SIP revision and the relevant requirements of CAA section 110. Moreover, none of the comments address a specific regulation or provision in question, or recommend a different action on the SIP submission from what EPA proposed. Therefore, we are finalizing our action as proposed.

II. Final Action

EPA is approving most elements of a submission from Ohio certifying that its current SIP is sufficient to meet the infrastructure requirements in CAA sections 110(a)(1) and (2) with respect to the 2015 Ozone NAAQS. EPA’s final actions for the state’s satisfaction of infrastructure SIP requirements, by element of section 110(a)(2) are contained in the table below.

Element	2015 ozone NAAQS
(A)—Emission limits and other control measures	A
(B)—Ambient air quality monitoring/data system	A

Element	2015 ozone NAAQS
(C)1—Program for enforcement of control measures	A
(C)2—Prevention of Significant Deterioration	A
(D)1—I Prong 1: Interstate transport—significant contribution	NA
(D)2—I Prong 2: Interstate transport—interfere with maintenance	NA
(D)3—II Prong 3: Interstate transport—prevention of significant deterioration	A
(D)4—II Prong 4: Interstate transport—protect visibility	A
(D)5—Interstate and international pollution abatement	A
(E)1—Adequate resources	A
(E)2—State board requirements	A
(F)1—Monitoring/Testing Source Emissions	A
(F)2—Periodic Source Emissions Reports	A
(F)3—Correlation and Public Availability of Source Emissions Reports and Data	A
(G)—Emergency power	A
(H)—Future SIP revisions	A
(I)—Nonattainment planning requirements of part D	*
(J)1—Consultation with government officials	A
(J)2—Public notification	A
(J)3—PSD	A
(J)4—Visibility protection	*
(K)—Air quality modeling/data	A
(L)—Permitting fees	A
(M)—Consultation and participation by affected local entities	A

In the above table, the key is as follows:
 A—Approve.
 NA—No Action/Separate Rulemaking.
 * Not germane to infrastructure SIPs.

III. Statutory and Executive Order Reviews

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

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

- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
 - Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
 - Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
 - Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).
- In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General

of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 12, 2021. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: July 30, 2021.
Cheryl Newton,
Acting Regional Administrator, Region 5.

For the reasons stated in the preamble, EPA amends title 40 CFR part 52 as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

- 1. The authority citation for part 52 continues to read as follows:
Authority: 42 U.S.C. 7401 *et seq.*
- 2. In § 52.1870, the table in paragraph (e) is amended under the heading “Infrastructure Requirements” by

adding an entry for “Section 110(a)(2) Infrastructure Requirements for the 2015 ozone NAAQS” immediately after the entry for “Section 110(a)(2) infrastructure requirements for the 2012 PM_{2.5} NAAQS” to read as follows:

§ 52.1870 Identification of plan.
 * * * * *
 (e) * * *

EPA-APPROVED OHIO NONREGULATORY AND QUASI-REGULATORY PROVISIONS

Title	Applicable geographical or non-attainment area	State date	EPA approval	Comments
*	*	*	*	*
Infrastructure Requirements				
*	*	*	*	*
Section 110(a)(2)(D) infrastructure requirements for the 2015 ozone NAAQS.	Statewide	9/28/2018	8/11/2021, [INSERT Federal Register CITATION].	Approved CAA elements: 110(a)(2)(A), (B), (C), (D), (E), (F), (G), (H), (J), (K), (L), and (M). We are not taking action on (D)(i)(II), prongs one and two.
*	*	*	*	*

* * * * *
 [FR Doc. 2021-16881 Filed 8-10-21; 8:45 am]
BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA-HQ-OPP-2020-0113; FRL-8751-01-OCSPP]

Florasulam; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes a tolerance with regional registrations for residues of florasulam in or on grass, forage, fodder and hay, group 17. The Interregional Project Number 4 (IR-4) requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective August 11, 2021.

Objections and requests for hearings must be received on or before October 12, 2021, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA-HQ-OPP-2020-0113, is available at <http://www.regulations.gov> or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC 20460-0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the OPP Docket is (703) 305-5805.

Due to the public health emergency, the EPA Docket Center (EPA/DC) and Reading Room is closed to visitors with limited exceptions. The staff continues to provide remote customer service via email, phone, and webform. For the latest status information on EPA/DC services and docket access, visit <https://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT: Marietta Echeverria, Acting Director, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001; main telephone number: (703) 305-

7090; email address: RDfRNNotices@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

You may access a frequently updated electronic version of EPA’s tolerance regulations at 40 CFR part 180 through the Government Publishing Office’s e-CFR site at http://www.ecfr.gov/cgi-bin/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.

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

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA-HQ-OPP-2020-0113 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing and must be received by the Hearing Clerk on or before October 12, 2021. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA-HQ-OPP-2020-0113, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.

- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW, Washington, DC 20460-0001.

- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at <https://www.epa.gov/dockets/where-send-comments-epa-dockets>. Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at <http://www.epa.gov/dockets>.

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of June 24, 2020 (85 FR 37806) (FRL-10010-82) and in the **Federal Register** of August 5, 2020 (85 FR 47330) (FRL-10012-32), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 0E8821) by IR-4, Rutgers, the State University of New

Jersey, 500 College Road East, Suite 201W, Princeton, NJ 08540. These petitions requested that 40 CFR 180.633 be amended by establishing tolerances with regional registrations for residues of the herbicide florasulam, N-(2, 6-difluorophenyl)-8-fluoro-5-methoxy (1, 2, 4) triazole (1, 5-c)pyrimidine-2-sulfonamide, in or on grass, forage at 0.01 parts per million (ppm); and grass, hay at 0.02 ppm. Those documents referenced a summary of the petition prepared by Corteva Agriscience, the registrant, which is available in the docket, <https://www.regulations.gov/document/EPA-HQ-OPP-2020-0113-0003>. There were no comments received in response to these notices of filings.

EPA is establishing a tolerance for the crop group rather than separate tolerances for forage and hay. The reason for this change is explained in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is “safe.” Section 408(b)(2)(A)(ii) of FFDCA defines “safe” to mean that “there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.” This includes exposure through drinking water and in residential settings but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to “ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue”

Consistent with FFDCA section 408(b)(2)(D), and the factors specified in FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for florasulam including exposure resulting from the tolerances established by this action. EPA’s assessment of exposures and risks associated with florasulam follows.

In an effort to streamline its publications in the **Federal Register**, EPA is not reprinting sections of the rule that would repeat what has been previously published in tolerance

rulemakings for the same pesticide chemical. Where scientific information concerning a particular pesticide chemical remains unchanged, the content of those sections would not vary between tolerance rulemakings and republishing the same sections is unnecessary and duplicative. EPA considers referral back to those sections as sufficient to provide an explanation of the information EPA considered in making its safety determination for the new rulemaking.

EPA has previously published a number of tolerance rulemakings for florasulam, in which EPA concluded, based on the available information, that there is a reasonable certainty that no harm would result from aggregate exposure to florasulam and established tolerances for residues of that chemical. EPA is incorporating previously published sections from those rulemakings as described further in this rulemaking, as they remain unchanged.

Toxicological profile. The Toxicological Profile of florasulam remains unchanged from the Toxicological Profile in Unit III.A. of the July 25, 2018 rulemaking (83 FR 35141) (FRL-9979-81). Refer to that section for a discussion of the Toxicological Profile of florasulam.

Toxicological Points of Departure/Levels of Concern. The Toxicological Points of Departure/Levels of Concern used for the safety assessment remain unchanged from Unit III.B. of the July 25, 2018 rulemaking. For a summary, refer to that discussion.

Exposure assessment. Much of the exposure assessment remains the same, although updates have occurred to accommodate exposures from the petitioned-for tolerances. These updates are discussed in this section; for a description of the rest of the EPA approach to and assumptions for the exposure assessment, see Unit III.C. of the July 25, 2018 rulemaking.

EPA’s dietary exposure assessments have been updated to include the additional exposure from the new uses of florasulam on grass seedlings, grasses grown for seed, and to add a default processing factor of 7.7x for oat bran that was previously omitted. All other assumptions in the exposure assessments for florasulam remain the same as in the July 25, 2018 rulemaking, including tolerance level residues, the other default processing factors, and 100% crop treated. Additionally, the proposed new use restricts the feeding of or grazing of livestock on grass treated with florasulam; therefore, 40 CFR 180.6(a)(3) continues to apply.

Drinking water and non-occupational exposures. Drinking water exposures are

not impacted by the new uses, and thus have not changed since the last assessment. There were no changes to the drinking water analysis due to the estimated drinking water concentrations (EDWC) for terrestrial applications that were approximately 500- to 1,200-fold lower than concern levels. Therefore, the Agency has concluded that previous EDWCs are adequate.

Residential (non-occupational) exposures are also not impacted by the new uses. There are no new proposed residential uses for florasulam at this time; however, there are registered uses of florasulam on turfgrass, including residential lawns, golf courses, sports fields, sod farms and commercial turfgrass areas. Because all current florasulam labels with turf uses require handlers to wear personal protective equipment, EPA assumes that florasulam is applied by professional applicators, not residential (homeowner) applicators. Therefore, the current assessment does not consider exposure to residential handlers. This is different than the assessment supporting the July 25, 2018 rule, which relied on a 2009 assessment that included inhalation exposure to residential handlers. EPA's policy has changed since 2009 to reflect the assumption described above regarding labels that require personal protective equipment.

Post-application residential exposures were considered as part of the assessment. Due to lack of a dermal endpoint, only the incidental oral exposures for children 1 to less than 2 years old from use on residential turf were assessed. Margins of exposure (MOEs) ranged from 25,000 for hand-to-mouth short-term exposure to 11,000,000 for incidental soil ingestion short-term exposure and were not of concern. More detailed information about the Agency's analysis can be found at <http://www.regulations.gov> in the document titled "Florasulam: Draft Human Health Risk Assessment for Registration Review" in docket ID number EPA-HQ-OPP-2020-0113.

Cumulative exposures. Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider "available information" concerning the cumulative effects of a particular pesticide's residues and "other substances that have a common mechanism of toxicity." EPA's assessment of cumulative exposures has not changed since the July 25, 2018 rulemaking. Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, EPA has not found a common mechanism of

toxicity as to florasulam and any other substances and florasulam does not appear to produce a toxic metabolite produced by other substances. For the purposes of this action, therefore, EPA has not assumed that florasulam has a common mechanism of toxicity with other substances.

Safety Factor for Infants and Children. The scientific information underpinning EPA's prior safety factor determination remains unchanged from the July 25, 2018 rulemaking. Therefore, EPA continues to conclude that there are reliable data to support the reduction of the Food Quality Protection Act (FQPA) safety factor. See Unit III.D. of the July 25, 2018 rulemaking for a discussion of the Agency's rationale for that determination.

Aggregate Risks and Determination of Safety. EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing dietary exposure estimates to the acute population adjusted dose (aPAD) and the chronic PAD (cPAD). Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate points of departure to ensure that an adequate MOE exists. For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure.

An acute dietary risk assessment was not conducted as toxicological effects attributable to a single dose were not identified. Chronic dietary risks are below the Agency's level of concern of 100% of the cPAD: They are less than 1% of the cPAD for the U.S. population and all population subgroups. Florasulam is classified as "Not Likely to be Carcinogenic to Humans;" therefore, a cancer dietary exposure analysis was not performed.

Short-term aggregated risk included the incidental oral exposures and the average dietary exposures from food and drinking water sources. Short-term aggregated risk estimates for the most highly exposed child population, children 1 to less than 2 years old, results in an MOE of 17,000 and is not of concern because it is greater than the level of concern of 100. As stated in the July 25, 2018 rule, florasulam is not registered for any use patterns that would result in intermediate-term residential exposure due to the intermittent nature of applications. Because there is no intermediate-term residential exposure and chronic dietary exposure has been assessed under the appropriately protective cPAD, EPA relies on the chronic dietary risk assessment for evaluating intermediate-term risk for florasulam.

Therefore, based on the risk assessments and information described above, EPA concludes there is a reasonable certainty that no harm will result to the general population, or to infants and children, from aggregate exposure to florasulam residues. More detailed information about the Agency's analysis can be found at <http://www.regulations.gov> in the document titled "Florasulam: Human Health Risk Assessment for the Proposed New Use on Seedlings and Grasses Grown for Seed" in docket ID number EPA-HQ-OPP-2020-0113.

IV. Other Considerations

A. Analytical Enforcement Methodology

For a discussion of the available analytical enforcement method, see Unit IV.A. of the July 25, 2018 rulemaking.

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4).

The Codex has not established MRLs for residues of florasulam in/on grasses.

C. Revisions to Petitioned-For Tolerances

After the NOF was published, the petitioner revised their tolerance request to establish a tolerance for grass, forage, fodder and hay, group 17 at 0.02 ppm. The Agency determined that the residue data support that tolerance and therefore is establishing the tolerance for the crop group.

V. Conclusion

Therefore, regional tolerances are established for residues of florasulam, *N*-(2, 6-difluorophenyl)-8-fluoro-5-methoxy (1, 2, 4) triazole (1, 5-*c*)pyrimidine-2-sulfonamide, in or on grass, forage, fodder and hay, group 17 at 0.02 ppm.

VI. Statutory and Executive Order Reviews

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

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

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

This action directly regulates growers, food processors, food handlers, and food retailers, not States or Tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or Tribal Governments, on the relationship between the National Government and the States or Tribal Governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian Tribes. Thus, the Agency has determined that Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 9, 2000) do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

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

VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

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

Dated: July 29, 2021.

Marietta Echeverria,
Acting Director, Registration Division, Office of Pesticide Programs.

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

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

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

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

- 2. In § 180.633, add paragraph (c) to read as follows:

§ 180.633 Florasulam; tolerances for residues.

* * * * *

(c) *Tolerances with regional registrations.* Tolerances are established for residues of the herbicide florasulam, including its metabolites and degradates, in or on the commodities in table 2 to this paragraph (c). Compliance with the tolerance levels specified in table 2 is to be determined by measuring only florasulam, *N*-(2, 6-difluorophenyl)-8-fluoro-5-methoxy (1, 2, 4) triazole (1, 5-*c*)pyrimidine-2-sulfonamide, in or on the commodities:

TABLE 2 TO PARAGRAPH (c)

Commodity	Parts per million
Grass, forage, fodder and hay, group 17	0.02

* * * * *

[FR Doc. 2021-16969 Filed 8-10-21; 8:45 am]

BILLING CODE 6560-50-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 210505-0101; RTID 0648-XB274]

Fisheries Off West Coast States; Modification of the West Coast Commercial Salmon Fisheries; Inseason Actions #22, #23, and #24

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

ACTION: Inseason modification of 2021 management measures.

SUMMARY: NMFS announces three inseason actions in the 2021 ocean salmon fisheries. These inseason actions modified the commercial and recreational salmon fisheries in the area from the U.S./Canada border to the Oregon/California border.

DATES: The effective dates for the inseason actions are set out in this document under the heading Inseason Actions.

FOR FURTHER INFORMATION CONTACT: Shannon Penna at 562-676-2148, Email: *Shannon.penna@noaa.gov*.

SUPPLEMENTARY INFORMATION:

Background

The 2021 annual management measures for ocean salmon fisheries (86 FR 26425, May 14, 2021), announced management measures for the commercial and recreational fisheries in the area from the U.S./Canada border to the U.S./Mexico border, effective from 0001 hours Pacific Daylight Time (PDT), May 16, 2021, until the effective date of the 2022 management measures, as published in the **Federal Register**. NMFS is authorized to implement inseason management actions to modify fishing seasons and quotas as necessary to provide fishing opportunity while meeting management objectives for the affected species (50 CFR 660.409). Inseason actions in the salmon fishery may be taken directly by NMFS (50 CFR 660.409(a)—Fixed inseason management provisions) or upon consultation with the Chairman of the Pacific Fishery Management Council (Council) and the appropriate State Directors (50 CFR 660.409(b)—Flexible inseason management provisions).

Management of the salmon fisheries is generally divided into two geographic areas: north of Cape Falcon (NOF) (U.S./Canada border to Cape Falcon, OR) and

south of Cape Falcon (SOF) (Cape Falcon, OR, to the U.S./Mexico border). The actions described in this document affected the NOF and SOF commercial ocean salmon fisheries and an NOF recreational salmon fishery, as set out under the heading Inseason Actions.

Consultation on these inseason actions occurred on July 20, 2021, and July 22, 2021. Representatives from NMFS, Washington Department of Fish and Wildlife (WDFW), Oregon Department of Fish and Wildlife (WDFW), California Department of Fish and Wildlife (CDFW), and Council staff participated in the consultations.

These inseason actions were announced on NMFS' telephone hotline and U.S. Coast Guard radio broadcast on the dates of the consultations (50 CFR 660.411(a)(2)).

Inseason Actions

Inseason Action #22

Description of the action: Inseason action #22 modified the NOF recreational salmon fishery from the U.S./Canada border to Cape Alava, WA (Neah Bay subarea), from a two salmon per day bag limit to a two salmon per day bag limit, no more than one of which may be a Chinook salmon, beginning at 12:01 a.m. on July 24, 2021.

Effective date: Inseason action #22 took effect on July 24, 2021, and remains in effect until superseded.

Reason and authorization for the action: This action was necessary after WDFW closed Chinook salmon retention in adjacent state waters, Washington Marine Area 5 (Sekiu), due to higher than expected catch rates. The Sekiu closure created a concern that effort would shift to the Neah Bay subarea, potentially requiring an early closure of Chinook salmon retention in that subarea.

The NMFS West Coast Region Regional Administrator (RA) considered the landings of Chinook salmon in the NOF recreational salmon fishery, fishery effort occurring to date as well as anticipated under the proposal, quotas and guidelines set preseason, the recreational Chinook salmon guideline remaining, and recent management changes in adjacent state waters. The RA determined that inseason action #22 was necessary to preserve the available recreational Chinook salmon guideline in the Neah Bay subarea in order to meet management goals set preseason, including the Pacific Coast Salmon Fishery management Plan's (FMP) goal of extending the recreational fishery through Labor Day. The modification of recreational bag limits is authorized by 50 CFR 660.409(b)(1)(iii).

Consultation date and participants: Consultation on inseason action #22 occurred on July 20, 2021. Representatives from NMFS, WDFW, ODFW, and the Council participated in this consultation.

Inseason Action #23

Description of the action: Inseason action #23 adjusted the July-September 2021 quota for the commercial salmon troll fishery north of Cape Falcon. The quota increased from 15,375 Chinook salmon to 16,931 Chinook salmon through an impact-neutral rollover of unutilized quota from the May-June commercial salmon troll fishery in the same area.

Effective dates: Inseason action #23 took effect on Tuesday July 20, 2021, and remains in effect until superseded.

Reason and authorization for the action: Authority for this impact-neutral rollover of unutilized quota is specified in the 2021 ocean salmon regulations (86 FR 26425, May 14, 2021). The NOF May-June commercial salmon fishery had a quota of 15,375 Chinook salmon. Of that quota, 9,818 Chinook salmon were landed, leaving 5,557 of the Chinook salmon quota unutilized. The Council's Salmon Technical Team (STT) determined the impact-neutral rollover would be constrained for fishery impacts on Lower Columbia River tulle Chinook salmon, and would limit the rollover to 28 percent of the 5,557 unutilized Chinook salmon quota. Therefore, the STT calculated that the impact-neutral rollover would add 1,556 Chinook salmon to the July-September quota for an adjusted quota of 16,931 Chinook salmon.

The NMFS West Coast Region RA considered the landings of Chinook salmon in the NOF commercial salmon fishery, fishery effort occurring to date, quotas set preseason, and the STT's calculations for the impact-neutral quota rollover. The RA determined that inseason action #23 was necessary to provide access to available Chinook salmon quota and meet management goals set preseason. The modification of quotas is authorized by 50 CFR 660.409(b)(1)(i).

Consultation date and participants: Consultation on inseason action #23 occurred on July 20, 2021. Representatives from NMFS, WDFW, ODFW, and the Council participated in this consultation.

Inseason Action #24

Description of the action: Inseason action #24 modified the landing limit in the commercial ocean salmon fishery in the area from Humbug Mountain, OR, to the Oregon/California border (Oregon

Klamath Management Zone (KMZ)) from 10 Chinook salmon per vessel, per landing week (Thursday-Wednesday) to 20 Chinook salmon per vessel per landing week.

Effective dates: Inseason action #24 superseded inseason action #21 (86 FR 40182, July 28, 2021) on July 22, 2021, and remains in effect until superseded.

Reason and authorization for the action: The preseason quota for July for the commercial ocean salmon fishery in the Oregon KMZ was 200 Chinook salmon (86 FR 26425, May 14, 2021). The quota was adjusted to 216 Chinook salmon through an impact-neutral rollover of unutilized quota in the June fishery in the same area (inseason action #20, 86 FR 40182, July 28, 2021). Fishing effort and landings in July in the Oregon KMZ commercial ocean salmon fishery were much lower than anticipated and, with 10 days remaining in the fishery, only 77 Chinook salmon had been landed (36 percent of the July quota).

The NMFS West Coast Region RA considered Chinook salmon landings in the fishery and fishery effort to date and determined that inseason action #24 was necessary to provide greater access to the remaining quota. Attaining the quota is consistent with management goals set preseason. Modification of landing and retention limits is authorized by 50 CFR 660.409(b)(1)(ii).

Consultation date and participants: Consultation on inseason action #24 occurred on July 22, 2021. Representatives from NMFS, ODFW, and CDFW participated in this consultation. Council staff were unavailable to participate in the consultation, but were notified of the action immediately.

All other restrictions and regulations remain in effect as announced for the 2021 ocean salmon fisheries (86 FR 26425, May 14, 2021), as modified by previous inseason action (86 FR 34161, June 29, 2021; 86 FR 37249, July 15, 2021; 86 FR 40182, July 28, 2021).

The NMFS West Coast Region RA determined that these inseason actions were warranted based on the best available information on Pacific salmon abundance forecasts, landings to date, and anticipated fishery effort. The states manage the fisheries in state waters adjacent to the areas of the U.S. exclusive economic zone [3–200 nautical miles (5.6–370.4 kilometers) off the coasts of the states of Washington, Oregon, and California] consistent with these Federal actions. As provided by the inseason notice procedures at 50 CFR 660.411, actual notice of the described regulatory action was given, prior to the time the action was

effective, by telephone hotline numbers 206-526-6667 and 800-662-9825, and by U.S. Coast Guard Notice to Mariners broadcasts on Channel 16 VHF-FM and 2182 kHz.

Classification

NMFS issues these actions pursuant to section 305(d) of the Magnuson-Stevens Fishery Conservation and Management Act. These actions are authorized by 50 CFR 660.409, which was issued pursuant to section 304(b), and is exempt from review under Executive Order 12866.

Pursuant to 5 U.S.C. 553(b)(3)(B), there is good cause to waive prior notice and an opportunity for public comment on these actions, as notice and comment would be impracticable and contrary to

the public interest. Prior notice and opportunity for public comment on these actions was impracticable because NMFS had insufficient time to provide for prior notice, and the opportunity for public comment between the time Chinook salmon abundance, catch, and effort information was developed, and fisheries impacts were calculated, and the time the fishery modifications to be implemented in order to ensure that fisheries are managed based on the best scientific information available. As previously noted, actual notice of the regulatory action was provided to fishers through telephone hotline and radio notification. This action complies with the requirements of the annual management measures for ocean salmon

fisheries (86 FR 26425, May 14, 2021), the FMP, and regulations implementing the FMP under 50 CFR 660.409 and 660.411.

There is good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effective date, as a delay in effectiveness of these actions would allow fishing at levels inconsistent with the goals of the FMP and the current management measures.

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

Dated: August 5, 2021.

Jennifer M. Wallace,

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

[FR Doc. 2021-17008 Filed 8-10-21; 8:45 am]

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Proposed Rules

Federal Register

Vol. 86, No. 152

Wednesday, August 11, 2021

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

DEPARTMENT OF ENERGY

10 CFR Part 430

[EERE–2021–BT–STD–0002]

RIN 1904–AF14

Energy Conservation Program: Product Classes for Residential Dishwashers, Residential Clothes Washers, and Consumer Clothes Dryers

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of proposed rulemaking and request for comment.

SUMMARY: On October 30, 2020 and December 16, 2020, the Department of Energy (“DOE”) published two final rules that established product classes for residential dishwashers with a cycle time for the normal cycle of 60 minutes or less, top-loading residential clothes washers and consumer clothes dryers with a cycle time of less than 30 minutes, and front-loading residential clothes washers with a cycle time of less than 45 minutes (“short-cycle product classes”). The rules resulted in amended energy conservation standards for these short cycle product classes, without determining whether the relevant statutory criteria for amending standards were met. Thus, DOE proposes to revoke the two earlier rules that improperly promulgated standards and reinstate the prior product classes and applicable standards for these covered products. DOE requests written comment on its proposal and announces a public meeting to receive comment on this notice of proposed rulemaking (“NOPR”).

DATES: *Meeting:* DOE will hold a webinar on September 23, 2021, from 1:00 p.m. to 4:00 p.m. See section VI, “Public Participation,” for webinar registration information, participant instructions, and information about the capabilities available to webinar participants.

Comments: DOE will accept comments, data, and information regarding this NOPR no later than October 12, 2021.

ADDRESSES: Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at www.regulations.gov. Follow the instructions for submitting comments for docket number EERE–2021–BT–STD–0002. Alternatively, interested persons may send an email to: ShortCycleProductClasses2021S.TD0002@ee.doe.gov. Include the docket number EERE–2021–BT–STD–0002 and/or RIN 1904–AF14 in the subject line of the message.

Although DOE has routinely accepted public comment submissions through a variety of mechanisms, including the Federal eRulemaking Portal, email, postal mail, or hand delivery/courier, the Department has found it necessary to make temporary modifications to the comment submission process in light of the ongoing COVID–19 pandemic. DOE is currently accepting only electronic submissions at this time. If a commenter finds that this change poses an undue hardship, please contact Appliance Standards Program staff at (202) 586–1445 to discuss the need for alternative arrangements. Once the COVID–19 pandemic health emergency is resolved, DOE anticipates resuming all of its regular options for public comment submission, including postal mail and hand delivery/courier.

No telefacsimiles (faxes) will be accepted. For detailed instructions on submitting comments and additional information on the rulemaking process, see section VI (Public Participation) of this document.

Docket: The docket for this activity, which includes **Federal Register** notices, comments, and other supporting documents/materials, is available for review at www.regulations.gov. All documents in the docket are listed in the www.regulations.gov index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

The docket web page can be found at www.regulations.gov/docket/EERE-2021-BT-STD-0002. The docket web page contains instructions on how to access all documents, including public comments, in the docket. See section VI

for information on how to submit comments through www.regulations.gov.

FOR FURTHER INFORMATION CONTACT:

Mr. John Cymbalsky, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Email: ApplianceStandardsQuestions@ee.doe.gov.

Ms. Kathryn McIntosh, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC, 20585–0121. Telephone: (202) 586–2002. Email: Kathryn.McIntosh@hq.doe.gov.

For further information on how to submit a comment, review other public comments and the docket, or participate in the public meeting, contact the Appliance and Equipment Standards Program staff at (202) 287–1445 or by email: ApplianceStandardsQuestions@ee.doe.gov.

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I. Summary of Proposed Rulemaking

In October and December of 2020, DOE published two final rules that

established new short-cycle product classes for residential dishwashers, residential clothes washers, and consumer clothes dryers. 85 FR 68723 (Oct. 30, 2020) (“October 2020 Final Rule”); 85 FR 81359 (Dec. 16, 2020) (“December 2020 Final Rule”). While these short-cycle products had previously been subject to energy and water conservation standards, the October and December 2020 Final Rules stated that short-cycle product classes were no longer subject to any water or energy conservation standards. 85 FR 68723, 68742; 85 FR 81359, 81376. As a result, short-cycle products are currently allowed to consume unlimited amounts of energy and water.

In amending the standards for short-cycle products to allow for unlimited water and energy usage, DOE failed to consider whether the amended standards met the criteria in the Energy Policy and Conservation Act, as amended (“EPCA”),¹ for issuing an amended standard. Notably, among other things, DOE did not determine, as required, that the amended standards for short-cycle products were designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. 42 U.S.C. 6295(o)(2)(A). As such, DOE proposes to revoke the two earlier rules that improperly promulgated standards and to reinstate the prior product classes and applicable standards for these covered products.

II. Authority and Background

A. Authority

EPCA authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. (42 U.S.C. 6291–6317) Title III, Part B² of EPCA established the Energy Conservation Program for Consumer Products Other Than Automobiles, which sets forth a variety of provisions designed to improve energy efficiency. These covered products include residential dishwashers, residential clothes washers, and consumer clothes dryers, the subjects of this document. 42 U.S.C. 6292(a)(6), (7), and (8), respectively.

The energy conservation program under EPCA consists essentially of four parts: (1) Testing, (2) labeling, (3) the establishment of Federal energy conservation standards, and (4) certification and enforcement

procedures. Relevant provisions of EPCA specifically include definitions (42 U.S.C. 6291), test procedures (42 U.S.C. 6293), labeling provisions (42 U.S.C. 6294), energy conservation standards (42 U.S.C. 6295), and the authority to require information and reports from manufacturers (42 U.S.C. 6296).

DOE must follow specific statutory criteria for prescribing new or amended standards for covered products, including residential dishwashers, residential clothes washers, and consumer clothes dryers. For instance, any new or amended standard for a covered product must be designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. 42 U.S.C. 6295(o)(2)(A). In deciding whether a standard is economically justified, DOE must determine whether the benefits of the standard exceed its burdens by, to the greatest extent possible, considering the following seven statutory factors: (1) The economic impact of the standard on manufacturers and consumers of the products subject to the standard; (2) the savings in operating costs throughout the estimated average life of the covered products in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered products that are likely to result from the standard; (3) the total projected amount of energy (or as applicable, water) savings likely to result directly from imposition of the standard; (4) any lessening of the utility or the performance of the covered products likely to result from imposition of the standard; (5) the impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the imposition of the standard; (6) the need for national energy and water conservation; and (7) other factors the Secretary of Energy (“Secretary”) considers relevant. 42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII). Furthermore, the new or amended standard must result in a significant conservation of energy. 42 U.S.C. 6295(o)(3)(B).

EPCA also includes what is known as an “anti-backsliding” provision, which prevents the Secretary from prescribing any amended standard that either increases the maximum allowable energy use or decreases the minimum required energy efficiency of a covered product. 42 U.S.C. 6295(o)(1).

Additionally, when prescribing an energy conservation standard, EPCA requires DOE to specify a different standard level than that which applies generally to a type or class of products

for any group of covered products that have the same function or intended use, if DOE determines that products within such group: (A) Consume a different kind of energy from that consumed by other covered products within such type (or class); or (B) have a capacity or other performance-related feature which other products within such type (or class) do not have and such feature justifies a higher or lower standard. 42 U.S.C. 6295(q)(1). In determining whether a performance-related feature justifies such a different standard for a group of products, DOE must consider such factors as the utility to the consumer of the feature and other factors DOE deems appropriate. *Id.* Any rule prescribing such a “higher or lower standard” must include an explanation of the basis on which such higher or lower level was established. 42 U.S.C. 6295(q)(2).

B. Background

As noted earlier, DOE’s October 2020 and December 2020 Final Rules amended the applicable energy and water conservation standards for residential dishwashers, residential clothes washers, and consumer clothes dryers when they established new short-cycle product classes for those products. Creation of those short-cycle classes effectively removed the energy and water conservation standards that had previously applied to those products. As discussed in greater detail below, the 2020 rulemakings failed to consider the criteria necessary for an amended standards rulemaking as required by the Energy Policy and Conservation Act, as amended, which directs DOE to consider whether the amended standards were designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. 42 U.S.C. 6295(o)(2)(A).

1. Residential Dishwashers

Prior to the October 2020 Final Rule, dishwashers were divided into two product classes by size: Standard and compact. Standard size dishwashers had a capacity equal to or greater than eight place settings plus six serving pieces, while compact size dishwashers had a capacity less than eight place settings plus six serving pieces. 10 CFR 430.32(f)(1) (as effective October 29, 2020). Standard size dishwashers, regardless of normal cycle time,³ had to

³ “Normal cycle” is the cycle type, including washing and drying temperature options, recommended in the manufacturer’s instructions for daily, regular, or typical use to completely wash a full load of normally soiled dishes, including the

¹ All references to EPCA in this document refer to the statute as amended by the Energy Act of 2020, Public Law 116–260 (Dec. 27, 2020).

² For editorial reasons, upon codification in the U.S. Code, Part B was re-designated Part A.

use less than 307 kwh/year and 5.0 gallons per cycle, while compact dishwashers, regardless of normal cycle time, had to use less than 222 kwh/year and 3.5 gallons per cycle.

On October 30, 2020, DOE published a final rule that replaced an existing product class for dishwashers with two new product classes based on cycle time and amended the standards for such dishwashers. 85 FR 68723. DOE initiated the rulemaking in response to a petition for rulemaking submitted by the Competitive Enterprise Institute (“CEI”) in March 2018, in which CEI asserted that there was considerable consumer dissatisfaction with the dramatically longer cycle time for dishwashers under the then-current energy conservation standards. 83 FR 17768 (Apr. 24, 2018). CEI requested that DOE establish a new product class for dishwashers with a cycle time of less than one hour. *Id.* at 83 FR 17771.

In the October 2020 Final Rule, DOE stated that a product class of standard size residential dishwashers with a normal cycle of 60 minutes or less would allow manufacturers to provide consumers with the option to purchase a dishwasher that maximizes the consumer utility of a short-cycle time to wash and dry dishes. 85 FR 68723, 68724. DOE also stated that a product class for which the normal cycle time is 60 minutes or less could spur manufacturer innovation to generate additional product offerings to fill the market gap that exists for these products. *Id.* at 85 FR 68726. DOE determined that, under 42 U.S.C. 6295(q), dishwashers with a normal cycle time of 60 minutes or less have a performance-related feature that other dishwashers lack and that this feature justifies a separate product class subject to a higher or lower standard than the standards currently applicable to the existing product classes of dishwashers. *Id.* As a result, DOE replaced the existing product class for standard dishwashers with two new product classes for standard size dishwashers based on normal cycle time. DOE kept the existing energy conservation standards for standard size dishwashers with a normal cycle time greater than 60 minutes at the level previously prescribed for the product class that covered all standard size dishwashers. *Id.* at 85 FR 68741. DOE also stated that standard size dishwashers with a normal cycle time of 60 minutes or less were not subject to any energy or water conservation standards, thus allowing for unlimited water and energy usage.

power-dry setting. 10 CFR part 430 subpart B appendix C1 (“Appendix C1”), section 1.12.

Id. at 85 FR 68742. DOE stated it would consider further amending energy and water conservation standards for standard size dishwashers with a normal cycle time of 60 minutes or less in a future rulemaking. *Id.* at 85 FR 68724.

On December 29, 2020, the National Resources Defense Council (“NRDC”), Sierra Club, Consumer Federation of America, and Massachusetts Union of Public Housing Tenants petitioned the U.S. Court of Appeals for the Second Circuit to review and set aside the October 2020 Final Rule. *Natural Resources Defense Council v. U.S. Dep’t of Energy*, No. 20–4256 (2d Cir.). On the same day, the States of California, Connecticut, Illinois, Maine, Michigan, Minnesota, New Jersey, New Mexico, New York, Nevada, Oregon, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York filed a separate petition for review of the October 2020 Final Rule in the U.S. Court of Appeals for the Second Circuit. *California v. U.S. Dep’t of Energy*, No. 20–4285 (2d Cir.). These two cases have been consolidated in the Second Circuit and have been placed in abeyance pending DOE’s review of the October 2020 Final Rule.

Further, on March 1, 2021, the Association of Home Appliance Manufacturers (“AHAM”) petitioned DOE to reconsider the October 2020 Final Rule that established and amended standards for short-cycle residential dishwashers. “AHAM petition for reconsideration-1”; Docket EERE–2021–BT–STD–0002, No. 001 at p. 2.⁴ On April 28, 2021, the NRDC, Sierra Club, the Consumer Federation of America, and the Massachusetts Union of Public Housing Tenants (“NRDC et al.”) also submitted a petition for DOE to repeal the same October 2020 Final Rule (“NRDC petition for reconsideration”).⁶ The petition challenges the legality of the final rule,

⁴ AHAM submitted its petition pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. 551 *et seq.*, which provides among other things, that “[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.” 5 U.S.C. 553(e). The AHAM petition is available in the docket to this rulemaking, EERE–2021–BT–STD–0002, at <https://www.regulations.gov>.

⁵ A notation in this form provides a reference for information that is in the specified docket, which is available at <https://www.regulations.gov>. This notation indicates that the statement preceding the reference is included in document number 001 of that docket at page 2.

⁶ NRDC also submitted its petition pursuant to the APA, 5 U.S.C. 553(e), to repeal the final rule. The NRDC petition is available in the docket to this rulemaking, EERE–2021–BT–STD–0002, at <https://www.regulations.gov>.

stating that the creation of the new product class violates the core requirements of EPCA. NRDC petition for reconsideration, Docket EERE–2021–BT–STD–0002, No. 003 at 2. The petition contends that addressing those defects is critical to preventing such an error from being repeated in the future.

2. Residential Clothes Washers and Consumer Clothes Dryers

Prior to the December 2020 Final Rule, product classes for residential clothes washers were based on clothing container capacity and axis of loading—*i.e.*, front-loading or top-loading. 10 CFR 430.32(g)(4) (Dec. 15, 2020). And, prior to the December 2020 Final Rule, product classes for consumer clothes dryers were based on fuel source (120V electric, 240V electric, or gas), venting configuration (vented or ventless), capacity, and integration with a clothes washer (combination washer-dryer). 10 CFR 430.32(h)(3) (as effective Dec. 15, 2020). Each product class was subject to a specific energy or energy and water conservation standard that applied regardless of the cycle time.

In August 2020, DOE proposed to replace existing product classes with new product classes based on cycle time for top-loading standard residential clothes washers (30 minutes or greater; less than 30 minutes), front-loading standard residential clothes washers (45 minutes or greater; less than 45 minutes), and consumer clothes dryers (30 minutes or greater; less than 30 minutes). 85 FR 49297, 49311–49312 (Aug. 13, 2020) (“August 2020 NOPR”). Unlike the dishwasher product class rulemaking, this rulemaking was not initiated in response to a petition, but instead relied on particular similarities between consumer use of dishwashers and clothes washers and clothes dryers as the basis for proposing the rulemaking. *Id.* at 85 FR 49298. Shortly thereafter, on December 16, 2020, DOE published the December 2020 Final Rule that replaced the product classes with new product classes based on cycle time and kept the existing energy conservation standards for the new product classes with longer cycle times, while declaring the short-cycle product classes are not currently subject to any energy or water conservation standards, thus allowing for unlimited water and energy usage. 85 FR 81359, 81375–81376.

On January 19, 2021, the States of California, Connecticut, Illinois, Maine, Michigan, Minnesota, New Jersey, New Mexico, New York, Nevada, Oregon, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of

New York filed a petition for review of the December 2020 Final Rule in the Second Circuit. *California v. U.S. Dep't of Energy*, No. 21–108 (2d Cir.). Shortly thereafter, two other groups of petitioners filed petitions for review of the December 2020 Final Rule. The Alliance for Water Efficiency, the U.S. Public Interest Research Group, and Environment America (collectively, “AWE”) filed a petition for review of that final rule in the Seventh Circuit on January 17, 2021, and the Sierra Club filed a petition for review of that final rule in the Ninth Circuit on February 12, 2021. *Alliance for Water Efficiency v. U.S. Dep't of Energy*, No. 21–428 (2d Cir.); *Sierra Club v. U.S. Dep't of Energy*, No. 21–564 (2d Cir.). After transfer of the Seventh and Ninth Circuit petitions for review, all three cases were consolidated in the Second Circuit. In its court filings, AWE has raised the following issues with the December 2020 Final Rule: that DOE lacks authority to exempt a product group from water conservation standards; DOE failed to comply with the requirements for a section 325(q) rule; DOE violated EPCA’s anti-backsliding provision; and DOE violated the National Environmental Policy Act. Briefing on the merits is currently stayed through October 1, 2021, while DOE reviews the December 2020 Final Rule.

On April 2, 2021, AHAM further petitioned DOE to reconsider the December 2020 Final Rule that established and amended standards for short-cycle residential clothes washers and dryers. “AHAM petition for reconsideration-2”; Docket EERE–2021–BT–STD–0002, No. 002 at 2.⁷ AHAM argued that the short-cycle product classes were neither justified nor needed for three reasons. First, AHAM stated that many clothes washers and clothes dryers already offer cycles that are within the December 2020 Final Rule’s cycle time goal and that meet the existing standards. *Id.* at 7–8, 12. Second, AHAM argued that the cycle times in the December 2020 Final Rule were arbitrary because DOE lacked the data necessary to demonstrate a consumer desire for the times adopted. *Id.* at 13. Third, AHAM specified that establishing the separate product classes would likely cause negative, unintended consequences such as strand manufacturer investments; create new regulation; introduce manufacturer uncertainty until standards for the new

product classes are developed; increase test burden; and potentially cause disharmony in North America for clothes washer and clothes dryer standards. *Id.* at 8–9, 16–18. For these reasons, AHAM requested that DOE withdraw the December 2020 Final Rule. *Id.* at 19.

Like its petition regarding the short-cycle product class for residential dishwashers, AHAM requested that, while DOE considers its petition, DOE stay the effectiveness of the final rule as it allows for unlimited energy and water use by these products and issue a statement to the market that these new product classes cannot reliably be used as the basis for new products. *Id.* at 2.

III. Discussion

In issuing the October 2020 and December 2020 Final Rules, DOE relied on its authority under EPCA to establish product classes with higher or lower levels of energy use or efficiency when prescribing, by rule, an energy conservation standard. 42 U.S.C. 6295(q). In so doing, the October 2020 and December 2020 Final Rules also amended the energy conservation standards for short-cycle products by stating they were no longer subject to energy and water conservation standards. 85 FR 68733; 85 FR 81366. But the 2020 Final Rules did not address any of EPCA’s requirements for amending an energy conservation standard, including an analysis of whether the amended standards are designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. 42 U.S.C. 6295(o)(2)(A); *see* 85 FR 81361. DOE also did not, among other things, adequately consider whether the amended standards violated EPCA’s prohibition against prescribing an amended standard that increases the maximum allowable energy use or decreases the energy efficiency of a covered product. 42 U.S.C. 6295(o)(1). Because the October 2020 and December 2020 Final Rules were contrary to EPCA, DOE proposes to revoke them through this rulemaking.

As an initial matter, as support for establishing product classes without associated energy conservation standards, the October 2020 and December 2020 Final Rules asserted that those rules were simply deferring the issuance of new conservation standards. 85 FR 68723, 68733; 85 FR 81359, 81368. EPCA does not, however, allow DOE to simply defer the establishment of new energy conservation standards for regulated products or equipment that already have energy conservation

standards. Even if EPCA authorized deferrals in some instances, any creation of the new product classes here would have needed to follow the requirements of 42 U.S.C. 6295(q), which frames the development of a product class within the context of an energy conservation standard rulemaking. But the October 2020 and December 2020 Final Rules did not develop the new product classes in the context of an energy conservation standard rulemaking. Instead, by stating that the new product classes were not subject to any energy conservation standards without following 42 U.S.C. 6295(q), the October 2020 and December 2020 Final Rules were an amendment in violation of EPCA.

EPCA requires, as stated previously, that an amended conservation standard must be designed to achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. 42 U.S.C. 6295(o)(2)(A). The plain meaning of the statutory term “amend” is to “alter formally by adding, deleting or rephrasing.” (American Heritage Dictionary for the English Language 42 (1981)). As explained above, the 2020 Final Rules altered the existing energy and water conservation standards for the short cycle products by removing the standards applicable to those products to allow for unlimited energy and water use. This activity clearly fits within this scope of the definition of “amend” because DOE deleted the applicable standards altogether.

Even assuming that EPCA were ambiguous in this regard, DOE’s position—that the 2020 Final Rules improperly amended the energy and water conservation standards for the short-cycle products—is the better understanding of the statute. Prior to the 2020 Final Rules, the short-cycle products belonged to product classes subject to specific energy and/or water conservation standards. The 2020 Final Rules separated the products that met the classification for the new short-cycle product classes from their regulated counterparts to establish product classes not subject to any standard and that could operate with unlimited energy and water use. Those products now do not have any applicable standard, which effectively amended the prior energy or water conservation standards for those products to zero. But the 2020 Final Rules did so without considering any of EPCA’s requirements for such action.

Relatedly, the October 2020 and December 2020 Final Rules inaccurately cited DOE’s 2007 distribution transformer and 2009 beverage vending machine (“BVM”) energy conservation standards rulemakings as support. 85 FR

⁷ As with its first petition, AHAM submitted its second petition pursuant to the APA. The AHAM petition for reconsideration-2 is available in the docket to this rulemaking, EERE–2021–BT–STD–0002, at <https://www.regulations.gov>.

68723, 68733; 85 FR 81361, 81368. In the 2007 distribution transformers rulemaking, DOE established a separate equipment class for underground mining distribution transformers without establishing associated energy conservation standards. 72 FR 58190 (Oct. 12, 2007). Similarly, in the 2009 BVM rulemaking, DOE established a separate equipment class for combination BVMs without establishing associated energy conservation standards. 74 FR 44914 (Aug. 31, 2009). But the October 2020 and December 2020 Final Rules failed to note the key distinction between these examples and the short-cycle product class rulemakings. Both the 2007 and 2009 rulemakings were the first instance of energy conservation standards being promulgated for distribution transformers and BVMs. As such, not setting standards for those equipment classes simply maintained the status quo—that is, underground mining distribution transformers and combination BVMs were not subject to energy use or efficiency restrictions either before or after those rulemakings. As a result, DOE was not required to satisfy any of the criteria in EPCA for amending a standard for these equipment classes.

In contrast, short-cycle residential dishwashers, residential clothes washers, and consumer clothes dryers were all subject to energy conservation standards prior to the October 2020 and December 2020 Final Rules. By stating that short-cycle products were no longer subject to energy or water conservation standards, the October 2020 and December 2020 Final Rules changed the status quo in a direction that would allow for unlimited energy and water use by these short-cycle products. Thus, DOE was required to satisfy the requirements in EPCA for issuing an amended standard.

In addition, DOE has made a policy judgment that EPCA's express purposes of energy and water conservation (42 U.S.C. 6201(4), (5), (8)) would be thwarted if DOE could avoid restrictions on amending existing standards by nominally characterizing a regulatory change in the energy conservation standards applicable to a covered product as something other than an amendment. The October 2020 and December 2020 Final Rules contravened EPCA by failing to consider these criteria when they amended the existing standards for short-cycle products in the 2020 Final Rules.

This review is also consistent with the direction provided in Executive Order 13990 of January 20, 2021, "Protecting Public Health and the Environment and

Restoring Science to Tackle the Climate Crisis." 86 FR 7037 (Jan. 25, 2021). While E.O. 13990 triggered the Department's re-evaluation, DOE is relying on the analysis presented in this NOPR, based upon EPCA, to re-examine the October and December 2020 Final Rules.

IV. Conclusion

After careful consideration, DOE proposes to revoke the October 2020 and December 2020 Final Rules that improperly amended standards and to reinstate the prior product classes and applicable standards for these covered products. DOE acknowledges that these rules will remain in effect while the Department considers whether to revoke the earlier rulemakings through notice and comment.

V. Procedural Issues and Regulatory Review

A. Review Under Executive Orders 12866

The Office of Information and Regulatory Affairs ("OIRA") in the Office of Management and Budget ("OMB") has waived review of this rule pursuant to Executive Order ("E.O.") 12866, "Regulatory Planning and Review."

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis ("IRFA") for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by E.O. 13272, "Proper Consideration of Small Entities in Agency Rulemaking," 67 FR 53461 (Aug. 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's website (<https://energy.gov/gc/office-general-counsel>). DOE has prepared the following IRFA for the products that are the subject of this rulemaking.

DOE reviewed this proposed rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. DOE has initially concluded that this rule, if made final, would not have a significant impact on a substantial

number of small entities. The factual basis for this determination is as follows:

The Small Business Administration ("SBA") considers a business entity to be a small business, if, together with its affiliates, it employs less than a threshold number of workers or earns less than the average annual receipts specified in 13 CFR part 121. The threshold values set forth in these regulations use size standards and codes established by the North American Industry Classification System ("NAICS") that are available at <https://www.sba.gov/document/support-tablesize-standards>. The threshold number for NAICS classification code 335220, "Major Household Appliance Manufacturing," which includes residential dishwasher, residential clothes washer, and consumer clothes dryer manufacturers, is 1,500 employees.

Most of the companies that manufacture residential dishwashers are large multinational corporations. Most of the manufacturers supplying residential clothes washers and consumer clothes dryers into the United States are large multinational corporations. DOE collected data from DOE's compliance certification database⁸ to identify potential manufacturers of residential dishwashers, residential clothes washers, and consumer clothes dryers. DOE then consulted publicly available data, such as Dun and Bradstreet, to determine whether they meet the SBA's definition of a "small business manufacturer" and have their manufacturing facilities located within the United States.

Based on this analysis, DOE identified two manufacturers of residential dishwashers that are potential small businesses, but initially determined that this proposed rule would not impose any compliance or other requirements on any manufacturers of residential dishwashers, including small businesses. This rulemaking would eliminate the separate product class for residential dishwashers with a "normal" cycle of 60 minutes or less from washing through drying as described in the preamble. As discussed, DOE did not identify any residential dishwashers on the market—let alone any manufactured by small businesses—that offer a normal cycle of less than 60 minutes from washing through drying.

DOE did not identify any small businesses that manufacture residential

⁸ <https://www.regulations.doe.gov/certificationdata>.

clothes washers or consumer clothes dryers.

As a result, DOE certifies that the proposed rule would not have a significant impact on a substantial number of small entities. DOE will transmit the certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the Small Business Administration for review under 5 U.S.C. 605(b).

C. Review Under the Paperwork Reduction Act of 1995

Manufacturers of covered products/equipment, such as residential dishwashers, residential clothes washers, and consumer clothes dryers, must certify to DOE that their products comply with any applicable energy conservation standards. In certifying compliance, manufacturers must test their products according to the DOE test procedures for residential dishwashers, residential clothes washers, and consumer clothes dryers, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including residential dishwashers, residential clothes washers, and consumer clothes dryers. 76 FR 12422 (Mar. 7, 2011); 80 FR 5099 (Jan. 30, 2015). The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act ("PRA"). This requirement has been approved by OMB under OMB control number 1910-1400. Public reporting burden for the certification is estimated to average 35 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.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

D. Review Under the National Environmental Policy Act of 1969

DOE is analyzing this proposed regulation in accordance with the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) ("NEPA") and DOE's NEPA implementing regulations (10 CFR part 1021). DOE's regulations include a categorical exclusion for rulemakings interpreting or amending

an existing rule or regulation that does not change the environmental effect of the rule or regulation being amended. 10 CFR part 1021, subpart D, appendix A5. DOE anticipates that this rulemaking qualifies for categorical exclusion A5 because it is an interpretive rulemaking that does not change the environmental effect of the rule and otherwise meets the requirements for application of a categorical exclusion. See 10 CFR 1021.410. DOE will complete its NEPA review before issuing the final rule.

E. Review Under Executive Order 13132

E.O. 13132, "Federalism," 64 FR 43255 (Aug. 10, 1999), imposes certain requirements on Federal agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this proposed rule and has tentatively determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of this proposed rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. 42 U.S.C. 6297. No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of E.O. 12988, "Civil Justice Reform," imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity, (2) write regulations to minimize litigation, (3) provide a clear legal standard for affected conduct rather than a general standard, and (4) promote simplification and burden

reduction. 61 FR 4729 (Feb. 7, 1996). Regarding the review required by section 3(a), section 3(b) of E.O. 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any, (2) clearly specifies any effect on existing Federal law or regulation, (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction, (4) specifies the retroactive effect, if any, (5) adequately defines key terms, and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this proposed rule meets the relevant standards of E.O. 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 ("UMRA") requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104-4, section 201 (codified at 2 U.S.C. 1531). For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. 2 U.S.C. 1532(a), (b). The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed "significant intergovernmental mandate," and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. DOE's policy statement is also available at https://energy.gov/sites/prod/files/gcprod/documents/umra_97.pdf.

This proposed rule contains neither an intergovernmental mandate nor a mandate that may result in the expenditures of \$100 million or more in any one year, so these requirements under the Unfunded Mandates Reform Act do not apply.

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

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Public Law 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

Pursuant to E.O. 12630, “Governmental Actions and Interference with Constitutionally Protected Property Rights,” 53 FR 8859 (Mar. 15, 1988), DOE has determined that this proposed rule would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

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

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for Federal agencies to review most disseminations of information to the public under information quality guidelines established by each agency pursuant to general guidelines issued by OMB. OMB’s guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE’s guidelines were published at 67 FR 62446 (Oct. 7, 2002). Pursuant to OMB Memorandum M–19–15, Improving Implementation of the Information Quality Act (April 24, 2019), DOE published updated guidelines which are available at <https://www.energy.gov/sites/prod/files/2019/12/f70/DOE%20Final%20Updated%20IQA%20Guidelines%20Dec%202019.pdf>. DOE has reviewed this proposed rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

E.O. 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,” 66

FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA at OMB, a Statement of Energy Effects for any proposed significant energy action. A “significant energy action” is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

This proposed rule, which would eliminate certain product classes for residential dishwashers, residential clothes washers, and consumer clothes dryers would not have a significant adverse effect on the supply, distribution, or use of energy and, therefore, is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects on this proposed rule.

VI. Public Participation

A. Participation in the Webinar

The time and date the webinar meeting are listed in the **DATES** section at the beginning of this document. Webinar registration information, participant instructions, and information about the capabilities available to webinar participants will be published on DOE’s website: https://www1.eere.energy.gov/buildings/appliance_standards/standards.aspx?productid=38&action=viewlive. Participants are responsible for ensuring their systems are compatible with the webinar software.

B. Procedure for Submitting Prepared General Statements for Distribution

Any person who has an interest in the topics addressed in this NOPR, or who is representative of a group or class of persons that has an interest in these issues, may request an opportunity to make an oral presentation at the webinar. Such persons may submit requests to speak by email to ApplianceStandardsQuestions@ee.doe.gov. Persons who wish to speak should include with their request a computer file in WordPerfect, Microsoft Word, PDF, or text (ASCII) file format that briefly describes the nature of their

interest in this rulemaking and the topics they wish to discuss. Such persons should also provide a daytime telephone number where they can be reached.

Persons requesting to speak should briefly describe the nature of their interest in this rulemaking and provide a telephone number for contact. DOE requests persons selected to make an oral presentation to submit an advance copy of their statements at least two weeks before the webinar. At its discretion, DOE may permit persons who cannot supply an advance copy of their statement to participate, if those persons have made advance alternative arrangements with the Building Technologies Office. As necessary, requests to give an oral presentation should ask for such alternative arrangements.

C. Conduct of the Webinar

DOE will designate a DOE official to preside at the webinar/public meeting and may also use a professional facilitator to aid discussion. The meeting will not be a judicial or evidentiary-type public hearing, but DOE will conduct it in accordance with section 336 of EPCA (42 U.S.C. 6306). A court reporter will be present to record the proceedings and prepare a transcript. DOE reserves the right to schedule the order of presentations and to establish the procedures governing the conduct of the webinar. There shall not be discussion of proprietary information, costs or prices, market share, or other commercial matters regulated by U.S. antitrust laws. After the webinar and until the end of the comment period, interested parties may submit further comments on the proceedings and any aspect of the rulemaking.

The webinar will be conducted in an informal, conference style. DOE will present summaries of comments received before the webinar, allow time for prepared general statements by participants, and encourage all interested parties to share their views on issues affecting this rulemaking. Each participant will be allowed to make a general statement (within time limits determined by DOE), before the discussion of specific topics. DOE will permit, as time permits, other participants to comment briefly on any general statements.

At the end of all prepared statements on a topic, DOE will permit participants to clarify their statements briefly. Participants should be prepared to answer questions by DOE and by other participants concerning these issues. DOE representatives may also ask

questions of participants concerning other matters relevant to this rulemaking. The official conducting the webinar/public meeting will accept additional comments or questions from those attending, as time permits. The presiding official will announce any further procedural rules or modification of the above procedures that may be needed for the proper conduct of the webinar.

A transcript of the webinar will be included in the docket, which can be viewed as described in the Docket section at the beginning of this NOPR. In addition, any person may buy a copy of the transcript from the transcribing reporter.

D. Submission of Comments

DOE will accept comments, data, and information regarding this proposed rule before or after the public meeting, but no later than the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments, data, and other information using any of the methods described in the **ADDRESSES** section at the beginning of this document.

Submitting comments via <https://www.regulations.gov>. The <https://www.regulations.gov> web page will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment itself or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to <https://www.regulations.gov> information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (“CBI”). Comments

submitted through <https://www.regulations.gov> cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through <https://www.regulations.gov> before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that <https://www.regulations.gov> provides after you have successfully uploaded your comment.

Submitting comments via email. Comments and documents submitted via email will also be posted to <https://www.regulations.gov>. If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information in a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. No telefacsimiles (faxes) will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, that are written in English, and that are free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters’ names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email two well-marked copies: One copy of the document marked “confidential” including all the information believed to be confidential,

and one copy of the document marked “non-confidential” with the information believed to be confidential deleted. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

It is DOE’s policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

VII. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this notice of proposed rulemaking.

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Intergovernmental relations, Small businesses.

Signing Authority

This document of the Department of Energy was signed on July 30, 2021, by Dr. Kathleen B. Hogan, Acting Under Secretary for Energy and Science, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on August 3, 2021.

Treena V. Garrett,

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

For the reasons set forth in the preamble, DOE proposes to amend part 430 of chapter II, subchapter D, of title 10 of the Code of Federal Regulations, as set forth below:

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

- 2. Section 430.32 is amended by:
- a. Removing paragraph (f)(1)(iii); and
- b. Revising paragraphs (g)(4) and (h)(3).

The revisions read as follows:

§ 430.32 Energy and water conservation standards and their compliance dates.

- * * * * *
- (g) * * *

(4) Clothes washers manufactured on or after January 1, 2018, shall have an Integrated Modified Energy Factor no less than, and an Integrated Water Factor no greater than:

Product class	Integrated modified energy factor (cu.ft./kWh/cycle)	Integrated water factor (gal/cycle/cu.ft.)
(i) Top-loading, Compact (less than 1.6 ft ³ capacity)	1.15	12.0
(ii) Top-loading, Standard (1.6 ft ³ or greater capacity)	1.57	6.5
(iii) Front-loading, Compact (less than 1.6 ft ³ capacity)	1.13	8.3
(iv) Front-loading, Standard (1.6 ft ³ or greater capacity)	1.84	4.7

(h) * * *

(3) Clothes dryers manufactured on or after January 1, 2015, shall have a combined energy factor no less than:

Product class	Combined energy factor (lbs/kWh)
(i) Vented Electric, Standard (4.4 ft ³ or greater capacity)	3.73
(ii) Vented Electric, Compact (120V) (less than 4.4 ft ³ capacity)	3.61
(iii) Vented Electric, Compact (240V) (less than 4.4 ft ³ capacity)	3.27
(iv) Vented Gas	3.30
(v) Ventless Electric, Compact (240V) (less than 4.4 ft ³ capacity)	2.55
(vi) Ventless Electric, Combination Washer-Dryer	2.08

* * * * *

[FR Doc. 2021-16830 Filed 8-10-21; 8:45 am]
 BILLING CODE 6450-01-P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1308

[Docket No. DEA-397]

Schedules of Controlled Substances: Placement of Mesocarb in Schedule I

AGENCY: Drug Enforcement Administration, Department of Justice.
ACTION: Notice of proposed rulemaking.

SUMMARY: The Drug Enforcement Administration proposes placing the substance mesocarb (chemical name: *N*-phenyl-*N'*-(3-(1-phenylpropan-2-yl)-1,2,3-oxadiazol-3-ium-5-yl)carbamimidate), including its salts, isomers, and salts of isomers, in schedule I of the Controlled Substances Act. This action is being taken to enable the United States to meet its obligations under the 1971 Convention on Psychotropic Substances. If finalized, this action would impose the regulatory

controls and administrative, civil, and criminal sanctions applicable to schedule I controlled substances on persons who handle (manufacture, distribute, reverse distribute, import, export, engage in research, conduct instructional activities or chemical analysis with, or possess), or propose to handle, mesocarb.

DATES: Comments must be submitted electronically or postmarked, on or before October 12, 2021.

Interested persons may file a request for hearing or waiver of hearing pursuant to 21 CFR 1308.44 and in accordance with 21 CFR 1316.45 and/or 1316.47, as applicable. Requests for hearing and waivers of an opportunity for a hearing or to participate in a hearing, together with a written statement of position on the matters of fact and law asserted in the hearing, must be received on or before September 10, 2021.

ADDRESSES: Interested persons may file written comments on this proposal in accordance with 21 CFR 1308.43(g). Commenters should be aware that the electronic Federal Docket Management System will not accept comments after 11:59 p.m. Eastern Time on the last day of the comment period. To ensure

proper handling of comments, please reference “Docket No. DEA-397” on all electronic and written correspondence, including any attachments.

- *Electronic comments:* Drug Enforcement Administration (DEA) encourages that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or attach a file for lengthier comments. Please go to <http://www.regulations.gov> and follow the on-line instructions at that site for submitting comments. Upon completion of your submission, you will receive a Comment Tracking Number. Please be aware that submitted comments are not instantaneously available for public view on <http://www.regulations.gov>. If you have received a Comment Tracking Number, your comment has been submitted successfully, and there is no need to resubmit the same comment.

- *Paper comments:* Paper comments that duplicate electronic submissions are not necessary and are discouraged. Should you wish to mail a paper comment in lieu of an electronic comment, send via regular or express mail to: Drug Enforcement

Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrisette Drive, Springfield, Virginia 22152.

• *Hearing requests:* All requests for a hearing and waivers of participation, together with a written statement of position on the matters of fact and law asserted in the hearing, must be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrisette Drive, Springfield, Virginia 22152. All requests for hearing and waivers of participation should also be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrisette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW 8701 Morrisette Drive, Springfield, Virginia 22152.

FOR FURTHER INFORMATION CONTACT: Terrence L. Boos, Drug & Chemical Evaluation Section, Diversion Control Division, Drug Enforcement Administration; Telephone: (571) 362-3249.

SUPPLEMENTARY INFORMATION:

Posting of Public Comments

Please note that all comments received in response to this docket are considered part of the public record. They will, unless reasonable cause is given, be made available by the Drug Enforcement Administration (DEA) for public inspection online at <http://www.regulations.gov>. Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter. The Freedom of Information Act applies to all comments received. If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want to make it publicly available, you must include the phrase "PERSONAL IDENTIFYING INFORMATION" in the first paragraph of your comment. You must also place all of the personal identifying information you do not want made publicly available in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want to make it publicly available, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You must also prominently identify the confidential business information to be redacted within the comment.

DEA will generally make available in publicly redacted form comments

containing personal identifying information and confidential business information identified as directed above. If a comment has so much confidential business information that it cannot be effectively redacted, DEA may not make available publicly all or part of that comment. Comments posted to <http://www.regulations.gov> may include any personal identifying information (such as name, address, and phone number) included in the text of your electronic submission that is not identified as directed above as confidential.

An electronic copy of this document and supplemental information to this proposed rule are available at <http://www.regulations.gov> for easy reference.

Request for Hearing, or Waiver of Participation in Hearing

Pursuant to 21 U.S.C. 811(a), this action is a formal rulemaking "on the record after opportunity for a hearing." Such proceedings are conducted pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C. 551-559. 21 CFR 1308.41-1308.45; 21 CFR part 1316, subpart D. Interested persons may file requests for a hearing or notices of intent to participate in a hearing in conformity with the requirements of 21 CFR 1308.44(a) or (b), and they shall include a statement of interest in the proceeding and the objections or issues, if any, concerning which the person desires to be heard. 21 CFR 1316.47(a). Any interested person may file a waiver of an opportunity for a hearing or to participate in a hearing together with a written statement regarding the interested person's position on the matters of fact and law involved in any hearing as set forth in 21 CFR 1308.44(c).

All requests for hearing and waivers of participation, together with a written statement of position on the matters of fact and law involved in such hearing, must be sent to DEA using the address information provided above.

Legal Authority

The United States is a party to the 1971 Convention on Psychotropic Substances (1971 Convention), February 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175, as amended. Procedures respecting changes in drug schedules under the 1971 Convention are governed domestically by 21 U.S.C. 811(d)(2)-(4). When the United States receives notification of a scheduling decision pursuant to Article 2 of the 1971 Convention indicating that a drug or other substance has been added to a schedule specified in the notification, the Secretary of the Department of

Health and Human Services (HHS),¹ after consultation with the Attorney General, shall first determine whether existing legal controls under subchapter I of the Controlled Substances Act (CSA) and the Federal Food, Drug, and Cosmetic Act meet the requirements of the schedule specified in the notification with respect to the specific drug or substance. 21 U.S.C. 811(d)(3). In the event that the Secretary of HHS (Secretary) did not so consult with the Attorney General, and the Attorney General did not issue a temporary order, as provided under 21 U.S.C. 811(d)(4), the procedures for permanent scheduling set forth in 21 U.S.C. 811(a) and (b) control. Pursuant to 21 U.S.C. 811(a)(1), the Attorney General may, by rule, add to such a schedule any drug or other substance, if he finds that such drug or other substance has a potential for abuse, and makes with respect to such drug or other substance the findings prescribed by 21 U.S.C. 812(b) for the schedule in which such drug is to be placed. The Attorney General has delegated this scheduling authority to the Administrator of DEA. 28 CFR 0.100.

Background

Mesocarb, known chemically as *N*-phenyl-*N'*-(3-(1-phenylpropan-2-yl)-1,2,3-oxadiazol-3-ium-5-yl)carbamimidate, has central nervous system (CNS) stimulating properties, and it has no approved medical use in the United States. Mesocarb (Sydnocarb) is marketed in Russia as a treatment for attention deficit hyperactivity disorder. Mesocarb's primary mode of action is to stimulate the CNS via dopamine (DA) activation resulting in increased mental capacity and activity.

Pursuant to 21 U.S.C. 811(d)(2), HHS published two notices in the **Federal Register** regarding mesocarb. The first notice requested the World Health Organization (WHO) consider information in preparing its scientific and medical evaluation for mesocarb.² The second notice solicited public comment regarding a recommendation by WHO to impose international

¹ As discussed in a memorandum of understanding entered into by the Food and Drug Administration (FDA) and the National Institute on Drug Abuse (NIDA), FDA acts as the lead agency within HHS in carrying out the Secretary's scheduling responsibilities under the Controlled Substances Act, with the concurrence of NIDA. 50 FR 9518 (March 8, 1985). The Secretary of HHS has delegated to the Assistant Secretary for Health of HHS the authority to make domestic drug scheduling recommendations. 58 FR 35460 (July 1, 1993).

² International Drug Scheduling; Convention on Psychotropic Substances; Certain Stimulant/Hallucinogenic Drugs and Certain Nonbarbiturate Sedative Drugs, 59 FR 31639, June 20, 1994.

controls on mesocarb.³ At its 38th session (1995), the United Nations Commission on Narcotic Drugs (UN/CND) listed mesocarb in Schedule IV of the 1971 Convention. Specifically, based on advice from WHO, UN/CND placed mesocarb in Schedule IV due to its low to moderate dependence potential and its appreciable abuse liability. Furthermore, mesocarb was found to have both little to moderate therapeutic usefulness and a similar spectrum of pharmacological effects as other substances in Schedule IV of the 1971 Convention. The CSA, in 21 U.S.C. 812(b), sets forth findings required to place a substance in a certain schedule under the CSA. As discussed below in the Proposed Determination to Schedule Mesocarb and Proposed Determination of Appropriate Schedule sections, DEA found that mesocarb must be placed in schedule I of the CSA.

Article 2, paragraph 7(d), of the 1971 Convention sets forth the minimum requirements that the United States must meet when a substance has been added to Schedule IV of the 1971 Convention. Pursuant to the 1971 Convention, the United States must require licenses for the manufacture, export and import, and distribution of mesocarb. The CSA's registration requirement accomplishes this license requirement, as set forth in 21 U.S.C. 822, 823, 957, and 958 and in accordance with 21 CFR parts 1301 and 1312. In addition, the United States must adhere to specific export and import provisions set forth in the 1971 Convention. The CSA's export and import provisions accomplish this requirement, as established in 21 U.S.C. 952, 953, 957, and 958 and in accordance with 21 CFR part 1312. Likewise, under Article 13, paragraphs 1 and 2, of the 1971 Convention, a party to the 1971 Convention may notify another party, through the Secretary-General of the United Nations, that it prohibits the importation of a substance in Schedule II, III, or IV of the 1971 Convention. If such notice is presented to the United States, the United States shall take measures to ensure that the named substance is not exported to the country of the notifying party. The CSA's export provisions mentioned above accomplish this requirement. Article 16, paragraph 4, of the 1971 Convention requires the United States to provide annual statistical reports to the International Narcotics Control Board

(INCB). Using INCB Form P, the United States shall provide the following information: (1) In regard to each Schedule I and II substance of the 1971 Convention, quantities manufactured in, exported to, and imported from each country or region as well as stocks held by manufacturers; (2) in regard to each Schedule II and III substance of the 1971 Convention, quantities used in the manufacture of exempt preparations; and (3) in regard to each Schedule II—IV substance of the 1971 Convention, quantities used for the manufacture of non-psychotropic substances or products. Lastly, under Article 2 of the 1971 Convention, the United States must adopt measures in accordance with Article 22 to address violations of any statutes or regulations that are adopted pursuant to its obligations under the 1971 Convention. Persons acting outside the legal framework established by the CSA are subject to administrative, civil, and/or criminal action; therefore, the United States complies with this provision.

Proposed Determination To Schedule Mesocarb

Pursuant to 21 U.S.C. 811(b), DEA gathered the necessary data on mesocarb and, in 2008, submitted it to the Assistant Secretary for Health of HHS with a request for a scientific and medical evaluation of available information and a scheduling recommendation for mesocarb. On April 3, 2012, HHS provided to DEA a written scientific and medical evaluation and scheduling recommendation entitled "Basis for the Recommendation for Control of Mesocarb in Schedule I of the Controlled Substances Act (CSA)." Pursuant to 21 U.S.C. 811(b), this document contained HHS' eight-factor analysis of the abuse potential of mesocarb, along with its recommendation that mesocarb be added to schedule I of the CSA.

In response, DEA reviewed the scientific and medical evaluation and scheduling recommendation provided by HHS and all other relevant data and conducted its own eight-factor analysis of mesocarb's abuse potential pursuant to 21 U.S.C. 811(c). Included below is a brief summary of each factor as analyzed by HHS and DEA in their respective eight-factor analyses, and as considered by DEA in its proposed scheduling determination. Please note that both DEA and HHS analyses are available in their entirety under "Supporting Documents" of the public docket for this rule at <http://www.regulations.gov> under docket number "DEA-397."

1. *The Drug's Actual or Relative Potential for Abuse:* As reported by HHS, DA is known to increase locomotion and is also directly involved in the rewarding, stimulatory, and antidepressant effects induced by psychostimulants. Mesocarb, known to be a selective inhibitor of the DA transporter, is readily self-administered at levels equal to that of methamphetamine in animals, demonstrating the reinforcing effects of mesocarb. Clinical studies have also confirmed the reinforcing effect of mesocarb as compared to both amphetamine and methamphetamine, both of which are schedule II drugs. While reports of mesocarb abuse are rare, anti-doping tests have led to the detection of unauthorized use of the drug by athletes during training and competition. Effects following administration of mesocarb include increased locomotion, increased work capacity, improved cardiovascular function, a marked psychostimulant effect, excessive vitality or nervous energy, tachycardia, hypertension, weight loss, and decreased appetite. These data indicate that mesocarb has the potential for abuse similar to other CNS stimulants.

2. *Scientific Evidence of the Drug's Pharmacological Effects, If Known:* Mesocarb modulates the uptake of DA, norepinephrine and 5-hydroxytryptamine, all of which are directly involved in the rewarding, stimulatory, and antidepressant effects induced by these psychostimulants. In comparison to amphetamine, mesocarb has a slower onset of action and is less potent; however, the stimulant effects of mesocarb on the CNS are longer lasting. Mesocarb is readily self-administered in both mice and monkeys and is shown to substitute fully for both amphetamine and methamphetamine when tested in a discriminative paradigm. Self-administration findings have also predicted that mesocarb has abuse potential, even though it is approximately ten times less potent than methamphetamine.

Mesocarb use in the United States is rare, and clinical information pertaining to its abuse potential is limited. Mesocarb is not studied scientifically outside of Russia or other countries that made up the former Union of Soviet Socialist Republics (USSR). In a clinical review by the Institute of Psychiatry of the Academy of Medical Sciences USSR and the Institute of Psychiatry of the Ministry of Health (Moscow), mesocarb was reported to produce a marked psychostimulant effect characterized by increased mental and physical activity along with increased locomotor and

³ International Drug Scheduling; Convention on Psychotropic Substances; World Health Organization Scheduling Recommendations for Seven Drug Substances, 60 FR 4169, January 20, 1995.

speech activity. Clinical observations demonstrate that mesocarb, while less potent than both methamphetamine and amphetamine, has similar CNS effects as other stimulants, providing evidence that mesocarb has a similar abuse liability.

3. *The State of Current Scientific Knowledge Regarding the Drug or Other Substance:* Mesocarb is a white crystalline powder, nearly insoluble in water and barely soluble in alcohol. Of the 19 reported metabolites of mesocarb, the main metabolite is *p*-hydroxymesocarb (conjugated with sulfate), which is detected in human urine and plasma. Amphetamine in trace amounts has also been detected as a metabolite of mesocarb (in human urine and blood plasma, and in rat urine). In healthy human volunteers, the estimated detection time for mesocarb after administration was approximately 10–11 days, due to the long half-lives of the metabolites.

4. *Its History and Current Pattern of Abuse:* Abused by athletes worldwide both in training and in competition, mesocarb is on the list of prohibited substances of the World Anti-Doping Agency (WADA) and banned by the International Olympics Committee. In addition, mesocarb is internationally controlled as a Schedule IV substance under the 1971 Convention. Diversion of legitimately produced mesocarb in Bulgaria was mentioned as a possible problem in the International Narcotics Control Strategy Report (INCSR) of 1993. In 2000, INCSR reported the primary stimulant of abuse, amphetamine, was being replaced by fenethylamine (schedule I of the CSA), pemoline (schedule IV of the CSA), mesocarb, and ephedrine (in that order) in western Africa. Queries of DEA's System to Retrieve Information from Drug Evidence (STRIDE)/STARLiMS⁴ and the National Forensic Laboratory Information System (NFLIS)⁵ on May 26, 2021, did not report any occurrence of mesocarb, suggesting that mesocarb is not trafficked in the United States.

5. *The Scope, Duration, and Significance of Abuse:* As noted above,

⁴ STRIDE is a database of drug exhibits sent to DEA laboratories for analysis. Exhibits from the database are from DEA, other federal agencies, and law enforcement agencies. On October 1, 2014, STARLiMS replaced STRIDE as DEA laboratory drug evidence data system of record.

⁵ NFLIS is a national drug forensic laboratory reporting system that systematically collects results from drug chemistry analyses conducted by state and local forensic laboratories across the country. The NFLIS participation rate, defined as the percentage of the national drug caseload represented by laboratories that have joined NFLIS, is over 97%. NFLIS includes drug chemistry results from completed analyses only.

mesocarb is prohibited by WADA and banned by the International Olympic Committee. It has been used by athletes worldwide both in training and in competition due to reported effects on learning, memory, work capacity, and antihypoxia. Case reports involving mesocarb abuse have included: (1) A Lithuanian athlete in the Barcelona 1992 Olympic games; (2) a U.S. citizen in the Tokyo 1991 International Amateur Federation World Championships; (3) a Bulgarian athlete in the Helsinki 1994 European Championships; (4) a report by observers for WADA covering the Mediterranean Games of Tunis (Tunisia) in 2001; and (5) another WADA report in 2005 following a positive laboratory result that tested positive for mesocarb.

6. *What, if any, Risk There is to the Public Health:* The presence of mesocarb in the United States is limited because of its lack of accepted medical use. According to HHS, mesocarb is not an approved drug, and there have been no reports of adverse effects related to mesocarb in the United States. Due to the pharmacological similarity of mesocarb to amphetamine and methamphetamine, even though the availability of mesocarb is limited, mesocarb likely presents similar risks to the public health as amphetamine and methamphetamine.

7. *Its Psychic or Physiological Dependence Liability:* For amphetamine or amphetamine-like substances, related withdrawal symptoms can be moderate or limited and are characterized by craving, irritability, nervousness, psychomotor agitation, paranoia, and sleep disturbances. Although there are no direct assessments of the physiologic and psychic dependence of mesocarb, it does induce locomotor and self-administration behaviors that are similar to those behaviors induced by amphetamine and methamphetamine. Mesocarb has been shown to substitute fully at high doses to amphetamine and methamphetamine in a drug discriminative paradigm. Therefore, mesocarb likely elicits a similar physiologic and psychic dependence profile as amphetamine and methamphetamine.

8. *Whether the Substance is an Immediate Precursor of a Substance Already Controlled under the CSA:* Both HHS and DEA find that mesocarb is not an immediate precursor of any substance already controlled under the CSA.

Conclusion: Based on consideration of the scientific and medical evaluation and accompanying recommendation of HHS, and based on DEA's consideration of its own eight-factor analysis, DEA

finds that these facts and all relevant data constitute substantial evidence of potential for abuse of mesocarb. As such, DEA hereby proposes to schedule mesocarb as a controlled substance under the CSA.

Proposed Determination of Appropriate Schedule

The CSA establishes five schedules of controlled substances known as schedules I, II, III, IV, and V. The CSA outlines the findings required to place a drug or other substance in any particular schedule. 21 U.S.C. 812(b). After consideration of the analysis and recommendation of the Assistant Secretary for Health of HHS and review of all available data, the Administrator of DEA, pursuant to 21 U.S.C. 812(b)(1), finds that:

(1) Mesocarb has a high potential for abuse. Mesocarb, similar to amphetamine and many other CNS stimulants, is a DA uptake inhibitor. In clinical observations, mesocarb produced marked psychostimulation accompanied with increased mental, physical, locomotor, and speech activity similar to amphetamine, albeit with less potency. Pre-clinical research has also directly compared mesocarb to other CNS stimulants, including amphetamine and methamphetamine that are scheduled and controlled under the CSA due to their well-known high abuse liability. The effects of mesocarb on DA are qualitatively similar to these schedule II stimulants. Intravenous drug self-administration studies in animals have shown that mesocarb has reinforcing effects. Mesocarb shares similar discriminative stimulus effects with amphetamine and methamphetamine, though at larger doses. Amphetamine and methamphetamine have medical use and have high potential for abuse.

(2) There are no approved New Drug Applications for mesocarb nor is there a known therapeutic application for mesocarb in the United States. Therefore, mesocarb has no currently accepted medical use in treatment in the United States.⁶

⁶ Although there is no evidence suggesting that mesocarb has currently accepted medical uses in treatment in the United States, it bears noting that a drug cannot be found to have such medical use unless DEA concludes that it satisfies a five-part test. Specifically, with respect to a drug that has not been approved by FDA, to have a currently accepted medical use in treatment in the United States, all of the following must be demonstrated: i. The drug's chemistry must be known and reproducible; ii. there must be adequate safety studies; iii. there must be adequate and well-controlled studies proving efficacy; iv. the drug must be accepted by qualified experts; and v. the scientific evidence must be widely available. 57 FR

(3) There is a lack of accepted safety for use of mesocarb under medical supervision since mesocarb lacks any accepted medical use in the United States. Clinical findings demonstrate that mesocarb induces similar effects characteristic of other CNS stimulants including amphetamine and methamphetamine. Adverse effects reported for mesocarb include tachycardia, hypertension, weight loss, and decreased appetite.

Based on these findings, the Administrator of DEA concludes that mesocarb warrants control under schedule I of the CSA. 21 U.S.C. 812(b)(1). More precisely, because of its stimulant effects, DEA proposes placing mesocarb in 21 CFR 1308.11(f) (the stimulants category of schedule I). As such, the proposed control of mesocarb includes the substance as well as its salts, isomers, and salts of isomers.

Requirements for Handling Mesocarb

If this rule is finalized as proposed, mesocarb would be subject to the CSA's schedule I regulatory controls and administrative, civil, and criminal sanctions applicable to the manufacture, distribution, reverse distribution, import, export, engagement in research, conduct of instructional activities or chemical analysis with, and possession of schedule I controlled substances, including the following:

1. *Registration.* Any person who handles (manufactures, distributes, reverse distributes, imports, exports, engages in research, or conducts instructional activities or chemical analysis with, or possesses) mesocarb, or who desires to handle mesocarb, would need to be registered with DEA to conduct such activities pursuant to 21 U.S.C. 822, 823, 957, and 958, and in accordance with 21 CFR parts 1301 and 1312 as of the effective date of a final scheduling action. Any person who currently handles mesocarb and is not registered with DEA would need to submit an application for registration and may not continue to handle mesocarb as of the effective date of a final scheduling action, unless DEA has approved that application for registration pursuant to 21 U.S.C. 822, 823, 957, and 958, and in accordance with 21 CFR parts 1301 and 1312.

2. *Disposal of stocks.* Any person who does not desire or is not able to obtain a schedule I registration would be required to surrender all quantities of currently held mesocarb or transfer all quantities of currently held mesocarb to

a person registered with DEA before the effective date of a final scheduling action in accordance with all applicable federal, State, local, and tribal laws. As of the effective date of a final scheduling action, mesocarb would be required to be disposed of in accordance with 21 CFR part 1317, in addition to all other applicable Federal, State, local, and tribal laws.

3. *Security.* Mesocarb would be subject to schedule I security requirements and would need to be handled and stored pursuant to 21 U.S.C. 821 and 823, and in accordance with 21 CFR 1301.71–1301.76, as of the effective date of a final scheduling action. Non-practitioners handling mesocarb would also need to comply with the employee screening requirements of 21 CFR 1301.90–1301.93.

4. *Labeling and Packaging.* All labels, labeling, and packaging for commercial containers of mesocarb would need to be in compliance with 21 U.S.C. 825 and 958(e) and in accordance with 21 CFR part 1302, as of the effective date of a final scheduling action.

5. *Quota.* Only registered manufacturers would be permitted to manufacture mesocarb in accordance with a quota assigned pursuant to 21 U.S.C. 826 and in accordance with 21 CFR part 1303, as of the effective date of a final scheduling action.

6. *Inventory.* Every DEA registrant who possesses any quantity of mesocarb on the effective date of a final scheduling action would be required to take an inventory of mesocarb on hand at that time, pursuant to 21 U.S.C. 827 and 958 and in accordance with 21 CFR 1304.03, 1304.04, and 1304.11(a) and (d).

Any person who becomes registered with DEA on or after the effective date of the final scheduling action would be required to take an initial inventory of all stocks of controlled substances (including mesocarb) on hand on the date the registrant first engages in the handling of controlled substances, pursuant to 21 U.S.C. 827 and 958 and in accordance with 21 CFR 1304.03, 1304.04, and 1304.11(a) and (b).

After the initial inventory, every DEA registrant would be required to take a new inventory of all controlled substances (including mesocarb) on hand every two years, pursuant to 21 U.S.C. 827 and 958 and in accordance with 21 CFR 1304.03, 1304.04, and 1304.11.

7. *Records and Reports.* Every DEA registrant would be required to maintain records and submit reports for mesocarb, or products containing mesocarb, pursuant to 21 U.S.C. 827 and

958 and in accordance with 21 CFR 1301.74(b) and (c) and parts 1304, 1312, and 1317, as of the effective date of a final scheduling action. Manufacturers and distributors would be required to submit reports regarding mesocarb to the Automation of Reports and Consolidated Order System pursuant to 21 U.S.C. 827 and in accordance with 21 CFR parts 1304 and 1312 as of the effective date of a final scheduling action.

8. *Order Forms.* Every DEA registrant who distributes mesocarb would be required to comply with order form requirements, pursuant to 21 U.S.C. 828 and in accordance with 21 CFR part 1305, as of the effective date of a final scheduling action.

9. *Importation and Exportation.* All importation and exportation of mesocarb would need to be in compliance with 21 U.S.C. 952, 953, 957, and 958 and in accordance with 21 CFR part 1312 as of the effective date of a final scheduling action.

10. *Liability.* Any activity involving mesocarb not authorized by, or in violation of, the CSA or its implementing regulations, would be unlawful, and may subject the person to administrative, civil, and/or criminal sanctions.

Regulatory Analyses

Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)

In accordance with 21 U.S.C. 811(a), this proposed scheduling action is subject to formal rulemaking procedures performed “on the record after opportunity for a hearing,” which are conducted pursuant to the provisions of 5 U.S.C. 556 and 557. The CSA sets forth procedures and criteria for scheduling a drug or other substance. Such actions are exempt from review by the Office of Management and Budget pursuant to Section 3(d)(1) of Executive Order (E.O.) 12866 and the principles reaffirmed in E.O. 13563.

Executive Order 12988, Civil Justice Reform

This proposed regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of E.O. 12988 to eliminate drafting errors and ambiguity, minimize litigation, provide a clear legal standard for affected conduct, and promote simplification and burden reduction.

Executive Order 13132, Federalism

This proposed rulemaking does not have federalism implications warranting

10499 (1992), *pet. for rev. denied*, *Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131, 1135 (DC Cir. 1994).

the application of E.O. 13132. The proposed rule does not have substantial direct effects on the States, on the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

This proposed rule does not have tribal implications warranting the application of E.O. 13175. 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.

Paperwork Reduction Act of 1995

This action does not impose a new collection of information requirement under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

Regulatory Flexibility Act

The Administrator, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 601–612, has reviewed this proposed rule, and by approving it, certifies that it will not have a significant economic impact on a substantial number of small entities.

DEA proposes placing the substance mesocarb, including its isomers, salts, and salts of isomers, in schedule I of the CSA. This action is being taken to enable the United States to meet its obligations under the 1971 Convention. If finalized, this action would impose the regulatory controls and administrative, civil, and criminal

sanctions applicable to schedule I controlled substances on persons who handle (manufacture, distribute, reverse distribute, import, export, engage in research, conduct instructional activities or chemical analysis with, or possess), or propose to handle, mesocarb.

According to HHS, mesocarb has a high potential for abuse, has no currently accepted medical use in treatment in the United States, and lacks accepted safety for use under medical supervision. DEA’s research confirms that there is no commercial market for mesocarb in the United States. Additionally, queries of DEA’s STRIDE/STARLiMS and the NFLIS databases on May 26, 2021, did not generate any reports of mesocarb, suggesting that it is not trafficked in the United States. Therefore, DEA estimates that no United States entity currently handles mesocarb and does not expect any United States entity to handle mesocarb in the foreseeable future. DEA concludes that no United States entity would be affected by this rule if finalized. As such, the proposed rule will not have a significant effect on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

On the basis of information contained in the “Regulatory Flexibility Act” section above, DEA has determined and certifies pursuant to the Unfunded Mandates Reform Act (UMRA) of 1995 (2 U.S.C. 1501 et seq.) that this action would not result in any Federal mandate that may result “in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of \$100,000,000 or more (adjusted annually for inflation) in any

1 year * * *.” Therefore, neither a Small Government Agency Plan nor any other action is required under provisions of the UMRA of 1995.

List of Subjects in 21 CFR Part 1308

Administrative practice and procedure, Drug traffic control, Reporting and recordkeeping requirements.

For the reasons set out above, 21 CFR part 1308 is proposed to be amended to read as follows:

PART 1308—SCHEDULES OF CONTROLLED SUBSTANCES

1. The authority citation for 21 CFR part 1308 continues to read as follows:

Authority: 21 U.S.C. 811, 812, 871(b), 956(b), unless otherwise noted.

2. Section 1308.11 is amended by redesignating paragraphs (f)(7) through (10) as paragraphs (f)(8) through (11), and adding a new paragraph (f)(7) to read as follows:

§ 1308.11 Schedule I.

* * * * *

(f) * * *

(7) Mesocarb (N-phenyl-N’-(3-(1-phenylpropan-2-yl)-1,2,3-oxadiazol-3-ium-5-yl)carbamimidate). 15. 1227XXXXXXXXXXXXXXXXXXXXX

* * * * *

(f) Stimulants. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers, and salts of isomers:

(1) Aminorex (Some other names: aminoxaphen; 2-amino-5-phenyl-2-oxazoline; or 4,5-dihydro-5-phenyl-2-oxazolamine) 1585
(2) N-Benzylpiperazine (some other names: BZP, 1-benzylpiperazine) 7493
(3) Cathinone 1235
Some trade or other names: 2-amino-1-phenyl-1-propanone, alpha-aminopropiophenone, 2-aminopropiophenone, and norephedrone
(4) Fenethylamine 1503
(5) Methcathinone (Some other names: 2-(methylamino)-propiophenone; alpha-(methylamino)propiophenone; 2-(methylamino)-1-phenylpropan-1-one; alpha-N-methylaminopropiophenone; monomethylpropion; ephedrone; N-methylcathinone; methylcathinone; AL-464; AL-422; AL-463 and UR1432), its salts, optical isomers and salts of optical isomers 1237
(6) (±)cis-4-methylaminorex ((±)cis-4,5-dihydro-4-methyl-5-phenyl-2-oxazolamine) 1590
(7) N-ethylamphetamine 1475
(8) N,N-dimethylamphetamine (also known as N,N-alpha-trimethyl-benzeneethanamine; N,N-alpha-trimethylphenethylamine)

Anne Milgram, Administrator.

[FR Doc. 2021-16489 Filed 8-10-21; 8:45 am]

BILLING CODE 4410-09-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R10-OAR-2020-0649; FRL-8788-01-R10]

Air Plan Approval; AK; Juneau's Mendenhall Valley Second 10-Year PM₁₀ Limited Maintenance Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve the Juneau, Mendenhall Valley, Alaska (AK) limited maintenance plan (LMP) submitted on November 10, 2020, by the Alaska Department of Environmental Conservation (ADEC or “the State”). This plan addresses the second 10-year maintenance period beyond redesignation for particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM₁₀). A LMP is used to meet Clean Air Act (CAA) requirements for formerly designated nonattainment areas that meet certain qualification criteria. The EPA is proposing to determine that Alaska's LMP meets CAA requirements. The plan relies upon control measures contained in the first 10-year maintenance plan and the determination that the Mendenhall Valley area currently monitors PM₁₀ levels well below the PM₁₀ National Ambient Air Quality Standards (NAAQS or “the standard”).

DATES: Comments must be received on or before September 10, 2021.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R10-OAR-2020-0649, at <https://www.regulations.gov>. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, 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>.

FOR FURTHER INFORMATION CONTACT:

Christi Duboiski, EPA Region 10, 1200 Sixth Avenue, Suite 155, Seattle, WA 98101, at (360) 753-9081, or duboiski.christi@epa.gov.

SUPPLEMENTARY INFORMATION:

Throughout this document, wherever “we”, “us” or “our” is used, it means the EPA.

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I. Background

On August 7, 1987, the EPA designated the City of Juneau, Mendenhall Valley area (Mendenhall Valley) as a PM₁₀ nonattainment area (NAA) due to measured violations of the 24-hour PM₁₀ NAAQS (52 FR 29383). The publication announcing the designation upon enactment of the 1990 CAA Amendments was published on March 15, 1991 (56 FR 11101). On November 6, 1991, the Mendenhall Valley NAA was subsequently classified as moderate under sections 107(d)(4)(B) and 188(a) of the CAA (56 FR 56694). ADEC worked with the City of Juneau and the community of Mendenhall Valley to develop a plan to bring the area into attainment no later than December 31, 1994. The State submitted the plan to the EPA on June 22, 1993, as a moderate PM₁₀ State Implementation Plan (SIP) under section 189(a) of the CAA. The primary control measures the plan relied on were a wood smoke control program and paving unpaved roads to control fugitive dust. The EPA took final action to approve the State's moderate PM₁₀ SIP on March 24, 1994 (59 FR 13884).

On May 8, 2009, the State requested the EPA redesignate the Mendenhall Valley NAA to attainment for PM₁₀ and submitted the Mendenhall Valley PM₁₀ LMP to the EPA for approval. On July 16, 2010, the EPA determined the Mendenhall Valley NAA had attained

the PM₁₀ NAAQS as of the extended attainment date of December 31, 1995 (75 FR 41379). On May 9, 2013, the EPA took direct final action to approve the LMP submitted by the State for the Mendenhall Valley NAA and concurrently redesignated the area to attainment for the PM₁₀ NAAQS (78 FR 27071).

The purpose of the State's November 10, 2020 LMP is to fulfill the second 10-year planning requirement of CAA section 175A(b) to ensure PM₁₀ NAAQS compliance through 2033.

II. Limited Maintenance Plan Option for PM₁₀ Areas

A. Requirements for the Limited Maintenance Plan Option

Section 175A of the CAA sets forth the elements of a maintenance plan. Under section 175A, a state must submit a plan to demonstrate continued attainment of the applicable NAAQS for at least 10 years after an area is redesignated to attainment. The state must then submit a revised maintenance plan demonstrating that the area will continue to attain for the 10 years following the initial 10-year period. On September 4, 1992, the EPA issued guidance on the content of a maintenance plan (Memorandum from John Calcagni, Director, Air Quality Management Division, entitled “Procedures for Processing Requests to Redesignate Areas to Attainment,” (Calcagni Memo)).¹ The Calcagni Memo states that a maintenance plan should include the following provisions: (1) An attainment emissions inventory; (2) a maintenance demonstration showing maintenance for 10 years; (3) a commitment to maintain the existing monitoring network; (4) verification of continued attainment; and (5) a contingency plan to prevent or correct future violations of the NAAQS.

On August 9, 2001, the EPA issued guidance on streamlined maintenance plan provisions for certain moderate PM₁₀ nonattainment areas (see Memo from Lydia Wegman, Director, Air Quality Standards and Strategies Division, entitled “Limited Maintenance Plan Option for Moderate PM₁₀ Nonattainment Areas” (LMP Option memo)).² The LMP Option memo

¹ The Memorandum from the EPA's Air Quality Management Division Director to EPA Regional Air Directors entitled “Procedures for Processing Requests to Redesignate Areas to Attainment,” dated September 4, 1992 (Calcagni Memo) can be found at https://www3.epa.gov/ttn/naaqs/aqmguide/collection/cp2/19920904_calcagni_process_redesignation_guidance.pdf.

² The “Limited Maintenance Plan Option for Moderate PM₁₀ Nonattainment Areas” Memo outlines the criteria for development of a PM₁₀

contains a statistical demonstration states can use to show that areas are meeting certain air quality criteria with a high degree of probability and therefore will maintain the standard 10 years into the future. By providing this statistical demonstration, the EPA can consider the maintenance demonstration requirement of the CAA to be satisfied for the moderate PM₁₀ nonattainment area meeting this air quality criteria. If the tests described in section IV of the LMP Option memo are met, the EPA will treat that as a demonstration that the area will maintain the NAAQS. Consequently, it follows that future year emission inventories for these areas, and some of the standard analyses to determine transportation conformity with the SIP are no longer necessary.

To qualify for the LMP Option, a State must demonstrate the area meets the following criteria. First, the area should have attained the PM₁₀ NAAQS. Second, the most recent five years of air quality data at all monitors in the area, called the 24-hour average design value, should be at or below 98 micrograms per cubic meter (µg/m³). Third, the State should expect only limited growth in on-road motor vehicle PM₁₀ emissions and should have passed a motor vehicle regional emissions analysis test. Lastly, the LMP Option Memo identifies core provisions that must be included in all limited maintenance plans. These provisions include an attainment year emissions inventory, assurance of continued operation of an EPA-approved air quality monitoring network, and contingency provisions.

B. Conformity Under the Limited Maintenance Plan Option

The transportation conformity rule and the general conformity rule (set forth in the Code of Federal Regulations (CFR) at 40 CFR parts 51 and 93) apply to nonattainment areas and maintenance areas covered by an approved maintenance plan. Under either conformity rule, an acceptable method of demonstrating that a Federal action conforms to the applicable SIP is to demonstrate that expected emissions from the planned action are consistent with the emissions budget for the area.

While the EPA’s LMP option does not exempt an area from the need to affirm conformity, it explains that the area may demonstrate conformity without conforming to an emissions budget. Under the LMP option, emissions budgets are treated as essentially not

constraining for the length of the maintenance period because it is unreasonable to expect that the qualifying areas would experience so much growth in that period that a violation of the PM₁₀ NAAQS would result. For transportation conformity purposes, the EPA would conclude that emissions in these areas need not be capped for the maintenance period and therefore a regional emissions analysis would not be required. Similarly, Federal actions subject to the general conformity rule could be considered to satisfy the “budget test” specified in 40 CFR 93.158 (a)(5)(i)(A) for the same reasons that the budgets are essentially considered to be unlimited.

While areas with maintenance plans approved under the LMP option are not subject to the budget test (see 40 CFR 93.109(e)), the areas remain subject to the other transportation conformity requirements of 40 CFR part 93, subpart A. Thus, the metropolitan planning organization (MPO) in the area or the state must document and ensure that:

- a. Transportation plans and projects provide for timely implementation of SIP transportation control measures (TCMs) in accordance with 40 CFR 93.113;
- b. transportation plans and projects comply with the fiscal constraint element as set forth in 40 CFR 93.108;
- c. the MPO’s interagency consultation procedures meet the applicable requirements of 40 CFR 93.105;
- d. conformity of transportation plans is determined no less frequently than every four years, and conformity of plan amendments and transportation projects is demonstrated in accordance with the timing requirements specified in 40 CFR 93.104;
- e. the latest planning assumptions and emissions model are used as set forth in 40 CFR 93.110 and 40 CFR 93.111;
- f. projects do not cause or contribute to any new localized carbon monoxide or particulate matter violations, in accordance with procedures specified in 40 CFR 93.123; and
- g. project sponsors and/or operators provide written commitments as specified in 40 CFR 93.125.

If the EPA approves the second 10-year LMP, the Mendenhall Valley maintenance area will continue to be exempt from performing a regional emissions analysis but must meet project-level conformity analyses as well as the transportation conformity criteria described above.

III. Review of the State’s Submittal

A. Qualifying for the Limited Maintenance Plan Option

As discussed in Section II.A. of this preamble, the LMP Option Memo outlines the requirements for an area to qualify for an LMP. First, the area should be attaining the PM₁₀ NAAQS. The PM₁₀ NAAQS is attained when the expected number of days per calendar year with a 24-hour average concentration above 150 µg/m³ is equal to or less than one (40 CFR 50.6). We have evaluated the most recent ambient air quality data for the 24-hour PM₁₀ NAAQS and determined that the Mendenhall Valley area continues to attain the NAAQS with zero annual exceedances for the period 2018 through 2020. Table 1 of this preamble shows the Mendenhall Valley area has not exceeded the standard of 150 µg/m³ for the 24-hour maximum PM₁₀ concentrations measured at the Floyd Dryden monitoring site from 2010–2020.

TABLE 1—FLOYD DRYDEN 24-HOUR MAXIMUM PM₁₀ CONCENTRATIONS 2010–2020

Year	24-Hr max µg/m ³	Number of days exceeding NAAQS
2010	30	0
2011	24	0
2012	26	0
2013	33	0
2014	38	0
2015	21	0
2016	34	0
2017	30	0
2018	24	0
2019	64	0
2020	35	0

Second, the 24-hour average design value for the most recent five years of monitoring data must be at or below the critical design value of 98 µg/m³ for the PM₁₀ NAAQS. The critical design value is a margin of safety in which an area has a one in ten probability of exceeding the NAAQS. The 5-year average design value for Mendenhall Valley, based on PM₁₀ monitoring data from 2014 through 2018, is 49 µg/m³. In addition, the EPA calculated the 5-year average design value for the Mendenhall Valley based on PM₁₀ monitoring data from 2016 through 2020 and found the most conservative average design value estimate to be 62 µg/m³, which is below the critical design value of 98 µg/m³. The EPA’s attainment and average design value evaluation used to determine if the area qualifies for the LMP option is included in the docket

limited maintenance plan and can be found at <https://www.epa.gov/sites/production/files/2016-06/documents/2001lmp-pm10.pdf>.

for this action. The EPA reviewed the data and methodology provided by the State and the most recent 5-year average design value and finds that the Mendenhall Valley area's 5-year average design value is below the critical design value of $98 \mu\text{g}/\text{m}^3$ outlined in the LMP Option Memo. Therefore, the EPA finds that the Mendenhall Valley area meets the design value criteria outlined in the LMP Option Memo.

Third, the area must meet the motor vehicle regional emissions analysis test described in the LMP Option Memo. The State submitted an analysis showing that growth in on-road mobile PM_{10} emissions sources was minimal and would not threaten the assumption of maintenance that underlies the LMP policy. Using the EPA's methodology, the State calculated total projected growth in on-road motor vehicle PM_{10} emissions through 2033 (the end of the maintenance planning period) for the Mendenhall Valley area. This calculation is derived using Attachment B of the EPA's LMP Option Memo, where the projected percentage increase in vehicle miles traveled over the next ten years (VMT_{pi}) is multiplied by the on-road mobile portion of the attainment year inventory (DV_{mv}), including re-entrained road dust. This test is met when $(\text{VMT}_{\text{pi}} \times \text{DV}_{\text{mv}})$ plus the design value for the most recent five years of quality assured data is below the margin of safety (MOS) for the relevant PM_{10} standard in $\mu\text{g}/\text{m}^3$ for a given area. This MOS value can be $98 \mu\text{g}/\text{m}^3$ or a site-specific value computed from data collected at the site of interest using methods outlined in Attachment A of the LMP Option Memo. The 24-hour average design value of $49 \mu\text{g}/\text{m}^3$ was used to compute a MOS selected for the Floyd Dryden monitoring site in Mendenhall Valley of $50.2 \mu\text{g}/\text{m}^3$, which is below the MOS value of $98 \mu\text{g}/\text{m}^3$. See the Mendenhall Valley LMP, Section III.D.3.4 and associated appendix, placed in the docket for this action, for details of this computation. The EPA reviewed the calculations in the State's LMP submittal and concurs with the determination that the area meets the motor vehicle regional emissions analysis test.

As described above, the Mendenhall Valley PM_{10} maintenance area meets the qualification criteria set forth in the LMP Option Memo and accordingly qualifies for the LMP option. To ensure these requirements continue to be met, the State commits to evaluate monitoring data annually to ensure the area continues to qualify for the LMP option. However, if after performing the annual recalculation of the area's average design value in a given year, the

State determines that the area no longer qualifies for the LMP, the State will take action to attempt to reduce PM_{10} concentrations enough for the area to requalify for the LMP. One possible approach the State could take is to implement a contingency measure found in its SIP. See Section III.D.3.9 of the State's submittal, placed in the docket for this action, for a description of the contingency measures.

B. Attainment Inventory

Pursuant to the LMP Option Memo, the State's submission should include an emissions inventory, which can be used to demonstrate attainment of the relevant NAAQS. The inventory should represent emissions during the same five-year period associated with air quality data used to determine whether the area meets the applicability requirements of the LMP option. The State should review its inventory every three years to ensure emissions growth is incorporated in the inventory if necessary.

Alaska's Mendenhall Valley PM_{10} LMP includes an emissions inventory, with a base year of 2017. The assumptions, methods and computations used to generate the 2017 emissions inventory are described in detail in Appendix III.D.3.6 of the Mendenhall Valley LMP submittal in the docket for this action. The 2017 base year represents the most recent emissions inventory data available, is representative of the level of emissions during a period of time used to calculate the area is attaining the NAAQS, and is consistent with the data used to determine applicability of the LMP option (*i.e.*, having no violations of the NAAQS during the five-year period used to calculate the design value).

Like the first 10-year LMP, four main source categories were inventoried for the second 10-year LMP. These include (1) On-Road; (2) Non-Road; (3) Area Sources; and (4) Point Sources. The same assumptions and methods used to develop the first 10-year LMP were used to develop the 2017 base year PM_{10} emissions inventory for the second 10-year LMP. The analysis of the emissions inventory for the second 10-year LMP indicates that the PM_{10} emissions in the maintenance area declined by about 78% between 2004 and 2017 and shows paved roads remain the most significant source of fugitive emissions in the maintenance area. Fugitive dust from paved roads accounted for 46.2% of the overall inventory; fugitive dust from unpaved roads accounted for 0.53%; and emissions from wood burning accounted for 8.4% of the overall inventory.

Efforts by the City and Borough of Juneau and the State to pave sections of unpaved roads and sweeping and sanding mitigation programs in the Valley, as well as the woodsmoke control program, have led to significant reduction in PM_{10} emissions. In accordance with the LMP Option Memo, all controls relied on to demonstrate attainment and continued maintenance will remain in place, and ADEC asserts that no additional control measures are necessary to maintain the NAAQS.

The submittal meets the EPA guidance for purposes of an attainment emissions inventory, and the emissions inventory data supports the State's conclusions that the existing control measures will continue to protect and maintain the PM_{10} NAAQS.

C. Air Quality Monitoring Network

Once an area is redesignated, the state must continue to operate an appropriate air monitoring network in accordance with 40 CFR part 58 to verify the attainment status of the area. From 1986 until the present, Alaska has operated a PM_{10} monitor at the Floyd Dryden Middle School in the Mendenhall Valley NAA. The Floyd Dryden monitor was sited and maintained in accordance with Federal siting and design criteria in 40 CFR part 58, and in consultation with the EPA Region 10. On June 26, 2020, ADEC submitted the 2020 Annual Monitoring Network Plan, which the EPA approved on January 25, 2021. ADEC's network plan and the EPA's approval letter are included in the docket for this action.

The State commits to continued operation of at least one EPA-approved PM_{10} monitoring site in the Mendenhall Valley maintenance area through the end of the maintenance planning period, 2033, and will continue to operate the monitor consistent with the EPA-approved ADEC annual network plan in order to meet the EPA requirements at 40 CFR part 58.

D. Verification of Continued Attainment

The level of the PM_{10} NAAQS is $150 \mu\text{g}/\text{m}^3$, 24-hour average concentration. The NAAQS is attained when the expected number of days per calendar year with a 24-hour average concentration above $150 \mu\text{g}/\text{m}^3$ is equal to or less than one (40 CFR 50.6). As stated in Section III.D of this preamble, ADEC commits to continue to operate a regulatory monitoring network in accordance with 40 CFR part 58. In addition, ADEC commits to verifying continued attainment of the PM_{10} standard through the maintenance plan period with the operation of an appropriate PM_{10} monitoring network.

In developing the second 10-year maintenance plan, ADEC evaluated the most recent three years of complete, quality-assured data for the Mendenhall Valley NAA (2017 through 2019) to verify continued attainment of the standard.

E. Contingency Provisions

The CAA section 175A states that a maintenance plan must include contingency provisions, as necessary, to ensure prompt correction of any violation of the NAAQS, which may occur after redesignation of the area to attainment. As explained in the LMP Option Memo and the Calcagni Memo, these contingency provisions are an enforceable part of the federally approved SIP. The maintenance plan should clearly identify the events that would “trigger” the adoption and implementation of a contingency provision, the contingency provision(s) that would be adopted and implemented, and the schedule indicating the time frame by which the State would adopt and implement the provision(s). The LMP Option Memo and the Calcagni Memo state that the EPA will determine the adequacy of a contingency plan on a case-by-case basis. At a minimum, it must require that the state implement all measures contained in the CAA part D nonattainment plan for the area prior to redesignation.

In the Mendenhall Valley PM₁₀ LMP, ADEC included maintenance plan contingency provisions to ensure the area continues to meet the PM₁₀ NAAQS. The Mendenhall Valley LMP describes a process and a timeline to identify, evaluate and select appropriate contingency measure(s) from a list of potential measures in the event of a quality assured violation of the PM₁₀ NAAQS. Within 120 days following a violation of the PM₁₀ NAAQS an assessment team will evaluate the events contributing to the violation and identify the appropriate measure(s) that may need to be implemented. Contingency measures that may be implemented to address the source and circumstances causing the violation and reduce emissions are listed in Section III.D.3.9 of the Mendenhall Valley LMP in the docket for this action. The

identified contingency measure(s) may be adopted and implemented in coordination with the ADEC Commissioner, City Manager and assembly.

The contingency provisions submitted in the Mendenhall Valley PM₁₀ LMP are adequate to meet CAA section 175A requirements and the contingency provisions as outlined in the LMP Option Memo.

IV. Proposed Action

The EPA is proposing to approve the second 10-year PM₁₀ limited maintenance plan for Juneau, Mendenhall Valley submitted by the State of Alaska.³ The EPA has reviewed the air quality data for the Mendenhall Valley area and determined that the area continues to show attainment of the PM₁₀ NAAQS and meets all the LMP requirements as described in this action. If finalized, the EPA’s approval of this LMP will satisfy the section 175A CAA requirements for the second 10-year period for the Mendenhall Valley PM₁₀ area.

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, 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 State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions

³ The remainder of the November 10, 2020 State of Alaska SIP submission (the Eagle River Second 10-year PM₁₀ LMP; the 2019 Emission Limit Control Measures; and the 2019 Adoption by Reference Updates and Standard Permit Conditions) will be addressed in separate EPA rulemaking actions.

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 subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because it does not involve technical standards; and
- Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

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

Dated: August 5, 2021.

Michelle L. Pirzadeh,

Acting Regional Administrator, Region 10.

[FR Doc. 2021–17099 Filed 8–10–21; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register

Vol. 86, No. 152

Wednesday, August 11, 2021

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

Animal and Plant Health Inspection Service

[Docket No. APHIS–2021–0028]

General Conference Committee of the National Poultry Improvement Plan; Virtual Public Meeting

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of virtual public meeting.

SUMMARY: We are giving notice that the General Conference Committee of the National Poultry Improvement Plan will be holding a virtual public meeting.

DATES: The General Conference Committee virtual public meeting will be held on Wednesday, September 22, 2021, at 12:00 p.m. Eastern Daylight Time.

FOR FURTHER INFORMATION CONTACT: Dr. Elena Behnke, Senior Coordinator, National Poultry Improvement Plan, VS, APHIS, USDA, 1506 Klondike Road, Suite 101, Conyers, GA 30094; (770) 922–3496; email: Elena.Behnke@usda.gov.

SUPPLEMENTARY INFORMATION: The General Conference Committee (the Committee) of the National Poultry Improvement Plan (NPIP) is the Secretary's Advisory Committee on poultry health. The Committee serves as a forum for the study of problems relating to poultry health and, as necessary, makes specific recommendations to the Secretary concerning ways the U.S. Department of Agriculture may assist the industry in addressing these problems.

The Committee has scheduled a virtual public meeting to be held on September 22, 2021, at 12:00 p.m. Eastern Daylight Time using Zoom, a web conferencing service. The meeting will start with a brief comment by the NPIP Senior Coordinator and GCC Chairperson, after which, new

diagnostic tests will be presented, reviewed, and voted on by the Committee. The Committee will then attend to old and new business. Anyone may observe and/or participate as indicated below, and we ask that, if you are new to Zoom, to please visit <https://support.zoom.us> prior to the meeting to allow time to help you get started and to familiarize yourself with the web conferencing service.

To Join as a Participant

Time permitting, participants may provide oral comments for no more than five (5) minutes per participant. Due to time constraints, it may not be possible to accommodate all who wish to speak. Participants in the open session can speak and may be asked questions by the Committee. If you wish to participate with an unmuted line, you must request to be scheduled as a full participant no later than September 15, 2021, via email to NPIP Program Analyst, Penny Kesler, Penny.E.Kesler@usda.gov with a copy to Elena.Behnke@usda.gov. Please submit your name and organizational affiliation in this request. After you pre-register, you will receive a unique link and instructions via email on how to fully participate.

To Join as an Observer

Observers can watch the open session, but they cannot speak. It is not necessary to pre-register to observe. To join as an observer, a link and call-in lines will be posted at www.poultryimprovement.org with further instructions on September 1, 2021.

Reasonable Accommodations

If needed, please request reasonable accommodations no later than August 20, 2021, by email to Penny.E.Kesler@usda.gov with a copy to Elena.Behnke@usda.gov. Requests made after that date may be considered, but it may not be possible to fulfill them.

This notice of meeting is given pursuant to section 10 of the Federal Advisory Committee Act (5 U.S.C. App. 2).

Done in Washington, DC, this 5th day of August 2021.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2021–17068 Filed 8–10–21; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2021–0039]

Notice of Request for Revision to and Extension of Approval of an Information Collection; Importation of Swine Hides, Bird Trophies, and Deer Hides

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Revision to and extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request a revision to and extension of approval of an information collection associated with the importation of swine hides, bird trophies, and deer hides.

DATES: We will consider all comments that we receive on or before October 12, 2021.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to www.regulations.gov. Enter APHIS–2021–0039 in the Search field. Select the Documents tab, then select the Comment button in the list of documents.
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2021–0039, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road, Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at regulations.gov or in our reading room, which is located in Room 1620 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: For information on the regulations for the importation of swine hides, bird trophies, and deer hides, contact Dr. Linda Kahn-Tobin, Senior Staff Veterinarian, Animal Products Import,

Strategy and Policy, VS, APHIS, 4700 River Road, Unit 40, Riverdale, MD 20737; (301) 851-3343. For more information on the information collection reporting process, contact Mr. Joseph Moxey, APHIS' Paperwork Reduction Act Coordinator, at (301) 851-2483; joseph.moxey@usda.gov.

SUPPLEMENTARY INFORMATION:

Title: Importation of Swine Hides, Bird Trophies, and Deer Hides.

OMB Control Number: 0579-0307.

Type of Request: Revision to and extension of approval of an information collection.

Abstract: Under the Animal Health Protection Act (7 U.S.C. 8301 *et seq.*), the Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture is authorized, among other things, to prohibit or restrict the importation and interstate movement of animals and animal products to prevent the introduction into and dissemination within the United States of livestock diseases and pests. To carry out this mission, APHIS regulates the importation of animals and animal products into the United States. The regulations are contained in 9 CFR parts 91 through 99.

The regulations in 9 CFR parts 94 and 95 (referred to below as the regulations) prohibit or restrict the importation of specified animal products into the United States to prevent the introduction into the U.S. livestock population of certain contagious animal diseases. Sections 95.16 and 95.17 of the regulations contain, among other things, specific processing and certification requirements for untanned hides and skins and bird trophies.

The regulations require, among other things, that shipments of hides be accompanied by certificates showing their origin and certifying that the hides are from areas free of certain animal diseases. Shipments of ruminant hides from Mexico must be accompanied by written statements indicating that the hides were frozen for 24 hours and treated for ticks. Shipments of bird trophies must be accompanied by certificates of origin certifying that the trophies are from regions free of Newcastle disease and highly pathogenic avian influenza. These activities help ensure that the products do not harbor disease or ticks.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities, as described, for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our

information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the 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, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.*, permitting electronic submission of responses.

Estimate of burden: Public burden for this collection of information is estimated to average approximately 0.320 hours per response.

Respondents: National government officials, owners of untanned ruminant and swine hides, and importers of untanned ruminant and swine hides.

Estimated number of respondents: 167.

Estimated number of responses per respondent: 9.

Estimated annual number of responses: 1,472.

Estimated total annual burden on respondents: 471 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

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.

Done in Washington, DC, this 4th day of August 2021.

Michael Watson,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2021-17069 Filed 8-10-21; 8:45 am]

BILLING CODE 3410-34-P

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

[Docket No. RUS-21-WATER-0008]

Notice of Request for Revision of a Currently Approved Information Collection; Comments Requested.

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the

Rural Utilities Service (RUS) invites comments on this information collection for which RUS intends to request approval from the Office of Management and Budget (OMB).

DATES: Comments on this notice must be received by October 12, 2021.

FOR FURTHER INFORMATION CONTACT:

Arlette Mussington, Management Analyst, Rural Development Innovation Center—Regulations Management Division, USDA, 1400 Independence Avenue SW, Room 4227, South Building, Washington, DC 20250-1522. Telephone: (202) 720-2825. Email arlette.mussington@usda.gov.

SUPPLEMENTARY INFORMATION: The Office of Management and Budget's (OMB) regulation (5 CFR 1320) implementing provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104-13) requires that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities (see 5 CFR 1320.8(d)). This notice identifies an information collection that RUS is submitting to OMB for revision.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (b) The accuracy of the Agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) Ways to enhance the quality, utility and clarity of the information to be collected; and (d) Ways to minimize the burden of the collection of information on 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 may be sent by the Federal eRulemaking Portal: Go to <http://www.regulations.gov> and, in the lower "Search Regulations and Federal Actions" box, select "RUS" from the agency drop-down menu, then click on "Submit." In the Docket ID column, select RUS-21-WATER-0008 to submit or view public comments and to view supporting and related materials available electronically. Information on using *Regulations.gov*, including instructions for accessing documents, submitting comments, and viewing the docket after the close of the comment period, is available through the site's "User Tips" link.

Title: The Rural Alaska Village Grant (RAVG) Program.

OMB Control Number: 0572-0150.

Expiration Date of Approval: February 28, 2022.

Type of Request: Revision of a Currently Approved Information Collection.

Abstract: The Rural Alaska Village Grant (RAVG) Program is authorized under Section 305D of the Consolidated Farm and Rural Development Act (CONACT), (7 U.S.C. 1926(d)), as amended. Governing regulations are currently codified in 7 CFR 1780. Under the RAVG program, the Secretary of Agriculture may make grants to the State of Alaska for the benefit of rural or Native Villages in Alaska to provide for the development and construction of water and wastewater systems to improve the health and sanitation conditions in those Villages. To be eligible to receive a grant under the RAVG program, the project must provide 25 percent in matching funds from the State of Alaska. The matching funds must come from non-Federal sources. The Secretary shall consult with the State of Alaska on a method of prioritizing the allocation of grants according to the needs of, and relative health and sanitation conditions in each village.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 1.36 hours per response.

Respondents: Business or other for profit, not-for-profit institutions, State, Local, or Tribal Government.

Estimated Number of Respondents: 36.

Estimated Number of Responses per Respondent: 18.7.

Estimated Number of Responses: 446.

Estimated Total Annual Burden on Respondents: 598.

Copies of this information collection can be obtained from Arlette Mussington, Innovation Center—Regulations Management Division, at (202) 720-2825. Email: arlette.mussington@usda.gov.

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.

Christopher A. McLean,

Acting Administrator, Rural Utilities Service.

[FR Doc. 2021-17101 Filed 8-10-21; 8:45 am]

BILLING CODE 3410-15-P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meetings of the West Virginia Advisory Committee

AGENCY: U.S. Commission on Civil Rights.

ACTION: Announcement of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the West Virginia Advisory Committee (Committee) will hold a two-hour meeting via web conference on Thursday, August 26, 2021 at 11:00 a.m. Eastern Time. The purpose of the meeting is to hear from national experts who will highlight the themes and questions related to the civil rights impacts of disparate school discipline policies and practices on students of color, students with disabilities and LGBTQIA+ students in West Virginia.

DATES: Thursday, August 26, 2021, from 11:00 a.m. to 1:00 p.m. (ET).

Online Registration: <https://bit.ly/3yqCAZx>.

- *Password if prompted:* USCCR, or follow instructions.

- You will be asked to register, including your email address, so that you will receive future information about the WV Committee's activities. If you prefer that your real name not show on screen, you may enter an alias when joining the meeting, and your actual name does not appear in the WebEx participant list.

Join by Phone: (audio only): 800-360-9505 USA Toll Free; Access code: 199 382 0354.

FOR FURTHER INFORMATION CONTACT: Ivy Davis, DFO, at ero@usccr.gov, or 202-539-8468.

SUPPLEMENTARY INFORMATION: The meeting is available to the public through the web link above. If joining via phone-only, callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Individuals who are deaf, deafblind and hard of hearing. Individuals may also follow the proceedings by first calling the Federal Relay Service at 1-800-877-8339 and providing the Service with conference details found through registering at the web link above. To request additional accommodations, please email Atten: Ivy Davis, DFO, at: ero@usccr.gov, at least 7 days prior to the meeting.

At the end of the panel presentation, members of the public are entitled to make brief comments—not to exceed five minutes—during the Public Comment section of the agenda. Members of the public may also submit written comments; the comments must be received in the Regional Programs Unit within 30 days following the meeting. Written comments may be

emailed to Atten: Ivy Davis at ero@usccr.gov. Persons who desire additional information may contact the Regional Programs Unit via email at: Atten: Ivy Davis, ivadavis@usccr.gov; by phone: 202-539-8468. Records and documents discussed during the meeting will be available for public viewing as they become available at www.facadatabase.gov. Persons interested in the work of the WV Advisory Committee may go to the Commission's website, www.usccr.gov, or contact the DFO at the above email address or phone number.

Agenda

- I. Welcome & Roll Call
- II. Panel Discussion
- III Committee Members Q & A
- IV. Public Comment
- V. Adjournment

Dated: August 5, 2021.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2021-17009 Filed 8-10-21; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-580-889]

Diocyl Terephthalate From the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2019-2020

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) determines that LG Chem Ltd. (LG Chem), a producer or exporter subject to this review, made sales of subject merchandise at less than normal value during the period of review (POR) August 1, 2019, through July 31, 2020. Commerce determines that Aekyung Petrochemical Co., Ltd. (AKP) had no shipments of subject merchandise during the POR.

DATES: Applicable August 11, 2021.

FOR FURTHER INFORMATION CONTACT: Laurel LaCivita or Patrick Barton, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482-4243 or (202) 482-0012, respectively.

SUPPLEMENTARY INFORMATION:

Background

On May 7, 2021, Commerce published the *Preliminary Results* of this administrative review.¹ We invited interested parties to comment on the *Preliminary Results*.² This review covers two respondents: AKP, and LG Chem. None of the parties to the proceeding provided comments on our *Preliminary Results*.

Scope of the Order

The merchandise covered by this order is dioctyl terephthalate (DOTP), regardless of form. DOTP that has been blended with other products is included within this scope when such blends include constituent parts that have not been chemically reacted with each other to produce a different product. For such blends, only the DOTP component of the mixture is covered by the scope of this order.

DOTP that is otherwise subject to this order is not excluded when commingled with DOTP from sources not subject to this order. Commingled refers to the mixing of subject and non-subject DOTP. Only the subject component of such commingled products is covered by the scope of the order.

DOTP has the general chemical formulation C6H4(C8H17COO)2 and a chemical name of “bis (2-ethylhexyl) terephthalate” and has a Chemical Abstract Service (CAS) registry number of 6422–86–2. Regardless of the label, all DOTP is covered by this order.

Subject merchandise is currently classified under subheading 2917.39.2000 of the Harmonized Tariff Schedule of the United States (HTSUS). Subject merchandise may also enter under subheadings 2917.39.7000 or 3812.20.1000 of the HTSUS. While the CAS registry number and HTSUS classification are provided for convenience and customs purposes, the written description of the scope of this order is dispositive.

Application of Adverse Facts Available

For these final results, we continue to find that LG Chem withheld information requested by Commerce, failed to provide the requested information in the form and manner requested, and significantly impeded the proceeding, warranting a determination on the basis of the facts available under section 776(a) of the Act. Further, we continue to find that LG Chem failed to cooperate to the best of its ability pursuant to

¹ See *Dioctyl Terephthalate from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2019–2020*, 86 FR 24585 (May 7, 2021) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

section 776(b) of the Act by declining to participate in the review. Therefore, we continue to find that the application of adverse facts available, pursuant to sections 776(a) and (b) of the Act, is warranted with respect to LG Chem.

Final Determination of No Shipments

In the *Preliminary Results*, Commerce determined that AKP had no shipments of subject merchandise during the POR.² As Commerce did not receive any comments on its preliminary finding, nor any information to contradict its preliminary determination of no shipments, Commerce continues to find that AKP did not have any shipments of subject merchandise during the POR. Accordingly, consistent with Commerce’s practice,³ we intend to instruct U.S. Customs and Border Protection (CBP) to liquidate any existing entries of subject merchandise produced by AKP, but exported by other parties, at the rate for the intermediate reseller, if available, or at the all-others rate of 3.69 percent.⁴

Final Results of the Administrative Review

Commerce conducted this review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act). Because no party submitted comments on the *Preliminary Results*, the final results remain unchanged from the *Preliminary Results*.

We determine that the following weighted-average dumping margin exists for the period August 1, 2019, through July 31, 2020:

Exporter or producer	Weighted-average dumping margin (percent)
LG Chem, Ltd	47.86

Disclosure

As noted above, Commerce received no comments on its *Preliminary Results*. As a result, we have not modified our analysis, and will not issue a decision memorandum to accompany this **Federal Register** notice. Further, because these results are based on the application of adverse facts available

² See *Preliminary Results*, 86 FR 24585, 24585–86; see also Preliminary Decision Memorandum at 3.

³ See, e.g., *Certain Corrosion-Resistant Steel Products from Taiwan: Final Results of the Antidumping Duty Administrative Review and Final Determination of No Shipments; 2018–2019*, 86 FR 28554 (May 27, 2021).

⁴ See *Dioctyl Terephthalate from the Republic of Korea: Antidumping Duty Order*, 82 FR 39410 (August 18, 2017).

and we have not changed our analysis since the *Preliminary Results*, there are no calculations to disclose in accordance with 19 CFR 351.224(b) for these final results.

Assessment Rates

Pursuant to section 751(a)(2)(A) of the Act and 19 CFR 351.212(b)(1), Commerce will determine, and CBP shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review. For LG Chem, we will instruct CBP to apply an *ad valorem* assessment rate for antidumping duties equal to LG Chem’s weighted-average dumping margin listed above to all entries of subject merchandise during the POR exported or produced by LG Chem.

For AKP, which we determined had no shipments during the POR, we will instruct CBP to liquidate any suspended entries associated with AKP pursuant to the reseller policy.⁵

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.*, within 90 days of publication).

Cash Deposit Requirements

The following cash deposit requirements will be effective for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for LG Chem will be equal to its weighted-average dumping margin established in the final results of this administrative review; (2) for merchandise exported by a company not covered in this review but covered in a prior completed segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published 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 complete segment of this proceeding, the cash deposit rate will be the rate established for the most recent period for the

⁵ For a full discussion of this practice, see *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003).

producer of the merchandise; (4) the cash deposit rate for all other producers or exporters will continue to be 3.69 percent,⁶ the all-others rate established in the less-than-fair-value investigation.

These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification Regarding Administrative Protective Order

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Interested Parties

We are issuing and publishing these final results of administrative review in accordance with sections 751(a)(1) and 777(i) of the Act, and 19 CFR 351.221(b)(5).

Dated: July 30, 2021.

Christian Marsh,

Acting Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2021-17094 Filed 8-10-21; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[Application No. 10-5A001]

Export Trade Certificate of Review

ACTION: Notice of Application for an Amended Export Trade Certificate of Review by Alaska Longline Cod

Commission, Application No. 10-5A001.

SUMMARY: The Office of Trade and Economic Analysis ("OTEA") of the International Trade Administration, Department of Commerce, has received an application for an amended Export Trade Certificate of Review ("Certificate"). This notice summarizes the proposed amendment and requests comments relevant to whether the amended Certificate should be issued.

FOR FURTHER INFORMATION CONTACT: Joseph Flynn, Director, Office of Trade and Economic Analysis, International Trade Administration, by telephone at (202) 482-5131 (this is not a toll-free number) or email at etca@trade.gov.

SUPPLEMENTARY INFORMATION: Title III of the Export Trading Company Act of 1982 (15 U.S.C. 4001-21) ("the Act") authorizes the Secretary of Commerce to issue Export Trade Certificates of Review. An Export Trade Certificate of Review protects the holder and the members identified in the Certificate from State and Federal government antitrust actions and from private treble damage antitrust actions for the export conduct specified in the Certificate and carried out in compliance with its terms and conditions. The regulations implementing Title III are found at 15 CFR part 325. OTEA is issuing this notice pursuant to 15 CFR 325.6(a), which requires the Secretary of Commerce to publish a summary of the application in the **Federal Register**, identifying the applicant and each member and summarizing the proposed export conduct.

Request for Public Comments

Interested parties may submit written comments relevant to the determination whether an amended Certificate should be issued. If the comments include any privileged or confidential business information, it must be clearly marked and a nonconfidential version of the comments (identified as such) should be included. Any comments not marked as privileged or confidential business information will be deemed to be nonconfidential.

An original and five (5) copies, plus two (2) copies of the nonconfidential version, should be submitted no later than 20 days after the date of this notice to: Office of Trade and Economic Analysis, International Trade Administration, U.S. Department of Commerce, Room 21028, Washington, DC 20230; and to email at etca@trade.gov.

Information submitted by any person is exempt from disclosure under the Freedom of Information Act (5 U.S.C.

552). However, nonconfidential versions of the comments will be made available to the applicant if necessary for determining whether or not to issue the amended Certificate. Comments should refer to this application as "Export Trade Certificate of Review, application number 10-5A001."

Summary of the Application

Applicant: Alaska Longline Cod Commission, c/o Mundt MacGregor L.L.P., 271 Wyatt Way NE, Suite 106, Bainbridge Island, WA 98110.
Contact: Duncan R. McIntosh, Attorney, dmcintosh@mundtmac.com.
Application No.: 10-5A001.
Date Deemed Submitted: July 28, 2021.

Proposed Amendment: Alaska Longline Cod Commission seeks to amend its Certificate as follows:

1. Add the following companies as new Members of the Certificate within the meaning of section 325.2(l) of the Regulations (15 CFR 325.2(l)):
 - Aleutian Longline, LLC, Seattle, WA;
 - Bristol Wave Seafoods, LLC, Seattle, WA;
 - Coastal Alaska Premier Seafoods, LLC, Anchorage, AK;
 - Gulf Prowler, LLC, Juneau, AK;
 - Kodiak Leader Fisheries LLC, Lynden, WA; and
 - Starfish Reverse, LLC, Seattle, WA.
2. Change the address for the following entities:
 - Beauty Bay Washington, LLC, changes address from Edmonds, WA to Bothell, WA;
 - Tatoosh Seafoods, LLC, changes address from Edmonds, WA to Kingston, WA.
3. Remove the following Members of the Certificate:
 - Prowler Fisheries LLC, Seattle, WA;
 - Blue North Fisheries, Inc., Seattle, WA;
 - Blue North Trading Company, LLC, Seattle, WA;
 - Clipper Group, Ltd., Seattle, WA;
 - Clipper Seafoods, Ltd., Seattle, WA;
 - Liberator Fisheries LLC, Seattle, WA; and
 - Siberian Sea Fisheries LLC, Seattle, WA.
4. Correct the names of the following Members:
 - Bristol Leader Fisheries LLC replaces Bristol Leader Seafoods LLC;
 - Bering Leader Fisheries LLC replaces Bering Leader Seafoods LLC; and
 - Northern Leader Fisheries LLC replaces Northern Leader Seafoods LLC.

Alaska Longline Cod Commission's proposed amendment of its Export Trade Certificate of Review would result in the following Membership list:

⁶ See *Diethyl Terephthalate from the Republic of Korea: Antidumping Duty Order*, 82 FR 39410 (August 18, 2017).

1. Akulurak LLC, Seattle, WA;
2. Alaskan Leader Fisheries LLC, Lynden, WA;
3. Alaskan Leader Seafoods LLC, Lynden, WA;
4. Alaskan Leader Vessel LLC, Lynden, WA;
5. Aleutian Longline, LLC, Seattle, WA;
6. Aleutian Spray Fisheries, Inc., Seattle, WA;
7. Beauty Bay Washington, LLC, Bothell, WA;
8. Bering Leader Fisheries LLC, Lynden, WA;
9. Bristol Leader Fisheries LLC, Lynden, WA;
10. Bristol Wave Seafoods, LLC, Seattle, WA;
11. Coastal Alaska Premier Seafoods, LLC, Anchorage, AK;
12. Coastal Villages Longline LLC, Anchorage, AK;
13. Deep Sea Fisheries, Inc., Everett, WA;
14. Gulf Mist, Inc., Everett, WA;
15. Gulf Prowler, LLC, Juneau, AK;
16. Kodiak Leader Fisheries LLC, Lynden, WA;
17. Northern Leader Fisheries LLC, Lynden, WA;
18. Romanzof Fishing Company, L.L.C., Seattle, WA;
19. Shelford's Boat, Ltd., Mill Creek, WA;
20. Siu Alaska Corporation, Anchorage, AK;
21. Starfish Reverse, LLC, Seattle, WA;
22. Tatoosh Seafoods, LLC, Kingston, WA.

Dated: August 6, 2021.

Joseph Flynn,

Director, Office of Trade and Economic Analysis, International Trade Administration, U.S. Department of Commerce.

[FR Doc. 2021-17146 Filed 8-10-21; 8:45 am]

BILLING CODE 3510-DR-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-570-909]

Certain Steel Nails From the People's Republic of China: Notice of Court Decision Not in Harmony With Final Scope Ruling and Notice of Amended Final Scope Ruling Pursuant to Court Decision

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: On August 3, 2021, the U.S. Court of International Trade (CIT) issued its final judgment in *Simpson*

Strong-Tie Company v. United States, Court No. 18-00062, sustaining the Department of Commerce (Commerce)'s remand redetermination pertaining to a scope ruling in which Commerce found Simpson Strong-Tie Company's (Simpson's) crimp drive anchors to be outside the scope of the antidumping duty (AD) order on certain steel nails (nails) from the People's Republic of China (China). Commerce is notifying the public that the CIT's final judgment is not in harmony with Commerce's scope ruling, and that Commerce is amending the scope ruling to find that crimp drive anchors are not covered by the order.

DATES: Applicable August 13, 2021.

FOR FURTHER INFORMATION CONTACT:

Kelsie Hohenberger, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482-2517.

SUPPLEMENTARY INFORMATION:

Background

On March 6, 2018, Commerce found Simpson's crimp drive anchors, which consist of a one-piece expansion anchor, to be within the scope of the AD order on nails from China.¹

Simpson appealed Commerce's *Final Scope Ruling*. On June 12, 2019, and July 22, 2019, the CIT stayed the case pending a final and conclusive determination from the U.S. Court of Appeals for the Federal Circuit (CAFC) in a case involving a similar product. On August 28, 2020, the CAFC issued a final ruling that case.² In light of the CAFC's decision, Commerce requested that the CIT remand this matter for further consideration. On November 18, 2020, the CIT remanded the *Final Scope Ruling* to Commerce.³

In its final remand redetermination, issued in February 2021, Commerce found Simpson's crimp drive anchors to be outside the scope of the AD order on nails from China.⁴ The CIT sustained Commerce's final redetermination.⁵

¹ See Memorandum, "Antidumping Duty Order on Certain Steel Nails from the People's Republic of China: Final Scope Ruling on Simpson Strong-Tie Company's "Crimp Drive" Anchors," dated March 6, 2018 (*Final Scope Ruling*).

² See *OMG, Inc. v. United States*, 972 F.3d 1358 (Fed. Cir. 2020).

³ See *Simpson Strong-Tie Co. v. United States*, Court No. 18-00062, ECF No. 45 (CIT November 18, 2020).

⁴ See Final Results of Redetermination Pursuant to *Simpson Strong-Tie Co. v. United States*, Court No. 18-00062, ECF No. 45 (CIT November 18, 2020), dated February 16, 2021.

⁵ See *Simpson Strong-Tie Co. v. United States*, Slip Op. 21-96, Court No. 18-00062 (CIT 2021).

Timken Notice

In its decision in *Timken*,⁶ as clarified by *Diamond Sawblades*,⁷ the CAFC held that, pursuant to sections 516A(c) and (e) of the Tariff Act of 1930, as amended (the Act), Commerce must publish a notice of court decision that is not "in harmony" with a Commerce determination and must suspend liquidation of entries pending a "conclusive" court decision. The CIT's August 3, 2021, judgment constitutes a final decision of the CIT that is not in harmony with Commerce's *Final Scope Ruling*. Thus, this notice is published in fulfillment of the publication requirements of *Timken*.

Amended Final Scope Ruling

In accordance with the CIT's August 3, 2021, final judgment, Commerce is amending its *Final Scope Ruling* and finds that the scope of the AD order on nails from China does not cover the products addressed in the *Final Scope Ruling*.

Liquidation of Suspended Entries

Commerce will instruct U.S. Customs and Border Protection (CBP) that, pending any appeals, Simpson's crimp drive anchors will not be subject to a cash deposit requirement. In the event that the CIT's final judgment is not appealed or is upheld on appeal, Commerce will instruct CBP to liquidate entries of Simpson's crimp drive anchors without regard to antidumping duties and to lift suspension of liquidation of such entries.

Notification to Interested Parties

This notice is issued and published in accordance with sections 516A(c) and (e) of the Act.

Dated: August 5, 2021.

Christian Marsh,

Acting Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2021-17096 Filed 8-10-21; 8:45 am]

BILLING CODE 3510-DS-P

⁶ See *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990) (*Timken*).

⁷ See *Diamond Sawblades Manufacturers Coalition v. United States*, 626 F.3d 1374 (Fed. Cir. 2010) (*Diamond Sawblades*).

DEPARTMENT OF COMMERCE

International Trade Administration

[A-570-909]

Certain Steel Nails From the People's Republic of China: Notice of Court Decision Not in Harmony With Final Scope Ruling and Notice of Amended Final Scope Ruling Pursuant to Court Decision

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: On August 3, 2021, the U.S. Court of International Trade (CIT) issued its final judgment in *Simpson Strong-Tie Company v. United States*, Court No. 17-00287, sustaining the Department of Commerce (Commerce)'s remand redetermination pertaining to a scope ruling in which Commerce found Simpson Strong-Tie Company's (Simpson's) split-drive anchors to be outside the scope of the antidumping duty (AD) order on certain steel nails (nails) from the People's Republic of China (China). Commerce is notifying the public that the CIT's final judgment is not in harmony with Commerce's scope ruling, and that Commerce is amending the scope ruling to find that split-drive anchors are not covered by the order.

DATES: Applicable August 13, 2021.

FOR FURTHER INFORMATION CONTACT: Kelsie Hohenberger, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482-2517.

Background

On December 1, 2017, Commerce found Simpson's split-drive anchors, which consist of a split shank and a blunt tip, to be within the scope of the AD order on nails from China.¹

Simpson appealed Commerce's *Final Scope Ruling*. On June 12, 2019, and July 22, 2019, the CIT stayed the case pending a final and conclusive determination from the U.S. Court of Appeals for the Federal Circuit (CAFC) in a case involving a similar product. On August 28, 2020, the CAFC issued a final ruling that case.² In light of the CAFC's decision, Commerce requested that the CIT remand this matter for further consideration. On November 18,

2020, the CIT remanded the *Final Scope Ruling* to Commerce.³

In its final remand redetermination, issued in February 2021, Commerce found Simpson's split-drive anchors to be outside the scope of the AD order on nails from China.⁴ The CIT sustained Commerce's final redetermination.⁵

Timken Notice

In its decision in *Timken*,⁶ as clarified by *Diamond Sawblades*,⁷ the CAFC held that, pursuant to sections 516A(c) and (e) of the Tariff Act of 1930, as amended (the Act), Commerce must publish a notice of court decision that is not "in harmony" with a Commerce determination and must suspend liquidation of entries pending a "conclusive" court decision. The CIT's August 3, 2021, judgment constitutes a final decision of the CIT that is not in harmony with Commerce's *Final Scope Ruling*. Thus, this notice is published in fulfillment of the publication requirements of *Timken*.

Amended Final Scope Ruling

In accordance with the CIT's August 3, 2021, final judgment, Commerce is amending its *Final Scope Ruling* and finds that the scope of the AD order on nails from China does not cover the products addressed in the *Final Scope Ruling*.

Liquidation of Suspended Entries

Commerce will instruct U.S. Customs and Border Protection (CBP) that, pending any appeals, Simpson's split-drive anchors will not be subject to a cash deposit requirement. In the event that the CIT's final judgment is not appealed or is upheld on appeal, Commerce will instruct CBP to liquidate entries of Simpson's split-drive anchors without regard to antidumping duties and to lift suspension of liquidation of such entries.

Notification to Interested Parties

This notice is issued and published in accordance with sections 516A(c) and (e) of the Act.

³ See *Simpson Strong-Tie Co. v. United States*, Court No. 17-00287, ECF No. 50 (CIT November 18, 2020).

⁴ See Final Results of Redetermination Pursuant to *Simpson Strong-Tie Co. v. United States*, Court No. 17-00287, ECF No. 50 (CIT November 18, 2020), dated February 16, 2021.

⁵ See *Simpson Strong-Tie Co. v. United States*, Slip Op. 21-95, Court No. 17-00269 (CIT 2021).

⁶ See *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990) (*Timken*).

⁷ See *Diamond Sawblades Manufacturers Coalition v. United States*, 626 F.3d 1374 (Fed. Cir. 2010) (*Diamond Sawblades*).

Dated: August 5, 2021.

Christian Marsh,

Acting Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2021-17095 Filed 8-10-21; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XB215]

Magnuson-Stevens Fishery Conservation and Management Act; General Provisions for Domestic Fisheries; Application for Exempted Fishing Permit

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

ACTION: Notice; request for comments.

SUMMARY: NMFS has determined that seven exempted fishing permit (EFP) applications warrant further consideration and is requesting public comment on the applications. All EFP applicants request an exemption from a single prohibition (the use of unauthorized gear to harvest highly migratory species (HMS)) under the Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species (HMS FMP) to test the effects and efficacy of using standard deep-set buoy gear (DSBG), and/or deep-set linked buoy gear (DSLBG), to harvest swordfish and other HMS off of the U.S. West Coast.

DATES: Comments must be submitted in writing by September 10, 2021.

ADDRESSES: You may submit comments on this document, identified by NOAA-NMFS-2020-0070, by any of the following methods:

- **Electronic Submission:** Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to <https://www.regulations.gov> and enter NOAA-NMFS-2020-0070, in the Search box. Click on the "Comment" icon, complete the required fields, and enter or attach your comments.

- **Mail:** Attn: Chris Fanning, NMFS West Coast Region, 501 W Ocean Blvd., Suite 4200, Long Beach, CA 90802. Include the identifier "NOAA-NMFS-2020-0070" in the comments.

- **Email:** wcr.hms@noaa.gov.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record

¹ See Memorandum, "Final Scope Ruling on Simpson Strong-Tie Company's Anchors," dated December 1, 2017 (*Final Scope Ruling*).

² See *OMG, Inc. v. United States*, 972 F.3d 1358 (Fed. Cir. 2020).

and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Chris Fanning, NMFS, West Coast Region, 562-980-4198.

SUPPLEMENTARY INFORMATION: DSBG fishing trials have occurred for the past 11 years (2011–2015, research years; 2015–2021, EFP years) in the U.S. West Coast Exclusive Economic Zone (EEZ) off California. The data collected from this fishing activity have demonstrated DSBG to achieve about a 95 percent marketable catch composition. Non-marketable catch rates have remained low and all non-marketable catch were released alive. Due to DSBG being actively tended, strikes are capable of being detected within minutes of a hooking on the line; as a result, all catches can be tended quickly, with catch brought to the vessel in good

condition. To date, DSBG has had five observed or reported interactions with protected species, four Northern elephant seals and one loggerhead sea turtle, which were not seriously injured and were released alive due to the quick strike detection of the gear. Northern elephant seals are protected by the Marine Mammal Protection Act, and loggerhead sea turtles are protected by the Endangered Species Act.

DSLBG trials have produced similar data to DSBG activities. Swordfish and other marketable species have represented about 90 percent of the catch. Non-marketable species are released alive due to DSLBG quick strike detection and active gear tending. To date, there have been no observed or reported interactions with protected species using DSLBG.

At its June 2021 meeting, the Pacific Fishery Management Council (Council) received ten applications for EFPs in time for review and recommended that NMFS issue seven of these EFPs to authorize use of DSBG and/or DSLBG (see Table 1), and recommended further Council consideration of the remaining three EFP applications at its September 2021 meeting. Council recommendations can be found on the

June 2021 meeting Decision Document here, <https://www.pcouncil.org/june-2021-decision-document/#HMS>.

At this time, NMFS is requesting public comment on the seven DSBG EFP applications recommended by the Council in June 2021. NMFS will take the Council's comments into consideration along with public comments on whether or not to issue these EFPs. If all seven of the June 2021 Council recommended applications are approved, a total of 52 vessels would be allowed to fish with permitted exemptions from the prohibitions related to unauthorized fishing gears used to target swordfish within the U.S. EEZ under the Fishery Management Plan for U.S. West Coast Fisheries for (HMS FMP) throughout the duration of their respective EFPs. Thirty-seven of the vessels would be permitted to fish with DSBG only and 15 of the vessels would be permitted to fish using both DSBG and DSLBG. Aside from the exemption described above, vessels fishing under an EFP would be subject to all other regulations implemented in the HMS FMP, including measures to protect sea turtles, marine mammals, and seabirds.

TABLE 1—SUMMARY OF DEEP-SET BUOY GEAR EXEMPTED FISHING PERMIT APPLICATIONS RECOMMENDED AT THE JUNE 2021 COUNCIL MEETING *

F.3 attachment No.	Applicant name	Number of vessels	Fishing method
1	Austin and Robert Ashe	1	Standard DSBG.
3	Austin Brown	1	Standard and Linked DSBG.
5	Miguel Ferre	1	Standard DSBG.
6	Scott and Wyatt Hawkins	1	Linked DSBG.
7	Blake Hermann	1	Standard DSBG.
8	Markus Medak, Brian Sims, and Daniel Fuller	1	Linked DSBG.
10	Mathew Rimmel	1	Standard DSBG.

* Linked DSBG vessels can also use standard deep-set buoy gear (<https://www.pcouncil.org/june-2021-briefing-book/#F>).

NMFS will consider all public comments submitted in response to this **Federal Register** notice prior to issuance of any EFP. Additionally, NMFS has analyzed the effects of issuing DSBG and DSLBG EFPs in accordance with the National Environmental Policy Act and NOAA's Administrative Order 216-6, as well as for compliance with other applicable laws, including Section 7(a)(2) of the Endangered Species Act (16 U.S.C. 1531 *et seq.*), which requires the agency to consider whether the proposed action is likely to jeopardize the continued existence and recovery of any endangered or threatened species or result in the destruction or adverse modification of critical habitat.

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

Dated: August 6, 2021.
Jennifer M. Wallace,
Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.
 [FR Doc. 2021-17147 Filed 8-10-21; 8:45 am]
BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XB301]

East Coast Fisheries of the United States; Public Meetings; Request for Comments

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public meetings.

SUMMARY: Several fishery management bodies on the East Coast of the Atlantic Ocean are convening three public webinars to introduce a project called *East Coast Climate Change Scenario Planning*. This is a joint effort of the Atlantic States Marine Fisheries Commission (ASMFC), the New England Fishery Management Council (NEFMC), the Mid-Atlantic Fishery Management Council (MAFMC), the South Atlantic Fishery Management Council (SAFMC), and NOAA Fisheries. These webinars will introduce stakeholders to the overall initiative, present draft objectives, discuss potential outcomes, explain the general

focus of the work, and collect initial stakeholder input.

DATES: These webinars will be held on Monday, August 30, 2021, at 4 p.m.–5:30 p.m.; Wednesday, September 1, 2021, at 6 p.m.–7:30 p.m.; Thursday, September 2, 2021, at 10 a.m.–11:30 a.m.

ADDRESSES: All meeting participants and interested parties are strongly encouraged to register in advance of any webinar they are interested in attending. Meeting links for each webinar can be located at: <https://www.mafmc.org/climate-change-scenario-planning>.

Meeting addresses: The meetings will be held via webinar (see **SUPPLEMENTARY INFORMATION**).

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492. Contact information and individual staff members working on this initiative can be found here: <https://www.mafmc.org/climate-change-scenario-planning>.

SUPPLEMENTARY INFORMATION:

Background

Climate change is a growing threat to marine fisheries worldwide. On the East coast of the United States, there is evidence of climate-related shifts in distribution, abundance, and/or productivity of fishery resources. It is uncertain what the next couple of decades will bring, and how fishery management programs can best prepare to meet the challenges ahead. Over the next year, this joint effort will bring together researchers, fishery managers, fishery participants and others to discuss these questions and emerge with ideas and recommendations for how fishery management can potentially adapt to climate change.

The management bodies in this region have decided to employ a scenario planning framework to discuss these issues. Scenario planning is a way of exploring how fishery management may need to evolve over the next few decades as climate change becomes a bigger issue. Specifically, scenarios are stories about possible future developments. This approach is designed to help stakeholders and managers think broadly about the future implications of climate change to help define what changes can potentially be made now to be better prepared.

These introductory webinars are the first step of a multi-year scenario planning effort. Staff will explain the overall initiative and share draft objectives, possible outcomes and focus of the work. There will be a presentation introducing the basics of scenario

planning and potential benefits of engaging in the process. At the end of the webinar there will be an opportunity for small group discussions for participants to share feedback and suggestions on the information presented and proposed. Additional details about the webinars will be posted to this page once available: <https://www.mafmc.org/climate-change-scenario-planning>.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

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

Dated: August 5, 2021.

Tracey L. Thompson,

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

[FR Doc. 2021–17051 Filed 8–10–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID: 0648–XB307]

Environmental Impact Statement on Phase 2 Modifications to the Atlantic Large Whale Take Reduction Plan To Reduce Serious Injury and Mortality of Large Whales in Commercial Trap/Pot and Gillnet Fisheries Along the U.S. East Coast

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

ACTION: Notice of intent to prepare an environmental impact statement, request for comments.

SUMMARY: The National Marine Fisheries Service (NMFS) intends to begin a rulemaking process that will amend the Atlantic Large Whale Take Reduction Plan (Plan) to reduce the risk of mortalities and serious injuries of North Atlantic right whales (*Eubalaena glacialis*) and other large whales caused by entanglement in commercial trap/pot and gillnet fisheries along the U.S. East Coast. An Environmental Impact Statement (EIS) will be prepared in accordance with the National Environmental Policy Act (NEPA) to analyze the impacts to the environment of alternatives to amend the Plan. This notice informs the public of upcoming

scoping meetings to solicit public input on Phase 2 of our efforts to reduce the risk of entanglement to right, humpback, and fin whales in U.S. commercial fisheries managed under the Plan. Phase 1, a final rule implementing new modifications to reduce mortalities and serious injuries caused by incidental entanglement in the northeast American lobster and Jonah crab trap/pot fishery, is anticipated shortly, and was analyzed in a Final Environmental Impact Statement released (FEIS) on July 2, 2021. Phase 2 focuses on risk reduction in U.S. East Coast gillnet, Atlantic mixed species trap/pot, and Mid-Atlantic lobster and Jonah crab trap/pot fisheries.

DATES: Written or electronic scoping inputs must be received at the appropriate address, email mailbox, or phone number (see **ADDRESSES**) by October 21, 2021.

Public Hearings: At least seven virtual public meetings will be held during the public comment period. In addition, we will be holding three call-in days for interested parties to call and speak to a NMFS staff member to ask questions or submit information and recommendations.

See **ADDRESSES** to obtain public hearing and call-in day notification details. Scoping will also occur through presentations and discussions at the Atlantic States Marine Fisheries Commission and New England, Mid-Atlantic, and South Atlantic Fishery Management Council meetings during the scoping period.

ADDRESSES: You may submit input on this document via email. Submit all electronic public comments by sending an email to nmfs.gar.ALWTRT2021@noaa.gov using the subject line “Comments on Atlantic Large Whale Take Reduction Plan Scoping.” Input can also be provided via webinar during scoping meetings or via phone on call-in days. Remote public meeting dates, access, and call-in information is available in the **SUPPLEMENTARY INFORMATION** section. Meeting information will also be posted on the Plan website fisheries.noaa.gov/ALWTRP, or you may contact Marisa Trego for information on dates and times.

FOR FURTHER INFORMATION CONTACT: Marisa Trego, Take Reduction Team Coordinator, Greater Atlantic Region. Telephone: 978 282–8484. Address: 55 Great Republic Drive, Gloucester, MA 01930. Email: marisa.trego@noaa.gov.

SUPPLEMENTARY INFORMATION:

Purpose and Need for Proposed Action

The proposed action for analysis in the EIS would be NMFS rulemaking to modify the Plan to reduce mortalities and serious injuries from incidental commercial fishing gear entanglements in U.S. East Coast gillnet fisheries as well as trap/pot fisheries, including the Atlantic mixed species and Mid-Atlantic lobster and Jonah crab fisheries. NMFS' purpose for the proposed action is to fulfill the mandates of the MMPA to reduce incidental mortalities and serious injuries of large whales to below each stock's potential biological removal (PBR) level.

North Atlantic right whales are listed as endangered under the Endangered Species Act (ESA) and considered depleted under the Marine Mammal Protection Act (MMPA). After more than two decades of an increasing trend, the right whale population has been declining since 2010, and the most recent estimate of 368 whales in 2019 (Pace 2021) is well below the optimum sustainable population. This estimate represents a minimum population number and reflects new research suggesting that many mortalities occur undetected (Pace *et al.* 2021). The decline was exacerbated by an Unusual Mortality Event (UME) that began in 2017, when a total of 17 confirmed dead right whales were documented. As of July 2021, the UME totals 50 individuals, comprising 34 right whale mortalities and an additional 16 seriously injured right whales. Of these 50 individuals, 18 definitively involved entanglement and another 5 were probable entanglements. During this period (2017–2021), only 40 calves have been born.

One of the primary causes of mortality and serious injury of North Atlantic right whales is entanglement in fishing gear. Climate change and associated changes in prey abundance and distribution are exacerbating the population decline by shifting the overlap between right whales and fisheries and reducing the population's resilience to stressors. With mortalities continuing to outpace births, the population decline continues and further mitigation of entanglements that cause mortality or serious injury is necessary for population recovery.

The MMPA mandates that NMFS develop and implement Take Reduction Plans for preventing the depletion and assisting in the recovery of certain marine mammal stocks that are killed or seriously injured incidental to commercial fisheries. Pursuant to the MMPA, NMFS convenes Take Reduction Teams composed of

stakeholders to develop recommendations that achieve a short-term goal of reducing mortalities and serious injuries of marine mammals covered by the plan to a rate below each stock's PBR level. NMFS considers those recommendations when implementing Take Reduction Plans through the rulemaking process.

The Atlantic Large Whale Take Reduction Team (Team) was first convened in 1996 to recommend measures to reduce mortalities and serious injuries of right, humpback, and fin whales incidental to certain commercial fisheries. NMFS implements measures under the Plan. Since 1997, the Plan has been amended several times to reduce the impacts of fishing gear on large whales in the region through measures that include area closures, gear configuration requirements, and gear marking rules. A final rule implementing new modifications to reduce mortalities and serious injuries caused by entanglement in the northeast American lobster and Jonah crab trap/pot fishery is anticipated shortly, and was analyzed in a FEIS released on July 2, 2021 (86 FR 35288).

In 2021, the Team convened to address large whale mortalities and serious injuries caused by entanglements in the U.S. East Coast gillnet, Atlantic mixed species trap/pot, and mid-Atlantic lobster and Jonah crab trap/pot fisheries. Specifically, these fisheries include: (1) Mid-Atlantic gillnet fisheries for monkfish, spiny dogfish, smooth dogfish, bluefish, weakfish, menhaden, spot, croaker, striped bass, large and small coastal sharks, Spanish mackerel, king mackerel, American shad, black drum, skate species, yellow perch, white perch, herring, scup, kingfish, spotted seatrout, and butterfish; (2) Northeast sink gillnet fisheries for Atlantic cod, haddock, pollock, yellowtail flounder, winter flounder, witch flounder, American plaice, windowpane flounder, spiny dogfish, monkfish, silver hake, red hake, white hake, ocean pout, skate spp, mackerel, redfish, and shad; (3) Northeast drift gillnet fisheries for shad, herring, mackerel, and menhaden and any residual large pelagic driftnet effort in New England; (4) Southeast Atlantic gillnet fisheries for finfish, including, but not limited to: King mackerel, Spanish mackerel, whiting, bluefish, pompano, spot, croaker, little tunny, bonita, jack crevalle, cobia, and striped mullet; (5) Southeast Atlantic shark gillnet fisheries for large and small coastal sharks, including but not limited to blacktip, blacknose, finetooth, bonnethead, and sharpnose sharks; (6)

Northeast anchored float gillnet fishery for mackerel, herring (particularly for bait), shad, and menhaden; and (7) Atlantic mixed species trap/pot fisheries for hagfish, shrimp, conch/whelk, red crab, Jonah crab, rock crab, black sea bass, scup, tautog, cod, haddock, Pollock, redfish (ocean perch), white hake, spot, skate, catfish, stone crab, and cunner; (8) Mid-Atlantic trap/pot fisheries for lobster and Jonah crab, and (9) Atlantic trap/pot fishery for Atlantic blue crab.

The Team met most recently on June 28 and July 1, 2021, to discuss the types of management actions that should be included in scoping to decrease the risk and severity of right whale and other large whale entanglements in the above-listed fisheries. Further information about the Plan and the 2021 Team meetings where potential management measures were discussed, including recordings of all the meetings, can be found at the Team's website: <https://www.fisheries.noaa.gov/alwtrp>.

Preliminary Description of Proposed Action and Alternatives

NMFS will consider suites of regulatory measures that would modify existing Plan requirements to address ongoing large whale entanglements. The primary purpose of the Plan modifications is to reduce the mortality and serious injury of right whales in U.S. East Coast gillnet, Atlantic mixed species trap/pot, and Mid-Atlantic lobster and Jonah crab trap/pot fisheries. In addition to the proposed action and the no action alternative, potential alternatives that the draft EIS may analyze include measures that would reduce or weaken line in gear associated with these fisheries, to reduce co-occurrence of this gear and right whales, and to improve identification of entangling gear. For gillnet fisheries, possible management options include changing configurations such as increasing the minimum number of net panels per set to reduce endline numbers, gear tending or daytime-only sets for gillnets, installation of weak links at panels and weak rope that breaks at forces of less than 1,700 lb, establishing seasonal restricted areas, and expanding gear marking requirements. For trap/pot fisheries, possible management options include changing configurations such as traps per trawl to reduce endline numbers and installation of weak inserts or ropes that break at forces of less than 1,700 lb, establishment of seasonal restricted areas, and expansion of gear marking requirements.

NEPA (42 U.S.C. 4321 *et al.*) requires that Federal agencies conduct an

environmental analysis of their proposed actions to determine if the actions may significantly affect the human environment. NMFS has determined that an EIS should be prepared under NEPA for the purpose of informing rulemaking to modify the Plan. We will prepare an EIS in accordance with NEPA requirements, as amended (42 U.S.C. 4321 *et al.*); NEPA implementing regulations (40 CFR 1500–1508); and other Federal laws, regulations, and policies. Reasonable alternatives that are identified during the scoping period will be evaluated in the draft EIS.

Summary of Expected Impacts

The draft EIS will identify and describe the potential effects of the proposed action on the human environment that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action. This includes such effects that occur at the same time and place as the proposed action or alternatives and such effects that are later in time or occur in a different place. The proposed action may include, but is not limited to, modifications to configurations of fishing gear, modification to fishing seasons and/or areas, and modifications to gear marking requirements. Expected potential impacts to commercial fishermen in the above-mentioned fisheries may include, but are not limited to, additional costs and labor for modifying gear configurations and gear markings, and reduced profit due to reduced catches, access to fishing grounds, or seasons. Expected potential impacts to Atlantic large whales include, but are not limited to, reduced mortality and serious injury due to a reduction in entanglement in fishing gear or reduced severity of any entanglements that do occur. Other potential impacts may include, but are not limited to, impacts (both beneficial and adverse) to other marine life, cultural resources, demographics, employment, and economics. These expected potential impacts will be analyzed in the draft and final EIS.

Schedule for the Decision-Making Process

After the draft EIS is completed, NMFS will publish a notice of availability (NOA) and request public comments on the draft EIS. NMFS expects to issue the NOA in the Fall of 2022. After the public comment period ends, NMFS will review, consider, and respond to comments received and will develop the final EIS. NMFS expects to make the final EIS available to the public in 2023. A record of decision will

be completed no sooner than 30 days after the final EIS is released, in accordance with 40 CFR 1506.11.

Scoping Process: This NOI commences the public scoping process for identifying issues and potential alternatives for consideration. Throughout the scoping process, Federal agencies, state, tribal, local governments, and the general public have the opportunity to help NMFS determine reasonable alternatives and potential measures to be analyzed in the EIS, as well as to provide additional information.

NMFS will hold virtual public scoping meetings at the following dates and times (eastern):

- Thursday, September 9, 2021, 6:30–8:30 p.m., for Maryland, Delaware, Virginia, Northern North Carolina trap/pot fisheries;
- Tuesday, September 14, 2021, 6:30–8:30 p.m., for Rhode Island, Connecticut, New York, and New Jersey trap/pot fisheries;
- Tuesday, September 21, 2021, 6:30–8:30 p.m., for Maine, New Hampshire, Massachusetts, and Rhode Island trap/pot fisheries;
- Thursday, September 23, 2021, 6:30–8:30 p.m., for Rhode Island, Connecticut, New York, and New Jersey gillnet fisheries;
- Tuesday, October 5, 2021, 6:30–8:30 p.m., for Southern North Carolina, South Carolina, Georgia, Florida, all gear;
- Tuesday, October 12, 2021, 6:30–8:30 p.m., for Maryland, Delaware, Virginia, Northern North Carolina gillnet fisheries;
- Thursday, October 14, 2021, 6:30–8:30 p.m., for Maine, New Hampshire, Massachusetts, and Rhode Island gillnet fisheries.

To register, go to our website: <https://www.fisheries.noaa.gov/alwtrp>. NMFS will also hold public call-in days:

- Friday, October 1, 2021, 12 noon to 6 p.m.
- Monday, October 4, 2021, 8 a.m. to 3 p.m.
- Tuesday, October 12, 10 a.m. to 4 p.m.

For more information on how to call, go to our website: <https://www.fisheries.noaa.gov/alwtrp>.

Request for Identification of Potential Alternatives, Information, and Analyses Relevant to the Proposed Action

Everyone potentially impacted by or interested in changes to the Plan, and particularly, management of commercial trap/pot and gillnet fisheries along the East Coast, is invited to participate in the public scoping process by

submitting written input, attending public scoping webinar meetings, or calling us during designated call-in days. This scoping process aims to gather input regarding the scope of actions to be proposed for rulemaking, the development of alternatives to analyze in the EIS, and the potential impacts of management actions.

For gillnet fisheries, the Team discussed and NMFS requests input on management options, particularly concerning information about operational challenges, time, and costs required to change configurations such as net panels per set to reduce endline numbers, gear tending or daytime-only sets for gillnets, installation of weak inserts or rope that breaks at forces of less than 1,700 lb, to establish restricted areas, and to expand gear marking requirements. For trap/pot fisheries, the Team discussed and NMFS requests input on management options, particularly including information about operational challenges, time, and costs required to change configurations such as traps per trawl to reduce endline numbers and to install weak inserts or rope that breaks at forces of less than 1,700 lb, to establish restricted areas, and to expand gear marking requirements.

NMFS and the Team particularly request input on latent effort in U.S. East Coast gillnet and trap/pot operations that may affect measures designed to reduce gear that could entangle whales, potential impacts to fishery operations arising from gear modifications likely to be considered, potential risks and benefits to large whales, and information regarding whale distribution or behavior along the U.S. East Coast that should be considered in developing risk reduction measures. In addition to direct costs of replacing new gear, input is requested on indirect cost of gear modification measure alternatives, such as costs and time required to install sleeves, install weak rope, and mark gear, and costs related to fewer vertical lines, seasonal closures, or exempted areas. Information on the value of whale conservation and the economic benefits of whale conservation is also requested.

NMFS and the Team also identified data needs to support future discussions, including data on open access fisheries, gear configurations across the fisheries, whale distribution, whale behavioral information, and gear marking. Data related to fishing gear configurations specific to areas or target species, how gear alterations measures may affect those fisheries, and how existing gear configurations contribute to large whale entanglement risk would

be very welcome. As an example, longer gear marks near the buoy and gear marks distinguishing permitting states, specific Federal and state water markings, and gear identification tape throughout buoy lines were analyzed in the FEIS released on July 2, 2021, for northeast lobster and Jonah crab trap/pot fisheries. One Team member suggested restricting fishing rope diameter to no greater than 0.5 inch (1.27 cm) to distinguish it from offshore Canadian gear.

Information received through this scoping process will inform the development of alternative risk reduction measures for an environmental impact analysis. Only inputs and suggestions that are within the scope of the proposed actions will be considered when developing the alternatives for analysis in the EIS. This includes items related to reducing risk of mortality and serious injury of large whales due to entanglements in commercial U.S. fishing gear and improving gear marking to reduce uncertainty about where entanglements occur. The purpose is to develop measures to fulfill the requirements of Section 118 of the MMPA, which regulates the taking of marine mammals incidental to U.S. commercial fishing operations. NMFS implements additional endangered species conservation and recovery programs under the ESA and also affords marine mammals protections under multiple programs pursuant to the MMPA. Therefore, for the purposes of the scoping period for this proposed action, we are not requesting input related to other stressors, such as vessel strikes, anthropogenic noise, natural mortality, international entanglement risk, offshore wind development, or climate change.

To promote informed decision-making, input should be as specific as possible and should provide as much detail as necessary to allow a commenter's meaningful participation and fully inform NMFS of the commenter's position. Input should explain why the issues raised are important to the consideration of potential environmental impacts and alternatives to the proposed action, as well as economic and other impacts affecting the quality of the human environment.

It is important that reviewers provide their input at such times and in such a manner that they are useful to the agency's preparation of the EIS. Comments should be provided prior to the close of the scoping period and should clearly articulate the reviewer's concerns and contentions. Input

received in response to this solicitation, including names and addresses of those who comment, will be part of the public record for this proposed action. Input submitted anonymously will be accepted and considered.

Citations

- Pace III, R.M. May 2021. Revisions and Further Evaluations of the Right Whale Abundance Model: Improvements for Hypothesis Testing. NOAA NEFSC Tech Memo 269.
- Pace, R.M., R. Williams, S.D. Kraus, A.R. Knowlton, H.M. Pettis. 2021. Cryptic mortality in North Atlantic right whales. *Conserv. Sci. Pract.* 3:e346.

Authority: This NOI is published pursuant to NEPA, 42 U.S.C. 4321 *et al.*, and MMPA, 31 U.S.C. 1361 *et al.*

Dated: August 6, 2021.

Catherine Marzin,

Acting Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2021-17126 Filed 8-10-21; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE:

National Oceanic and Atmospheric Administration

[RTID 0648-XB280]

Gulf of Mexico Fishery Management Council; Public Meeting; Correction

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

ACTION: Notice of a correction to a public meeting.

SUMMARY: NMFS, NOAA, published a document in the **Federal Register** of August 3, 2021, regarding a meeting of the Gulf of Mexico Fishery Management Council (Council). The meeting has since changed to a hybrid meeting offering both in-person and virtual options for attending the meeting.

FOR FURTHER INFORMATION CONTACT: Dr. Carrie Simmons, Executive Director, Gulf of Mexico Fishery Management Council; telephone: (813) 348-1630.

SUPPLEMENTARY INFORMATION:

Correction

In the **Federal Register** of August 3, 2021, in FR Doc. 2021-16465, on page 41832, in the first column, correct the third full paragraph to read:

The meeting will be a hybrid meeting. You may register for the webinar to listen-in only by visiting www.gulfcouncil.org and click on the Council meeting on the calendar.

On page 41831, under heading *Wednesday, August 25, 2021; 8:30 a.m.–5:30 p.m.*, correct the last paragraph to read:

The Council will hold public testimony from 2:45 p.m. to 5:30 p.m., EDT for Potential Reconsideration of Final Document—Framework Action: Gulf of Mexico *Red Snapper* Recreational Data Calibration and Recreational Catch Limits, and open testimony on other fishery issues or concerns. Public comment may begin earlier than 2:45 p.m. EDT, but will not conclude before that time. Persons wishing to give public testimony in-person must register at the registration kiosk in the meeting room. Persons wishing to give public testimony virtually must sign up on the Council website on the day of public testimony. Registration for virtual testimony closes one hour (1:45 p.m. EDT) before public testimony begins.

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

Dated: August 3, 2021.

Tracey L. Thompson,

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

[FR Doc. 2021-16860 Filed 8-10-21; 8:45 am]

BILLING CODE 3510-22-P

BUREAU OF CONSUMER FINANCIAL PROTECTION

[Docket No. CFPB-2021-0014]

Agency Information Collection Activities: Comment Request

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice and request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (PRA), the Bureau of Consumer Financial Protection (Bureau) is publishing this notice seeking comment on a Generic Information Collection titled “Electronic Disclosure on Mobile Devices” prior to requesting the Office of Management and Budget’s (OMB’s) approval of this collection under the Generic Information Collection Plan “Generic Information Collection Plan for Studies of Consumers using Controlled Trials in Field and Economic Laboratory Settings,” OMB Control number 3170-0048.

DATES: Written comments are encouraged and must be received on or before September 10, 2021 to be assured of consideration.

ADDRESSES: You may submit comments, identified by the title of the information collection, OMB Control Number (see

below), and docket number (see above), by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Email:* PRA_Comments@cfpb.gov. Include Docket No. CFPB–2021–0014 in the subject line of the email.

- *Mail/Hand Delivery/Courier:* Comment intake, Bureau of Consumer Financial Protection (Attention: PRA Office), 1700 G Street NW, Washington, DC 20552.

Please note that due to circumstances associated with the COVID–19 pandemic, the Bureau discourages the submission of comments by mail, hand delivery, or courier. Please note that comments submitted after the comment period will not be accepted. In general, all comments received will become public records, including any personal information provided. Sensitive personal information, such as account numbers or Social Security numbers, should not be included.

FOR FURTHER INFORMATION CONTACT: Documentation prepared in support of this information collection request is available at www.regulations.gov. Requests for additional information should be directed to Anthony May, Paperwork Reduction Act Officer, at (202) 841–0544, or email: CFPB_PRA@cfpb.gov. If you require this document in an alternative electronic format, please contact CFPB_Accessibility@cfpb.gov. Please do not submit comments to these email boxes.

SUPPLEMENTARY INFORMATION:

Title of Collection: Electronic Disclosure on Mobile Devices.
OMB Control Number: 3170–0048.
Type of Review: Request for approval of a generic information collection under an existing Generic Information Collection Plan.

Affected Public: Individuals.
Estimated Number of Respondents: 20,000.

Estimated Total Annual Burden Hours: 10,000.

Abstract: We plan to conduct several studies using methodologies rooted in psychology and behavioral economics to understand electronic disclosure on mobile devices. We will show information to participants similar to financial disclosures and collect information including demographics, psychological measures around reading electronic disclosures, and information on how consumers currently engage with their finances on different devices (e.g., phone, computer). A contractor will run the studies using an online panel.

Request for Comments: The Bureau is publishing this notice and soliciting

comments on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (b) The accuracy of the Bureau's estimate of the burden of the collection of information, including the validity of the methods and the assumptions used; (c) Ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Comments submitted in response to this notice will be submitted to OMB as part of its review of this request. All comments will become a matter of public record.

Dated: August 5, 2021.

Anthony May,

Paperwork Reduction Act Officer, Bureau of Consumer Financial Protection.

[FR Doc. 2021–17073 Filed 8–10–21; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF EDUCATION

Annual Notice of Interest Rates for Variable-Rate Federal Student Loans Made Under the Federal Family Education Loan Program Prior to July 1, 2010

AGENCY: Federal Student Aid, Department of Education.

ACTION: Notice.

SUMMARY: The Chief Operating Officer for Federal Student Aid announces the interest rates for loans made under the Federal Family Education Loan (FFEL) Program, Assistance Listing Number 84.032, that have variable interest rates. The rates announced in this notice are in effect for the period July 1, 2021, through June 30, 2022.

FOR FURTHER INFORMATION CONTACT: Travis Sturlaugson, U.S. Department of Education, 830 First Street NE, 11th Floor, Washington, DC 20202. Telephone: (202) 377–4174. Email: travis.sturlaugson@ed.gov.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: Section 427A of the Higher Education Act of 1965, as amended (HEA) (20 U.S.C. 1077a), provides formulas for determining the interest rates charged to borrowers on loans made under the FFEL Program, including Federal

Subsidized and Unsubsidized Stafford Loans (Stafford Loans), Federal PLUS Loans (PLUS Loans), Federal Consolidation Loans (Consolidation Loans), and Federal Supplemental Loans for Students (SLS Loans). No new loans have been made under the FFEL Program since June 30, 2010.

The FFEL Program includes loans with variable interest rates that change each year and loans with fixed interest rates that remain the same for the life of the loan. For loans with a variable interest rate, the specific interest rate formula that applies to a particular loan depends on the date of the first disbursement of the loan or, in the case of a Consolidation Loan, the date the application for the loan was received. If a loan has a variable interest rate, a new rate is determined annually and is in effect during the period from July 1 of one year through June 30 of the following year.

This notice announces the interest rates for variable-rate FFEL Program loans that will be in effect during the period from July 1, 2021, through June 30, 2022. Interest rates for fixed-rate FFEL Program loans may be found in a **Federal Register** notice published on September 15, 2015 (80 FR 55342).

For the majority of variable-rate FFEL Program loans, the annual interest rate is equal to the lesser of—

- (1) The bond equivalent rate of the 91-day Treasury bills auctioned at the final auction held before June 1 of each year, plus a statutory add-on percentage; or
- (2) A statutorily established maximum interest rate.

The bond equivalent rate of the 91-day Treasury bills auctioned on May 24, 2021, is 0.015 percent, rounded to 0.02 percent.

For PLUS Loans first disbursed before July 1, 1998, and for all SLS Loans, the annual interest rate is equal to the lesser of—

- (1) The weekly average of the one-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the last calendar week ending on or before June 26 of each year, plus a statutory add-on percentage; or
- (2) A statutorily established maximum interest rate.

The weekly average of the one-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the last calendar week ending on or before June 26, 2021, is 0.09 percent.

For Consolidation Loans that have a variable interest rate, the annual interest rate for the portion of a Consolidation Loan that repaid loans other than loans made under the Health Education

Assistance Loans (HEAL) Program is equal to—

(1) The bond equivalent rate of the 91-day Treasury bill auctioned at the final auction held before June 1 of each year, plus a statutory add-on percentage; or

(2) A statutorily established maximum interest rate.

If a Consolidation Loan (whether a variable-rate loan or a fixed-rate loan) repaid loans made under the HEAL Program, the interest rate on the portion of the Consolidation Loan that repaid HEAL loans is a variable rate that is equal to the average of the bond equivalent rates of the 91-day Treasury bills auctioned for the quarter ending June 30, plus a statutory add-on percentage. For the portion of a Consolidation Loan that repaid HEAL loans, there is no maximum interest rate.

The average of the bond equivalent rates of the 91-day Treasury bills

auctioned for the quarter ending on June 30, 2021, is 0.02 percent.

The statutory add-on percentages and maximum interest rates vary depending on loan type and when the loan was first disbursed. In addition, the add-on percentage for certain Stafford Loans is different depending on whether the loan is in an in-school, grace, or deferment status, or in any other status. If the interest rate calculated in accordance with the applicable formula exceeds the statutory maximum interest rate, the statutory maximum rate applies.

Charts 1 through 4 show the interest rate formulas that are used to determine the interest rates for all variable-rate FFEL Program loans and the interest rates that are in effect during the 12-month period from July 1, 2021, through June 30, 2022. Unless otherwise indicated, the cohorts shown in each

chart include all borrowers, regardless of prior borrowing.

Chart 1 shows the interest rates for loans with rates based on the 91-day Treasury bill, with the exception of “converted” variable-rate Federal Stafford Loans and certain Federal Consolidation Loans.

Chart 2 shows the interest rates for loans with rates based on the weekly average of the one-year constant maturity Treasury yield.

Chart 3 shows the interest rates for “converted” variable-rate Federal Stafford Loans. These are loans that originally had varying fixed interest rates.

Finally, Chart 4 shows the interest rates for variable-rate Federal Consolidation Loans, and for the portion of any Federal Consolidation Loan that repaid loans made under the HEAL Program.

CHART 1—SUBSIDIZED FEDERAL STAFFORD LOANS, UNSUBSIDIZED FEDERAL STAFFORD LOANS, AND FEDERAL PLUS LOANS

[Interest rate based on 91-day Treasury bill]

Loan type	Cohort	91-day T-bill rate 05/24/21 (%)	Add-on (%)		Maximum rate (%)	Interest rate 07/01/21 through 06/30/22 (%)	
Subsidized Stafford. Unsubsidized Stafford.	First disbursed on/after 07/01/98 and before 07/01/06.	0.02	1.70 (in-school, grace, deferment).	2.30 (any other status).	8.25	1.72 (in-school, grace, deferment).	2.32 (any other status).
PLUS	First disbursed on/after 07/01/98 and before 07/01/06.	0.02	3.10		9.00	3.12	
Subsidized Stafford. Unsubsidized Stafford.	First disbursed on/after 07/01/95 and before 07/01/98.	0.02	2.50 (in-school, grace, deferment).	3.10 (any other status).	8.25	2.52 (in-school, grace, deferment).	3.12 (any other status)
Subsidized Stafford. Unsubsidized Stafford.	First disbursed on/after 07/01/94 and before 07/01/95, for a period of enrollment that included or began on or after 07/01/94.	0.02	3.10		8.25	3.12	
Subsidized Stafford. Unsubsidized Stafford.	First disbursed on/after 10/01/92 and before 07/01/94; and. First disbursed on/after 07/01/94, for a period of enrollment ending before 07/01/94 (new borrowers).	0.02	3.10		9.00	3.12	

CHART 2—FEDERAL PLUS LOANS AND SLS LOANS

[Interest rate based on weekly average of one-year constant maturity Treasury Yield]

Loan type	Cohort	Weekly average of 1-year constant maturity Treasury yield for last calendar week ending on or before 06/26/21 (%)	Add-on (%)	Maximum rate (%)	Interest rate 07/01/21 through 06/30/22 (%)
PLUS	First disbursed on/after 07/01/94 and before 07/01/98 ...	0.09	3.10	9.00	3.19
PLUS	First disbursed on/after 10/01/92 and before 07/01/94 ...	0.09	3.10	10.00	3.19
SLS	First disbursed on/after 10/01/92, for a period of enrollment beginning before 07/01/94.	0.09	3.10	11.00	3.19
PLUS	First disbursed before 10/01/92	0.09	3.25	12.00	3.34
SLS.					

CHART 3—“CONVERTED” VARIABLE-RATE SUBSIDIZED AND UNSUBSIDIZED FEDERAL STAFFORD LOANS

[Interest rate based on 91-day Treasury bill]

Loan type	Cohort	Original fixed interest rate (later converted to variable rate) (%)	91-day T-bill rate 05/24/21 (%)	Add-on (%)	Maximum rate (%)	Interest rate 07/01/21 through 06/30/22 (%)
Subsidized Stafford	First disbursed on or after 07/23/92 and before 07/01/94 (prior borrowers).	8.00, increasing to 10.00.	0.02	3.10	10.00	3.12
Unsubsidized Stafford.						
Subsidized Stafford	First disbursed on or after 07/23/92 and before 07/01/94 (prior borrowers).	9.00	0.02	3.10	9.00	3.12
Unsubsidized Stafford.						
Subsidized Stafford	First disbursed on or after 07/23/92 and before 07/01/94 (prior borrowers).	8.00	0.02	3.10	8.00	3.12
Unsubsidized Stafford.						
Subsidized Stafford	First disbursed on or after 07/23/92 and before 07/01/94 (prior borrowers).	7.00	0.02	3.10	7.00	3.12
Unsubsidized Stafford.						
Subsidized Stafford	First disbursed on or after 07/23/92 and before 10/01/92 (new borrowers).	8.00, increasing to 10.00.	0.02	3.25	10.00	3.27
Unsubsidized Stafford.						
Subsidized Stafford	First disbursed on or after 07/01/88 and before 07/23/92.	8.00, increasing to 10.00.	0.02	3.25	10.00	3.27
Unsubsidized Stafford.						

CHART 4—FEDERAL CONSOLIDATION LOANS

Consolidation loan component	Cohort	91-day T-bill rate 05/24/21 (%)	Average of the bond equivalent rates of the 91-day T-bills auctioned for the quarter ending 06/30/20 (%)	Add-on (%)	Maximum rate (%)	Interest rate 07/01/21 through 06/30/22 (%)
Portion of loan that repaid loans other than HEAL loans.	Application received on/ after 11/13/97 and before 10/01/98.	0.02	N/A	3.10	8.25	3.12
Portion of the loan that repaid HEAL loans.	Application received on/ after 11/13/97.	N/A	0.02	3.00	None	3.02

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document in an accessible format. The Department will provide the

requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

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www.govinfo.gov. At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at www.federalregister.gov. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Program Authority: 20 U.S.C. 1071 *et seq.*

Richard Cordray,
Chief Operating Officer, Federal Student Aid.

[FR Doc. 2021-17054 Filed 8-10-21; 8:45 am]

BILLING CODE 4000-01-P

DEPARTMENT OF EDUCATION

Annual Notice of Interest Rates for Fixed-Rate Federal Student Loans Made Under the William D. Ford Federal Direct Loan Program

AGENCY: Federal Student Aid, Department of Education.

ACTION: Notice.

SUMMARY: The Chief Operating Officer for Federal Student Aid announces the interest rates for Federal Direct Stafford/Ford Loans (Direct Subsidized Loans), Federal Direct Unsubsidized Stafford/Ford Loans (Direct Unsubsidized Loans), and Federal Direct PLUS Loans (Direct PLUS Loans) made under the William D. Ford Federal Direct Loan (Direct Loan) Program, Assistance Listing Number 84.268, with first disbursement dates on or after July 1, 2021, and before July 1, 2022.

FOR FURTHER INFORMATION CONTACT: Travis Sturlaugson, U.S. Department of Education, 830 First Street NE, 11th Floor, Washington, DC 20202. Telephone: (202) 377-4174 or by email: travis.sturlaugson@ed.gov.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1-800-877-8339.

SUPPLEMENTARY INFORMATION: Direct Subsidized Loans, Direct Unsubsidized Loans, Direct PLUS Loans, and Direct Consolidation Loans (collectively referred to as “Direct Loans”) may have either fixed or variable interest rates, depending on when the loan was first disbursed or, in the case of a Direct Consolidation Loan, when the application for the loan was received. Direct Subsidized Loans, Direct Unsubsidized Loans, and Direct PLUS Loans first disbursed on or after July 1, 2006, and Direct Consolidation Loans for which the application was received on or after February 1, 1999, have fixed interest rates that apply for the life of the loan. Direct Subsidized Loans, Direct Unsubsidized Loans, and Direct PLUS Loans first disbursed before July 1, 2006, and Direct Consolidation Loans for which the application was received before February 1, 1999, have variable interest rates that are determined annually and are in effect during the period from July 1 of one year through June 30 of the following year.

This notice announces the fixed interest rates for Direct Subsidized Loans, Direct Unsubsidized Loans, and Direct PLUS Loans with first disbursement dates on or after July 1, 2021, and before July 1, 2022, and provides interest rate information for other fixed-rate Direct Loans. Interest rate information for variable-rate Direct

Loans is announced in a separate **Federal Register** notice.

Fixed-Rate Direct Subsidized Loans, Direct Unsubsidized Loans, and Direct PLUS Loans First Disbursed on or After July 1, 2013

Section 455(b) of the Higher Education Act of 1965, as amended (HEA) (20 U.S.C. 1087e(b)) includes formulas for determining the interest rates for all Direct Subsidized Loans, Direct Unsubsidized Loans, and Direct PLUS Loans first disbursed on or after July 1, 2013. The interest rate for these loans is a fixed rate that is determined annually for all loans first disbursed during any 12-month period beginning on July 1 and ending on June 30. The rate is equal to the high yield of the 10-year Treasury notes auctioned at the final auction held before June 1 of that 12-month period, plus a statutory add-on percentage that varies depending on the loan type and, for Direct Unsubsidized Loans, whether the loan was made to an undergraduate or graduate student. The calculated interest rate may not exceed a maximum rate specified in the HEA. If the interest rate formula results in a rate that exceeds the statutory maximum rate, the rate is the statutory maximum rate. Loans first disbursed during different 12-month periods that begin on July 1 and end on June 30 may have different interest rates, but the rate determined for any loan is a fixed interest rate for the life of the loan.

On May 12, 2021, the United States Treasury Department held a 10-year Treasury note auction that resulted in a high yield of 1.684 percent.

Chart 1 shows the fixed interest rates for Direct Subsidized Loans, Direct Unsubsidized Loans, and Direct PLUS Loans first disbursed on or after July 1, 2021, and before July 1, 2022.

CHART 1—DIRECT SUBSIDIZED LOANS, DIRECT UNSUBSIDIZED LOANS, AND DIRECT PLUS LOANS FIRST DISBURSED ON OR AFTER 07/01/2021 AND BEFORE 07/01/2022

Loan type	Borrower type	10-year treasury note high yield 05/12/2021 (%)	Add-on (%)	Maximum rate (%)	Fixed interest rate (%)
Direct Subsidized Loans	Undergraduate students	1.684	2.05	8.25	3.73
Direct Unsubsidized Loans	Graduate and professional students	1.684	3.60	9.50	5.28
Direct PLUS Loans	Parents of dependent undergraduate students. Graduate and professional students.	1.684	4.60	10.50	6.28

¹ Graduate and professional students are not eligible to receive Direct Subsidized Loans.

For reference, Chart 2 compares the fixed interest rates for Direct Subsidized

Loans, Direct Unsubsidized Loans, and Direct PLUS Loans first disbursed

during the period July 1, 2021, through June 30, 2022, with the fixed interest

rates for loans first disbursed during each previous 12-month period from July 1, 2013, through June 30, 2021.

CHART 2—DIRECT SUBSIDIZED LOANS, DIRECT UNSUBSIDIZED LOANS, AND DIRECT PLUS LOANS FIRST DISBURSED ON OR AFTER 07/01/2013 AND BEFORE 07/01/2022

First disbursed		Fixed interest rates (%)			Federal Register Notice
On/after	Before	Direct subsidized loans Direct Unsubsidized loans (undergraduate students)	Direct unsubsidized loans (graduate or professional students)	Direct PLUS loans	
07/01/2021	07/01/2022	3.73	5.28	6.28	N/A
07/01/2020	07/01/2021	2.75	4.30	5.30	85 FR 48229 (August 10, 2020).
07/01/2019	07/01/2020	4.53	6.08	7.08	85 FR 2417 (January 15, 2020).
07/01/2018	07/01/2019	5.05	6.60	7.60	83 FR 53864 (October 25, 2018).
07/01/2017	07/01/2018	4.45	6.00	7.00	82 FR 29062 (June 27, 2017).
07/01/2016	07/01/2017	3.76	5.31	6.31	81 FR 38159 (June 13, 2016).
07/01/2015	07/01/2016	4.29	5.84	6.84	80 FR 42488 (July 17, 2015).
07/01/2014	07/01/2015	4.66	6.21	7.21	79 FR 37301 (July 1, 2014).
07/01/2013	07/01/2014	3.86	5.41	6.41	78 FR 59011 (September 25, 2013).

Fixed-rate Direct Subsidized Loans, Direct Unsubsidized Loans, and Direct PLUS Loans First Disbursed on or After July 1, 2006, and Before July 2, 2013

Direct Subsidized Loans, Direct Unsubsidized Loans, and Direct PLUS

Loans first disbursed on or after July 1, 2006, and before July 1, 2013, have fixed interest rates that are specified in section 455(b) of the HEA (20 U.S.C. 1087e(b)). Chart 3 shows the interest rates for these loans.

CHART 3—DIRECT SUBSIDIZED LOANS, DIRECT UNSUBSIDIZED LOANS, AND DIRECT PLUS LOANS FIRST DISBURSED ON OR AFTER 07/01/2006 AND BEFORE 07/01/2013

Loan type	Borrower type	First disbursed on/after	First disbursed before	Interest rate (%)
Subsidized	Undergraduate students	07/01/2011	07/01/2013	3.40
Subsidized	Undergraduate students	07/01/2010	07/01/2011	4.50
Subsidized	Undergraduate students	07/01/2009	07/01/2010	5.60
Subsidized	Undergraduate students	07/01/2008	07/01/2009	6.00
Subsidized	Undergraduate students	07/01/2006	07/01/2008	6.80
Subsidized	Graduate or professional students	07/01/2006	07/01/2012 ²	6.80
Unsubsidized	Undergraduate and graduate or professional students	07/01/2006	07/01/2013	6.80
PLUS	Graduate or professional students and parents of dependent undergraduate students.	07/01/2006	07/01/2013	7.90

² Effective for loan periods beginning on or after July 1, 2012, graduate and professional students are no longer eligible to receive Direct Subsidized Loans.

Fixed-Rate Direct Consolidation Loans

Section 455(b) of the HEA specifies that all Direct Consolidation Loans for which the application was received on or after February 1, 1999, have a fixed interest rate that is equal to the weighted average of the interest rates on

the loans consolidated, rounded to the nearest higher one-eighth of one percent. For Direct Consolidation Loans for which the application was received on or after February 1, 1999, and before July 1, 2013, the interest rate may not exceed 8.25 percent. However, under

455(b) of the HEA the 8.25 percent interest rate cap does not apply to Direct Consolidation Loans made based on applications received on or after July 1, 2013. Chart 4 shows the interest rates for fixed-rate Direct Consolidation Loans.

CHART 4—DIRECT CONSOLIDATION LOANS MADE BASED ON APPLICATIONS RECEIVED ON OR AFTER 02/01/1999

Application received	Interest rate (%)	Maximum interest rate (%)
On/after 07/01/2013	Weighted average of the interest rates on the loans consolidated, rounded to the nearest higher one-eighth of one percent..	None
On/after 02/01/1999 and before 07/01/2013	(same as above)	8.25

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

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You may also access documents of the Department published in the **Federal Register** by using the article search feature at www.federalregister.gov. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Program Authority: 20 U.S.C. 1087, *et seq.*

Richard Cordray,

Chief Operating Officer, Federal Student Aid.

[FR Doc. 2021-17056 Filed 8-10-21; 8:45 am]

BILLING CODE 4000-01-P

DEPARTMENT OF EDUCATION

Annual Notice of Interest Rates for Variable-Rate Federal Student Loans Made Under the William D. Ford Federal Direct Loan Program

AGENCY: Federal Student Aid, Department of Education.

ACTION: Notice.

SUMMARY: The Chief Operating Officer for Federal Student Aid announces the interest rates for Federal Direct Stafford/Ford Loans (Direct Subsidized Loans), Federal Direct Unsubsidized Stafford/Ford Loans (Direct Unsubsidized Loans), and Federal Direct PLUS Loans (Direct PLUS Loan), Assistance Listing Number 84.268, with first disbursement dates before July 1, 2006, and for Federal Direct Consolidation Loans (Direct Consolidation Loans) for which the application was received before February 1, 1999. The rates announced in this notice are in effect for the period July 1, 2021, through June 30, 2022.

FOR FURTHER INFORMATION CONTACT: Travis Sturlaugson, U.S. Department of Education, 830 First Street NE, 11th floor, Washington, DC 20202. Telephone: (202) 377-4174 or by email: travis.sturlaugson@ed.gov.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1-800-877-8339.

SUPPLEMENTARY INFORMATION: Direct Subsidized Loans, Direct Unsubsidized Loans, Direct PLUS Loans, and Direct Consolidation Loans (collectively referred to as "Direct Loans") may have either fixed or variable interest rates, depending on when the loan was first disbursed or, in the case of a Direct Consolidation Loan, when the application for the loan was received. Direct Subsidized Loans, Direct Unsubsidized Loans, and Direct PLUS Loans first disbursed before July 1, 2006, and Direct Consolidation Loans for which the application was received before February 1, 1999, have variable interest rates. For these loans, a new rate is determined annually and is in effect during the period from July 1 of one year through June 30 of the following year.

Direct Subsidized Loans, Direct Unsubsidized Loans, and Direct PLUS Loans first disbursed on or after July 1, 2006, and Direct Consolidation Loans for which the application was received on or after February 1, 1999, have fixed interest rates that apply for the life of the loan.

This notice announces the interest rates for variable-rate Direct Loans that will apply during the period from July 1, 2021, through June 30, 2022. Interest rate information for fixed-rate Direct Loans is announced in a separate notice published in the **Federal Register**.

Interest rates for variable-rate Direct Loans are determined in accordance with formulas specified in section 455(b) of the Higher Education Act of 1965, as amended (HEA) (20 U.S.C. 1087e(b)). The formulas vary depending on loan type and when the loan was first disbursed or, for certain Direct Consolidation Loans, when the application for the loan was received. The HEA specifies a maximum interest rate for these loan types. If the interest rate formula results in a rate that exceeds the statutory maximum rate, the rate is the statutory maximum rate.

Variable-Rate Direct Subsidized Loans, Direct Unsubsidized Loans, and Direct PLUS Loans

For Direct Subsidized Loans and Direct Unsubsidized Loans with first

disbursement dates before July 1, 2006, and for Direct PLUS Loans with first disbursement dates on or after July 1, 1998, and before July 1, 2006, the interest rate is equal to the lesser of—

(1) The bond equivalent rate of 91-day Treasury bills auctioned at the final auction held before the June 1 immediately preceding the 12-month period to which the interest rate applies, plus a statutory add-on percentage; or

(2) 8.25 percent (for Direct Subsidized Loans and Direct Unsubsidized Loans) or 9.00 percent (for Direct PLUS Loans).

For Direct Subsidized Loans and Direct Unsubsidized Loans with first disbursement dates on or after July 1, 1995, and before July 1, 2006, the statutory add-on percentage varies depending on whether the loan is in an in-school, grace, or deferment status, or in any other status. For all other loans, the statutory add-on percentage is the same during any status.

The bond equivalent rate of 91-day Treasury bills auctioned on May 24, 2021, is 0.015 percent, rounded to 0.02 percent.

For Direct PLUS Loans with first disbursement dates before July 1, 1998, the interest rate is equal to the lesser of—

(1) The weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the last calendar week ending on or before the June 26 preceding the 12-month period to which the interest rate applies, plus a statutory add-on percentage; or

(2) 9.00 percent.

The weekly average of the one-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the last calendar week ending on or before June 26, 2021, is 0.09 percent.

Variable-Rate Direct Consolidation Loans

A Direct Consolidation Loan may have up to three components, depending on the types of loans that were repaid by the consolidation loan and when the application for the consolidation loan was received. The three components are called Direct Subsidized Consolidation Loans, Direct Unsubsidized Consolidation Loans, and (only for Direct Consolidation Loans made based on applications received before July 1, 2006) Direct PLUS Consolidation Loans. In most cases the interest rates for variable-rate Direct Subsidized Consolidation Loans, Direct Unsubsidized Consolidation Loans, and Direct PLUS Consolidation Loans are determined in accordance with the same formulas that apply to Direct Subsidized

Loans, Direct Unsubsidized Loans, and Direct PLUS Loans, respectively.

Interest Rate Charts

Charts 1 and 2 show the interest rate formulas used to determine the interest

rates for all variable-rate Direct Loans and the rates that are in effect during the 12-month period from July 1, 2021, through June 30, 2022.

Chart 1 shows the interest rates for loans with rates based on the 91-day

Treasury bill rate. Chart 2 shows the interest rates for loans with rates based on the weekly average of the one-year constant maturity Treasury yield.

CHART 1—DIRECT SUBSIDIZED LOANS, DIRECT UNSUBSIDIZED LOANS, DIRECT SUBSIDIZED CONSOLIDATION LOANS, DIRECT UNSUBSIDIZED CONSOLIDATION LOANS, DIRECT PLUS LOANS, AND DIRECT PLUS CONSOLIDATION LOANS
 [Interest rates based on 91-day Treasury bill]

Loan type	Cohort	91-day T-bill rate 05/24/21 (%)	Add-on (%)		Maximum rate (%)	Interest rate 07/01/21 through 06/30/22 (%)	
Subsidized, Unsubsidized.	First disbursed on/after 07/01/98 and before 07/01/06.	0.02	1.70 (in-school, grace, deferment).	2.30 (any other status).	8.25	1.72 (in-school, grace, deferment).	2.32 (any other status)
Subsidized Consolidation, Unsubsidized Consolidation.	First disbursed on/after 07/01/98 and before 10/01/98; or Application received before 10/01/98 and first disbursed on/after 10/01/98.	.....	.....	.....	.....	.....	.....
PLUS	First disbursed on/after 07/01/98 and before 07/01/06.	0.02	3.10		9.00	3.12	
PLUS Consolidation.	First disbursed on/after 07/01/1998 and before 10/01/1998; or Application received before 10/01/98 and first disbursed on/after 10/01/98.						
Subsidized, Unsubsidized, Subsidized Consolidation, Unsubsidized Consolidation.	First disbursed on/after 07/01/95 and before 07/01/98.	0.02	2.50 (in-school, grace, deferment).	3.10 (any other status).	8.25	2.52 (in-school, grace, deferment).	3.12 (any other status)
Subsidized, Unsubsidized, Subsidized Consolidation, Unsubsidized Consolidation.	First disbursed before 07/01/95.	0.02	3.10		8.25	3.12	
Subsidized Consolidation, Unsubsidized Consolidation, PLUS Consolidation.	Application received on/after 10/01/98 and before 02/01/99.	0.02	2.30		8.25	2.32	

CHART 2—DIRECT PLUS LOANS AND DIRECT PLUS CONSOLIDATION LOANS INTEREST RATES BASED ON WEEKLY AVERAGE OF ONE-YEAR CONSTANT MATURITY TREASURY YIELD

Loan type	Cohort	Weekly average of 1-year constant maturity treasury yield for last calendar week ending on or before 06/26/21 (%)	Add-on (%)	Maximum rate (%)	Interest rate 07/01/21 through 06/30/22 (%)
PLUS, PLUS Consolidation	First disbursed before 07/01/98	0.09	3.10	9.00	3.19

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at www.govinfo.gov. At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at www.federalregister.gov. Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Program Authority: 20 U.S.C. 1087 et seq.

Richard Cordray,

Chief Operating Officer Federal Student Aid.

[FR Doc. 2021-17053 Filed 8-10-21; 8:45 am]

BILLING CODE 4000-01-P

DEPARTMENT OF ENERGY

Request for Information Regarding Establishment of the Department of Energy Uranium Reserve Program

AGENCY: National Nuclear Security Administration, Department of Energy.

ACTION: Request for information (RFI).

SUMMARY: The U.S. Department of Energy (DOE or the Department) is issuing this RFI to invite public comment on topics related to

establishment of the DOE's Uranium Reserve program.

DATES: Written comments and information are requested on or before September 10, 2021.

ADDRESSES: Interested persons may submit comments by any of the following methods:

Email: rfi-uranium@hq.doe.gov. Submit electronic comments in Microsoft Word or PDF file format and avoid the use of special characters or any form of encryption. Please include "Response to Uranium Reserve RFI" in the subject line.

Postal Mail: Response to Uranium Reserve RFI, c/o Mr. Kyle Fowler, U.S. Department of Energy, National Nuclear Security Administration, Mailstop NA-10, 1000 Independence Avenue SW, Washington, DC 20585-0121.

Online: Responses will be accepted online at <https://www.regulations.gov>.

Instructions: All submissions received must include the agency name for this request for information. No facsimiles (faxes) will be accepted.

Note: The Government has posted a parallel RFI to SAM.gov in order invite industry comment on topics related to establishment of the DOE's Uranium Reserve program. To avoid duplicate submissions, interested parties are encouraged to only respond to one of the notices.

FOR FURTHER INFORMATION CONTACT: Requests for further information should be sent to: rfi-uranium@hq.doe.gov or Mr. Kyle Fowler, (202) 586-1963. If responding by email, please include "Question on Uranium Reserve RFI" in the subject line.

SUPPLEMENTARY INFORMATION:

Background

In the United States (U.S.), nuclear energy provides more than 55 percent of our clean energy and supports about half a million American jobs. However, the U.S. nuclear industry and the nuclear fuel supply chain face significant challenges that have left domestic nuclear fuel suppliers in a weakened position on the domestic and global stage. Revitalizing the U.S. nuclear fuel supply infrastructure

would support the Administration's goals described in the American Jobs Plan,¹ including addressing the climate crisis, creating American jobs, positioning the U.S. to compete with economic rivals, and supporting national security. It would support environmental justice initiatives, prioritize addressing long-standing and persistent racial injustice by targeting 40 percent of the benefits of climate and clean infrastructure investments to disadvantaged communities, consider rural communities and communities impacted by the market-based transition to clean energy, and include meaningful stakeholder engagement.

In December 2020, Congress passed the Consolidated Appropriations Act, 2021 (Pub. L. 116-260) that makes \$75,000,000 available to the Department for the Uranium Reserve Program. The Department is considering options to acquire natural uranium and convert this uranium into uranium hexafluoride that would be stored at commercial facilities in the United States.

In considering options, the Department will focus on reinvigorating domestic nuclear fuel supply chain capabilities, utilizing existing facilities, and minimizing negative disruption of market mechanisms. The Department expects the acquisition of natural uranium to result in new uranium production at existing domestic sites. The Department does not intend such new production to initiate or expand mining on Tribal lands, expand the Office of Legacy Management's (LM) Uranium Leasing Program, or expand access to additional uranium deposits located on other Federal lands. Additionally, the Department does not intend to acquire uranium or uranium hexafluoride produced from enricher underfeeding, the re-enrichment of tails, or other sources that do not support the reinvigoration of uranium production and conversion capabilities. Likewise, the Department expects to use existing domestic commercial conversion

¹ <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/>

capabilities and store the uranium hexafluoride at a domestic facility.

The Department will comply with all applicable laws, including the National Environmental Policy Act and the National Historic Preservation Act, in the proposed establishment of a uranium reserve. In addition, the Department will give careful attention to energy justice, distributive impacts, and other relevant issues in its decision-making process. This program would include meaningful engagement with stakeholders, including State, local, Tribal governments, and disadvantaged communities.

The Department is publishing this RFI to gain a better understanding of Tribal and other disadvantaged communities and stakeholder views on topics related to the establishment of a uranium reserve. Responses to the RFI will inform the Department's establishment of a uranium reserve, as well as the development of a procurement strategy for acquisition of uranium, conversion services, and storage.

Specific Questions on Which Information Is Requested

The Department is seeking public comment on the following questions related to the establishment of a uranium reserve and the development of a procurement strategy for acquiring uranium, conversion services, and storage for the uranium. Please provide data, analyses, or other justifications for all responses.

General Questions

(1) How can the establishment of a uranium reserve be structured to:

Incentivize the production of uranium from domestic sources and the maintenance of domestic conversion services,

Support the Administration's goals described in the American Jobs Plan, and

Promote energy justice, including consideration of community needs and distribution of benefits pursuant to the Justice40 Initiative?²

(2) How do you envision reinvigorating the domestic nuclear fuel supply chain as being responsive to the President's Justice40 Initiative—a plan to deliver 40 percent of the overall benefits of climate investments to disadvantaged communities and inform equitable research, development, and deployment within the DOE? Please provide specific actions, the type of benefit (*i.e.* employment, educational

opportunities, etc.) and targeted communities that would be responsive.

(3) What siting and environmental justice concerns should the Department consider in the management of any waste generated through establishment of a uranium reserve? Please provide specific concerns, (*e.g.*, siting, transportation, exposure, and other human health impacts, including knowledge of the potential impacts of exposure to the hazards associated with uranium production).

(4) Are there additional factors or considerations that should be taken into account regarding the establishment of a uranium reserve?

Limitations and/or Restrictions

The Department is considering the following factors as we develop our approach to acquire and convert natural uranium and to store uranium hexafluoride in commercial facilities:

Uranium must be newly-produced in the U.S. from deposits at an existing site; uranium that was produced previously that is currently held in inventory will not be eligible.

Uranium newly-produced from "alternate feed" materials are eligible to be bid for sale.

Provision of uranium must not require (1) initiation or expansion of mining on Tribal lands; (2) expansion of the Office of Legacy Management's Uranium Leasing Program; or (3) expansion of access to additional uranium deposits located on other Federal lands.

Provision of conversion services must utilize existing domestic commercial facilities.

The entity providing uranium, conversion services, or storage must be U.S.-owned or controlled.

Uranium and conversion services must not carry any peaceful-use or end-use restrictions.

(5) Do the limitations/restrictions support the Department's objective to incentivize the production of U.S. uranium and conversion services? Why or why not?

(6) Should any of these limitations/restrictions be modified or eliminated? Include your justification for any modification or elimination.

(7) Please describe any additional limitations/restrictions (other than cost) that you believe the Department should consider and include your justification.

Additional factors for consideration:

(8) Please describe any additional considerations (other than cost) that you believe the Department should consider and include your justification.

(9) Please describe any legal, regulatory, and policy issues, including environmental justice concerns, that

should be addressed to enable the implementation of the Uranium Reserve Program under the Consolidated Appropriations Act, 2021 (Pub. L. 116–260).

(10) To what extent should the Department prioritize support for multiple suppliers?

Should the Department impose limitations on the procurement of uranium from a single company?

If so, should the limits be percentage-based or based on an absolute quantity maximum?

Submission of Comments

DOE invites all interested parties to submit in writing by 30 days from the publication of this RFI or by September 10, 2021, comments and information on matters addressed in this RFI. Any information that may be business proprietary and exempt by law from public discourse should be submitted as described in Section IV. Business Proprietary Information.

Business Proprietary Information

Pursuant to 10 CFR 1004.11, any person submitting information he or she believes to be business proprietary and exempt by law from public disclosure should submit via email, or postal mail two well-marked copies: One copy of the document marked "Business Proprietary" including all the information believed to be proprietary, and one copy of the document marked "non-Proprietary" with the information believed to be business proprietary deleted. DOE will make its own determination about the business proprietary status of the information and treat it according to its determination. Factors of interest to DOE when evaluating requests to treat submitted information as business proprietary include: (1) A description of the items; (2) whether and why such items are customarily treated as business proprietary within the industry; (3) whether the information is generally known by or available from other sources; (4) whether the information has previously been made available to others without obligation concerning its business proprietary nature; (5) an explanation of the competitive injury to the submitting person which would result from public disclosure; (6) when such information might lose its business proprietary character due to the passage of time; and (7) why disclosure of the information would be contrary to the public interest.

Signing Authority

This document of the Department of Energy was signed on August 4, 2021,

² <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>.

by Jill Hruby, Under Secretary for Nuclear Security and Administrator of the National Nuclear Security Administration, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on August 4, 2021.

Treena V. Garrett,

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

[FR Doc. 2021-17145 Filed 8-10-21; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 6470-008]

Winooski Hydroelectric Company; Notice of Application Tendered for Filing With the Commission and Soliciting Additional Study Requests and Establishing Procedural Schedule for Relicensing and a 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.:* 6470-008.
- c. *Date Filed:* July 30, 2021.
- d. *Applicant:* Winooski Hydroelectric Company (WHC).
- e. *Name of Project:* Winooski 8 Hydroelectric Project (project).
- f. *Location:* On the Winooski River in Washington County, Vermont. No federal lands are occupied by the project works or located within the project boundary.
- g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)-825(r)
- h. *Applicant Contact:* Mathew Rubin, General Partner, Winooski Hydroelectric Company, 26 State Street, Montpelier, Vermont 05602; (802) 793-5939; or email at m@mrubin.biz.
- i. *FERC Contact:* Kristen Sinclair at (202) 502-6587, or kristen.sinclair@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 (2001).

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:* September 28, 2021.

The Commission strongly encourages electronic filing. Please file additional study requests and requests for cooperating agency status using the Commission's eFiling system at <https://ferconline.ferc.gov/FERCOOnline.aspx>. For assistance, please contact FERC Online Support at FERCOOnlineSupport@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. All filings must clearly identify the project name and docket number on the first page: Winooski 8 Hydroelectric Project (P-6470-008).

m. The application is not ready for environmental analysis at this time.

n. *Project Description:* The existing Winooski 8 Hydroelectric Project consists of: (1) A 222.5-foot-long, 26-foot-high concrete gravity dam impounding a reservoir with a storage capacity of approximately 20 acre-feet at an elevation of 615 feet mean sea level; (2) a 148-foot-long spillway with 4-foot-high flashboards built into the crest of the dam; (3) a 24-foot-long,

hydraulically operated crest gate built into the crest of the dam; (4) a 1,100-square-foot forebay located adjacent to the project impoundment; (5) three hydraulically operated trashracks; (6) a 1,550-square-foot powerhouse that contains two semi-Kaplan turbines and one fixed propeller turbine for a total installed capacity of 856 kilowatts; (7) a 100-foot-long tailrace; (8) a 1,000 kilovolt-amp station transformer; (9) a 30-foot long, 13-kilovolt transmission line and (10) appurtenant facilities. The project generates an annual average of 3,507 megawatt-hours. WHC proposes to continue to operate the project in an automated run-of-river mode. WHC also proposes to add 3.6 acres to the existing project boundary to enclose a 4,100-foot-long dirt road currently used by WHC to access the dam and powerhouse and to enclose an existing unimproved site that provides access to the river for boating and fishing activities downstream of the dam.

o. In addition to publishing the full text of this notice in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this notice, as well as other documents in the proceeding (e.g., license application) via the internet through the Commission's Home Page (<http://www.ferc.gov>) using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document (P-6470). 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 FERCOOnlineSupport@ferc.gov or call toll-free, (866) 208-3676 or (202) 502-8659 (TTY).

You may also register online at <https://ferconline.ferc.gov/FERCOOnline.aspx> to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

p. *Procedural Schedule:* The application will be processed according to the following preliminary schedule. Revisions to the schedule will be made as appropriate.

Issue Deficiency Letter (if necessary)—August 2021
Request Additional Information (if needed)—September 2021
Issue Notice of Acceptance—December 2021
Issue Scoping Document 1 for comments—January 2022

Issue Scoping Document 2—March 2022
Issue Notice of Ready for Environmental
Analysis—March 2022

q. 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: August 5, 2021.

Kimberly D. Bose,
Secretary.

[FR Doc. 2021–17137 Filed 8–10–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 7656–000]

Village of Highland Falls High-Point Utility, LDC; Notice of Existing Licensee's Failure To File a Notice of Intent To File a Subsequent License Application, and Soliciting; Notices of Intent To File a License Application and Pre-Application Documents

The current license for Buttermilk Falls Hydroelectric Project No. 7656 (Buttermilk Falls Project) was issued to the original licensee, John A. Dodson, on June 24, 1986, for a term of 40 years, ending May 31, 2026.¹ The project became non-operational in 2012 due to damage caused by Hurricanes Sandy and Irene, and has remained non-operational since. The license was transferred to the current licensee, Village of Highland Falls High-Point Utility, LDC (High-Point Utility) on September 21, 2017.² The 75-kilowatt (kW) project is located on Buttermilk Falls Brook, a tributary of the Hudson River, in Orange County, New York.

The principal project works consist of: (1) An 18-inch-high, 15-foot-long dam; (2) an 18-inch-diameter, 400-foot-long PVC penstock; (3) a powerhouse containing one 55-kW and one 20-kW generating unit, for a total of installed generating capacity of 75-kW; (4) two 480-volt generator leads; (5) a 300-foot-long, 480-volt transmission line; and (6) a 0.48/13.6-kilovolt cable connecting the transformer to the area distribution system.

At least five years before the expiration of a license for a minor water power project in which sections 14 and 15 of the Federal Power Act were waived, the Commission's regulations require the licensee to file with the Commission a notice of intent (NOI) that

contains an unequivocal statement of the licensee's intention to file or not to file an application for a subsequent license, details on the principal project works and installed plant capacity, and other information.³

If such a licensee does not inform the Commission that it intends to file an application for, in this case, a subsequent license for the project, the licensee may not file an application for a subsequent license, either individually or in conjunction with an entity or entities that are not currently licensees of the project.⁴

Because the current license expires on May 31, 2026, the NOI was due to be filed no later than the close of business on May 31, 2021.⁵ High-Point Utility, the current licensee for the Buttermilk Falls Project, failed to file an NOI by this date.⁶

Any party interested in filing a license application for the Buttermilk Falls Project No. 7656 must first file a NOI⁷ and pre-application document (PAD)⁸ pursuant to Part 5 of the Commission's regulations. Although the integrated licensing process is the default pre-filing process, section 5.3(b) of the Commission's regulations allows a potential license applicant to request to use alternative licensing procedures when it files its NOI.⁹

This notice sets a deadline of 120 days from the date of this notice for interested applicants, other than the existing licensee, to file NOIs, PADs, and requests to use an alternative licensing process.

Applications for a subsequent license from potential (non-licensee) applicants must be filed with the Commission at

³ 18 CFR 16.19(b) (2020) (citing 18 CFR 16.6(b)). Section 16.19(b) applies to licenses not subject to Parts 14 and 15 of the Federal Power Act.

⁴ 18 CFR 16.24(b) (2020).

⁵ 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 2007(a)(2) (2020). Because the deadline to file the NOI fell on a federal holiday (*i.e.*, Memorial Day), the filing deadline was extended until the close of business on Tuesday, June 1, 2021.

⁶ On June 23, 2021, High-Point Utility filed a letter indicating that it intended to proceed with relicensing for the Buttermilk Falls Hydroelectric Project No. 7656, however, the filing was not in conformance with the noticing requirements of section 5.5 of the Commission's regulations, because among other things, it did not identify the principle project works and it did not include the names and mailing addresses of nearby municipalities, counties, political subdivisions, or affected Indian tribes. It also did not include a pre-application document as required by section 5.6 of the regulations.

⁷ 18 CFR 5.5 (2020).

⁸ 18 CFR 5.6 (2020).

⁹ 18 CFR 5.3(b) (2020).

least 24 months prior to the expiration of the current license.¹⁰ Because the current license expires on May 31, 2026, applications for license for this project must be filed by May 31, 2024.¹¹

Questions concerning this notice should be directed to Samantha Pollak at (202) 502–6419 or samantha.pollak@ferc.gov.

Dated: August 5, 2021.

Kimberly D. Bose,
Secretary.

[FR Doc. 2021–17136 Filed 8–10–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC21–36–000]

Commission Information Collection Activities (FERC–725G1 and FERC– 725G4); Consolidated Comment Request; Extension

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of information collections and request for comments.

SUMMARY: In compliance with the requirements of the Paperwork Reduction Act of 1995, the Federal Energy Regulatory Commission (Commission or FERC) is soliciting public comment on the currently approved information collections, FERC–725G1 (Mandatory Reliability Standards for the Bulk-Power System: Reliability Standard PRC–004–6) and FERC–725G4 (Mandatory Reliability Standards: Reliability Standard PRC–010–2 (Undervoltage Load Shedding)).

DATES: Comments on the collections of information are due October 12, 2021.

ADDRESSES: You may submit your comments (identified by Docket No. IC21–36–000) on FERC–725G1 and/or FERC–725G4 by one of the following methods:

Electronic filing through <http://www.ferc.gov> is preferred.

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

¹⁰ 18 CFR 16.20 (2020).

¹¹ To the extent an interested applicant files an NOI and PAD and elects or is required to use the Commission's ILP, a process plan will be issued within 180 days of this notice, which accelerates the steps of the ILP to allow for filing a subsequent license application by the May 31, 2024 deadline.

¹ See John A. Dodson, 35 FERC ¶ 62,532 (1986).

² See John A. Dodson, *Village of Highland Falls High-Point Utility, LDC*, 160 FERC ¶ 62,239 (2017).

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

○ *Hand (including courier) delivery:*
Deliver to: Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

Instructions: All submissions must be formatted and filed in accordance with submission guidelines at: <http://www.ferc.gov>. For user assistance, contact FERC Online Support by email at ferconlinesupport@ferc.gov, or by phone at (866) 208-3676 (toll-free).

Docket: Users interested in receiving automatic notification of activity in this docket or in viewing/downloading comments and issuances in this docket may do so at <http://www.ferc.gov>.

FOR FURTHER INFORMATION CONTACT:

Ellen Brown may be reached by email at DataClearance@FERC.gov, or by telephone at (202) 502-8663.

SUPPLEMENTARY INFORMATION:

FERC-725G1

Title: Mandatory Reliability Standards for the Bulk-Power System: Reliability Standard PRC-004-6.

OMB Control No.: 1902-0284.

Type of Request: Three-year extension of the FERC-725G1 information collection requirements.

Abstract: The Commission collects information under FERC-725G1 in accordance with section 215 of the Federal Power Act (FPA) ¹ and 18 CFR parts 39 and 40. Section 215 of the FPA gives the Commission and the North American Electric Reliability Corporation (as the Commission-approved Electric Reliability Organization) to establish and enforce reliability standards for all users, owners, and operators of the bulk-power system.² Once approved, the Reliability Standards may be enforced by the Electric Reliability Organization subject

to Commission oversight, or by the Commission independently.³

Reliability Standard PRC-004-6 requires transmission owners, generator owners, and distribution providers to identify and correct causes of misoperations of certain protection systems for bulk-power system elements. It also requires retention of evidence of misoperations for a minimum of 12 calendar months.

Types of Respondents: Transmission Owners, Generator Owners, and Distribution Providers for FERC-725G1. Transmission Owners and Distribution Providers for FERC-725G4.

Frequency of Response: On occasion.

Estimate of Annual Burden: The Commission estimates 703 responses annually, and per-response burdens of 16.5 hours and \$1,435.50.⁴ The total estimated burdens per year are 703 responses, 11,599.5 hours, and \$1,009,156.50. These burdens are itemized in the following table:

FERC-725G1—ANNUAL ESTIMATES OF RESPONDENTS' BURDENS

Number of respondents	Annual number of responses per respondent	Total number of responses	Average burden and cost per response ⁵	Total annual burden hours and total annual cost	Cost per respondent (\$)
A.	B.	C. (column A × column B)	D.	E. (column C × column D)	F. (column E ÷ column A)
703	1	703	16.5 hrs.; \$1,435.50	11,599.5 hrs.; \$1,009,156.50	\$1,435.50

FERC-725G4

Title: Mandatory Reliability Standards: Reliability Standard PRC-010-2 (Undervoltage Load Shedding).

OMB Control No.: 1902-0282.

Type of Request: Three-year extension of the FERC-725G4 information collection requirements.⁶

Abstract: The Commission collects information under FERC-725G4 in

accordance with section 215 of the FPA and 18 CFR parts 39 and 40. Reliability Standard PRC-010-2 requires respondents to submit date-stamped documentation of their compliance with the relevant UVLS Program.⁷

Types of Respondents: UVLS Entities.⁸

Frequency of Response: On occasion.

Estimate of Annual Burden: The Commission estimates 25 responses annually, and per-response burdens of 48 hours and \$4,176.⁹ The total estimated burdens per year are 25 responses, 1,200 hours, and \$104,400. These burdens are itemized in the following table:

¹ 16 U.S.C. 824o.

² As defined at 16 U.S.C. 824o(a)(1) and 18 CFR 39.1, the term "bulk-power system" means facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof), and electric energy from generating facilities needed to maintain transmission system reliability. The term does not include facilities used in the local distribution of electric energy.

³ 16 U.S.C. 824o(e).

⁴ Using the May 14, 2021 NERC compliance registration information for entities that are Generator Owners, Transmission Owners, and Distribution Providers (in the U.S.), the number of potential respondents is 1,405, taking into account overlap between functions. However, not every entity will have a misoperation event during a year. Based on our previous experience with this information collection, we are estimating that

approximately half of the 1,405 potential respondents annually will have a reportable misoperation, i.e., 703 responses per year for FERC-725G1.

⁵ Commission staff estimates that the average industry hourly cost for this information collection is approximated by the current FERC 2021 average hourly costs for wages and benefits, i.e., \$87.00/hour.

⁶ If OMB renews FERC-725G4, the Commission subsequently may consider requesting that OMB combine that information collection activity with FERC-725G1. Such action would be administrative only and would not indicate the discontinuation of the information collection requirements in FERC-725G4.

⁷ "Load shedding" means disconnecting consumers from the grid to prevent demand from exceeding supply, which can cause widespread grid collapse. A "UVLS Program" provides for automatic

load shedding, utilizing voltage inputs, in specific circumstances and locations.

⁸ "UVLS Entities," as defined at the NERC website at <https://www.nerc.com/pa/Stand/Reliability%20Standards/PRC-010-2.pdf>, are distribution providers and transmission owners responsible for the ownership, operation, or control of UVLS equipment, as required by a UVLS Program.

⁹ Using the May 14, 2021 NERC compliance registration information for entities that are Transmission Owners and Distribution Providers (in the U.S.), the number of potential respondents is 494, taking into account overlap between functions. However, not every entity has an undervoltage load shedding program. Approximately five percent of the potential respondents have such a program. Therefore, we estimate 25 responses per year for FERC-725G4.

FERC-725G4—ANNUAL ESTIMATES OF RESPONDENTS’ BURDENS

Number of respondents	Annual number of responses per respondent	Total number of responses (column A × column B)	Average burden and cost per response ¹⁰	Total annual burden hours and total annual cost (column C × column D)	Cost per respondent (\$) (column E ÷ column A)
A	B	C	D	E	F
25	1	25	48 hrs.; \$4,176	1,200 hrs.; \$104,400	\$4,176

Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency’s estimate of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information collection; and (4) 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.

Dated: August 5, 2021.

Kimberly D. Bose,
Secretary.

[FR Doc. 2021-17135 Filed 8-10-21; 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: ER21-1790-005.
Applicants: California Independent System Operator Corporation.
Description: Compliance filing: 2021-08-04 Supplemental to Pending Compliance Filing—LEW to be effective 12/31/9998.
Filed Date: 8/4/21.
Accession Number: 20210804-5089.
Comments Due: 5 p.m. ET 8/25/21.
Docket Numbers: ER21-2087-001.
Applicants: Southwest Power Pool, Inc.

Description: Tariff Amendment: The Empire District Electric Company Amended Formula Rate to be effective 5/14/2021.

Filed Date: 8/4/21.

¹⁰ Commission staff estimates that the average industry hourly cost for this information collection is approximated by the current FERC 2021 average hourly costs for wages and benefits, i.e., \$87.00/hour.

Accession Number: 20210804-5096.
Comments Due: 5 p.m. ET 8/25/21.
Docket Numbers: ER21-2138-001.
Applicants: Southwest Power Pool, Inc.

Description: Tariff Amendment: 1518R21 Arkansas Electric Cooperative Corp NITSA NOA Amended to be effective 8/1/2021.

Filed Date: 8/5/21.

Accession Number: 20210805-5114.
Comments Due: 5 p.m. ET 8/26/21.

Docket Numbers: ER21-2230-001.
Applicants: Southwest Power Pool, Inc.

Description: Tariff Amendment: 2415R15 Kansas Municipal Energy Agency NITSA and NOA Amended to be effective 9/1/2021.

Filed Date: 8/5/21.

Accession Number: 20210805-5052.
Comments Due: 5 p.m. ET 8/26/21.

Docket Numbers: ER21-2611-000.
Applicants: Wisconsin Public Service Corporation.

Description: § 205(d) Rate Filing: Filing of Revised LBAAOCA with WPL to be effective 10/4/2021.

Filed Date: 8/4/21.

Accession Number: 20210804-5097.
Comments Due: 5 p.m. ET 8/25/21.

Docket Numbers: ER21-2612-000.
Applicants: Niagara Mohawk Power Corporation, New York Independent System Operator, Inc.

Description: § 205(d) Rate Filing: Joint Section 205 SGIA among NYISO, NMPC and SunEast Hilltop Solar SA No. 2638 to be effective 7/28/2021.

Filed Date: 8/5/21.

Accession Number: 20210805-5082.
Comments Due: 5 p.m. ET 8/26/21.

Docket Numbers: ER21-2613-000.
Applicants: PJM Interconnection, L.L.C., Trans-Allegheny Interstate Line Company.

Description: § 205(d) Rate Filing: TrAILCo submits One ECSA, SA No. 5954 to be effective 10/5/2021.

Filed Date: 8/5/21.

Accession Number: 20210805-5096.
Comments Due: 5 p.m. ET 8/26/21.

Docket Numbers: ER21-2614-000.
Applicants: Mid-Atlantic Interstate Transmission, LLC, PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: MAIT submits One ECSA, SA No. 5953 to be effective 10/5/2021.

Filed Date: 8/5/21.

Accession Number: 20210805-5107.
Comments Due: 5 p.m. ET 8/26/21.

Docket Numbers: ER21-2615-000.
Applicants: American Transmission Systems, Incorporated, PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: ATSI submits Four ECSAs, SA Nos. 6034-6037 to be effective 10/5/2021.

Filed Date: 8/5/21.

Accession Number: 20210805-5109.
Comments Due: 5 p.m. ET 8/26/21.

Docket Numbers: ER21-2616-000.
Applicants: El Paso Electric Company.

Description: § 205(d) Rate Filing: Rate Schedule No. 361 Cost Reimbursement Agreement with SunZia to be effective 7/19/2021.

Filed Date: 8/5/21.

Accession Number: 20210805-5112.
Comments Due: 5 p.m. ET 8/26/21.

Docket Numbers: ER21-2617-000.
Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original IISA, Service Agreement No. 6124; Queue No. AD1-101 to be effective 7/6/2021.

Filed Date: 8/5/21.

Accession Number: 20210805-5113.
Comments Due: 5 p.m. ET 8/26/21.

Docket Numbers: ER21-2618-000.
Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Amendment to WMPA, Service Agreement No. 5522; Queue No. AE1-075 to be effective 10/14/2019.

Filed Date: 8/5/21.

Accession Number: 20210805-5116.
Comments Due: 5 p.m. ET 8/26/21.

The filings are accessible in the Commission’s eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercgensearch.asp>) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission’s Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern

time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.
 eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Dated: August 5, 2021.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2021-17143 Filed 8-10-21; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC21-37-000]

Commission Information Collection Activities (FERC-520); Comment Request; Extension

AGENCY: Federal Energy Regulatory Commission, DOE.
ACTION: Notice of information collection and request for comments.

SUMMARY: In compliance with the requirements of the Paperwork Reduction Act of 1995, the Federal Energy Regulatory Commission (Commission or FERC) is soliciting public comment on the currently approved information collection, FERC-520 (Application for Authority to Hold Interlocking Directorate Positions).

DATES: Comments on the collections of information are due October 12, 2021.

ADDRESSES: You may submit your comments (identified by Docket No. IC21-37-000) on FERC-520 by one of the following methods:

Electronic filing through <http://www.ferc.gov> is preferred.

- *Electronic Filing:* Documents must be filed in acceptable native

applications and print-to-PDF, but not in scanned or picture format.

- For those unable to file electronically, comments may be filed by USPS mail or by hand (including courier) delivery:

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

- *Hand (Including Courier) Delivery:* Deliver to: Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

Instructions: All submissions must be formatted and filed in accordance with submission guidelines at: <http://www.ferc.gov>. For user assistance, contact FERC Online Support by email at ferconlinesupport@ferc.gov, or by phone at (866) 208-3676 (toll-free).

Docket: Users interested in receiving automatic notification of activity in this docket or in viewing/downloading comments and issuances in this docket may do so at <http://www.ferc.gov>.

FOR FURTHER INFORMATION CONTACT: Ellen Brown may be reached by email at DataClearance@FERC.gov, or by telephone at (202) 502-8663.

SUPPLEMENTARY INFORMATION:

Title: FERC-520 (Application for Authority to Hold Interlocking Directorate Positions).

OMB Control No.: 1902-0083.

Type of Request: Three-year extension of the FERC-520 information collection requirements with no revisions to the current requirements.

Abstract: FERC Form No. 520 is an application requesting FERC authorization for officers and directors of regulated public utilities to simultaneously hold positions of officers and directors of certain other entities. Section 305(b)(1) of the Federal Power Act (FPA)¹ prohibits the holding of specific interlocking positions unless the Commission has authorized the holding of such interlocks upon a determination that neither public nor

private interests will be adversely affected.

FERC-520 consists of three information collection activities. A “full application,” in accordance with 18 CFR 45.8, provides detailed information about the positions for which authorization is sought, including a description of duties. Submission of a more streamlined “informational report,” in accordance with 18 CFR 45.9, is a condition for an automatic grant of authorization to hold interlocking directorates. This automatic authorization is available only to certain types of officers and directors. Finally, a “notice of change,” in accordance with 18 CFR 45.5, is required within 60 days after an officer or director resigns or withdraws from Commission-authorized interlocked positions or if the applicant is not re-elected or reappointed to the interlocked position. However, no notice of change is required if the only change is: (1) A resignation or withdrawal from fewer than all position held between or among affiliated public utilities; (2) a reelection or reappointment to a position that was previously authorized; or (3) holding a different or additional interlocking position that would qualify for automatic authorization under 18 CFR 45.9.

Types of Respondents: Officers and directors of public utilities seeking authorization to hold interlocking directorates.

Estimate of Annual Burden: For full applications, 16 responses annually, and per-response burdens of 50 hours and \$69,600. For informational reports, 500 responses annually, and per-response burdens of 8 hours and \$348,000. For notices of change, 100 responses annually, and per-response burdens of 0.25 of an hour and \$2,175. The total estimated burdens per year are 616 responses, 4,825 hours and \$419,775. These burdens are itemized in the following table:

Number of respondents	Number of respondents	Annual number of responses per respondent	Total number of responses (column A × column B)	Average burden & cost per response ²	Total annual burden hours & total annual cost (column C × column D)	Cost per respondent (column E ÷ column A)
	A	B	C	D	E	F
Full Application	16	1	16	50 hrs.; \$4,350	800 hrs.; \$69,600	\$4,350
Informational Report	500	1	500	8 hrs.; \$696	4,000 hrs.; \$348,000	\$696
Notice of Change	100	1	100	0.25 hrs.; \$21.75 ...	25 hrs.; \$2,175	\$21.75

¹ 16 U.S.C 825d(b)(1).

² Commission staff estimates that the average industry hourly cost for this information collection is approximated by the current FERC 2021 average

hourly costs for wages and benefits, *i.e.*, \$87.00/hour.

Number of respondents	Number of respondents	Annual number of responses per respondent	Total number of responses (column A × column B)	Average burden & cost per response ²	Total annual burden hours & total annual cost (column C × column D)	Cost per respondent (column E ÷ column A)
	A	B	C	D	E	F
Totals	616	N/A	616	N/A	4,825 hrs.; \$419,775	N/A

Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency’s estimate of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) 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.

Dated: August 5, 2021.

Kimberly D. Bose,

Secretary.

[FR Doc. 2021–17134 Filed 8–10–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC21–19–000, RD21–4–000]

Commission Information Collection Activities (FERC–725A); Comment Request; Extension

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of information collection and request for comments.

SUMMARY: In compliance with the requirements of the Paperwork Reduction Act of 1995, the Federal Energy Regulatory Commission (Commission or FERC) is soliciting public comment on the currently approved information collection, FERC–725A (Mandatory Reliability Standards for the Bulk-Power System). This notice includes the burden totals for proposed Reliability Standard FAC–008–5, which will be submitted to the Office of Management and Budget (OMB) for review.

DATES: Comments on the collection of information are due September 10, 2021.

ADDRESSES: Send written comments on FERC–725A to OMB through www.reginfo.gov/public/do/PRAMain. Attention: Federal Energy Regulatory Commission Desk Officer. Please identify the OMB Control Number (1902–0244) in the subject line of your comments. Comments should be sent within 30 days of publication of this notice to www.reginfo.gov/public/do/PRAMain.

Please submit copies of your comments to the Commission. You may submit copies of your comments (identified by Docket No. IC21–19–000) by one of the following methods:

Electronic filing through <http://www.ferc.gov>, is preferred.

- **Electronic Filing:** Documents must be filed in acceptable native applications and print-to-PDF, but not in scanned or picture format.

- For those unable to file electronically, comments may be filed by USPS mail or by hand (including courier) delivery.

- *Mail via U.S. Postal Service Only:*

Addressed to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426.

- *Hand (including courier) delivery:*

Deliver to: Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

Instructions: OMB submissions must be formatted and filed in accordance with submission guidelines at www.reginfo.gov/public/do/PRAMain. Using the search function under the “Currently Under Review” field, select Federal Energy Regulatory Commission; click “submit,” and select “comment” to the right of the subject collection.

FERC submissions must be formatted and filed in accordance with submission guidelines at: <http://www.ferc.gov>. For user assistance, contact FERC Online Support by email at ferconlinesupport@ferc.gov, or by phone at: (866) 208–3676 (toll-free).

Docket: Users interested in receiving automatic notification of activity in this docket or in viewing/downloading comments and issuances in this docket may do so at <https://www.ferc.gov/ferc-online/overview>.

FOR FURTHER INFORMATION CONTACT: Ellen Brown may be reached by email

at DataClearance@FERC.gov, telephone at (202) 502–8663.

SUPPLEMENTARY INFORMATION:

Title: FERC–725A (Mandatory Reliability Standards for the Bulk-Power System).

OMB Control No.: 1902–0244.

Type of Request: Three-year extension of the FERC–725A information collection requirements with no changes to the current reporting requirements.

Abstract: On August 8, 2005, the Electricity Modernization Act of 2005, which is Title XII, Subtitle A, of the Energy Policy Act of 2005 (EPAct 2005), was enacted into law.¹ EPAct 2005 added a new section 215 to the FPA, which requires a Commission-certified electric reliability organization (ERO) (FERC–725) to develop mandatory and enforceable Reliability Standards, which are subject to Commission review and approval. Once approved, the Reliability Standards may be enforced by the ERO, subject to Commission oversight or the Commission can independently enforce Reliability Standards (FERC–725A).²

On February 3, 2006, the Commission issued Order No. 672, implementing section 215 of the FPA.³ Pursuant to Order No. 672, the Commission certified one organization, NERC, as the ERO.⁴ The ERO is required to develop Reliability Standards, which are subject to Commission review and approval. The Reliability Standards will apply to users, owners and operators of the Bulk-Power System, as set forth in each Reliability Standard.

On March 16, 2007, the Commission issued Order No. 693, a Final Rule adding part 40, a new part, to the

¹ Energy Policy Act of 2005, Public Law 109–58, Title XII, Subtitle A, 119 Stat. 594, 941 (2005), to be codified at 16 U.S.C. 824o.

² 16 U.S.C. 824o(e)(3).

³ *Rules Concerning Certification of the Electric Reliability Organization; Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards*, Order No. 672, 71 FR 8662 (February 17, 2006), FERC Stats. & Regs. ¶ 31,204 (2006), order on reh’g, Order No. 672–A, 71 FR 19814 (April 18, 2006), FERC Stats. & Regs. ¶ 31,212 (2006).

⁴ *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062 (ERO Certification Order), order on reh’g & compliance, 117 FERC ¶ 61,126 (ERO Rehearing Order) (2006), order on compliance, 118 FERC ¶ 61,030 (2007) (January 2007 Compliance Order).

Commission’s regulations. The Final Rule states that this part applies to all users, owners and operators of the Bulk-Power System within the United States (other than Alaska or Hawaii). It also requires that each Reliability Standard identify the subset of users, owners and operators to which that particular Reliability Standard applies. The new regulations also require that each Reliability Standard that is approved by the Commission will be maintained on the ERO’s internet website for public inspection.

In order that the Commission is able to perform its oversight function with regard to Reliability Standards that are proposed by the ERO and established by the Commission, it is essential that the Commission receive timely information regarding all or potential violations of Reliability Standards. While section 215 of the FPA contemplates the filing of the record of an ERO or Regional Entity enforcement action, FERC needs information regarding violations and potential violations at or near the time of occurrence. Therefore, it will work with the ERO and regional reliability organizations to be able to use the electronic filing of information so the Commission receives timely information. The new regulations also require that each Reliability Standard that is approved by the Commission will be maintained on the ERO’s internet website for public inspection.

In accordance with section 39.5 of the Commission’s regulations, the ERO must file each Reliability Standard or a modification to a Reliability Standard with the Commission. The filing is to include a concise statement of the basis and purpose of the proposed Reliability Standard, either a summary of the Reliability development proceedings conducted by the ERO or a summary of the Reliability Standard development proceedings conducted by a Regional

Entity together with a summary of the Reliability Standard review proceedings of the ERO and a demonstration that the proposed Reliability Standard is “just, reasonable, not unduly discriminatory or preferential, and in the public interest.

RD21–4 (FAC–008–05)

The proposed information collection changes in Docket No. RD21–4–000 relate to the proposed Reliability Standard FAC–008–05 (Facility Ratings) developed by the North American Electric Reliability Corporation (NERC), and submitted to the Commission for approval. The Commission received NERC’s petition to approve the proposed Reliability Standards.

On February 19, 2021, NERC filed a petition seeking approval of proposed Reliability Standard FAC–008–5. NERC states that proposed Reliability Standard FAC–008–5 reflects the retirement of Requirement R7 of the currently effective standard. NERC notes that this proposal was recommended following the first phase of work under the NERC Standards Efficiency Review and that in its Order No. 873 remanding a previously proposed version of the FAC–008 Reliability Standard, the Commission agreed that the retirement of Requirement R7 from the standard would not result in a reliability gap.

In June 2019, following the conclusion of the standard development process, NERC submitted a series of standard retirement proposals to the Commission. Among the proposals, NERC submitted for Commission approval proposed Reliability Standard FAC–008–4, in which NERC proposed to retire Requirements R7 and R8 of currently effective Reliability Standard FAC–008–3. In September 2020, the Commission issued Order No. 873 regarding NERC’s retirement proposals. In this order, the Commission remanded

proposed Reliability Standard FAC–008–4 to NERC for further consideration, citing concerns with the proposed retirement of Requirement R8 of the currently effective standard. The standard drafting team determined to develop a new version of the Reliability Standard, proposed Reliability Standard FAC–008–5, in which only Requirement R7 of the currently effective standard would be proposed for retirement. Reliability Standard FAC–008–5 Requirement R7 requires Generator Owners and Transmission Owners to provide certain information to requesting Reliability Coordinator(s), Planning Coordinator(s), Transmission Planner(s), Transmission Owner(s), and Transmission Operator(s) regarding their Facilities, as follows:

R7. Each Generator Owner shall provide Facility Ratings (for its solely and jointly owned Facilities that are existing Facilities, new Facilities, modifications to existing Facilities and re-ratings of existing Facilities) to its associated Reliability Coordinator(s), Planning Coordinator(s), Transmission Planner(s), Transmission Owner(s) and Transmission Operator(s) as scheduled by such requesting entities.

In the years since Reliability Standard FAC–008–5 was developed, NERC has developed other Reliability Standards that render the data provision obligations of Requirement R7 redundant, Requirement R1 of Reliability Standard TOP–003–3—Operational Reliability Data requires the Transmission Operator to maintain a documented data specification (Requirement R1) and for the Transmission Owner and Generator Owner to provide the requested data (Requirement R5).

*Estimate of Annual Burden:*⁵ The Commission estimates the burden and cost⁶ for this information collection as follows.

PROPOSED CHANGES TO BURDEN DUE TO DOCKET NO. RD21–4–000 ADJUSTMENTS AND CLARIFICATIONS

Reliability standard and requirements	Number of respondents and type of entity (1)	Annual number of responses per respondent (2)	Annual number of responses (1) * (2) = (3)	Average burden hrs. per response (4)	Total annual burden hours (3) * (4) = (5)
RD21–4 Net Changes to FERC–725A, OMB Control No. 1902–0244					
FAC–008–05 (Facility Ratings) ⁷	* 1,003	1	* 1,003	† – 10	† – 10,030

* (No Changes).
† (Reduction).

⁵ Burden is defined as the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. For further

explanation of what is included in the information collection burden, refer to 5 CFR part 1320.

⁶ The Commission staff thinks that the average respondent for this collection is similarly situated

to the Commission, in terms of salary plus benefits. Based on FERC’s 2020 annual average of \$172,329 (for salary plus benefits), the average hourly cost is \$83/hour.

IC21-19-000 Renewal of 725A

The following table represents the current burden associated with all

Mandatory Reliability Standards that fall under FERC-725A.

Reliability standard and requirement	Number of entity ^a	Number of annual responses per entity	Total number of responses	Average number of burden hours per response	Total burden hours
	(1)	(2)	(1) * (2) = (3)	(4)	(3) * (4) = (5)
FERC-725A					
Mandatory Reliability Standards for Bulk Power System	(3,420)	1	3,420	428.86	1,466,716
RD21-4 Net Changes	* 1,003	1	* 1,003	- 10	† - 10,030
Total for FERC-725A					1,456,686

* (No Change).
† (Reduction)

Note: FAC-008-05 is a part of the Bulk Power System burden totals. The net changes for the responses and hours will affect the totals for the row stated

“Mandatory Reliability Standards for Bulk Power System.”
Expanded Table Showing the Mandatory Reliability Standards for Bulk Power System is provided below

The hyperlinks highlighted in blue provide additional information on the individual standards (Requirements, Measurements, and most recent order):

Standard	Name	In-service
FAC-008-5	Facility Ratings	1/1/2013
INT-006-5	Evaluation of Interchange Transactions	4/1/2021
INT-009-3	Implementation of Interchange	4/1/2021
PER-003-2	Operating Personnel Credentials	7/1/2019
PRC-008-0	Implementation and Documentation of Underfrequency Load Shedding Equipment Maintenance Program	6/18/2007
PRC-011-0	Undervoltage Load Shedding System Maintenance and Testing	6/18/2007
PRC-017-1	Remedial Action Scheme Maintenance and Testing	4/1/2017
PRC-018-1	Disturbance Monitoring Equipment Installation and Data Reporting	6/18/2007
TOP-001-5	Transmission Operations	4/1/2021
TOP-002-4	Operations Planning	4/1/2017
TOP-003-4	Operational Reliability Data	4/1/2021
TOP-010-1(i) ...	Real-time Reliability Monitoring and Analysis Capabilities	4/1/2018

Comments: Comments are invited on:
(1) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;
(2) the accuracy of the agency’s estimate of the burden and cost of the collection of information, including the validity of the methodology and assumptions used;
(3) ways to enhance the quality, utility and clarity of the information collection; and
(4) 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.

Dated: August 5, 2021.
Kimberly D. Bose,
Secretary.
[FR Doc. 2021-17129 Filed 8-10-21; 8:45 am]
BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2997-031]

South Sutter Water District; Notice of Intent To Prepare an Environmental Assessment

On July 1, 2019, South Sutter Water District filed an application for a major, new license for the 6.8-megawatt Camp Far West Hydroelectric Project (Camp

Far West Project; FERC No. 2997). The Camp Far West Project is located on the Bear River in Yuba, Nevada, and Placer Counties, California. No federal or tribal lands occur within or adjacent to the project boundary or along the Bear River downstream of the project.

In accordance with the Commission’s regulations, on March 16, 2021, 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. Therefore, staff intends to prepare a draft and final Environmental Assessment (EA) on the

⁷ The type of entity effect is the NERC registered GO = Generator Owners (1,003). This reduction for 725A represent a decrease in burden but the GOs still have other obligations, so the 1,003 is included for information purpose but does not affect the overall number of entities in 725A.

⁸ This is a list of NERC registered entities who under 725A need to follow the NERC Standards.

BA = Balancing Authority (99); DP = Distribution Provider (373); GP = Generator Owner (1,003); Generator Operator (937); PA/PC Planning Authority/Planning Coordinator (65); RC=Reliability Coordinator (11); RP = Resource Planner (160); RSG = Reserve Sharing Group (11); FRSG = Frequency Response Sharing Group (1); TO = Transmission Owner (321); TOP = Transmission Operator (167); TP = Transmission Provided (201);

TSP = Transmission Service Provider (71); for a sum total of (3,420). The same entity may have multiple registration obligation to follow under 725A so an individual entity’s obligation increases based on registration functions. These values were derived from the NERC Compliance data of February 5, 2021 using only unique United States registered entities.

application to relicense the Camp Far West 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 application will be processed according to the following schedule. Revisions to the schedule may be made as appropriate.

Milestone	Target date
Commission issues draft EA	January 2022.
Comments on draft EA	February 2022.
Commission issues final EA	May 2022 ¹

Any questions regarding this notice may be directed to Quinn Emmering at (202) 502-6382 or quinn.emmering@ferc.gov.

Dated: August 5, 2021.

Kimberly D. Bose,
Secretary.

[FR Doc. 2021-17128 Filed 8-10-21; 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:

Docket Numbers: RP21-1016-000.

Applicants: Gulf South Pipeline Company, LLC.

Description: § 4(d) Rate Filing; Cap Rel Neg Rate Agmt (Constellation 54202 to Exelon 54236) to be effective 8/3/2021.

Filed Date: 8/3/21.

Accession Number: 20210803-5034.

Comments Due: 5 p.m. ET 8/16/21.

Docket Numbers: RP21-1017-000.

Applicants: Washington 10 Storage Corporation.

Description: § 4(d) Rate Filing; Filing for Non-Conforming Agreement to be effective 8/3/2021.

Filed Date: 8/3/21.

Accession Number: 20210803-5104.

Comments Due: 5 p.m. ET 8/16/21.

The filings are accessible in the Commission's eLibrary system (<https://elibrary.ferc.gov/idmws/search/>

¹ The Council on Environmental Quality's (CEQ) regulations under 40 CFR 1501.10(b)(1) require that EAs be completed within 1 year of the federal action agency's decision to prepare an EA. This notice establishes the Commission's intent to prepare a draft and final EA for the Camp Far West Project. Therefore, in accordance with CEQ's regulations, the final EA must be issued within 1 year of the issuance date of this notice.

fercgensearch.asp) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Dated: August 5, 2021.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2021-17141 Filed 8-10-21; 8:45 am]

BILLING CODE 6717-01-P

EXPORT-IMPORT BANK

[Public Notice: 2021-3018]

Agency Information Collection Activities: Comment Request

AGENCY: Export-Import Bank of the United States.

ACTION: Submission for OMB review and comments request.

SUMMARY: The Export-Import Bank of the United States (EXIM), as a part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal Agencies to comment on the proposed information collection, as required by the Paperwork Reduction Act of 1995. The collection provides EXIM staff with the information necessary to monitor the borrower's payments for exported goods covered under its short and medium-term export credit insurance policies. It also alerts EXIM staff of defaults, so they can manage the portfolio in an informed manner.

DATES: Comments must be received on or before September 10, 2021 to be assured of consideration.

ADDRESSES: Comments may be submitted electronically on WWW.REGULATIONS.GOV (EIB 92-27) or by mail to Office of Information and Regulatory Affairs, 725 17th Street NW, Washington, DC 20038 Attn: OMB 3048-0027 Form can be viewed at <https://www.exim.gov/sites/default/files/pub/pending/eib92-27.pdf>.

SUPPLEMENTARY INFORMATION:

Title and Form Number: EIB 92-27 Report of Overdue Accounts Under Short-Term Policies.

OMB Number: 3048-0027.

Type of Review: Regular.

Need and Use: The collection provides EXIM staff with the information necessary to monitor the borrower's payments for exported goods covered under its short- and medium term export credit insurance policies. It also alerts EXIM staff of defaults, so they can manage the portfolio in an informed manner.

Affected Public: This form affects entities involved in the export of U.S. goods and services.

Annual Number of Respondents: 745.

Estimated Time per Respondent: 15 minutes.

Annual Burden Hours for Respondents: 186.25 hours.

Frequency of Reporting or Use:

Monthly, until completed.

Government Expenses:

Reviewing Time per Year: 186.25 hours.

Average Wages per Hour: \$42.50.

Average Cost per Year: \$7,915.63 (time * wages).

Benefits and Overhead: 20%.

Total Government Cost: \$9,498.75.

Bassam Doughman,
IT, Specialist.

[FR Doc. 2021-17100 Filed 8-10-21; 8:45 am]

BILLING CODE 6690-01-P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060-0824; FR ID 41837]

Information Collection Being Submitted for Review and Approval to Office of Management and Budget

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Pursuant to the Small Business Paperwork Relief Act of 2002, the FCC seeks specific comment on how it might "further reduce the information collection burden for small business concerns with fewer than 25 employees." The Commission may not conduct or sponsor a collection of

information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written comments and recommendations for the proposed information collection should be submitted on or before September 10, 2021.

ADDRESSES: Comments should be sent to www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function. Your comment must be submitted into www.reginfo.gov per the above instructions for it to be considered. In addition to submitting in www.reginfo.gov also send a copy of your comment on the proposed information collection to Nicole Ongele, FCC, via email to PRA@fcc.gov and to Nicole.Ongele@fcc.gov. Include in the comments the OMB control number as shown in the **SUPPLEMENTARY INFORMATION** below.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection, contact Nicole Ongele at (202) 418–2991. To view a copy of this information collection request (ICR) submitted to OMB: (1) go to the web page <http://www.reginfo.gov/public/do/PRAMain>, (2) look for the section of the web page called “Currently Under Review,” (3) click on the downward-pointing arrow in the “Select Agency” box below the “Currently Under Review” heading, (4) select “Federal Communications Commission” from the list of agencies presented in the “Select Agency” box, (5) click the “Submit” button to the right of the “Select Agency” box, (6) when the list of FCC ICRs currently under review appears, look for the Title of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

SUPPLEMENTARY INFORMATION: As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the FCC invited the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including

whether the information shall have practical utility; (b) the accuracy of the Commission’s burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. Pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the FCC seeks specific comment on how it might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”

OMB Control Number: 3060–0824.

Title: Service Provider and Billed Entity Identification Number and Contact Information Form.

Form Number: FCC Form 498.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit and Not-for-profit institutions.

Number of Respondents and Responses: 26,000 respondents; 26,000 responses.

Estimated Time per Response: 0.75 hours.

Frequency of Response: On occasion reporting requirements.

Obligation To Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 151–154 and 254 the Communications Act of 1934, as amended.

Total Annual Burden: 19,500 hours.

Total Annual Cost: No cost.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: The Commission notes that the Universal Service Administrative Company (USAC) who administers the universal service program must preserve the confidentiality of all data obtained from respondents and contributors to the universal service programs, must not use the data except for purposes of administering the universal service programs, and must not disclose data in company-specific form unless directed to do so by the Commission. With respect to the FCC Form 498, USAC shall publish each participant’s name, SPIN, and contact information via USAC’s website. All other information, including financial institution account numbers or routing information, shall remain confidential.

Needs and Uses: One of the functions of the Universal Service Administrative Company (USAC) is to provide a means for the billing, collection and disbursement of funds for the universal

service support mechanisms. On October 1998, the OMB approved FCC Form 498, the “Service Provider Information Form” to enable USAC to collect service provider name and address, telephone number, Federal Employer Identification Number (EIN), contact names, contact telephone numbers, and remittance information. FCC Form 498 enables participants to request a Service Provider Identification Number (SPIN) and provides the official record for participation in the universal service support mechanisms. The remittance information provided by participants on FCC Form 498 enables USAC to make payments to participants in the universal service support mechanisms.

Pursuant to 47 CFR 54.202, 54.301, 54.303, 54.307, 54.309, 54.311, 54.504, 54.407, 54.422, 54.514, 54.515, 54.679, 54.702, 54.802, and 54.902, USAC collects service provider name, phone numbers, other contact information, and remittance information for all four of the universal service support mechanisms—Schools and Libraries, Rural Health Care, High-Cost and Low-Income (commonly referred to as Lifeline). On July 23, 2014, the Commission released an Order and FNPRM (WC Docket No. 13–184, FCC 14–99; 79 FR 49160, August 19, 2014) (*E-rate Modernization Order*) modernizing the E-rate program. Specifically, the *E-rate Modernization Order* revised the Commission rules to allow an applicant that pays the full cost of the Schools and Libraries (E-rate) supported services to a service provider to receive direct reimbursement from USAC.

The Digital Accountability and Transparency Act (DATA Act) directs Federal agencies to report financial obligations and standardize the information that recipients of federal funds report to government agencies. To comply with the DATA Act, the DATA Act Business Type is reported on FCC Form 498. When completing or updating this form, service providers and billed entities are required to select up to three business types that best describes the organization.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2021–17090 Filed 8–10–21; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1228; FR ID 42331]

Information Collection Being Reviewed by the Federal Communications Commission**AGENCY:** Federal Communications Commission.**ACTION:** Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act 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 October 12, 2021. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicole Ongele, FCC, via email PRA@fcc.gov and to Nicole.Ongele@fcc.gov.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Nicole Ongele, (202) 418–2991.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1228.
Title: Connect America Fund—High Cost Portal Filing.

Form Number: N/A.*Type of Review:* Revision of a currently approved collection.*Respondents:* Business or other for-profit, not-for-profit institutions.*Number of Respondents and Responses:* 2,024 unique respondents; 4,644 responses.*Estimated Time per Response:* 8 hours–60 hours.*Frequency of Response:* On occasion, quarterly reporting requirements, annual reporting requirements, and recordkeeping requirement.*Obligation to Respond:* Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 151–154, 155, 201–206, 214, 218–220, 251, 252, 254, 256, 303(r), 332, 403, 405, 410, and 1302.*Total Annual Burden:* 86,727 hours.*Total Annual Cost:* No cost.*Privacy Act Impact Assessment:* No impact(s).

Nature and Extent of Confidentiality: Except for the middle-mile maps for Alaska Plan carriers, and the coverage maps and information for Uniendo a Puerto Rico Fund and Connect USVI Fund Stage 2 mobile support recipients, the Commission is not requesting respondents to submit confidential information to the Commission. We note that the Universal Service Administrative Company (USAC) must preserve the confidentiality of all data obtained from respondents and contributors to the universal service support program mechanism; must not use the data except for purposes of administering the universal service support program; and must not disclose data in company-specific form unless directed to do so by the Commission. Also, respondents may request materials or information submitted to the Commission or to the Administrator believed confidential to be withheld from public inspection under 47 CFR 0.459 of the FCC's rules.

Needs and Uses: Through several orders, the Commission has recently changed or modified reporting obligations for high-cost support. Pursuant to the following orders, this collection includes location reporting and related certification requirements of high-cost support recipients: *Connect America Fund et al.*, Report and Order, Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, 31 FCC Rcd 3087 (2016) (*2016 Rate-of-Return Order*); *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 5949 (2016) (*Phase II Auction Order*); *Connect America Fund et al.*, Order, 31 FCC Rcd

12086 (2016) (*ACS Phase II Order*); *Connect America Fund et al.*, Report and Order and Notice of Proposed Rulemaking, 29 FCC Rcd 876 (2014) (*Rural Broadband Experiments Order*); *Connect America Fund et al.*, Report and Order, 29 FCC Rcd 15644 (2014) (*Price Cap Order*); *Technology Transitions et al.*, Order et al., 29 FCC Rcd 1433 (2014) (*Tech Transitions Order*); *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 10139 (2016) (*Alaska Plan Order*); *Connect America Fund et al.*, Order, 32 FCC Rcd 968 (2017) (*New York Auction Order*); *Connect America Fund et al.*, Report and Order, Further Notice of Proposed Rulemaking, and Order on Reconsideration, 33 FCC Rcd 11–893 (2018) (*2018 Rate-of-Return Order*); *Uniendo a Puerto Rico and Connect USVI Fund et al.*, Report and Order and Order on Reconsideration, 34 FCC Rcd 9109 (2019) (*PR-USVI Stage 2 Order*); *Rural Digital Opportunity Fund et al.*, Report and Order, 35 FCC Rcd 686 (2020) (*2020 Rural Digital Opportunity Fund Order*).

This information collection addresses the requirement that certain carriers with high-cost reporting obligations must file information about the locations to which they have deployed broadband service meeting applicable public interest requirements (location information). A web-based portal, the High-Cost Universal Broadband Portal (HUBB or portal), is used to accept this information. The Commission and USAC will use this information to monitor the deployment progress of reporting carriers and to verify the reporting carriers' claims of service at the reported locations. Such activities help the Commission ensure that support is being used as intended. In addition, because data filed in the HUBB is publicly accessible, the reporting helps ensure public accountability and transparency.

In the *2019 PR-USVI Stage 2 Order*, the Commission created a competitive process to determine support recipients for the Commonwealth of Puerto Rico and the U.S. Virgin Islands. As a result, carriers receiving support in these areas are subject to specific public interest obligations related to speed, usage, latency, and price as well as certain deployment milestones. Specifically, the Commission imposed defined deployment obligations and associated HUBB reporting requirements (annual location reporting and build-out certifications) for all Uniendo a Puerto Rico Fund and Connect USVI Fund Stage 2 fixed support recipients as well as annual reporting and certification

requirements for all Uniendo a Puerto Rico Fund and Connect USVI Fund Stage 2 mobile support recipients.

Uniendo a Puerto Rico Fund and Connect USVI Fund Stage 2 mobile support recipients will also file network coverage and other data as required by the Commission's orders. The Commission and USAC will use this information to monitor the deployment progress of mobile carriers and to verify that carriers meet the public interest obligations for 4G LTE and 5G mobile broadband and voice services in the Commonwealth of Puerto Rico and the U.S. Virgin Islands. Instead of filing in the HUBB portal, mobile support recipients will submit their reports electronically as part of a web form accessed via the Commission's Form 477 portal (477 Portal) and the Electronic Comment Filing System (ECFS). This collection mechanism is being used to reduce the technological burden on the public and the Commission, as carriers and the public are familiar with both of these systems. The Commission's Wireline Competition Bureau (WCB) will specify the filing process by which Stage 2 mobile support recipients must file their reports in the 477 Portal prior to the filing deadlines.

In the *2020 Rural Digital Opportunity Fund Order*, the Commission adopted a support mechanism to provide funding through a competitive auction to connect rural homes and businesses to high-speed broadband networks. The Commission established specific public interest obligations and deployment milestones for all carriers receiving this support. Specifically, the Commission imposed defined deployment obligations and associated HUBB reporting requirements (annual location reporting and build-out certifications) for all support recipients. We therefore propose to revise this information collection. Finally, we propose to increase the burdens associated with existing and new reporting requirements to account for additional carriers that will be subject to these requirements.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2021-17114 Filed 8-10-21; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL COMMUNICATIONS COMMISSION

[FR ID: 42435]

Privacy Act of 1974; Matching Program

AGENCY: Federal Communications Commission.

ACTION: Notice of a new matching program.

SUMMARY: In accordance with the Privacy Act of 1974, as amended ("Privacy Act"), this document announces the establishment of a computer matching program the Federal Communications Commission ("FCC" or "Commission" or "Agency") and the Universal Service Administrative Company (USAC) will conduct with the Mississippi Department of Human Services (Department). The purpose of this matching program is to verify the eligibility of applicants to and subscribers of the Emergency Broadband Benefit Program, which is administered by USAC under the direction of the FCC, or other federal programs that use qualification for the FCC's Lifeline Program as an eligibility criterion. More information about this program is provided in the **SUPPLEMENTARY INFORMATION** section below.

DATES: Written comments are due on or before September 10, 2021. This computer matching program will commence on September 10, 2021, and will conclude 18 months after becoming effective.

ADDRESSES: Send comments to Margaret Drake, FCC, 45 L Street NE, Washington, DC 20554, or to Privacy@fcc.gov.

FOR FURTHER INFORMATION CONTACT: Margaret Drake at 202-417-1707 or Privacy@fcc.gov.

SUPPLEMENTARY INFORMATION: The Emergency Broadband Benefit Program (EBBP) was established by Congress in the Consolidated Appropriations Act of 2021, Public Law 116-260, 134 Stat. 1182. EBBP is a program that helps low-income Americans obtain discounted broadband service and one-time co-pay for a connected device (laptop, desktop computer or tablet). This program was created specifically to assist American families' access to broadband, which has proven to be essential for work, school, and healthcare during the public health emergency that exists as a result of COVID-19. A household may qualify for the EBBP benefit under various criteria, including an individual qualifying for the FCC's Lifeline program.

In a Report and Order adopted on March 31, 2016, the Commission ordered USAC to create a National

Lifeline Eligibility Verifier ("National Verifier"), including the National Lifeline Eligibility Database (LED), that would match data about Lifeline applicants and subscribers with other data sources to verify the eligibility of an applicant or subscriber. The Commission found that the National Verifier would reduce compliance costs for Lifeline service providers, improve service for Lifeline subscribers, and reduce waste, fraud, and abuse in the program. The Consolidated Appropriations Act of 2021 directs the FCC to leverage the National Verifier to verify applicants' eligibility for EBBP. The purpose of this matching program is to verify the eligibility of EBBP applicants and subscribers by determining whether they receive Supplemental Nutrition Assistance Program (SNAP) benefits administered by the Mississippi Department. Under FCC rules, consumers receiving these benefits qualify for Lifeline discounts and also for EBBP benefits.

Participating Non-Federal Agencies

Mississippi Department of Human Services (Department).

Authority for Conducting the Matching Program

Consolidated Appropriations Act of 2021, Public Law 116-260, 134 Stat. 1182; 47 CFR part 54.

Purpose(s)

In the 2016 Lifeline Modernization Order, the FCC required USAC to develop and operate the National Verifier to improve efficiency and reduce waste, fraud, and abuse in the Lifeline program. The stated purpose of the National Verifier is "to increase the integrity and improve the performance of the Lifeline program for the benefit of a variety of Lifeline participants, including Lifeline providers, subscribers, states, community-based organizations, USAC, and the Commission." 31 FCC Rcd 3962, 4006, para. 126. To help determine whether Lifeline applicants and subscribers are eligible for Lifeline benefits, the Order contemplates that the USAC-operated LED will communicate with information systems and databases operated by other Federal and State agencies. *Id.* at 4011-2, paras. 135-7.

The Consolidated Appropriations Act of 2021 directs the FCC to leverage the National Verifier to verify applicants' eligibility for EBBP. The purpose of this matching program is to verify the eligibility of EBBP applicants and subscribers by determining whether they receive SNAP benefits administered by the Mississippi

Department. Under FCC rules, consumers receiving these benefits qualify for Lifeline discounts and also for EBBP benefits.

Categories of Individuals

The categories of individuals whose information is involved in the matching program include, but are not limited to, those individuals who have applied for EBBP benefits; are currently receiving benefits; are individuals who enable another individual in their household to qualify for EBBP benefits; are minors whose status qualifies a parent or guardian for EBBP benefits; or are individuals who have received EBBP benefits.

Categories of Records

The categories of records involved in the matching program include, but are not limited to first and last name, date of birth and the last four digits of the applicant's Social Security Number. The National Verifier will transfer these data elements to the Mississippi Department, which will respond either "yes" or "no" that the individual is enrolled in an EBBP-qualifying assistance program: State of Mississippi's SNAP and Medicaid.

System(s) of Records

The USAC records shared as part of this matching program reside in the EBBP system of records, FCC/WCB-3, Emergency Broadband Benefit Program, which was published in the **Federal Register** at 86 FR 11523 (Feb. 25, 2021).

Federal Communications Commission.

Katura Jackson,

Federal Register Liaison Officer.

[FR Doc. 2021-17278 Filed 8-9-21; 4:15 pm]

BILLING CODE 6712-01-P

FEDERAL COMMUNICATIONS COMMISSION

[FR ID: 42433]

Privacy Act of 1974; Matching Program

AGENCY: Federal Communications Commission.

ACTION: Notice of a computer matching program.

SUMMARY: In accordance with the Privacy Act of 1974, as amended ("Privacy Act"), this document announces the notice of a computer matching program the Federal Communications Commission ("FCC" or "Commission" or "Agency") and the Universal Service Administrative Company (USAC) will conduct with the U.S. Department of Housing and Urban Development (HUD) ("Agency"). The

purpose of this matching program is to verify the eligibility of applicants to and subscribers of Lifeline (existing purpose) and the new Emergency Broadband Benefit Program, both of which are administered by USAC under the direction of the FCC. More information about these programs is provided in the **SUPPLEMENTARY INFORMATION** section below.

DATES: Written comments are due on or before September 10, 2021. This computer matching program will commence on September 10, 2021, and will conclude 18 months after the effective date.

ADDRESSES: Send comments to Margaret Drake, FCC, 45 L Street NE, Washington, DC 20554, or to Privacy@fcc.gov.

FOR FURTHER INFORMATION CONTACT: Margaret Drake at 202-418-1707 or Privacy@fcc.gov.

SUPPLEMENTARY INFORMATION:

The Lifeline program provides support for discounted broadband and voice services to low-income consumers. Lifeline is administered by the Universal Service Administrative Company (USAC) under FCC direction. Consumers qualify for Lifeline through proof of income or participation in a qualifying program, such as Medicaid, the Supplemental Nutritional Assistance Program (SNAP), Federal Public Housing Assistance, Supplemental Security Income (SSI), Veterans and Survivors Pension Benefit, or various Tribal-specific federal assistance programs.

The Emergency Broadband Benefit Program (EBBP) was established by Congress in the Consolidated Appropriations Act of 2021, Public Law 116-260, 134 Stat. 1182. EBBP is a program that helps low-income Americans obtain discounted broadband service and one-time co-pay for a connected device (laptop, desktop computer or tablet). This program was created specifically to assist American families' access to broadband, which has proven to be essential for work, school, and healthcare during the public health emergency that exists as a result of COVID-19. A household may qualify for the EBBP benefit under various criteria, including an individual qualifying for the FCC's Lifeline program.

In a Report and Order adopted on March 31, 2016, the Commission ordered USAC to create a National Lifeline Eligibility Verifier ("National Verifier"), including the National Lifeline Eligibility Database (LED), that would match data about Lifeline applicants and subscribers with other data sources to verify the eligibility of

an applicant or subscriber. The Commission found that the National Verifier would reduce compliance costs for Lifeline service providers, improve service for Lifeline subscribers, and reduce waste, fraud, and abuse in the program.

The Consolidated Appropriations Act of 2021 directs the FCC to leverage the National Verifier to verify applicants' eligibility for EBBP. The purpose of this matching program is to verify the eligibility of EBBP applicants and subscribers by determining whether they receive Federal Public Housing Assistance benefits administered by the HUD. Persons receiving these benefits qualify for Lifeline discounts and also for EBBP benefits.

Participating Non-Federal Agencies

U.S. Department of Housing and Urban Development.

Authority for Conducting the Matching Program

The authority for the FCC's EBBP is Consolidated Appropriations Act of 2021, Public Law 116-260, 134 Stat. 1182; 47 CFR part 54. The authority for the FCC's Lifeline program is 47 U.S.C. 254; 47 CFR 54.400 *et seq.*; Lifeline and Link Up Reform and Modernization, *et al.*, Third Report and Order, Further Report and Order, and Order on Reconsideration, 31 FCC Rcd 3962, 4006-21, paras. 126-66 (2016) (*2016 Lifeline Modernization Order*).

Purpose(s)

In the 2016 Lifeline Modernization Order, the FCC required USAC to develop and operate the National Verifier to improve efficiency and reduce waste, fraud, and abuse in the Lifeline program. The stated purpose of the National Verifier is "to increase the integrity and improve the performance of the Lifeline program for the benefit of a variety of Lifeline participants, including Lifeline providers, subscribers, states, community-based organizations, USAC, and the Commission." 31 FCC Rcd 3962, 4006, para. 126. To help determine whether Lifeline applicants and subscribers are eligible for Lifeline benefits, the Order contemplates that the USAC-operated LED will communicate with information systems and databases operated by other Federal and State agencies. *Id.* at 4011-2, paras. 135-7. The Consolidated Appropriations Act of 2021 directs the FCC to leverage the National Verifier to verify applicants' eligibility for EBBP.

The purpose of this matching agreement is to verify the eligibility of applicants and subscribers to Lifeline (existing purpose), as well as to the new

EBBP and to other Federal programs that use qualification for Lifeline as an eligibility criterion. This new agreement would replace the existing agreement with HUD, which permits matching only for the Lifeline program by checking an applicant's/subscriber's participation in Federal Public Housing Assistance. Under FCC rules, consumers receiving these benefits qualify for Lifeline discounts and also for EBBP benefits.

Categories of Individuals

The categories of individuals whose information is involved in the matching program include, but are not limited to, those individuals who have applied for Lifeline and/or EBBP benefits; are currently receiving Lifeline and/or EBBP benefits; are individuals who enable another individual in their household to qualify for Lifeline and/or EBBP benefits; are minors whose status qualifies a parent or guardian for Lifeline and/or EBBP benefits; or are individuals who have received Lifeline and/or EBBP benefits.

Categories of Records

The categories of records involved in the matching program include, but are not limited to, the last four digits of the applicant's Social Security Number, date of birth, state of residence, and first name and last name. The National Verifier will transfer these data elements to the Department of Housing and Urban Development which will respond either "yes" or "no" that the individual is enrolled in a qualifying assistance program: Department of Housing and Urban Development, Federal Public Housing Assistance.

System(s) of Records

The records shared as part of this matching program reside in the Lifeline system of records, FCC/WCB-1, Lifeline, which was published in the **Federal Register** at 86 FR 11526 (Feb. 25, 2021).

The records shared as part of this matching program reside in the EBBP system of records, FCC/WCB-3, Emergency Broadband Benefit Program, which was published in the **Federal Register** at 86 FR 11523 (Feb. 25, 2021). Federal Communications Commission.

Katura Jackson,

Federal Register Liaison Officer.

[FR Doc. 2021-17280 Filed 8-9-21; 4:15 pm]

BILLING CODE 6712-01-P

FEDERAL MARITIME COMMISSION

Notice of Agreement Filed

The Commission hereby gives notice of the filing of the following agreement under the Shipping Act of 1984.

Interested parties may submit comments, relevant information, or documents regarding the agreement to the Secretary by email at Secretary@fmc.gov, or by mail, Federal Maritime Commission, 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**. Copies of agreement 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.: 012248-001.

Agreement Name: MOL/NMCC Joint Operating Agreement.

Parties: Mitsui O.S.K. Lines, Ltd.; and Nissan Motor Car Carrier Co., Ltd.

Filing Party: Rebecca Fenneman; Jeffrey/Fenneman Law and Strategy PLLC.

Synopsis: The amendment would remove World Logistics Service (U.S.A.) Inc. as a party to the agreement and conform the language to reflect its removal; revise MOL's ownership of NMCC; correct a typographical error; and remove the authority to jointly negotiate with tug or towing vessel service providers on any matter relating to rates or services provided within the United States by those tugs or towing vessels.

Proposed Effective Date: 9/17/2021.

Location: <https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/304>.

Dated: August 5, 2021.

Rachel E. Dickon,

Secretary.

[FR Doc. 2021-17110 Filed 8-10-21; 8:45 am]

BILLING CODE 6730-02-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket No. CDC-2021-0084]

Advisory Committee on Immunization Practices (ACIP)

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice of meeting and request for comment.

SUMMARY: In accordance with the Federal Advisory Committee Act, the Centers for Disease Control and Prevention (CDC), announces the following meeting of the Advisory Committee on Immunization Practices (ACIP). This meeting is open to the public. The meeting will be webcast live via the World Wide Web. A notice of this ACIP meeting has also been posted on CDC's ACIP website at: <http://www.cdc.gov/vaccines/acip/index.html>. In addition, CDC has sent notice of this ACIP meeting by email to those who subscribe to receive email updates about ACIP.

DATES: The meeting will be held on August 13, 2021, from 11:00 a.m. to 2:00 p.m., EDT (dates and times subject to change), see the ACIP website for updates: <http://www.cdc.gov/vaccines/acip/index.html>. The public may submit written comments from August 11, 2021 through August 13, 2021.

ADDRESSES: You may submit comments, identified by Docket No. CDC-2021-0084 by any of the following methods:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments.
- **Mail:** Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS H24-8, Atlanta, Georgia 30329-4027; Attn: August 13, 2021 ACIP Meeting.

Instructions: All submissions received must include the Agency name and Docket Number. All relevant comments received in conformance with the <https://www.regulations.gov> suitability policy will be posted without change to <https://www.regulations.gov>, including any personal information provided. For access to the docket to read background documents or comments received, go to <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT:

Stephanie Thomas, ACIP Committee Management Specialist, Centers for Disease Control and Prevention, National Center for Immunization and Respiratory Diseases, 1600 Clifton Road NE, MS-H24-8, Atlanta, Georgia 30329-4027; Telephone: (404) 639-8367; Email: ACIP@cdc.gov.

SUPPLEMENTARY INFORMATION: In accordance with 41 CFR 102-3.150(b), less than 15 calendar days' notice is being given for this meeting due to the exceptional circumstances of the COVID-19 pandemic and rapidly evolving COVID-19 vaccine development and regulatory processes. A notice of this ACIP meeting has also been posted on CDC's ACIP website at: <http://www.cdc.gov/vaccines/acip/index.html>. In addition, CDC has sent notice of this ACIP meeting by email to

those who subscribe to receive email updates about ACIP.

Purpose: The committee is charged with advising the Director, CDC, on the use of immunizing agents. In addition, under 42 U.S.C. 1396s, the committee is mandated to establish and periodically review and, as appropriate, revise the list of vaccines for administration to vaccine-eligible children through the Vaccines for Children (VFC) program, along with schedules regarding dosing interval, dosage, and contraindications to administration of vaccines. Further, under provisions of the Affordable Care Act, section 2713 of the Public Health Service Act, immunization recommendations of the ACIP that have been approved by the Director of the Centers for Disease Control and Prevention and appear on CDC immunization schedules must be covered by applicable health plans.

Matters To Be Considered: The agenda will include discussions on additional doses of COVID-19 vaccine, including booster doses. A recommendation vote is scheduled. Agenda items are subject to change as priorities dictate. For more information on the meeting agenda visit <https://www.cdc.gov/vaccines/acip/meetings/meetings-info.html>.

Meeting Information: The meeting will be webcast live via the World Wide Web; for more information on ACIP please visit the ACIP website: <http://www.cdc.gov/vaccines/acip/index.html>.

Public Participation

Interested persons or organizations are invited to participate by submitting written views, recommendations, and data. Please note that comments received, including attachments and other supporting materials, are part of the public record and are subject to public disclosure. Comments will be posted on <https://www.regulations.gov>. Therefore, do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure. If you include your name, contact information, or other information that identifies you in the body of your comments, that information will be on public display. CDC will review all submissions and may choose to redact, or withhold, submissions containing private or proprietary information such as Social Security numbers, medical information, inappropriate language, or duplicate/near duplicate examples of a mass-mail campaign. CDC will carefully consider all comments submitted into the docket.

Written Public Comment: Written comments must be received on or before August 13, 2021.

Oral Public Comment: This meeting will include time for members of the public to make an oral comment. Oral public comment will occur before any scheduled votes including all votes relevant to the ACIP's Affordable Care Act and Vaccines for Children Program roles. Priority will be given to individuals who submit a request to make an oral public comment before the meeting according to the procedures below.

Procedure for Oral Public Comment: All persons interested in making an oral public comment at the August 13, 2021, ACIP meeting must submit a request at <http://www.cdc.gov/vaccines/acip/meetings/> no later than 11:59 p.m., EDT, August 11, 2021, according to the instructions provided.

If the number of persons requesting to speak is greater than can be reasonably accommodated during the scheduled time, CDC will conduct a lottery to determine the speakers for the scheduled public comment session. CDC staff will notify individuals regarding their request to speak by email by 12:00 p.m., EDT, August 12, 2021. To accommodate the significant interest in participation in the oral public comment session of ACIP meetings, each speaker will be limited to 3 minutes, and each speaker may only speak once per meeting.

The Director, Strategic Business Initiatives Unit, 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, Strategic Business Initiatives Unit,
Office of the Chief Operating Officer, Centers
for Disease Control and Prevention.

[FR Doc. 2021-17266 Filed 8-9-21; 4:15 pm]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Screening Tool for Unaccompanied Children Program Staff and Visitors (0970-0543)

AGENCY: Office of Refugee Resettlement, Administration for Children and Families, Department of Health and Human Services.

ACTION: Request for public comment.

SUMMARY: The Office of Refugee Resettlement (ORR), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS), is proposing to continue use of a coronavirus (COVID-19) screening tool for unaccompanied children (UC) program staff and visitors at ORR care provider facilities.

DATES: *Comments due within 60 days of publication.* In compliance with the requirements of the Paperwork Reduction Act of 1995, ACF is soliciting public comment on the specific aspects of the information collection described above.

ADDRESSES: Copies of the proposed collection of information can be obtained and comments may be forwarded by emailing infocollection@acf.hhs.gov. Alternatively, copies can also be obtained by writing to the Administration for Children and Families, Office of Planning, Research, and Evaluation (OPRE), 330 C Street SW, Washington, DC 20201, Attn: ACF Reports Clearance Officer. All requests, emailed or written, should be identified by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: The COVID-19 Verbal Screening and Temperature Check tool is verbally administered to all staff and visitors before they are granted access an ORR care provider facility. The tool asks whether the individual displays COVID-19 symptoms, has had close contact with individuals known to test positive for COVID-19, has been tested for COVID-19, has been exposed to someone known or suspected to be infected with COVID-19, or has been tested for COVID-19. The tool also requests a temperature check. The information collected by administering this screening tool will help ensure the health and safety of children and staff at care provider facilities by helping to identify and reduce potential exposure to COVID-19.

Respondents: Staff and visitors at ORR care provider programs.

ANNUAL BURDEN ESTIMATES

Instrument	Total number of respondents	Annual responses per respondent	Average burden hours per response	Annual burden hours
COVID-19 Verbal Screening and Temperature Check	15,000	260	.033	128,700

Comments: The Department specifically requests comments on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Authority: 6 U.S.C. 279.

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2021-17255 Filed 8-9-21; 4:15 pm]

BILLING CODE 4184-45-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2021-N-0008]

Request for Nominations for Individuals and Consumer Organizations for Advisory Committees

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is requesting that any consumer organizations interested in participating in the selection of voting and/or nonvoting consumer representatives to serve on its advisory committees or panels notify FDA in writing. FDA is also requesting nominations for voting and/or nonvoting consumer representatives to serve on advisory committees and/or panels for which vacancies currently exist or are expected to occur in the near future. Nominees recommended to serve as a voting or nonvoting consumer representative may be self-nominated or may be nominated by a consumer organization. FDA seeks to include the views of women and men, members of all racial and ethnic groups, and individuals with and without disabilities on its advisory committees and, therefore, encourages nominations of appropriately qualified candidates from these groups.

DATES: Any consumer organization interested in participating in the selection of an appropriate voting or nonvoting member to represent consumer interests on an FDA advisory committee or panel may send a letter or email stating that interest to FDA (see **ADDRESSES**) by September 27, 2021, for vacancies listed in this notice. Concurrently, nomination materials for prospective candidates should be sent to FDA (see **ADDRESSES**) by September 27, 2021. Nominations will be accepted for current vacancies and for those that will or may occur through December 31, 2021.

ADDRESSES: All statements of interest from consumer organizations interested in participating in the selection process should be submitted electronically to ACOMSSubmissions@fda.hhs.gov or by mail to Advisory Committee Oversight and Management Staff, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 5122, Silver Spring, MD 20993-0002.

Consumer representative nominations should be submitted electronically by logging into the FDA Advisory Committee Membership Nomination Portal: <https://www.accessdata.fda.gov/scripts/FACTRSPortal/FACTRS/index.cfm>, or by mail to Advisory Committee Oversight and Management Staff, 10903 New Hampshire Ave., Bldg. 32, Rm. 5122, Silver Spring, MD 20993-0002. Additional information about becoming a member of an FDA advisory committee can also be obtained by visiting FDA's website at <https://www.fda.gov/AdvisoryCommittees/default.htm>.

FOR FURTHER INFORMATION CONTACT: *For questions relating to participation in the selection process:* Kimberly Hamilton, Advisory Committee Oversight and Management Staff, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 5122, Silver Spring, MD 20993-0002, 301-796-8220, kimberly.hamilton@fda.hhs.gov.

For questions relating to specific advisory committees or panels, contact the appropriate Contact Person listed in table 1.

TABLE 1—ADVISORY COMMITTEE CONTACTS

Contact person	Committee/panel
Rakesh Raghuwanshi, Office of the Chief Scientist, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 1, Rm. 3309, Silver Spring, MD 20993-0002, 301-796-4769, Rakesh.Raghuwanshi@fda.hhs.gov .	FDA Science Board Advisory Committee.
Christina Vert, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 6268, Silver Spring, MD 20993-0002, 240-402-8054, Christina.Vert@fda.hhs.gov .	Blood Products Advisory Committee.
Jarrod Collier, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Silver Spring, MD 20993-0002, 202-906-0043, Jarrod.Collier@fda.hhs.gov .	Cellular, Tissue and Gene Therapies Advisory Committee.

TABLE 1—ADVISORY COMMITTEE CONTACTS—Continued

Contact person	Committee/panel
Kathleen Hayes, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 6307C, Silver Spring, MD 20993-0002, 301-796-7864, Kathleen.Hayes@fda.hhs.gov .	Allergens Products Advisory Committee, Vaccines and Related Biological Products Advisory Committee.
Yvette Waples, Center for Drugs Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2510, Silver Spring, MD 20993-0002, 301-796-9034, Yvette.Waples@fda.hhs.gov .	Gastrointestinal Drugs Advisory Committee, Pharmaceutical Science and Clinical Pharmacology Advisory Committee, Psychopharmacologic Drugs Advisory Committee.
James Swink, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5211, Silver Spring, MD 20993-0002, 301-796-6313, James.Swink@fda.hhs.gov .	Anesthesiology and Respiratory Therapy Devices Panel, Circulatory Systems Devices Panel, Dental Products Devices Panel, General Hospital and Personal Use Devices Panel, Hematology and Pathology Devices Panel, Radiological Devices Panel.
Patricio Garcia, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5216, Silver Spring, MD 20993-0002, 301-796-6875, Patricio.Garcia@fda.hhs.gov .	Clinical Chemistry and Clinical Toxicology Devices Panel, Gastroenterology and Urology Devices Panel, General and Plastic Surgery Devices Panel, Obstetrics and Gynecology Devices Panel.
Aden Asefa, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5214, Silver Spring, MD 20993-0002, 301-796-0400, Aden.Asefa@fda.hhs.gov .	Immunology Devices Panel, Microbiology Devices Panel, Molecular and Clinical Genetics Devices Panel, Neurological Devices Panel.
Aden Asefa, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5214, Silver Spring, MD 20993-0002, 301-796-0400, Aden.Asefa@fda.hhs.gov .	National Mammography Quality Assurance Advisory Committee.
Letise Williams, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5407, Silver Spring, MD 20993-0002, 301-796-8398, Letise.Williams@fda.hhs.gov .	Patient Engagement Advisory Committee.

SUPPLEMENTARY INFORMATION: FDA is or nonvoting consumer representatives requesting nominations for voting and/ for the vacancies listed in table 2:

TABLE 2—COMMITTEE DESCRIPTIONS, TYPE OF CONSUMER REPRESENTATIVE VACANCY, AND APPROXIMATE DATE NEEDED

Committee/panel/areas of expertise needed	Type of vacancy	Approximate date needed
FDA Science Board Advisory Committee—The Science Board provides advice to the Commissioner of Food and Drugs (Commissioner) and other appropriate officials on specific complex scientific and technical issues important to FDA and its mission, including emerging issues within the scientific community. Additionally, the Science Board provides advice that supports the Agency in keeping pace with technical and scientific developments, including in regulatory science; and input into the Agency's research agenda, and on upgrading its scientific and research facilities and training opportunities. It also provides, where requested, expert review of Agency-sponsored intramural and extramural scientific research programs.	1—Voting	Immediately.
Blood Products Advisory Committee—Knowledgeable in the fields of clinical and administrative medicine, hematology, immunology, blood banking, surgery, internal medicine, biochemistry, engineering, biological and physical sciences, biotechnology, computer technology, statistics, epidemiology, sociology/ethics, and other related professions.	1—Voting	October 1, 2021.
Cellular, Tissue and Gene Therapies Advisory Committee—Knowledgeable in the fields of cellular therapies, tissue transplantation, gene transfer therapies and xenotransplantation (biostatistics, bioethics, hematology/oncology, human tissues and transplantation, reproductive medicine, general medicine, and various medical specialties, including surgery and oncology, immunology, virology, molecular biology, cell biology, developmental biology, tumor biology, biochemistry, rDNA technology, nuclear medicine, gene therapy, infectious diseases, and cellular kinetics).	1—Voting	Immediately.
Allergens Products Advisory Committee—Knowledgeable in the fields of allergy, immunology, pediatrics, internal medicine, biochemistry, and related specialties.	1—Voting	September 1, 2021.
Vaccines and Related Biologic Advisory Committee—Knowledgeable in the fields of immunology, molecular biology, rDNA, virology, bacteriology, epidemiology or biostatistics, allergy, preventive medicine, infectious diseases, pediatrics, microbiology, and biochemistry.	1—Voting	Immediately.
Gastrointestinal Drugs Advisory Committee—Knowledgeable in the fields of gastroenterology, endocrinology, surgery, clinical pharmacology, physiology, pathology, liver function, motility, esophagitis, and statistics.	1—Voting	July 1, 2021.
Pharmaceutical Science and Clinical Pharmacology Advisory Committee—Knowledgeable in the fields of pharmaceutical manufacturing, clinical pharmacology, pharmacokinetics, bioavailability and bioequivalence research, the design and evaluation of clinical trials, laboratory analytical techniques, pharmaceutical chemistry, physiochemistry, biochemistry, biostatistics, and related biomedical and pharmacological specialties.	1—Voting	November 1, 2021.

TABLE 2—COMMITTEE DESCRIPTIONS, TYPE OF CONSUMER REPRESENTATIVE VACANCY, AND APPROXIMATE DATE NEEDED—Continued

Committee/panel/areas of expertise needed	Type of vacancy	Approximate date needed
Psychopharmacologic Drugs Advisory Committee—Knowledgeable in the fields of psychopharmacology, psychiatry, epidemiology or statistics, and related specialties.	1—Voting	Immediately.
Anesthesiology and Respiratory Therapy Devices Panel—Anesthesiologists, pulmonary medicine specialists, or other experts who have specialized interests in ventilator support, pharmacology, physiology, or the effects and complications of anesthesia.	1—Nonvoting	December 1, 2021.
Circulatory Systems Devices Panel—Interventional cardiologists, electrophysiologists, invasive (vascular) radiologists, vascular and cardiothoracic surgeons, and cardiologists with special interest in congestive heart failure.	1—Nonvoting	Immediately.
Dental Products Devices Panel—Dentists, engineers, and scientists who have expertise in the areas of dental implants, dental materials, periodontology, tissue engineering, and dental anatomy.	1—Nonvoting	Immediately.
General Hospital and Personal Use Devices Panel—Internists, pediatricians, neonatologists, endocrinologists, gerontologists, nurses, biomedical engineers, or microbiologists/infection control practitioners or experts.	1—Nonvoting	Immediately.
Hematology and Pathology Devices Panel—Hematologists (benign and/or malignant hematology), hematopathologists (general and special hematology, coagulation and hemostasis, and hematological oncology), gynecologists with special interests in gynecological oncology, cytopathologists, and molecular pathologists with special interests in development of predictive biomarkers.	1—Nonvoting	Immediately.
Radiological Devices Panel—Physicians with experience in general radiology, mammography, ultrasound, magnetic resonance, computed tomography, other radiological subspecialties and radiation oncology; scientists with experience in diagnostic devices, radiation physics, statistical analysis, digital imaging, and image analysis.	1—Nonvoting	Immediately.
Clinical Chemistry and Clinical Toxicology Devices Panel—Doctor of Medicine or Philosophy with experience in clinical chemistry (e.g., cardiac markers), clinical toxicology, clinical pathology, clinical laboratory medicine, and endocrinology.	1—Nonvoting	Immediately.
Gastroenterology and Urology Devices Panel—Gastroenterologists, urologists, and nephrologists.	1—Nonvoting	Immediately.
General and Plastic Surgery Devices Panel—Surgeons (general, plastic, reconstructive, pediatric, thoracic, abdominal, pelvic, and endoscopic); dermatologists; experts in biomaterials, lasers, wound healing, and quality of life; and biostatisticians.	1—Nonvoting	Immediately.
Obstetrics and Gynecology Devices Panel—Experts in perinatology, embryology, reproductive endocrinology, pediatric gynecology, gynecological oncology, operative hysteroscopy, pelviscopy, electrosurgery, laser surgery, assisted reproductive technologies, contraception, postoperative adhesions, and cervical cancer and colposcopy; biostatisticians and engineers with experience in obstetrics/gynecology devices; urogynecologists; experts in breast care; experts in gynecology in the older patient; experts in diagnostic (optical) spectroscopy; experts in midwifery; labor and delivery nursing.	1—Nonvoting	Immediately.
Immunology Devices Panel—Persons with experience in medical, surgical, or clinical oncology, internal medicine, clinical immunology, allergy, molecular diagnostics, or clinical laboratory medicine.	1—Nonvoting	Immediately.
Microbiology Devices Panel—Clinicians with an expertise in infectious disease, e.g., pulmonary disease specialists, sexually transmitted disease specialists, pediatric infectious disease specialists, experts in tropical medicine and emerging infectious diseases, mycologists; clinical microbiologists and virologists; clinical virology and microbiology laboratory directors, with expertise in clinical diagnosis and in vitro diagnostic assays, e.g., hepatologists; molecular biologists.	1—Nonvoting	Immediately.
Molecular and Clinical Genetics Devices Panel—Experts in human genetics and in the clinical management of patients with genetic disorders, e.g., pediatricians, obstetricians, neonatologists. The Agency is also interested in considering candidates with training in inborn errors of metabolism, biochemical and/or molecular genetics, population genetics, epidemiology, and related statistical training. Additionally, individuals with experience in genetic counseling, medical ethics, as well as ancillary fields of study will be considered.	1—Nonvoting	Immediately.
Neurological Devices Panel—Neurosurgeons (cerebrovascular and pediatric), neurologists (stroke, pediatric, pain management, and movement disorders), interventional neuroradiologists, psychiatrists, and biostatisticians.	1—Nonvoting	December 1, 2021.
National Mammography Quality Assurance Advisory Committee—Physician, practitioner, or other health professional whose clinical practice, research specialization, or professional expertise includes a significant focus on mammography.	4—Voting	Immediately.
Patient Engagement Advisory Committee—Experts who are knowledgeable in areas such as clinical research, primary care patient experience, and healthcare needs of patient groups in the United States. Selected Committee members may also be experienced in the work of patient and health professional organizations; methodologies for eliciting patient preferences; and strategies for communicating benefits, risks, and clinical outcomes to patients and research subjects.	1—Voting	Immediately.

I. Functions and General Description of the Committee Duties

A. FDA Science Board Advisory Committee

The Science Board Advisory Committee (Science Board) provides advice to the Commissioner of Food and

Drugs (Commissioner) and other appropriate officials on specific complex scientific and technical issues important to FDA and its mission, including emerging issues within the scientific community. Additionally, the Science Board provides advice that supports the Agency in keeping pace

with technical and scientific developments, including in regulatory science, and input into the Agency’s research agenda and on upgrading its scientific and research facilities and training opportunities. It also provides, where requested, expert review of

Agency-sponsored intramural and extramural scientific research programs.

B. Blood Products Advisory Committee

The Blood Products Advisory Committee reviews and evaluates available data concerning the safety, effectiveness, and appropriate use of blood products derived from blood and serum or biotechnology. The Committee reviews and evaluates these products or biotechnology which are also intended for use in the diagnosis, prevention, or treatment of human diseases, as well as the safety, effectiveness, and labeling of the products, on clinical and laboratory studies involving such products, on the affirmation or revocation of biological product licenses. The Committee also reviews and evaluates the quality and relevance of FDA's research program that provides the scientific support for regulating these products.

C. Cellular, Tissue, and Gene Therapies Advisory Committee

The Cellular, Tissue, and Gene Therapies Advisory Committee reviews and evaluates available data relating to the safety, effectiveness, and appropriate use of human cells, human tissues, gene transfer therapies and xenotransplantation products that are intended for transplantation, implantation, infusion and transfer in the prevention and treatment of a broad spectrum of human diseases, and in the reconstruction, repair, or replacement of tissues for various conditions. The Committee also considers the quality and relevance of FDA's research program that provides scientific support for the regulation of these products.

D. Allergenic Products Advisory Committee

Reviews and evaluates available data concerning the safety, effectiveness, and adequacy of labeling of marketed and investigational allergenic biological products or materials that are administered to humans for the diagnosis, prevention, or treatment of allergies and allergic disease as well as the affirmation or revocation of biological product licenses, on the safety, effectiveness, and labeling of the products, on clinical and laboratory studies of such products, on amendments or revisions to regulations governing the manufacture, testing and licensing of allergenic biological products, and on the quality and relevance of FDA's research programs.

E. Vaccines and Related Biologic Products Advisory Committee

The Vaccines and Related Biologic Products Advisory Committee reviews

and evaluates data concerning the safety, effectiveness, and appropriate use of vaccines and related biological products that are intended for use in the prevention, treatment, or diagnosis of human diseases, as well as considers the quality and relevance of FDA's research program that provides scientific support for the regulation of these products.

F. Gastrointestinal Drugs Advisory Committee

The Gastrointestinal Drugs Advisory Committee reviews and evaluates available data concerning the safety and effectiveness of marketed and investigational human drug products for use in the treatment of gastrointestinal diseases.

G. Pharmaceutical Science and Clinical Pharmacology Advisory Committee

The Pharmaceutical Science and Clinical Pharmacology Advisory Committee provides advice on scientific and technical issues concerning the safety and effectiveness of human generic drug products for use in the treatment of a broad spectrum of human diseases and as required, any other product for which FDA has regulatory responsibility. The Committee may also review Agency-sponsored intramural and extramural biomedical research programs in support of FDA's generic drug regulatory responsibilities.

H. Psychopharmacologic Drugs Advisory Committee

The Psychopharmacologic Drugs Advisory Committee reviews and evaluates data concerning the safety and effectiveness of marketed and investigational human products for use in the practice of psychiatry and related fields.

I. Certain Panels of the Medical Devices Advisory Committee

The Medical Devices Advisory Committee has established certain panels to review and evaluate data on the safety and effectiveness of marketed and investigational devices and make recommendations for their regulation. With the exception of the Medical Devices Dispute Resolution Panel, each panel, according to its specialty area: (1) Advises on the classification or reclassification of devices into one of three regulatory categories and advises on any possible risks to health associated with the use of devices; (2) advises on formulation of product development protocols; (3) reviews premarket approval applications for medical devices; (4) reviews guidelines and guidance documents; (5) recommends exemption of certain

devices from the application of portions of the Federal Food, Drug, and Cosmetic Act; (6) advises on the necessity to ban a device; and (7) responds to requests from the Agency to review and make recommendations on specific issues or problems concerning the safety and effectiveness of devices. With the exception of the Medical Devices Dispute Resolution Panel, each panel, according to its specialty area, may also make appropriate recommendations to the Commissioner on issues relating to the design of clinical studies regarding the safety and effectiveness of marketed and investigational devices.

The Dental Products Panel also functions at times as a dental drug panel. The functions of the dental drug panel are to evaluate and recommend whether various prescription drug products should be changed to over-the-counter status and to evaluate data and make recommendations concerning the approval of new dental drug products for human use.

The Medical Devices Dispute Resolution Panel provides advice to the Commissioner on complex or contested scientific issues between FDA and medical device sponsors, applicants, or manufacturers relating to specific products, marketing applications, regulatory decisions and actions by FDA, and Agency guidance and policies. The Panel makes recommendations on issues that are lacking resolution, are highly complex in nature, or result from challenges to regular advisory panel proceedings or Agency decisions or actions.

J. National Mammography Quality Assurance Advisory Committee

The National Mammography Quality Assurance Advisory Committee advises the Agency on the following: Development of appropriate quality standards and regulations for mammography facilities; standards and regulations for bodies accrediting mammography facilities under this program; regulations with respect to sanctions; procedures for monitoring compliance with standards; establishing a mechanism to investigate consumer complaints; and reporting new developments concerning breast imaging that should be considered in the oversight of mammography facilities. The Committee also advises the Agency on determining whether there exists a shortage of mammography facilities in rural and health professional shortage areas and determining the effects of personnel on access to the services of such facilities in such areas; determining whether there exist a sufficient number of

medical physicists; and determining the costs and benefits of compliance with these requirements.

K. Patient Engagement Advisory Committee

The Patient Engagement Advisory Committee advises the Agency on complex issues relating to medical devices, the regulation of devices, and their use by patients. The Committee may consider topics such as Agency guidance and policies, clinical trial or registry design, patient preference study design, benefit-risk determinations, device labeling, unmet clinical needs, available alternatives, patient reported outcomes and device-related quality of life or health status issues, and other patient-related topics. The Committee will provide relevant skills and perspectives to improve communication of benefits, risks, and clinical outcomes and increase integration of patient perspectives into the regulatory process for medical devices. The Committee will perform its duties by discussing and providing advice and recommendation in ways such as identifying new approaches, promoting innovation, recognizing unforeseen risks or barriers, and identifying unintended consequences that could result from FDA policy.

II. Criteria for Members

Persons nominated for membership as consumer representatives on committees or panels should meet the following criteria: (1) Demonstrate an affiliation with and/or active participation in consumer or community-based organizations, (2) be able to analyze technical data, (3) understand research design, (4) discuss benefits and risks, and (5) evaluate the safety and efficacy of products under review. The consumer representative should be able to represent the consumer perspective on issues and actions before the advisory committee; serve as a liaison between the committee and interested consumers, associations, coalitions, and consumer organizations; and facilitate dialogue with the advisory committees on scientific issues that affect consumers.

III. Selection Procedures

Selection of members representing consumer interests is conducted through procedures that include the use of organizations representing the public interest and public advocacy groups. These organizations recommend nominees for the Agency's selection. Representatives from the consumer health branches of Federal, State, and local governments also may participate

in the selection process. Any consumer organization interested in participating in the selection of an appropriate voting or nonvoting member to represent consumer interests should send a letter stating that interest to FDA (see **ADDRESSES**) within 30 days of publication of this document.

Within the subsequent 30 days, FDA will compile a list of consumer organizations that will participate in the selection process and will forward to each such organization a ballot listing at least two qualified nominees selected by the Agency based on the nominations received, together with each nominee's current curriculum vitae or résumé. Ballots are to be filled out and returned to FDA within 30 days. The nominee receiving the highest number of votes ordinarily will be selected to serve as the member representing consumer interests for that particular advisory committee or panel.

IV. Nomination Procedures

Any interested person or organization may nominate one or more qualified persons to represent consumer interests on the Agency's advisory committees or panels. Self-nominations are also accepted. Nominations must include a current, complete résumé or curriculum vitae for each nominee and a signed copy of the *Acknowledgement and Consent* form available at the FDA Advisory Nomination Portal (see **ADDRESSES**), and a list of consumer or community-based organizations for which the candidate can demonstrate active participation.

Nominations must also specify the advisory committee(s) or panel(s) for which the nominee is recommended. In addition, nominations must also acknowledge that the nominee is aware of the nomination unless self-nominated. FDA will ask potential candidates to provide detailed information concerning such matters as financial holdings, employment, and research grants and/or contracts to permit evaluation of possible sources of conflicts of interest. Members will be invited to serve for terms of up to 4 years.

FDA will review all nominations received within the specified timeframes and prepare a ballot containing the names of qualified nominees. Names not selected will remain on a list of eligible nominees and be reviewed periodically by FDA to determine continued interest. Upon selecting qualified nominees for the ballot, FDA will provide those consumer organizations that are participating in the selection process with the opportunity to vote on the

listed nominees. Only organizations vote in the selection process. Persons who nominate themselves to serve as voting or nonvoting consumer representatives will not participate in the selection process.

This notice is issued under the Federal Advisory Committee Act (5 U.S.C. app. 2) and 21 CFR part 14, relating to advisory committees.

Dated: August 5, 2021.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2021-17066 Filed 8-10-21; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2021-N-0008]

Patient Engagement Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing a forthcoming public advisory committee meeting of the Patient Engagement Advisory Committee. The general function of the committee is to provide advice to the Commissioner of Food and Drugs, or designee, on complex scientific issues relating to medical devices, the regulation of devices, and their use by patients. The meeting will be open to the public.

DATES: The meeting will take place virtually on October 6, 2021, from 10 a.m. to 5 p.m. Eastern Time.

ADDRESSES: Please note that due to the impact of this COVID-19 pandemic, all meeting participants will be joining this advisory committee meeting via an online teleconferencing platform. Answers to commonly asked questions about FDA advisory committee meetings may be accessed at: <https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm408555.htm>.

Information on how to access the webcast will be made available no later than 2 business days prior to the meeting at <https://www.fdalive.com/peac>.

FOR FURTHER INFORMATION CONTACT: Letise Williams, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5441, Silver Spring, MD 20993-0002, letise.williams@

[fda.hhs.gov](https://www.fda.hhs.gov), 301-796-8398, or FDA Advisory Committee Information Line, 1-800-741-8138 (301-443-0572 in the Washington, DC area). A notice in the **Federal Register** about last-minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's website at <https://www.fda.gov/advisory-committees> and scroll down to the appropriate advisory committee meeting link or call the advisory committee information line to learn about possible modifications.

SUPPLEMENTARY INFORMATION:

Agenda: The meeting presentations will be heard, viewed, captioned, and recorded through an online teleconferencing platform. On October 6, 2021, the committee will discuss and make recommendations on the topic "Medical Device Recalls." Once a medical device is available in the U.S. marketplace and in widespread use, unforeseen problems can sometimes lead to a recall. When a device is defective or potentially harmful, recalling that product—removing it from the market or correcting the problem—is the most effective means for protecting the public. A company may recall a device after discovering a problem on its own, or after FDA raises concerns. In rare cases, FDA may require a company to recall a device. When a device is recalled, FDA reviews the company's strategy for resolving the problem by assessing the relative degree of risk associated with the product and making sure the strategy effectively resolves the problem with the device.

FDA provides transparency and communicates information when the public needs to be alerted to a serious hazard, as well as once the recall has been appropriately resolved. The recommendations provided by the committee will address factors FDA and industry should consider to effectively communicate medical device recall information to patients and the public, including but not limited to content, format, methods used to disseminate the message, and timing of communication. The committee will also consider concerns patients have about changes to their device in response to a recall and will discuss ways patient perspectives could be incorporated in FDA and industry benefit-risk decision making, as well as the healthcare provider and patient decision-making process related to a recalled medical device, including implanted devices.

FDA intends to make background material available to the public no later

than 2 business days before the meeting. If FDA is unable to post the background material on its website prior to the meeting, the background material will be made publicly available on FDA's website at the time of the advisory committee meeting, and the background material will be posted on FDA's website after the meeting. Background materials will be available at <https://www.fda.gov/advisory-committees/committees-and-meeting-materials/patient-engagement-advisory-committee>. Select the link for the 2021 Meeting Materials. The meeting will include slide presentations with audio components to allow the presentation of materials in a manner that most closely resembles an in-person advisory committee meeting.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Oral presentations from the public will be scheduled on October 6, 2021, between approximately 2 p.m. to 3 p.m. Eastern Time. Those individuals interested in making formal oral presentations should notify the contact person (see **FOR FURTHER INFORMATION CONTACT**). The notification should include a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before September 8, 2021. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by September 10, 2021. Individuals who do not wish to speak at the open public hearing session but would like their comments to be heard by the committee may send written submissions to the contact person on or before September 16, 2021.

Virtual Breakout Session: Individuals interested in participating in the virtual breakout scenario discussions will need to sign up to participate on or before September 22, 2021. The signup sheet, as well as, additional information pertaining to the virtual scenario discussions will be available at <https://www.fdalive.com/peac>. Everyone who signs up in advance and provides a valid email address will receive an email at least 2 days prior to the meeting with information on how to access the virtual platform that will host the

virtual breakout scenario discussions. Please note due to limited technology capacity, participation in the virtual breakout scenario discussions will be limited to 150 participants. Once capacity reaches 150 participants, the breakout session will be closed to additional participants. Additional information regarding the virtual breakout scenario discussions will be provided at <https://www.fdalive.com/peac>.

For press inquiries, please contact the Office of Media Affairs at fdaoma@fda.hhs.gov or 301-796-4540.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with disabilities. If you require accommodations due to a disability, please contact AnnMarie Williams at Annmarie.Williams@fda.hhs.gov, or 301-796-5966 at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our website at <https://www.fda.gov/advisory-committees/about-advisory-committees/public-conduct-during-fda-advisory-committee-meetings> for procedures on public conduct during advisory committee meetings. Please be advised that, during the virtual scenario breakout discussions, FDA will prepare a summary of the discussion in lieu of detailed transcripts.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: August 6, 2021.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2021-17118 Filed 8-10-21; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material,

and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel Clinical Trials & Biomarker Studies in Stroke.

Date: August 18, 2021.

Time: 11:00 a.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Virtual Meeting).

Contact Person: Shanta Rajaram, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Activities, NINDS/NIH, NSC, 6001 Executive Blvd., Suite 3208, MSC 9529, Rockville, MD 20852, (301) 435-6033, rajarams@mail.nih.gov.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: August 5, 2021.

Tyeshia M. Roberson-Curtis,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021-17102 Filed 8-10-21; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[Docket No. USCBP-2021-0028]

Receipt of Domestic Interested Party Petition Concerning the Tariff Classification of Dried Onion Products

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of receipt of domestic interested party petition; solicitation of comments.

SUMMARY: U.S. Customs and Border Protection (CBP) has received a petition submitted on behalf of a domestic interested party requesting the reclassification, under the Harmonized Tariff Schedule of the United States (HTSUS), of certain dried onion products. CBP currently classifies the subject dried onion products under subheading 2005.99.20, HTSUS, as onions prepared or preserved otherwise than by vinegar or acetic acid. Petitioner

contends that the proper classification for the subject dried onion products is under subheading 0712.20.20, HTSUS, as dried onion powder not further prepared. This document invites comments with regard to the correctness of the current classification.

DATES: Comments must be received on or before October 12, 2021.

ADDRESSES: You may submit comments, identified by docket number, by the first method listed below:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments via docket number USCBP-2021-0028.

- *Mail:* Due to COVID-19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

Instructions: All submissions received must include the agency name and docket number for this notice of domestic interested party petition concerning the tariff classification of dried onion products. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

Docket: For access to the docket to read background documents, exhibits, or comments received, go to <http://www.regulations.gov>. Due to the relevant COVID-19-related restrictions, CBP has temporarily suspended on-site public inspection of public comments.

FOR FURTHER INFORMATION CONTACT:

Tanya Secor, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, at (202) 325-0062 or by email at tanya.j.secor@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

Background

A petition has been filed under section 516 of the Tariff Act of 1930, as amended (19 U.S.C. 1516), on behalf of Olam West Coast Inc. (Petitioner or Olam), which is an agri-business and supplier of food, ingredients, and raw materials, based in Fresno, California. Olam manages a wide range of production, processing, and supply of agricultural products in twelve states, with a majority of its operations in California. Olam's largest onion and garlic plant is in Gilroy, California. Olam meets all of the requirements of a domestic interested party set forth in 19 U.S.C. 1516(a)(2) and section 175.3(a) in title 19 of the Code of Federal Regulations (19 CFR 175.3(a)).

In New York Ruling Letter (NY) N265994 (July 9, 2015), NY N261449 (February 20, 2015), NY N257752 (October 24, 2014), and NY M86441

(October 13, 2006), CBP classified various mixtures of onion powder and salt or other ingredients as prepared or preserved onions in subheading 2005.99.20 of the Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Other vegetables prepared or preserved otherwise than by vinegar or acetic acid, not frozen, other than products of heading 2006: Other vegetables and mixtures of vegetables: Other: Onions." Petitioner contends that the proper classification for the onion powder mixtures is dried onion powder in subheading 0712.20.20, HTSUS, which provides for "Dried vegetables, whole, cut, sliced, broken or in powder, but not further prepared: Onions: Powder or flour."

Applicable Legal Principles

Classification under the HTSUS is determined in accordance with the General Rules of Interpretation (GRIs) and, in the absence of special language or context which otherwise requires, by the Additional U.S. Rules of Interpretation (ARIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, GRIs 2 through 6 may be applied in order. GRI 3(b) applies to mixtures, which are *prima facie*, classifiable under two or more headings and which cannot be classified by reference to GRI 3(a). Pursuant to GRI 3(b), mixtures shall be classified as if they consisted of the material or component which gives them their essential character.

Note 3 to Chapter 7, HTSUS, provides that heading 0712 covers all dried vegetables of the kinds falling in headings 0701 to 0711, excluding certain vegetables but including onions. Note 1(a) to Chapter 20, HTSUS, provides that this chapter does not cover vegetables, fruit or nuts, prepared or preserved by the processes specified in Chapter 7, 8, or 11. Conversely, Note 3 to Chapter 20, HTSUS, provides in pertinent part that heading 2005 covers, as the case may be, only those products of Chapter 7, which have been prepared or preserved by processes other than those referred to in Note 1(a).

The Explanatory Notes (ENs) to the Harmonized Commodity Description and Coding System represent the official interpretation of the tariff at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of

these headings. See Treasury Decision (T.D.) 89–80, 54 FR 35127, 35128 (August 23, 1989).

The General EN to Chapter 7, HTSUS, provides, in pertinent part, that this Chapter covers vegetables, including the products listed in Note 2 to the Chapter, whether fresh, chilled, frozen (uncooked or cooked by steaming or boiling in water), provisionally preserved or dried (including dehydrated, evaporated or freeze-dried), and that some of these products when dried and powdered are sometimes used as flavoring materials but nevertheless remain classified in heading 07.12. The EN further states that vegetables prepared or preserved by any process not provided for in Chapter 7 fall in Chapter 20. The EN for heading 07.12 states, in pertinent part, that the heading covers vegetables of headings 07.01 to 07.11 which have been dried (including dehydrated, evaporated or freeze-dried) *i.e.*, with their natural water content removed by various processes. The EN further provides that heading 0712, HTSUS, covers dried vegetables, broken or powdered, such as asparagus, cauliflower, parsley, chervil, onion, garlic, celery, generally used either as flavouring materials or in the preparation of soups. The EN for heading 20.05 states, in pertinent part, that the heading covers products (other than vegetables prepared or preserved by vinegar or acetic acid of heading 20.01, frozen vegetables of heading 20.04 and vegetables preserved by sugar of heading 20.06) that have been prepared or preserved by processes not provided for in Chapter 7 or 11.

Elaboration of the Petitioner's Views

Petitioner contends that the proper classification for the subject dried onion products is subheading 0712.20.20, HTSUS, which provides for “Dried vegetables, whole, cut, sliced, broken or in powder, but not further prepared: Onions: Powder or flour.” Petitioner contends that the subject onion products are (1) preserved by drying and, therefore, excluded from Chapter 20, HTSUS; (2) neither “preserved” nor “prepared” in a manner covered by Chapter 20, HTSUS; and (3) not “prepared” or “preserved” under the “common and commercial meaning” of those terms. Specifically, Petitioner argues that the subject dried onion products are neither prepared nor preserved because the small quantities of salt or preservatives do not create a permanent change to the onion powder. In support of its argument, Petitioner relies on Headquarters Ruling Letter (HQ) H243645 (September 30, 2015) wherein CBP classified dried sliced and diced potatoes with added sodium

bisulfate under subheading 0712.90.30, HTSUS, as dried potatoes not further prepared. In HQ H243645, CBP determined that sodium bisulfite simply preserved the potatoes’ freshness, color and flavor, and did not further prepare the product.

Petitioner asserts that to the extent the products are mixtures of multiple ingredients, the essential character of these products remains onion powder and therefore they should be classified under 0712.20.20, HTSUS, pursuant to GRI 3(b). Petitioner also argues that classifying such products as “prepared” or “preserved” is contrary to the intention to protect domestic production of dried onion as indicated by the high tariff rate applicable to dried onion and dried onion powder.

Analysis Used by CBP in Prior Rulings

Subheading 2005.99.20, HTSUS, provides for “Other vegetables prepared or preserved otherwise than by vinegar or acetic acid, not frozen, other than products of heading 2006: Other vegetables and mixtures of vegetables: Other: Onions.” The EN for heading 07.12 provides guidance that the heading covers dried vegetables in powder form, including onion, not otherwise prepared. If a dried vegetable product is prepared beyond the scope of heading 0712, HTSUS, it will be precluded from classification in that heading and classifiable in heading 2005, HTSUS.

In the rulings at issue, the dried onion products are comprised of dried onion powder and varying additional ingredients. Specifically, NY N265994 classified agglomerated onion powder consisting of 94.5% dried onion powder, 5% water, and 0.5% of maltodextrin, silicon dioxide, and potassium sorbate combined. NY N261449 classified onion and salt powders blended in five different formulations: 91% onion powder and 9% salt; 93% onion powder and 7% salt; 95% onion powder and 5% salt; 97% onion powder and 3% salt; and 99% onion powder and 1% salt. NY N257752 classified five products, two of which were comprised of onion powder and salt. The first consisted of 80% onion powder and 20% salt and the second consisted of 90% onion powder and 10% salt. Finally, NY M86441 classified agglomerated onion powder consisting of 88.5% dehydrated onion powder, 5% water, 4% corn starch, 1% Arabic gum, 1% silicon dioxide, and 0.5% citric acid. CBP determined that the addition of salt and other ingredients, regardless of the proportions, further prepared the onion powder beyond the scope of heading

0712, HTSUS. Thus, these dried onion products were classified pursuant to GRI 1 in subheading 2005.99.20, HTSUS, as onions prepared or preserved otherwise than by vinegar or acetic acid.

Comments

Pursuant to section 175.21, CBP Regulations (19 CFR 175.21), before making a determination on this matter, CBP invites written comments on the petition from interested parties.

The domestic interested party petition concerning the tariff classification of certain dried onion products, as well as all comments received in response to this notice, will be available for public inspection on the docket at www.regulations.gov.

Authority

This notice is published in accordance with 19 U.S.C. 1516 and section 175.21 of the CBP Regulations (19 CFR 175.21).

Troy A. Miller, the Acting Commissioner, having reviewed and approved this document, is delegating the authority to electronically sign this document to Robert F. Altneu, who is the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

Dated: August 6, 2021.

Robert F. Altneu,

Director, Regulations & Disclosure Law Division, Regulations & Rulings, Office of Trade, U.S. Customs and Border Protection.

[FR Doc. 2021–17142 Filed 8–10–21; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[Docket No. USCBP–2021–0029]

Receipt of Domestic Interested Party Petition Concerning the Tariff Classification of Steel Table Pans

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of receipt of domestic interested party petition; solicitation of comments.

SUMMARY: U.S. Customs and Border Protection (CBP) has received a petition submitted on behalf of a domestic interested party requesting the reclassification, under the Harmonized Tariff Schedule of the United States (HTSUS), of certain steel table pans. CBP currently classifies the subject steel

table pans under subheading 7323.93.00, HTSUS, as table, kitchen or other household articles and parts thereof of iron or steel, other, other, of stainless steel. Petitioner contends that the proper classification for the subject steel table pans is under subheading 8419.90.95, HTSUS, as parts of steam tables, which are machinery for the treatment of materials by a process involving a change of temperature such as . . . steaming, other than machinery of a kind used for domestic purposes. This document invites comments with regard to the correctness of the current classification.

DATE: Comments must be received on or before October 12, 2021.

ADDRESSES: You may submit comments, identified by docket number, by the first method listed below:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments via docket number USCBP-2021-0029.
- *Mail:* Due to COVID-19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

Instructions: All submissions received must include the agency name and docket number for this notice of domestic interested party petition concerning the tariff classification of steel table pans. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

Docket: For access to the docket to read background documents, exhibits, or comments received, go to <http://www.regulations.gov>. Due to the relevant COVID-19-related restrictions, CBP has temporarily suspended on-site public inspection of public comments.

FOR FURTHER INFORMATION CONTACT:

Anthony L. Shurn, Electronics, Machinery, Automotive, and International Nomenclature Branch, Regulations and Rulings, Office of Trade, Customs and Border Protection, at (202) 325-0218, or by email at anthony.l.shurn@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

Background

A petition has been filed under section 516 of the Tariff Act of 1930, as amended (19 U.S.C. 1516), on behalf of The Vollrath Company, LLC (Vollrath or Petitioner), which is a commercial and consumer food service equipment manufacturer and supplier based in Sheboygan, Wisconsin. Vollrath meets all of the requirements of a domestic interested party set forth in 19 U.S.C. 1516(a)(2) and section 175.3(a) in title

19 of the Code of Federal Regulations (CFR) (19 CFR 175.3(a)).

In New York Ruling (NY) C87748 (May 27, 1998), CBP's predecessor, the U.S. Customs Service (Customs), stated that "steam table pans and chafers of stainless steel" are "items [that] come in various sizes. They are intended to be placed in a steam table or in a food warmer to keep food hot. They can not [sic] be used on top of a stove." CBP classified the "steam table pans and chafers of stainless steel" under subheading 7323.93.00, HTSUS, which provides for "Table, kitchen or other household articles and parts thereof, of iron or steel; iron or steel wool; pot scourers and scouring or polishing pads, gloves and the like, of iron or steel: Other: Of stainless steel." Petitioner contends that the proper classification for the steel table pans is under subheading 8419.90.95, HTSUS, which provides for "Machinery, plant or laboratory equipment, whether or not electrically heated (excluding furnaces, ovens and other equipment of heading 8514), for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting, distilling, rectifying, sterilizing, pasteurizing, steaming, drying, evaporating, vaporizing, condensing or cooling, other than machinery or plant of a kind used for domestic purposes; instantaneous or storage water heaters, nonelectric; parts thereof: Parts: Other".

Applicable Legal Principles

Classification under the HTSUS is determined in accordance with the General Rules of Interpretation (GRIs) and, in the absence of special language or context which otherwise requires, by the Additional U.S. Rules of Interpretation (ARIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, GRIs 2 through 6 may be applied in order.

The Explanatory Notes (ENs) to the Harmonized Commodity Description and Coding System represent the official interpretation of the tariff at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See Treasury Decision (T.D.) 89-80, 54 FR 35127, 35128 (August 23, 1989). The EN for heading 73.23, states, in pertinent part, that this

group comprises a wide range of iron or steel articles, not more specifically covered by other headings of the Nomenclature, used for table, kitchen or other household purposes; it includes the same goods for use in hotels, restaurants, boarding-houses, hospitals, canteens, barracks, etc. The EN further states, in pertinent part, that the group includes articles for kitchen use such as steamers and preserving pans and that the group also includes iron or steel parts of the article listed above such as separating compartments for pressure cookers.

Elaboration of Petitioner's Views

Petitioner contends that the proper classification for the subject steel table pans is subheading 8419.90.95, HTSUS, which provides for "Machinery, plant or laboratory equipment, whether or not electrically heated (excluding furnaces, ovens and other equipment of heading 8514), for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting, distilling, rectifying, sterilizing, pasteurizing, steaming, drying, evaporating, vaporizing, condensing or cooling, other than machinery or plant of a kind used for domestic purposes; instantaneous or storage water heaters, nonelectric; parts thereof." Petitioner contends that between the classifications that merit consideration, heading 8419, HTSUS, is the most appropriate because steel table pans are not table, kitchen or other household articles of heading 7323, HTSUS. Petitioner further states that classification of the steel table pans as a part of steam tables and commercial chafers within heading 8419, HTSUS, is supported by the tariff headings, the EN to heading 8419, HTSUS, and court decisions that establish the definition of a "part."

Petitioner contends that steam tables are classified under subheading 8419.81.90, HTSUS, in reliance upon Customs' ruling in NY N836798 (February 22, 1989), which classified a food warmer used to transport food to various areas located within commercial establishments, and the EN to heading 84.19. Subheading 8419.81.90, HTSUS, provides for "Machinery, plant or laboratory equipment, whether or not electrically heated (excluding furnaces, ovens and other equipment of heading 8514), for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting, distilling, rectifying, sterilizing, pasteurizing, steaming, drying, evaporating, vaporizing, condensing or cooling, other than machinery or plant of a kind used for

domestic purposes: Other machinery, plant and equipment: For making hot drinks or for cooking or heating food: Other.”

According to the Petitioner, steam tables, which are gas or electric powered machines used in commercial food service operations to heat and hold prepared food, are a type of steam-heated cooker, and that steam tables are appropriately classified under heading 8419, HTSUS, in reliance upon Part I (17) to EN 84.19, which includes specialized heating or cooking apparatus which are not normally used in the household (e.g., steam-heated cookers, hot-plates, warming cupboards, drying cabinets, etc.). Petitioner asserts that the subject steel table pans are parts of steam tables in reliance upon the notes to Section XVI, HTSUS, which provide, in pertinent part, that parts and accessories, if suitable for use solely or principally with a particular kind of machine, instrument or apparatus, or with a number of machines, instruments or apparatus of the same heading are to be classified with the machines, instruments, or apparatus of that kind. Petitioner advises that the subject steel table pans are specifically designed to fit within the standard size well of a steam table, transfer heat from the steam to the food, and withstand extended exposure to steam, and therefore, that the steel table pans are principally used with steam tables.

Petitioner advises that CBP’s rulings are inconsistent. Petitioner references NY C87748 (May 27, 1998) in which Customs classified steam table pans and chafers of stainless steel under subheading 7323.93.00, HTSUS; NY N199500 (January 24, 2012), in which CBP rejected classification of chafing dishes heated by sterno candles under subheading 8419.81.90, HTSUS, because the unit was not mechanical; and, NY C88591 (July 1, 1998), in which Customs classified a similar chafer set with water pan, food pan, and cover under subheading 8419.81.90, HTSUS. According to Petitioner, unlike the products of NY N199500, the steel table pans at issue here are not excluded from heading 8419 because they are specifically designed to be used with electric or gas-powered steam tables. Petitioner notes that the subject steel table pans should be classified in accordance with NY C88591 under heading 8419, HTSUS.

Analysis Used by CBP in Prior Rulings

Note 1(f) to Section XV, HTSUS, provides in pertinent part that this section does not cover articles of section XVI (machinery, mechanical appliances and electrical goods). Subheading

7323.93.00, HTSUS, provides, in pertinent part, for “Table, kitchen or other household articles and parts thereof, of iron or steel; iron or steel wool; pot scourers and scouring or polishing pads, gloves and the like, of iron or steel: Other: Of stainless steel.” CBP has classified stainless steel cookware, including chafing dishes and steam pans, under heading 7323, HTSUS, where the merchandise is not mechanical or electric. See NY C87748 and NY N199500. As noted above, however, in NY C88591, CBP’s predecessor classified a chafer set with water pan, food pan, and cover in subheading 8419.81.90, HTSUS.

Comments

Pursuant to section 175.21 of the CBP Regulations (19 CFR 175.21), before making a determination on this matter, CBP invites written comments on the petition from interested parties.

The domestic interested party petition concerning the tariff classification of certain steel table pans, as well as all comments received in response to this notice, will be available for public inspection on the docket at www.regulations.gov.

Authority

This notice is published in accordance with 19 U.S.C. 1516 and section 175.21 of the CBP Regulations (19 CFR 175.21).

Troy A. Miller, the Acting Commissioner, having reviewed and approved this document, is delegating the authority to electronically sign this document to Robert F. Altneu, who is the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

Dated: August 6, 2021.

Robert F. Altneu,

Director, Regulations & Disclosure Law Division, Regulations & Rulings, Office of Trade, U.S. Customs and Border Protection.

[FR Doc. 2021–17138 Filed 8–10–21; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[Docket No. USCBP–2020–0023]

Receipt of Domestic Interested Party Petition Concerning the Tariff Classification of Mixtures of Dried Garlic and Dried Onion

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of receipt of domestic interested party petition; solicitation of comments.

SUMMARY: U.S. Customs and Border Protection (CBP) has received a petition submitted on behalf of a domestic interested party requesting the reclassification, under the Harmonized Tariff Schedule of the United States (HTSUS), of certain dried garlic and dried onion mixtures. CBP currently classifies the subject dried garlic and dried onion mixtures under subheading 0712.90.85, HTSUS, as mixtures of dried vegetables. Petitioner contends that the proper classification for the subject dried garlic and dried onion mixtures is under subheading 0712.90.40, HTSUS, as dried garlic. This document invites comments with regard to the correctness of the current classification.

DATES: Comments must be received on or before October 12, 2021.

ADDRESSES: You may submit comments, identified by docket number, by the first method listed below:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments via docket number USCBP–2020–0023.
- *Mail:* Due to COVID–19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

Instructions: All submissions received must include the agency name and docket number for this notice of domestic interested party petition concerning the tariff classification of dried garlic and dried onion mixtures. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

Docket: For access to the docket to read background documents, exhibits, or comments received, go to <http://www.regulations.gov>. Due to the relevant COVID–19-related restrictions, CBP has temporarily suspended on-site public inspection of public comments.

FOR FURTHER INFORMATION CONTACT:

Tanya Secor, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, at (202) 325–0062, or by email at tanya.j.secor@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

Background

A petition has been filed under section 516 of the Tariff Act of 1930, as amended (19 U.S.C. 1516), on behalf of Olam West Coast Inc. (Petitioner or Olam), which is an agri-business and

supplier of food, ingredients, and raw materials, based in Fresno, California. Olam manages a wide range of production, processing, and supply of agricultural products in twelve states, with a majority of its operations in California. Olam's largest onion and garlic plant is in Gilroy, California. Olam meets all of the requirements of a domestic interested party set forth in 19 U.S.C. 1516(a)(2) and section 175.3(a) in title 19 of the Code of Federal Regulations (19 CFR 175.3(a)).

In New York Ruling Letter (NY) N276018 (November 23, 2016), NY N276015 (November 23, 2016), NY N267292 (August 27, 2015), NY N259557 (November 28, 2014), and NY N256957 (September 23, 2014), CBP classified various mixtures of dried (also referred to as dehydrated) garlic and dried onions as mixtures of dried vegetables in subheading 0712.90.85 of the Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Dried vegetables, whole, cut, sliced, broken or in powder, but not further prepared: Other vegetables; mixtures of vegetables: Other vegetables; mixtures of vegetables." Petitioner contends that the proper classification for the dried garlic and dried onion mixtures is dried garlic in subheading 0712.90.40, HTSUS, which provides for "Dried vegetables, whole, cut, sliced, broken or in powder, but not further prepared: Other vegetables; mixtures of vegetables: Garlic."

Applicable Legal Principles

Classification under the HTSUS is determined in accordance with the General Rules of Interpretation (GRIs) and, in the absence of special language or context which otherwise requires, by the Additional U.S. Rules of Interpretation (ARIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, GRIs 2 through 6 may be applied in order.

The Explanatory Notes (ENs) to the Harmonized Commodity Description and Coding System represent the official interpretation of the tariff at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See Treasury Decision (T.D.) 89-80, 54 FR 35127, 35128 (August 23, 1989). The EN for heading 07.12, states, in pertinent part, that the

heading also covers dried vegetables, broken or powdered, such as asparagus, cauliflower, parsley, chervil, onion, garlic, celery, generally used either as flavouring materials or in the preparation of soups.

Elaboration of the Petitioner's Views

Petitioner contends that the proper classification for the subject dried garlic and dried onion mixtures is subheading 0712.90.40, HTSUS, which provides for "Dried vegetables, whole, cut, sliced, broken or in powder, but not further prepared: Other vegetables; mixtures of vegetables: Garlic." Petitioner contends that the subject dried garlic and dried onion mixtures are not "mixtures of vegetables" because they are "overwhelmingly composed of dried garlic" and therefore are "appropriately classified as dried garlic under" subheading 0712.90.40, HTSUS, pursuant to GRI 3(b).

Petitioner argues that whether a given product is to be considered a "mixture of vegetables" depends on the specific vegetables included in the mixture, the relative quantities of such vegetables, and the impact that the non-predominant vegetables have on the product's essential character. Petitioner also urges CBP to consider how a given product is marketed to determine whether industry standards and/or consumers consider the product in question to be a "mixture of vegetables." Based on these factors, Petitioner urges CBP to find that the subject dried garlic and dried onion mixtures are not "mixtures of vegetables," but rather dried garlic products. It is Petitioner's view that dried garlic imparts the essential character. In support of its argument, Petitioner relies on a ruling where dried garlic mixed with chemical substances is classified as "dried garlic" in subheading 0712.90.40, HTSUS. See, e.g., NY N270709 (December 15, 2015) (dried garlic mixed with calcium stearate and dried garlic mixed with silicon dioxide).

Analysis Used by CBP in Prior Rulings

Subheading 0712.90.85, HTSUS, provides for "Dried vegetables, whole, cut, sliced, broken or in powder, but not further prepared: Other vegetables; mixtures of vegetables: Other vegetables; mixtures of vegetables." There are no specifications or requirements to qualify as a mixture in the section notes, chapter notes, or ENs. The EN for heading 07.12 provides guidance that both garlic and onion are vegetables. "Mixture" is not defined in the HTSUS.

In the rulings at issue, the mixtures of dried vegetables are comprised of varying combinations of the

components dried garlic and dried onion. Specifically, NY N256957 classifies a mixture of 50 percent dried garlic and 50 percent dried onion; NY N259557 also classifies a 50-50 percent dried garlic and dried onion mixture; NY N267292 classifies three dried garlic and dried onion mixtures covering 90 percent dried garlic and 10 percent dried onion, 95 percent dried garlic and 5 percent dried onion, 99 percent dried garlic and 1 percent dried onion; NY N276015 also classifies three vegetable mixtures, one of 64 percent dried garlic and 36 percent dried onion, one of 87 percent dried garlic and 13 percent dried tomatoes, one of 80 percent dried onion and 20 percent dried celery; NY N276018 classifies two dried garlic and dried onion mixtures, one of 99 percent dried garlic and 1 percent dried onion and the other of 1 percent dried garlic and the 99 percent dried onion. All of these various dried vegetable mixtures are classified in subheading 0712.90.85, HTSUS, as mixtures of dried vegetables, notwithstanding the amount of the component dried garlic. These rulings classified the mixtures of dried garlic and dried onion under GRIs 1 and 6, because the subject merchandise are all mixtures of dried vegetables and there are no requisite amounts to qualify as a mixture.

Comments

Pursuant to section 175.21 of the CBP Regulations (19 CFR 175.21), before making a determination on this matter, CBP invites written comments on the petition from interested parties.

The domestic interested party petition concerning the tariff classification of certain dried garlic and dried onion mixtures, as well as all comments received in response to this notice, will be available for public inspection on the docket at www.regulations.gov.

Authority: This notice is published in accordance with 19 U.S.C. 1516 and section 175.21 of the CBP Regulations (19 CFR 175.21).

Troy A. Miller, the Acting Commissioner, having reviewed and approved this document, is delegating the authority to electronically sign this document to Robert F. Altneu, who is the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

Dated: August 6, 2021.

Robert F. Altneu,

Director, Regulations & Disclosure Law Division, Regulations & Rulings, Office of Trade, U.S. Customs and Border Protection.

[FR Doc. 2021-17140 Filed 8-10-21; 8:45 am]

BILLING CODE 9111-14-P

DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service**

[FWS–R2–EA–2021–N172;
FX.GO166009NAT21/212/FF02XNAL00; OMB
Control Number 1018–New]

**Agency Information Collection
Activities; U.S. Fish and Wildlife
Service External Affairs Tribal
Contacts Database**

AGENCY: Fish and Wildlife Service,
Interior.

ACTION: Notice of information collection;
request for comment.

SUMMARY: In accordance with the
Paperwork Reduction Act of 1995, we,
the U.S. Fish and Wildlife Service
(Service), are proposing a new
information collection in use without
Office of Management and Budget
(OMB) approval.

DATES: Interested persons are invited to
submit comments on or before October
12, 2021.

ADDRESSES: Send your comments on the
information collection request (ICR) by
mail to the Service Information
Collection Clearance Officer, U.S. Fish
and Wildlife Service, MS: PRB (JAO/
3W), 5275 Leesburg Pike, Falls Church,
VA 22041–3803 (mail); or by email to
Info_Coll@fws.gov. Please reference
OMB Control Number “1018–Tribal
Contacts” in the subject line of your
comments.

FOR FURTHER INFORMATION CONTACT: To
request additional information about
this ICR, contact Madonna L. Baucum,
Service Information Collection
Clearance Officer, by email at *Info_Coll@fws.gov*, or by telephone at (703)
358–2503. Individuals who are hearing
or speech impaired may call the Federal
Relay Service at 1–800–877–8339 for
TTY assistance.

SUPPLEMENTARY INFORMATION: In
accordance with the Paperwork
Reduction Act (PRA, 44 U.S.C. 3501 *et
seq.*) and its implementing regulations
at 5 CFR 1320, all information
collections require approval under the
PRA. We may not conduct or sponsor
and you are not required to respond to
a collection of information unless it
displays a currently valid OMB control
number.

As part of our continuing effort to
reduce paperwork and respondent
burdens, we invite the public and other
Federal agencies to comment on new,
proposed, revised, and continuing
collections of information. This helps us
assess the impact of our information
collection requirements and minimize
the public’s reporting burden. It also

helps the public understand our
information collection requirements and
provide the requested data in the
desired format.

We are especially interested in public
comment addressing the following:

(1) Whether or not the collection of
information is necessary for the proper
performance of the functions of the
agency, including whether or not the
information will have practical utility;
(2) The accuracy of our estimate of the
burden for this collection of
information, including the validity of
the methodology and assumptions used;
(3) Ways to enhance the quality,
utility, and clarity of the information to
be collected; and

(4) How might the agency minimize
the burden of the collection of
information on those who are to
respond, including through the use of
appropriate automated, electronic,
mechanical, or other technological
collection techniques or other forms of
information technology, *e.g.*, permitting
electronic submission of response.

Comments that you submit in
response to this notice are a matter of
public record. We will include or
summarize each comment in our request
to OMB to approve this ICR. Before
including your address, phone number,
email address, or other personal
identifying information in your
comment, you should be aware that
your entire comment—including your
personal identifying information—may
be made publicly available at any time.
While you can ask us in your comment
to withhold your personal identifying
information from public review, we
cannot guarantee that we will be able to
do so.

Abstract: In support of Executive
Order 13175, “*Consultation and
Coordination With Indian Tribal
Governments*” (November 6, 2000),
Presidential Memorandum “*Tribal
Consultation and Strengthening Nation-
to-Nation Relationships*” (January 26,
2021), and Secretarial Order 3335,
“*Reaffirmation of the Federal Trust
Responsibility to Federally Recognized
Indian Tribes and Individual Indian
Beneficiaries*” (August 20, 2014), the
Service strives to strengthen its
government-to-government relationship
with Indian Tribes through a
commitment to consultation with and
recognition of their right to self-
governance and Tribal sovereignty.
Coordination with and on the behalf of
Tribes is some of the most important
work the Service does. Within that
work, the Service bears the large
responsibility to ensure that it is
consistently and accurately working on
a government-to-government basis with

each Tribe and its delegated program
staff.

An ongoing challenge in this
endeavor is ensuring that Tribal contact
information is accurate and up to date,
because using outdated contact
information when coordinating with
Tribes serves to undermine the integrity
of the Service’s Tribal trust
responsibility. To help maintain the
integrity in our outreach and
collaborative work with Tribes, the
Service’s Southwest (SW) Region Office
of External Affairs (EA) has identified
the need to have a regionally based
contacts database for Tribes that can
be expanded both nationally and to other
regions in the future if such need should
arise. In addition, the Service will
solicit information from the Tribal
contacts regarding their Tribal priorities
and/or interests in relation to Service
programs and periodic updates to those
priorities and/or interests.

The Service plans to solicit a contract
opportunity for the development of a
Tribal contacts database for the SW
Region to facilitate improved
collaboration with Tribes. This database
would need to be accessible by Service
staff and will be updated in real time
with information from Tribal contacts.
In addition, the database will contain a
significant geospatial component to help
ensure that the contacts data can easily
be integrated with various geographic
datasets representing content that is of
mutual interest to the Tribes and the
Service, such as areas in which an
endangered species may exist within
Tribal lands.

Types of data collected from Tribal
contacts to be maintained within the
database include:

General Tribe Information:

- Official Tribe name (or other name,
if different from Federally recognized
Tribe name);
- Tribal contact information, to
include mailing address, phone number,
and official website;
- Relevant cultural information;
- Tribal interest in FWS program;
- Tribal priorities; and
- Additional relevant notes.

Tribal Contact Information:

- Tribal contact/staff name(s);
preferred salutation, job title, and
contact information;
- Type of contact (Tribal leader;
Tribal historic preservation officer;
person in a cultural, legal, grants, fiscal
role, etc.);
- Tribal department;
- Type of work (as related to Service-
related projects);
- Specialization (*e.g.*, eagles, Mexican
wolves, etc.); and
- Additional relevant notes.

- Species of Interest:*
- Scientific name; and
 - Common name.
- State/Other Government Tribal Liaisons:*
- Agency name and department;
 - Contact information, to include mailing address, phone number, and email address;
 - Specialization (e.g., eagles, Mexican wolves, etc.);
 - Type of work (as related to Service-related projects); and
 - Additional relevant notes.

The Service will use the database to effectively and efficiently uphold its Federal Trust responsibility to Tribes through ensuring the integrity of the contact data needed to do so. Tribal leader information will be collected from the Bureau of Indian Affairs as a baseline but will be updated through our own working knowledge of changes/ needed revisions. Another purpose of this database is to better identify Service actions of interest to Federally recognized Tribes.

Title of Collection: U.S. Fish and Wildlife Service External Affairs Tribal Contacts Database.
OMB Control Number: 1018–New.
Form Number(s): None.
Type of Review: Existing collection in use without an OMB control number.
Respondents/Affected Public: State and Tribal government representatives.
Respondent’s Obligation: Voluntary.
Frequency of Collection: On occasion for initial submission, and during subsequent updates to data.
Total Estimated Annual Nonhour Burden Cost: None.

Requirement	Average number of annual respondents	Average number of responses each	Average number of annual responses*	Average completion time per response	Estimated Annual burden hours*
Solicitation of General Tribe/Tribal Contact Information					
Government	87	1	87	5 mins	7
Updates to General Tribe/Tribal Contact Information					
Government	8	1	8	5 mins	1
Solicitation of Tribal Priorities and/or Interests in Relation to FWS Programs					
Government	87	1	87	5 mins	7
Updates to Tribal Priorities and/or Interests in Relation to FWS Programs					
Government	8	1	8	5 mins	1
<i>Totals:</i>	190	.....	190	.....	16

* Rounded.

An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Madonna Baucum,
Information Collection Clearance Officer, U.S. Fish and Wildlife Service.
 [FR Doc. 2021–17097 Filed 8–10–21; 8:45 am]
BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Geological Survey

[GX21GC009PLFM00; OMB Control Number 1028–0088]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; National Cooperative Geologic Mapping Program (EDMAP and STATEMAP)

AGENCY: U.S. Geological Survey, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, we, the U.S. Geological Survey (USGS) are proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before October 12, 2021.

ADDRESSES: Send your comments on this information collection request (ICR) by mail to Mr. Michael Marketti, National Cooperative Geologic Mapping Program, U.S. Geological Survey, 12201 Sunrise Valley Drive, Mail Stop 908, Reston, VA 20192, or email him at mmarketti@usgs.gov.

Please reference Office of Management and Budget (OMB) Control Number 1028–0088 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Michael Marketti by email at mmarketti@usgs.gov, or by telephone at 703–648–6976. You may also view the ICR at <http://www.reginfo.gov/public/do/PRAMain>.

Individuals who are hearing or speech impaired may call the Federal Relay Service at 1–800–877–8339 for TTY assistance.

SUPPLEMENTARY INFORMATION: We, the USGS, in accordance with the Paperwork Reduction Act of 1995, provide the general public and other Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public’s reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are soliciting comments on the proposed ICR that is described below. We are especially interested in public comment addressing the following issues: (1) Is the collection necessary to the proper functions of the USGS; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the USGS enhance the quality, utility, and clarity of the information to be collected; and (5) how might the

USGS minimize the burden of this collection on the respondents, including through the use of information technology.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Abstract: EDMAP is the educational component of the National Cooperative Geologic Mapping Program (NCGMP) that is intended to train the next generation of geologic mappers. The primary objective of the STATEMAP component of the NCGMP is to establish the geologic framework of areas that are vital to the welfare of individual States.

The NCGMP EDMAP program allocates funds to colleges and universities in the United States and Puerto Rico through an annual competitive cooperative agreement process. Every Federal dollar awarded is matched with university funds.

Geology professors, who are skilled in geologic mapping, request EDMAP funding to support undergraduate and graduate students at their college or university in a one-year mentored geologic mapping project that focuses on a specific geographic area.

Only State Geological Surveys are eligible to apply to the STATEMAP component of the NCGMP pursuant to the National Geologic Mapping Act (Pub. L. 106–148). Since many State Geological Surveys are organized under a state university system, such universities may submit a proposal on behalf of the State Geological Survey.

Each fall, the program announcements are posted to the *Grants.gov* website and respondents are required to submit applications (comprising Standard Form 424, 424A, 424B, Proposal Summary Sheet, the Proposal, and Budget Sheets. Additionally, EDMAP proposals must include a Negotiated Rate Agreement and a Support letter from a State Geologist or USGS Project Chief).

Since 1996, more than \$10 million from the NCGMP has supported geologic mapping efforts of more than 1,335 students at 171 universities in 44 states, the District of Columbia, and Puerto Rico. Funds for graduate projects are limited to \$25,000 and undergraduate project funds limited to

\$15,000. These funds are used to cover field expenses and student salaries, but not faculty salaries or tuition. The authority for both programs is listed in the National Geologic Mapping Act (Pub. L. 106–148).

We will protect information from respondents considered proprietary under the Freedom of Information Act (5 U.S.C. 552) and its implementing regulations (43 CFR part 2), and under regulations at 30 CFR 250.197, “Data and information to be made available to the public or for limited inspection.” Responses are voluntary. No questions of a “sensitive” nature are asked.

Title of Collection: National Cooperative Geologic Mapping Program (NCGMP–EDMAP and STATEMAP).

OMB Control Number: 1028–0088.

Form Number: None.

Type of Review: Extension without change of a currently approved collection.

Respondents/Affected Public: University or College faculty and State Geological Surveys.

Total Estimated Number of Annual Respondents: Approximately 50 University or College faculty and 45 State Geological Survey respondents.

Total Estimated Number of Annual Responses: Total number of responses is 185. Approximately 95 University or College faculty and 90 State Geological Survey responses.

Estimated Completion Time per Response: 36 hours.

Total Estimated Number of Annual Burden Hours: 5,220 hours total.

Respondent’s Obligation: None. Participation is voluntary, though necessary to receive funding.

Frequency of Collection: Annually.

Total Estimated Annual Non-Hour Burden Cost: There are no “non-hour cost” burdens associated with this IC.

An agency may not conduct, or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*).

Michael Marketti,

*Acting Associate Program Coordinator,
National Cooperative Geologic Mapping Program.*

[FR Doc. 2021–17106 Filed 8–10–21; 8:45 am]

BILLING CODE 4338–11–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[212A2100DD/AAKC001030/
AOA501010.999900253G]

Indian Gaming; Approval by Operation of Law of Tribal-State Class III Gaming Compact in the State of Florida

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice publishes the approval by operation law of the Compact Between the Seminole Tribe of Florida (Tribe) and the State of Florida (State).

DATES: The compacts take effect on August 11, 2021.

FOR FURTHER INFORMATION CONTACT: Ms. Paula L. Hart, Director, Office of Indian Gaming, Mailstop 3543, 1849 C Street NW, Washington, DC 20240, telephone (202) 219–4066, *paula.hart@bia.gov*.

SUPPLEMENTARY INFORMATION: The Indian Gaming Regulatory Act of 1988, 25 U.S.C. 2701 *et seq.*, (IGRA) provides the Secretary of the Interior (Secretary) with 45 days to review and approve or disapprove a Tribal-State compact governing the conduct of class III gaming activity on the Tribe’s Indian lands. 25 U.S.C. 2710(d)(8). If the Secretary does not approve or disapprove a Tribal-State compact within the 45 days, IGRA provides that the Tribal-State compact is considered to have been approved by the Secretary but only to the extent the compact is consistent with IGRA. 25 U.S.C. 2710(d)(8)(C). The IGRA also requires the Secretary of the Interior to publish in the **Federal Register** notice of approved Tribal-State compacts for the purpose of engaging in Class III gaming activities on Indian lands. 25 U.S.C. 2710(d)(8)(D). The Department’s regulations at 25 CFR 293.4, require all compacts and amendments to be reviewed and approved by the Secretary prior to taking effect. The Secretary took no action on the Compact between the Tribe and the State. Therefore, the Compact is considered to have been approved, but only to the extent it is consistent with IGRA. *See* 25 U.S.C. 2710(d)(8)(C).

Bryan Newland,

Principal Deputy Assistant Secretary—Indian Affairs.

[FR Doc. 2021–17055 Filed 8–10–21; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF THE INTERIOR**National Park Service**

[NPS-WASO-NAGPRA-NPS0032394;
PPWOCRADNO-PCU00RP14.R50000]

**Notice of Inventory Completion:
Peabody Museum of Archaeology and
Ethnology, Harvard University,
Cambridge, MA**

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The Peabody Museum of Archaeology and Ethnology, Harvard University (Peabody Museum) has completed an inventory of human remains and associated funerary objects, in consultation with the appropriate Indian Tribes or Native Hawaiian organizations, and has determined that there is no cultural affiliation between the human remains and associated funerary objects and any present-day Indian Tribes or Native Hawaiian organizations. Representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request to the Peabody Museum. If no additional requestors come forward, transfer of control of the human remains and associated funerary objects to the Indian Tribes or Native Hawaiian organizations stated in this notice may proceed.

DATES: Representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to the Peabody Museum at the address in this notice by September 10, 2021.

FOR FURTHER INFORMATION CONTACT: Patricia Capone, Peabody Museum of Archaeology and Ethnology, Harvard University, 11 Divinity Avenue, Cambridge, MA 02138, telephone (617) 496-3702, email pcapone@fas.harvard.edu.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects under the control of the Peabody Museum of Archaeology and Ethnology, Harvard University, Cambridge, MA. The human remains and associated funerary objects were removed from sites in Cumberland,

Hancock, Kennebec, Knox, and Lincoln Counties, ME.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3) and 43 CFR 10.11(d). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by the Peabody Museum of Archaeology and Ethnology professional staff in consultation with representatives of the Aroostook Band of Micmacs [previously listed as Aroostook Band of Micmac Indians]; Houlton Band of Maliseet Indians; Passamaquoddy Tribe; and the Penobscot Nation [previously listed as Penobscot Tribe of Maine] (hereafter referred to as "The Tribes.")

History and Description of the Remains

At an unknown date, human remains representing, at minimum, four individuals were removed from Flying Point in Freeport, Cumberland County, ME, by Dr. J. C. or J. E. Porter. Porter donated the human remains to the Peabody Museum on August 27, 1953. No known individuals were identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, three individuals were removed from Maine State Site #8-1, in a marsh in Scarborough, Cumberland County, ME, by W. W. Lord. Lord donated the human remains to the Robert S. Peabody Institute, then known as the Robert S. Peabody Foundation, at an unknown date. The Robert S. Peabody Foundation donated the human remains to the Peabody Museum on February 1, 1956. No known individuals were identified. No associated funerary objects are present.

Around 1888, human remains representing, at minimum, one individual were removed from a burial place in Prout's Neck near Scarborough Beach in Cumberland County, ME, by an unknown person. At an unknown date, Ruthven Deaide received the human remains. In 1906, Deaide donated the human remains to the Peabody Museum. No known individual was identified. No associated funerary objects are present, though copper stains are present on the individual's metacarpals, suggesting that the

individual was interred wearing finger rings or jewelry on the hands.

At an unknown date, human remains representing, at minimum, one individual were removed from an unknown place in Prout's Neck in Cumberland County, ME, by an unknown person. At an unknown date, H.T. Deane received the human remains. In 1912, Deane donated the human remains to the Peabody Museum. No known individual was identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, one individual were removed from Burial A in Grave 4 in a shell heap on the south end of Deer Island in Hancock County, ME, by Manley Hardy. In November 1877, Hardy donated the human remains to the Peabody Museum. No known individual was identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, two individuals were removed from a shell heap on the south end of Deer Island in Hancock County, ME, by Manley Hardy. In November 1877, Hardy donated the human remains to the Peabody Museum. No known individuals were identified. No associated funerary objects are present.

In May 1878, human remains representing, at minimum, one individual were removed from Maine State Site #30-15, a shell heap on Deer Island in Hancock County, ME, by Manly Hardy as part of a Peabody Museum expedition. The Peabody Museum received the human remains in June 1878. No known individual was identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, one individual were removed from Bar Harbor in Hancock County, ME, by an unknown person. An unknown person at an unknown date presented the human remains to the Peabody Museum, where they were accessioned on July 23, 1937. No known individual was identified. No associated funerary objects are present.

Between 1936 and 1937, human remains representing, at minimum, 43 individuals were removed from the Nevin site at Blue Hill (Maine State Site #42-1) in Hancock County, ME, by Douglas S. Byers and Frederick Johnson as part of a Robert S. Peabody Foundation expedition. The Robert S. Peabody Foundation loaned some of the human remains to the Peabody Museum on March 24, 1941 and converted the loan to a gift on June 28, 1989. The Robert S. Peabody Foundation donated

the remaining human remains to the Peabody Museum on August 8, 1997. No known individuals were identified. The 462 associated funerary objects are four stone adzes; two antler tools; nine birch bark fragments; one pileated woodpecker beak; 16 beaver teeth and tooth fragments; one stone biface; 188 faunal remains, teeth, and bone fragments; 31 animal teeth and fragments; one antler flaking tool; one bone flaking tool; one bird bone flute; three harpoon foreshafts; three stone gouges; six hammerstones; four animal teeth, incisors; two mink jaw fragments; one modified mineral fragment, iron; one red ochre and soil; two bone pendants; 34 perforated animal teeth and fragments; 100 perforators, awls, daggers, pikes, knives, and needles of bone, including fragments; six stone plummets; two bone points; two stone bayonets and fragments; nine bone harpoons; one stone projectile point; one polishing stone; nine iron pyrites; one scraper or flesher of bone; two soil samples; one swordfish rostrum; one deer antler socket; one unmodified stone; 12 porpoise vertebrae and fragments; and three hammerstone and iron pyrites with fragments. The 462 objects are the possession and control of the Robert S. Peabody Institute of Archaeology, Andover, MA. (The Robert S. Peabody Institute of Archaeology continues to look for the 52 missing associated funerary objects, which are two beaver teeth, three bifaces, four animal bone fragments, one stone gouge, 18 miscellaneous faunal remains, 16 perforated animal tooth fragments, six bone perforators, and two bone points.)

In 1895, human remains representing, at minimum, one individual were removed from Maine State Site #58-2 in Hancock County, ME, by Charles C. Willoughby as part of a Peabody Museum expedition. No known individual was identified. The three associated funerary objects are one lot of copper beads, copper bead fragments, and leather fragments; one lot of charcoal and burned bone fragments; and one lot of birch bark fragments.

In 1895, human remains representing, at minimum, one individual were removed from Maine State Site #58-2 in Hancock County, ME, by Charles C. Willoughby as part of a Peabody Museum expedition. No known individual was identified. No associated funerary objects are present.

In 1884, human remains representing, at minimum, one individual were removed from an unknown site in Lamoine in Hancock County, ME, by an unknown person from whom John E. Clark acquired the human remains. Clark donated the human remains to the

Peabody Museum in December 1884. No known individual was identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, seven individuals were removed from an unknown site in Lamoine in Hancock County, ME, by Elijah R. Emerson. Emerson donated the human remains to the Peabody Museum in 1892. No known individuals were identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, one individual were removed from a shell heap on Sheldrake Island (Maine State Site #44-11) in Hancock County, ME, by Arlo Bates. Bates donated the human remains to the Peabody Museum in 1907. No known individual was identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, two individuals were removed from a shell heap on Taft Point (Maine State Site #44-6) in Hancock County, ME, by Arlo Bates. Bates donated the human remains to the Peabody Museum in 1907. No known individuals were identified. No associated funerary objects are present.

In the summer of 1966, human remains representing, at minimum, one individual were removed from an unknown site in Benton in Kennebec County, ME, by Donaldson Koons. Koons donated the human remains to the Peabody Museum in March 1967 through Douglas S. Byers at the Phillips Academy in Andover, MA. No known individual was identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, three individuals were removed from Maine State Site #53-3 in Kennebec County, ME, by Elijah R. Emerson. Emerson donated the human remains to the Peabody Museum in 1892. No known individuals were identified. No associated funerary objects are present.

In June 1884, human remains representing, at minimum, one individual were removed from the Crotch Island shell heap (Maine State Site #17-1) in Knox County, ME, by Albert I. Phelps as part of a Peabody Museum Expedition directed by Frederic Ward Putnam. No known individual was identified. No associated funerary objects are present.

In 1883, human remains representing, at minimum, one individual were removed from the Davis Point shell heap (Maine State Site #17-3) in Knox County, ME, by Warren Morse. James E. Knowlton donated the human remains to the Peabody Museum on May 31, 1884. No known individual was

identified. The nine associated funerary objects are five bone points, three chipped stone implements, and one stone pestle. The associated funerary objects are not in the possession or control of the Peabody Museum.

At an unknown date, human remains representing, at minimum one individual were removed from a shell heap (Maine State Site #30-79) in Knox County, ME, by Arlo Bates. Arlo and Oric Bates donated the human remains to the Peabody Museum in 1919. No known individual was identified. No associated funerary objects are present.

In 1911, human remains representing, at minimum, four individuals were removed from shell heaps in Knox County, ME, by Arlo Bates and donated to the Peabody Museum. No known individuals were identified. No associated funerary objects are present.

In 1939, human remains representing, at minimum, three individuals were removed from a site on Lane's Island (Maine State Site #29-1) in Knox County, ME, by young men who discovered the human remains by accident. The individuals who discovered the remains may have included Kenneth Snowdeal, John Gordon, and Gust Carlson. H. J. Weisman took possession of the human remains and donated them to the Peabody Museum on May 26, 1939. No known individuals were identified. The 15 associated funerary objects are 13 animal bones and two shells. The associated funerary objects are not in the possession or control of the Peabody Museum.

In September 1884, human remains representing, at minimum, one individual were removed from E. Stetson's field in Lincoln County, ME, by Albert I. Phelps as part of a Peabody Museum expedition under the direction of Frederic Ward Putnam. No known individual was identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, three individuals were removed from A. K. Hodgsdon's field in Lincoln County, ME, by Abram T. Gamage. Gamage donated the human remains to the Peabody Museum in 1898. No known individuals were identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, one individual were removed from a site on Spectacle Island (Maine State Site #16-57a or #16-57b) in Lincoln County, ME, by Abram T. Gamage. Gamage donated the human remains to the Peabody Museum in 1898. No known individual was identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, one individual were removed from a shell heap on Hog Island in Lincoln County, ME, by Elijah R. Emerson. Emerson donated the human remains to the Peabody Museum around 1892. No known individual was identified. No associated funerary objects are present.

In 1872, human remains representing, at minimum, two individuals were removed from the bank of Damariscotta River, about one mile from Damariscotta Bridge (Maine State Site #16-169), in Lincoln County, ME, by Samuel Kneeland. Kneeland donated the human remains to the Peabody Museum in October 1872. No known individuals were identified. No associated funerary objects are present.

In 1882, human remains representing, at minimum, one individual were removed from a shell heap on Fort Island (Maine State Site #16-17) in Lincoln County, ME, by Abram T. Gamage. Gamage donated the human remains to the Peabody Museum on January 10, 1882. No known individual was identified. No associated funerary objects are present.

In 1882, human remains representing, at minimum, one individual were removed from a shell heap on Fort Island (Maine State Site #16-17) in Lincoln County, ME, by Abram T. Gamage. R. C. Chapman donated the human remains to the Peabody Museum on September 20, 1882. No known individual was identified. No associated funerary objects are present.

Between August and October 1886, human remains representing, at minimum, 12 individuals were removed from the Whaleback shell mound (Maine State Site #26-2) in Lincoln County, ME, by Abram T. Gamage as part of a Peabody Museum expedition under the direction of Frederic Ward Putnam. No known individuals were identified. Excavation notes indicated that the bones of a wolf were found with one individual, but no faunal remains were accessioned with the human remains. The associated funerary objects are not in the possession or control of the Peabody Museum.

On September 18, 1882, human remains representing, at minimum, one individual were removed from a bank at the north end of Loud's Island (Maine State Site #17-102) in Lincoln County, ME, by Frederic Ward Putnam as part of a Peabody Museum expedition under the direction of Putnam and Charles L. Metz. No known individual was identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, three

individuals were removed from the Great Oyster Heap site (Maine State Site #26-1) in Lincoln County, ME, by Charles Metcalf. Metcalf donated the human remains to the Peabody Museum through R. C. Chapman around 1882. No known individuals were identified. No associated funerary objects are present.

In 1931 or 1935, human remains representing, at minimum, one individual were removed from the Hight site in Lincoln County, ME, by Frederick P. Orchard. Orchard donated the human remains to the Peabody Museum on March 1, 1940. No known individual was identified. No associated funerary objects are present.

Determinations Made by the Peabody Museum of Archaeology and Ethnology, Harvard University

Officials of the Peabody Museum of Archaeology and Ethnology, Harvard University have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice are Native American based on osteological analysis, and/or archeological contexts and museum records.

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of 111 individuals of Native American ancestry.

- Pursuant to 25 U.S.C. 3001(3)(A), the three objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.

- Pursuant to 25 U.S.C. 3001(2), a relationship of shared group identity cannot be reasonably traced between the Native American human remains and associated funerary objects and any present-day Indian Tribe.

- Treaties, Acts of Congress, Executive Orders, or other authoritative governmental sources indicate that the land from which the Native American human remains and associated funerary objects were removed is the aboriginal land of The Tribes.

- Pursuant to 43 CFR 10.11(c)(1), the disposition of the human remains and associated funerary objects may be to The Tribes.

Additional Requestors and Disposition

Representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to Patricia Capone, Peabody Museum of Archaeology and Ethnology,

Harvard University, 11 Divinity Avenue, Cambridge, MA 02138, telephone (617) 496-3702, email pcapone@fas.harvard.edu, by September 10, 2021.

After that date, if no additional requestors have come forward, transfer of control of the human remains and associated funerary objects to The Tribes may proceed.

The Peabody Museum of Archaeology and Ethnology, Harvard University is responsible for notifying The Tribes that this notice has been published.

Dated: July 28, 2021.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2021-17059 Filed 8-10-21; 8:45 am]

BILLING CODE 4312-52-P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS-WASO-NAGPRA-NPS0032393; PPWOCRADN0-PCU00RP14.R50000]

Notice of Inventory Completion: Princeton University, Princeton, NJ; Correction

AGENCY: National Park Service, Interior.

ACTION: Notice; correction.

SUMMARY: Princeton University has corrected an inventory of human remains, published in a Notice of Inventory Completion in the **Federal Register** on April 1, 2021. This notice corrects the list of Indian Tribes from whose aboriginal land the culturally unidentifiable Native American human remains were removed. Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request to Princeton University. If no additional requestors come forward, transfer of control of the human remains to the lineal descendants, Indian Tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to Princeton University at the address in this notice by September 10, 2021.

FOR FURTHER INFORMATION CONTACT: Bryan R. Just, Princeton University Art Museum, Princeton, NJ 08544,

telephone (609) 258-8805, email bjust@princeton.edu.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the correction of an inventory of human remains under the control of the Princeton University, Princeton, NJ. The human remains were removed from Henry County, IN.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

This notice corrects the list of Indian Tribes from whose aboriginal land the culturally unidentifiable Native American human remains were removed published in a Notice of Inventory Completion in the **Federal Register** (86 FR 17196-17197, April 1, 2021). That list omitted the Kaw Nation, Oklahoma. Transfer of control of the items in this correction notice has not occurred.

Correction

In the **Federal Register** (86 FR 17197, April 1, 2021), column 2, paragraph 1, bullet point 6 is corrected by substituting the following sentence:

- According to other authoritative government sources, the land from which the Native American human remains were removed is the aboriginal land of the Absentee-Shawnee Tribe of Indians of Oklahoma; Citizen Potawatomi Nation, Oklahoma; Eastern Shawnee Tribe of Oklahoma; Forest County Potawatomi Community, Wisconsin; Hannahville Indian Community, Michigan; Kaw Nation, Oklahoma; Little Shell Tribe of Chippewa Indians of Montana; Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan; Nottawaseppi Huron Band of the Potawatomi, Michigan [previously listed as Huron Potawatomi, Inc.]; Omaha Tribe of Nebraska; Pokagon Band of Potawatomi Indians, Michigan and Indiana; Prairie Band Potawatomi Nation [previously listed as Prairie Band of Potawatomi Nation, Kansas]; and the Shawnee Tribe.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to Bryan R. Just, Princeton University Art Museum, Princeton, NJ 08544, telephone (609)

258-8805, email bjust@princeton.edu, by September 10, 2021. After that date, if no additional requestors have come forward, transfer of control of the human remains to the Indian Tribes from whose aboriginal land the culturally unidentifiable Native American human remains were removed may proceed.

Princeton University is responsible for notifying The Consulted Tribes, The Invited Tribes and Groups, and the Indian Tribes from whose aboriginal land the culturally unidentifiable Native American human remains were removed that this notice has been published.

Dated: July 28, 2021.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2021-17062 Filed 8-10-21; 8:45 am]

BILLING CODE 4312-52-P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS-WASO-NAGPRA-NPS0032391;
PPWOCRADNO-PCU00RP14.R50000]

Notice of Inventory Completion: New York State Office of Parks, Recreation, and Historic Preservation, Waterford, NY

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The New York State Office of Parks, Recreation, and Historic Preservation (NYSOPRHP) has completed an inventory of human remains, in consultation with the appropriate Indian Tribes or Native Hawaiian organizations, and has determined that there is a cultural affiliation between the human remains and present-day Indian Tribes or Native Hawaiian organizations. Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request to the NYSOPRHP. If no additional requestors come forward, transfer of control of the human remains to the lineal descendants, Indian Tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to the NYSOPRHP at the

address in this notice by September 10, 2021.

FOR FURTHER INFORMATION CONTACT:

Andrew Farry (Scientist/Archaeology), Division for Historic Preservation, P.O. Box 189, Waterford, NY 12188-0189, telephone (518) 268-2185, email andrew.farry@parks.ny.gov.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains under the control of the New York State Office of Parks, Recreation, and Historic Preservation, Waterford, NY. The human remains were removed from the Old Arsenal/Arsenal Hill Site, Canandaigua, Ontario County and the Ball Farm/Totiaktion Site, Mendon, Monroe County, NY.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by the New York State Office of Parks, Recreation, and Historic Preservation professional staff in consultation with representatives of the Cayuga Nation; Seneca Nation of Indians [previously listed as Seneca Nation of New York]; Seneca-Cayuga Nation [previously listed Seneca-Cayuga Tribe of Oklahoma]; Tonawanda Band of Seneca [previously listed as Tonawanda Band of Seneca Indians of New York]; and the Tuscarora Nation (hereafter referred to as "The Consulted Tribes").

History and Description of the Remains

In the late nineteenth century, human remains representing, at minimum, two individuals were removed from the Old Arsenal/Arsenal Hill Site in Ontario County, NY. The human remains were excavated by William M. Locke and acquired by William Pryor Letchworth. The Letchworth collection was included in the gift of the Glen Iris Estate to New York State in 1907. The human remains include a skull belonging to an adult of unknown sex (LE.2010.7) and partial cranium vault fragments belonging to an adult of unknown sex (LE.2010.8). No known individuals were identified. No associated funerary objects are present.

Based on the known context of recovery and a 2002 archeological and

osteological assessment, the human remains predate A.D. 1400 and are connected to earlier Owasco/Seneca. The provenience of the human remains is consistent with the historically documented territory of the Seneca. Consultation has further established the cultural affiliation of these human remains with the Seneca Nation of Indians [previously listed as Seneca Nation of New York] and the Tonawanda Band of Seneca [previously listed as Tonawanda Band of Seneca Indians of New York].

In the late nineteenth century, human remains representing, at minimum, one individual were removed from the Ball Farm/Totiakton Site, Monroe County, NY. The human remains were excavated by William M. Locke and acquired by William Pryor Letchworth. The Letchworth collection was included in the gift of the Glen Iris Estate to New York State in 1907. The human remains include the mandible, teeth, and cranial fragments belonging to a sub-adult aged 6–12 of unknown sex. No known individual was identified. No associated funerary objects are present.

Based on the known context of recovery and a 2002 archaeological and osteological assessment, the human remains date to ca. A.D. 1669–1687 and are connected to the earlier Seneca. Ca. A.D. 1669–1687, Totiakton was a Seneca village located along Honeoye Creek in the Town of Mendon, Monroe County, NY. The provenience of the human remains is consistent with the historically documented territory of the Seneca. Consultation has further established the cultural affiliation of these human remains with the Seneca Nation of Indians [previously listed as Seneca Nation of New York] and the Tonawanda Band of Seneca [previously listed as Tonawanda Band of Seneca Indians of New York].

Determinations Made by the New York State Office of Parks, Recreation, and Historic Preservation

Officials of the New York State Office of Parks, Recreation, and Historic Preservation have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of three individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Seneca Nation of Indians [previously listed as Seneca Nation of New York] and the Tonawanda Band of Seneca [previously listed as Tonawanda Band of Seneca

Indians of New York] (hereafter referred to as “The Tribes”).

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to Division for Historic Preservation, P.O. Box 189, Waterford, NY 12188–0189, telephone (518) 268–2185, email andrew.farry@parks.ny.gov, by September 10, 2021.

After that date, if no additional requestors have come forward, transfer of control of the human remains to The Tribes may proceed.

The New York State Office of Parks, Recreation, and Historic Preservation is responsible for notifying The Consulted Tribes that this notice has been published.

Dated: July 28, 2021.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2021–17065 Filed 8–10–21; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

**[NPS–WASO–NAGPRA–NPS0032390;
PPWOCRADN0–PCU00RP14.R50000]**

Notice of Inventory Completion: John Michael Kohler Arts Center, Sheboygan, WI

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The John Michael Kohler Arts Center has completed an inventory of human remains, in consultation with the appropriate Indian Tribes or Native Hawaiian organizations and has determined that there is a cultural affiliation between the human remains and present-day Indian Tribes or Native Hawaiian organizations. Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request to the John Michael Kohler Arts Center. If no additional requestors come forward, transfer of control of the human remains to the lineal descendants, Indian Tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not

identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to the John Michael Kohler Arts Center at the address in this notice by September 10, 2021.

FOR FURTHER INFORMATION CONTACT: Sam Gappmayer, John Michael Kohler Arts Center, 608 New York Avenue, Sheboygan, WI 53081, telephone (920) 694–4526, email sgappmayer@jmkac.org.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains under the control of the John Michael Kohler Arts Center, Sheboygan, WI. The human remains were removed from Sheboygan, Sheboygan County, WI.

This notice is published as part of the National Park Service’s administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by the John Michael Kohler Arts Center professional staff in consultation with representatives of the Winnebago Tribe of Nebraska.

History and Description of the Remains

In the early 1990s, human remains representing at minimum, two individuals were removed from native burial sites in what is now Sheboygan, Sheboygan County, WI, by Rudolph Kuehne. After his death, in the late 1920s, Kuehne’s widow sold the Kuehne collection—the remains of the two individuals and 5,816 objects—to the Kohler Foundation. The collection was packed away and not studied until 1968, when it was examined by John Michael Kohler Arts Center staff while preparing an exhibit, at which time the human remains described in this notice were discovered. The human remains belong to two individuals of unidentified age and sex. No known individuals were identified. A Notice of Intent to Repatriate Cultural Items for the 5,816 objects was published in the **Federal Register** on June 10, 2020 (85 FR 35438, June 10, 2020).

Determinations Made by the John Michael Kohler Arts Center

Officials of the John Michael Kohler Arts Center have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of two individuals of Native American ancestry.

- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Winnebago Tribe of Nebraska.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to Sam Gappmayer, John Michael Kohler Arts Center, 608 New York Avenue, Sheboygan, WI 53081, telephone (920) 694-4526, email sgappmayer@jmkac.org, by September 10, 2021. After that date, if no additional requestors have come forward, transfer of control of the human remains to the Winnebago Tribe of Nebraska may proceed.

The John Michael Kohler Arts Center is responsible for notifying the Winnebago Tribe of Nebraska that this notice has been published.

Dated: July 28, 2021.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2021-17061 Filed 8-10-21; 8:45 am]

BILLING CODE 4312-52-P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS-NERO-BLRV-NPS0031853; ACCT Number: PPNEBLRV00/PPMSPD1Z.YM0000]

Blackstone River Valley National Historical Park

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: As authorized by Section 3031 of the National Defense Authorization Act for Fiscal Year 2015, the National Park Service (NPS) announces that the Secretary of the Interior (Secretary) has established the park boundary for Blackstone River Valley National Historical Park in the Commonwealth of Massachusetts and the State of Rhode Island.

DATES: The effective date of the establishment of the boundary is August 11, 2021.

FOR FURTHER INFORMATION CONTACT: Celeste Bernardo, Acting Deputy Regional Director, NPS, Interior Region 1 at (978) 275-1703.

ADDRESSES: A color version and more detailed area maps depicting the boundary are available here: <https://www.nps.gov/blrv/planyourvisit/maps.htm>.

SUPPLEMENTARY INFORMATION: Section 3031 of the National Defense Authorization Act for Fiscal Year 2015, Public Law 113-291 includes a specific provision relating to establishment of a Park boundary for Blackstone River Valley National Historical Park. To establish the boundary, the Secretary must determine that a sufficient quantity of land, or interests in land, has been acquired to constitute a manageable park unit and must publish a boundary map in the **Federal Register**.

The NPS acquired by Donation Deed the fee simple interests in the 3.06 acres at 67 Roosevelt Avenue in Pawtucket, Rhode Island, on March 31, 2021. This

property contains the historic Old Slater Mill (ca. 1793), the Wilkinson Mill (ca. 1810) and the Sylvanus Brown House (ca. 1753) and associated lands.

In addition, on March 27, 2021, the NPS accepted the conveyance of an 85-acre conservation and preservation easement from the State of Rhode Island for the protection of portions of the Blackstone River State Park including the historic canal and the Captain Wilbur Kelly House Museum.

Further, the enabling legislation provides that the Secretary may include in the park boundary any resources that are the subject of an agreement with the States or a subdivision of the States entered into under paragraph (c)(4)(D) of the Act. The park has entered into such agreements with the following subdivisions:

- Town of Northbridge, Massachusetts for Whitinsville Historic District (April 11, 2018)
- Town of Hopedale, Massachusetts for Little Red Shop Local Historic District (August 8, 2019)
- Town of Cumberland, Rhode Island for Ashton Historic District (October 11, 2018)
- Town of North Smithfield, Rhode Island for Slatersville Local Historic District (March 20, 2018)

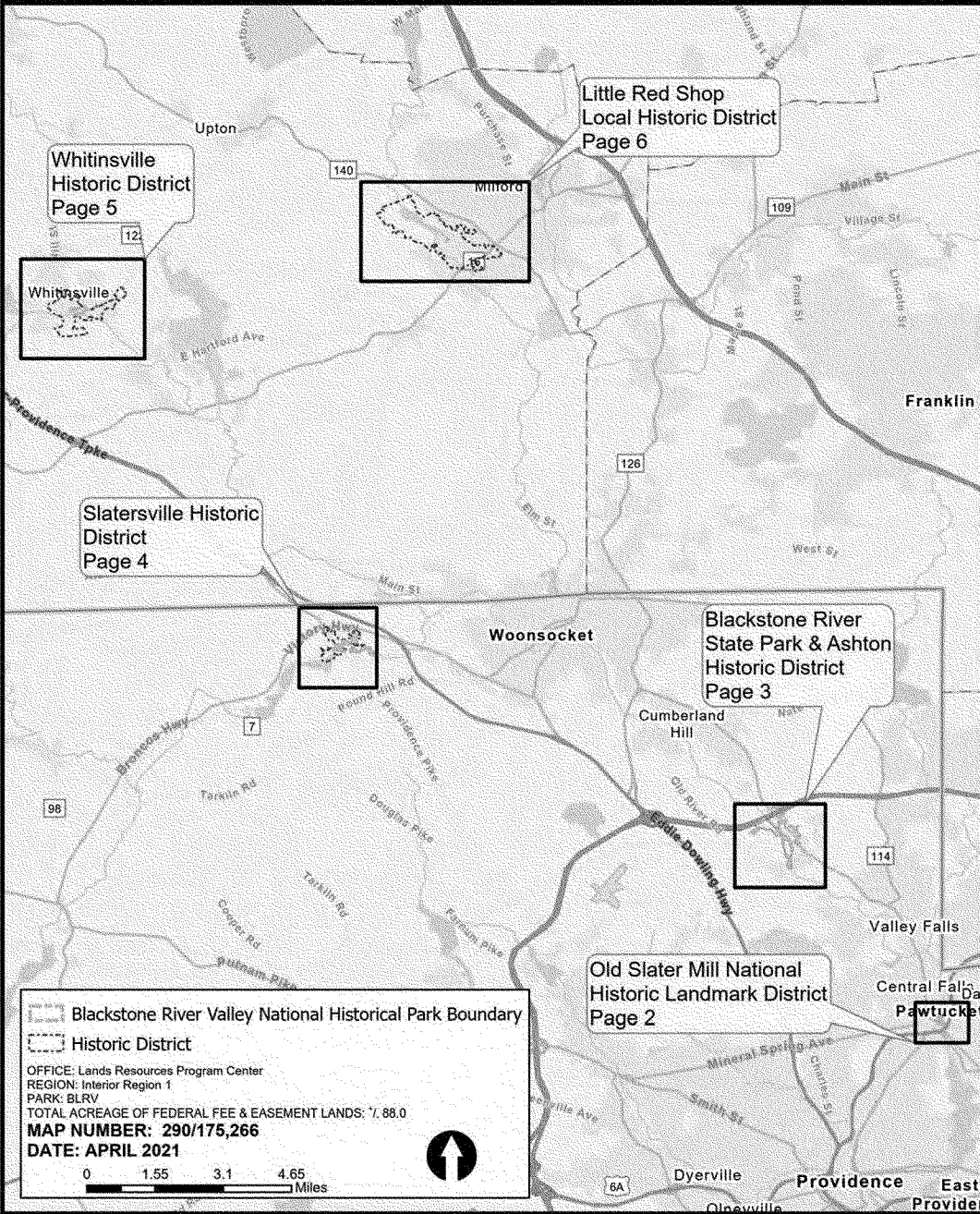
Each of these communities has a local historic district in place within its defined historic district that has the benefit of local regulatory oversight and protection. These areas are considered to be within the boundary of the park.

On July 27, 2021, the Secretary of the Interior signed a Decision Memorandum determining that a sufficient quantity of land, or interests in land, had been acquired to constitute a manageable park unit. With the signing of this Decision Memorandum by the Secretary and the publication of the boundary map in the **Federal Register**, the boundary of the Blackstone River Valley National Historical Park is established.

BILLING CODE 4312-52-P

Blackstone River Valley National Historical Park Boundary

National Park Service
U.S. Department of the Interior



Shawn Benge,

Deputy Director, Operations, Exercising the Delegated Authority of the Director, National Park Service.

[FR Doc. 2021-17125 Filed 8-10-21; 8:45 am]

BILLING CODE 4312-52-C

DEPARTMENT OF THE INTERIOR**National Park Service**

[NPS-WASO-NAGPRA-NPS0032395; PPWOCRADNO-PCU00RP14.R50000]

Notice of Inventory Completion: Peabody Museum of Archaeology and Ethnology, Harvard University, Cambridge, MA; Correction

AGENCY: National Park Service, Interior.

ACTION: Notice; correction.

SUMMARY: The Peabody Museum of Archaeology and Ethnology, Harvard University has corrected an inventory of human remains and associated funerary objects published in a Notice of Inventory Completion in the **Federal Register** on July 30, 2007. This notice corrects the minimum number of individuals and number of associated funerary objects. Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request to the Peabody Museum of Archaeology and Ethnology. If no additional requestors come forward, transfer of control of the human remains and associated funerary objects to the lineal descendants, Indian Tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to the Peabody Museum of Archaeology and Ethnology at the address in this notice by September 10, 2021.

FOR FURTHER INFORMATION CONTACT: Patricia Capone, Peabody Museum of Archaeology and Ethnology, Harvard University, 11 Divinity Avenue, Cambridge, MA 02138, telephone (617) 496-3702, email pcapone@fas.harvard.edu.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and

Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the correction of an inventory of human remains and associated funerary objects under the control of the Peabody Museum of Archaeology and Ethnology, Harvard University, Cambridge, MA. The human remains and associated funerary objects were removed from Burlington, Gloucester, and Mercer Counties, NJ, and Chester County, PA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

This notice corrects the minimum number of individuals and number of associated funerary objects published in a Notice of Inventory Completion in the **Federal Register** (72 FR 41524-41525, July 30, 2007). [The cultural affiliation determinations made in this Notice of Inventory Completion were subsequently corrected in the **Federal Register** (73 FR 58625-58626, October 7, 2008, and 77 FR 46120-46121, August 2, 2012)]. Following further consultation and inventory review with the Delaware Nation, Oklahoma; Delaware Tribe of Indians; and the Stockbridge Munsee Community, Wisconsin, the Peabody Museum of Archaeology and Ethnology has determined that the minimum number of individuals should be increased by 17 and the number of associated funerary objects should be increased by the addition of two previously unidentified associated funerary objects and four associated funerary objects for which cultural affiliation has now been established. Transfer of control of the items in this correction notice has not occurred.

Correction

In the **Federal Register** (72 FR 41524, July 30, 2007), column 3, paragraph 1 is corrected by substituting the following paragraph:

In 1879, human remains representing a minimum of two individuals were recovered from an unknown location in Burlington County, NJ, by Michael Newbold during a Peabody Museum of Archaeology and Ethnology expedition led by C.C. Abbott. No known individuals were identified. No associated funerary objects are present.

In the **Federal Register** (72 FR 41524, July 30, 2007), column 3, paragraph 2, sentence 1 is corrected by substituting the following sentence:

Osteological characteristics indicate that these individuals are Native American.

In the **Federal Register** (72 FR 41524, July 30, 2007), column 3, paragraph 5 is corrected by substituting the following paragraph:

On October 2, 1894, human remains representing a minimum of 12 individuals were recovered from the Lalor Field site in Trenton, Mercer County, NJ, by Ernest Volk during a Peabody Museum of Archaeology and Ethnology expedition led by Mr. Volk. No known individuals were identified. The six associated funerary objects are one animal mandible with teeth, one notched stone, three stone implements, and one stone gorget. The animal mandible with teeth, notched stone, and stone implements were accessioned into the museum's collection in 1952 and the stone gorget was accessioned into the museum's collection in 1895.

In the **Federal Register** (72 FR 41525, July 30, 2007), column 1, paragraph 1, sentence 3 is corrected by substituting the following sentence:

The polished stone gorget associated with the human remains, as well as artifacts recovered from the grave fill but not associated with the human remains, including lithic flakes and ceramic sherds, support this date.

In the **Federal Register** (72 FR 41525, July 30, 2007), column 1, paragraph 2 is corrected by substituting the following paragraph:

Between 1894 and 1895, human remains representing a minimum of four individuals were recovered from the Lalor Field site in Trenton, Mercer County, NJ, by Ernest Volk during a Peabody Museum of Archaeology and Ethnology expedition led by Mr. Volk. No known individuals were identified. No associated funerary objects are present.

In the **Federal Register** (72 FR 41525, July 30, 2007), column 1, paragraph 3, sentence 3 is corrected by substituting the following sentence:

The lack of known burials predating the Middle Woodland Period in the area of Lalor Field excavated in 1894-1895, the artifacts recovered from the grave fill but not associated with the human remains, including lithic flakes, bifacial implements and fragments, and ceramic sherds, the positioning of the deceased, and the lack of associated funerary objects support this date.

In the **Federal Register** (72 FR 41525, July 30, 2007), column 1, paragraph 5, the following paragraphs are added at the end of paragraph 5:

In 1894, human remains representing a minimum of seven individuals were likely recovered from the Lalor Field site in Trenton, Mercer County, NJ, by Ernest Volk during a Peabody Museum of Archaeology and Ethnology expedition led by Mr. Volk. No known individuals were identified. No associated funerary objects are present.

Osteological characteristics indicate that these individuals are Native American. The

interments most likely date to the Middle to Late Woodland periods (A.D. 0–1500). The lack of known burials predating the Middle Woodland Period in the area of Lalor Field excavated in 1894–1895 supports this date. Archeological evidence, museum documentation, and oral histories indicate that the human remains are from an area considered to be part of the aboriginal homelands and traditional burial areas of the Delaware people.

Between 1894 and 1895, human remains representing a minimum of one individual were recovered from either the Lalor Field site or the Lowland site in Trenton, Mercer County, NJ, by Ernest Volk during a Peabody Museum of Archaeology and Ethnology expedition led by Mr. Volk. No known individuals were identified. No associated funerary objects are present.

Osteological characteristics indicate that this individual is Native American. The interment most likely dates to the Middle to Late Woodland periods (A.D. 0–1500). The lack of known burials predating the Middle Woodland Period in the area of Lalor Field excavated in 1894–1895 or in the area of the Lowland site excavated in 1895 supports this date. Archeological evidence, museum documentation, and oral histories indicate that the human remains are from an area considered to be part of the aboriginal homelands and traditional burial areas of the Delaware people.

In 1909, human remains representing a minimum of one individual were likely recovered from the A.K. Rowan Farm site in Trenton, Mercer County, NJ, by Ernest Volk during a Peabody Museum of Archaeology and Ethnology expedition led by Mr. Volk. No known individuals were identified. No associated funerary objects are present.

Osteological characteristics indicate that this individual is Native American. The interment most likely dates to the Late Woodland or Contact Periods (900–1700 A.D.). The lack of known burials likely predating the Late Woodland Period in the area of the A.K. Rowan Farm site excavated in 1909, associated funerary objects in known burial contexts from 1909 at the A.K. Rowan Farm site, stratigraphic context and burial positioning, and artifacts recovered from the grave fill but not associated with human remains support this date. Archeological evidence, museum documentation, and oral histories indicate that the human remains are from an area considered to be part of the aboriginal homelands and traditional burial areas of the Delaware people.

Between 1886 and 1887, human remains representing a minimum of three individuals were recovered from an “Indian Burial Ground” on Lalor Farm in Trenton, Mercer County, NJ, by C.C. Abbott during a Peabody Museum of Archaeology and Ethnology expedition led by Dr. Abbott. No known individuals were identified. The associated funerary objects are two dog teeth and one dog jaw. The dog jaw is not in the possession or control of the Peabody Museum of Archaeology and Ethnology.

Osteological characteristics indicate that this individual is Native American. The interment most likely dates to the Late Woodland Period (900–1500 A.D.). Dog

burials occur throughout the northeastern United States from the Late Archaic through Contact Periods (B.C. 4000–1600 A.D.) both independently and accompanying human burials. In the Delaware Valley and other areas historically inhabited by the Delaware people, dog burials in association with human remains are most frequent in the Late Woodland Period. The placement of the remains of a dog with the three individuals in this burial supports this date. Archeological evidence, museum documentation, and oral histories indicate that the human remains are from an area considered to be part of the aboriginal homelands and traditional burial areas of the Delaware people.

Between 1892 and 1894, human remains representing a minimum of one individual were recovered from the Dutch Trader’s House site on Burlington Island in Burlington, Burlington County, New Jersey, by C.C. Abbott. No known individuals were identified. The four associated funerary objects are one cattle bone and three fragments of white-tailed deer bones.

Osteological characteristics indicate that this individual is Native American. This interment most likely dates to the Contact or Historic period (post-A.D. 1500) and the associated funerary objects recovered with the human remains support this date.

Archeological evidence, museum documentation, and oral histories indicate that the human remains are from an area considered to be part of the aboriginal homelands and traditional burial areas of the Delaware people.

In the **Federal Register** (72 FR 41525, July 30, 2007), column 2, paragraph 1, sentences 1 and 2 are corrected by substituting the following sentences:

Officials of the Peabody Museum of Archaeology and Ethnology, Harvard University have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of 36 individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(3)(A), the 22 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to Patricia Capone, Peabody Museum of Archaeology and Ethnology, Harvard University, 11 Divinity Avenue, Cambridge, MA 02138, telephone (617) 496–3702, email pcapone@fas.harvard.edu, by September 10, 2021. After that date, if no additional requestors have come forward, transfer of control of the human remains and

associated funerary objects to the Delaware Nation, Oklahoma; Delaware Tribe of Indians; and the Stockbridge Munsee Community, Wisconsin may proceed.

The Peabody Museum of Archaeology and Ethnology, Harvard University is responsible for notifying the Delaware Nation, Oklahoma; Delaware Tribe of Indians; and the Stockbridge Munsee Community, Wisconsin that this notice has been published.

Dated: July 28, 2021.

Melanie O’Brien,

Manager, National NAGPRA Program.

[FR Doc. 2021–17064 Filed 8–10–21; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–DTS#–32414; PFWOCRADIO, PCU00RP14.R50000]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The National Park Service is soliciting electronic comments on the significance of properties nominated before July 31, 2021, for listing or related actions in the National Register of Historic Places.

DATES: Comments should be submitted electronically by August 26, 2021.

ADDRESSES: Comments are encouraged to be submitted electronically to National_Register_Submissions@nps.gov with the subject line “Public Comment on <property or proposed district name, (County) State>.” If you have no access to email you may send them via U.S. Postal Service and all other carriers to the National Register of Historic Places, National Park Service, 1849 C Street NW, MS 7228, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Sherry A. Frear, Chief, National Register of Historic Places/National Historic Landmarks Program, 1849 C Street NW, MS 7228, Washington, DC 20240, sherry_frear@nps.gov, 202–913–3763.

SUPPLEMENTARY INFORMATION: The properties listed in this notice are being considered for listing or related actions in the National Register of Historic Places. Nominations for their consideration were received by the National Park Service before July 31, 2021. Pursuant to Section 60.13 of 36 CFR part 60, comments are being accepted concerning the significance of

the nominated properties under the National Register criteria for evaluation.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Nominations submitted by State or Tribal Historic Preservation Officers:

ARIZONA

Pima County

American Smelting and Refining Company
Southwestern Department Headquarters,
1150 North 7th Ave., Tucson,
SG100006883

DELAWARE

New Castle County

African Union Church and Cemetery of Iron
Hill, 1578 Whittaker Rd., Newark vicinity,
SG100006887

MISSISSIPPI

Hancock County

William and Mary McGee House, 16634
Whites Rd., Pearlinton, SG100006893

Neshoba County

Booker T. Washington High School, 234
Carver Ave., Philadelphia, SG100006878

MISSOURI

Jackson County

Rector House, 2008 East 12th St., Kansas
City, SG100006890
Mason Building, 1110 Grand Blvd., Kansas
City, SG100006891

PENNSYLVANIA

Erie County

Mayer Building, 1501–1509 State St., Erie,
SG100006881

Philadelphia County

Bellevue Worsted Mills, 5115–5139 Belfield
Ave., Philadelphia, SG100006880

SOUTH CAROLINA

Aiken County

Aiken County Hospital, 828 Richland Ave.
West, Aiken, SG100006888

Florence County

Heiden, Philip C., House, 116 North Blanding
St., Lake City, SG100006885

Richland County

Holman's Barber Shop, (Segregation in
Columbia, South Carolina MPS), 2128
Gervais St., Columbia, MP100006884

TEXAS

Cameron County

Essey, Lillian and George K. Aziz, House,
1205 West Elizabeth St., Brownsville,
SG100006889

VERMONT

Windham County

Brookline Baptist Church, (Religious
Buildings, Sites and Structures in Vermont
MPS), 632 Grassy Brook Rd., Brookline,
MP100006892

WYOMING

Johnson County

Wold Rock Art District, Address Restricted,
Barnum vicinity, SG100006877

Additional documentation has been
received for the following resources:

ARIZONA

Maricopa County

Willo Historic District (Additional
Documentation), Roughly bounded by
Central Ave., McDowell Rd., 7th Ave., and
Thomas Rd., Phoenix, AD90002099

VERMONT

Washington County

Roxbury Fish Hatchery (Additional
Documentation), (Fish Culture Resources
of Vermont MPS), West side VT 12A, about
1.0 mi. south of Roxbury, Roxbury vicinity,
AD94000177

Nomination submitted by Federal
Preservation Officer:

The State Historic Preservation
Officer reviewed the following
nomination and responded to the
Federal Preservation Officer within 45
days of receipt of the nomination and
supports listing the properties in the
National Register of Historic Places.

OKLAHOMA

Oklahoma County

Federal Building and United States Court
House, 200 NW 4th St., Oklahoma City,
SG100006876

Authority: Section 60.13 of 36 CFR
part 60

Dated: August 3, 2021.

Sherry A. Frear,

*Chief, National Register of Historic Places/
National Historic Landmarks Program.*

[FR Doc. 2021–17070 Filed 8–10–21; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0032392;
PPWOCRADNO–PCU00RP14.R50000]

Notice of Inventory Completion: Department of Anthropology, University of South Florida, Tampa, FL

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The Department of Anthropology, University of South Florida (USF) has completed an inventory of human remains, in consultation with the appropriate Indian Tribes or Native Hawaiian organizations, and has determined that there is a cultural affiliation between the human remains and present-day Indian Tribes or Native Hawaiian organizations. Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request to the Department of Anthropology, University of South Florida. If no additional requestors come forward, transfer of control of the human remains to the lineal descendants, Indian Tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to the Department of Anthropology, University of South Florida at the address in this notice by September 10, 2021.

FOR FURTHER INFORMATION CONTACT: Thomas J. Pluckhahn, Department of Anthropology, University of South Florida, 4202 E Fowler Avenue, SOC 107, Tampa, FL 33620–8100, telephone (813) 549–9742, email tpluckhahn@usf.edu.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains under the control of the Department of Anthropology, University of South Florida, Tampa, FL. The human remains were removed from various sites in Florida.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25

U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains was made by the Department of Anthropology, University of South Florida professional staff in consultation with representatives of the Seminole Tribe of Florida [previously listed as Seminole Tribe of Florida (Dania, Big Cypress, Brighton, Hollywood, & Tampa Reservations)] and The Seminole Nation of Oklahoma.

The Alabama-Coushatta Tribe of Texas [previously listed as Alabama-Coushatta Tribes of Texas]; Alabama-Quassarte Tribal Town; Coushatta Tribe of Louisiana; Jena Band of Choctaw Indians; Kialegee Tribal Town; Miccosukee Tribe of Indians; Mississippi Band of Choctaw Indians; Poarch Band of Creek Indians [previously known as the Poarch Band of Creeks, and as the Poarch Band of Creek Indians of Alabama]; The Choctaw Nation of Oklahoma; The Muscogee (Creek) Nation; and the Thlopthlocco Tribal Town were invited to consult but did not participate.

Hereafter, all Indian Tribes listed in this section are referred to as "The Consulted and Invited Tribes."

History and Description of the Remains

In 1988 and 1999, human remains representing, at minimum, six individuals were removed from the Corbin-Tucker site (8CA142) in Calhoun County, FL, by USF faculty member Dr. Nancy White. The site is associated with the Fort-Walton material culture complex (ca. A.D. 1440–1640). Radiocarbon dates on samples of the human remains indicate a date in the 1600s, perhaps associated with the early mission period in Florida. The human remains belong to one adult female and five individuals of undetermined age and sex. No known individuals were identified. The 2,550 associated funerary objects are one shell cup, 2,346 ceramic sherds, one lot of charcoal (277.6 g), 82 faunal remains, 49 floral remains, 25 flaked stone, and 46 soil samples. (A greenstone celt and two copper ornaments found in association with the burials and reported in publications were released to the private landowner.)

In 1975, human remains representing, at minimum, one individual were removed from the McKinney Midden site (also referred to as the Land O'Lakes

site) (8CI127) in Citrus County, FL. The human remains were collected by an amateur archeologist and subsequently donated to the University of South Florida. McKinney Midden is a midden and possible mound site located along the shore of the Homosassa River. The Florida Master Site File lists the occupation of the site as "unspecified prehistoric," but a brief report by the avocational archeologist who excavated the human remains suggests occupations dating from Late Archaic to Mississippian (ca. 1000 B.C. to A.D. 1500). The human remains belong to one individual of undetermined age and sex. No known individual was identified. No associated funerary objects are present.

In 1980, human remains representing, at minimum, 28 individuals were excavated from the Gibsonton site (8HI26), in Hillsborough County, FL, by former USF faculty member Dr. Stephen Gluckman. The Gibsonton site is a prehistoric village and cemetery located along the south side of the Alafia River. Dr. Gluckman conducted salvage excavations on a portion of the site after removal of palm trees by county road workers led to the inadvertent discovery of human remains. The excavations were later summarized in an article for *The Florida Anthropologist* by Jeffrey Mitchem, who participated in the excavations as a graduate student. The Florida Master Site File lists components from ranging from Woodland (Manasota and Weeden Island I, 700 B.C. to A.D. 700) to Mississippian (Safety Harbor, A.D. 1000 to 1500) for the Gibsonton site. However, the excavation report indicates that the ceramic assemblage is most consistent with a late Weeden Island association (ca. A.D. 600 to 1000). The highly fragmentary human remains belong to nine adults (based on repetition of left ulnae) and 19 juveniles of multiple ages. No known individuals were identified. No associated funerary objects are present.

In 1974, human remains representing, at minimum, seven individuals were removed from the Barley Barbor II site (8MT28), a small burial mound in Martin County, FL, by former USF faculty member Dr. Ray Williams. The excavations were conducted under a grant from the Florida Division of Archives, History, and Management in anticipation of the destruction of the mound by the construction of a Florida Power and Light reservoir and plant. The Florida Master Site File lists components on the site ranging from Woodland (Glades II, A.D. 750–1200) to Mississippian (Glades III, A.D. 1000–1700); however, Williams reported the

main period of use of the mound as Glades I Early, based on the ceramic assemblage and a radiocarbon date of 2110 ± 50 BP (UM-370). The human remains belong to six adults of undetermined sex and one individual of undetermined age and sex. No known individuals were identified. The 63 associated funerary objects are one flaked stone; three shells; 20 unmodified rocks; one lot of charred botanicals (6.62 g); 31 faunal remains; four concretions; one lot of miscellaneous metals (25.97 g); one metal bolt; and one fulgurite.

At unknown date, human remains representing, at minimum, eight individuals, were removed from the Weeden Island site (8PI1), in Pinellas County, FL. How these human remains were acquired is unknown. Some of them may have been obtained by donation from the St. Petersburg Museum of History. Tags included with some of the human remains suggest they were collected many years ago. Weeden Island, the type site for a ceramic type and phase of the same name, consists of a large shell midden and cemetery. The site was first described in print by S.T. Walker in 1880. Major excavations were led by Jesse Walter Fewkes for the Smithsonian Institution in 1923–1924. The Florida Master Site File lists components ranging from Late Archaic (Orange), Woodland (Manasota, Swift Creek, Weeden Island, 1000 B.C. to A.D. 1000), Mississippian (Safety Harbor, A.D. 1000–1500), to American (19th and 20th centuries). However, the most intensive pre-colonial settlement appears to have come in the Weeden Island and Safety Harbor periods, from around A.D. 100 to 1550. The human remains belong to eight individuals of undetermined age and sex. No known individuals were identified. No associated funerary objects are present.

In 1971, human remains representing, at minimum, four individuals were excavated from the Bay Pines site (8PI64), in Pinellas County, FL, by members of the Suncoast Archaeological Society, a chapter of the Florida Anthropological Society. Bay Pines was a prehistoric midden and cemetery first recorded by S.T. Walker in the late nineteenth century. The site was largely destroyed for a Veterans Administration hospital complex and other developments. The excavations by the Suncoast Archaeological Society were conducted in anticipation of the destruction of a portion of the site for the construction of a nursing home and were briefly reported by John Gallagher and Lyman Warren in *The Florida Anthropologist* (1975). The Florida Master Site File site form lists

components dating from the Late Archaic (3000 to 1000 B.C.) to the Woodland (1000 B.C. to A.D. 1000) periods. The published report indicates an occupation dating mainly to the latter period, specifically the Perico Island, Deptford, and early Weeden Island phases. The human remains belong to four individuals of undetermined age and sex. No known individuals were identified. The 4,106 associated funerary objects are 110 ceramic sherds, two pieces of charcoal, 3,986 faunal remains, three flaked stones, one fossilized faunal, three shell columella, and one metal pop top.

Sometime between 1952 and 1965, human remains representing, at minimum, one individual were removed from site 8HI50, located on MacDill Airforce Base, in Hillsborough County, FL. The human remains appear to have been removed by former USF faculty member Dr. Simon Messing. The Florida Master Site File lists the culture types represented on the site as Manasota and Weeden Island I and II, generalizable to the Woodland period (1000 B.C. to A.D. 1000). The human remains belong to one individual of undetermined age and sex. No known individuals were identified. No associated funerary objects are present.

At various dates, human remains representing, at minimum, five individuals were removed from the Cockroach Key/Indian Hill (8HI2) site, a mound complex on an anthropogenic island located along the eastern shore of Tampa Bay, in Hillsborough County, FL. The site was noted by S. T. Walker in the late 1800s. Excavations were later conducted by C.B. Moore. In the 1930s, Works Progress Administration (WPA) crews excavated much of the burial mound on the site, as later reported by Gordon Willey and Ripley Bullen. Some of the human remains appear to have been collected by Karlis Kaklins in 1964, while a tag identifies others as being excavated by pothunters in 1985. The Florida Master Site File lists the components on site 8HI2 as Woodland (Glades I, 1000 B.C. to A.D. 1000) and Mississippian (Glades II and III, A.D. 750 to 1700). The human remains belong to five individuals of undetermined age and sex. No known individuals were identified. The 23 associated funerary objects are four shells and 19 ceramics identified as coming from a provenience described as "Cockroach Key Burial Mound Material Karklins 10-31-64."

At an unknown date, human remains representing, at minimum, one individual were removed from the Little Cockroach Key site (8HI38), a shell midden and burial mound on an island

of the same name located on the eastern margin of Tampa Bay in Hillsborough County, FL. According to documents on file at the Florida Master Site File, archeologist John Goggin recorded the site in 1952, based on information provided by William Plowden. These human remains were acquired in 1977, but how or from whom they were acquired is unknown. The Florida Master Site File lists the site as dating to the Safety Harbor period (A.D. 1000-1500). The human remains belong to one individual of undetermined age and sex. No known individual was identified. The three associated funerary objects are ceramic sherds.

In 1980, human remains representing, at minimum, one individual were removed from the Briarwood Site, in Pasco County, FL. The human remains were excavated under the direction of Dr. Stephen Gluckman in advance of the construction of a housing development. The Briarwood site is dated primarily to the Safety Harbor period, ca. A.D. 1000 to 1550. A brief report by Jeffrey Mitchem, published in a 1985 issue of *Florida Scientist*, indicates that the remains of approximately 82 individuals were removed, and that most of them were sent to Florida Atlantic University for analysis. Mitchem also reported that most of excavated artifacts were sent to the Florida Museum of Natural History in Gainesville, FL. The human remains at the University of South Florida, which consist of very small fragments of bone that were recovered from flotation samples identified as coming from burial contexts, belong to one individual of undetermined age and sex. No known individual was identified. The one associated funerary object is one lot of small charcoal fragments.

At an unknown date, human remains representing, at minimum, one individual were removed from the Buck Island site (8HI6), on the University of South Florida Forest Preserve in Hillsborough County, FL. Published sources, along with documents on file at the Florida Master Site File, indicate that Buck Island was occupied repeatedly from the Paleoindian through early Spanish periods, but the main use of the site seems to have fallen in the Weeden Island (A.D. 100 to 1000) and Safety Harbor (A.D. 1000-1500) periods. Major excavations were conducted at Buck Island by WPA crews in the 1930s, when the land was part of the estate of Percy Rockefeller. The excavations, which were later described by Gordon Willey and Ripley Bullen, removed at least 28 burials. As the human remains at the University of South Florida are identified by a label reading "Site 1

[May 19 1970 Buck Island" and another reading "G. Smith Buck Island 8-Hi-6," presumably, they were a donation from G. Smith. The human remains belong to one individual of undetermined age and sex. No known individual was identified. No associated funerary objects are present.

Sometime around 1984, human remains representing, at minimum, two individuals were removed from "Unknown Florida Site #1" located in Cockroach Bay Hillsborough County, FL. The human remains were donated to USF by the City of Tampa, Department of Public Works in 1984. Based on skeletal taphonomy, these human remains are determined to be Native American. The human remains belong to two individuals of undetermined age and sex. No known individuals were identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, one individual were removed from "Unknown Florida Site #2" but believed to be Safety Harbor, in Pinellas County, FL. The human remains, which appear to have been acquired by donation from the St. Petersburg Museum of History, are accompanied by a tag reading "Indian skull. Safety Harbor, Pinellas County, Florida." They might be associated with the Safety Harbor site (8PI2), located on the western shore of Tampa Bay. If so, the human remains probably date to the Safety Harbor period, ca. A.D. 1000 to 1550. The human remains belong to one individual of undetermined age and sex. No known individual was identified. The 13 associated funerary objects are eight pottery fragments, one lightning whelk shell, one fossilized faunal bone, two flaked stones, and one possible groundstone.

Sometime in 1943 or earlier, human remains representing, at minimum, two individuals were removed from "Unknown Florida Site #3" believed to be in Pinellas County, FL. The remains were acquired from the St. Petersburg Historical Museum at an unknown date. They can be broadly traced to Pinellas County based on their identification as "Piece of Human Bone From Maximo Point 1943 Gift of Louis Poole." Maximo Point is a toponym that may refer to one of several archeological sites on the southern tip of the Pinellas County peninsula. The human remains belong to one adult of undetermined sex and one juvenile of undetermined sex. No known individuals were identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, one individual were removed from

“Unknown Florida Site #4” believed to be in Pinellas County, FL. The remains were obtained by donation from an unknown individual around 2011. Based on their identification as coming from the “Park Street Mound,” these human remains are likely associated with one of two mound sites along the western side of Park Street in St. Petersburg, Pinellas County—the Abercrombie Park complex (sites 8PI58 and 8PI10650) or the Jungle Prada site complex (site 8PI54). Components on these sites range from Late Archaic to Woodland to Safety Harbor (from 3000 B.C. to A.D. 1500), according to the Florida Master Site File. The human remains belong to one individual of undetermined age and sex. No known individual was identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, four individuals were removed from “Unknown Florida Site #5” believed to be in Pinellas County, FL. These human remains can be reasonably traced to Pinellas County based on their identification as coming from “Burial Mound near Seminole Bridge (US Rte #6), St. Petersburg, Florida.” “Seminole Bridge” was the original link to Clearwater Beach from the Pinellas County mainland; it was completed in 1917 and replaced by a causeway in 1926. Although there are several known sites in the vicinity, none match the description of a burial mound. The human remains belong to three adults of undetermined sex and one juvenile of undetermined sex. No known individuals were identified. The two associated funerary objects are one fragment of groundstone and one faunal remain.

At an unknown date, human remains representing, at minimum, two individuals were removed from “Unknown Florida Site #6” believed to be in Pinellas County, FL. These human remains can be broadly associated with Pinellas County because of their identification as part of the Walter Fuller collection. H. Walter Fuller and his son Walter P. Fuller were prominent developers in St. Petersburg, Pinellas County, in the early and middle twentieth century. The USF Library curates the papers associated with Walter P. Fuller, and the human remains in our collection were acquired by transfer from the library in 2000. The human remains belong to one adult of indeterminate sex and one juvenile of indeterminate sex. No known individuals were identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, five

individuals were removed from “Unknown Florida Site #7” believed to be in Pinellas County, FL. These human remains can be broadly associated with Pinellas County based on a box label reading “Snell Island.” Snell Island is a toponym in Pinellas County. (An addendum to our previous NAGPRA inventory indicates these human remains were acquired in 1978, but we have no documentation to substantiate this or to indicate the circumstances under which they were acquired.) The human remains belong to five individuals of undetermined age and sex. No known individuals were identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, one individual were removed from “Unknown Florida Site #8” believed to be in Pinellas County, FL. USF might have acquired them from the St. Petersburg Museum of History. These human remains can be broadly associated with Pinellas County based on accompanying documentation that identifies them as part of a “mounted museum exhibit” and a museum label that describes them as “remains of an Indian who lived in this section many years ago . . . Capt. Barnett Harris, Florida Anthropological Society.” The human remains likely were exhibited at a now defunct museum—the Sea-Orama—that Harris operated in Clearwater, Pinellas County, from around 1952 to 1968. The human remains belong to one individual of undetermined age and sex. No known individual was identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, 15 individuals were removed from “Unknown Florida Site #9” believed to be in Citrus County, FL. These human remains can be broadly associated to Citrus County based on an accompanying tag reading “Ozella, FLA.” Ozello is an unincorporated community in Citrus County. These human remains appear to have been acquired as part of a larger donation from the former Hillsborough County Museum between 1967 (when the museum took this name) and 1980 (when it became the Museum of Science and Industry, or MOSI). The human remains belong to 12 adults of undetermined sex and three juveniles of undetermined sex. No known individuals were identified. No associated funerary objects are present.

At an unknown date, human remains representing, at minimum, one individual were removed from “Unknown Florida Site #10” believed to

be in Lee County, FL. The human remains were part of a larger acquisition from the former Hillsborough County Museum (now MOSI), probably between 1967 and 1980. These human remains can be reasonably traced to Lee County, in southwestern Florida, based on an accompanying tag that reads “Pine Island near Boca Grande.” Pine Island and Boca Grande are islands near Cape Coral, Lee County. The human remains belong to one individual of undetermined age and sex. No known individual was identified. No associated funerary objects are present.

Determinations Made by the Department of Anthropology, University of South Florida

Officials of the Department of Anthropology, University of South Florida have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of 97 individuals of Native American ancestry.

- Pursuant to 25 U.S.C. 3001(3)(A), the 6,761 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.

- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Seminole Tribe of Florida [previously listed as Seminole Tribe of Florida (Dania, Big Cypress, Brighton, Hollywood, & Tampa Reservations)] and The Seminole Nation of Oklahoma (hereafter referred to as “The Tribes”).

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains should submit a written request with information in support of the request to Thomas J. Pluckhahn, Department of Anthropology, University of South Florida, 4202 E Fowler Avenue, SOC 107, Tampa, FL 33620–8100, telephone (813) 549–9742, email tpluckhahn@usf.edu, by September 10, 2021. After that date, if no additional requestors have come forward, transfer of control of the human remains to The Tribes may proceed.

The Department of Anthropology, University of South Florida is responsible for notifying The Tribes and The Invited Tribes that this notice has been published.

Dated: July 28, 2021.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2021-17058 Filed 8-10-21; 8:45 am]

BILLING CODE 4312-52-P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS-WASO-NAGPRA-NPS0032396;
PPWOCRADNO-PCU00RP14.R50000]

Notice of Intent To Repatriate Cultural Items: Peabody Museum of Archaeology and Ethnology, Harvard University, Cambridge, MA; Correction

AGENCY: National Park Service, Interior.

ACTION: Notice; correction.

SUMMARY: The Peabody Museum of Archaeology and Ethnology, Harvard University has corrected a Notice of Intent to Repatriate published in the **Federal Register** on July 30, 2007. This notice corrects the number of unassociated funerary objects. Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request to the Peabody Museum of Archaeology and Ethnology. If no additional claimants come forward, transfer of control of the cultural items to the lineal descendants, Indian Tribes, or Native Hawaiian organizations stated in this notice may proceed.

DATES: Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request with information in support of the claim to the Peabody Museum of Archaeology and Ethnology at the address in this notice by September 10, 2021.

FOR FURTHER INFORMATION CONTACT: Patricia Capone, Peabody Museum of Archaeology and Ethnology, Harvard University, 11 Divinity Avenue, Cambridge, MA 02138, telephone (617) 496-3702, email pcapone@fas.harvard.edu.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3005, of the intent to repatriate cultural items under the control of the Peabody Museum of Archaeology and Ethnology, Harvard University, Cambridge, MA, that meet the definition of unassociated funerary objects under 25 U.S.C. 3001.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American cultural items. The National Park Service is not responsible for the determinations in this notice.

This notice corrects the number of unassociated funerary objects published in a Notice of Intent to Repatriate in the **Federal Register** (72 FR 41522-41524, July 30, 2007). [The cultural affiliation determinations made in this Notice of Intent to Repatriate were subsequently corrected in the **Federal Register** (73 FR 58619-58620, October 7, 2008, and 77 FR 46114, August 2, 2012)]. Further consultation and inventory review with the Delaware Nation, Oklahoma; Delaware Tribe of Indians; and the Stockbridge Munsee Community, Wisconsin, yielded additional evidence of cultural affiliation for several unassociated funerary objects. A detailed re-inventory of cultural items from New Jersey held by the Peabody Museum of Archaeology and Ethnology revealed additional unassociated funerary objects, produced more specific site information for some unassociated funerary objects, and showed that two previously reported cultural items did not meet the definition of unassociated funerary objects. Transfer of control of the items in this correction notice has not occurred.

Correction

In the **Federal Register** (72 FR 41523, July 30, 2007), column 1, paragraph 2 is corrected by substituting the following paragraph:

The 63 cultural items are stone effigy pendants, glass and shell beads, ceramic sherds, projectile points, bone fragments, metal bells, one worked stone, one ceramic pipe, and one pipe stem fragment.

In the **Federal Register** (72 FR 41523, July 30, 2007), column 2, paragraph 2 is corrected by substituting the following paragraph:

In 1895, four cultural items were recovered from the Lalor Field site in Trenton, Mercer County, NJ, by Ernest Volk during a Peabody Museum of Archaeology and Ethnology expedition led by Mr. Volk. Three of the cultural items were accessioned into the Museum's collection in 1895 but one of the cultural items was not accessioned into the Museum's collection until 1952, as a gift of C.C. Abbott. The four unassociated funerary objects are three lots of ceramic sherds and one ceramic pot base.

In the **Federal Register** (72 FR 41523, July 30, 2007), column 2, paragraph 4 is

corrected by substituting the following paragraph:

In 1909, 22 cultural items were recovered from the A.K. Rowan Farm site and "burial place near old house" in Trenton, Mercer County, NJ, by Ernest Volk and R.E. Merwin during a Peabody Museum of Archaeology and Ethnology expedition led by Mr. Volk and Mr. Merwin. The 22 unassociated funerary objects are six projectile points, one stone scraper, one set of glass beads, five lots of ceramic sherds, two worked bone fragments, three metal bells, one worked stone, one stone effigy pendant depicting a face, one kaolin pipe stem fragment, and one ground stone pendant.

In the **Federal Register** (72 FR 41523, July 30, 2007), column 2, paragraph 6, sentence 1 is corrected by substituting the following sentence:

In 1911, 10 cultural items were recovered from an "Indian Burying Ground" south of the Riverview Cemetery, on the south shore of the Delaware River, in Trenton, Mercer County, NJ, by Frank Wachter.

In the **Federal Register** (72 FR 41523, July 30, 2007), column 2, paragraph 6, sentence 3 is corrected by substituting the following sentence:

The 10 unassociated funerary objects are one set of glass beads, one kaolin pipe, five shell bird effigy ornaments, one shell bead, one worked wood fragment, and one lot of metal bracelet fragments.

In the **Federal Register** (72 FR 41523, July 30, 2007), column 3, paragraph 1 is corrected by deleting the following paragraph:

Between 1888 and 1917, three cultural items were recovered from the Lalor Field site in Trenton, Mercer County, NJ, by C.C. Abbott and Ernest Volk. They were donated to the Peabody Museum of Archaeology and Ethnology by Mr. Abbott at an unknown date and accessioned into the Museum's collection in 1952. The three unassociated funerary objects are three lots of ceramic sherds.

In the **Federal Register** (72 FR 41523, July 30, 2007), column 3, paragraph 3 is corrected by substituting the following paragraph:

The cultural item most likely dates to the Middle or Late Woodland Periods (A.D. 0-1500), as suggested by the decoration and/or fabric of the sherds.

In the **Federal Register** (72 FR 41523, July 30, 2007), column 3, paragraph 3, the following paragraphs are added to the end of paragraph 3:

In 1872, six cultural items were recovered from graves in Trenton, Mercer County, NJ, by C.C. Abbott and F.W. Putnam. They were donated to the Peabody Museum of Archaeology and Ethnology by the Peabody Museum Salem (now the Peabody Essex Museum) through Ernest Dodge in 1952. The unassociated funerary objects are one ceramic pipe stem, one ceramic pipe bowl fragment, two mortars, and two pestles.

The ceramic pipe stem and ceramic pipe bowl fragment most likely date to the Late Woodland Period (A.D. 900–1500), as suggested by the decoration on the pipe bowl fragment. Consultation, oral tradition, archeological, and historical evidence indicates that the two mortars and two pestles are typically used as “paint pots” for applying pigment to the face of the deceased, a practice that persisted from at least the Late Woodland to the Historic Period and present day (A.D. post-900).

In 1895, 15 cultural items were recovered from the Lowland site in Trenton, Mercer County, NJ, by Ernest Volk during a Peabody Museum of Archaeology and Ethnology expedition led by Mr. Volk. Five of the cultural items were accessioned into the Museum’s collection in 1895 but 10 of the cultural items were not accessioned into the Museum’s collection until 1952, as a gift of C.C. Abbott. The 15 unassociated funerary objects are nine lots of ceramic sherds, five projectile points, and one chipped stone.

The cultural items most likely date to the Middle or Late Woodland Periods (A.D. 0–1500), as suggested by the decoration and/or fabric of the ceramic sherds and the shapes of the projectile points.

In the **Federal Register** (72 FR 41523, July 30, 2007), column 3, paragraph 4, sentence 1 is corrected by substituting the following sentence:

Museum documentation indicates that the 63 cultural items described above were recovered from burial contexts.

In the **Federal Register** (72 FR 41523, July 30, 2007), column 3, paragraph 5, sentence 1 is corrected by substituting the following sentence:

Officials of the Peabody Museum of Archaeology and Ethnology, Harvard University have determined that:

- Pursuant to 25 U.S.C. 3001(3)(B), the 63 cultural items described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual.

Additional Requestors and Disposition

Lineal descendants or representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to claim these cultural items should submit a written request with information in support of the claim to Patricia Capone, Peabody Museum of Archaeology and Ethnology, Harvard University, 11 Divinity Avenue, Cambridge, MA 02138, telephone (617) 496–3702, email pcapone@fas.harvard.edu, by September 10, 2021. After that date, if no additional claimants have come forward, transfer of control of the unassociated funerary objects to the Delaware Nation, Oklahoma; Delaware Tribe of Indians;

and the Stockbridge Munsee Community, Wisconsin may proceed.

The Peabody Museum of Archaeology and Ethnology, Harvard University is responsible for notifying the Delaware Nation, Oklahoma; Delaware Tribe of Indians; and the Stockbridge Munsee Community, Wisconsin that this notice has been published.

Dated: July 28, 2021.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2021–17060 Filed 8–10–21; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0032397; PPWOCRADNO–PCU00RP14.R50000]

Notice of Inventory Completion: Peabody Museum of Archaeology and Ethnology, Harvard University, Cambridge, MA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The Peabody Museum of Archaeology and Ethnology, Harvard University (Peabody Museum) has completed an inventory of human remains and associated funerary objects, in consultation with the appropriate Indian Tribes or Native Hawaiian organizations, and has determined that there is no cultural affiliation between the human remains and associated funerary object and any present-day Indian Tribes or Native Hawaiian organizations. Representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary object should submit a written request to the Peabody Museum of Archaeology and Ethnology. If no additional requestors come forward, transfer of control of the human remains and associated funerary object to the Indian Tribes or Native Hawaiian organizations stated in this notice may proceed.

DATES: Representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary object should submit a written request with information in support of the request to the Peabody Museum of Archaeology and Ethnology at the address in this notice by September 10, 2021.

FOR FURTHER INFORMATION CONTACT:

Patricia Capone, Peabody Museum of Archaeology and Ethnology, Harvard University, 11 Divinity Avenue, Cambridge, MA 02138, telephone (617) 496–3702, email pcapone@fas.harvard.edu.

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and an associated funerary object under the control of the Peabody Museum of Archaeology and Ethnology, Harvard University, Cambridge, MA. The human remains and associated funerary object were removed from Mercer, Burlington, and Monmouth Counties, NJ.

This notice is published as part of the National Park Service’s administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3) and 43 CFR 10.11(d). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary object. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains and associated funerary object was made by the Peabody Museum of Archaeology and Ethnology professional staff in consultation with representatives of the Delaware Nation, Oklahoma; Delaware Tribe of Indians; and the Stockbridge Munsee Community, Wisconsin.

History and Description of the Remains

In 1905, human remains representing, at minimum, one individual were removed from Lalor Field in Mercer County, NJ, by Ernest Volk as part of a Peabody Museum expedition. Volk removed the human remains from an unknown provenience within Lalor Field. The human remains are fragmentary cranial remains of an adult of indeterminate sex and age. No known individual was identified. No associated funerary objects are present.

Between 1910 and 1912, human remains representing, at minimum, one individual were removed from an unknown location in Trenton in Mercer County, NJ, by Charles C. Abbott and his son Richard (Dick) M. Abbott. Charles C. Abbott donated the human remains to the Peabody Museum in 1912. The human remains are fragmentary postcranial remains of an adult of indeterminate sex and age. No known

individual was identified. No associated funerary objects are present.

In 1882, human remains representing, at minimum, one individual were removed from a gravel deposit at an unknown location in Trenton in Mercer County, NJ, by Charles C. Abbott as part of a Peabody Museum expedition. The human remains are fragmentary cranial remains of an adult of indeterminate sex and age. No known individual was identified. No associated funerary objects are present.

On April 18, 1884, human remains representing, at minimum, one individual were removed from a railroad cut in Trenton in Mercer County, NJ, by Charles C. Abbott as part of a Peabody Museum expedition. The human remains were originally encountered by workmen digging a cut for the railroad in Trenton. The workmen excavated the human remains and later reconstructed for Abbott the original location of the human remains. The human remains lay in either “ferruginous sand” or gravel 16 feet below the surface. The human remains are fragmentary cranial remains of an adult of indeterminate sex and age. No known individual was identified. No associated funerary objects are present.

In April 1886, human remains representing, at minimum, one individual were removed from a railroad cut in Trenton in Mercer County, NJ, by Charles C. Abbott. Abbott donated the human remains to the Peabody Museum on May 6, 1886. The human remains were removed from the railroad cut east of the Pennsylvania Railroad passenger station, where they lay in gravel 11 feet below the surface. The human remains are fragmentary cranial remains of an adult of indeterminate sex and age. No known individual was identified. No associated funerary objects are present.

On September 10, 1895, human remains representing, at minimum, one individual were removed by Charles C. Abbott from the roadside southeast of his house in Mercer County, NJ. Abbott donated the human remains to the Peabody Museum on September 21, 1895. The human remains lay in gravel. The human remains are fragmentary cranial remains of an adult of indeterminate age who is probably male. No known individual was identified. No associated funerary objects are present.

Around 1897, human remains representing, at minimum, two individuals were removed from an unknown site on the “Assiscunk Creek” approximately three miles from Burlington in Burlington County, NJ, by Stacy Scott. Scott conveyed the human remains to Charles C. Abbott at an

unknown date, and Abbott donated the human remains to the Peabody Museum in 1913. The human remains are the partial cranial remains of an adult male between the ages of 20 and 40 years old and the partial cranial remains of a subadult between the ages of 16 and 20 years old who is probably female. No known individuals were identified. No associated funerary objects are present.

Between 1858 and 1887, human remains representing, at minimum, one individual were removed from “near Hornerstown” in Monmouth County, NJ, by Samuel Lockwood. Lockwood sold the human remains to the Peabody Museum in 1888. The human remains are the fragmentary cranial and postcranial remains of an adult of indeterminate sex and age. No known individual was identified. The one associated funerary object is a corner-notched biface.

Determinations Made by the Peabody Museum of Archaeology and Ethnology, Harvard University

Officials of the Peabody Museum of Archaeology and Ethnology, Harvard University have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice are Native American based on osteological analysis, archeological context, and museum records.

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of nine individuals of Native American ancestry.

- Pursuant to 25 U.S.C. 3001(3)(A), the one object described in this notice is reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.

- Pursuant to 25 U.S.C. 3001(2), a relationship of shared group identity cannot be reasonably traced between the Native American human remains and associated funerary object and any present-day Indian Tribe.

- Treaties, Acts of Congress, or Executive Orders, indicate that the land from which the Native American human remains and associated funerary object were removed is the aboriginal land of the Delaware Nation, Oklahoma; Delaware Tribe of Indians; and the Stockbridge Munsee Community, Wisconsin (hereafter referred to as “The Tribes”).

- Pursuant to 43 CFR 10.11(c)(1), the disposition of the human remains and associated funerary object may be to The Tribes.

Additional Requestors and Disposition

Representatives of any Indian Tribe or Native Hawaiian organization not identified in this notice that wish to request transfer of control of these human remains and associated funerary object should submit a written request with information in support of the request to Patricia Capone, Peabody Museum of Archaeology and Ethnology, Harvard University, 11 Divinity Avenue, Cambridge, MA 02138, telephone (617) 496-3702, email pcapone@fas.harvard.edu, by September 10, 2021. After that date, if no additional requestors have come forward, transfer of control of the human remains and associated funerary object to The Tribes may proceed.

The Peabody Museum of Archaeology and Ethnology, Harvard University is responsible for notifying The Tribes that this notice has been published.

Dated: July 28, 2021.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2021-17063 Filed 8-10-21; 8:45 am]

BILLING CODE 4312-52-P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731-TA-1528 (Final)]

Seamless Refined Copper Pipe and Tube From Vietnam

Determination

On the basis of the record¹ developed in the subject investigation, the United States International Trade Commission (“Commission”) determines, pursuant to the Tariff Act of 1930 (“the Act”), that an industry in the United States is materially injured by reason of imports of seamless refined copper pipe and tube (“SRC pipe and tube”) from Vietnam, provided for in subheading 7411.10.10 of the Harmonized Tariff Schedule of the United States, that have been found by the U.S. Department of Commerce (“Commerce”) to be sold in the United States at less than fair value (“LTFV”).²

Background

The Commission instituted this investigation effective June 30, 2020, following receipt of a petition filed with the Commission and Commerce by the American Copper Tube Coalition, consisting of the Mueller Group, Collierville, Tennessee, and Cerro Flow

¹ The record is defined in § 207.2(f) of the Commission’s Rules of Practice and Procedure (19 CFR 207.2(f)).

² 86 FR 33228 (June 24, 2021).

Products, LLC, Sauget, Illinois. The Commission scheduled the final phase of the investigation following notification of a preliminary determination by Commerce that imports of SRC pipe and tube from Vietnam were being sold at LTFV within the meaning of section 733(b) of the Act (19 U.S.C. 1673b(b)). Notice of the scheduling of the final phase of the Commission's investigation and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of February 23, 2021 (86 FR 10994). Since no party to the investigation requested a hearing, the public hearing in connection with the investigation, originally scheduled for June 15, 2021, was canceled.³

The Commission made this determination pursuant to § 735(b) of the Act (19 U.S.C. 1673d(b)). It completed and filed its determination in this investigation on August 5, 2021. The views of the Commission are contained in USITC Publication 5216 (August 2021), entitled *Seamless Refined Copper Pipe and Tube from Vietnam: Investigation No. 731-TA-1528 (Final)*.

By order of the Commission.
Issued: August 5, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021-17083 Filed 8-10-21; 8:45 am]

BILLING CODE 7020-02-P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-1166]

Certain Foodservice Equipment and Components Thereof; Commission Determination To Review in Part a Final Initial Determination Finding No Violation of Section 337; Schedule for Filing Written Submissions on the Issues Under Review and on Remedy, the Public Interest, and Bonding

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in part the final initial determination ("final ID") issued by the presiding administrative law judge ("ALJ") on June 4, 2021, finding no violation of

section 337 of the Tariff Act of 1930, as amended. The Commission requests briefing from the parties on certain issues under review, as indicated in this notice. The Commission also requests briefing from the parties, interested government agencies, and interested persons on the issues of remedy, the public interest, and bonding.

FOR FURTHER INFORMATION CONTACT: Ronald A. Traud, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205-3427. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email EDIS3Help@usitc.gov. General information concerning the Commission may also be obtained by accessing its internet server at <https://www.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on July 3, 2019, based on a complaint filed on behalf of Illinois Tool Works, Inc. of Glenview, Illinois; Vesta Global Limited of Hong Kong; Vesta (Guangzhou) Catering Equipment Co., Ltd. of China; and Admiral Craft Equipment Corp. of Westbury, New York (collectively, "Complainants"). 84 FR 31911 (Jul. 3, 2019). The complaint, as supplemented, alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, based upon the importation of articles into the United States, or in the sale of such articles by the owner, importer, or consignee of certain foodservice equipment and components thereof by reason of misappropriation of trade secrets and unfair competition through tortious interference with contractual relationships, the threat or effect of which is to destroy or substantially injure a domestic industry. *Id.* at 31911-12. The notice of investigation named as respondents Guangzhou Rebenet Catering Equipment Manufacturing Co., Ltd.; Zhou Hao; Aceplus International Limited (aka Ace Plus International Ltd.); Guangzhou Liangsheng Trading Co., Ltd.; and Zeng Zhaoliang, all of China. *Id.* at 31912. The Office of Unfair Import Investigations ("OUII") was also named as a party in this investigation. *Id.*

On July 9, 2020, Order No. 52 granted a motion for summary determination of no substantial injury to a domestic

industry. The Commission determined to review Order No. 52, and on December 14, 2020, reversed the grant of summary determination.

On June 4, 2021, the ALJ issued the final ID, which found that Respondents did not violate section 337, primarily based on a Complainants' failure to establish a domestic industry. The final ID found that the Commission has *in rem* jurisdiction over the accused products, subject matter jurisdiction, and personal jurisdiction. ID at 99. The final ID also found that Respondents imported into the United States, sold for importation, or sold within the United States after importation the accused products. *Id.* The final ID further found that Respondents have misappropriated certain of Complainants' trade secrets in the manufacture of certain accused products, but that Complainants have not shown that Respondents tortiously interfered with contractual relationships. *Id.* The final ID additionally found that Complainants have not shown that the importation and sale of accused products has the threat or effect of destroying or substantially injuring a domestic industry.

The RD issued on June 10, 2021. The RD recommended that, if the Commission finds a violation of section 337, the Commission should issue limited exclusion orders of various durations for each of the various categories of accused products. RD at 10. The durations of the recommended exclusion orders are all quite short, ranging from 1-17 months from issuance. *Id.* at 10-11. The RD further recommended that a cease and desist order would be unnecessary. *Id.* at 12. The RD additionally recommended that a bond of 1% of entered value be imposed during the period of Presidential review. The public interest was not delegated to the ALJ.

On June 21, 2021, Complainants and Respondents filed petitions for review and OUII filed a contingent petition for review. On June 29, 2021, the parties filed responses to the petitions.

Having examined the record in this investigation, including the final ID, the petitions for review, and the responses thereto, the Commission has determined to review the final ID in part. In particular, the Commission has determined to review the following:

(1) The final ID's findings and conclusions as to the existence of a domestic industry and injury to a domestic industry.

(2) The final ID's findings and conclusions regarding the wrongful taking and use of the Bills of Materials

³ 86 FR 32277 (June 11, 2021).

("BOM") Trade Secrets and the Custom Components and Mold Trade Secrets. The Commission has determined to not review the remainder of the final ID.

The parties are requested to brief their positions with reference to the applicable law and the evidentiary record regarding the questions provided below:

(1) *Regarding domestic industry:*

(A) Please explain whether Complainants' asserted expenditures for warranty services differ from those of a mere importer, including by discussing: (A) How the Commission and the Federal Circuit have considered such investments in prior investigations, and (B) how the facts of this investigation should be assessed in light of applicable precedent. Also address the extent to which the warranty servicing activities relied upon to show the existence of a domestic industry need to take place in the United States either as a legal or a practical matter, such that those activities would not distinguish a domestic industry from a mere importer.

(B) Are complainants required to allocate payments made to third-party service providers for warranty services to qualifying activities in an investigation under 19 U.S.C. 1337(a)(1)(A)? In answering this question, please discuss any relevant legal authority.

(C) Did Complainants sufficiently allocate their payments to third-party service providers for warranty services to qualifying activities.

(D) If the payments to third-party service providers are not sufficiently allocated, what qualifying expenditures remain?

(E) What evidence and argument were timely-presented regarding the nature and significance of those remaining qualifying expenditures?

(F) Assuming there is an industry in the United States within the meaning of 19 U.S.C. 1337(a)(1)(A), please discuss the evidence and arguments addressing whether the industry is substantially injured or threatened with substantial injury.

(2) *Regarding wrongful taking and use of the BOM Trade Secrets:*

(A) To what extent are Vesta's BOM Codes non-public information, and to what extent did the final ID make findings on that point (particularly unpetitioned findings)?

(B) Is it contradictory for the final ID to consider the similarities in Vesta's BOM Codes and Rebenet's part numbers in its wrongful taking and use analysis, where the final ID finds that the BOM Codes are not themselves trade secrets? Please discuss any relevant legal authority.

(C) If evidence of the similarities between Vesta's BOM Codes and Rebenet's part numbers cannot be considered for determining wrongful taking and use of the BOM Trade Secrets, could Complainants still meet their burden of proof as to those elements of trade secret misappropriation?

(3) *Regarding wrongful taking and use of the Custom Components and Mold Trade Secrets:*

(A) Is it contradictory for the final ID to consider the similarities in Vesta's BOM Codes and Rebenet's part numbers, and Vesta's and Rebenet's drawings, where those codes and drawings were not found to be trade secrets? Please discuss any relevant legal authority.

(B) If evidence of the similarities between Vesta's BOM Codes and Rebenet's part numbers, and Vesta's and Rebenet's drawings cannot be considered for determining wrongful taking and use of the Custom Components and Mold Trade Secrets, could Complainants still meet their burden of proof as to those elements of trade secret misappropriation?

In connection with the final disposition of this investigation, the statute authorizes issuance of, *inter alia*, (1) an exclusion order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) cease and desist orders that could result in the respondents being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or are likely to do so. For background, see *Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843, Comm'n Op. at 7-10 (Dec. 1994).

The statute requires the Commission to consider the effects of that remedy upon the public interest. The public interest factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on: (1) The public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S.

consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve, disapprove, or take no action on the Commission's determination. See Presidential Memorandum of July 21, 2005, 70 FR 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

Written Submissions: The parties to the investigation are requested to file written submissions on the questions identified in this notice. Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such initial written submissions should include views on the RD that issued on June 10, 2021.

Initial written submissions, limited to 60 pages, must be filed no later than the close of business on August 19, 2021. The following information is also requested in the initial written submissions and will not count against the above-mentioned page limitations. Complainants are requested to identify the form of the remedy sought. Complainants and OUII are requested to submit proposed remedial orders for the Commission's consideration. Complainants are also requested to state the HTSUS subheadings under which the accused articles are imported, and to supply identification information for all known importers of the accused products.

Reply submissions, limited to 30 pages, must be filed no later than the close of business on August 26, 2021. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. The Commission's paper filing requirements in 19 CFR 210.4(f) are currently waived. 85 FR 15798 (March 19, 2020). Submissions should refer to the investigation number ("Inv. No. 337-TA-1166") in a prominent place on the cover page and/or the first

page. (See Handbook for Electronic Filing Procedures, https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf). Persons with questions regarding filing should contact the Secretary at (202) 205–2000.

Any person desiring to submit a document to the Commission in confidence must request confidential treatment by marking each document with a header indicating that the document contains confidential information. This marking will be deemed to satisfy the request procedure set forth in Rules 201.6(b) and 210.5(e)(2) (19 CFR 201.6(b) & 210.5(e)(2)). Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. A redacted non-confidential version of the document must also be filed simultaneously with any confidential filing. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements. All nonconfidential written submissions will be available for public inspection on EDIS.

The Commission vote for this determination took place on August 5, 2021.

The authority for the Commission’s determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission’s Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.
 Issued: August 5, 2021.

Lisa Barton,
Secretary to the Commission.

[FR Doc. 2021–17082 Filed 8–10–21; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Clean Water Act

On August 5, 2021, the Department of Justice filed a complaint and lodged a proposed consent decree with the United States District Court for the District of North Dakota in the lawsuit entitled *United States and North Dakota v. Summit Midstream Partners, LLC and Meadowlark Midstream Company, LLC*, Civil Action No. 1:21–cv–00161. The Department of the Interior’s Fish and Wildlife Service, the North Dakota Department of Environmental Quality, and the North Dakota Department of Game and Fish (“Trustees”) are also providing notice of an opportunity for public comment on a Draft Restoration Plan.

The United States and the State of North Dakota filed this lawsuit under the Clean Water Act and North Dakota water pollution control laws. The complaint names Summit Midstream Partners, LLC and Meadowlark Midstream Company, LLC as defendants. The complaint seeks injunctive relief, civil penalties, and natural resource damages for violations of the Clean Water Act and North Dakota law as a result of a produced water spill from a pipeline owned and operated by Defendants. Defendants’ pipeline discharged more than 700,000 barrels of produced water between August 2014 and January 2015; produced water from the spill reached groundwater, a nearby creek, and downstream rivers.

The Consent Decree requires Defendants to perform injunctive relief; remediate environmental impacts; pay \$250,000 in natural resource damage assessment costs; pay \$1,000,000 to be used by the Trustees for the costs of projects that restore, rehabilitate, replace, or acquire the equivalent of natural resources; and pay a \$20,000,000 civil penalty to be split evenly between the United States and North Dakota. Based on certain ability to pay limitations, the civil penalty will be paid over six years, subject to interest. The Consent Decree resolves the civil claims alleged by the United States and North Dakota in the complaint. Under the Consent Decree, the United States and North Dakota also agreed not to sue Defendants for natural resource damages resulting from the produced water spill.

The Trustees have written a Draft Restoration Plan that describes proposed alternatives for restoring natural resources and natural resource services injured by the produced water

spill. The preferred alternatives include three restoration project types: (1) Aquatic service enhancements; (2) conservation of environmentally sensitive lands; and (3) recreational access enhancement.

The publication of this notice opens a period for public comment on the Consent Decree and the Draft Restoration Plan. Comments on the Consent Decree should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States and North Dakota v. Summit Midstream Partners, LLC and Meadowlark Midstream Company, LLC*, D.J. Ref. No. 90–5–2–1–11253. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

<i>To submit comments:</i>	<i>Send them to:</i>
By email	<i>pubcomment-ees.enrd@usdoj.gov.</i>
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the Consent Decree may be examined and downloaded at this Justice Department website: <https://www.justice.gov/enrd/consent-decrees>. We will provide a paper copy of the Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for \$23.00 (25 cents per page reproduction cost) payable to the United States Treasury. For a paper copy without the appendices and signature pages, the cost is \$16.25.

Comments on the Draft Restoration Plan may be submitted to the Trustees, and should refer to Blacktail Creek—Summit Midstream Pipeline Release Settlement Agreement, DOI Reference #9590. All comments on the Draft Restoration Plan must be submitted no later than 30 days after the publication date of this notice. Comments on the Draft Restoration Plan may be submitted either by email or by mail:

<i>To submit comments:</i>	<i>Send them to:</i>
By email	<i>FW6BlacktailCreekNRDAR@fws.gov.</i>

<i>To submit comments:</i>	<i>Send them to:</i>
By mail	Jessica Johnson U.S. Fish and Wildlife Service 3425 Miriam Ave., Bismarck, ND 58501.

During the public comment period, a copy of the Draft Restoration Plan will be available electronically at <https://www.fws.gov/mountain-prairie/pressrel/archives/index.php> and at <https://deq.nd.gov/EHSRulesRegs.aspx>. A link to the Draft Restoration Plan and updates about it will also be made available on the Listserv of the North Dakota Department of Environmental Quality (“NDDEQ”). To be placed on the Listserv, please visit <https://deq.nd.gov/subscriptions/> and self-register, or contact the NDDEQ by phone at (701) 328–5150, or by email at deq@nd.gov. A copy of the Draft Restoration Plan may also be examined at 3425 Miriam Avenue, Bismarck ND 58501. Arrangements to view the Draft Restoration Plan must be made in advance by contacting (701) 250–4402.

Susan Akers,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2021–17093 Filed 8–10–21; 8:45 am]

BILLING CODE 4410–15–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–348, 50–364; and 50–424, 50–425; NRC–2021–0139]

Southern Nuclear Operating Company; Joseph M. Farley Nuclear Plant, Units 1 and 2; Vogtle Electric Generating Plant, Units 1 and 2

AGENCY: Nuclear Regulatory Commission.

ACTION: Exemption; issuance.

SUMMARY: The U. S. Nuclear Regulatory Commission (NRC) is granting exemptions in response to a request dated June 9, 2021, from Southern Nuclear Operating Company, Inc., seeking exemptions from specific regulations that require periodic updates of the Farley Nuclear Plant, Units 1 and 2, and Vogtle Electric Generating Plant, Units 1 and 2, Updated Final Safety Reports (UFSARs).

DATES: The exemption was issued on August 4, 2021.

ADDRESSES: Please refer to Docket ID NRC–2021–0139 when contacting the NRC about the availability of information regarding this document.

You may obtain publicly available information related to this document using any of the following methods:

- **Federal Rulemaking Website:** Go to <https://www.regulations.gov> and search for Docket ID NRC–2021–0139. 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, 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.

- **Attention:** The PDR, where you may examine and order copies of public documents, is currently closed. You may submit your request to the PDR via email at pdr.resource@nrc.gov or call 1–800–397–4209 or 301–415–4737, between 8:00 a.m. and 4:00 p.m. (ET), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: John G. Lamb, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–415–3100, email: John.Lamb@nrc.gov.

SUPPLEMENTARY INFORMATION: The text of the exemptions is attached.

Dated: August 6, 2021.

For the Nuclear Regulatory Commission.

John G. Lamb,

Senior Project Manager, Plant Licensing Branch 2–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

Attachment—Exemption

NUCLEAR REGULATORY COMMISSION

Docket Nos. 50–348, 50–364; and 50–424, 50–425

Southern Nuclear Operating Company

Joseph M. Farley Nuclear Plant, Units 1 and 2

Vogtle Electric Generating Plant, Units 1 and 2

I. Background

Southern Nuclear Operating Company (SNC, the licensee) is the holder of Facility Operating License Nos. NPF–2, NPF–8, NPF–68, and NPF–81, for the Joseph M. Farley Nuclear Plant (Farley), Units 1 and 2; and the Vogtle Electric Generating Plant (Vogtle), Units 1 and 2, respectively. The licenses provide, among other things, that the licensee is subject to all rules, regulations, and orders of the Commission now or hereafter in effect. The Farley, Units 1 and 2; and Vogtle, Units 1 and 2, facilities consist of two pressurized-water reactors located at each of the licensee’s sites in Houston County, Alabama, and Burke County, Georgia, respectively.

II. Request/Action

In accordance with Section 50.71 of title 10 of the *Code of Federal Regulations* (10 CFR), “Maintenance of records, making of reports,” paragraph (e)(4) states, in part, that “Subsequent revisions [to the Updated Final Safety Analysis Report (UFSAR) submitted as part of the original license application] must be filed annually or 6 months after each refueling outage provided the interval between successive updates [to the UFSAR] does not exceed 24 months.” By letter dated June 9, 2021 (ADAMS Accession No. ML21160A156), SNC requested that the due date for submittal of the Farley, Units 1 and 2, UFSAR be by October 31 of every odd-numbered year, provided the interval between successive updates does not exceed 24 months, and that the due date for submittal of the Vogtle, Units 1 and 2, UFSAR be by October 31 of every even-numbered year, provided the interval between successive updates does not exceed 24 months.

Pursuant to 10 CFR 50.12, “Implementation of the Equal Access to Justice Act in Agency Proceeding,” the NRC may, upon application by any

interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR part 50, "Domestic Licensing of Production and Utilization Facilities," including 10 CFR 50.71(e)(4) when: (1) The exemptions are authorized by law, will not present an undue risk to the public health and safety, and are consistent with the common defense and security; and (2) special circumstances are present. Under 10 CFR 50.12(a)(2), special circumstances include, among other things, whenever application of the regulation in the particular circumstances would not serve, or is not necessary to achieve, the underlying purpose of the rule.

III. Discussion

The Exemption Is Authorized by Law

The regulation at 10 CFR 50.71(e)(4) requires revisions to UFSARs to be filed annually or six months after each refueling outage, provided the interval between successive updates does not exceed 24 months. The underlying purpose of the regulation is to ensure that the licensee periodically updates its UFSAR so that the UFSAR remains up-to-date and accurately reflects the plant design and operation. The proposed exemptions would change the current UFSAR submittal schedule for Farley, Units 1 and 2, and Vogtle, Units 1 and 2, to a calendar-based schedule that would not exceed the maximum 24 months between successive updates as required by 10 CFR 50.71(e)(4). Submitting the UFSAR updates for Farley, Units 1 and 2; and Vogtle, Units 1 and 2, as proposed by October 31 of the odd year and by October 31 of the even year, respectively, continues to meet the intent of the regulation and maintaining UFSAR information up-to-date. The NRC staff has determined that granting the licensee's proposed exemptions will not result in a violation of the Atomic Energy Act of 1954, as amended, or the Commission's regulations. Therefore, the exemptions are authorized by law.

The Exemption Presents No Undue Risk to Public Health and Safety

The underlying purpose of 10 CFR 50.71(e)(4) is to ensure that licensees periodically update their UFSARs so that the UFSARs remain up-to-date and accurately reflect the plant design and operation. The NRC has determined by rule that an update frequency not exceeding 24 months between successive updates is acceptable for maintaining up to date UFSAR content. Farley, Units 1 and 2, were granted an exemption dated July 7, 1998 (ADAMS

Accession No. ML013130216), that allowed the licensee to submit a unified UFSAR update for both units every 18 months, not to exceed 24 months from the last submittal. Vogtle, Units 1 and 2, were granted an exemption dated March 5, 1998 (ADAMS Accession No. ML012410088), that allowed the licensee to submit a unified UFSAR update for both units every 18 months, not to exceed 24 months from the last submittal. While the regulation requires, in part, that UFSAR updates be submitted "annually or 6 months after each refueling outage," it allows the submission of such updates on a different schedule, "provided the interval between successive updates does not exceed 24 months." The requested exemptions also meet the intent of the rule for regulatory burden reduction. Additionally, based on the nature of the requested exemptions and the requirement that updates will not exceed 24 months from the last submittal as described in this notice, no new accident precursors are created by the exemptions; therefore, neither the probability nor the consequences of postulated accidents are increased. In conclusion, the requested exemptions do not result in any undue risk to the public health and safety.

The Exemption Is Consistent With the Common Defense and Security

The requested exemptions from 10 CFR 50.71(e)(4) would allow SNC to submit its periodic updates to the Farley, Units 1 and 2, UFSAR by October 31 of odd-numbered years, not to exceed 24 months from the last submittal, and periodic updates to the Vogtle, Units 1 and 2, UFSAR by October 31 of even-numbered years, not to exceed 24 months from the last submittal. Neither the regulation nor the proposed exemptions have any relation to security issues. Therefore, the common defense and security is not impacted by the exemptions.

Special Circumstances

Special circumstances, in accordance with 10 CFR 50.12(a)(2)(ii), are present whenever application of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule. The rule change promulgated in August 1992 (57 FR 39358; August 31, 1992) was intended to provide a reduction in regulatory burden by providing licensees with the option to submit UFSAR updates once per refueling outage, not to exceed 24 months between successive updates, instead of annually. Currently, Farley, Units 1 and

2, and Vogtle, Units 1 and 2, submit a combined UFSAR for each site every 18 months, not to exceed 24 months from the last submittal. The processing and submittal of the UFSAR every 18 months is not necessary to achieve the underlying purpose of the rule in that the licensee continues to meet the maximum 24-month interval between submittals as required by the regulation. Therefore, special circumstances exist under 10 CFR 50.12(a)(2)(ii) in that application of the requirements in these particular circumstances, would not serve the underlying purpose of the rule and are not necessary to achieve the underlying purpose of the rule.

Environmental Considerations

With respect to the impact of the exemptions on the quality of the human environment, the NRC has determined that the issuance of the exemptions discussed herein meets the eligibility criteria for categorical exclusion from the requirement to prepare an environmental assessment or environmental impact statement, set forth in 10 CFR 51.22(c)(25).

Under 10 CFR 51.22(c)(25), the granting of an exemption from the requirements of any regulation of 10 CFR chapter I (which includes 10 CFR 50.71(e)(4)) is an action that is a categorical exclusion, provided that certain specified criteria are met. The basis for NRC's determination is provided in the following evaluation of the requirements in 10 CFR 51.22(c)(25)(i)-(vi).

Requirements in 10 CFR 51.22(c)(25)(i):

To qualify for a categorical exclusion under 10 CFR 51.22(c)(25)(i), the exemption must involve no significant hazards consideration. The criteria for determining whether an action involves a significant hazards consideration are found in 10 CFR 50.92. The proposed action involves only a schedule change regarding the submission of an update to the UFSAR. As set forth in that regulation, there are no significant hazard considerations because granting the exemptions would not: (1) Involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety.

Requirements in 10 CFR 51.22(c)(25)(ii):

There is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite. The proposed action involves only a schedule change, which

is administrative in nature, and does not involve any changes in the types or increase in the amounts of any effluents that may be released offsite.

Requirements in 10 CFR 51.22(c)(25)(iii):

There is no significant increase in individual or cumulative public or occupational radiation exposure. Since the proposed action involves only a schedule change, which is administrative in nature, it does not contribute to any significant increase in individual or cumulative public or occupational radiation exposures.

Requirements in 10 CFR 51.22(c)(25)(iv):

There is no significant construction impact. Since the proposed action involves only a schedule change related to the timing for submittal of UFSAR updates, which is administrative in nature, it does not involve any construction impact.

Requirements in 10 CFR 51.22(c)(25)(v):

There is no significant increase in the potential for or consequences from radiological accidents. The proposed action involves only a schedule change related to the timing for submittal of UFSAR updates, which is administrative in nature and does not impact the potential for or consequences from radiological accidents.

Requirements in 10 CFR 51.22(c)(25)(vi):

The requirements from which the exemption is sought involve recordkeeping, reporting, scheduling, or other requirements of an administrative, managerial, or organizational nature. The proposed action involves recordkeeping, reporting, and scheduling requirements, and other requirements of an administrative, managerial, or organizational nature because it is associated with the schedule for submittal of UFSAR updates pursuant to 10 CFR 50.71(e)(4), and meets that regulation's requirement that the interval between successive updates does not exceed 24 months.

Based on the previously noted requirements, the NRC staff concludes that the proposed exemptions meet the eligibility criteria for the categorical exclusion set forth in 10 CFR 51.22(c)(25). Therefore, in accordance with 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared in connection with the NRC's issuance of these exemptions.

IV. Conclusions

Accordingly, the Commission has determined that, pursuant to 10 CFR part 50.12, the requested exemptions are

authorized by law, will not present an undue risk to public health and safety, and are consistent with the common defense and security. Also, special circumstances, pursuant to 10 CFR 50.12(a)(2)(ii), are present. Therefore, the NRC hereby grants SNC an exemption from the requirements of 10 CFR 50.71(e)(4) to allow SNC to file its periodic updates to the Farley, Units 1 and 2, UFSAR by October 31 of odd-numbered years, not to exceed 24 months from the last submittal, and to the Vogtle, Units 1 and 2, UFSAR by October 31 of even-numbered years, not to exceed 24 months from the last submittal.

The exemptions are effective upon issuance.

Dated: August 4, 2021.

For the Nuclear Regulatory Commission.

/RA/

Caroline L. Carusone,
Deputy Director, Division of Operating
Reactor Licensing, Office of Nuclear Reactor
Regulation.

[FR Doc. 2021-17116 Filed 8-10-21; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50-341; NRC-2020-0110]

Issuance of Exemption in Response to COVID-19 Public Health Emergency

AGENCY: Nuclear Regulatory Commission.

ACTION: Exemption; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) issued one exemption in June 2021 in response to a request from one licensee for relief due to the coronavirus 2019 disease (COVID-19) public health emergency (PHE). The exemption affords the licensee temporary relief from certain requirements under NRC regulations.

DATES: On June 17, 2021, the NRC granted one exemption in response to a request submitted by one licensee on May 17, 2021.

ADDRESSES: Please refer to Docket ID NRC-2020-0110 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

- *Federal Rulemaking website:* Go to <https://www.regulations.gov> and search for Docket ID NRC-2020-0110. 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, 301-415-4737, or by email to pdr.resource@nrc.gov. For the convenience of the reader, instructions about obtaining materials referenced in this document are provided in the "Availability of Documents" section.

- *Attention:* The PDR, where you may examine and order copies of public documents, is currently closed. You may submit your request for copies of documents to the PDR via email at pdr.resource@nrc.gov or call 1-800-397-4209 or 301-415-4737, between 8:00 a.m. and 4:00 p.m. (ET), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: James Danna, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone: 301-415-7422, email: James.Danna@nrc.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

On June 17, 2021, the NRC granted one exemption in response to a request submitted by one licensee dated May 17, 2021. The exemption temporarily allows the licensee to deviate from certain requirements of chapter I of title 10 of the *Code of Federal Regulations* (10 CFR), appendix E, "Emergency Planning and Preparedness for Production and Utilization Facilities," section IV.F., "Training."

The exemption grants DTE Electric Company (for Fermi, Unit 2), a schedular exemption from the offsite biennial emergency preparedness exercise requirement, allowing it to postpone the calendar year 2020 full-participation biennial emergency preparedness (EP) exercise until the end of calendar year 2021. The exemption affords this licensee temporary relief from the requirements of 10 CFR part 50, appendix E, regarding offsite response organization (ORO) participation in the biennial emergency preparedness exercise. The exemption will not adversely affect the emergency response capability of the facility because the licensee has conducted numerous drills, exercises, and other

training activities that have exercised the licensee’s emergency response strategies since the last evaluated biennial emergency preparedness exercise and that State, county and local OROs have participated therein.

The table in this notice provides transparency regarding the number and type of exemptions the NRC has issued. Additionally, the NRC publishes tables

of approved regulatory actions related to the COVID–19 PHE on its public website at <https://www.nrc.gov/about-nrc/covid-19/reactors/licensing-actions.html>.

II. Availability of Documents

The table in this notice provides the facility name, docket number, document description, and ADAMS accession

number for the exemption issued. Additional details on the exemption issued, including the exemption request submitted by the licensee and the NRC’s decision, are provided in the exemption approval listed in the table in this notice. For additional directions on accessing information in ADAMS, see the **ADDRESSES** section of this document.

FERMI, UNIT 2
[Docket No. 50–341]

Document Description	ADAMS Accession No.
Fermi, Unit 2—Request for Exemption from 10 CFR part 50, appendix E, Biennial Emergency Preparedness Exercise Requirements due to the COVID–19 Pandemic, dated May 17, 2021	ML21137A234
Fermi, Unit 2—Temporary Exemption from Biennial Emergency Preparedness Exercise Frequency Requirements of 10 CFR part 50, appendix E, sections IV.F.2.B and IV.F.2.C (EPID L–2021–LLE–0029 [COVID–19]), dated June 17, 2021	ML21159A054

Dated: August 6, 2021.

For the Nuclear Regulatory Commission.

James G. Danna,

Chief, Plant Licensing Branch I, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2021–17105 Filed 8–10–21; 8:45 am]

BILLING CODE 7590–01–P

POSTAL SERVICE

Privacy Act of 1974; System of Records

AGENCY: Postal Service™.

ACTION: Notice of a modified system of records.

SUMMARY: The United States Postal Service® (Postal Service) is proposing to modify a General Privacy Act System of Records (SOR) to support the implementation of an online tool that will be used by the Government Relations and Public Policy department within the Postal Service to more effectively manage relationships with Congressional, federal, and state officials.

DATES: These revisions will become effective without further notice on September 10, 2021, unless, in response to comments received on or before that date result in a contrary determination.

ADDRESSES: Comments may be submitted via email to the Privacy and Records Management Office, United States Postal Service Headquarters (privacy@usps.gov). To facilitate public inspection, arrangements to view copies of any written comments received will be made upon request.

FOR FURTHER INFORMATION CONTACT: Janine Castorina, Chief Privacy and Records Management Officer, Privacy

and Records Management Office, 202–268–3069 or privacy@usps.gov.

SUPPLEMENTARY INFORMATION: This notice is in accordance with the Privacy Act requirement that agencies publish their systems of records in the **Federal Register** when there is a revision, change, or addition, or when the agency establishes a new system of records. The Postal Service is proposing revisions to an existing system of records (SOR) to support the implementation of an online tool that will be used to track meetings and interactions for the Government Relations and Public Policy department within the Postal Service.

I. Background

The Government Relations and Public Policy (GRPP) department is responsible for managing public policy issues at all levels. This includes legislation and other policies affecting the Postal Service, as well as developing public policy strategy, tactics and messaging, and serving as the primary representative with Congress, the Executive Branch, and other government leaders. GRPP is implementing the use of an online tool used by public policy professionals across all industries to manage relationships with Congressional, federal, and state officials. The online tool also provides public policy professionals with enhanced legislative and public policy research and analysis tools. GRPP will primarily use the online tool to research and track legislative and public policy actions of members of Congress and Congressional committees to determine if such action could impact the Postal Service. Additionally, GRPP will use the communications features of the tool to send educational and advocacy

information to members of Congress and their staff, and to track the number of engagements with members of Congress and their staff for internal reporting purposes. GRPP will also enter notes in the tool to memorialize details of engagements with members of Congress and Congressional staff that will be maintained to provide historical perspectives to all GRPP personnel who may be involved in future engagements with the same officials.

II. Rationale for Changes to USPS Privacy Act Systems of Records

The Postal Service is proposing to modify USPS SOR 100.200 Employee Performance Records to support the implementation of an online tool by the GRPP department that will be used to more effectively manage relationships with Congressional, federal, and state officials. Implementation of the use of the online tool is expected to enhance legislative and public policy research, tracking and analysis capabilities, gain better insights on GRPP’s Congressional engagements, and to enhance the ability for more centralized and trackable delivery of information to Congress.

A new Purpose is being added to SOR 100.200, Employee Performance Records, along with a new Category of Records and record retention and disposal policy that pertain to records maintained by the online tool. The Postal Service is also proposing administrative changes for system managers within the SOR to reflect recent organizational changes.

III. Description of the Modified System of Records

Pursuant to 5 U.S.C. 552a(e)(11), interested persons are invited to submit written data, views, or arguments on

this proposal. A report of the proposed revisions to USPS SOR 100.200, Employee Performance Records, has been sent to Congress and to the Office of Management and Budget for their evaluations. The Postal Service does not expect this modified system of records to have any adverse effect on individual privacy rights. Accordingly, for the reasons stated above, the Postal Service proposes revisions to this system of records as follows:

SYSTEM NAME AND NUMBER:

USPS 100.200 Employee Performance Records.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

USPS facilities where employee performance is evaluated or measured.

SYSTEM MANAGER(S):

Vice President, Human Resources, United States Postal Service, 475 L'Enfant Plaza SW, Washington, DC 20260.

Vice President, Government Relations and Public Policy, United States Postal Service, 475 L'Enfant Plaza, SW, Washington, DC 20260.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

39 U.S.C. 401, 410, 1001, 1005, and 1206.

PURPOSE(S) OF THE SYSTEM:

1. To provide managers and supervisors with decision making information for training needs, promotion, assignment considerations, or other job-related actions.
2. To administer achievement award programs and pay for performance.
3. To improve relations and communication between managers and employees by soliciting employee feedback, and to improve management and supervisor leadership skills.
4. To document USPS Business interactions and meetings for historical purposes.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Current and former USPS employees, including supervisors and managers who are responsible for a work location.

CATEGORIES OF RECORDS IN THE SYSTEM:

1. *Employee information:* Name, Social Security Number, Employee Identification Number, postal assignment information, work contact information, username, email address, finance number(s), duty location, and pay location.
2. *Employee performance information:* Records related to

individual performance evaluation; reports about supervisors and managers who are responsible for a work location; employee recognition; and safe driver awards.

3. USPS Business information:

Records maintained regarding an employee's use of record tracking system; records maintained regarding employee's participation and/or presence representing the USPS in meetings and discussions; information regarding USPS meetings, such as time, place, topics discussed, and attendees.

RECORD SOURCE CATEGORIES:

Employees and employees' supervisor or manager.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

Standard routine uses 1. through 9. apply. In addition:

- a. When records about the receipt of an award by an employee, including driver safety records, are of news interest and consistent with the public's right to know, the records may be disclosed to the news media or the National Safety Council.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Automated database, computer storage media, digital files, and paper files.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

By employee name, email address, username, Social Security Number, Employee Identification Number, or duty or pay location.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

1. Pay for performance evaluation records are retained 5 years. Individual performance evaluations are retained 5 years or until separation of the employee, whichever comes first.
2. Incentive award records are retained 7 years. Length of service award records are retained 1 year. Non-USPS awards are retained 2 years. Letters of commendation and appreciation (excluding permanent copies filed in the OPF or eOPF) are retained 2 years.
3. Employee survey records are retained 5 years.
4. Safe Driver Award records are retained 2 years from date of separation, expiration of license, rescission of authorization, transfer of driver into a nondriving status, or other transfer, whichever comes first.
5. Active employee data is retained until the employee no longer is active or

has access to the tracking system; USPS business information which may contain employee names is retained indefinitely for historical purposes.

Records existing on paper are destroyed by burning, pulping, or shredding. Records existing on computer storage media are destroyed according to the applicable USPS media sanitization practice.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Paper records, computers, and computer storage media are located in controlled-access areas under supervision of program personnel. Access to these areas is limited to authorized personnel, who must be identified with a badge.

Access to records is limited to individuals whose official duties require such access. Contractors and licensees are subject to contract controls and unannounced on-site audits and inspections. Computers are protected by mechanical locks, card key systems, or other physical access control methods.

The use of computer systems is regulated with installed security software, computer logon identifications, and operating system controls including access controls, terminal and transaction logging, and file management software.

RECORD ACCESS PROCEDURES:

Requests for access must be made in accordance with the Notification Procedure above and USPS Privacy Act regulations regarding access to records and verification of identity under 39 CFR 266.5.

CONTESTING RECORD PROCEDURES:

See Notification Procedure and Record Access Procedures.

NOTIFICATION PROCEDURES:

Individuals wanting to know if information about them is maintained in this system must address inquiries to the facility head where currently or last employed. Headquarters employees must submit inquiries to Human Resources or Government Relations and Public Policy, 475 L'Enfant Plaza SW, Washington, DC 20260.

Inquiries must include full name, Social Security Number or Employee Identification Number, name and address of facility where last employed, and dates of USPS employment.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

June 17, 2011, 76 FR 35483; April 29, 2005, 70 FR 22516.

Ruth B. Stevenson,

Chief Counsel, Ethics and Legal Compliance.

[FR Doc. 2021-17117 Filed 8-10-21; 8:45 am]

BILLING CODE 7710-12-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-92573; File No. SR-NYSEArca-2021-53]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of a Proposed Rule Change To List and Trade Shares of Teucrium Bitcoin Futures Fund Under NYSE Arca Rule 8.200-E

August 5, 2021.

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the “Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that, on July 23, 2021, 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, II, and III 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 list and trade the shares of the following under NYSE Arca Rule 8.200-E, Commentary .02 (“Trust Issued Receipts”): Teucrium Bitcoin Futures Fund. Teucrium Bitcoin Futures Fund [sic]. The proposed 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 list and trade shares (“Shares”) of the following under NYSE Arca Rule 8.200-E, Commentary .02, which governs the listing and trading of Trust Issued Receipts: Teucrium Bitcoin Futures Fund (the “Fund”).⁴

The Fund is a series of Teucrium Commodity Trust (the “Trust”), a Delaware statutory trust.⁵ The Fund is managed and controlled by Teucrium Trading, LLC (“Sponsor”). The Sponsor is registered as a commodity pool operator (“CPO”) and a commodity trading adviser (“CTA”) with the Commodity Futures Trading Commission (“CFTC”) and is a member of the National Futures Association (“NFA”).

The Fund’s Investment Objective and Strategy

According to the Registration Statement, the CME currently offers two Bitcoin futures contracts, one contract representing 5 Bitcoin (“BTC Contracts”) and another contract representing 0.10 Bitcoin (“MBT Contracts”). BTC Contracts began trading on the CME Globex trading platform on December 15, 2017 under the ticker symbol “BTC” and are cash-settled in U.S. dollars. MBT Contracts began trading on the CME Globex trading platform on May 3, 2021 under the ticker symbol “MBT” and are also cash-settled in U.S. dollars.⁶

BTC Contracts and MBT Contracts each trade six consecutive monthly

⁴ Commentary .02 to NYSE Arca Rule 8.200-E applies to Trust Issued Receipts that invest in “Financial Instruments.” The term “Financial Instruments,” as defined in Commentary .02(b)(4) to NYSE Arca Rule 8.200-E, means any combination of investments, including cash; securities; options on securities and indices; futures contracts; options on futures contracts; forward contracts; equity caps, collars, and floors; and swap agreements.

⁵ On May 20, 2021, the Trust filed with the Commission a registration statement on Form S-1 under the Securities Act of 1933 (15 U.S.C. 77a) (“Securities Act”) relating to the Fund (File No. 333-256339) (the “Registration Statement”). The description of the operation of the Trust and the Fund herein is based, in part, on the Registration Statement.

⁶ The daily settlements in MBT are derived directly from the settlements in BTC for each contract listing. See <https://www.cmegroup.com/confluence/display/EPICSANDBOX/Bitcoin#Bitcoin-NormalDailySettlementProcedure.1>.

contracts plus two additional December contract months (if the 6 consecutive months include December, only one additional December contract month is listed). Because BTC Contracts and MBT Contracts are exchange-listed, they allow investors to gain exposure to Bitcoin without having to hold the underlying cryptocurrency. Like a futures contract on a commodity or stock index, BTC Contracts and MBT Contracts allow investors to hedge investment positions or speculate on the future price of Bitcoin.

According to the Registration Statement, the investment objective of the Fund is to have the daily changes in the net asset value (“NAV”) of the Fund’s shares (“Shares”) reflect the daily changes in the price of a specified benchmark (the “Benchmark”). The Benchmark is the average of the closing settlement prices for the first to expire and second to expire BTC Contracts listed on the Chicago Mercantile Exchange, Inc. (“CME”). The first to expire and second to expire BTC Contracts and MBT Contracts are referred to as the Bitcoin Futures Contracts. Under normal market conditions,⁷ the Fund will invest in Bitcoin Futures Contracts and in cash and cash equivalents.⁸

According to the Registration Statement, the Fund seeks to maintain its holdings in Bitcoin Futures Contracts with a roughly constant expiration profile. Therefore, the Fund’s positions will be changed or “rolled” on a regular basis in order to track the changing nature of the Benchmark by closing out first to expire contracts prior to settlement that are no longer part of the Benchmark, and then entering into second to expire contracts. Accordingly, the Fund will never carry futures positions all the way to cash settlement—the Fund will price only off of the daily settlement prices of the Bitcoin Futures Contracts.⁹ To achieve this, the Fund will roll its futures

⁷ The term “normal market conditions” includes, but is not limited to, the absence of: Trading halts in the applicable financial markets generally; operational issues (e.g., systems failure) causing dissemination of inaccurate market information; or force majeure type events such as a natural or manmade disaster, act of God, armed conflict, act of terrorism, riot or labor disruption or any similar intervening circumstance. See NYSE Arca Rule 8.600-E(c)(5).

⁸ The term “cash equivalents” includes short term Treasury bills, money market funds, demand deposit accounts and commercial paper.

⁹ As discussed in more detail below, the CME determines the daily settlements for Bitcoin futures based on trading activity on CME Globex between 14:59:00 and 15:00:00 Central Time (CT), which is the “settlement period.”

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

holdings prior to cash settlement of the expiring contract.

In seeking to achieve the Fund's investment objective, the Sponsor will employ a "neutral" investment strategy that is intended to track the changes in the Benchmark regardless of whether the Benchmark goes up or goes down. The Fund will endeavor to trade in Bitcoin Futures Contracts so that the Fund's average daily tracking error against the Benchmark will be less than 10 percent over any period of 30 trading days. The Fund's "neutral" investment strategy is designed to permit investors generally to purchase and sell the Fund's Shares for the purpose of investing in the Bitcoin Futures Contracts (as discussed below). Such investors may include participants in the Bitcoin market seeking to hedge the risk of losses in their Bitcoin-related transactions, as well as investors seeking price exposure to the Bitcoin market.

According to the Registration Statement, one factor determining the total return from investing in futures contracts is the price relationship between soon to expire contracts and later to expire contracts. If the futures market is in a state of backwardation (*i.e.*, when the price of BTC Contracts and MBT Contracts in the future is expected to be less than the current price), the Fund will buy later to expire contracts for a lower price than the sooner to expire contracts that it sells. Hypothetically, and assuming no changes to either prevailing BTC Contracts and MBT Contracts' prices or the price relationship between soon to expire contracts and later to expire contracts, the value of a contract will rise as it approaches expiration. Over time, if backwardation remained constant, the performance of a portfolio would continue to be affected. If the futures market is in contango, the Fund will buy later to expire contracts for a higher price than the sooner to expire contracts that it sells. Hypothetically, and assuming no other changes to either prevailing BTC Contracts and MBT Contracts' prices or the price relationship between the spot price, soon to expire contracts and later to expire contracts, the value of a contract will fall as it approaches expiration. Over time, if contango remained constant, the performance of a portfolio would continue to be affected. Frequently, whether contango or backwardation exists is a function, among other factors, of the prevailing market conditions of the underlying market and government policy.

Summary of the Application

The CME is a regulated futures exchange with the requisite oversight, controls, and regulatory scrutiny necessary to maintain, promote, and effectuate fair and transparent trading of its listed products, including the BTC Contracts and MBT Contracts. The BTC Contracts and MBT Contracts are highly liquid, financially-settled instrument with no ownership interests of any kind in actual Bitcoin. The unique risks currently posed by the trading and/or storage of Bitcoins are not posed by BTC Contracts and MBT Contracts. As proposed, the Fund would solely hold BTC Contracts and MBT Contracts, and as such, would be an investment product similar to any other exchange-traded product ("ETP") whose component holdings are futures contracts traded on a regulated exchange. The Sponsor believes that investors would be afforded all of the protections that exchanges provide, including bilateral surveillance agreements between the listing exchange of the ETP and the listing exchange of the ETP's futures-based components.

According to the Registration Statement, the Fund will be a liquid, transparent investment product separate and apart from any other Bitcoin related product, including actual Bitcoin traded in any other venue. An ETP whose holdings consists exclusively of BTC Contracts and MBT Contracts would have all the benefits enjoyed by investors currently holding approved and listed futures-based ETPs without the risks associated with ETPs that hold actual Bitcoin. A futures-based Bitcoin ETP will fulfill investor demand for a highly regulated product that provides exposure to the price of Bitcoin without certain risks associated with holding actual Bitcoin.

The Bitcoin and Bitcoin Futures Markets Have Progressed and Matured Significantly

According to the Registration Statement, and as discussed in further detail below, Bitcoin is a digital asset based on the decentralized, open source protocol of the peer-to-peer computer network launched in 2009 that governs the creation, movement, and ownership of Bitcoin and hosts the public ledger, or "blockchain," on which all Bitcoin transactions are recorded (the "Bitcoin Network" or "Bitcoin"). The decentralized nature of the Bitcoin Network allows parties to transact directly with one another based on cryptographic proof instead of relying on a trusted third party. The protocol

also lays out the rate of issuance of new Bitcoin within the Bitcoin Network, a rate that is reduced by half approximately every four years with an eventual hard cap of 21 million. It is generally understood that the combination of these two features—a systemic hard cap of 21 million Bitcoin and the ability to transact with anyone connected to the Bitcoin Network—gives Bitcoin its value.¹⁰

The first rule filing proposing to list an exchange-traded product to provide exposure to Bitcoin in the U.S. was submitted by the Cboe BZX Exchange, Inc. on June 30, 2016.¹¹ At that time, blockchain technology, and digital assets that utilized it, were relatively new to the broader public. The market cap of all Bitcoin in existence at that time was approximately \$10 billion. No registered offering of digital asset securities or shares in an investment vehicle with exposure to Bitcoin or any other cryptocurrency had yet been conducted, and the regulated infrastructure for conducting a digital asset securities offering had not begun to develop.¹² Similarly, regulated U.S. Bitcoin futures contracts did not exist. The Commodity Futures Trading Commission (the "CFTC") had determined that Bitcoin is a commodity,¹³ but had not engaged in significant enforcement actions in the space. The New York Department of Financial Services ("NYDFS") adopted its final BitLicense regulatory framework in 2015, but had only approved four entities to engage in

¹⁰ For additional information about Bitcoin and the Bitcoin Network, see <https://bitcoin.org/en/gettingstarted>.

¹¹ See Order Setting Aside Action by Delegated Authority and Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, to List and Trade Shares of the Winklevoss Bitcoin Trust, Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018) (the "Winklevoss II Order"). This proposal was subsequently disapproved by the Commission. See *id.*

¹² Digital assets that are securities under U.S. law are referred to throughout this proposal as "digital asset securities." All other digital assets, including Bitcoin, are referred to interchangeably as "cryptocurrencies" or "virtual currencies." The term "digital assets" refers to all digital assets, including both digital asset securities and cryptocurrencies, together.

¹³ See "In the Matter of Coinflip, Inc." ("Coinflip") (CFTC Docket 15-29 (September 17, 2015)) (order instituting proceedings pursuant to Sections 6(c) and 6(d) of the CEA, making findings and imposing remedial sanctions), in which the CFTC stated: "Section 1a(9) of the CEA defines 'commodity' to include, among other things, 'all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in.' 7 U.S.C. 1a(9). The definition of a 'commodity' is broad. See, e.g., Board of Trade of City of Chicago v. SEC, 677 F.2d 1137, 1142 (7th Cir. 1982). Bitcoin and other virtual currencies are encompassed in the definition and properly defined as commodities."

activities relating to virtual currencies (whether through granting a BitLicense or a limited-purpose trust charter) as of June 30, 2016.¹⁴ While the first over-the-counter Bitcoin fund launched in 2013, public trading was limited and the fund had only \$60 million in assets.¹⁵ There were very few, if any, traditional financial institutions engaged in the space, whether through investment or providing services to digital asset companies. In January 2018, the Staff of the Commission noted in a letter to the Investment Company Institute and SIFMA that it was not aware, at that time, of a single custodian providing fund custodial services for digital assets.¹⁶

As of the first quarter of 2021, the digital assets financial ecosystem, including Bitcoin, has progressed and matured significantly. The development of a regulated market for digital asset securities has significantly evolved, with market participants having conducted registered public offerings of both digital asset securities¹⁷ and shares in investment vehicles holding Bitcoin futures.¹⁸ Additionally, licensed and regulated service providers have emerged to provide fund custodial services for digital assets, among other services. For example, in December 2020, the Commission adopted a conditional no-action position permitting certain special purpose broker-dealers to custody digital asset securities under Rule 15c3–3 under the Exchange Act.¹⁹ In September 2020, the Staff of the Commission released a no-action letter permitting certain broker-

dealers to operate a non-custodial Alternative Trading System (“ATS”) for digital asset securities, subject to specified conditions.²⁰ In October 2019, the Staff of the Commission granted temporary relief from the clearing agency registration requirement to an entity seeking to establish a securities clearance and settlement system based on distributed ledger technology;²¹ and multiple transfer agents who provide services for digital asset securities have registered with the Commission.²²

Beyond the Commission’s purview, the regulatory landscape has also changed significantly since 2016, and cryptocurrency markets have grown and evolved as well. The market for Bitcoin is approximately 100 times larger, having recently reached a market cap of over \$1 trillion. On February 27, 2021, Bitcoin’s market cap was greater than companies such as Facebook, Inc., Berkshire Hathaway Inc., and JP Morgan Chase & Co. The number of verified users at Coinbase, the largest U.S.-based Bitcoin exchange, has grown to over 56 million.²³ CFTC-regulated Bitcoin futures (“Bitcoin Futures”) represented approximately \$28 billion in notional trading volume on the CME in December 2020 compared to \$737 million, \$1.4 billion, and \$3.9 billion in total trading in December 2017, December 2018, and December 2019, respectively. Bitcoin Futures traded over \$1.2 billion per day in December 2020 and represented \$1.6 billion in open interest compared to \$115 million in December 2019.²⁴ The CFTC has

exercised its regulatory jurisdiction in bringing a number of enforcement actions related to Bitcoin and against trading platforms that offer cryptocurrency trading.²⁵ The U.S. Office of the Comptroller of the Currency (the “OCC”) has made clear that federally-chartered banks are able to provide custody services for cryptocurrencies and other digital assets.²⁶ The OCC recently granted conditional approval of two charter conversions by state-chartered trust companies to national banks, both of which provide cryptocurrency custody services.²⁷ NYDFS has granted no fewer than twenty-five BitLicenses, including to established public payment companies like PayPal Holdings, Inc. and Square, Inc., and limited purpose trust charters to entities providing cryptocurrency custody services. The U.S. Treasury Financial Crimes Enforcement Network (“FinCEN”) has released extensive guidance regarding the applicability of the Bank Secrecy Act (“BSA”) and implementing regulations to virtual currency businesses,²⁸ and has proposed rules imposing requirements on entities subject to the BSA that are specific to the technological context of virtual currencies.²⁹ In addition, the Treasury’s Office of Foreign Assets Control

addressing the Commission’s concerns about potential manipulation of the Bitcoin market.

²⁵ The CFTC’s annual report for Fiscal Year 2020 (which ended on September 30, 2020) noted that the CFTC “continued to aggressively prosecute misconduct involving digital assets that fit within the CEA’s definition of commodity” and “brought a record setting seven cases involving digital assets.” See CFTC FY2020 Division of Enforcement Annual Report, available at: https://www.cftc.gov/media/5321/DOE_FY2020_AnnualReport_120120/download. Additionally, the CFTC filed on October 1, 2020, a civil enforcement action against the owner/operators of the BitMEX trading platform, which was one of the largest Bitcoin derivative exchanges. See CFTC Release No. 8270–20 (October 1, 2020), available at: <https://www.cftc.gov/PressRoom/PressReleases/8270-20>.

²⁶ See OCC News Release 2021–2 (January 4, 2021), available at: <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-2.html>.

²⁷ See OCC News Release 2021–6 (January 13, 2021), available at: <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-6.html> and OCC News Release 2021–19 (February 5, 2021), available at: <https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-19.html>.

²⁸ See FinCEN Guidance FIN–2019–G001 (May 9, 2019) (Application of FinCEN’s Regulations to Certain Business Models Involving Convertible Virtual Currencies), available at: <https://www.fincen.gov/sites/default/files/2019-05/FinCEN%20Guidance%20CVC%20FINAL%20508.pdf>.

²⁹ See U.S. Department of the Treasury Press Release: “The Financial Crimes Enforcement Network Proposes Rule Aimed at Closing Anti-Money Laundering Regulatory Gaps for Certain Convertible Virtual Currency and Digital Asset Transactions” (December 18, 2020), available at: <https://home.treasury.gov/news/press-releases/sm1216>.

¹⁴ A list of virtual currency businesses that are entities regulated by the NYDFS is available on the NYDFS website. See https://www.dfs.ny.gov/apps_and_licensing/virtual_currency_businesses/regulated_entities.

¹⁵ See Bitcoin Investment Trust Form S–1, dated May 27, 2016, available at: <https://www.sec.gov/Archives/edgar/data/1588489/000095012316017801/FILENAME1.htm> (data as of March 31, 2016 according to publicly available filings).

¹⁶ See Letter from Dalia Blass, Director, Division of Investment Management, U.S. Securities and Exchange Commission to Paul Schott Stevens, President & CEO, Investment Company Institute and Timothy W. Cameron, Asset Management Group—Head, Securities Industry and Financial Markets Association (January 18, 2018), available at: <https://www.sec.gov/divisions/investment/noaction/2018/cryptocurrency-011818.htm>.

¹⁷ See Prospectus Supplement filed pursuant to Rule 424(b)(1) for INX Tokens (Registration No. 333–233363), available at: https://www.sec.gov/Archives/edgar/data/1725882/000121390202023202/ea125858-424b1_inxlimited.htm.

¹⁸ See Prospectus filed by Stone Ridge Trust VI on behalf of NYDIG Bitcoin Strategy Fund Registration, available at: <https://www.sec.gov/Archives/edgar/data/1764894/000119312519309942/d693146d497.htm>.

¹⁹ See Securities Exchange Act Release No. 90788, 86 FR 11627 (February 26, 2021) (File Number S7–25–20) (Custody of Digital Asset Securities by Special Purpose Broker-Dealers).

²⁰ See Letter from Elizabeth Baird, Deputy Director, Division of Trading and Markets, U.S. Securities and Exchange Commission to Kris Dailey, Vice President, Risk Oversight & Operational Regulation, Financial Industry Regulatory Authority (September 25, 2020), available at: <https://www.sec.gov/divisions/marketreg/mr-noaction/2020/finra-ats-role-in-settlement-of-digital-asset-security-trades-09252020.pdf>.

²¹ See Letter from Jeffrey S. Mooney, Associate Director, Division of Trading and Markets, U.S. Securities and Exchange Commission to Charles G. Cascarilla & Daniel M. Burstein, Paxos Trust Company, LLC (October 28, 2019), available at: <https://www.sec.gov/divisions/marketreg/mr-noaction/2019/paxos-trust-company-102819-17a.pdf>.

²² See, e.g., Form TA–1/A filed by Tokensoft Transfer Agent LLC (CIK: 0001794142) on January 8, 2021, available at: https://www.sec.gov/Archives/edgar/data/1794142/000179414219000001/xslFTA1X01/primary_doc.xml.

²³ See, e.g., “Riding Bitcoin Surge, Coinbase Active Users Grew by 117% in Q1 2021; Revenue Tops \$1.8B” (April 6, 2021), available at: <https://www.coindesk.com/coinbase-q1-earnings-report-monthly-active-users>.

²⁴ All statistics and charts included in this proposal with respect to the CME are sourced from <https://www.cmegroup.com/trading/bitcoin-futures.html>. In addition, as further discussed below, the Sponsor believes the CME represents a regulated market of significant size for purposes of

(“OFAC”) has brought enforcement actions over apparent violations of the sanctions laws in connection with the provision of wallet management services for digital assets.³⁰

In addition to the regulatory developments noted above, more traditional financial market participants appear to be embracing cryptocurrency: large insurance companies,³¹ investment banks,³² asset managers,³³ credit card companies,³⁴ university endowments,³⁵ pension funds,³⁶ and even historically Bitcoin skeptical fund managers³⁷ are allocating to Bitcoin. The largest over-the-counter Bitcoin fund previously filed a Form 10 registration statement, which the Staff of the Commission reviewed and which took effect automatically, and is now a

³⁰ See U.S. Department of the Treasury Enforcement Release: “OFAC Enters Into \$98,830 Settlement with BitGo, Inc. for Apparent Violations of Multiple Sanctions Programs Related to Digital Currency Transactions” (December 30, 2020), available at: https://home.treasury.gov/system/files/126/20201230_bitgo.pdf.

³¹ On December 10, 2020, Massachusetts Mutual Life Insurance Company (MassMutual) announced that it had purchased \$100 million in Bitcoin for its general investment account. See MassMutual Press Release “Institutional Bitcoin provider NYDIG announces minority stake purchase by MassMutual” (December 10, 2020), available at: <https://www.massmutual.com/about-us/news-and-press-releases/press-releases/2020/12/institutional-bitcoin-provider-nydig-announces-minority-stake-purchase-by-massmutual>.

³² See, e.g., “Morgan Stanley to Offer Rich Clients Access to Bitcoin Funds” (March 17, 2021) available at: <https://www.bloomberg.com/news/articles/2021-03-17/morgan-stanley-to-offer-rich-clients-access-to-bitcoin-funds>.

³³ See, e.g., “BlackRock’s Rick Rieder says the world’s largest asset manager has ‘started to dabble’ in Bitcoin” (February 17, 2021), available at: <https://www.cnbc.com/2021/02/17/blackrock-has-started-to-dabble-in-bitcoin-says-rick-rieder.html> and “Guggenheim’s Scott Minerid Says Bitcoin Should Be Worth \$400,000” (December 16, 2020), available at: <https://www.bloomberg.com/news/articles/2020-12-16/guggenheim-s-scott-minerid-says-bitcoin-should-be-worth-400-000>.

³⁴ See, e.g., “Visa Moves to Allow Payment Settlements Using Cryptocurrency” (March 29, 2021), available at: <https://www.reuters.com/business/autos-transportation/exclusive-visa-moves-allow-payment-settlements-using-cryptocurrency-2021-03-29/>.

³⁵ See, e.g., “Harvard and Yale Endowments Among Those Reportedly Buying Crypto” (January 25, 2021), available at: <https://www.bloomberg.com/news/articles/2021-01-26/harvard-and-yale-endowments-among-those-reportedly-buying-crypto>.

³⁶ See, e.g., “Virginia Police Department Reveals Why its Pension Fund is Betting on Bitcoin” (February 14, 2019), available at: <https://finance.yahoo.com/news/virginia-police-department-reveals-why-194558505.html>.

³⁷ See, e.g., “Bridgewater: Our Thoughts on Bitcoin” (January 28, 2021) available at: <https://www.bridgewater.com/research-and-insights/our-thoughts-on-bitcoin> and “Paul Tudor Jones says he likes bitcoin even more now, rally still in the ‘first inning’” (October 22, 2020), available at: <https://www.cnbc.com/2020/10/22/paul-tudor-jones-says-he-likes-bitcoin-even-more-now-rally-still-in-the-first-inning.html>.

reporting company.³⁸ Established companies like Tesla, Inc.,³⁹ MicroStrategy Incorporated,⁴⁰ and Square, Inc.,⁴¹ among others, have recently announced substantial investments in Bitcoin in amounts as large as \$1.5 billion (Tesla) and \$425 million (MicroStrategy).

The Sponsor maintains that despite these developments, access for U.S. retail investors to gain exposure to Bitcoin via a transparent and regulated exchange-traded vehicle remains limited. As investors and advisors increasingly utilize ETPs to manage diversified portfolios (including equities, fixed income securities, commodities, and currencies) quickly, easily, relatively inexpensively, tax-efficiently, and without having to hold directly any of the underlying assets; options for Bitcoin exposure for U.S. investors remain limited to: (i) Investing in over-the-counter Bitcoin funds (“OTC Bitcoin Funds”) that are subject to high premium/discount volatility (and high management fees) to the advantage of more sophisticated investors that are able to purchase shares at NAV directly with the issuing trust; (ii) facing the technical risk, complexity, and generally high fees associated with buying and storing Bitcoin directly; or (iii) purchasing shares of operating companies that they believe will provide proxy exposure to Bitcoin with limited disclosure about the associated risks. Meanwhile, investors in many other countries, including Canada, are able to use more traditional exchange listed and traded products to gain exposure to Bitcoin.⁴²

³⁸ See Letter from Division of Corporation Finance, Office of Real Estate & Construction to Barry E. Silbert, Chief Executive Officer, Grayscale Bitcoin Trust (January 31, 2020), available at: <https://www.sec.gov/Archives/edgar/data/1588489/000000000020000953/FILENAME1.pdf>.

³⁹ See Form 10-K submitted by Tesla, Inc. for the fiscal year ended December 31, 2020 at 23: https://www.sec.gov/ix?doc=/Archives/edgar/data/1318605/000156459021004599/tsla-10k_20201231.htm.

⁴⁰ See Form 10-Q submitted by MicroStrategy Incorporated for the quarterly period ended September 30, 2020 at 8: https://www.sec.gov/ix?doc=/Archives/edgar/data/1050446/000156459020047995/mstr-10q_20200930.htm.

⁴¹ See Form 10-Q submitted by Square, Inc. for the quarterly period ended September 30, 2020 at 51: <https://www.sec.gov/ix?doc=/Archives/edgar/data/1512673/0000151267320000012/sq-20200930.htm>.

⁴² Securities regulators in a number of other countries have either approved or otherwise allowed the listing and trading of Bitcoin ETPs. Specifically, these funds (with their respective approximate AUMs as of April 14, 2021) include the Purpose Bitcoin ETF (\$993,000,000), VanEck Vectors Bitcoin ETN (\$209,000,000), WisdomTree Bitcoin ETP (\$407,000,000), Bitcoin Tracker One (\$1,380,000,000), BTCctc Bitcoin ETP (\$1,410,000,000), 21Shares Bitcoin ETP

For example, the Purpose Bitcoin ETF, a retail physical Bitcoin ETP recently launched in Canada, reportedly reached \$421.8 million in assets under management (“AUM”) in two days, and has achieved \$993 million in assets as of April 14, 2021, demonstrating the demand for a North American market listed Bitcoin ETP. The Sponsor believes that the demand for the Purpose Bitcoin ETF is driven primarily by investors’ desire to have a regulated and accessible means of exposure to [sic]. The Purpose Bitcoin ETF also offers a class of units that is U.S. dollar Bitcoin denominated, which could appeal to U.S. investors. Without an approved Bitcoin ETP in the U.S. as a viable alternative, the Sponsor believes U.S. investors will seek to purchase these shares in order to get access to Bitcoin exposure, leaving them without the protections of U.S. securities laws. Given the separate regulatory regime and the potential difficulties associated with any international litigation, such an arrangement would create more risk exposure for U.S. investors than they would otherwise have with a U.S. exchange listed ETP. With the addition of more Bitcoin ETPs in non-U.S. jurisdictions expected to grow, the Sponsor anticipates that such risks will only continue to grow.

In addition, several funds registered under the Investment Company Act of 1940 (the “1940 Act”) have effective registration statements that contemplate Bitcoin exposure through a variety of means, including through investments in Bitcoin futures contracts⁴³ and through OTC Bitcoin Funds.⁴⁴ As of the date of this filing, it is anticipated that other 1940 Act funds will soon begin to pursue Bitcoin through other means, including through options on Bitcoin futures contracts and investments in privately offered pooled investment vehicles that invest in Bitcoin.⁴⁵ In previous statements, the Staff of the Commission has acknowledged how such funds can satisfy their concerns regarding custody, valuation, and

(\$362,000,000), 21Shares Bitcoin Suisse ETP (\$30,000,000), CoinShares Physical Bitcoin ETP (\$396,000,000).

⁴³ See, e.g., Stone Ridge Trust VI (File No. 333-234055); BlackRock Global Allocation Fund, Inc. (File No. 33-22462); and BlackRock Funds V (File No. 333-224371).

⁴⁴ See, e.g., Amplify Transformational Data Sharing ETF (File No. 333-207937); and ARK Innovation ETF (File No. 333-191019).

⁴⁵ See Stone Ridge Trust, Post-Effective Amendment No. 74 to Registration Statement on Form N-1A (File No. 333-184477), available at: <https://www.sec.gov/Archives/edgar/data/1559992/000119312521072856/d129263d485apos.htm>.

manipulation.⁴⁶ The funds that have already invested in Bitcoin instruments have no reported issues regarding custody, valuation, or manipulation of the instruments held by these funds. While these funds do offer investors some means of exposure to Bitcoin, the Sponsor believes the current offerings fall short of giving investors an accessible, regulated product that provides concentrated exposure to Bitcoin and Bitcoin prices.

OTC Bitcoin Funds and Investor Protection

The Sponsor notes that U.S. investor exposure to Bitcoin through OTC Bitcoin Funds has grown into the tens of billions of dollars. With that growth, so too has grown the potential risk to U.S. investors. As described below, premium and discount volatility, high fees, insufficient disclosures, and technical hurdles are exposing U.S. investors to risks that could potentially be eliminated through access to a Bitcoin futures-based ETP. Investor protection concerns remain and are growing related to OTC Bitcoin Funds. The Sponsor understands the Commission's previous focus in prior disapproval orders on potential manipulation of a Bitcoin ETP holding actual Bitcoin, but believes that such concerns have been sufficiently mitigated by the use of futures contracts in the proposed ETP. Accordingly, the Sponsor believes that the Fund represents an opportunity for U.S. investors to gain price exposure to Bitcoin futures contracts in a regulated and transparent exchange-traded vehicle that limits risks by: (i) Reducing premium and discount volatility; (ii) reducing management fees through meaningful competition; (iii) reducing risks associated with investing in operating companies that are imperfect proxies for Bitcoin exposure; and (iv) avoiding regulatory concerns regarding custody and valuation posed by ETFs and ETPs that invest directly in Bitcoin rather than in Bitcoin futures contracts.

OTC Bitcoin Funds and Premium/Discount Volatility

According to the Sponsor, OTC Bitcoin Funds are generally designed to provide exposure to Bitcoin in a manner similar to the Shares. However, unlike the Shares, OTC Bitcoin Funds are unable to freely offer creation and redemption in a way that incentivizes market participants to keep their shares

trading in line with their NAV⁴⁷ and, as a result, shares of OTC Bitcoin Funds frequently trade at a price that is out of line with the value of their assets held. Historically, OTC Bitcoin Funds have traded at a significant premium to NAV.⁴⁸

Trading at a premium or a discount is not unique to OTC Bitcoin Funds and is not in itself problematic, but the size of such premiums/discounts and volatility thereof highlight the key differences in operations and market structure of OTC Bitcoin Funds as compared to ETPs.

Combined with the significant increase in AUM for OTC Bitcoin Funds over the past year, the size and volatility of premiums and discounts for OTC Bitcoin Funds have given rise to significant and quantifiable investor protection issues, as further described below. In fact, the largest OTC Bitcoin Fund has grown to \$35.0 billion in AUM as of February 19, 2021⁴⁹ and has historically traded at a premium of between roughly five and forty percent, though it has seen premiums at times above one hundred percent.⁵⁰ Recently, however, it has traded at a discount. As of March 24, 2021, the discount was approximately 14%,⁵¹ representing around \$4.9 billion less in market value

⁴⁷ Because OTC Bitcoin Funds are not listed on an exchange, they are also not subject to the same transparency and regulatory oversight by a listing exchange as the Shares would be. In the case of the Fund, the existence of an information sharing agreement between the Exchange and the CME results in increased investor protections as compared to OTC Bitcoin Funds.

⁴⁸ The inability to trade in line with NAV may at some point result in OTC Bitcoin Funds trading at a discount to their NAV, which has occurred more recently with respect to one prominent OTC Bitcoin Fund. While that has not historically been the case, and it is not clear whether such discounts will continue, such a prolonged, significant discount scenario would give rise to nearly identical potential issues related to trading at a premium.

⁴⁹ Compare to an AUM of approximately \$2.6 billion on February 26, 2020, the date on which the Commission issued the most recent disapproval order for a Bitcoin ETP. See Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, to Amend NYSE Arca Rule 8.201-E (Commodity-Based Trust Shares) and to List and Trade Shares of the United States Bitcoin and Treasury Investment Trust Under NYSE Arca Rule 8.201-E, Securities Exchange Act Release No. 88284 (February 26, 2020), 85 FR 12595 (March 3, 2020) (SR-NYSE Arca-2019-39) (the "Wilshire Phoenix Order"). While the price of one Bitcoin has increased approximately 400% in the intervening period, the total AUM has increased by approximately 1240%, indicating that the increase in AUM is attributable to more than just price appreciation in Bitcoin.

⁵⁰ See "Traders Piling Into Overvalued Crypto Funds Risk a Painful Exit" (February 4, 2021), available at: <https://www.bloomberg.com/news/articles/2021-02-04/bitcoin-one-big-risk-when-investing-in-crypto-funds>.

⁵¹ This discount is compared to another OTC Bitcoin Product which had a premium of over 60% on the same day, with a premium of over 200% a few days earlier.

than the Bitcoin actually held by the fund. If premium/discount numbers move back to the middle of its historical range to a 20% premium (which historically could occur at any time and overnight), it would represent a swing of approximately \$11.9 billion in value unrelated to the value of Bitcoin held by the fund and if the premium returns to the upper end of its typical range, that number increases to \$18.9 billion. These numbers are only associated with a single OTC Bitcoin Fund—as more and more OTC Bitcoin Funds come to market and more investor assets flood into them to get access to Bitcoin exposure, the potential dollars at risk will only increase.

The Sponsor believes that the risks associated with volatile premiums/discounts for OTC Bitcoin Funds raise significant investor protection issues in several ways. First, investors may be buying shares of a fund for a price that is not reflective of the per share value of the fund's underlying assets. Even operating within the normal premium range, it is possible for an investor to buy shares of an OTC Bitcoin Fund only to have those shares quickly lose 10% or more in dollar value without any movement of the price of Bitcoin. That is to say—the price of Bitcoin could have stayed exactly the same from market close on one day to market open the next, yet the value of the shares held by the investor decreased only because of the fluctuation of the premium/discount. As more investment vehicles, including mutual funds and ETFs, seek to gain exposure to Bitcoin, the easiest option for a buy and hold strategy is often an OTC Bitcoin Fund, meaning that even investors that do not directly buy OTC Bitcoin Funds can be disadvantaged by extreme premiums (or discounts) and premium volatility.

The second issue is related to the first and explains how the premium in OTC Bitcoin Funds essentially creates a transfer of value from retail investors to more sophisticated investors. Generally speaking, only accredited investors are able to purchase shares from the issuing fund, which means that they are able to purchase shares directly with the fund at NAV (in exchange for either cash or Bitcoin) without having to pay the premium or sell into the discount. While there are often minimum holding periods for shares required by law, an investor that is allowed to purchase directly from the fund is able to hedge their Bitcoin exposure as needed to satisfy the holding requirements and collect on the premium or discount opportunity.

As noted above, the existence of a premium or discount and the premium/

⁴⁶ See Dalia Blass, "Keynote Address—2019 ICI Securities Law Developments Conference" (December 3, 2019), available at: <https://www.sec.gov/news/speech/bllass-keynote-address-2019-ici-securities-law-developments-conference>.

discount collection opportunity is not unique to OTC Bitcoin Funds and does not in itself warrant the approval of an exchange traded product.⁵² What is unique is that such significant and persistent premiums and discounts can exist in a product with over \$35 billion in assets under management,⁵³ that billions of retail investor dollars are constantly under threat of premium/discount volatility,⁵⁴ and that premium/discount volatility is generally captured by more sophisticated investors on a riskless basis. While the Sponsor appreciates the Commission's focus on potential manipulation of a Bitcoin ETP in prior disapproval orders and believes those concerns are adequately addressed in this filing, the Sponsor believes that the Commission should also consider the direct, quantifiable investor protection issue in determining whether to approve this proposal, particularly when the Trust, as a Bitcoin ETP, is designed to reduce the likelihood of significant and prolonged premiums and discounts with its open-ended nature as well as the ability of market participants (*i.e.*, market makers and authorized participants) to create and redeem on a daily basis.

Spot and Proxy Exposure

According to the Sponsor, exposure to Bitcoin through a Bitcoin futures-based ETP like the Fund also presents certain advantages for retail investors compared to buying spot Bitcoin directly. The most notable advantage is that, as discussed below, the BTC Contracts and MBT Contracts in which the Fund will invest do not require special, potentially complex and untested, custody procedures. Unlike physical Bitcoin ETPs, the Fund will not be required to use a Bitcoin custodian because it will not be holding Bitcoin. By contrast, an individual retail investor holding

Bitcoin through a cryptocurrency exchange lacks these protections. Meanwhile, a retail investor holding spot Bitcoin directly in a self-hosted wallet may suffer from inexperience in private key management (*e.g.*, insufficient password protection, lost key, etc.), which could cause them to lose some or all of their Bitcoin holdings. In addition, retail investors will be able to hold the Shares in traditional brokerage accounts which provide SIPC protection if a brokerage firm fails.

Finally, as described above, a number of operating companies engaged in unrelated businesses—such as Tesla (a car manufacturer) and MicroStrategy (an enterprise software company)—have recently announced investments as large as \$1.5 billion in Bitcoin.⁵⁵ Without access to a Bitcoin ETP, retail investors seeking investment exposure to Bitcoin may end up purchasing shares in these companies in order to gain the exposure to Bitcoin that they seek.⁵⁶ In fact, mainstream financial news networks have written a number of articles providing investors with guidance for obtaining Bitcoin exposure through publicly traded companies (such as MicroStrategy, Tesla, and Bitcoin mining companies, among others) instead of dealing with the complications associated with buying spot Bitcoin in the absence of a Bitcoin ETP.⁵⁷ Such operating companies, however, are imperfect Bitcoin proxies and provide investors with partial Bitcoin exposure paired with a host of additional risks associated with whichever operating company they decide to purchase. Additionally, the disclosures provided by the aforementioned operating companies with respect to risks relating to their Bitcoin holdings are generally substantially smaller than the

registration statement of a Bitcoin ETP, including the Sponsor's Registration Statement, typically amounting to a few sentences of narrative description and a handful of risk factors.⁵⁸ In other words, investors seeking Bitcoin exposure through publicly traded companies are gaining only partial exposure to Bitcoin, without the full benefit of the risk disclosures and associated investor protections that come from the securities registration process.

The Bitcoin Futures Market Has Developed Alongside the Bitcoin Spot Market Into a Strong and Viable Marketplace That Stands On Its Own

As noted above, CME began offering trading in BTC Contracts in 2017, and in MBT Contracts in 2021. Each of the contract's final cash settlement is based on the CME CF Bitcoin Reference Rate (the "CME CF BRR").⁵⁹ The contracts trade and settle like other cash-settled commodity futures contracts. According to the Sponsor, trading in CME Bitcoin futures contracts has increased significantly, in particular with respect to BTC Contracts. Nearly every measurable metric related to BTC Contracts has trended consistently up since launch and/or accelerated upward in the past year. For example, there was approximately \$28 billion in trading in BTC Contracts in December 2020 compared to \$737 million, \$1.4 billion, and \$3.9 billion in total trading in December 2017, December 2018, and December 2019, respectively. BTC Contracts traded over \$1.2 billion per day in December 2020 and represented \$1.6 billion in open interest compared to \$115 million in December 2019. This general upward trend in trading volume and open interest is captured in the following chart.

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⁵² For example, similar premiums/discounts and premium/discount volatility exist for other non-Bitcoin cryptocurrency related over-the-counter funds, but the size and investor interest in those funds does not give rise to the same investor protection concerns that exist for OTC Bitcoin Funds.

⁵³ At \$35 billion in AUM, the largest OTC Bitcoin Fund would be among the top 40 largest out of roughly 2,400 U.S. listed ETPs.

⁵⁴ In two recent incidents, the premium dropped from 28.28% to 12.29% from the close on 3/19/20 to the close on 3/20/20 and from 38.40% to 21.05% from the close on 5/13/19 to the close on 5/14/19. Similarly, over the period of 12/21/20 to 1/21/21, the premium went from 40.18% to 2.79%. While the price of Bitcoin appreciated significantly during this period and NAV per share increased by 41.25%, the price per share increased by only 3.58%.

⁵⁵ See notes 39–41, *supra*. MicroStrategy recently completed a \$900 million convertible note offering for the purpose of acquiring Bitcoin. See <https://www.microstrategy.com/en/investor-relations/press/microstrategy-announces-pricing-of-offering-of-convertible-senior-notes02-17-2021>.

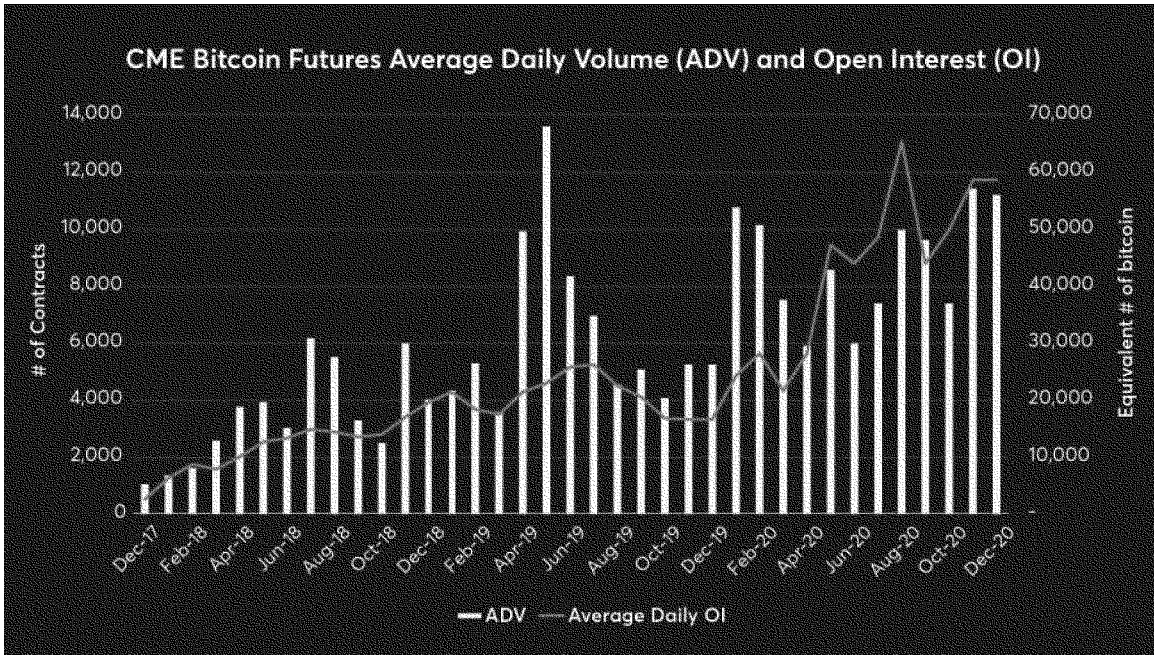
⁵⁶ In August 2017, the Commission's Office of Investor Education and Advocacy warned investors about situations where companies were publicly announcing events relating to digital coins or tokens in an effort to affect the price of the company's publicly traded common stock. See https://www.sec.gov/oiea/investor-alerts-and-bulletins/ia_icorelatedclaims.

⁵⁷ See, *e.g.*, "7 public companies with exposure to bitcoin" (February 8, 2021) available at: <https://finance.yahoo.com/news/7-public-companies-with-exposure-to-bitcoin-154201525.html>; and "Want to get in the crypto trade without holding bitcoin yourself? Here are some investing ideas" (February

19, 2021) available at: <https://www.cnbc.com/2021/02/19/ways-to-invest-in-bitcoin-without-holding-the-cryptocurrency-yourself.html>.

⁵⁸ See, *e.g.*, Tesla 10-K for the year ended December 31, 2020, which mentions Bitcoin just nine times: https://www.sec.gov/ix?doc=/Archives/edgar/data/1318605/000156459021004599/tsla-10k_20201231.htm.

⁵⁹ According to the CME, the CME CF BRR aggregates the trade flow of major Bitcoin spot exchanges during a specific calculation window into a once-a-day reference rate of the U.S. dollar price of Bitcoin. Calculation rules are geared toward maximum transparency and real-time replicability in underlying spot markets, including Bitstamp, Coinbase, Gemini, iBit, and Kraken. For additional information, refer to <https://www.cmegroup.com/trading/cryptocurrency-indices/cf-bitcoin-reference-rate.html?redirect=/trading/cf-bitcoin-reference-rate.html>.



Similarly, the number of large open interest holders⁶⁰ has continued to increase even as the price of Bitcoin has risen, as have the number of unique accounts trading Bitcoin Futures.

As it pertains specifically to the Bitcoin Futures Contracts in which the Fund will invest, the statistics are equally as profound. The following table and chart, calculated by the Sponsor, sets forth the approximate daily

notional average volume for the Bitcoin Futures Contracts together, followed by the daily average volume (in number of contracts) for each of the Bitcoin Futures Contracts, the first to expire and the second to expire.

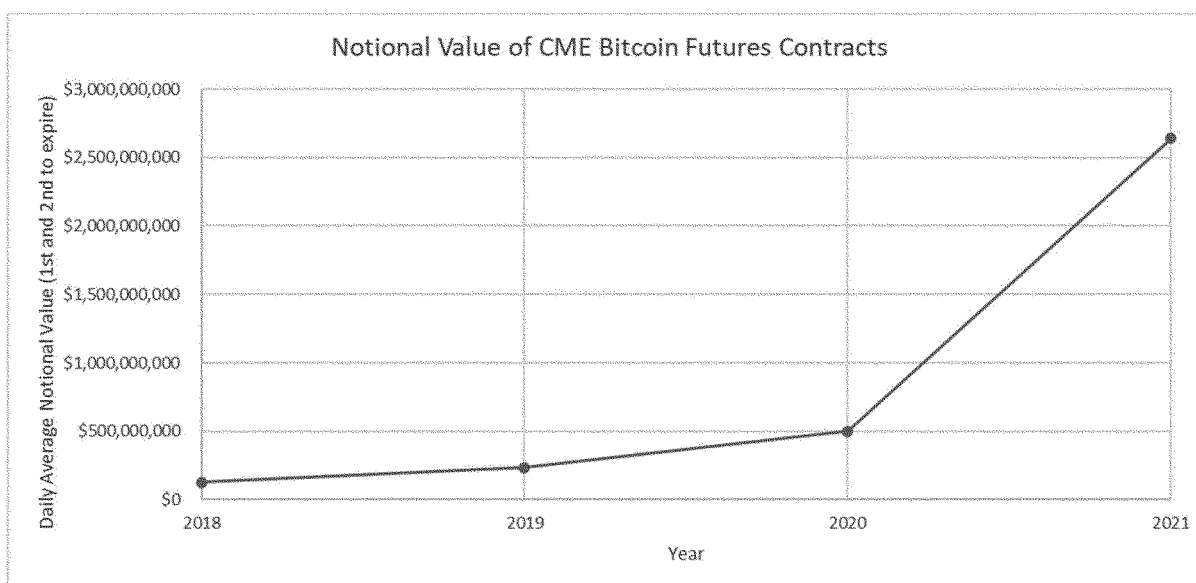
DAILY NOTIONAL AVERAGE

	Volume for Bitcoin Futures Contracts (in \$)	First-to-expire Bitcoin Futures Contract	Second-to-expire Bitcoin Futures Contract
2018	\$126,000,000	3,200	400
2019	234,000,000	5,400	700
2020	500,000,000	7,100	1,300
2021	2,640,000,000	8,800	2,400

⁶⁰ A large open interest holder in BTC Contracts is an entity that holds at least 25 contracts, which

is the equivalent of 125 Bitcoin. At a price of approximately \$30,000 per Bitcoin on 12/31/20,

more than 80 firms had outstanding positions of greater than \$3.8 million in BTC Contracts.



Note: The 2021 daily average notional value is for the period from January 1, 2021 through June 1, 2021.

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The Bitcoin Industry and Market Transactions

According to the Registration Statement, Bitcoin is the digital asset that is native to, and created and transmitted through the operations of, the peer-to-peer Bitcoin Network, a decentralized network of computers that operates on cryptographic protocols. No single entity owns or operates the Bitcoin Network, the infrastructure of which is collectively maintained by a decentralized user base. The Bitcoin Network allows people to exchange tokens of value, called Bitcoin, which are recorded on a public transaction ledger known as the Blockchain. Bitcoin can be used to pay for goods and services, or it can be converted to fiat currencies, such as the U.S. dollar, at rates determined on Bitcoin trading platforms or in individual end-user-to-end-user transactions under a barter system. Although nascent in use, Bitcoin may be used as a medium of exchange, unit of account or store of value.

The Bitcoin Network is decentralized and does not require governmental authorities or financial institution intermediaries to create, transmit, or determine the value of Bitcoin. In addition, no party may easily censor transactions on the Bitcoin Network. As a result, the Bitcoin Network is often referred to as decentralized and censorship resistant.

According to the Registration Statement, the value of Bitcoin is determined by the supply of and demand for Bitcoin. New Bitcoin are created and rewarded to the parties

providing the Bitcoin Network's infrastructure ("miners") in exchange for their expending computational power to verify transactions and add them to the Blockchain. The Blockchain is effectively a decentralized database that includes all blocks that have been solved by miners, and it is updated to include new blocks as they are solved. Each Bitcoin transaction is broadcast to the Bitcoin Network and, when included in a block, recorded in the Blockchain. As each new block records outstanding Bitcoin transactions, and outstanding transactions are settled and validated through such recording, the Blockchain represents a complete, transparent, and unbroken history of all transactions of the Bitcoin Network.

The Fund Will Not Transact in Bitcoin and Will Not Be Required To Retain a Bitcoin Custodian

The Sponsor notes that individual users, institutional investors and investment funds that want to provide exposure to Bitcoin by investing directly in Bitcoin, and therefore must transact in Bitcoin, must use the Bitcoin Network to download specialized software referred to as a "Bitcoin wallet." This wallet may be used to send and receive Bitcoin through users' unique "Bitcoin addresses." The amount of Bitcoin associated with each Bitcoin address, as well as each Bitcoin transaction to or from such address, is captured on the Blockchain. Bitcoin transactions are secured by cryptography known as public-private key cryptography, represented by the Bitcoin addresses and digital signature in a transaction's data file. Each Bitcoin Network address, or wallet, is associated

with a unique "public key" and "private key" pair, both of which are lengthy alphanumeric codes, derived together and possessing a unique relationship. The private key is a secret and must be kept in accordance with appropriate controls and procedures to ensure it is used only for legitimate and intended transactions. If an unauthorized third person learns of a user's private key, that third person could forge the user's digital signature and send the user's Bitcoin to any arbitrary Bitcoin address, thereby stealing the user's Bitcoin. Similarly, if a user loses his private key and cannot restore such access (e.g., through a backup), the user may permanently lose access to the Bitcoin contained in the associated address.

According to the Registration Statement, institutional purchasers of Bitcoin, including other Bitcoin funds that provide exposure to Bitcoin by investing directly in Bitcoin, generally maintain their Bitcoin account with a Bitcoin custodian. Bitcoin custodians are financial institutions that have implemented a series of specialized security precautions, including holding Bitcoin in "cold storage," to try to ensure the safety of an account holder's Bitcoin. These Bitcoin custodians must carefully consider the design of the physical, operational, and cryptographic systems for secure storage of private keys in an effort to lower the risk of loss or theft, and many use a multi-factor security system under which actions by multiple individuals working together are required to access the private keys necessary to transfer such digital assets and ensure exclusive ownership.

The nature of the Bitcoin Futures Contracts that the Fund will hold is

such that the Fund will not be required to use a Bitcoin custodian. According to the Registration Statement, the Fund will deposit an initial margin amount to initiate an open position in futures contracts. A margin deposit is like a cash performance bond. It helps assure the trader's performance of the futures contracts that he or she purchases or sells. Futures contracts are marked to market at the end of each trading day and the margin required with respect to such contracts is adjusted accordingly. The remainder of the Fund's assets will be held in cash and cash equivalents at the Fund custodian or other financial institutions. The Fund will only hold Bitcoin Futures Contracts described above. Accordingly, the Fund will not need a Bitcoin custodian because it will never hold actual Bitcoin and the risks posed by transacting and holding actual Bitcoin will be irrelevant to Fund investors.

The Structure and Operation of the Trust Satisfies Commission Requirements for Bitcoin-Based Exchange Traded Products

In disapproving prior proposals to list and trade shares of various Bitcoin trusts and Bitcoin-based trust issued receipts, the Commission noted that such proposals did not adequately demonstrate that they were designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest, consistent with Section 6(b)(5) of the Act.⁶¹ The Commission does not apply

⁶¹ See, e.g., Order Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, to BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, To List and Trade Shares Issued by the Winklevoss Bitcoin Trust, Securities Exchange Act Release No. 80206 (March 10, 2017), 82 FR 14076 (March 16, 2017) (SR-BatsBZX-2016-30) (the "Winklevoss I Order"); the Winklevoss II Order; Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Listing and Trading of Shares of the Bitwise Bitcoin ETF Trust Under NYSE Arca Rule 8.201-E, Securities Exchange Act Release No. 87267 (October 9, 2019), 84 FR 55382 (October 16, 2019) (SR-NYSEArca-2019-01) (the "Bitwise Order"); the Wilshire Phoenix Order; Order Disapproving a Proposed Rule Change to List and Trade the Shares of the ProShares Bitcoin ETF and the ProShares Short Bitcoin ETF, Securities Exchange Act Release No. 83904 (August 22, 2018), 83 FR 43934 (August 28, 2018) (SR-NYSEArca-2017-139); Order Disapproving a Proposed Rule Change Relating to Listing and Trading of the Direxion Daily Bitcoin Bear 1X Shares, Direxion Daily Bitcoin 1.25X Bull Shares, Direxion Daily Bitcoin 1.5X Bull Shares, Direxion Daily Bitcoin 2X Bull Shares, and Direxion Daily Bitcoin 2X Bear Shares Under NYSE Arca Rule 8.200-E, Securities Exchange Act Release No. 83912 (August 22, 2018), 83 FR 43912 (August 28, 2018) (SR-NYSEArca-2018-02); Order Disapproving a Proposed Rule Change to List and Trade the Shares of the GraniteShares Bitcoin ETF and the GraniteShares Short Bitcoin ETF, Securities Exchange Act Release No. 83913 (August 22, 2018),

a "cannot be manipulated" standard, but instead seeks to examine whether a proposal meets the requirements of the Act.⁶² The Commission has explained that a proposal could satisfy the requirements of the Act in the first instance by demonstrating that the listing exchange has entered into a comprehensive surveillance-sharing agreement ("CSSA") with a regulated "market of significant size" relating to the underlying assets.⁶³ The Commission has also recognized that a listing exchange would not necessarily need to enter into a CSSA with a regulated significant market if the underlying commodity market inherently possessed a unique resistance to manipulation beyond the protections that are utilized by traditional commodity or securities markets or if the listing exchange could demonstrate that there were sufficient "other means to prevent fraudulent and manipulative acts and practices."⁶⁴

As described below, the Sponsor believes the structure and operation of the Trust are designed to prevent fraudulent and manipulative acts and practices, to protect investors and the public interest, and to respond to the specific concerns that the Commission has identified with respect to potential fraud and manipulation in the context of a Bitcoin or Bitcoin futures ETP. Further, as the Commission has previously acknowledged, trading in a Bitcoin-based ETP on a national securities exchange, as compared to trading in an unregulated Bitcoin spot market, may provide additional protection to investors.⁶⁵ The Sponsor also believes that listing of the Trust's Shares on the Exchange will provide investors with such an opportunity to obtain exposure to Bitcoin within a regulated environment.

⁶² 83 FR 43923 (August 28, 2018) (SR-CboeBZX-2018-01) (the "GraniteShares Order").

⁶³ See Winklevoss II Order, 83 FR at 37582.

⁶⁴ See Wilshire Phoenix Order, 85 FR at 12596-97.

⁶⁵ See Winklevoss II Order, 83 FR at 37580, 37582-91; Bitwise Order, 84 FR at 55383, 55385-406; Wilshire Phoenix Order, 85 FR at 12597.

⁶⁶ See GraniteShares Order, 83 FR at 43931. See also Hester M. Peirce, U.S. Sec. Exch. Comm'n, Dissent of Commissioner Hester M. Peirce to Release No. 34-83723 (July 26, 2018), available at: <https://www.sec.gov/news/public-statement/peirce-dissent-34-83723> ("An ETP based on bitcoin would offer investors indirect exposure to bitcoin through a product that trades on a regulated securities market and in a manner that eliminates some of the frictions and worries of buying and holding bitcoin directly. If we were to approve the ETP at issue here, investors could choose whether to buy it or avoid it.").

Surveillance Sharing Agreements With a Market of Significant Size

1. The Presence of Surveillance Sharing Agreements

In previous orders rejecting the listing of Bitcoin ETFs, the Commission noted its concerns that the Bitcoin market could be subject to manipulation.⁶⁶ In these orders, the Commission cited numerous precedents⁶⁷ in which listing proposals were approved based on findings that the particular market was either inherently resistant to manipulation or that the listing exchange had entered into a surveillance sharing agreement with a market of significant size.⁶⁸ The Commission noted that, for commodity-trust ETPs "there has been in every case at least one significant, regulated market for trading futures in the underlying commodity—whether gold, silver, platinum, palladium or copper—and the ETP listing exchange has entered into surveillance-sharing agreements with, or held Intermarket Surveillance Group (the "ISG") membership in common with, that market."⁶⁹

The CME⁷⁰ is a member of the ISG, the purpose of which is "to provide a

⁶⁶ See Winklevoss I Order and Winklevoss II Order. The Sponsor represents that some of the concerns raised are that a significant portion of Bitcoin trading occurs on unregulated platforms and that there is a concentration of a significant number of Bitcoin in the hands of a small number of holders. However, these facts are not unique to Bitcoin and are true of a number of commodity and other markets. For instance, some gold bullion trading takes place on unregulated OTC markets and a significant percentage of gold is held by a relative few (according to estimates of the World Gold Council, approximately 22% of total above ground gold stocks are held by private investors and 17% are held by foreign governments; by comparison, 13.61% of Bitcoin are held by the 86 largest Bitcoin addresses, some of which are known to be cold storage addresses of large centralized cryptocurrency trading platforms). See <https://www.gold.org/goldhub/data/above-ground-stocks> for gold data cited in this note and <https://bitinfocharts.com/top-100-richest-bitcoin-addresses.html> for Bitcoin data.

⁶⁷ For an extensive listing of such precedents, see Winklevoss I Order, 82 FR at 14083 n. 96.

⁶⁸ The Exchange to date has not entered into surveillance sharing agreements with any cryptocurrency platform. However, the CME, which calculates the CME CF BRR, and which has offered contracts for Bitcoin futures products since 2017, is, as noted below, a member of the ISG. In addition, each Constituent Platform has entered into a data sharing agreement with CME. See <https://docs-cfbenchmarkmarks.s3.amazonaws.com/CME+CF+Constituent+Exchanges+Criteria.pdf>.

⁶⁹ See Winklevoss II Order, 83 FR at 37594.

⁷⁰ The CME is regulated by the CFTC, which has broad reaching anti-fraud and anti-manipulation authority including with respect to the Bitcoin market since Bitcoin has been designated as a commodity by the CFTC. See A CFTC Primer on Virtual Currencies (October 17, 2017), available at: https://www.cftc.gov/sites/default/files/idc/groups/public/documents/file/labcftc_primervirtual100417.pdf (the "CFTC Primer on Virtual

framework for the sharing of information and the coordination of regulatory efforts among exchanges trading securities and related products to address potential intermarket manipulations and trading abuses.”⁷¹ Membership of a relevant futures exchange in ISG is sufficient to meet the surveillance-sharing requirement.⁷²

The Commission has previously noted that the existence of a surveillance-sharing agreement by itself is not sufficient for purposes of meeting the requirements of Section 6(b)(5); the surveillance-sharing agreement must be with a market of significant size.⁷³ The Commission has also provided an example of how it interprets the terms “significant market” and “market of significant size,” though that definition is meant to be illustrative and not exclusive: “the terms ‘significant market’ and ‘market of significant size’ . . . include a market (or group of markets) as to which (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to successfully manipulate the ETP so that a surveillance sharing agreement would assist the ETP listing market in detecting and deterring misconduct and it is unlikely that trading in the ETP would be the predominant influence on prices in that market.”⁷⁴

For the following reasons, the Sponsor maintains that the CME, as the leading market for Bitcoin futures is a “market of significant size” that satisfies both elements of the example provided by the Commission.

(a) Reasonable Likelihood That a Person Manipulating the ETP Would Have To Trade on the Bitcoin Futures Market

The first element of a “significant market” or “market of significant size” is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market (or group of markets) to successfully manipulate the ETP, such that a surveillance sharing agreement would assist the ETP listing market in detecting and deterring misconduct. The Commission has stated that establishing a lead-lag relationship between the

Currencies”) (“The CFTC’s jurisdiction is implicated when a virtual currency is used in a derivatives contract or if there is fraud or manipulation involving a virtual currency traded in interstate commerce.”). See also 7 U.S.C. 7(d)(3) (“The board of trade shall list on the contract market only contracts that are not readily susceptible to manipulation.”).

⁷¹ See <https://isgportal.org/overview>.

⁷² See, e.g., Winklevoss II Order, 83 FR at 37594.

⁷³ See, e.g., *id.* at 37589–90.

⁷⁴ *Id.* at 37594; see also GraniteShares Order, 83 FR at 43930 n. 85 and accompanying text.

Bitcoin futures market and the spot market is central to understanding whether it is reasonably likely that a would-be manipulator of the ETP would need to trade on the Bitcoin futures market to successfully manipulate prices on those spot platforms that feed into the proposed ETP’s pricing mechanism.⁷⁵

The Sponsor believes that the CME meets the first element in several ways. First, the CME Bitcoin futures is the primary Bitcoin price discovery market, and compares favorably with other markets that were deemed to be markets of significant size in precedents.⁷⁶ There are various prior orders approving the listing of commodity and commodity futures-based ETPs whose OTC markets and futures markets exhibit a number of similarities with Bitcoin markets. The Sponsor maintains that, like Bitcoin, the primary price discovery mechanism for other commodities are the futures markets in those commodities.⁷⁷

Specifically, the Sponsor notes that as with many OTC commodities markets, it is not possible to enter into an information sharing agreement with the OTC Bitcoin market.⁷⁸ When the Commission has approved the listing of other commodity-trust ETPs, rather than requiring surveillance sharing agreements with the relevant OTC markets, it has recognized surveillance sharing agreements between the listing exchange and “regulated markets for trading futures on the underlying commodity,”⁷⁹ given the understanding that the manipulation of the market for

⁷⁵ See Wilshire Phoenix Order, 85 FR at 12612.

⁷⁶ See <https://www.wilshirephoenix.com/efficient-price-discovery-in-the-bitcoin-markets/?email=giovanni.vicioso@cmegroup.com>. See also <https://www.sciencedirect.com/science/article/abs/pii/S0165176518304440?via%3Dihub>.

⁷⁷ “The OTC market has no formal structure and no open-outcry meeting place.” See Securities Exchange Act Release No. 50603 (October 28, 2004), 69 FR 64614 (November 5, 2004) (SR–NYSE–2004–22) (Order Granting Approval of Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendments No. 1 and No. 2 Thereto to the Proposed Rule Change by the New York Stock Exchange, Inc. Regarding Listing and Trading of streetTRACKS® Gold Shares) (the “streetTRACKS Order”).

⁷⁸ “It is not possible, however, to enter into an information sharing agreement with the OTC gold market.” streetTRACKS Order, 69 FR at 64619. See also Order Granting Approval of Proposed Rule Change and Amendment Nos. 2, 3 and 4 and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 5 by the American Stock Exchange LLC Relating to the Listing and Trading of the iShares® COMEX Gold Trust, Securities Exchange Act Release No. 51058 (January 19, 2005), 70 FR 3749 (January 26, 2005) (SR–Amex–2004–38); Notice of Filing of Proposed Rule Change Relating to Listing and Trading of Shares of ETFs Palladium Trust, Securities Exchange Act Release No. 60971 (November 9, 2009), 74 FR 59283 (November 17, 2009) (SR–NYSEArca–2009–94).

⁷⁹ See Winklevoss II Order, 83 FR at 37591.

a commodity often involves the futures market for that commodity.⁸⁰

The Sponsor also believes that the CME meets the first element because, due to the unique structure of the Fund, it is unlikely that price manipulation or fraud on the trading platforms for Bitcoin will have a measurable impact on the NAV of the Fund. In this regard, the Sponsor notes that the Fund will only hold first and second to expire Bitcoin Futures Contracts along with cash and cash equivalents and will not hold Bitcoin. Unlike other exchange traded products that propose to calculate daily NAV based on the CME CF Bitcoin Real-Time Index (BRTI),⁸¹ which is in turn based on price feeds from certain designated spot market exchanges, the Fund will never directly price off of the CME CF BRR. This is because the Fund will roll its futures holdings prior to settlement of the expiring contract and intends to never carry futures positions all the way to cash settlement (the only date that the BTC Contracts and MBT Contracts settle to the CME CF BRR). The Fund will only price off of Bitcoin Futures Contracts VWAP daily settlement price.⁸²

Because the Fund calculates daily NAV based on Bitcoin Futures Contracts’ settlement prices and does not calculate NAV based directly on the underlying spot Bitcoin market, the Sponsor believes that the only practicable way for a bad actor to manipulate the NAV of the Fund is through manipulating the first and second to expire Bitcoin Futures Contracts; there is simply no material connection between those two futures contracts and the underlying Bitcoin spot market. The Sponsor believes that the market for BTC Contracts and MBT Contracts stands alone within the overall global Bitcoin ecosphere; BTC Contracts and MBT Contracts are now of such size and scale that Bitcoin futures prices are not specifically materially influenced by other Bitcoin markets.

⁸⁰ See, e.g., Frank Easterbrook, *Monopoly, Manipulation, and the Regulation of Futures Markets*, 59 J. of Bus. S103, S103–S127 (1986); William D. Harrington, *The Manipulation of Commodity Futures Prices*, 55 St. Johns L. Rev. 240, 240–275 (2012); Robert C. Lower, *Disruptions of the Futures Market: A Comment on Dealing With Market Manipulation*, 8 Yale J. on Reg. 391, 391–402 (1991).

⁸¹ See e.g., Notice of Filing of Proposed Rule Change to List and Trade Shares of the First Trust SkyBridge Bitcoin ETF Trust under NYSE Arca Rule 8.201–E, Securities Exchange Act Release No. 91962 (May 21, 2021), 86 FR 28646 (May 27, 2021) (SR–NYSEArca–2021–37).

⁸² For an explanation of how the CME VWAP closing price for Bitcoin futures contracts is calculated, see <https://www.cmegroup.com/confluence/display/EPICSANDBOX/Bitcoin>.

The Sponsor notes that this lack of connection between the Bitcoin Futures Contracts and underlying spot trading platforms makes it unnecessary and not beneficial to try to establish a “lead-lag” relationship between the two. The Sponsor respectfully notes that while thousands of pages of studies have been devoted to trying to demonstrate whether the Bitcoin spot market “leads” the Bitcoin futures market, or vice versa, no listing exchanges to date have been able to bear the burden of proof of satisfactorily establishing through such a “lead-lag” analysis that it is “reasonably likely” that a person who is attempting to manipulate the price of a Bitcoin fund’s shares would need to trade in the underlying spot market. As discussed above, the structure of the Fund makes such an exercise unnecessary and irrelevant.

The Sponsor also notes in this regard that in the Winklevoss II Order, the SEC stated that “[c]onsistent with the discussion of ‘significant market’ described above, the Commission has not previously, and does not now, require that an ETP listing exchange be able to enter into a surveillance-sharing agreement with each regulated spot or derivatives market relating to an underlying asset, provided that the market or markets with which there is such an agreement constitute a “significant market.” As discussed above, the Sponsor believes that the Bitcoin futures market is a “significant market” and that any bad actor trying to manipulate the price of the Fund would necessarily have to manipulate the Bitcoin futures market.

Additionally, the SEC stated in the Winklevoss II Order that “[a]nd where, as here, a listing exchange fails to establish that other means to prevent fraudulent and manipulative acts and practices will be sufficient, the listing exchange must enter into a surveillance-sharing agreement with a regulated market of significant size because [s]uch agreements provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.”⁸³ The SEC attributed the quote to a 1998 release, but nowhere does that release say that the surveillance agreement has to be with a “market of significant size.” The release merely states that “[t]he SRO also must have a surveillance

program *adequate to monitor* for abuses in the trading of the new derivative securities product, including trading in the underlying security or securities.”

For the reasons discussed, the Sponsor believes that the surveillance agreement already in place between the Exchange and the CME is “adequate to monitor” for abuses in the trading of the Fund’s shares, given the significant likelihood that a person attempting to manipulate the price of the shares of the Fund would have to manipulate the prices of the Bitcoin Futures Contracts. In short, in the context of the Sponsor’s unique product design and particularly in light of the profound growth in the CME futures market since inception, and in particular over the past 6–9 months, the Sponsor believes it is entirely appropriate to apply the initial standard from the 1998 release. Importantly, however, to the extent the SEC believes it is necessary to hew to the “markets of significant size” standard, that standard does not necessarily lead to the two-part “reasonably likely” standard. In this regard, the Winklevoss II Order stated that “[i]n light of the history and purpose of looking to surveillance-sharing agreements, with respect to markets for assets underlying an ETP or for derivatives on those assets, the Commission interprets the terms ‘significant market’ and ‘market of significant size’ to include a market (or group of markets) as to which (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to successfully manipulate the ETP, so that a surveillance-sharing agreement would assist the ETP listing market in detecting and deterring misconduct, and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market. *This definition is illustrative and not exclusive. There could be other types of “significant markets” and “markets of significant size,” but this definition is an example that will provide guidance to market participants.*”⁸⁴

The Sponsor notes that, as discussed above, it sees no difference between gold futures (or wheat or other futures) versus Bitcoin futures as acceptable stand-alone components of a futures-based ETP. Stated another way: Bitcoin futures have grown in size to such a degree that they cannot be effectively or precisely manipulated by trading in other Bitcoin interests; neither can gold, or wheat, or other futures. The Sponsor believes that data discussed above

regarding the recent growth in the Bitcoin futures market clearly establishes that the CME Bitcoin futures markets generally are a market of significant size and there is a clear trend in year-over-year growth. Indeed, the current size and volume of the CME Bitcoin futures market is already more than adequate—and still growing in size—to make its own trading activity the primary, if not the lone determinant, of its valuation. The CME has its own surveillance systems in place to combat manipulation of all futures contracts, and the CME must follow rules and other protective protocols applicable as a “Designated Contracts Market” or “DCM,” which are designed to detect anomalies and prevent fraudulent and/or manipulative activities.⁸⁵ In short, if manipulation is going to happen, it will fall under one of two regulated exchanges (CME and NYSE Arca).

The Sponsor also maintains that any would-be manipulator of Bitcoin prices would be reasonably likely to have to do so through the CME Bitcoin futures market in order to take advantage of the leverage inherent in trading futures contracts. The inherent leverage in Bitcoin futures would allow a potential manipulator to attempt a manipulation scheme with far less upfront capital than it would need to achieve the same results in the spot market. As the spot Bitcoin market has grown tremendously since the issuance of the Wilshire Phoenix Order, it would be critical for a would-be manipulator to efficiently use its capital to have the desired effect, and a would-be manipulator would certainly recognize that the chances of

⁸⁵ CME’s Department of Market Regulation comprehensively surveils futures market conditions and price movements on a real-time and ongoing basis in order to detect and prevent price distortions, including price distortions caused by manipulative efforts.

To reduce the potential threat of price distortions and manipulation, CME’s Market Regulation Department also implements trader position limits and accountability limits that are linked to the size of the futures contract’s underlying market during the expiration month of trading.

Position limits supplement the reporting of large trader positions (25 contracts or more) to CME’s Market Regulation Department and the Commodity Futures Trading Commission (“CFTC”) on a daily basis.

CME’s market surveillance program and its related self-regulatory responsibilities are implemented pursuant to the Commodity Exchange Act and CFTC regulations thereunder.

The relevant requirements require CME to (i) only list contracts that are not readily susceptible to manipulation, (ii) prevent market disruptions, and (iii) establish tailored position limits or position accountability rules for each futures contract.

The above self-regulatory framework is administered under the CFTC’s market oversight mandate which also includes direct enforcement jurisdiction over manipulative activity in a futures contract’s underlying market.

⁸³ See Winklevoss II Order, 83 FR at 37580 (citing to Amendment to Rule Filing Requirements for Self-Regulatory Organizations Regarding New Derivative Securities Products, Exchange Act Release No. 40761 (Dec. 8, 1998), 63 FR 70952, 70954, 70959 (Dec. 22, 1998) (File No. S7–13–98) (“NDSP Adopting Release”).

⁸⁴ See Winklevoss II Order, 83 FR at 37594 (emphasis added); NDSP Adopting Release.

successfully deploying its scheme are increased materially if it can affect the Bitcoin futures market (and thus the Bitcoin spot market) by utilizing the inherent leverage in futures markets.⁸⁶ Accordingly, it is highly likely such manipulators would attempt to do so in the CME Bitcoin Futures market rather than any spot market.

Finally, the Sponsor maintains that a would-be manipulator of Bitcoin would be required to execute trades on multiple exchanges simultaneously in order to successfully impact the global price of Bitcoin due to the decentralized nature of the Bitcoin Network. The Sponsor thus believes that Bitcoin

manipulators would be much more likely to attempt to manipulate a limited number of futures markets rather than attempt simultaneous executions on potentially dozens of different exchanges. Even if a would-be manipulator does attempt to manipulate Bitcoin prices across platforms, such a scheme would also necessarily include some attempt to manipulate the price of Bitcoin futures, including the CME.

(b) Predominant Influence on Prices in Spot and Bitcoin Futures

The second feature of a “significant market” or “market of significant size” in the Commission’s example is that the

market is one in which it is unlikely that trading in the ETP would be the predominant influence on prices in that market. The Sponsor believes that trading in the Shares would not be the predominant force on prices in the Bitcoin Futures market (or spot market) for a number of reasons, including the significant volume in and size of the CME Bitcoin futures market and the significant liquidity available in the spot market.⁸⁷

Since the Wilshire Phoenix Order was issued, there has been significant growth in Bitcoin Futures across each of trading volumes and open interest as reflected in the chart below:

CHICAGO MERCANTILE EXCHANGE BITCOIN FUTURES

	February 26, 2020	April 7, 2021
Trading Volume	\$433,000,000	\$4,321,000,000
Open Interest	238,000,000	2,582,000,000

The Sponsor believes that the growth of CME Bitcoin Futures market has coincided with similar growth in the Bitcoin spot market. The market for Bitcoin futures is rapidly approaching the size of markets for other commodity interests, including interests in metals, agricultural and petroleum products. Accordingly, as the Bitcoin futures market continues to develop and more closely resemble other commodity futures markets, it can be reasonably expected that the relationship between the Bitcoin futures market and Bitcoin spot market will behave similarly to other future/spot market relationships, where the spot market may have no relationship to the futures market.

The Sponsor believes that the significant liquidity in the spot market and the impact of market orders on the overall price of Bitcoin have made attempts to move the price of Bitcoin increasingly expensive over the past year. In January 2020, for example, the cost to buy or sell \$5 million worth of Bitcoin averaged roughly 30 basis points (compared to 10 basis points in

February 2021) with a market impact of 50 basis points (compared to 30 basis points in February 2021).⁸⁸ For a \$10 million market order, the cost to buy or sell was roughly 50 basis points (compared to 20 basis points in February 2021) with a market impact of 80 basis points (compared to 50 basis points in February 2021). As the liquidity in the Bitcoin spot market increases, it follows that the impact of \$5 million and \$10 million orders will continue to decrease the overall impact in spot price. Accordingly, to the extent that the spot market can be used to move the CME Bitcoin futures market (which the Sponsor does not believe is the case), this would make it even more likely that a person attempting to manipulate the price of the shares of the Fund would have to do so by manipulating the CME Bitcoin futures market.

Settlement of BTC Contracts and MBT Contracts

According to the Registration Statement, each BTC Contract and MBT

Contract settles daily to the BTC Contract volume-weighted average price (“VWAP”) of all trades that occur between 2:59 p.m. and 3:00 p.m. Central Time, the settlement period, rounded to the nearest tradable tick.⁸⁹

BTC Contracts and MBT Contracts each expire on the last Friday of the contract month and are settled with cash. The final settlement value is based on the CME CF BRR at 4:00 p.m. London time on the expiration day of the futures contract.

As proposed, the Fund will rollover its soon to expire Bitcoin Futures Contracts to extend the expiration or maturity of its position forward by closing the initial contract holdings and opening a new longer-term contract holding for the same underlying asset at the then-current market price. The Fund does not intend to hold any Bitcoin futures positions into cash settlement.

Net Asset Value

According to the Registration Statement, the Fund’s NAV per Share will be calculated by taking the current

⁸⁶ As of April 12, 2021, the initial margin required in connection with CME Bitcoin Futures for the April 2021 contract ranges from 42% to 38%.

⁸⁷ A 12,500 share CU create or redeem at \$50 per share and CME contract value of \$200,000 only prompts buying of a little over 3 contracts. 10 CU = 31 contracts, 100 Cu create 310 contracts compared to YTD avg daily trade volume of 8800 1st to expire and 2450 2nd to expire.

⁸⁸ These statistics are based on samples of Bitcoin liquidity in USD (excluding stablecoins or Euro liquidity) based on executable quotes on Coinbase Pro, Gemini, Bitstamp, Kraken, LMAX Exchange, BinanceUS, and OKCoin during February 2021.

⁸⁹ VWAP is calculated based first on Tier 1 (if there are trades during the settlement period); then Tier 2 (if there are no trades during the settlement period); and then Tier 3 (in the absence of any trade activity or bid/ask in a given contract month during the current trading day, as follows:

Tier 1: Each contract month settles to its VWAP of all trades that occur between 14:59:00 and 15:00:00 CT, the settlement period, rounded to the nearest tradable tick. If the VWAP is exactly in the middle of two tradable ticks, then the settlement will be the tradable price that is closer to the contract’s prior day settlement price.

Tier 2: If no trades occur on CME Globex between 14:59:00 and 15:00:00 CT, the settlement period, then the last trade (or the contract’s settlement price

from the previous day in the absence of a last trade price) is used to determine whether to settle to the bid or the ask during this period.

a. If the last trade price is outside of the bid/ask spread, then the contract month settles to the nearest bid or ask price.

b. If the last trade price is within the bid/ask spread, or if a bid/ask spread is not available, then the contract month settles to the last trade price.

Tier 3: In the absence of any trade activity or bid/ask in a given contract month during the current trading day, the daily settlement price will be determined by applying the net change from the preceding contract month to the given contract month’s prior daily settlement price.

market value of its total assets, subtracting any liabilities, and dividing that total by the number of Shares.

The Administrator of the Fund will calculate the NAV once each trading day, as of the earlier of the close of the New York Stock Exchange or 4:00 p.m. Eastern Standard Time (EST).

According to the Registration Statement, to determine the value of Bitcoin Futures Contracts, the Fund's Administrator will use the Bitcoin Futures Contract settlement price on the exchange on which the contract is traded, except that the "fair value" of Bitcoin Futures Contracts (as described in more detail below) may be used when Bitcoin Futures Contracts close at their price fluctuation limit for the day. The Fund's Administrator will determine the value of Fund investments as of the earlier of the close of the New York Stock Exchange or 4:00 p.m. EST. The Fund's NAV will include any unrealized profit or loss on open Bitcoin futures contracts and any other credit or debit accruing to the Fund but unpaid or not received by the Fund.

According to the Registration Statement, the fair value of the Fund's holdings will be determined by the Fund's Sponsor in good faith and in a manner that assesses the future Bitcoin market value based on a consideration of all available facts and all available information on the valuation date. When a Bitcoin Futures Contract has closed at its price fluctuation limit, the fair value determination will attempt to estimate the price at which such Bitcoin Futures Contract would be trading in the absence of the price fluctuation limit (either above such limit when an upward limit has been reached or below such limit when a downward limit has been reached). Typically, this estimate will be made primarily by reference to exchange traded instruments at 4:00 p.m. EST on settlement day. The fair value of BTC Contracts and MBT Contracts may not reflect such security's market value or the amount that the Fund might reasonably expect to receive for the BTC Contracts and MBT Contracts upon its current sale.

Indicative Fund Value

According to the Registration Statement, in order to provide updated information relating to the Fund for use by investors and market professionals, ICE Data Indices, LLC will calculate an updated Indicative Fund Value ("IFV"). The IFV will be calculated by using the prior day's closing NAV per Share of the Fund as a base and will be updated throughout the Core Trading Session of 9:30 a.m. E.T. to 4:00 p.m. E.T. to reflect

changes in the value of the Fund's holdings during the trading day.

The IFV will be disseminated on a per Share basis every 15 seconds during the Exchange's Core Trading Session and be widely disseminated by one or more major market data vendors during the Exchange's Core Trading Session.⁹⁰

Creation and Redemption of Shares

According to the Registration Statement, the Shares issued by the Fund may only be purchased by Authorized Purchasers and only in blocks of 12,500 Shares called "Creation Baskets." The amount of the purchase payment for a Creation Basket is equal to the total NAV of Shares in the Creation Basket. Similarly, only Authorized Purchasers may redeem Shares and only in blocks of 12,500 Shares called "Redemption Baskets." The amount of the redemption proceeds for a Redemption Basket is equal to the total NAV of Shares in the Redemption Basket. The purchase price for Creation Baskets and the redemption price for Redemption Baskets are the actual NAV calculated at the end of the business day when a request for a purchase or redemption is received by the Fund.

"Authorized Purchasers" will be the only persons that may place orders to create and redeem Creation Baskets. Authorized Purchasers must be (1) either registered broker-dealers or other securities market participants, such as banks and other financial institutions, that are not required to register as broker-dealers to engage in securities transactions, and (2) DTC Participants. An Authorized Purchaser is an entity that has entered into an Authorized Purchaser Agreement with the Sponsor.

Creation Procedures

According to the Registration Statement, on any "Business Day," an Authorized Purchaser may place an order with the Transfer Agent to create one or more Creation Baskets. For purposes of processing both purchase and redemption orders, a "Business Day" means any day other than a day when the CME or the New York Stock Exchange is closed for regular trading. Purchase orders for Creation Baskets must be placed by 3:00 p.m. EST or one hour prior to the close of trading on the New York Stock Exchange, whichever is earlier. The day on which the Distributor receives a valid purchase order is referred to as the purchase order date. If the purchase order is received after the applicable cut-off time, the

purchase order date will be the next Business Day. Purchase orders are irrevocable.

By placing a purchase order, an Authorized Purchaser agrees to deposit cash with the Custodian.

Redemption Procedures

According to the Registration Statement, the procedures by which an Authorized Purchaser can redeem one or more Creation Baskets will mirror the procedures for the creation of Creation Baskets. On any Business Day, an Authorized Purchaser may place an order with the Transfer Agent to redeem one or more Creation Baskets.

The redemption procedures allow Authorized Purchasers to redeem Creation Baskets. Individual shareholders may not redeem directly from the Fund. By placing a redemption order, an Authorized Purchaser agrees to deliver the Creation Baskets to be redeemed through DTC's book entry system to the Fund by the end of the next Business Day following the effective date of the redemption order or by the end of such later business day.

Determination of Redemption Distribution

According to the Registration Statement, the redemption distribution from the Fund will consist of an amount of cash, cash equivalents and/or exchange listed Bitcoin futures that is in the same proportion to the total assets of the Fund on the date that the order to redeem is properly received as the number of Shares to be redeemed under the redemption order is in proportion to the total number of Shares outstanding on the date the order is received.

Delivery of Redemption Distribution

According to the Registration Statement, an Authorized Purchaser who places a purchase order will transfer to the Custodian the required amount of cash, cash equivalents and/or Bitcoin futures by the end of the next business day following the purchase order date or by the end of such later business day, not to exceed three business days after the purchase order date, as agreed to between the Authorized Purchaser and the Custodian when the purchase order is placed (the "Purchase Settlement Date"). Upon receipt of the deposit amount, the Custodian will direct DTC to credit the number of Creation Baskets ordered to the Authorized Purchaser's DTC account on the Purchase Settlement Date.

⁹⁰ Several major market data vendors display and/or make widely available IFVs taken from the Consolidated Tape Association ("CTA") or other data feeds.

Availability of Information

The NAV for the Fund's Shares will be disseminated daily to all market participants at the same time. The intraday, closing prices, and settlement prices of the Bitcoin Futures Contracts will be readily available from the applicable futures exchange websites, automated quotation systems, published or other public sources, or major market data vendors.

Complete real-time data for the Bitcoin Futures Contracts will be available by subscription through on-line information services. ICE Futures U.S. and CME also provide delayed futures and options on futures information on current and past trading sessions and market news free of charge on their respective websites. The specific contract specifications for Bitcoin Futures Contracts will also be available on such websites, as well as other financial informational sources. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA. Quotation information for cash equivalents and commodity futures may be obtained from brokers and dealers who make markets in such instruments. Intra-day price and closing price level information for the Benchmark will be available from major market data vendors. The Benchmark value will be disseminated once every 15 seconds. The IFV will be available through on-line information services.

In addition, the Fund's website, www.teucrium.com, will display the applicable end of day closing NAV. The daily holdings of the Fund will be available on the Fund's website. The Fund's website will also include a form of the prospectus for the Fund that may be downloaded. The website will include the Shares' ticker and CUSIP information along with additional quantitative information updated on a daily basis, including: (1) The prior Business Day's reported NAV and closing price and a calculation of the premium and discount of the closing price or mid-point of the bid/ask spread at the time of NAV calculation (the "Bid/Ask Price") against the NAV; and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily closing price or Bid/Ask Price against the NAV, within appropriate ranges, for at least each of the four previous calendar quarters. The website disclosure of portfolio holdings will be made daily and will include, as applicable, (i) the name, quantity, price, and market value of the Fund's holdings, (ii) the counterparty to and value of forward contracts and any other

financial instruments tracking the Benchmark, and (iii) the total cash and cash equivalents held in the Fund's portfolio, if applicable.

The Fund's website will be publicly available at the time of the public offering of the Shares and accessible at no charge.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund.⁹¹ Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Rule 7.12-E have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable.

The Exchange may halt trading during the day in which an interruption to the dissemination of the IFV or the value of the Benchmark occurs. The Benchmark value will be disseminated once every 15 seconds. If the interruption to the dissemination of the IFV, or to the value of the Benchmark persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption. In addition, if the Exchange becomes aware that the NAV with respect to the Shares is not disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV is available to all market participants.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Shares will trade on the NYSE Arca Marketplace from 4 a.m. to 8 p.m. E.T. in accordance with NYSE Arca Rule 7.34-E (Early, Core, and Late Trading Sessions). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in NYSE Arca Rule 7.6-E, the minimum price variation ("MPV") for quoting and entry of orders in equity securities traded on the NYSE Arca Marketplace is \$0.01, with the exception of securities that are priced less than \$1.00 for which the MPV for order entry is \$0.0001.

The Shares will conform to the initial and continued listing criteria under NYSE Arca Rule 8.200-E. The trading of the Shares will be subject to NYSE Arca Rule 8.200-E, Commentary .02(e), which sets forth certain restrictions on

Equity Trading Permit ("ETP") Holders acting as registered Market Makers in Trust Issued Receipts to facilitate surveillance. With respect to the application of Rule 10A-3⁹² under the Act, the Trust will rely on the exception contained in Rule 10A-3(c)(7).⁹³ A minimum of 50,000 Shares of the Fund will be outstanding at the commencement of trading on the Exchange.

Surveillance

The Exchange represents that trading in the Shares of the Fund will be subject to the existing trading surveillances administered by the Exchange, as well as cross-market surveillances administered by the Financial Industry Regulatory Authority ("FINRA") on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.⁹⁴ The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and federal securities laws applicable to trading on the Exchange.

The surveillances referred to above generally focus on detecting securities trading outside their normal patterns, which could be indicative of manipulative or other violative activity. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares and the Fund's holdings with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares and the Fund's holdings from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and the Fund's holdings from

⁹² 17 CFR 240.10A-3.

⁹³ See Rule 10A-3(c)(7), 17 CFR 240.10A-3(c)(7) (stating that a listed issuer is not subject to the requirements of Rule 10A-3 if the issuer is organized as an unincorporated association that does not have a board of directors and the activities of the issuer are limited to passively owning or holding securities or other assets on behalf of or for the benefit of the holders of the listed securities).

⁹⁴ FINRA conducts cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

⁹¹ See NYSE Arca Rule 7.12-E.

markets and other entities that are members of ISG or with which the Exchange has in place a CSSA. The Exchange is also able to obtain information regarding trading in the Shares, the physical commodities underlying the futures contracts through ETP Holders, in connection with such ETP Holders' proprietary or customer trades which they effect through ETP Holders on any relevant market. The Exchange can obtain market surveillance information, including customer identity information, with respect to transactions (including transactions in futures contracts) occurring on U.S. futures exchanges, which are members of the ISG. In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

The Fund will only hold Bitcoin Futures Contracts that are listed on an exchange that is a member of the ISG or is a market with which the Exchange has a CSSA.⁹⁵

All statements and representations made in this filing regarding (a) the description of the portfolios of the Funds or Benchmark, (b) limitations on portfolio holdings or the Benchmark, or (c) the applicability of Exchange listing rules specified in this rule filing shall constitute continued listing requirements for listing the Shares on the Exchange.

The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Rule 5.5–E(m).

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)⁹⁶ that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market

and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Rule 8.200–E. The Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. The Exchange or FINRA, on behalf of the Exchange, or both, will communicate as needed regarding trading in the Shares and the Fund's holdings with other markets and other entities that are members of the ISG, and the Exchange or FINRA, on behalf of the Exchange, or both, may obtain trading information regarding trading in the Shares and the Fund's holdings from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and the Fund's holdings from markets and other entities that are members of ISG or with which the Exchange has in place a CSSA. The Exchange is also able to obtain information regarding trading in the Shares and the Fund's holdings through ETP Holders, in connection with such ETP Holders' proprietary or customer trades which they effect through ETP Holders on any relevant market. The Exchange can obtain market surveillance information, including customer identity information, with respect to transactions (including transactions in Bitcoin Futures Contracts) occurring on U.S. futures exchanges, which are members of the ISG. The intraday, closing prices, and settlement prices of the Bitcoin Futures Contracts will be readily available from the applicable futures exchange websites, automated quotation systems, published or other public sources, or major market data vendors website or on-line information services.

Complete real-time data for the Bitcoin Futures Contracts will be available by subscription from on-line information services. ICE Futures U.S. and CME also provide delayed futures information on current and past trading sessions and market news free of charge on the Fund's website. The specific contract specifications for Bitcoin Futures Contracts will also be available on such websites, as well as other financial informational sources. Information regarding options will be available from the applicable exchanges

or major market data vendors. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the CTA. The IFV will be disseminated on a per Share basis every 15 seconds during the Exchange's Core Trading Session and be widely disseminated by one or more major market data vendors during the NYSE Arca Core Trading Session. The Fund's website will also include a form of the prospectus for the Fund that may be downloaded. The website will include the Share's ticker and CUSIP information along with additional quantitative information updated on a daily basis, including, for the Fund: (1) The prior business day's reported NAV and closing price and a calculation of the premium and discount of the closing price or mid-point of the Bid/Ask Price against the NAV; and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily closing price or Bid/Ask Price against the NAV, within appropriate ranges, for at least each of the four previous calendar quarters. The website disclosure of portfolio holdings will be made daily and will include, as applicable, (i) the name, quantity, price, and market value of Bitcoin Futures Contracts, (ii) the counterparty to and value of forward contracts, and (iii) other financial instruments, if any, and the characteristics of such instruments and cash equivalents, and amount of cash held in the Fund's portfolio, if applicable.

Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Rule 7.12–E have been reached or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of Trust Issued Receipts based on Bitcoin that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

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

⁹⁵ For a list of the current members of ISG, see www.isgportal.org. The Exchange notes that not all components of the Fund may trade on markets that are members of ISG or with which the Exchange has in place a CSSA.

⁹⁶ 15 U.S.C. 78f(b)(5).

of the purpose of the Act. The Exchange notes that the proposed rule change will facilitate the listing and trading of Trust Issued Receipts based on Bitcoin and that will enhance competition among market participants, to the benefit of investors and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) By order approve or disapprove the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-NYSEArca-2021-53 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-2021-53. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule

change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEArca-2021-53 and should be submitted on or before *September 1, 2021*.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁹⁷

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2021-17078 Filed 8-10-21; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-92572; File No. SR-DTC-2021-014]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing of a Proposed Rule Change To Provide Settlement Services for Transactions Entered Into Under the Proposed Securities Financing Transaction Clearing Service of the National Securities Clearing Corporation

August 5, 2021.

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 July 22, 2021, The Depository Trust Company ("DTC") 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 clearing agency. The Commission is publishing this notice to solicit comments on the

proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change of DTC would amend the Rules, the Settlement Guide, and the Fee Guide³ in order to provide Participants that are also members of the National Securities Clearing Corporation ("NSCC") with settlement services in connection with a proposed optional securities financing transaction clearing service of NSCC ("NSCC SFT Service").

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the clearing agency 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 clearing agency has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule change would amend the Rules, the Settlement Guide, and the Fee Guide in order to provide Participants that are also members of NSCC with settlement services in connection the NSCC SFT Service. The proposed NSCC SFT Service would provide central clearing for equity securities financing transactions, which are, broadly speaking, transactions where the parties exchange equity securities against cash and simultaneously agree to exchange the same securities and cash, plus or minus a rate payment, on a future date (each, an "SFT").⁴ SFTs between

³ Each capitalized term not otherwise defined herein has its respective meaning as set forth in DTC's rules, including, but not limited to, the Rules, By-Laws and Organization Certificate of DTC ("Rules"), the DTC Settlement Service Guide ("Settlement Guide"), and the Guide to the 2020 DTC Fee Schedule ("Fee Guide"), available at <http://www.dtcc.com/legal/rules-and-procedures.aspx>.

⁴ On July 22, 2021, NSCC filed a proposed rule change and an advance notice to establish the NSCC SFT Service ("NSCC Proposed Rules"). See SR-NSCC-2021-010 and SR-NSCC-2021-803, which were filed with Commission and the Board of Governors of the Federal Reserve System, respectively, but have not been published in the **Federal Register**. Copies of the proposed rule

⁹⁷ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

counterparties that are members of NSCC (each, an “NSCC SFT Counterparty”)⁵ would be settled through their respective Participant Accounts at DTC.⁶

Pursuant to the proposed rule change, DTC would (i) expand the types of instructions that NSCC, as the representative (“Special Representative”) of each Participant that is also a member of NSCC, can submit to DTC on behalf of a Participant with respect to an Account of the Participant, (ii) establish a new type of payment order for the crediting and debiting of payment amounts relating to SFT activity at NSCC (“SFT Price Differential” or “SFT PD”)⁷ to and from the Accounts of the Participants that are NSCC SFT Counterparties, (iii) apply a modified look-ahead process to the new Account that NSCC would maintain at DTC in connection with the NSCC SFT Service (the “NSCC SFT Account” or “Special Representative SFT Account”),⁸ and (iv) establish a fee for the payor and payee of an SFT Price Differential payment order. Finally, DTC is proposing to make clarifying and conforming changes, as discussed below.

(i) Overview of Proposed Rule Change

DTC understands that, pursuant to the Proposed NSCC Rules and consistent with the manner in which NSCC accepts cash market transactions, SFTs would

change and the advance notice are available at <http://www.dtcc.com/legal/sec-rule-filings.aspx>.

⁵DTC understands that the NSCC SFT Service would offer the clearance of SFT transactions between a buy-side entity (a “Sponsored Member”) and the member of NSCC that sponsored that entity for the NSCC SFT Service (“Sponsoring Member”). This proposed rule change by DTC does not relate to Sponsoring Members, Sponsored Members, or their SFT transactions at NSCC. All SFT transactions between a Sponsored Member and its Sponsoring Member would settle on the books of the Sponsoring Member. These SFT transactions and the related activity would occur outside of DTC and would not settle at DTC. The term “NSCC SFT Counterparty,” as used in this filing, does not refer to Sponsored Members or Sponsoring Members.

⁶DTC understands that, pursuant to the NSCC Proposed Rules, NSCC would establish a new membership category for agent clearing members (each, an “Agent CM”), where members of NSCC would be permitted to submit SFTs to NSCC for novation on behalf of their customers. All SFTs settling at DTC would be processed by DTC without regard to whether a Participant is acting as Agent CM under the NSCC Proposed Rules or is acting on its own behalf. DTC would not establish any SFT or Agent CM Participant membership type, or any special SFT or Agent CM Participant accounts, at DTC.

⁷DTC understands that the Proposed NSCC Rules would define such credit/debit amount as a “Price Differential,” which would include, but would not be limited to, mark-to-market payments and payments relating to offsetting SFT obligations.

⁸The NSCC SFT Account, which would appear in the Rules as the “Special Representative SFT Account,” would be Account No. 881.

be submitted to NSCC by an Approved SFT Submitter⁹ already matched as between the pre-novation NSCC SFT Counterparties (*i.e.*, on a locked in basis).¹⁰ Once the SFT instruction is processed by NSCC, NSCC would submit Delivery Versus Payment (“DVP”) instructions or SFT PD payment orders to DTC in accordance with the NSCC Proposed Rules. Pursuant to the NSCC Proposed Rules and the proposed rule change, NSCC would typically only submit pairs of instructions to DTC, as follows: (i) One instruction on its own behalf, with respect to the NSCC SFT Account, and (ii) one instruction on behalf of a Participant, as its Special Representative, with respect to the DTC Account of the Participant.¹¹ Accordingly, these DVP and SFT PD transactions between Participants that are NSCC SFT Counterparties to an SFT would pass through the NSCC SFT Account.

A. NSCC Instructions to DTC

(1) NSCC as the Special Representative of Participants That Are Members of NSCC

Pursuant to Rule 6, NSCC is the Special Representative of each Participant that is also a Member of NSCC. Currently, as the Special Representative of the Participant, NSCC may instruct DTC, on behalf of the Participant, to make a transfer of securities from the Account of the Participant to an Account that NSCC maintains at DTC in connection with its Continuous Net Settlement (“CNS”) System¹² (the “Special Representative CNS Account”).¹³ The purpose of these transfers is to settle the CNS obligations

⁹DTC understands that the Proposed NSCC Rules would define the term “Approved SFT Submitter” as a provider of transaction data on an SFT that the parties to the SFT have selected and NSCC has approved.

¹⁰DTC understands that the NSCC Proposed Rules would provide that the obligations reflected in the transaction data on an SFT would be deemed to have been confirmed and acknowledged by each NSCC SFT Counterparty designated by the Approved SFT Submitter as a party thereto and to have been adopted by such NSCC SFT Counterparty and, for the purposes of determining the rights and obligations between NSCC and such NSCC SFT Counterparty under the NSCC Proposed Rules, would be valid and binding upon such NSCC SFT Counterparty.

¹¹The NSCC Proposed Rules would provide that the submission of each SFT to NSCC constitutes an authorization to NSCC by the NSCC SFT Counterparties for NSCC to give instruction regarding the SFT to DTC in respect of the relevant Participant Accounts of the NSCC SFT Counterparties at DTC.

¹²See *e.g.*, Rule 11 of the NSCC Rules & Procedures, available at <http://www.dtcc.com/legal/rules-and-procedures.aspx>.

¹³The Special Representative CNS Account is Account No. 888.

of a member of NSCC to NSCC through the member’s Participant Account at DTC.

The NSCC SFT Service would operate separately from the NSCC CNS system, and NSCC would use its new NSCC SFT Account, and not the NSCC CNS Account, in connection with the NSCC SFT Service. In order to efficiently provide Participants with settlement services for SFTs cleared through the NSCC SFT Service and settled at DTC, DTC is proposing to leverage the status of NSCC as the Special Representative of Participants that are members of NSCC. Pursuant to the proposed rule change, Rule 6 would provide NSCC, as the Special Representative of a Participant, with the additional authority to submit instructions to DTC with respect to DVP and SFT PD transactions from the Account of the Participant to the NSCC SFT Account.¹⁴

(2) DVP Instructions

As noted above, pursuant to the proposed rule change, NSCC would submit pairs of instructions to DTC as follows: (i) One instruction on its own behalf, with respect to the NSCC SFT Account, and (ii) one instruction on behalf of a Participant as its Special Representative, with respect to the DTC Account of the Participant. Accordingly, in order to effectuate a DVP transaction between Participants that are NSCC SFT Counterparties to an SFT, NSCC would send DTC a pair of DVP instructions: (i) One instruction, as the Special Representative of the Participant that is an NSCC SFT Counterparty, to deliver the subject securities versus payment from the Account of the delivering Participant to the NSCC SFT Account, and (ii) one instruction, on NSCC’s own behalf, to deliver the subject securities versus payment from the NSCC SFT Account to the Account of the receiving Participant that is the other NSCC SFT Counterparty. As explained in more detail below, if the pair of instructions satisfy DTC risk management controls¹⁵ and the modified look-ahead, DTC would process the deliveries. If risk management controls and the modified look-ahead are not satisfied, the

¹⁴ See *supra* notes 10 and 11.

¹⁵DTC uses its risk management controls, the Collateral Monitor and Net Debit Cap, to manage its credit risk. These two controls work together to protect the DTC settlement system in the event of Participant default. The Collateral Monitor requires net debit settlement obligations, as they accrue intraday, to be fully collateralized; the Net Debit Cap limits the amount of any Participant’s net debit settlement obligation to an amount that can be satisfied with DTC liquidity resources (the Participants Fund and the committed line of credit from a consortium of lenders). See Settlement Guide, *supra* note 3, at 64–67.

instructions would recycle¹⁶ and, if not completed, would drop at the end of the day.

There is only one situation where NSCC would only send a single DVP instruction to DTC.¹⁷ Specifically, pursuant to the NSCC Proposed Rules, the initial transfer of the securities that are the subject of the SFT versus the payment amount would be initiated at DTC by the Participant that is the delivering NSCC SFT Counterparty. Therefore, pursuant to the proposed rule change, the Participant that is the delivering NSCC SFT Counterparty would submit the DVP instruction to DTC to deliver the subject securities versus the payment amount from the Account of the Participant to the NSCC SFT Account. Provided that the SFT had already been submitted to NSCC by an Approved SFT Submitter on that business day,¹⁸ NSCC would submit a DVP instruction to DTC to deliver the subject securities versus the payment amount from the NSCC SFT Account to the Account of the Participant that is the receiving NSCC SFT Counterparty. If the Participant instruction and the NSCC instruction satisfy DTC risk management controls and the modified look-ahead, DTC would process the deliveries. If risk management controls and the modified look-ahead are not satisfied, the instructions would recycle and, if not completed, would drop at the end of the day.

(3) Price Differential Payment Orders

Pursuant to the proposed rule change, NSCC would also submit SFT PD payment orders to DTC on behalf of itself and on behalf of DTC Participants, as their Special Representative, in connection with SFT activity at NSCC.

DTC Rule 9(A) provides that a Participant may submit to DTC an instruction to (i) credit the Account of the Participant with an amount of funds and debit the Account of another Participant the same amount of funds, or (ii) debit the Account of the Participant with an amount of funds and credit the Account of another Participant the same amount of funds (each, a “payment order”).¹⁹ The Settlement Guide describes the DTC

payment order service as providing Participants with a method for settling money payments for securities transactions that were processed separately.²⁰ Currently, Participants use payment orders to collect option contract premiums (a “premium payment order” or “PPO”) and mark-to-market open contracts such as stock loans (a “securities payment order” or “SPO”). Payment orders are subject to DTC risk management controls.

Pursuant to the proposed rule change, DTC would enhance the DTC payment order service by adding the SFT PD payment order. The SFT PD payment order would offer an efficient way for NSCC to instruct DTC, on behalf of a Participant or on its own behalf, to credit and debit funds between the NSCC SFT Account and the Accounts of the Participants that are NSCC SFT Counterparties. DTC understands that the amount of each SFT PD would be calculated and instructed by NSCC in accordance with the instructions of an Approved SFT Submitter.

In order to effectuate the payments between Participants that are NSCC SFT Counterparties in connection with SFT activity at NSCC, NSCC would submit a pair of SFT PD payment orders to DTC: (i) One instruction, on NSCC’s own behalf, to debit the payment amount from the Account of the payor Participant and credit the payment amount to the NSCC SFT Account, and (ii) one instruction, as the Special Representative of the payee Participant, to debit the payment amount from the NSCC SFT Account and credit the payment amount to the Account of the payee Participant. If the pair of instructions satisfy DTC risk management controls and the modified look-ahead, DTC would process the transaction. If the pair of SFT PD payment orders do not satisfy DTC risk management controls and the modified look-ahead, the instructions would recycle and, if they are not completed, would drop at the end of the day.

B. Modified Look-Ahead Processing

The typical look-ahead process utilized by DTC reduces transaction blockage by applying the net amount of offsetting receive and deliver transactions in the same security rather than the gross amount of the receive transaction to a Participant’s Net Debit Cap. The look-ahead process calculates and processes submitted transactions in the same CUSIP that, when processed simultaneously, would not violate the risk management controls of the involved Participants. Specifically, the

look-ahead process identifies a receive transaction pending due to a net debit cap insufficiency and determines whether an offsetting delivery transaction pending because of a quantity deficiency in the same security would permit both transactions to be completed in compliance with DTC risk management controls.²¹

As noted above, the NSCC SFT Account is intended to be a pass-through account for DVP and SFT PD transactions between Participants that are NSCC SFT Counterparties. DTC understands that because NSCC, as the central counterparty, would substitute itself as the counterparty for each SFT, it is essential to NSCC that there not be any net settlement obligation against the NSCC SFT Account intraday or at the end of any day. It is essential to NSCC that its obligations to DTC with respect to all completed DVP and SFT PD transactions to which the NSCC SFT Account was a party should be netted to zero with respect to both securities and funds. In an effort to help ensure that there would not be any net settlement obligation against the NSCC SFT Account, and to prevent transaction blockage due to risk management controls on the NSCC SFT Account, DTC is proposing to use a modified look-ahead process for the instructions it receives from NSCC in connection with the NSCC SFT Account.

Pursuant to the proposed rule change, upon receipt of a pair of DVP instructions or SFT PD payment orders from NSCC, DTC would only complete the transaction if the modified look-ahead is satisfied. The modified look-ahead would be satisfied when (i) the pair of instructions from NSCC are consistent in terms of the number of subject shares and/or dollar amount, CUSIP, and DTCC Reference ID,²² and (ii) the net effect of processing the instructions would not violate the respective Net Debit Caps, Collateral Monitor or other risk management system controls of the Participants that are on each side of the DVP or SFT PD transaction.²³ If the modified look-ahead is not satisfied, then the pair of instructions would recycle until the

¹⁶ For a description of Recycle Processing, see Settlement Guide, *supra* note 3, at 56.

¹⁷ This paragraph does not apply to a “Bilaterally Initiated SFT,” which is described in the NSCC Proposed Rules as an SFT that was submitted to NSCC after the initial transfer of securities versus payment had already occurred. DTC is agnostic to whether an NSCC SFT instruction relates to a Bilaterally Initiated SFT or a typical SFT.

¹⁸ If the SFT was not submitted to NSCC on that business day, the Participant DVP instruction would be rejected.

¹⁹ See Rule 9(A), *supra* note 3.

²⁰ See Settlement Guide, *supra* note 3, at 3.

²¹ See Settlement Guide, *supra* note 3, at 45. See also *supra* note 15.

²² The DTCC Reference ID is the fourteen-digit UTC Loan ID that NSCC assigns to each SFT transaction.

²³ DTC uses the same modified look-ahead (except for the DTCC Reference ID) for DVP transactions to and from the OCC Market Loan Program Account, which is maintained by The Options Clearing Corporation (“OCC”) at DTC in connection with the OCC Market Loan Program. See Securities Exchange Act Release No. 59298 (January 26, 2009), 74 FR 5692 (January 30, 2009) (SR-DTC-2008-15).

look-ahead is satisfied or until the 3:10 p.m. cutoff time, when all recycling valued transactions at DTC are dropped.²⁴

In addition, because the modified look-ahead relies on the completion of offsetting transactions, transactions to and from the NSCC SFT Account would not be subject to either reclaims or Receiver Authorized Delivery (“RAD”).²⁵ Since both reclaims and RAD effectively permit one side of the transaction to reject or reverse the transaction, allowing such activity would interfere with the ability of the modified look-ahead to rely on the completion of the offsetting transactions. DTC believes that Participants would not be affected by the exclusion of reclaims and RAD because the NSCC SFT instructions would be based on instructions that were matched and submitted to NSCC on a locked-in basis by an Approved SFT Submitter on behalf of the NSCC SFT Counterparties. Therefore, the Participants that are NSCC SFT Counterparties to an SFT would have already agreed to the transactions to and from the NSCC SFT Account relating to their Participant Account, and, as such, the reclaim and RAD functions would not be necessary.²⁶

C. SFT Price Differential Fee

DTC is proposing to amend the Fee Guide to establish a fee for SFT PD payment orders. DTC is proposing a fee of \$0.005 per item delivered or received, to be charged to the payor and to the payee of an SFT PD payment order.

DTC recognizes that the fee for SFT PD payment orders would be significantly less than the \$0.10 fee for SPO payment orders, which are used by Participants in connection with their noncleared stock loan transactions. DTC is proposing to establish this lower fee for SFT PD payment orders because settling payment obligations for cleared SFTs would require a higher volume of

payment orders than would otherwise be required for settling payment obligation for uncleared SFTs. More specifically, pursuant to the NSCC Proposed Rules, NSCC SFT Counterparties would pay and collect Price Differentials at the individual transaction level. In the bilateral world, mark-to-market payments and collections on securities lending transactions are typically done at the CUSIP level via SPOs, inclusive of all open securities lending transactions of a given participant. Accordingly, it is likely that there would be more SFT PD payment orders processed by DTC in connection with SFTs than the amount of SPOs DTC would have otherwise processed if those SFTs were bilateral, non-cleared securities lending transactions. Therefore, as an initial matter,²⁷ DTC is proposing to charge the lower fee \$0.005 for SFT PD payment orders in an effort to maintain cost efficiency for both the cleared SFT activity and the uncleared securities financing transactions of market participants.”

(ii) Proposed Rule Change

A. Amendments to the Rules

(1) Rule 1

In order to clearly differentiate between the Special Representative CNS Account and the NSCC SFT Account in Rule 6, DTC is proposing to insert the following definitions into Section 1 of Rule 1:

i. *Special Representative*: The term “Special Representative” has the meaning provided in Rule 6.

ii. *Special Representative CNS Account*: The term “Special Representative CNS Account” means the Account of the Special Representative that it uses in connection with its continuous net settlement system.

iii. *Special Representative SFT Account*: The term “Special Representative SFT Account” means the Account of the Special Representative that it uses in connection with its securities financing transaction service.

In addition, DTC is proposing to remove “Special Representative” from the list of definitions in Section 2 of Rule 1, because it would be redundant once the definition is inserted into Section 1 of Rule 1 pursuant to the proposed rule change.

²⁷ DTC understands that since NSCC would be offering central clearing for overnight SFTs for the first time, NSCC is not able at this time to anticipate the size and composition of the SFT portfolios and activity. Therefore, DTC is not yet able to estimate the volume of SFT PD payment orders that it would process after the NSCC SFT Service is implemented. Once the NSCC SFT Service is implemented and historical data is available, DTC may, if circumstances warrant, review the amount of the SFT PD payment order fee.

(2) Rule 6

Pursuant to the proposed rule change, DTC would replace references to the “Account of the Special Representative” with “Special Representative CNS Account,” to (i) clearly differentiate the Account that NSCC uses in connection with CNS from the proposed Special Representative SFT Account, and (ii) clearly delineate the transfer and delivery instructions that NSCC as the Special Representative submits to DTC in connection with the CNS system and the DVP instructions and SFT PD payment orders that NSCC as the Special Representative would submit to DTC in connection with the NSCC SFT Service.

Under current Rule 6, the scope of NSCC’s authority as Special Representative to instruct DTC with respect to an Account of a Participant that is a member of NSCC is limited to transfers of securities from the Account of the Participant to the Account of the Special Representative (which would be renamed “Special Representative CNS Account,” as proposed above). Pursuant to the proposed rule change, DTC would amend Rule 6 to provide that NSCC, as the Special Representative, may submit to DTC, on behalf of the Participant, instructions for “the Delivery Versus Payment of Securities from the Account of a Participant to the Special Representative SFT Account,” and for “an amount of money to be credited to the Account of a Participant and debited from the Special Representative SFT Account, in connection with a transaction in Securities, in accordance with Rule 9(A) and as specified in the Procedures.”

B. Amendments to the Settlement Guide

(1) In the “Settlement Transactions” subsection of the “About Settlement” section, DTC is proposing to add “Price Differentials (as defined in the NSCC Rules)” to the description of payment orders.

(2) In the “Important Terms” subsection of the “About Settlement” section, DTC is proposing to:

a. Amend the description of a “payment order” to be consistent with the amended description in the “Settlement Transactions” subsection. Specifically, DTC would replace the sentence “A transaction in which a Participant charges another Participant for changes in value for outstanding stock loans or option contract premiums” with “The payment order service provides Participants with a mechanism for settling amounts of money related to securities transactions that are effected separately through

²⁴ DTC would also set the Net Debit Cap of the NSCC SFT Account to one dollar (\$1), which would help ensure that no DVP or SFT PD to or from the NSCC SFT Account would be completed unless an offsetting DVP or SFT PD is also completed. The OCC Market Loan Program Account is similarly risk managed to help ensure that no receives are completed to the OCC Market Loan Program Account unless an offsetting delivery is also completed. See Securities Exchange Act Release No. 59298 (January 26, 2009), 74 FR 5692 (January 30, 2009) (SR-DTC-2008-15).

²⁵ A reclaim is the return of a deliver order, payment order, institutional delivery transaction or MMI transaction received by a Participant. RAD is a control mechanism that allows a Participant to review transactions prior to completion of processing. See Settlement Guide, *supra* note 3, at 6.

²⁶ See *supra* notes 10 and 11.

DTC. Participants use payment orders to collect option contract premiums (premium payment order), mark-to-market open contracts such as stock loans (securities payment order), and Price Differentials (SFT PD payment order)."

b. Insert the term "SFT Price Differential ("SFT PD") payment order" with the following description: "A payment order through which the amount of a Price Differential (as defined in the NSCC Rules) is (i) debited from the account of a Participant and credited to the NSCC SFT Account, or (ii) is debited from the NSCC SFT Account and credited to the account of a Participant."

c. Insert the term "NSCC Securities Financing Transaction Service (SFT) Service" with the following description: "A securities financing transaction clearing service offered by NSCC."

(3) After the "NSCC ACATS Settlement Accounting Operation—Processing at DTC" section of the Settlement Guide, DTC is proposing to insert a new section titled "NSCC Securities Financing Transactions (SFT) Service." The new section would include the following subsections: "About the Product," which would briefly describe the NSCC SFT Service; "Initial Transfer of SFT Securities at DTC," which would describe the process for the DVP instructions for the initial transfer of securities versus payment for an SFT; "NSCC Instructions to DTC," which would describe the pairs of DVP instructions and SFT PD payment orders that NSCC would submit to DTC in connection with SFT activity at NSCC; and "NSCC SFT Account Look-Ahead Processing," which would describe the modified look-ahead process and inform Participants that transactions to and from the NSCC SFT Account would not be subject to RAD and that reclaims from the NSCC SFT Account would be blocked.

(4) In the subsection titled "Settlement Processing Schedule" of the "End-of-Day Settlement Process" section, DTC is proposing to:

a. In the 3:00 p.m. "Cutoff Time ET" row, under "Cutoff for," insert a third item in the bulleted list that reads: "SFT Transactions cannot be entered after 3:00 p.m."

b. In the 3:10 p.m. "Cutoff Time ET" row, under "Cutoff for," insert "/SFT" after "CNS" in the second bulleted paragraph to reflect that recycling NSCC SFT instructions would be dropped at that time.

(5) In the section "Look-Ahead Processing," DTC proposes to correct the first sentence to reflect that DTC's

current look-ahead process runs on two-minute intervals, not on fifteen-minute intervals.

(6) In the subsection "Optional Memo Segregation Indicators" of the "Memo Segregation" section, DTC is proposing to make a conforming change in order to reflect that securities positions from deliver orders relating to SFT activity at NSCC would be treated the same as stock loan positions. Specifically, DTC is proposing to insert the SFT reason codes 200 and 201 into (i) the row for Activate Indicator 4 as follows:

"Turnaround securities positions, regardless of Memo Segregation constraints, for positions received from DOs with reason codes 10, 30, 200, and 600, except those with reason codes 10, 20, 200, 201, 260, 270, 280, or 290," and (ii) the row for Activate Indicator 5 as follows: "Turnaround securities positions, regardless of Memo Segregation constraints, for positions received from: All DOs, except those with reason codes 20–29, 40–48, 99, 201, 261–268, 270–278, 290, 291, 330–338, 340–348, 390, 610–619, 705–707 and CNS receives from the "C" and "E" accounts except if the turnaround is a reason code 10, 20, 200, 201, 260, 270, 280, or 290."

(7) In order to provide clarification around the payment order service and to differentiate between PPOs and SPOs on the one hand and SFT PD payment orders on the other hand, DTC is proposing to amend the "Payment Orders" section by:

a. Amending the "About the Product" subsection to insert a general description of the payment order service that would state: "A payment order authorizes DTC to credit the payee Participant's settlement account with the specified amount and to debit the payor Participant's settlement account for the same amount. All payment orders must satisfy the payor Participant's risk management controls before being processed."

b. Amending the "How the Product Works" subsection by (i) inserting "Premium Payment Order (PPO) and Securities Payment Order (SPO)" as a new heading for the description of PPOs and SPOs, (ii) deleting the sentence "Either type of payment order authorizes DTC to credit the payee Participant's settlement account with the specified amount and to debit the payor Participant's settlement account for the same amount," from the first paragraph, (iii) changing a reference to "the Payment Order Service" to "PPOs and SPOs," (iv) inserting "SFT Price Differential (SFT PD) Payment Order" as a new heading, and (v) inserting the sentence "For a description of SFT Price

Differential payment orders, please see NSCC Securities Financing Transactions (SFT) Service" under the SFT Price Differential Payment Order (SFT PD) heading.

(8) In order to reflect that a Participant would not be able to use the "Pend Hold" function for a DVP to the NSCC SFT Account, DTC is proposing to insert "with the exception of DOs to and from the NSCC SFT Account" into the description of Pend Hold function in the "Pend Hold" subsection.²⁸

(9) In Annex A, DTC is proposing to insert the following new reason codes into the "Memo Segregation Supplement/DO Reason Code Description Reference" section: 200 (SFT Stock Loan) and 201 (SFT Stock Loan Return). These new settlement reason codes would be established at DTC to support on-leg and off-leg settlement of SFTs.

C. Amendments to the Fee Guide

Pursuant to the proposed rule change, DTC would amend the Fee Guide to insert an SFT Price Differential delivery or receipt fee of \$0.005 per item delivered or received.

Implementation Date

DTC will implement the proposed changes when DTC and NSCC receive all necessary regulatory approvals for this proposed rule change and NSCC's proposed rule changes. DTC will announce the implementation date of the proposed rule change in an Important Notice posted on its website.

As proposed, a legend would be added to the Rules,²⁹ Settlement Guide, and Fee Guide stating there are changes that have been approved but have not yet been implemented. The proposed legend also would include that the implementation date would be announced in an Important Notice to be issued by DTC. In addition, the proposed legend would state that the legend would automatically be removed upon the implementation of the proposed changes.

2. Statutory Basis

DTC believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a registered clearing agency. Specifically, DTC believes that the

²⁸ A Pend Hold allows a Participant that initiated a DO or pledge transaction to hold (*i.e.*, exclude from processing) the transaction if it is pending for insufficient position. Since a DVP to the NSCC SFT Account is instructed by NSCC as the Special Representative, a Pend Hold is not relevant.

²⁹ DTC is proposing to add the legend to Rules 1 and 6.

proposed rule change is consistent with Sections 17A(b)(3)(F)³⁰ and 17A(b)(3)(D) of the Act³¹ for the reasons described below.

Section 17A(b)(3)(F) of the Act requires, in part, that the Rules be designed to promote the prompt and accurate clearance and settlement of securities transactions.³² DTC is proposing to expand the types of instructions that NSCC, as the Special Representative of a Participant that is also a member of NSCC, can submit to DTC on behalf of a Participant with respect to an Account of the Participant. As noted above, the NSCC Proposed Rules would provide that the submission of each SFT to NSCC by the Approved SFT Submitter on behalf of the NSCC SFT Counterparties would constitute an authorization to NSCC by the NSCC SFT Counterparties for NSCC to give instructions regarding the SFT to DTC in respect of the relevant Participant Accounts of the NSCC SFT Counterparties at DTC. The proposed rule change would provide a basis for DTC to accept and rely on those NSCC instructions. Specifically, DTC would amend Rule 6 to provide for the additional authority of NSCC, as the Special Representative of a Participant, to submit DVP instructions and SFT PD payment orders to DTC, on behalf of Participant, from the Account of the Participant to the NSCC SFT Account. By providing NSCC with the authority to submit these instructions on behalf of a Participant, the proposed rule change supports the efficient settlement of cleared SFTs, thereby promoting the prompt and accurate clearance and settlement of securities transactions, consistent with Section 17A(b)(3)(F) of the Act, cited above.

Pursuant to the proposed rule change, DTC would establish the SFT PD payment order, which would be a payment order for NSCC to instruct DTC, on behalf of Participants that are NSCC SFT Counterparties, as well as on its own behalf, to credit and debit funds between the NSCC SFT Account and the Accounts of the Participants in connection with SFT activity at NSCC. By establishing this new type of payment order that would utilize the efficiency of the DTC payment order service to settle payments relating to cleared SFTs, the proposed rule change is designed to promote the prompt and accurate clearance and settlement of payment obligations relating to securities transactions, consistent with

Section 17A(b)(3)(F) of the Act, cited above.

The proposed rule change would also apply a modified look-ahead process to the new NSCC SFT Account. As discussed above, DTC would use modified look-ahead processing in an effort to (i) ensure that there would not be any net settlement obligation against the NSCC SFT Account and (ii) prevent transaction blockage that could occur from unsatisfied risk management controls on the NSCC SFT Account. By applying a modified look-ahead to the new NSCC SFT Account, DTC believes that the proposed rule change is designed to promote efficient processing of DVP and SFT PD transactions relating to cleared SFTs. In this way, DTC believes that the proposed rule change would promote the prompt and accurate clearance and settlement of securities transactions, consistent with Section 17A(b)(3)(F) of the Act, cited above.

DTC also believes that the proposed rule change to make conforming and technical changes to the Rules and the Settlement Guide would promote the prompt and accurate clearance and settlement of securities transactions. DTC believes that the proposed conforming and technical changes would help ensure consistency in the Rules and the Settlement Guide and help ensure that the Rules and the Settlement Guide remain clear and accurate. Having clear and accurate Rules and Settlement Guide would help Participants to better understand their rights and obligations regarding DTC settlement services in connection with the NSCC SFT Service. DTC believes that when Participants better understand their rights and obligations regarding DTC settlement services, they can act in accordance with the Rules and Procedures. DTC believes that better enabling Participants to comply with the Rules and the Settlement Guide would promote the prompt and accurate clearance and settlement of securities transactions. As such, DTC believes the proposed rule change to make conforming and technical changes is consistent with Section 17A(b)(3)(F) of the Act.³³

Section 17A(b)(3)(D) of the Act requires, *inter alia*, that the Rules provide for the equitable allocation of reasonable dues, fees, and other charges among Participants.³⁴ Pursuant to the proposed rule change, DTC would establish a fee of \$0.005 per item delivered or received, which would be charged to the payor and the payee of an SFT PD payment order. For the

reasons set forth below, DTC believes that the proposed fee for SFT PD payment orders would provide for the equitable allocation of reasonable dues, fees, and other charges among Participants. First, DTC believes that the proposed fee of \$0.005 is reasonable. DTC recognizes that the fee for SFT PD orders would be significantly less than the \$0.10 fee for SPOs, which are used by Participants in connection with bilateral stock loan transactions. DTC is proposing to establish this lower fee for SFT PD payment orders because settling payment obligations for cleared SFTs would require a higher volume of payment orders than would otherwise be required for uncleared SFTs. More specifically, pursuant to the NSCC Proposed Rules, NSCC SFT Counterparties would pay and collect Price Differentials at the individual transaction level. In the bilateral world, mark-to-market payments and collections on securities lending transactions are typically done at the CUSIP level via SPOs, inclusive of all open securities lending transactions of a given participant. Accordingly, it is likely that there would be more SFT PD payment orders processed by DTC in connection with SFTs than the amount of SPOs DTC would have otherwise processed if those SFTs were bilateral, non-cleared securities lending transactions. Therefore, as an initial matter, DTC is proposing to charge the lower fee \$0.005 for SFT PD payment orders in an effort to maintain cost efficiency for both the cleared SFT activity and the uncleared securities financing transactions of market participants. As noted above,³⁵ due to the lack of history for cleared SFT activity, DTC cannot estimate at this time the average number of SFT PD payment orders that would be processed and cannot, therefore, quantify a precise fee. However, DTC believes that the proposed fee of \$0.005 is designed to take into account the imbalance between the amount of payment orders that would be required for cleared SFTs and the amount required for uncleared SFTs and is therefore reasonable. DTC also believes that the proposed fee would be equitably allocated because the fee would be charged to payors and payees per item delivered or received in accordance with their use of SFT PD payment orders and all such payors and payees would be treated equally with respect to the fee. Accordingly, DTC believes that the proposed rule change establishing a fee for the delivery and receipt of an SFT PD payment order is designed to provide for the equitable

³⁰ 15 U.S.C. 78q-1(b)(3)(F).

³¹ 15 U.S.C. 78q-1(b)(3)(D).

³² 15 U.S.C. 78q-1(b)(3)(F).

³³ *Id.*

³⁴ 15 U.S.C. 78q-1(b)(3)(D).

³⁵ See *supra* note 27.

allocation of reasonable dues, fees, and other charges among participants, consistent with Section 17A(b)(3)(D) of the Act, cited above.

(B) Clearing Agency's Statement on Burden on Competition

DTC does not believe that the proposed rule change to expand the types of instructions that NSCC, as Special Representative of a Participant that is a member of NSCC, can submit to DTC on behalf of the Participant with respect to an Account of the Participant would have an impact on competition.³⁶ The proposed rule change is designed to support the use of the NSCC SFT Service by NSCC SFT Counterparties by providing a mechanism for NSCC to submit DVP instructions and SFT PD payment orders to DTC, on behalf of a Participant that is an NSCC SFT Counterparty, for the settlement of the NSCC SFT Counterparty's obligations relating to a cleared SFT. The proposed rule change would only affect Participants that are NSCC SFT Counterparties and would apply to all such Participants equally. Therefore, DTC believes that the proposed rule change to expand the types of instructions that NSCC, as the Special Representative of Participants that are also members of NSCC, can submit to DTC on behalf of a Participant with respect to an Account of the Participant would not have an impact on competition.³⁷

DTC does not believe that the proposed rule change to provide for SFT PD payment orders and to establish a fee for SFT PD payment orders would have an impact on competition.³⁸ As discussed above, an SFT PD payment order would provide Participants a way to utilize the efficiency of the DTC payment order service to settle payments relating to their cleared SFT activity. The establishment of the SFT PD payment order would only affect Participants that are NSCC SFT Counterparties and would apply to all such Participants equally. In addition, the proposed fee for SFT PD payment orders would be charged to payors and payees per their use of SFT PD payment orders and all such payors and payees would be treated equally with respect to the fee. Therefore, DTC believes that the proposed rule change to provide for SFT PD payment orders and to establish a fee for SFT PD payment orders would not have an impact on competition.³⁹

DTC does not believe that the proposed rule changes to use modified look-ahead processing for transactions to and from the NSCC SFT Account would have an impact on competition.⁴⁰ The proposed rule changes would apply to all DVP and SFT PD transactions to and from the NSCC SFT Account, and are designed to promote efficient processing of transactions relating to SFTs cleared by NSCC. The proposed rule change would only affect Participants that are NSCC SFT Counterparties and would apply to all such Participants equally. Therefore, DTC believes that the proposed rule change to use modified look-ahead processing for transactions to and from the NSCC SFT Account would not have an impact on competition.⁴¹

DTC does not believe that the proposed rule change to make conforming and technical changes to the Rules and the Settlement Guide would have an impact on competition.⁴² Having clear and accurate Rules and Settlement Guide would facilitate Participants' understanding of the Rules and Settlement Guide and provide Participants with increased predictability and certainty regarding their obligations regarding DTC settlement services in connection with the NSCC SFT Service. Therefore, DTC believes that the proposed rule change to make conforming and technical changes to the Rules and the Settlement Guide would not have an impact on competition.⁴³

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

DTC has not received or solicited any written comments relating to this proposal. If any written comments are received, they will be publicly filed as an Exhibit 2 to this filing, as required by Form 19b-4 and the General Instructions thereto.

Persons submitting comments are cautioned that, according to Section IV (Solicitation of Comments) of the Exhibit 1A in the General Instructions to Form 19b-4, the Commission does not edit personal identifying information from comment submissions. Commenters should submit only information that they wish to make available publicly, including their name, email address, and any other identifying information.

All prospective commenters should follow the Commission's instructions on how to submit comments, available at <https://www.sec.gov/regulatory-actions/how-to-submit-comments>. General questions regarding the rule filing process or logistical questions regarding this filing should be directed to the Main Office of the Commission's Division of Trading and Markets at tradingandmarkets@sec.gov or 202-551-5777.

DTC reserves the right not to respond to any comments received.

III. Date of Effectiveness of the Proposed Rule Change, and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) By order approve or disapprove such proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-DTC-2021-014 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR-DTC-2021-014. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the

³⁶ 15 U.S.C. 78q-1(b)(3)(I).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ 15 U.S.C. 78q-1(b)(3)(I).

⁴² *Id.*

⁴³ *Id.*

Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of DTC and on DTCC's website (<http://dtcc.com/legal/sec-rule-filings.aspx>). All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-DTC-2021-014 and should be submitted on or before September 1, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁴

Jill M. Peterson,
Assistant Secretary.

[FR Doc. 2021-17077 Filed 8-10-21; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-92574; File No. SR-C2-2021-011]

Self-Regulatory Organizations; Cboe C2 Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Enhance and Clarify Its Price Adjust Process and Modify the Bulk Message Fat Finger Check

August 5, 2021.

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 July 28, 2021, Cboe C2 Exchange, Inc. ("Exchange" or "C2") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A)(iii) of

the Act³ 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 C2 Exchange, Inc. (the "Exchange" or "C2 Options") proposes to enhance and clarify its Price Adjust process and modify the bulk message fat finger check. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (http://markets.cboe.com/us/options/regulation/rule_filings/ctwo/), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to enhance its Price Adjust (as defined below) process for certain Market-Maker interest—specifically Book Only⁵ orders and bulk messages⁶ submitted through bulk

³ 15 U.S.C. 78s(b)(3)(A)(iii).

⁴ 17 CFR 240.19b-4(f)(6).

⁵ Rule 5.6(c) defines a "Book Only" order as an order the System ranks and executes pursuant to Rule 5.32, subjects to the Price Adjust process pursuant to Rule 5.32, or cancels, as applicable (in accordance with User instructions), without routing away to another exchange. Users may designate bulk messages as Book Only as set forth in Rule 5.5(c).

⁶ The term "bulk message" means a bid or offer included in a single electronic message a User submits with an M Capacity to the Exchange in which the User may enter, modify, or cancel up to an Exchange-specified number of bids and offers. A User may submit a bulk message through a bulk port as set forth in Rule 5.5(c)(3). The System handles a bulk message in the same manner as it handles an order or quote, unless the Rules specify otherwise. See Rule 1.1.

ports⁷—and clarify other parts of that process, as well as modify the bulk message fat finger check.

Rule 5.32(b) describes the Price Adjust process, which applies to an order unless a user enters instructions for the order to not be subject to the Price Adjust process. The System ranks and displays a buy (sell) order that at the time of entry would lock or cross a Protected Quotation of the Exchange or another exchange at one minimum price increment below (above) the current national best offer ("NBO") (national best bid ("NBB")) ("Price Adjust").

This Price Adjust process applies to Book Only orders and bulk messages submitted that are designated as Price Adjust (and not designated as Cancel Back). Separately, a Book Only order or bulk message bid or offer (or unexecuted portion) is rejected if submitted by a Market-Maker with an appointment in the class through a bulk port if it would execute against a resting offer or bid, respectively with a capacity of M. Therefore, if a Book Only bulk message bid of an appointed Market-Maker does not execute upon entry and would rest at the same price as an offer not represented by a capacity of M, that bid price would be adjusted and rest on the book at one minimum price variation below the offer. However, if the offer was represented by a capacity of M, the System would reject the bid since it may not execute against that resting offer.

The proposed rule change amends the Price Adjust process so that an appointed Market-Maker's Book Only bids and offers submitted through a bulk port may have the opportunity to rest on the book if they are submitted at the same price as the opposite side of the market when represented by Market-Maker interest. Specifically, the proposed rule change adds subparagraph (1)(B) to Rule 5.32(b),⁸ which states if the bid (offer) of a Book Only order or bulk message⁹ submitted through a bulk port at the time of entry would lock or cross (1) a protected offer (bid) of another options exchange¹⁰ or a resting offer (bid) with a Capacity of

⁷ A "bulk port" is a dedicated logical port that provides Users with the ability to submit bulk messages, single orders, and auction responses, each subject to certain restrictions. See Rule 5.5(c)(3).

⁸ To accommodate this change, the proposed rule change numbers the current introductory paragraph to Rule 5.32(b) as subparagraph (1) (some of which becomes subparagraph (A)) and makes nonsubstantive changes to reflect two subparagraphs to new subparagraph (1).

⁹ The Exchange notes that pursuant to Rule 5.5(c)(3)(A), only appointed Market-Makers may submit such orders and bulk messages through a bulk port.

¹⁰ This is how these orders and messages are currently handled pursuant to Rule 5.32(b).

⁴⁴ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

M, the System ranks and displays the order at one minimum price variation below (above) the better of the current away best offer (“ABO”) (away best bid (“ABB”)) or resting M-Capacity offer (bid).¹¹ This will permit appointed Market-Maker orders and quotes submitted through bulk ports (the primary purpose of which is to provide liquidity to the Book) that are subject to the Price Adjust process (indicating the submitting Market-Makers prefer a price adjustment to rejection) so their quotes may rest in the Book if they would otherwise lock interest against which they could not execute.

The proposed rule change makes nonsubstantive changes to current Rule 5.32(b) to set forth to which orders and bulk messages the functionality in each subparagraph will apply; the proposed rule change has no impact on how the Price Adjust process applies to orders and bulk messages other than Book Only orders and bulk messages submitted through a bulk port that would otherwise execute against resting M-Capacity interest. Similarly, the proposed rule change updates Rule 5.32(c)(6) to indicate that provision will only apply to Cancel Back¹² Book Only orders and bulk messages submitted through bulk ports. Book Only orders and bulk messages submitted through a bulk port may either be Price Adjust or Cancel Back. As Price Adjust Book Only orders and bulk messages submitted through a bulk port will be handled as described above if they would execute against resting M-Capacity interest, this provision will now only apply to Cancel Back Book Only bulk messages and orders submitted through bulk ports.¹³

The proposed rule change also clarifies in proposed Rule 5.32(b)(1) that the Price Adjust process applies to an order or remaining portion that does not execute upon entry. This is consistent with current functionality, as Price

Adjust orders may execute upon entry against resting interest—the price adjustment applies only to permit any remaining interest from an incoming order to rest at a price that would not lock or cross opposite side interest in accordance with the linkage plan.

Additionally, current Rule 5.32(b)(1) (which the proposed rule change rennumbers as subparagraph (2) provides that if the NBBO changes so that an order subject to Price Adjust would not lock or cross a Protection Quotation,¹⁴ the System gives the Price Adjust order a new timestamp. Currently, the rule states the System displays the order at a price that at the price that locked the Protected Quotation at the time of entry. Pursuant to current subparagraph (3), the ranked and displayed price of an order subject to Price Adjust may be adjusted once or multiple times depending upon the instructions of a User and changes to the prevailing NBBO. The proposed rule change deletes current subparagraph (2) and moves the concept of single or multiple price adjust to proposed subparagraph (2).¹⁵ The proposed rule change clarifies how each of single price adjust and multiple price adjust currently function. Specifically, if a User designated an order as eligible for single price adjust, the System ranks and displays the order at the price of the Protected Quotation that was present in the Book at the time of order entry. That is the price at which the Price Adjust order would have entered the Book but for the presence of that Protected Quotation.

Additionally, the proposed rule change clarifies that bulk message bids and offers are only subject to single price adjust. The Exchange understands that Market-Makers’ automated quote streaming systems review their resting interest when the markets change and update as appropriate in accordance with their business and risk models. Therefore, the Exchange does not believe it is necessary for it also to review resting Market-Maker interest continuously and reprice as the market changes. The proposed rule change amends proposed subparagraph (2)(B) to indicate it applies to orders designated as multiple price adjust, and specifies the repricing described in that paragraph may occur multiple times as

the opposite side of the NBBO changes (up to the order’s limit price). The proposed rule change has no impact on how the System handles order and bulk messages subject to single or multiple price adjust; it rather more accurately describes this process. The proposed rule change also amends this provision to reflect that a Price Adjust bulk message may be re-priced upon entry due to the presence of opposite side M Capacity interest (rather than rejected in accordance with current functionality).

With respect to multiple price adjust functionality, the proposed rule change clarifies that the price at which the System reprices an order is the ranked and displayed price (rather than or), which is consistent with the remainder of paragraph (b). Price Adjust orders are always ranked and displayed at the same price. Additionally, the proposed rule change deletes the concept of the new price locking a new Protected Quotation, as the new price will always be one minimum price variation away to be consistent with linkage rules.

Finally, the proposed rule change enhances the bulk message fat finger check set forth in Rule 5.34(a)(5). In accordance with the fat finger check, the System cancels or rejects any bulk message bid (offer) above (below) the NBO (NBB) by more than a specified amount determined by the Exchange.¹⁶ The proposed rule change indicates that the Exchange may also determine a minimum and maximum dollar value for the bulk message fat finger check.¹⁷ The Exchange believes Market-Makers may be willing to accept an execution at a price beyond the NBBO at the time of order entry, but not too far away. The purpose of the fat finger check is intended to reject bulk message bids and offers that on their face are likely to be entered at erroneous prices and thus prevent potentially erroneous executions. The proposed rule change to permit the Exchange to set a minimum and maximum value will provide the Exchange with the opportunity to set a meaningful buffer that is not “too close” to the NBBO (in other words, a de minimis buffer) but not “too far” from the NBBO (in other words, a buffer that is more likely to accept erroneously priced bulk messages). The proposed rule change also permits the Exchange to set the relevant amounts for the bulk message fat finger check on a class-by-

¹¹ This is how these orders and messages are currently handled pursuant to Rule 5.32(b).

¹² Rule 5.6(c) defines a Cancel Back order as an order (including a bulk message) a user designates to not be subject to the Price Adjust process that the System cancels or rejects if displaying the order on the book would create a violation of the linkage rules or if the order cannot otherwise be executed or displayed in the book at its limit price. The System executes a Book Only—Cancel Back order against resting orders, and cancels or rejects a Post Only—Cancel Back order, that locks or crosses the opposite side of the BBO.

¹³ The proposed rule change also clarifies in Rule 5.32(c)(6) that it applies if the incoming order or bulk message would execute against or lock resting M-Capacity interest. It is possible a Cancel Back Book Only order or bulk message may otherwise not execute against resting M-Capacity interest but would instead lock that interest if it rested in the book, so the System would reject that order or bulk message to prevent the dissemination of a locked market.

¹⁴ The Exchange notes that a change in the NBBO would include a change in M-Capacity interest resting at the top of the Book that caused a Book Only bulk message or order to have its price adjusted.

¹⁵ The proposed rule change also moves the latter part of current subparagraph (2) regarding the priority of re-ranked and re-displayed Price Adjust orders to proposed subparagraph (3). The proposed rule change also rennumbers current subparagraph (3) to be subparagraph (4).

¹⁶ This check does not apply to bulk messages submitted prior to the conclusion of the opening process or when no NBBO is available.

¹⁷ The proposed rule change also makes a nonsubstantive change to say the System cancels or rejects any bulk message bid (offer) more than a buffer amount above (below) the NBO (NBB) to align the language with other rules.

class basis. Option classes have different characteristics and trading models, and the proposed flexibility will permit the Exchange to apply different parameters to address those differences.

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.¹⁸ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹⁹ 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)²⁰ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the proposed rule change to enhance the Price Adjust process to adjust the price of Book Only orders and bulk messages submitted by Market-Makers through bulk ports will remove impediments to and perfect the mechanism of a free and open market. Market-Makers that have elected to have their bulk port interest subject to the Price Adjust process have indicated their desire to have the prices of that interest adjusted rather than have the System reject that interest. The proposed rule change is consistent with that election and will cause such interest to be repriced rather than rejected in a situation—when it would otherwise execute or lock against other M-Capacity interest—in addition to locking an away market. Therefore, the proposed rule change will permit additional Market-Maker interest to enter the book rather than be rejected. This additional liquidity may increase execution opportunities and tighten spreads, which ultimately benefits all investors.

The Exchange also believes the proposed rule change to codify that bulk

message bids and offers may only be subject to single price adjust will benefit investors by adding transparency to the Rules. The Exchange understands that Market-Makers' automated quote streaming systems review their resting interest when the markets change and update as appropriate in accordance with their business and risk models. Therefore, the Exchange does not believe it is necessary for it also to review resting Market-Maker interest continuously and reprice as the market changes.

In addition, the Exchange believes the proposed change to the bulk message fat finger check will protect investors and the public interest as the check will continue to mitigate potential risks associated with Market-Makers submitting bulk message bids and offers at unintended prices, and risks associated with orders and quotes trading at prices that are extreme and potentially erroneous, which may likely have resulted from human or operational error. The proposed enhancement that the Exchange will apply a minimum and maximum to the fat finger check will permit the Exchange to apply the fat finger check to bulk messages in a more meaningful way. The Exchange believes class flexibility is appropriate to permit the Exchange to apply reasonable buffers to classes, which may exhibit different trading characteristics and have different market models. The Exchange has other price checks and risk controls that permit it to set a minimum and maximum, as well as apply parameters on a class basis.²¹

The proposed nonsubstantive and clarifying changes will protect investors by adding transparency to the Rules.

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 the proposed rule change will impose any burden on intramarket competition, as the proposed changes will apply in the same manner to all Book Only orders and bulk messages submitted through a bulk port. The proposed rule change to codify that bulk messages will only be subject to single price adjust is appropriate given that Market-Makers' automated quote streaming systems review their resting interest when the markets change and update as

appropriate in accordance with their business and risk models. Therefore, the Exchange does not believe it is necessary for it also to review resting Market-Maker interest continuously and reprice as the market changes. The Exchange does not believe the proposed rule change will impose any burden on intermarket competition, as the proposed rule change applies to functionality that applies to incoming interest that may only rest or execute on the Exchange's book.

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

Because the foregoing proposed rule change does not:

A. Significantly affect the protection of investors or the public interest;

B. impose any significant burden on competition; and

C. 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 Act²² and Rule 19b-4(f)(6)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 (<http://www.sec.gov/rules/sro.shtml>); or

²² 15 U.S.C. 78s(b)(3)(A).

²³ 17 CFR 240.19b-4(f)(6).

¹⁸ 15 U.S.C. 78f(b).

¹⁹ 15 U.S.C. 78f(b)(5).

²⁰ *Id.*

²¹ See, e.g., Rule 5.34(a)(2) (market order NBBO width protection).

• Send an email to rule-comments@sec.gov. Please include File Number SR–C2–2021–011 on the subject line.

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–C2–2021–011. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–C2–2021–011 and should be submitted on or before September 1, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁴

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2021–17079 Filed 8–10–21; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–92576; File No. SR–CboeEDGX–2021–035]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Enhance and Clarify Its Price Adjust Process and Modify the Bulk Message Fat Finger Check

August 5, 2021.

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 July 28, 2021, Cboe EDGX Exchange, Inc. (“Exchange” or “EDGX”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a “non-controversial” proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act³ 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 enhance and clarify its Price Adjust process and modify the bulk message fat finger check. 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 enhance its Price Adjust (as defined below) process for certain Market-Maker interest—specifically Book Only⁵ orders and bulk messages⁶ submitted through bulk ports⁷—and clarify other parts of that process, as well as modify the bulk message fat finger check.

Rule 21.1(i) describes the Price Adjust process, which applies to an order unless a user enters instructions for the order to not be subject to the Price Adjust process. The System adjusts the price (“Price Adjust”) of an order subject to the Price Adjust as follows:

(A) If a buy (sell) non-all-or-none (“AON”) order at the time of entry, would lock or cross:

(i) A Protected Quotation of another options exchange or the Exchange, the System ranks and displays the order at one minimum price variation below (above) the current national best offer (“NBO”) (national best bid (“NBB”)); or

(ii) the offer (bid) of a sell (buy) AON order resting on the Book at or better than the Exchange's best offer (bid), the System ranks the resting AON order one minimum price variation above (below) the bid (offer) of the non-AON order.

(B) If a buy (sell) AON order, at the time of entry, would:

(i) Cross a Protected Offer (Bid) of another options exchange or a sell (buy) AON order resting on the Book at or better than the Exchange's best offer (bid), the System ranks the incoming AON order at a price equal to

⁵ Rule 21.1(d)(7) defines “Book Only Orders” as orders that are to be ranked and executed on the Exchange pursuant to Rule 21.8 or cancelled, as appropriate, without routing away to another options exchange. A Book Only Order will be subject to the Price Adjust process set forth in Rule 21.1(i) unless a User has entered instructions not to use such process. Users may designate bulk messages as Book Only as set forth in Rule 21.1(j).

⁶ The term “bulk message” means a bid or offer included in a single electronic message a User submits with an M Capacity to the Exchange in which the User may enter, modify, or cancel up to an Exchange-specified number of bids and offers (which number the Exchange announces via Exchange notice or publicly available technical specifications). A User may submit a bulk message through a bulk port as set forth in Rule 21.1(j)(3). The System handles a bulk message in the same manner as it handles an order or quote, unless the Rules specify otherwise. See Rule 16.1.

⁷ A “bulk port” is a dedicated logical port that provides Users with the ability to submit bulk messages, single orders, and auction responses, each subject to certain restrictions. See Rule 21.1(j)(3).

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).

²⁴ 17 CFR 200.30–3(a)(12).

the Protected Offer (Bid) or the offer (bid) of the resting AON order, respectively; or

(ii) lock or cross a Protected Offer (Bid) of the Exchange, the System ranks the incoming AON order at a price one minimum price variation below (above) the Protected Offer (Bid).

This Price Adjust process applies to Book Only orders and bulk messages submitted that are designated as Price Adjust (and not designated as Cancel Back). Separately, a Book Only order or bulk message bid or offer (or unexecuted portion) is rejected if submitted by a Market-Maker with an appointment in the class through a bulk port if it would execute against a resting offer or bid, respectively with a capacity of M. Therefore, if a Book Only bulk message bid of an appointed Market-Maker does not execute upon entry and would rest at the same price as an offer not represented by a capacity of M, that bid price would be adjusted and rest on the book at one minimum price variation below the offer. However, if the offer was represented by a capacity of M, the System would reject the bid since it may not execute against that resting offer.

The proposed rule change amends the Price Adjust process so that an appointed Market-Maker's Book Only bids and offers submitted through a bulk port may have the opportunity to rest on the book if they are submitted at the same price as the opposite side of the market when represented by Market-Maker interest. Specifically, the proposed rule change adds subparagraph (C) to Rule 21.1(i)(1), which states if the bid (offer) of a Book Only buy (sell) non-AON order or bulk message⁸ submitted through a bulk port at the time of entry would lock or cross (1) a protected offer (bid) of another options exchange⁹ or a resting offer (bid) with a Capacity of M, the System ranks and displays the order at one minimum price variation below (above) the better of the current away best offer ("ABO") (away best bid ("ABB")) or resting M-Capacity offer (bid); or (2) the offer (bid) of a sell (buy) AON order resting on the Book at or better than the Exchange's best offer (bid), the System ranks the resting AON order one minimum price variation above (below) the bid (offer) of the non-AON order.¹⁰ This will permit appointed Market-Maker orders and quotes submitted through bulk ports (the primary purpose

⁸ The Exchange notes that pursuant to Rule 21.1(j)(3)(A), only appointed Market-Makers may submit such orders and bulk messages through a bulk port.

⁹ This is how these orders and messages are currently handled pursuant to Rule 21.1(i)(1)(A)(i).

¹⁰ This is how these orders and messages are currently handled pursuant to Rule 21.1(i)(1)(A)(ii).

of which is to provide liquidity to the Book) that are subject to the Price Adjust process (indicating the submitting Market-Makers prefer a price adjustment to rejection) so their quotes may rest in the Book if they would otherwise lock interest against which they could not execute.

The proposed rule change makes nonsubstantive changes to current Rules 21.1(i)(1)(A) and (B) to set forth to which orders and bulk messages the functionality in each subparagraph will apply; the proposed rule change has no impact on how the Price Adjust process applies to orders and bulk messages other than Book Only orders and bulk messages submitted through a bulk port that would otherwise execute against resting M-Capacity interest. Similarly, the proposed rule change updates Rule 21.1(j)(3)(B)(ii) to indicate that provision will only apply to Cancel Back¹¹ Book Only orders and bulk messages¹² submitted through bulk ports. Book Only orders and bulk messages submitted through a bulk port may either be Price Adjust or Cancel Back. As Price Adjust Book Only orders and bulk messages submitted through a bulk port will be handled as described above if they would execute against resting M-Capacity interest, this provision will now only apply to Cancel Back Book Only bulk messages and orders submitted through bulk ports.¹³

The proposed rule change also clarifies in Rule 21.1(i)(1) that the Price Adjust process applies to an order or remaining portion that does not execute upon entry. This is consistent with current functionality, as Price Adjust orders may execute upon entry against resting interest—the price adjustment applies only to permit any remaining

¹¹ Rule 21.1(l) defines a Cancel Back order as an order a user designates to not be subject to the Price Adjust process that the System cancels or rejects if displaying the order on the book would create a violation of the linkage rules or if the order cannot otherwise be executed or displayed in the book at its limit price. The System executes a Book Only—Cancel Back order against resting orders, and cancels or rejects a Post Only—Cancel Back order, that locks or crosses the opposite side of the BBO.

¹² The proposed rule change clarifies that Rule 21.1(j)(3)(B)(ii) applies to bulk messages as well as orders. This is consistent with current functionality and the definition of bulk message in Rule 16.1, which states that the System handles a bulk message in the same manner as it handles an order or quote unless the Rules specify otherwise.

¹³ The proposed rule change also clarifies in Rule 21.1(j)(3)(B)(ii) that it applies if the incoming order or bulk message would execute against or lock resting M-Capacity interest. It is possible a Cancel Back Book Only order or bulk message may otherwise not execute against resting M-Capacity interest but would instead lock that interest if it rested in the book, so the System would reject that order or bulk message to prevent the dissemination of a locked market.

interest from an incoming order to rest at a price that would not lock or cross opposite side interest in accordance with the linkage plan.

Additionally, Rule 21.1(i)(2) provides that in the event the circumstances that caused the System to adjust the price of an order pursuant to subparagraph (i)(1) change so that it would not lock or cross, as applicable, a Protection Quotation or an AON resting on the EDGX Options Book at a price at or better than the Exchange's BBO,¹⁴ the System gives the Price Adjust order a new timestamp. Currently, the rule states the System ranks or displays the order at a price that locks or is one minimum price variation away from the new Protection Quotation or AON resting on the Book at or better than the BBO, as applicable. Pursuant to current subparagraph (3), the ranked and displayed price of an order subject to Price Adjust may be adjusted once or multiple times depending upon the instructions of a User and changes to the prevailing NBBO. The proposed rule change deletes this subparagraph (3) and moves the concept of single or multiple price adjust to subparagraph (2).¹⁵ The proposed rule change clarifies how each of single price adjust and multiple price adjust currently function. Specifically, if a User designated an order as eligible for single price adjust, the System ranks and displays the order at the price of the Protected Quotation that was present in the Book at the time of order entry. That is the price at which the Price Adjust order would have entered the Book but for the presence of that Protected Quotation.

Additionally, the proposed rule change clarifies that bulk message bids and offers are only subject to single price adjust. The Exchange understands that Market-Makers' automated quote streaming systems review their resting interest when the markets change and update as appropriate in accordance with their business and risk models. Therefore, the Exchange does not believe it is necessary for it also to review resting Market-Maker interest continuously and reprice as the market changes. The proposed rule change amends proposed subparagraph (2)(B) to indicate it applies to orders designated as multiple price adjust, and specifies the repricing described in that

¹⁴ The Exchange notes that a change in the BBO would include a change in M-Capacity interest resting at the top of the Book that caused a Book Only bulk message or order to have its price adjusted.

¹⁵ The proposed rule change also moves the latter part of current subparagraph (2) regarding the priority of re-ranked and re-displayed Price Adjust orders to proposed subparagraph (3).

paragraph may occur multiple times as the opposite side of the NBBO changes (up to the order's limit price). The proposed rule change has no impact on how the System handles order and bulk messages subject to single or multiple price adjust; it rather more accurately describes this process. The proposed rule change also amends this provision to reflect that a Price Adjust bulk message may be re-priced upon entry due to the presence of opposite side M Capacity interest (rather than rejected in accordance with current functionality).

With respect to multiple price adjust functionality, the proposed rule change clarifies that the price at which the System reprices an order is the ranked and displayed price (rather than or), which is consistent with the remainder of paragraph (i). Price Adjust orders are always ranked and displayed at the same price. Additionally, the proposed rule change deletes the concept of the new price locking a new Protected Quotation, as the new price will always be one minimum price variation away to be consistent with linkage rules. Finally, the proposed rule change deletes the concept of repricing a Price Adjust order based on the presence of an AON order. As set forth in Rule 21.1(i)(1), if an incoming order would lock the price of an AON resting on the book, the System reprices the AON rather than the incoming order. Therefore, if the AON is no longer in the book, there would be no reason to reprice the other order, making the reference to AON in subparagraph (2) regarding repricing is unnecessary.

Finally, the proposed rule change enhances the bulk message fat finger check set forth in Rule 21.17(a)(6). In accordance with the fat finger check, the System cancels or rejects any bulk message bid (offer) above (below) the NBO (NBB) by more than a specified amount determined by the Exchange.¹⁶ The proposed rule change indicates that the Exchange may also determine a minimum and maximum dollar value for the bulk message fat finger check.¹⁷ The Exchange believes Market-Makers may be willing to accept an execution at a price beyond the NBBO at the time of order entry, but not too far away. The purpose of the fat finger check is intended to reject bulk message bids and offers that on their face are likely to be entered at erroneous prices and thus

¹⁶ This check does not apply to bulk messages submitted prior to the conclusion of the opening process or when no NBBO is available.

¹⁷ The proposed rule change also makes a nonsubstantive change to say the System cancels or rejects any bulk message bid (offer) more than a buffer amount above (below) the NBO (NBB) to align the language with other rules.

prevent potentially erroneous executions. The proposed rule change to permit the Exchange to set a minimum and maximum value will provide the Exchange with the opportunity to set a meaningful buffer that is not "too close" to the NBBO (in other words, a de minimis buffer) but not "too far" from the NBBO (in other words, a buffer that is more likely to accept erroneously priced bulk messages). The proposed rule change also permits the Exchange to set the relevant amounts for the bulk message fat finger check on a class-by-class basis. Option classes have different characteristics and trading models, and the proposed flexibility will permit the Exchange to apply different parameters to address those differences.

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.¹⁸ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹⁹ 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)²⁰ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the proposed rule change to enhance the Price Adjust process to adjust the price of Book Only orders and bulk messages submitted by Market-Makers through bulk ports will remove impediments to and perfect the mechanism of a free and open market. Market-Makers that have elected to have their bulk port interest subject to the Price Adjust process have indicated their desire to have the prices of that interest adjusted rather than have the System reject that interest. The proposed rule change is consistent with that election and will cause such

¹⁸ 15 U.S.C. 78f(b).

¹⁹ 15 U.S.C. 78f(b)(5).

²⁰ *Id.*

interest to be repriced rather than rejected in a situation—when it would otherwise execute or lock against other M-Capacity interest—in addition to locking an away market. Therefore, the proposed rule change will permit additional Market-Maker interest to enter the book rather than be rejected. This additional liquidity may increase execution opportunities and tighten spreads, which ultimately benefits all investors.

The Exchange also believes the proposed rule change to codify that bulk message bids and offers may only be subject to single price adjust will benefit investors by adding transparency to the Rules. The Exchange understands that Market-Makers' automated quote streaming systems review their resting interest when the markets change and update as appropriate in accordance with their business and risk models. Therefore, the Exchange does not believe it is necessary for it also to review resting Market-Maker interest continuously and reprice as the market changes.

In addition, the Exchange believes the proposed change to the bulk message fat finger check will protect investors and the public interest as the check will continue to mitigate potential risks associated with Market-Makers submitting bulk message bids and offers at unintended prices, and risks associated with orders and quotes trading at prices that are extreme and potentially erroneous, which may likely have resulted from human or operational error. The proposed enhancement that the Exchange will apply a minimum and maximum to the fat finger check will permit the Exchange to apply the fat finger check to bulk messages in a more meaningful way. The Exchange believes class flexibility is appropriate to permit the Exchange to apply reasonable buffers to classes, which may exhibit different trading characteristics and have different market models. The Exchange has other price checks and risk controls that permit it to set a minimum and maximum, as well as apply parameters on a class basis.²¹

The proposed nonsubstantive and clarifying changes will protect investors by adding transparency to the Rules.

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

²¹ See, e.g., Rule 21.17(a)(1) (market order NBBO width protection).

of the purposes of the Act. The Exchange does not believe the proposed rule change will impose any burden on intramarket competition, as the proposed changes will apply in the same manner to all Book Only orders and bulk messages submitted through a bulk port. The proposed rule change to codify that bulk messages will only be subject to single price adjust is appropriate given that Market-Makers' automated quote streaming systems review their resting interest when the markets change and update as appropriate in accordance with their business and risk models. Therefore, the Exchange does not believe it is necessary for it also to review resting Market-Maker interest continuously and reprice as the market changes. The Exchange does not believe the proposed rule change will impose any burden on intermarket competition, as the proposed rule change applies to functionality that applies to incoming interest that may only rest or execute on the Exchange's book.

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

Because the foregoing proposed rule change does not:

A. Significantly affect the protection of investors or the public interest;

B. impose any significant burden on competition; and

C. 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 Act²² and Rule 19b-4(f)(6)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.

²² 15 U.S.C. 78s(b)(3)(A).

²³ 17 CFR 240.19b-4(f)(6).

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-CboeEDGX-2021-035 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-2021-035. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CboeEDGX-2021-035 and should be submitted on or before September 1, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁴

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2021-17081 Filed 8-10-21; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-92575; File No. SR-CboeBZX-2021-054]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Modify the Bulk Message Fat Finger Check

August 5, 2021.

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 July 28, 2021, Cboe BZX Exchange, Inc. ("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 Exchange filed the proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act³ 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 BZX Exchange, Inc. (the "Exchange" or "BZX Options") proposes to modify the bulk message fat finger check. 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

²⁴ 17 CFR 200.30-3(a)(12).

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).

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 modify the bulk message⁵ fat finger check in Rule 21.17(a)(6). In accordance with the fat finger check, the System cancels or rejects any bulk message bid (offer) above (below) the national best offer ("NBO") (national best bid ("NBB")) by more than a specified amount determined by the Exchange.⁶ The proposed rule change indicates that the Exchange may also determine a minimum and maximum dollar value for the bulk message fat finger check.⁷ The Exchange believes Market-Makers may be willing to accept an execution at a price beyond the NBBO at the time of order entry, but not too far away. The purpose of the fat finger check is intended to reject bulk message bids and offers that on their face are likely to be entered at erroneous prices and thus prevent potentially erroneous executions. The proposed rule change to permit the Exchange to set a minimum and maximum value will provide the Exchange with the opportunity to set a meaningful buffer that is not "too close" to the NBBO (in other words, a de minimis buffer) but not "too far" from the NBBO (in other words, a buffer that is more likely to accept erroneously priced bulk messages). The proposed rule change also permits the Exchange to set the relevant amounts for the bulk message fat finger check on a class-by-

⁵ The term "bulk message" means a bid or offer included in a single electronic message a User submits with an M Capacity to the Exchange in which the User may enter, modify, or cancel up to an Exchange-specified number of bids and offers (which number the Exchange announces via Exchange notice or publicly available technical specifications). A User may submit a bulk message through a bulk port as set forth in Rule 21.1(j)(3). The System handles a bulk message in the same manner as it handles an order or quote, unless the Rules specify otherwise. See Rule 16.1.

⁶ This check does not apply to bulk messages submitted prior to the conclusion of the opening process or when no NBBO is available.

⁷ The proposed rule change also makes a nonsubstantive change to say the System cancels or rejects any bulk message bid (offer) more than a buffer amount above (below) the NBO (NBB) to align the language with other rules.

class basis. Option classes have different characteristics and trading models, and the proposed flexibility will permit the Exchange to apply different parameters to address those differences.

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.⁸ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)⁹ 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)¹⁰ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the proposed change to the bulk message fat finger check will protect investors and the public interest as the check will continue to mitigate potential risks associated with Market-Makers submitting bulk message bids and offers at unintended prices, and risks associated with orders and quotes trading at prices that are extreme and potentially erroneous, which may likely have resulted from human or operational error. The proposed enhancement that the Exchange will apply a minimum and maximum to the fat finger check will permit the Exchange to apply the fat finger check to bulk messages in a more meaningful way. The Exchange believes class flexibility is appropriate to permit the Exchange to apply reasonable buffers to classes, which may exhibit different trading characteristics and have different market models. The Exchange has other price checks and risk controls that permit it to set a minimum and maximum, as well as apply parameters on a class basis.¹¹

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(5).

¹⁰ *Id.*

¹¹ *See, e.g.*, Rule 21.17(a)(1) (market order NBBO width protection).

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 the proposed rule change will impose any burden on intramarket competition, as the proposed changes will apply in the same manner to all bulk messages submitted through a bulk port. The Exchange does not believe the proposed rule change will impose any burden on intermarket competition, as the proposed rule change applies to functionality that applies to incoming interest that may only rest or execute on the Exchange's book.

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

Because the foregoing proposed rule change does not:

A. significantly affect the protection of investors or the public interest;

B. impose any significant burden on competition; and

C. 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 Act¹² and Rule 19b-4(f)(6)¹³ 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.

¹² 15 U.S.C. 78s(b)(3)(A).

¹³ 17 CFR 240.19b-4(f)(6).

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-CboeBZX-2021-054 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-2021-054. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CboeBZX-2021-054 and should be submitted on or before September 1, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁴

Jill M. Peterson,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-92577; File No. SR-ISE-2021-16]

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend ISE's Options Regulatory Fee

August 5, 2021.

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 July 30, 2021, 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 ISE's Pricing Schedule at Options 7, Section 9, Part C related to the Options Regulatory Fee or "ORF".

While the changes proposed herein are effective upon filing, the Exchange has designated the amendments become operative on October 1, 2021.

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

Currently, ISE assesses an ORF of \$0.0018 per contract side as specified in ISE's Pricing Schedule at Options 7, Section 9, Part C. The Exchange proposes to waive its ORF from October 1, 2021 to January 31, 2022, and then recommence the ORF on February 1, 2022.

By way of background, the options industry has experienced extremely high options trading volumes and volatility. This historical anomaly of persistent increased options volumes has impacted ISE's ORF collection which, in turn, has caused the Exchange to continue to revisit its financial forecast to reflect the sustained elevated options volumes and volatility. As the Exchange continues to monitor the amount of revenue collected from the ORF to ensure that our ORF collection, in combination with other regulatory fees and fines, does not exceed regulatory costs, the Exchange has found it difficult to determine when volumes will return to more normal levels. In order to avoid iterative rule changes to amend its ORF, the Exchange believes it is prudent to instead waive its ORF from October 1, 2021 to January 31, 2022, to permit the Exchange to plan future forecasts without the need to account for any ORF collection during that timeframe. This proposal would ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, would not exceed the Exchange's total regulatory costs. ISE would recommence assessing its current ORF rate of \$0.0018 per contract side as of February 1, 2022. Furthermore, prior to February 1, 2022, ISE will examine its ORF rate to determine if the \$0.0018 per contract side ORF is justified given the current volumes in 2022 as well as the current Exchange regulatory expenses at that time. ISE would file a proposed rule change to amend its per contract ORF if changes are necessary to ensure an equitable allocation of reasonable ORF, if *e.g.*, the Exchange believes that the volumes ISE experiences in the second half of 2021 are likely to persist throughout 2022. Of note, ISE proposes to continue to operate with the ORF fee waived in January 2022 to allow its members and other broker dealers time to align their systems for February 1, 2022, allowing for time after the holiday period which traditionally have year-end code freezes in place.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

¹⁴ 17 CFR 200.30-3(a)(12).

Collection of ORF

Currently, ISE assesses its ORF for each customer option transaction that is either: (1) Executed by a member on ISE; or (2) cleared by an ISE member at The Options Clearing Corporation (“OCC”) in the customer range,³ even if the transaction was executed by a non-member of ISE, regardless of the exchange on which the transaction occurs.⁴

ORF Revenue and Monitoring of ORF

The Exchange monitors the amount of revenue collected from the ORF to ensure that it, in combination with other regulatory fees and fines, does not exceed regulatory costs. In determining whether an expense is considered a regulatory cost, the Exchange reviews all costs and makes determinations if there is a nexus between the expense and a regulatory function. The Exchange notes that fines collected by the Exchange in connection with a disciplinary matter offset ORF.

Revenue generated from ORF, when combined with all of the Exchange’s other regulatory fees and fines, is designed to recover a material portion of the regulatory costs to the Exchange of

the supervision and regulation of member customer options business including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. Regulatory costs include direct regulatory expenses and certain indirect expenses in support of the regulatory function. The direct expenses include in-house and third-party service provider costs to support the day-to-day regulatory work such as surveillances, investigations and examinations. The indirect expenses include support from such areas as Office of the General Counsel, technology, and internal audit. Indirect expenses are estimated to be approximately 42% of the total regulatory costs for 2021. Thus, direct expenses are estimated to be approximately 58% of total regulatory costs for 2021.

The ORF is designed to recover a material portion of the costs to the Exchange of the supervision and regulation of its members, including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities.

Proposal

Based on the Exchange’s most recent review, the Exchange proposes to waive ORF from October 1, 2021 to January 31, 2022, to help ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, does not exceed the Exchange’s total regulatory costs. ISE would recommence assessing its current ORF rate of \$0.0018 per contract side as of February 1, 2022. The Exchange issued an Options Trader Alert on July 2, 2021 indicating the proposed rate change for October 1, 2021.⁵

The proposed waiver is based on recent options volume which has remained at abnormally and unexpectedly high levels. Options volume in 2021 remains significantly high when that volume is compared to 2019 and 2020 options volume. For example, total options contract volume in November 2020 was 71% higher than the total options contract volume in November 2019.⁶ Below is industry data from OCC⁷ which illustrates the significant increase in volume during the fourth quarter of 2020.

Volume	October 2020	November 2020	December 2020	Q4 2020
Total	633,365,184	673,660,858	753,568,354	2,060,594,396
Customer	587,707,301	630,297,252	708,037,956	1,926,042,509
Total ADV	28,789,326.55	33,683,042.90	34,253,107.00	32,196,787.44
Customer ADV	26,713,968.23	31,514,862.60	32,183,543.45	30,094,414.20

Below is industry data from OCC⁸ which illustrates the significant increase in volume from January 2021 through

March 2021. The options volume in the first quarter of 2021 was higher than the fourth quarter of 2020. Also, April and

May 2021 volumes remain significantly high as compared to 2020 options volume in general.

Volume	January 2021	February 2021	March 2021	April 2021	May 2021
Total	838,339,790	823,412,827	898,653,388	711,388,828	718,368,993
Customer	784,399,878	782,113,450	837,247,059	667,208,963	659,913,862
Total ADV	44,123,146.84	43,337,517.20	39,071,886.40	33,875,658.50	35,918,449.70
Customer ADV	41,284,204.11	41,163,865.79	36,402,046.04	31,771,855.38	32,995,693.10

As a result of the historical anomaly created by these high options volumes, ISE has no assurance that the Exchange’s final costs for 2021 will not differ materially from these expectations and prior practice, nor can the Exchange predict with certainty whether options volume will remain at the current level going forward. The Exchange notes however, that when combined with

regulatory fees and fines, the revenue being generated utilizing the current ORF rate may result in revenue in excess of the Exchange’s estimated regulatory costs for the year. Particularly, as noted above, the options market has seen a substantial increase in volume in 2021 as compared to 2020, due in large part to the continued extreme volatility in the marketplace as

a result of the COVID–19 pandemic. This unprecedented spike in volatility resulted in significantly higher volume than was originally projected by the Exchange (thereby resulting in substantially higher ORF revenue than projected). The Exchange therefore proposes to waive ORF from October 1, 2021 to January 31, 2022 to ensure it does not exceed its regulatory costs for

³ Participants must record the appropriate account origin code on all orders at the time of entry of the order. The Exchange represents that it has surveillances in place to verify that members mark orders with the correct account origin code.

⁴ The Exchange uses reports from OCC when assessing and collecting the ORF.

⁵ See Options Trader Alert 2021–41.

⁶ See data from OCC at: <https://www.businesswire.com/news/home/>

20201202005584/en/OCC-November-2020-Total-Volume-Up-71-Percent-From-a-Year-Ago.

⁷ See data from OCC at: <https://www.theocc.com/Market-Data/Market-Data-Reports/Volume-and-Open-Interest/Volume-by-Account-Type>.

⁸ *Id.*

2021. Particularly, the Exchange believes that waiving ORF from October 1, 2021 to January 31, 2022 and considering all of the Exchange's other regulatory fees and fines would allow the Exchange to continue covering a material portion of its regulatory costs, while lessening the potential for generating excess revenue that may otherwise occur using the current rate.⁹

ISE would recommence assessing its current ORF rate of \$0.0018 per contract side as of February 1, 2022. Until October 1, 2021, the Exchange will continue to monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed regulatory costs. The Exchange would also continue monitoring the amount of revenue collected from the ORF when it recommences assessing ORF on February 1, 2022. If the Exchange determines regulatory revenues exceed regulatory costs, the Exchange will adjust the ORF by submitting a fee change filing to the Commission and notifying¹⁰ its members via an Options Trader Alert.¹¹

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.¹² Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,¹³ which provides that Exchange rules may provide for the equitable allocation of reasonable dues, fees, and other charges among its members, and other persons using its facilities. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹⁴ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

⁹ The Exchange notes that its regulatory responsibilities with respect to member compliance with options sales practice rules have largely been allocated to FINRA under a 17d-2 agreement. The ORF is not designed to cover the cost of that options sales practice regulation.

¹⁰ The Exchange will provide members with such notice at least 30 calendar days prior to the effective date of the change.

¹¹ The Exchange notes that in connection with this proposal, it provided the Commission confidential details regarding the Exchange's projected regulatory revenue, including projected revenue from ORF, along with a projected regulatory expenses.

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(4).

¹⁴ 15 U.S.C. 78f(b)(5).

The Exchange believes the proposed fee waiver is reasonable because customer transactions will be subject to no ORF from October 1, 2021 to January 31, 2022. Moreover, the proposed waiver is necessary, so the Exchange does not collect revenue in excess of its anticipated regulatory costs, in combination with other regulatory fees and fines, which is consistent with the Exchange's practices.

The Exchange designed the ORF to generate revenues that would be less than the amount of the Exchange's regulatory costs to ensure that it, in combination with its other regulatory fees and fines, does not exceed regulatory costs, which is consistent with the view of the Commission that regulatory fees be used for regulatory purposes and not to support the Exchange's business operations. As discussed above, however, after review of its regulatory costs and regulatory revenues, which includes revenues from ORF and other regulatory fees and fines, the Exchange determined that absent a reduction in ORF, it may be collecting revenue in excess of its regulatory costs. Indeed, the Exchange notes that when considering the recent options volume, which included an increase in customer options transactions, it estimates the ORF may generate revenues that may cover more than the approximated Exchange's projected regulatory costs. As such, the Exchange believes it's reasonable and appropriate to waive ORF from October 1, 2021 to January 31, 2022 and recommence assessing ORF on February 1, 2022.

The Exchange also believes the proposed fee change is equitable and not unfairly discriminatory as no member would be assessed an ORF from October 1, 2021 to January 31, 2022. While the Exchange has assessed and collected ORF from January through September, 2021, but will not collect ORF, with this proposal, from October 2021 through January 2022, the Exchange does not believe that it is unfairly discriminatory to not assess the ORF from October 2021 through January 2022 because the ORF is designed and intended to recover a portion of the Exchange's regulatory costs without collecting in excess of those costs. Unexpectedly high and sustained customer volume has resulted in higher revenues from the ORF that, if not suspended, will likely result in over-collection of ORF, which would be inconsistent with the Exchange's prior representations and undertaking to not collect ORF in excess of regulatory expenses. Despite decreasing the amount of the ORF on April 1, 2021, the Exchange did not decrease the amount

of the ORF again in 2021 because it did not expect, based on its prior experience, that customer volume would remain abnormally high. Also, it is equitable and not unfairly discriminatory to recommence the assessment of the ORF on February 1, 2022 because assessing the ORF to each member for options transactions cleared by OCC in the customer range where the execution occurs on another exchange and is cleared by an ISE member is an equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.¹⁵

The Exchange believes recommencing the ORF on February 1, 2022 at the same rate, unless options volumes or the Exchange's regulatory expense at that time warrant a proposed rule change, continues to ensure fairness by assessing higher fees to those members that require more Exchange regulatory services based on the amount of customer options business they conduct. As noted in prior ORF rule changes which set the current ORF rate of \$0.0018 per contract side, regulating customer trading activity is much more labor intensive and requires greater expenditure of human and technical resources than regulating non-customer trading activity, which tends to be more automated and less labor-intensive. For example, there are costs associated with main office and branch office examinations (e.g., staff expenses), as well as investigations into customer complaints and the terminations of registered persons.¹⁶

¹⁵ If the OCC clearing member is a ISE member, ORF is assessed and collected on all cleared customer contracts (after adjustment for CMTA); and (2) if the OCC clearing member is not a ISE member, ORF is collected only on the cleared customer contracts executed at ISE, taking into account any CMTA instructions which may result in collecting the ORF from a non-member.

¹⁶ See Securities Exchange Act Release No. 91420 (March 26, 2021), 86 FR 17223 (April 1, 2021) (SR-ISE-2021-04) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend ISE's Pricing Schedule at Options 7, Section 9, Part C To Reduce the Options Regulatory Fee). The Exchange also noted in this rule change that, "As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component (e.g., member proprietary transactions) of its regulatory program. Moreover, the Exchange notes that it has broad regulatory responsibilities with respect to activities of its members, irrespective of where their transactions take place. Many of the Exchange's surveillance programs for customer trading activity may require the Exchange to look at activity across all markets, such as reviews related to position limit violations and manipulation. Indeed, the Exchange cannot effectively review for such conduct without looking at and evaluating activity regardless of where it transpires. In addition to its own surveillance programs, the Exchange also works with other SROs

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 does not believe that this proposal creates an unnecessary or inappropriate intra-market or inter-market burden on competition for several reasons. First, ORF has been amended several times since its inception in 2009.¹⁷ For example, most recently on April 1, 2021, ISE amended its ORF rate from \$0.0020 to \$0.0018 per contract side as of April 1, 2021. Members who either executed a transaction on ISE or cleared a transaction at OCC in the customer range would have been assessed a higher ORF for a transaction executed on ISE on March 31, 2021 (\$0.0020 per contract side) as compared to April 1, 2021 (\$0.0018 per contract side). There have been other ORF amendments prior to 2021 which have caused ISE to assess different ORF rates to members for different time periods causing members to have paid different ORFs since 2009. Second, ISE's regulatory costs have varied over time. For example, if ISE received payment of a fine from a disciplinary action, that fine would offset regulatory costs and would cause ISE to require less regulatory revenue for a particular period. The changing regulatory costs would impact the ORF assessed by ISE to members. In the past, the Exchange has amended ORF to be higher or lower,¹⁸ thereby impacting the amount paid by members in a calendar year. Third, options markets assess ORF at different rates. For instance, today, Nasdaq MRX, LLC ("MRX") assesses a lower ORF of \$0.0004 per contract side.¹⁹ MRX has assessed this rate since

and exchanges on intermarket surveillance related issues. Through its participation in the Intermarket Surveillance Group ("ISG") the Exchange shares information and coordinates inquiries and investigations with other exchanges designed to address potential intermarket manipulation and trading abuses. Accordingly, there is a strong nexus between the ORF and the Exchange's regulatory activities with respect to customer trading activity of its members." See 86 FR 17225.

¹⁷ See also Securities Exchange Act Release Nos. 81345 (August 8, 2017), 82 FR 37939 (August 14, 2017) (SR-ISE-2017-71); 70859 (November 13, 2013), 78 FR 69501 (November 19, 2013) (SR-ISE-2014-54); 69270 (April 2, 2013), 78 FR 20988 (April 8, 2013) (SR-ISE-2013-28); 67087 (May 31, 2012), 77 FR 33535 (June 6, 2012) (SR-ISE-2012-43); and 62012 (April 30, 2010), 75 FR 25306 (May 7, 2010) (SR-ISE-2010-36).

¹⁸ *Id.*

¹⁹ See Securities Exchange Act Release Nos. 85127 (February 13, 2019), 84 FR 5173 (February 20, 2019) (SR-MRX-2019-03).

February 1, 2019.²⁰ Depending on where a customer order is executed, a member could be assessed a much different ORF. For example, in the case where a customer order is sent to ISE and routed to MRX, and a non-member cleared that transaction, the ISE ORF of \$0.0018 would not be assessed to the member who executed the transaction or cleared the transaction, rather the MRX rate of \$0.0004 per contract side would be assessed. In that same scenario presuming a non-member cleared the transaction, if the customer order could have executed on ISE instead of routing away the member would have been assessed the ISE ORF of \$0.0018 per contract side. The customer, in that instance, would have no knowledge of where the order could be executed, as the liquidity profile of each exchange may differ at that exact moment. Therefore, members could be assessed a different ORF on the same day on the same transaction based on routing decisions, and in those cases the member would continue to benefit from the regulatory program available on each market and discover where the liquidity is available, irrespective of any ORF rate differentials across markets.

The Exchange believes recommending the ORF on February 1, 2022 at the same rate, unless options volumes or the Exchange's regulatory expense at that time warrant a proposed rule change, does not create an undue burden on competition because the ORF applies to all customer activity, thereby raising regulatory revenue to offset regulatory expenses. It also supplements the regulatory revenue derived from non-customer activity. Recommending the assessment of the current ORF does not create an unnecessary or inappropriate inter-market burden on competition because it is a regulatory fee that supports regulation in furtherance of the purposes of the Act. The Exchange is obligated to ensure that the amount of regulatory revenue collected from the ORF, in combination with its other regulatory fees and fines, does not exceed regulatory costs.

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.

²⁰ Of note, prior to February 1, 2019, MRX assessed no ORF thereby creating a calendar year where members were assessed no ORF for a period similar to what is proposed.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)²¹ of the Act and subparagraph (f)(2) of Rule 19b-4²² thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)²³ of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File No. SR-ISE-2021-16 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 No. SR-ISE-2021-16. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the

²¹ 15 U.S.C. 78s(b)(3)(A).

²² 17 CFR 240.19b-4(f)(2).

²³ 15 U.S.C. 78s(b)(2)(B).

Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-ISE-2021-16, and should be submitted on or before September 1, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁴

Jill M. Peterson,
Assistant Secretary.

[FR Doc. 2021-17084 Filed 8-10-21; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-92585; File No. SR-Phlx-2021-39]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Phlx's Options Regulatory Fee

August 5, 2021.

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 July 30, 2021, 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 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 Phlx's Pricing Schedule at Options 7,

Section 6, Part D related to the Options Regulatory Fee or "ORF".

While the changes proposed herein are effective upon filing, the Exchange has designated the amendments become operative on October 1, 2021.

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

Currently, Phlx assesses an ORF of \$0.0042 per contract side as specified in Phlx's Pricing Schedule at Options 7, Section 6, Part D. The Exchange proposes to waive its ORF from October 1, 2021 to January 31, 2022, and then recommence the ORF on February 1, 2022.

By way of background, the options industry has experienced extremely high options trading volumes and volatility. This historical anomaly of persistent increased options volumes has impacted Phlx's ORF collection which, in turn, has caused the Exchange to continue to revisit its financial forecast to reflect the sustained elevated options volumes and volatility. As the Exchange continues to monitor the amount of revenue collected from the ORF to ensure that our ORF collection, in combination with other regulatory fees and fines, does not exceed regulatory costs, the Exchange has found it difficult to determine when volumes will return to more normal levels. In order to avoid iterative rule changes to amend its ORF, the Exchange believes it is prudent to instead waive its ORF from October 1, 2021 to January 31, 2022, to permit the Exchange to plan future forecasts without the need to account for any ORF collection during

that timeframe. This proposal would ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, would not exceed the Exchange's total regulatory costs. Phlx would recommence assessing its current ORF rate of \$0.0042 per contract side as of February 1, 2022. Furthermore, prior to February 1, 2022, Phlx will examine its ORF rate to determine if the \$0.0042 per contract side ORF is justified given the current volumes in 2022 as well as the current Exchange regulatory expenses at that time. Phlx would file a proposed rule change to amend its per contract ORF if changes are necessary to ensure an equitable allocation of reasonable ORF, if e.g., the Exchange believes that the volumes Phlx experiences in the second half of 2021 are likely to persist throughout 2022. Of note, Phlx proposes to continue to operate with the ORF fee waived in January 2022 to allow its member organizations and other broker dealers time to align their systems for February 1, 2022, allowing for time after the holiday period which traditionally have year-end code freezes in place.

Collection of ORF

Currently, Phlx assesses its ORF for each customer option transaction that is either: (1) Executed by a member organization³ on Phlx; or (2) cleared by a Phlx member organization at The Options Clearing Corporation ("OCC") in the customer range,⁴ even if the transaction was executed by a non-member organization of Phlx, regardless of the exchange on which the transaction occurs.⁵

ORF Revenue and Monitoring of ORF

The Exchange monitors the amount of revenue collected from the ORF to ensure that it, in combination with other

³ The term "member organization" means a corporation, partnership (general or limited), limited liability partnership, limited liability company, business trust or similar organization, transacting business as a broker or a dealer in securities and which has the status of a member organization by virtue of (i) admission to membership given to it by the Membership Department pursuant to the provisions of General 3, Sections 5 and 10 or the By-Laws or (ii) the transitional rules adopted by the Exchange pursuant to Section 6-4 of the By-Laws. References herein to officer or partner, when used in the context of a member organization, shall include any person holding a similar position in any organization other than a corporation or partnership that has the status of a member organization. See General 1, Section 1(17).

⁴ Participants must record the appropriate account origin code on all orders at the time of entry of the order. The Exchange represents that it has surveillances in place to verify that member organizations mark orders with the correct account origin code.

⁵ The Exchange uses reports from OCC when assessing and collecting the ORF.

²⁴ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

regulatory fees and fines, does not exceed regulatory costs. In determining whether an expense is considered a regulatory cost, the Exchange reviews all costs and makes determinations if there is a nexus between the expense and a regulatory function. The Exchange notes that fines collected by the Exchange in connection with a disciplinary matter offset ORF.

Revenue generated from ORF, when combined with all of the Exchange's other regulatory fees and fines, is designed to recover a material portion of the regulatory costs to the Exchange of the supervision and regulation of member⁶ and member organization customer options business including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. Regulatory costs include direct regulatory expenses and certain indirect expenses in support of the regulatory function. The direct expenses include

in-house and third-party service provider costs to support the day-to-day regulatory work such as surveillances, investigations and examinations. The indirect expenses include support from such areas as Office of the General Counsel, technology, and internal audit. Indirect expenses are estimated to be approximately 42% of the total regulatory costs for 2021. Thus, direct expenses are estimated to be approximately 58% of total regulatory costs for 2021.

The ORF is designed to recover a material portion of the costs to the Exchange of the supervision and regulation of its members and member organizations, including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities.

Proposal

Based on the Exchange's most recent review, the Exchange proposes to waive

ORF from October 1, 2021 to January 31, 2022, to help ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, does not exceed the Exchange's total regulatory costs. Phlx would recommence assessing its current ORF rate of \$0.0042 per contract side as of February 1, 2022. The Exchange issued an Options Trader Alert on July 2, 2021 indicating the proposed rate change for October 1, 2021.⁷

The proposed waiver is based on recent options volume which has remained at abnormally and unexpectedly high levels. Options volume in 2021 remains significantly high when that volume is compared to 2019 and 2020 options volume. For example, total options contract volume in November 2020 was 71% higher than the total options contract volume in November 2019.⁸ Below is industry data from OCC⁹ which illustrates the significant increase in volume during the fourth quarter of 2020.

Volume	October 2020	November 2020	December 2020	Q4 2020
Total	633,365,184	673,660,858	753,568,354	2,060,594,396
Customer	587,707,301	630,297,252	708,037,956	1,926,042,509
Total ADV	28,789,326.55	33,683,042.90	34,253,107.00	32,196,787.44
Customer ADV	26,713,968.23	31,514,862.60	32,183,543.45	30,094,414.20

⁶ The term "member" means a permit holder which has not been terminated in accordance with the By-Laws and these Rules of the Exchange. A member is a natural person and must be a person associated with a member organization. Any references in the rules of the Exchange to the rights

or obligations of an associated person or person associated with a member organization also includes a member. See General 1, Section 1(16).

⁷ See Options Trader Alert 2021-41.

⁸ See data from OCC at: <https://www.businesswire.com/news/home/>

[2021202005584/en/OCC-November-2020-Total-Volume-Up-71-Percent-From-a-Year-Ago](https://www.theocc.com/2021202005584/en/OCC-November-2020-Total-Volume-Up-71-Percent-From-a-Year-Ago).

⁹ See data from OCC at: <https://www.theocc.com/Market-Data/Market-Data-Reports/Volume-and-Open-Interest/Volume-by-Account-Type>.

Below is industry data from OCC¹⁰ which illustrates the significant increase in volume from January 2021 through

March 2021. The options volume in the first quarter of 2021 was higher than the fourth quarter of 2020. Also, April and

May 2021 volumes remain significantly high as compared to 2020 options volume in general.

Volume	January 2021	February 2021	March 2021	April 2021	May 2021
Total	838,339,790	823,412,827	898,653,388	711,388,828	718,368,993
Customer	784,399,878	782,113,450	837,247,059	667,208,963	659,913,862
Total ADV	44,123,146.84	43,337,517.20	39,071,886.40	33,875,658.50	35,918,449.70
Customer ADV	41,284,204.11	41,163,865.79	36,402,046.04	31,771,855.38	32,995,693.10

As a result of the historical anomaly created by these high options volumes, Phlx has no assurance that the Exchange’s final costs for 2021 will not differ materially from these expectations and prior practice, nor can the Exchange predict with certainty whether options volume will remain at the current level going forward. The Exchange notes however, that when combined with regulatory fees and fines, the revenue being generated utilizing the current ORF rate may result in revenue in excess of the Exchange’s estimated regulatory costs for the year. Particularly, as noted above, the options market has seen a substantial increase in volume in 2021 as compared to 2020, due in large part to the continued extreme volatility in the marketplace as a result of the COVID–19 pandemic. This unprecedented spike in volatility resulted in significantly higher volume than was originally projected by the Exchange (thereby resulting in substantially higher ORF revenue than projected). The Exchange therefore proposes to waive ORF from October 1, 2021 to January 31, 2022 to ensure it does not exceed its regulatory costs for 2021. Particularly, the Exchange believes that waiving ORF from October 1, 2021 to January 31, 2022 and considering all of the Exchange’s other regulatory fees and fines would allow the Exchange to continue covering a material portion of its regulatory costs, while lessening the potential for generating excess revenue that may otherwise occur using the current rate.¹¹

Phlx would recommence assessing its current ORF rate of \$0.0042 per contract side as of February 1, 2022. Until October 1, 2021, the Exchange will continue to monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed regulatory costs. The Exchange would also continue monitoring the

amount of revenue collected from the ORF when it recommences assessing ORF on February 1, 2022. If the Exchange determines regulatory revenues exceed regulatory costs, the Exchange will adjust the ORF by submitting a fee change filing to the Commission and notifying¹² its member organizations via an Options Trader Alert.¹³

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.¹⁴ Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,¹⁵ which provides that Exchange rules may provide for the equitable allocation of reasonable dues, fees, and other charges among its members, member organizations, and other persons using its facilities. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹⁶ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes the proposed fee waiver is reasonable because customer transactions will be subject to no ORF from October 1, 2021 to January 31, 2022. Moreover, the proposed waiver is necessary, so the Exchange does not collect revenue in excess of its anticipated regulatory costs, in combination with other regulatory fees and fines, which is consistent with the Exchange’s practices.

The Exchange designed the ORF to generate revenues that would be less than the amount of the Exchange’s regulatory costs to ensure that it, in combination with its other regulatory fees and fines, does not exceed

regulatory costs, which is consistent with the view of the Commission that regulatory fees be used for regulatory purposes and not to support the Exchange’s business operations. As discussed above, however, after review of its regulatory costs and regulatory revenues, which includes revenues from ORF and other regulatory fees and fines, the Exchange determined that absent a reduction in ORF, it may be collecting revenue in excess of its regulatory costs. Indeed, the Exchange notes that when considering the recent options volume, which included an increase in customer options transactions, it estimates the ORF may generate revenues that may cover more than the approximated Exchange’s projected regulatory costs. As such, the Exchange believes it’s reasonable and appropriate to waive ORF from October 1, 2021 to January 31, 2022 and recommence assessing ORF on February 1, 2022.

The Exchange also believes the proposed fee change is equitable and not unfairly discriminatory as no member organization would be assessed an ORF from October 1, 2021 to January 31, 2022. While the Exchange has assessed and collected ORF from January through September, 2021, but will not collect ORF, with this proposal, from October 2021 through January 2022, the Exchange does not believe that it is unfairly discriminatory to not assess the ORF from October 2021 through January 2022 because the ORF is designed and intended to recover a portion of the Exchange’s regulatory costs without collecting in excess of those costs. Unexpectedly high and sustained customer volume has resulted in higher revenues from the ORF that, if not suspended, will likely result in over-collection of ORF, which would be inconsistent with the Exchange’s prior representations and undertaking to not collect ORF in excess of regulatory expenses. Despite decreasing the

¹⁰ *Id.*

¹¹ The Exchange notes that its regulatory responsibilities with respect to member compliance with options sales practice rules have largely been allocated to FINRA under a 17d–2 agreement. The ORF is not designed to cover the cost of that options sales practice regulation.

¹² The Exchange will provide member organizations with such notice at least 30 calendar days prior to the effective date of the change.

¹³ The Exchange notes that in connection with this proposal, it provided the Commission confidential details regarding the Exchange’s projected regulatory revenue, including projected

revenue from ORF, along with a projected regulatory expenses.

¹⁴ 15 U.S.C. 78f(b).

¹⁵ 15 U.S.C. 78f(b)(4).

¹⁶ 15 U.S.C. 78f(b)(5).

amount of the ORF on April 1, 2021, the Exchange did not decrease the amount of the ORF again in 2021 because it did not expect, based on its prior experience, that customer volume would remain abnormally high. Also, it is equitable and not unfairly discriminatory to recommence the assessment of the ORF on February 1, 2022 because assessing the ORF to each member organization for options transactions cleared by OCC in the customer range where the execution occurs on another exchange and is cleared by a Phlx member organization is an equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.¹⁷

The Exchange believes recommencing the ORF on February 1, 2022 at the same rate, unless options volumes at that time warrant a proposed rule change, continues to ensure fairness by assessing higher fees to those member organizations that require more Exchange regulatory services based on the amount of customer options business they conduct. As noted in prior ORF rule changes which set the current ORF rate of \$0.0042 per contract side, regulating customer trading activity is much more labor intensive and requires greater expenditure of human and technical resources than regulating non-customer trading activity, which tends to be more automated and less labor-intensive. For example, there are costs associated with main office and branch office examinations (e.g., staff expenses), as well as investigations into customer complaints and the terminations of registered persons.¹⁸

¹⁷ If the OCC clearing member is a Phlx member organization, ORF is assessed and collected on all cleared customer contracts (after adjustment for CMTA); and (2) if the OCC clearing member is not a Phlx member organization, ORF is collected only on the cleared customer contracts executed at Phlx, taking into account any CMTA instructions which may result in collecting the ORF from a non-member organization.

¹⁸ See Securities Exchange Act Release No. 91418 (March 26, 2021), 86 FR 17254 (April 1, 2021) (SR-Phlx-2021-16) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Phlx's Pricing Schedule at Options 7, Section 6, Part D To Reduce the Phlx Options Regulatory Fee). The Exchange also noted in this rule change that, "As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component (e.g., member organization proprietary transactions) of its regulatory program. Moreover, the Exchange notes that it has broad regulatory responsibilities with respect to activities of its member organizations, irrespective of where their transactions take place. Many of the Exchange's surveillance programs for customer trading activity may require the Exchange to look at activity across all markets, such as reviews related to position limit violations and

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 does not believe that this proposal creates an unnecessary or inappropriate intra-market or inter-market burden on competition for several reasons. First, ORF has been amended several times since its inception in 2009.¹⁹ For example, most recently on April 1, 2021, Phlx amended its ORF rate from \$0.0050 to \$0.0042 per contract side as of April 1, 2021. Member organizations who either executed a transaction on Phlx or cleared a transaction at OCC in the customer range would have been assessed a higher ORF for a transaction executed on Phlx on March 31, 2021 (\$0.0050 per contract side) as compared to April 1, 2021 (\$0.0042 per contract side). There have been other ORF amendments prior to 2021 which have caused Phlx to assess different ORF rates to member organizations for different time periods causing member organizations to have paid different ORFs since 2009. Second, Phlx's regulatory costs have varied over time. For example, if Phlx received payment of a fine from a disciplinary action, that fine would offset regulatory costs and would cause Phlx to require less regulatory revenue for a particular

manipulation. Indeed, the Exchange cannot effectively review for such conduct without looking at and evaluating activity regardless of where it transpires. In addition to its own surveillance programs, the Exchange also works with other SROs and exchanges on intermarket surveillance related issues. Through its participation in the Intermarket Surveillance Group ("ISG") the Exchange shares information and coordinates inquiries and investigations with other exchanges designed to address potential intermarket manipulation and trading abuses. Accordingly, there is a strong nexus between the ORF and the Exchange's regulatory activities with respect to customer trading activity of its member organizations." See 86 FR 17256-7.

¹⁹ See Securities Exchange Act Release Nos. 61133 (December 9, 2009), 74 FR 66715 (December 16, 2009) (SR-Phlx-2009-100); 1529 (February 17, 2010), 75 FR 8421 (February 24, 2010) (SR-Phlx-2010-17); 62619 (July 30, 2010), 75 FR 47874 (August 9, 2010) (SR-Phlx-2010-100); 63436 (December 6, 2010), 75 FR 77021 (December 10, 2010) (SR-Phlx-2010-166); 65897 (December 6, 2011), 76 FR 77277 (December 12, 2011) (SR-Phlx-2011-163); 66664 (March 27, 2012), 77 FR 19743 (April 2, 2012) (SR-Phlx-2012-36); 71569 (February 19, 2014), 79 FR 10593 (February 25, 2014) (SR-Phlx-2014-12); 75749 (August 21, 2015), 80 FR 52073 (August 27, 2017) (SR-Phlx-2015-71); 77032 (February 2, 2016), 81 FR 6560 (February 8, 2016) (SR-Phlx-2016-04); and 79751 (January 6, 2017), 82 FR 3826 (January 12, 2017) (SR-Phlx-2017-02); 81343 (August 8, 2017), 82 FR 37964 (August 14, 2017) (SR-Phlx-2017-54); and 85125 (February 13, 2019), 84 FR 5171 (February 20, 2019) (SR-Phlx-2019-01).

period. The changing regulatory costs would impact the ORF assessed by Phlx to member organizations. In the past, the Exchange has amended ORF to be higher or lower,²⁰ thereby impacting the amount paid by member organizations in a calendar year. Third, options markets assess ORF at different rates. For instance, today, Nasdaq MRX, LLC ("MRX") assesses a lower ORF of \$0.0004 per contract side.²¹ MRX has assessed this rate since February 1, 2019.²² Depending on where a customer order is executed, a member organization could be assessed a much different ORF. For example, in the case where a customer order is sent to Phlx and routed to MRX, and a non-member organization cleared that transaction, the Phlx ORF of \$0.0042 would not be assessed to the member organization who executed the transaction or cleared the transaction, rather the MRX rate of \$0.0004 per contract side would be assessed. In that same scenario presuming a non-member organization cleared the transaction, if the customer order could have executed on Phlx instead of routing away the member organization would have been assessed the Phlx ORF of \$0.0042 per contract side. The customer, in that instance, would have no knowledge of where the order could be executed, as the liquidity profile of each exchange may differ at that exact moment. Therefore, member organizations could be assessed a different ORF on the same day on the same transaction based on routing decisions, and in those cases the member organization would continue to benefit from the regulatory program available on each market and discover where the liquidity is available, irrespective of any ORF rate differentials across markets.

The Exchange believes recommencing the ORF on February 1, 2022 at the same rate, unless options volumes or the Exchange's regulatory expenses at that time warrant a proposed rule change, does not create an undue burden on competition because the ORF applies to all customer activity, thereby raising regulatory revenue to offset regulatory expenses. It also supplements the regulatory revenue derived from non-customer activity. Recommencing the assessment of the current ORF does not create an unnecessary or inappropriate inter-market burden on competition

²⁰ *Id.*

²¹ See Securities Exchange Act Release Nos. 85127 (February 13, 2019), 84 FR 5173 (February 20, 2019) (SR-MRX-2019-03).

²² Of note, prior to February 1, 2019, MRX assessed no ORF thereby creating a calendar year where member organizations were assessed no ORF for a period similar to what is proposed.

because it is a regulatory fee that supports regulation in furtherance of the purposes of the Act. The Exchange is obligated to ensure that the amount of regulatory revenue collected from the ORF, in combination with its other regulatory fees and fines, does not exceed regulatory costs.

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 is effective upon filing pursuant to Section 19(b)(3)(A)²³ of the Act and subparagraph (f)(2) of Rule 19b-4²⁴ thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

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)²⁵ of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File No. SR-Phlx-2021-39 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 No. SR-Phlx-2021-39. This file number

should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-Phlx-2021-39, and should be submitted on or before September 1, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁶

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2021-17089 Filed 8-10-21; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-92566; File No. SR-NSCC-2021-011]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing of a Proposed Rule Change To Remove ID Net Transactions From the Required Fund Deposit Calculations and Make Other Changes to the Rules

August 5, 2021.

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 July 27, 2021, National Securities Clearing Corporation ("NSCC") 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 clearing agency. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change consists of modifications to NSCC's Rules & Procedures ("Rules") to (1) remove transactions processed through the ID Net Service from the calculation of Members' Required Fund Deposits to the Clearing Fund; (2) provide greater transparency regarding the status of the ID Net Service as a non-guaranteed service and how transactions processed through the ID Net Service are handled following a Member default; and (3) make other changes to the Rules to implement these proposed changes, as described in greater detail below.³

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the clearing agency 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 clearing agency has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NSCC is proposing to revise its margining methodology to remove institutional delivery ("ID") transactions that are processed through the ID Net Service from the calculation of Members' Required Deposits to the Clearing Fund, as described in greater detail below.⁴ While ID transactions processed through the ID Net Service ("ID Net Transactions") are netted with transactions that have been processed through NSCC's continuous net

³ Capitalized terms not defined herein are defined in the Rules, available at http://dtcc.com/~lmedia/Files/Downloads/legal/rules/nscs_rules.pdf.

⁴ See Rule 65 (ID Net Service) and Procedure XVI (ID Net Service) of the Rules, *supra* note 3.

²³ 15 U.S.C. 78s(b)(3)(A).

²⁴ 17 CFR 240.19b-4(f)(2).

²⁵ 15 U.S.C. 78s(b)(2)(B).

²⁶ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

settlement (“CNS”) system, these transactions are not subject to NSCC’s trade guarantee.⁵ Therefore, the proposed change would improve NSCC’s ability to collect Required Fund Deposits from its Members that more accurately reflect the positions that it may be required to complete in the event of a Member default.

NSCC is also proposing to amend the Rules to provide greater transparency regarding the status of the ID Net Service as a non-guaranteed service and how ID Net Transactions are handled following a Member default. Finally, NSCC is proposing to make other changes to the Rules to implement these proposed changes.

Overview of ID Transactions and the ID Net Service

The parties involved in an ID transaction include the institutional investor (such as mutual funds, insurance companies, hedge funds, bank trust departments and pension funds), the investment manager (who enters trade orders on behalf of institutional investors), the buying broker and the selling broker, and custodian banks. After execution, the trade allocation details of ID transactions are matched between the executing broker and the investment manager or institutional investor’s custodian bank. After an executing broker has provided a final notice of execution, most investment managers will provide client trade allocation details to the executing broker using a service provided by NSCC’s affiliate, Institutional Trade Processing (“ITP”).

When the executing broker accepts and processes the trade allocations, an electronic confirmation is provided through ITP’s TradeSuite ID™ service to the investment manager or the institutional investor’s custodian bank for affirmation.⁶ ITP links with the various parties to institutional trades to provide real-time central matching electronically comparing trade details and notifying parties of any exceptions.⁷ After the trade allocation details are affirmed, the institutional delivery details are sent to The Depository Trust Company (“DTC”) where the trade is settled. NSCC risk management receives

a daily feed from ITP that includes both ID transactions that have only been confirmed as well as those that have also been affirmed. Some eligible ID transactions may be processed through NSCC’s CNS Accounting Operation or Balance Order Accounting Operation, as applicable, for clearance and settlement with the buying broker and selling broker as counterparties.⁸

Alternatively, Members may subscribe for the ID Net Service and direct ID transactions to be submitted to NSCC and DTC pursuant to this service. The ID Net Service is a joint service of NSCC and DTC that allows the executing brokers that are subscribers to the service to net affirmed eligible ID transactions that are held at DTC with transactions that have been processed through CNS. ID Net Transactions net with CNS obligations to create efficiencies in settlement but these transactions are not processed through CNS. The ID Net Service accepts affirmed transactions in Eligible ID Net Securities (as defined in Rule 65 (ID Net Service) of the Rules) and nets the broker-dealer side of such transactions with the broker-dealer’s CNS obligations.⁹ Most equity securities that are eligible for processing through CNS are Eligible ID Net Securities.

Participation in the ID Net Service is voluntary. Eligibility for the ID Net Service requires that the broker-dealer in the ID transaction be an NSCC Member and a participant of DTC. The custodian bank in the ID transaction must be a DTC participant. In addition, eligibility for ID Net Service processing is based on the underlying security being processed, the type of transaction submitted for processing, and the timing of affirmation. As described in Procedure XVI of the Rules, ID Net Transactions that are not completed by the cut-off time established by NSCC (currently 11:30 a.m. EST) on settlement day are exited from NSCC’s systems and must be settled on a trade-for-trade basis away from NSCC.¹⁰

This service provides Members with the operational benefit of netting these transactions with their CNS obligations, allowing them to combine their affirmed ID transactions with other trades in CNS. As noted above, ID Net transactions are not subject to NSCC’s trade guarantee.

Required Fund Deposit and Risk Management of ID Net Transactions

As part of its market risk management strategy, NSCC manages its credit exposure to Members by determining the appropriate Required Fund Deposits to the Clearing Fund and monitoring its sufficiency, as provided for in the Rules.¹¹ The Required Fund Deposit serves as each Member’s margin. The objective of a Member’s Required Fund Deposit is to mitigate potential losses to NSCC associated with liquidating a Member’s portfolio in the event NSCC ceases to act for that Member (hereinafter referred to as a “default”).¹² The aggregate of all Members’ Required Fund Deposits constitutes the Clearing Fund of NSCC. NSCC would access its Clearing Fund should a defaulting Member’s own Required Fund Deposit be insufficient to satisfy losses to NSCC caused by the liquidation of that Member’s portfolio.

Pursuant to the Rules, each Member’s Required Fund Deposit amount consists of a number of applicable components, each of which is calculated to address specific risks faced by NSCC, and are described in Procedure XV of the Rules.¹³ Because ID Net Transactions are netted with CNS transactions, these transactions are currently included in the netted positions that are used to calculate certain components of Members’ Required Fund Deposits. These components include the volatility component, the mark-to-market component, which includes both a Regular Mark-to-Market charge and an ID Net Mark-to-Market charge, the Margin Requirement Differential component (“MRD charge”), and a margin liquidity adjustment charge (“MLA charge”).

The volatility component of each Member’s Required Fund Deposit is designed to measure market price volatility and is calculated for Members’ net of unsettled pending positions, defined as “Net Unsettled Positions.”¹⁴ Currently, Members’ Net Unsettled Positions, for purposes of calculating

¹¹ See Rule 4 (Clearing Fund) and Procedure XV (Clearing Fund Formula and Other Matters), *supra* note 3. NSCC’s market risk management strategy is designed to comply with Rule 17Ad-22(e)(4) under the Act, where these risks are referred to as “credit risks.” 17 CFR 240.17Ad-22(e)(4).

¹² The Rules identify when NSCC may cease to act for a Member and the types of actions NSCC may take. For example, NSCC may suspend a firm’s membership with NSCC or prohibit or limit a Member’s access to NSCC’s services in the event that Member defaults on a financial or other obligation to NSCC. See Rule 46 (Restrictions on Access to Services) of the Rules, *supra* note 3.

¹³ *Supra* note 3.

¹⁴ See Sections I(A)(1)(a) and (2)(a) of Procedure XV of the Rules, *supra* note 3.

⁵ Transactions processed through the ID Net Service have never been subject to NSCC’s trade guarantee. This service was implemented only to provide Members with the operational benefit of netting these transactions with their CNS obligations, as described in greater detail below.

⁶ For more information regarding this service, see <https://www.dtcc.com/institutional-trade-processing/itp/tradesuite-id>.

⁷ Exceptions occur when the mandatory matching fields (for example, security identifier or settlement date) do not match.

⁸ See Section B (Institutional Clearing Service) of Procedure IV (Special Representative Service) of the Rules, *supra* note 3.

⁹ See *supra* note 4.

¹⁰ *Supra* note 3.

the volatility component, include ID Net Transactions. The volatility component captures the market price risk associated with each Member's portfolio at a 99th percentile level of confidence. NSCC has two methodologies for calculating the volatility component. The volatility component applicable to most Net Unsettled Positions is calculated using a parametric Value at Risk ("VaR") model and usually comprises the largest portion of a Member's Required Fund Deposit ("VaR Charge").¹⁵

The mark-to-market component measures the unrealized profit or loss using the contract price versus the Current Market Price (which is the price for a security determined daily for purposes of the CNS system; generally, the prior day's closing price).¹⁶ NSCC calculates both a Regular Mark-to-Market charge and, for Members that subscribe to the ID Net Service, NSCC also calculates a separate ID Net mark-to-market component with respect to only ID Net Transactions, using the same calculation, referred to in the Rules as the ID Net Mark-to-Market charge.¹⁷ For both calculations, and only with respect to Members that use the ID Net Service, if the mark-to-market calculation results in a positive number, there is no mark-to-market charge applied.¹⁸

The MRD charge is designed to help mitigate the risks posed to NSCC by day-over-day fluctuations in a Member's portfolio by forecasting future changes in a Member's portfolio based on a 100-day historical look-back at each Member's portfolio over a given time period.¹⁹ Currently, the charge is calculated as the sum of the changes in a Member's Regular Mark-to-Market charge, ID Net Mark-to-Market charge, and volatility component over the look-back period. Finally, the MLA charge is designed to address the risk presented to NSCC when a Member's portfolio contains large Net Unsettled Positions in a particular group of securities with a similar risk profile or in a particular asset type.²⁰ Similar to the volatility

component, the MLA charge is calculated on a Member's Net Unsettled Positions, which currently includes ID Net Transactions.

Proposed Enhancement to NSCC's Margining Methodology

NSCC is proposing to enhance its margining methodology to remove ID Net Transactions from the calculation of Members' Required Fund Deposits. NSCC does not guaranty the completion of these ID Net Transactions, so, in the event of a Member default, these transactions are excluded from NSCC's operations to be settled away from NSCC. By removing ID Net Transactions from the calculation of Members' Required Fund Deposits, NSCC would be able to calculate and collect an amount that more accurately reflects the risks presented by positions it would be obligated to complete in the event of a Member default.

Including ID Net Transactions in the margin calculations presents the risk that NSCC is either under-margining or over-margining the positions of Members that use the ID Net Service.²¹ However, NSCC does not expect the proposed change to have a material impact on the size of its Clearing Fund. At the time of this filing, only twelve Members are subscribed to the ID Net Service, and their Required Fund Deposits are driven primarily by their CNS and Balance Order activity. For most of these Members, the inclusion of ID Net Transactions in margin calculations has an immaterial impact on these Members' Required Fund Deposits on a typical business day. In connection with its regular review of its margining methodology, NSCC has determined that it could more accurately and, therefore, more effectively measure the risks it faces following a Member default by removing these non-guaranteed positions from its margining methodology.

In order to implement this proposed change, NSCC would remove ID Net Transactions from Members' Net Unsettled Positions for purposes of calculating the volatility charge and the MLA charge. NSCC would also (1) eliminate the ID Net Mark-to-Market charge from the Required Fund Deposit calculations by removing Section I(A)(1)(c) from Procedure XV of the

Rules and (2) amend Section I(A)(1)(b) of Procedure XV of the Rules to make clear that ID Net Transactions are not included in the calculation of the Regular Mark-to-Market charge. Finally, NSCC would amend Section I(A)(1)(f) (which will be renamed Section I(A)(1)(e) following implementation of the proposed changes) and Section I(A)(2)(d) of Procedure XV of the Rules, which describe the calculation of the MRD charge, to remove the ID Net Mark-to-Market charge from this description.

NSCC is not proposing any other changes to the calculation of these margin charges and is not proposing any changes to the operation of the ID Net Service.

Proposed Changes to Clarify the Non-Guaranteed Status of ID Net Service

NSCC is also proposing to amend Rule 65 (ID Net Service) and Rule 18 (Procedures for when the Corporation Declines or Ceases to Act) to provide greater transparency and clarity into how ID Net Transactions are processed in the event of a Member default. As stated above, the ID Net Service provides Members with the operational benefit of netting these transactions through NSCC's CNS system, allowing them to combine their affirmed ID transactions with other trades in CNS. However, ID Net Transactions are not subject to NSCC's trade guarantee and would be exited from NSCC's systems in the event of a Member default.

Currently, Rule 65 current describes the circumstances in which NSCC may remove a Member's status as an ID Net Subscriber, which include the circumstances that provide NSCC with the right to suspend, prohibit or limit a Member's access to NSCC's services under Rule 46 (Restrictions on Access to Services) of the Rules.²² Additionally, Procedure XVI (ID Net Service) of the Rules describes NSCC's ability to exit ID Net Transactions from its operations.²³ Because the ID Net Service is not a guaranteed service, NSCC would rely on these rules to exit ID Net Transactions from its operations in the event of a Member default. Specifically, if NSCC ceases to act for a Member that is an ID Net Subscriber, that firm would no longer be eligible to use the service pursuant to Rule 65, and NSCC would exit its ID Net Transactions from its operations, and those transactions would be settled on a trade-for-trade basis outside the ID Net Service.²⁴ NSCC

¹⁵ As described in Procedure XV, Section I(A)(1)(a)(ii), (iii) and (iv), and Section I(A)(2)(a)(ii), (iii) and (iv) of the Rules, Net Unsettled Positions in certain securities are excluded from the VaR Charge and instead charged a volatility component that is calculated by multiplying the absolute value of those Net Unsettled Positions by a percentage. *Supra* note 3.

¹⁶ See Section I(A)(1)(b) of Procedure XV of the Rules, *supra* note 3. See also the definition of "Current Market Price" in Rule 1 (Definitions and Descriptions), *id.*

¹⁷ See Section I(A)(1)(c) of Procedure XV of the Rules, *supra* note 3.

¹⁸ See *id.*

¹⁹ See Section I(A)(1)(f) and (d) of Procedure XV of the Rules, *supra* note 3.

²⁰ See *supra* note 3.

²¹ For example, if the inclusion of ID Net Transactions in a Member's Net Unsettled Positions results in a lower margin charge (as compared to the margin charge that would have been calculated for that Member if those ID Net Transactions were excluded from its Net Unsettled Positions), NSCC could be under-margining on that Net Unsettled Position.

²² See Section 5(b) of Rule 65 (ID Net Service) and Section 1 of Rule 46 (Restrictions on Access to Services) of the Rules, *supra* note 3.

²³ See *supra* note 3.

²⁴ See Securities Exchange Act Release No. 57901 (June 2, 2008), 73 FR 32373, at 32375 (June 6, 2008)

is proposing to amend Rules 65 and 18 of the Rules to improve the transparency of the Rules in describing this service as non-guaranteed and to provide clarity on how these transactions will be processed in the event of a Member default.

First, NSCC would include a statement in a new Section 5(c) of Rule 65 of the Rules that states the ID Net Service is not a guaranteed service, and refers to Rule 18 of the Rules to describe how ID Net Transactions would be treated if NSCC ceases to act for a Member that is an ID Net Subscriber. Second, NSCC would amend Section 2(a) of Rule 18 of the Rules to make it clear that uncompleted transactions processed through the ID Net Service in accordance with Rule 65 would be excluded from NSCC's operations if NSCC ceased to act for a Member that is an ID Net Subscriber pursuant to Rule 46 of the Rules.

The proposed changes to Rules 65 and 18 of the Rules would use language that is similar to language used to describe two other non-guaranteed NSCC services—the Automated Customer Account Transfer Service (“ACATS”) and the Obligation Warehouse (“OW”) service.²⁵ By using parallel language in describing the nature of each of these services as non-guaranteed and how transactions processed through these services would be excluded from NSCC's operations following a Member default, the proposed changes would create consistency and clarity within the Rules, improving the Rules' transparency to Members.

Other Proposed Changes to the NSCC Rules To Implement the Proposal

NSCC is proposing additional changes to the Rules in order implement the proposed changes described above. First, NSCC would move the definitions of “Net Unsettled Positions” and “Net Balance Order Unsettled Positions” from Procedure XV (Clearing Fund Formula and Other Matters) to Rule 1 (Definitions and Descriptions) of the Rules. In moving the definition of this term, which is used for the calculation of both the volatility component and the MLA charge, to Rule 1 of the Rules, NSCC would simplify the description of the calculation of these charges. NSCC would also amend the definition of Net

Unsettled Positions to implement the proposed change to remove ID Net Transactions from these positions. Other than with respect to the removal of ID Net Transactions from these positions, the meaning of the term “Net Unsettled Positions” would not change from its current meaning.

NSCC is also proposing to change the defined term “Regular Mark-to-Market” charge to the “Mark-to-Market” charge in Procedure XV of the Rules.²⁶ Following the proposed change to eliminate the ID Net Mark-to-Market charge, as described above, the Regular Mark-to-Market charge would be the only mark-to-market charge that is calculated by NSCC. Therefore, it will no longer be necessary to refer to this charge as the “Regular” mark-to-market charge.

Finally, NSCC is proposing to renumber the margin components in Section I(A)(1) of Procedure XV of the Rules to reflect the deletion of the ID Mark-to-Market charge, and to update the references to these components in the description of the Excess Capital Premium charge.²⁷

(i) Implementation Timeframe

NSCC would implement the proposed changes no later than 10 Business Days after the approval of the proposed rule change by the Commission. NSCC would announce the effective date of the proposed changes by Important Notice posted to its website.

2. Statutory Basis

NSCC believes that the proposed changes are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a registered clearing agency. In particular, NSCC believes the proposed changes are consistent with Section 17A(b)(3)(F) of the Act,²⁸ and Rules 17Ad-22(e)(4)(i) and (e)(6)(i), each promulgated under the Act,²⁹ for the reasons described below.

Section 17A(b)(3)(F) of the Act requires that the rules of NSCC be designed to, among other things, assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible.³⁰ The proposed change to remove ID Net Transactions from the calculation of the Members' Required Fund Deposits would allow NSCC to calculate these amounts using only the

positions that it may be required to complete in the event of a Member default. The proposed change would assist NSCC in calculating and collecting margin requirements that better reflect the risks it may face in liquidating a defaulted Member's positions. The Clearing Fund is a key tool that NSCC uses to mitigate potential losses to NSCC associated with liquidating a Member's portfolio in the event of Member default. The proposal to enhance the calculation of margin requirements by removing non-guaranteed positions would enable NSCC to better measure the risks it faces in the event of a Member default, such that NSCC's operations would not be disrupted and non-defaulting Members would not be exposed to losses they cannot anticipate or control in such an event.

Additionally, the proposed changes to include transparency around the nature of the ID Net Service as a non-guaranteed service and clarity on how ID Net Transactions are processed following a Member default, and to update the Rules to implement the other proposed changes, would make the Rules more effective in communicating Members' rights and obligations in connection with the use of the ID Net Service. When Members better understand their rights and obligations regarding the Rules, they are more likely to act in accordance with the Rules, which NSCC believes would promote the prompt and accurate clearance and settlement of securities transactions.

Therefore, the proposed changes are designed to assure the safeguarding of securities and funds which are in the custody or control of NSCC or for which it is responsible, consistent with Section 17A(b)(3)(F) of the Act.³¹

Rule 17Ad-22(e)(4)(i) under the Act requires, in part, that NSCC establish, implement, maintain and enforce written policies and procedures reasonably designed to effectively identify, measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes, including by maintaining sufficient financial resources to cover its credit exposure to each participant fully with a high degree of confidence.³² As described above, the proposed change to remove ID Net Transactions from the calculation of Required Fund Deposits of Members that are ID Net Subscribers would enable NSCC to more accurately measure the risks presented by those Members' guaranteed positions.

(File Nos. SR-DTC-2007-14; SR-NSCC-2007-14) (“If the transaction becomes ineligible for any reason, the transaction will be exited from the ID Net Service processing and will be settled on a trade-for-trade basis between the ID Net Firm and the ID Net Bank outside of the ID Net Service at DTC.”)

²⁵ See Rule 50 (Automated Customer Account Transfer Service) and Rule 51 (Obligation Warehouse), *supra* note 3.

²⁶ See Section I(A)(1)(c) of Procedure XV of the Rules, *supra* note 3.

²⁷ See Section I(B)(2) of Procedure XV of the Rules, *supra* note 3.

²⁸ 15 U.S.C. 78q-1(b)(3)(F).

²⁹ 17 CFR 240.17Ad-22(e)(4)(i), (e)(6)(i).

³⁰ 15 U.S.C. 78q-1(b)(3)(F).

³¹ *Id.*

³² 17 CFR 240.17Ad-22(e)(4)(i).

Therefore, NSCC believes the proposal would enhance NSCC's ability to effectively identify, measure, monitor and, through the collection of Required Fund Deposits, manage its credit exposures to Members by maintaining sufficient financial resources to cover its credit exposure fully with a high degree of confidence. As such, NSCC believes the proposed changes are consistent with Rule 17Ad-22(e)(4)(i) under the Act.³³

Rule 17Ad-22(e)(6)(i) under the Act requires, in part, that NSCC establish, implement, maintain and enforce written policies and procedures reasonably designed to cover its credit exposures to its participants by establishing a risk-based margin system that, at a minimum, considers, and produces margin levels commensurate with, the risks and particular attributes of each relevant product, portfolio, and market.³⁴ The Required Fund Deposits are made up of risk-based components (as margin) that are calculated and assessed daily to limit NSCC's credit exposures to Members. NSCC's proposal to remove ID Net Transactions from the calculation of Required Fund Deposits is designed to enable NSCC to more effectively measure the risks presented by its Members' guaranteed positions and, therefore, assess a more appropriate level of margin. The proposed change is designed to assist NSCC in maintaining a risk-based margin system that considers, and produces margin levels commensurate with, the risks and particular attributes of Members' portfolios. Therefore, NSCC believes the proposed change is consistent with Rule 17Ad-22(e)(6)(i) under the Act.³⁵

(B) Clearing Agency's Statement on Burden on Competition

NSCC believes that the proposed change to remove ID Net Transactions from the calculation of Required Fund Deposits of Members that are ID Net Subscribers could have an impact on competition. Specifically, NSCC believes the proposed change could burden competition because it may result in either larger or smaller Required Fund Deposit amounts for those Members. When the proposal results in a larger Required Fund Deposit, the proposed change could burden competition for Members that have lower operating margins or higher costs of capital compared to other Members. However, any increase or decrease in a Required Fund Deposit is

not expected to be material and would be the result of a margin calculation that more accurately reflects the risks presented by each Member's guaranteed positions. As such, NSCC believes that any burden on competition imposed by the proposed change would not be significant and, further, would be both necessary and appropriate in furtherance of NSCC's efforts to mitigate risks and meet the requirements of the Act, as described in this filing and further below.

NSCC believes the above described burden on competition that may be created by the proposed change would be necessary in furtherance of the Act, specifically Section 17A(b)(3)(F) of the Act.³⁶ As stated above, the proposal is designed to assist NSCC in better estimating and collecting margin requirements that reflect the risks it may face in liquidating a defaulted Member's guaranteed positions. Therefore, NSCC believes this proposed change is consistent with the requirements of Section 17A(b)(3)(F) of the Act, which requires that the Rules be designed to assure the safeguarding of securities and funds that are in NSCC's custody or control or which it is responsible.³⁷

NSCC believes the proposal would also support NSCC's compliance with Rules 17Ad-22(e)(4)(i) and Rule 17Ad-22(e)(6)(i) under the Act, which require NSCC to establish, implement, maintain and enforce written policies and procedures reasonably designed to (x) effectively identify, measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes, including by maintaining sufficient financial resources to cover its credit exposure to each participant fully with a high degree of confidence; and (y) cover its credit exposures to its participants by establishing a risk-based margin system that, at a minimum, considers, and produces margin levels commensurate with, the risks and particular attributes of each relevant product, portfolio, and market.³⁸

As described above, NSCC believes the proposal to remove ID Net Transactions from the calculation of Required Fund Deposits would enable it to more effectively measure the risks presented by its Members' guaranteed positions, and improve its ability to maintain a risk-based margin system that considers, and produces margin levels commensurate with, the risks of each Member's portfolio. Therefore, the proposed change would better limit

NSCC's credit exposures to Members, consistent with the requirements of Rules 17Ad-22(e)(4)(i) and Rule 17Ad-22(e)(6)(i) under the Act.³⁹ NSCC believes that the above described burden on competition that could be created by the proposed change would be appropriate in furtherance of the Act because such change has been appropriately designed to assure the safeguarding of securities and funds which are in the custody or control of NSCC or for which it is responsible, as described in detail above. The proposal would also enable NSCC to produce margin levels more commensurate with the risks and particular attributes of each Member's portfolio by removing non-guaranteed positions from the calculation of Required Fund Deposits. NSCC believes that it has designed the proposed change in an appropriate way in order to meet compliance with its obligations under the Act. Specifically, the proposal would improve the risk-based margin methodology that NSCC employs to set margin requirements and better limit NSCC's credit exposures to its Members. Therefore, as described above, NSCC believes the proposed change is necessary and appropriate in furtherance of NSCC's obligations under the Act, specifically Section 17A(b)(3)(F) of the Act⁴⁰ and Rules 17Ad-22(e)(4)(i) and Rule 17Ad-22(e)(6)(i) under the Act.⁴¹

The proposed rule changes to increase transparency regarding the ID Net Service and to update the Rules to implement the other proposed changes would help ensure that the Rules remain clear and accurate. In addition, these changes would facilitate Members' understanding of the Rules and their obligations thereunder. These changes would not affect NSCC's operations or the rights and obligations of the membership. As such, NSCC believes these proposed rule changes would not have any impact on competition.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

NSCC has not received or solicited any written comments relating to this proposal. If any written comments are received, they will be publicly filed as an Exhibit 2 to this filing, as required by Form 19b-4 and the General Instructions thereto.

Persons submitting comments are cautioned that, according to Section IV

³³ *Id.*

³⁴ 17 CFR 240.17Ad-22(e)(6)(i).

³⁵ *Id.*

³⁶ 15 U.S.C. 78q-1(b)(3)(F).

³⁷ *Id.*

³⁸ 17 CFR 240.17Ad-22(e)(4)(i), (e)(6)(i).

³⁹ *Id.*

⁴⁰ 15 U.S.C. 78q-1(b)(3)(F).

⁴¹ 17 CFR 240.17Ad-22(e)(4)(i), (e)(6)(i).

(Solicitation of Comments) of the Exhibit 1A in the General Instructions to Form 19b-4, the Commission does not edit personal identifying information from comment submissions.

Commenters should submit only information that they wish to make available publicly, including their name, email address, and any other identifying information.

All prospective commenters should follow the Commission's instructions on how to submit comments, available at <https://www.sec.gov/regulatory-actions/how-to-submit-comments>. General questions regarding the rule filing process or logistical questions regarding this filing should be directed to the Main Office of the Commission's Division of Trading and Markets at tradingandmarkets@sec.gov or 202-551-5777.

NSCC reserves the right not to respond to any comments received.

III. Date of Effectiveness of the Proposed Rule Change, and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-NSCC-2021-011 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR-NSCC-2021-011. This file number should be included on the subject line if email is used. To help the

Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of NSCC and on DTCC's website (<http://dtcc.com/legal/sec-rule-filings.aspx>). All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NSCC-2021-011 and should be submitted on or before September 1, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴²

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021-17074 Filed 8-10-21; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-92584; File No. SR-OCC-2021-007]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing of Proposed Rule Change Concerning The Options Clearing Corporation's Governance Arrangements

August 5, 2021.

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 July 30, 2021, The Options

Clearing Corporation ("OCC") 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 primarily by OCC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

This proposed rule change by OCC would provide OCC's Board of Directors ("Board") with the discretion to elect either an Executive Chairman or a Non-Executive Chairman to preside over the Board, provide OCC's Board and stockholders with the discretion to elect a Management Director, clarify the respective authority and responsibility of any Executive Chairman or Non-Executive Chairman, and make other clarifying, conforming, and administrative changes to OCC's rules.

The proposed changes to OCC's By-Laws, Rules, Board of Directors Charter and Corporate Governance Principles ("Board Charter"), Audit Committee Charter, Compensation and Performance Committee Charter, Governance and Nominating Committee Charter, Risk Committee Charter, Technology Committee Charter (such committee charters collectively being the "Board Committee Charters"), and Amended and Restated Stockholders Agreement ("Stockholders Agreement") (all collectively, the "OCC Governing Documents") have been provided as Exhibits 5A-5I of OCC filing SR-OCC-2021-007. Material proposed to be added to the OCC Governing Documents is marked by underlining. Material proposed to be deleted from the OCC Governing Documents is marked by strikethrough. All terms with initial capitalization that are not otherwise defined herein have the same meaning as set forth in OCC's By-Laws and Rules.³

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

³ OCC's By-Laws and Rules can be found on OCC's public website at <https://www.theocc.com/Company-Information/Documents-and-Archives/By-Laws-and-Rules>. OCC's Board and Board Committee Charters are also available on OCC's public website: <https://www.theocc.com/about/corporate-information/board-charter>.

⁴² 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

(1) Purpose

Background

Generally speaking, the board of directors of a company is responsible for its own structure and processes and applies its business judgment to board leadership decisions. A board's leadership structure is determined based on several factors, including the board's culture and practices and the capabilities, leadership styles, expectations, personal characteristics, and relationships of its potential leaders. Board leadership roles are context dependent and evolve depending on the circumstances of the company and the board. Specifically, the board of directors generally has discretion to determine whether, for example, the chairman of the board should also be an employee of the company. An "Executive Chairman" is typically employed by the company and may work for the company on a full-time or part-time basis. An Executive Chairman fulfills responsibilities to manage the board while also being more involved with management decisions and "day-to-day" aspects of the company. A "Non-Executive Chairman" is typically not an employee of the company and focuses on leading and supporting the board. Self-regulatory organizations ("SROs") registered with the Commission, including registered clearing agencies, employ a variety of board of director and management structures, with both Executive and Non-Executive Chairmen presiding over the board of directors of SROs.⁴

Article III, Section I of OCC's By-Laws currently requires that the Board be

⁴ For example, the National Securities Clearing Corporation and Fixed Income Clearing Corporation have a Non-Executive Chairman presiding over each of their respective boards of directors. See By-Laws of National Securities Clearing Corporation, Article II, Section 2.8 and By-Laws of Fixed Income Clearing Corporation, Article II, Section 2.8 (available at <http://www.dtcc.com/legal/rules-and-procedures>). Alternatively, The Financial Industry Regulatory Authority, Inc. ("FINRA") and Cboe Exchange, Inc. each retain flexibility in their By-Laws to elect an Executive or Non-Executive Chairman. See FINRA, By-Laws of the Corporation, Article VII, Section 4 (available at <https://www.finra.org/rules-guidance/rulebooks/corporate-organization/laws-corporation>) and Eleventh Amended and Restated Bylaws of Cboe Exchange, Inc., Section 3.6 (available at: <https://markets.cboe.com/us/options/regulation/>).

composed of nine Member Directors,⁵ five Exchange Directors, five Public Directors,⁶ and an Executive Chairman (who also serves as a Management Director⁷). The Board is generally responsible for advising management and overseeing the management of the business and affairs of OCC. The Board performs its oversight role, either directly or indirectly, through delegating certain authority to its committees to ensure that OCC is managed and operated in a manner consistent with the discharge of OCC's regulatory responsibilities as a systemically important financial market utility and that OCC has the critical capabilities necessary to achieve its objectives and obligations in a safe and efficient manner. The Board is also responsible for electing OCC's Executive Chairman and appointing certain key officers of OCC, including but not limited to, OCC's Chief Executive Officer ("CEO") and Chief Operating Officer ("COO").⁸ Each member of OCC's executive management team is ultimately responsible for the day-to-day operations and performance of his or her applicable business area. For example, OCC's Executive Chairman is responsible for certain control functions of the Corporation, including internal audit and public affairs and government relations,⁹ and its CEO is responsible for all aspects of the Corporation's business and of its day-to-day affairs, including enterprise risk management and compliance, and all other aspects of the business of the Corporation that do not report directly to the Executive Chairman.¹⁰

⁵ Member Directors include Clearing Members or representatives of a Clearing Member who are selected based on, among other things: (i) Consideration of balanced representation among all Clearing Members; (ii) balanced representation of all business activities of Clearing Members; (iii) the nature of the firm with which each prospective Director is associated; (iv) industry affiliations; (v) assuring that not all Member Directors are representatives of the largest Clearing Members based on the prior year's volume; and (vi) developing a mix of Member Directors that includes representatives of Clearing Members that are primarily engaged in agency trading on behalf of retail customers or individual investors.

⁶ Public Directors are independent directors who are not affiliated with any national securities exchange or national securities association or with any broker or dealer.

⁷ Management Directors also serve as employees of the Corporation. See Article III, Section 7 of the OCC By-Laws.

⁸ See Article IV, Sections 1 and 2 of the OCC By-Laws. The Executive Chairman, CEO, and COO may also delegate authority for certain responsibilities to other senior executives and officers.

⁹ See Article IV, Section 6 of the OCC By-Laws.

¹⁰ OCC's COO supports the operations of the Corporation in accordance with the directions and under the oversight of the Chief Executive Officer. See Article IV, Section 8 of the OCC By-Laws.

OCC's Board continually evaluates OCC's governance arrangements, including the composition of the Board and OCC's senior management team. OCC's Board and management structure have evolved over time in response to changing business conditions and regulatory obligations as well as to changes in personnel and the knowledge, skills, and experience of its various Board members and senior officers.¹¹ OCC's By-Laws currently require the Board to elect an Executive Chairman from among the employees of OCC.¹² While OCC's By-Laws also contemplate discretion for the Board and stockholders to elect a Management Director,¹³ the Executive Chairman, by virtue of being elected to his or her office, serves as the Management Director.¹⁴

Proposed Changes

OCC proposes to revise the OCC Governing Documents to give the Board discretion to elect either an Executive or Non-Executive Chairman to preside over the Board. In addition, the proposed rule change would provide OCC's Board and stockholders discretion to elect Management Directors from OCC's management, which would be necessary if OCC does not have an Executive Chairman. The proposed rule change would also provide clarity around the authority and responsibilities of an Executive Chairman versus a Non-Executive Chairman. OCC also proposes to make additional clarifying, conforming, and administrative changes to the OCC Governing Documents. OCC believes the proposed changes would provide appropriate flexibility to the Board to evaluate OCC's governance arrangements, including whether OCC should have an Executive or Non-Executive Chairman, and more quickly

¹¹ For example, at the end of 2013, OCC's then Chairman and CEO retired, and the Board changed OCC's governance structure by separating the roles of Chairman and CEO and creating the new Executive Chairman position. See Securities Exchange Act Release No. 34-70076 (July 30, 2013), 78 FR 47449 (August 5, 2013) (SR-OCC-2013-09). In 2014, upon the resignation of the then President and CEO, the Board composition was changed to include only one Management Director (the Executive Chairman). See Securities Exchange Act Release No. 34-73785 (December 8, 2014), 79 FR 73915 (December 12, 2014) (SR-OCC-2014-18). In 2017, the roles of Executive Chairman and CEO were temporarily combined and then subsequently separated in 2018. See Securities Exchange Act Release No. 80531 (April 26, 2017), 82 FR 20502 (May 2, 2017) (SR-OCC-2017-002) and Securities Exchange Act Release No. 34-85129 (February 13, 2019), 84 FR 5129 (February 20, 2019) (SR-OCC-2018-015).

¹² See Article IV, Section 1 of the OCC By-Laws.

¹³ See, e.g., Article III, Sections 1 and 7 of the OCC By-Laws.

¹⁴ See e.g., Article IV, Section 1 of the OCC By-Laws.

adjust the composition of OCC's Board and leadership structure in response to changing business conditions and personnel and the knowledge, skills, and experience of its various Board members and senior officers. The proposed changes are discussed in detail below.

Proposed Changes to OCC's By-Laws

OCC proposes to revise Article III, Section 9 and Article IV, Sections 1 and 6 of its By-Laws to give its Board the discretion to elect either an Executive or Non-Executive Chairman. Under OCC's current By-Laws, OCC's Chairman is described as an "Executive Chairman." As a result of this specificity, even though there is no legal or regulatory requirement that OCC have either an Executive or Non-Executive Chairman, and the Board's desire to cast as wide a net as possible for qualified candidates for an important leadership role, the Board likely would not consider Non-Executive Chairman candidates if the ability to do so were not already in the By-Laws. OCC believes that revising its By-Laws to allow the Board the option to elect either an Executive or Non-Executive Chairman would dramatically increase the potential pool of qualified candidates for the position and enable the Board to select the best Chairman for the company at any given time.

Newly proposed Article III, Section 9 (currently Reserved) would provide that, upon the nomination of the Governance and Nominating Committee, the Board shall elect from among its members a Chairman of the Board (as opposed to an Executive Chairman), and if the Chairman is elected from among the employees of OCC, such Chairman would be an "Executive Chairman" for purposes of OCC's By-Laws and Rules. OCC also proposes to revise Article I of its By-Laws to add a definition for the term "Chairman," which would be defined to mean the individual elected by the Board as the Chairman of the Board pursuant to Article III, Section 9 of the By-Laws and that may be, but would not be required to be, an Executive Chairman. In addition, OCC would revise Article III, Section I of the By-Laws to provide that the Board may have no less than five Public Directors. The proposed change would allow OCC to have a sixth Public Director serving on its Board if there is a Public Director serving as Chairman.¹⁵

¹⁵ OCC notes that the proposed change, along with the potential election of a Management Director that is not an Executive Chairman (discussed below), could result in the Board having up to 21 total directors as opposed to its current 20 directors. OCC also notes that if the Board elects a

Pursuant to proposed Article III, Section 9 of the By-Laws, the Chairman would preside at all meetings of the Board of Directors, be responsible for carrying out the policies of the Board, have general supervision over the Board and its activities, and provide overall leadership to the Board of Directors. Additionally, the By-Laws would be revised to provide OCC's Board with additional flexibility to define the role of the Chairman. Article IV, Section 6 of the By-Laws currently states that the Executive Chairman is responsible for certain control functions of OCC, including internal audit and public affairs and government relations, and has supervision of the officers and agents appointed by him. This By-Law requirement would be replaced by a more general statement in proposed Article III, Section 9 that the Chairman would have those powers and perform such duties as the Board may designate. The proposed change would provide appropriate flexibility for the Board to assign or remove responsibilities of the Chairman based on whether such Chairman is an Executive or Non-Executive Chairman and based upon the needs of OCC at a given point in time, as discussed in further detail below. OCC would also make conforming changes to Article IV, Section 8 to clarify that the CEO would be responsible for all aspects of OCC's business and for its day-to-day affairs, except for those that may report directly to the Chairman, as determined by the Board.

OCC also proposes to revise the following sections of its By-Laws so that any Chairman (whether Executive or Non-Executive) retains the authority and responsibility currently given to the Executive Chairman and which OCC believes relate to governance matters appropriately assigned to any Chairman of the Board. This includes the following sections of the By-Laws.

- Article II, Sections 2 and 4 concerning the authority to call and provide notice of meetings of OCC's stockholders;
- Article III, Section 10 concerning the authority to receive notice of resignation of a member of the Board;
- Article III, Section 14 concerning the authority to call special meetings of the Board;

Non-Executive Chairman that is determined to be an independent Public Director, such a Chairman would be eligible to serve as the chair of any of OCC's Board Committees pursuant to the requirements of each Board Committee Charter. OCC does not believe that the potential addition of a Public Director to its Board, increasing the overall Board size by one director, would materially impact the composition, representation, or decision-making process of the Board.

- Article III, Section 15 concerning the authority to exercise emergency powers and call special meetings of the Board during such an emergency;
- Article IV, Sections 2, 3, 9 and 13 concerning the authority to appoint officers, fix the salaries of any appointed officers, and remove such officers;
- Article VIIB, Section 1, Interpretation and Policy .01 concerning the responsibility to promptly provide Non-Equity Exchanges with information the Chairman considers to be of competitive significance to such Non-Equity Exchanges that was disclosed to Exchange Directors at or in connection with any meeting or action of the Board or one of its committees;
- Article IX, Section 12 concerning the authority to sign certificates for shares of OCC; and
- Article IX, Section 14 concerning the authority to suspend the rules of OCC in emergency circumstances.

OCC would also revise its By-Laws to transfer certain responsibilities that currently belong to the Executive Chairman, and that would no longer belong to any Chairman, to OCC's CEO. Specifically, OCC proposes to revise Article VI, Section 11 of the By-Laws to assign the responsibility for participating in the Securities Committee and panels thereof for purposes of contract adjustments to the CEO. OCC also proposes similar changes to its By-Laws concerning the fixing of: (i) Underlying interest values of binary and range options (Article XIV, Section 5), (ii) exercise settlement amounts of yield-based Treasury options (Article XVI, Section 4), (iii) exercise settlement amounts of cash-settled securities options other than OTC index options (Article XVII, Section 4), (iv) exercise settlement amounts of cash-settled foreign currency options (Article XXII) in circumstances where certain prices or values are determined to be unavailable or inaccurate for the contracts in question, and (v) the Closing Price for BOUNDS contracts (Article XXIV). OCC believes these responsibilities are best discharged by the CEO—the senior executive of the company directly familiar with the day-to-day operations of the company and with no director-related responsibilities—than an Executive Chairman. Furthermore, the proposed changes would ensure these responsibilities remain clearly and transparently assigned to an executive officer of the company in the event the Board elects a Non-Executive Chairman.

OCC also proposes to revise its By-Laws and Stockholder Agreement to provide OCC's Board and stockholders with the discretion to elect a Management Director. Currently, under

the By-Laws and Stockholder Agreement, the Executive Chairman is also elected as the Management Director of OCC. Under the proposed rule change, however, OCC's Board would have the discretion to elect a Non-Executive Chairman. OCC therefore proposes to revise Article VIIA, Section 3 of the By-Laws and Sections 2 and 3 of the Stockholder Agreement to provide the Board and stockholders with the discretion to elect a Management Director if the Board has elected a Non-Executive Chairman should they choose. OCC would also revise Article III, Section 12 of the By-Laws to reflect that any vacancy in the position of Management Director may be filled by the Board until the next meeting of the stockholders and would not be limited to the selection of the Executive Chairman to serve as Management Director. In addition, OCC proposes to revise Article IV, Sections 1 and 7 of the By-Laws to relocate certain provisions concerning the election of the Vice Chairman of the Board.

Finally, OCC proposes to revise Article III, Section 4 of the By-Laws to remove specific references to various Board committees and their compositions. OCC notes that each of the Board Committee Charters are filed with the Commission as rules of OCC, and as a result, this information is unnecessarily duplicated in OCC's By-Laws. OCC believes that maintaining this information in multiple places does not add any benefit to the rules of OCC and only increases the possibility for inconsistent statements among the OCC Governing Documents to the detriment of clear and transparent governance arrangements.¹⁶

Proposed Changes to OCC's Rules

OCC proposes changes to its Rules in connection with the proposed By-Law changes described above. OCC would revise the following Rules so that any Chairman (whether Executive or Non-Executive) retains the following authority and responsibility currently given to the Executive Chairman.

- Rule 505 concerning the authority to extend settlement times upon a determination that an emergency or force majeure condition exists;
- Rule 609A concerning the authority to waive margin deposits in limited circumstances;

¹⁶ As part of this proposed change, OCC would relocate from the By-Laws to each of the Board Committee Charters the requirement that committee members are selected by the Board from among the directors recommended by the then-constituted Governance and Nominating Committee after consultation with the Chairman and serve at the pleasure of the Board.

- Rule 1006(f) concerning the authority to use Clearing Fund assets to borrow or otherwise obtain funds from third parties;

- Rule 1104, Interpretation and Policy .02 concerning the authority to elect to use one or more private auctions to liquidate collateral, open positions and/or exercised/matured contracts of a suspended Clearing Member; and
- Rule 1110 concerning the authority to appoint an appeals panel to consider and decide appeals by suspended Clearing Members.

OCC believes it is appropriate for the Chairman to retain the authority to make certain critical decisions, which primarily involve emergency or exigent circumstances or other activities generally outside of OCC's day-to-day activities. The proposed change would help to ensure the efficient management and operation of OCC in such circumstances if other authorized officers are absent or otherwise unable to perform their duties.

OCC also proposes conforming changes to its Rules concerning those responsibilities and authorities that would remain with any Executive Chairman of the Corporation. This includes the following:¹⁷

- Rule 1104(b) concerning the authority to delay the immediate liquidation of a suspended Clearing Member's margin deposits and to use such deposits to borrow or otherwise obtain funds from third parties;
- Rule 1106(e) concerning the authority to determine not to close out a suspended Clearing Member's unsegregated long positions or short positions in options or BOUNDS, or long or short positions in futures; and
- Rule 1106(f) concerning the authority to execute hedging transactions to reduce the risk associated with any collateral or positions not immediately liquidated or closed out pursuant to Rules 1104(b) and 1006(e).

While these responsibilities and authorities involve important aspects of OCC's default management process, OCC does not believe they rise to the level of emergency or exigent circumstances. OCC believes it is appropriate for these responsibilities to remain with senior executives more closely familiar with the day-to-day operations of the Corporation. As a result, OCC would not substantively change the requirements in its existing rules.

¹⁷ OCC notes that the CEO and COO would also continue to have authority to take the following actions.

Proposed Changes to OCC Board Charters

OCC proposes several conforming changes to its Board Charters in connection with the proposed changes to its By-Laws and Rules. OCC also proposes administrative changes to its Board Charters relating to its Board Committee composition requirements. The proposed changes to each of the charters are described below.

Board Charter

OCC proposes to revise its Board Charter to conform to the proposed changes to OCC's By-Laws discussed above. First, OCC would remove the qualifier "Executive" before most occurrences of "Executive Chairman" throughout the charter. In addition, OCC would revise the Board Charter to clarify that those provisions relating to management structure, evaluation, and succession would be applicable only to any Executive Chairman. The proposed changes would also clarify that, with respect to employee compensation, the Board would be responsible for the compensation, incentive, and benefit programs and evaluating the performance of any Executive Chairman. OCC also proposes to revise the Board Charter to reflect that the election of a Management Director would be at the discretion of the Board and provide that a Management Director would no longer be eligible to serve if he or she ceases to hold a senior officer position at OCC, by virtue of which he or she was elected as a Management Director.

OCC also proposes to revise the Board Charter to include the Regulatory Committee in the list of charters required to be established by the Board.¹⁸ In addition, OCC proposes to revise its Board Charter to remove specific requirements around the composition of the Governance and Nominating Committee, which would align with proposed changes to the Governance and Nominating Committee discussed below.

Audit Committee Charter

OCC proposes changes to its Audit Committee Charter regarding the functional and administrative reporting lines for the Chief Audit Executive ("CAE") and Chief Compliance Officer ("CCO") and the review and oversight of OCC's Internal Audit and Compliance functions to accommodate the proposed changes to OCC's By-Laws. The Audit Committee Charter currently provides

¹⁸ See Securities Exchange Act Release No. 87577 (November 20, 2019) 84 FR 65202 (November 26, 2019) (SR-OCC-2019-008).

that the CAE reports functionally to the Audit Committee and administratively¹⁹ to the Executive Chairman and that the committee consults with the Executive Chairman and CEO in reviewing the performance of the Internal Audit function and CAE. OCC would revise the Audit Committee Charter to state that the CAE would continue to report functionally to the Committee and report administratively to a member of the Management Committee designated by the Committee. As noted above, governance responsibilities may vary depending on OCC's management structure and the Board's allocation of responsibilities at a given point in time. The proposed rule change is intended to provide appropriate flexibility for the administrative reporting line of the CAE and in the officers that the committee may consult in their review of the Internal Audit function. OCC also proposes similar changes to the functional and administrative reporting lines of the CCO, who currently reports functionally to the Audit Committee and administratively to the CEO, and to the consultation requirements in reviewing the performance of the CCO and Compliance Department. This would provide for a consistent approach and similar flexibility for the Audit Committee's oversight of OCC's Compliance function.

Compensation and Performance Committee Charter

OCC proposes to revise its Compensation and Performance Committee Charter to conform to the proposed changes to OCC's By-Laws. Specifically, the proposed revisions would reflect that the committee's responsibilities for reviewing the performance and compensation of OCC's management team, including the executive officers of OCC, would extend to any Executive Chairman of OCC.

Governance and Nominating Committee Charter

OCC proposes to revise its Governance and Nominating Committee Charter to conform to the proposed changes to OCC's By-Laws by clarifying that the Committee would consult with any Chairman in its oversight and advising responsibilities to OCC's Board.

¹⁹ Administrative reporting may include, for example, reporting concerning budgeting and accounting issues, human resource administration, administration of OCC's internal policies and procedures, and other day-to-day communication and updates concerning the respective function.

Risk Committee Charter

OCC proposes changes to its Risk Committee Charter regarding the functional and administrative reporting lines for the Chief Risk Officer ("CRO"). Currently, the Risk Committee Charter provides that the CRO reports functionally to the Committee and administratively to the CEO and that the Committee consults with the CEO and other committees as appropriate in reviewing the CRO's performance. OCC proposes to revise the Risk Committee Charter to state that the CRO would continue to report functionally to the Committee and would report administratively to a member of the Management Committee designated by the Committee. The proposed rule change is intended to provide flexibility for the administrative reporting line of the CRO and the particular officers and committees the Risk Committee may consult in their review of the CRO's performance depending on the Board's allocation of responsibilities at a given point in time.

Technology Committee Charter

Finally, OCC proposes to revise its Technology Committee Charter to require that the chair of the committee be a Public Director. The proposed change is intended to align the Technology Committee Charter with OCC's other Board Committee Charters, which also require that a Public Director serves as committee chair. OCC notes that the proposed change would not result in any practical change to the Technology Committee as it is currently chaired by a Public Director.

(2) Statutory Basis

OCC believes the proposed rule change is consistent with Section 17A of the Act²⁰ and the rules thereunder applicable to OCC. Section 17A(b)(3)(A) of the Act²¹ requires, among other things, that a clearing agency be so organized and have the capacity to be able to facilitate the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts, and transactions for which it is responsible. The proposed changes would enable the Board to adjust OCC's Board and management structure in a timelier fashion based on changing business conditions as well as changes in personnel and the knowledge, skills, and experience of OCC's various Board members and senior officers, particularly as it concerns the Chairman of OCC's Board. OCC notes that SROs

registered with the Commission, including registered clearing agencies, employ a variety of board of director and management structures, with both Executive and Non-Executive Chairmen presiding over the board of directors of SROs.²² In certain cases, SROs maintain flexibility to elect Executive and Non-Executive Chairmen as circumstances warrant. OCC proposes similar changes to its rules so that its Board can maintain governance arrangements that promote the efficient and effective management and operation of OCC. The proposed rule change would also clearly delineate the authority and responsibilities of an Executive Chairman versus a Non-Executive Chairman. The proposed rule change would also provide flexibility in the administrative reporting lines for key OCC personnel such as the CAE, CCO, and CRO, allowing these administrative reporting lines to be adjusted, as necessary, and develop an appropriate review process for the performance of OCC's Internal Audit and Compliance functions so that OCC can adapt to its evolving Board and management structure. For these reasons, OCC believes the proposed rule change is designed to ensure that OCC is so organized and has the capacity to be able to facilitate the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts, and transaction for which it is responsible consistent with the requirements of Section 17A(b)(3)(A) of the Act.²³

Exchange Act Rules 17Ad-22(e)(2)(i) and (v)²⁴ require covered clearing agencies to have governance arrangements that are clear and transparent and that specify clear and direct lines of responsibility. As discussed above, the proposed rule change would further enable OCC's Board to adjust OCC's governance arrangements in a more timely fashion, particularly as they relate to OCC's Chairman, so that its governance arrangements are continually designed to promote the efficient and effective management and operation of OCC, taking into consideration the Board's culture and practices, business circumstances, and the capabilities, leadership styles, expectations, personal characteristics, and relationships of its potential leaders at a given point in time. The proposed rule change would also clearly delineate the proposed authority and responsibilities of an Executive Chairman versus a Non-

²² See *supra* note 4.

²³ 15 U.S.C. 78q-1(b)(3)(A).

²⁴ 17 CFR 240.17Ad-22(e)(2)(i) and (v).

²⁰ 15 U.S.C. 78q-1.

²¹ 15 U.S.C. 78q-1(b)(3)(A).

Executive Chairman. Finally, OCC believes the proposed changes to its Board Committee Charters would provide OCC's Board with appropriate flexibility to more quickly adjust the administrative reporting lines for, and oversight of the performance of, OCC's Internal Audit and Compliance functions and key OCC personnel, such as the CAE, CCO, and CRO, taking into account the specific qualifications, experience, competence, character, skills, incentives, integrity or other relevant attributes of Board members and senior officers at any given time. OCC believes the proposed change would provide an appropriate level of clarity and transparency regarding the limited set of officers to which the CAE, CCO, and CRO may report to for administrative purposes and the Board's responsibility for designating such reporting lines. The proposed changes to the Board Committee Charters would not alter the responsibilities of the Board generally or of any of its individual committees or committee members. These responsibilities would continue to be specified in each of the Board Committee Charters. As a result, OCC believes the proposed rule change is reasonably designed to provide for governance arrangements that remain clear and transparent and specify clear and direct lines of responsibility in accordance with Rule 17Ad-22(e)(2)(i) and (v).²⁵

(B) Clearing Agency's Statement on Burden on Competition

Section 17A(b)(3)(I) of the Exchange Act²⁶ requires that the rules of a clearing agency not impose any burden on competition not necessary or appropriate in furtherance of the Act. OCC does not believe that the proposed rule change would have any impact or impose any burden on competition. The proposed rule change would provide OCC's Board with the discretion to elect either an Executive Chairman or a Non-Executive Chairman to preside over the Board and would clarify the roles and responsibilities of an Executive versus a Non-Executive Chairman. The proposed rule change would also make changes to OCC's Board and Board Committee Charters regarding the Board's oversight of the Chairman and other senior officers of OCC. The proposed rule change would not inhibit access to OCC's services or disadvantage of favor any user in relationship to another. As a result, OCC believes the proposed rule

change would not impact or impose a burden on competition.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments on the proposed rule change 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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) By order approve or disapprove the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-OCC-2021-007 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-2021-007. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the

proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of 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>.

All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-OCC-2021-007 and should be submitted on or before September 1, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁷

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2021-17088 Filed 8-10-21; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-92579; File No. SR-MEMX-2021-09]

Self-Regulatory Organizations; MEMX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule

August 5, 2021.

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 August 2, 2021, MEMX LLC ("MEMX" or the "Exchange") 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.

²⁷ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

²⁵ *Id.*

²⁶ 15 U.S.C. 78q-1(b)(3)(I).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Commission a proposed rule change to amend the Exchange's fee schedule applicable to Members³ (the "Fee Schedule") pursuant to Exchange Rules 15.1(a) and (c). The Exchange proposes to implement the changes to the Fee Schedule pursuant to this proposal on August 2, 2021. The text of the proposed rule change is provided in Exhibit 5.

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 Fee Schedule to: (i) Adopt a new Liquidity Removal Tier applicable to the fees charged for executions of orders in securities priced at or above \$1.00 per share that remove liquidity from the Exchange (such orders, "Removed Volume"); (ii) increase the standard fee for executions of Removed Volume; and (iii) allow affiliated Members to aggregate their volume for purposes of the Exchange's pricing tiers with prior notice to the Exchange.⁴

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 registered equities exchanges, as well as a number of alternative trading systems and other off-exchange venues, to which market participants may direct their order flow. Based on publicly

available information, no single registered equities exchange currently has more than approximately 16% of the total market share of executed volume of equities trading.⁵ 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 currently represents approximately 3% of the overall market share.⁶

Adoption of Liquidity Removal Tier

The Exchange is proposing to introduce a tiered pricing structure applicable to the fees charged for executions of Removed Volume, which is similar to the Exchange's existing tiered pricing structure applicable to the rebates provided for executions of displayed orders in securities priced at or above \$1.00 per share that add liquidity to the Exchange ("Added Displayed Volume").⁷ Specifically, the Exchange proposes to adopt a new volume-based tier, referred to by the Exchange as the Liquidity Removal Tier, in which the Exchange will charge a fee that is lower than the standard fee for executions of Removed Volume for Members that meet at least one of two specified volume thresholds on the Exchange, as described below.

Currently, the Exchange charges a standard fee of \$0.00265 per share for all executions of Removed Volume, which the Exchange is proposing to increase to \$0.0028, as further described below. The Exchange now proposes to adopt the Liquidity Removal Tier in which it will charge a lower fee of \$0.00265 per share for executions of Removed Volume for Members that qualify for the Liquidity Removal Tier by achieving: (1) A Step-Up ADAV⁸ from July 2021 that is equal to or greater than 0.05% of the TCV;⁹ or (2) an

⁵ Market share percentage calculated as of July 30, 2021. The Exchange receives and processes data made available through consolidated data feeds (*i.e.*, CTS and UTDF).

⁶ *Id.*

⁷ The Exchange currently provides an enhanced rebate for executions of Added Displayed Volume to Members that meet a specified volume threshold under the Exchange's Liquidity Provision Tier. See Securities Exchange Act Release No. 92150 (June 10, 2021), 86 FR 32090 (June 16, 2021) (SR-MEMX-2021-07).

⁸ As proposed, the term "Step-Up ADAV" means ADAV in the relevant baseline month subtracted from current ADAV. As set forth on the Fee Schedule, "ADAV" means the average daily added volume calculated as the number of shares added per day, which is calculated on a monthly basis.

⁹ As proposed, the term "TCV" means total consolidated volume calculated as the volume reported by all exchanges and trade reporting facilities to a consolidated transaction reporting plan for the month for which the fees apply.

ADV¹⁰ that is equal to or greater than 0.30% of the TCV.¹¹ As proposed, ADV and Step-Up ADAV will be calculated on a monthly basis, and Members that qualify for the Liquidity Removal Tier by achieving at least one of the Step-Up ADAV or ADV thresholds specified above in a particular month will be charged the proposed lower fee of \$0.00265 per share, instead of the proposed standard fee of \$0.0028 per share, for all executions of Removed Volume in that month.

The Exchange proposes to charge Members that qualify for the Liquidity Removal Tier a fee of 0.05% of the total dollar value of the transaction for executions of orders that remove liquidity from the Exchange in securities priced below \$1.00 per share, which is the same fee that would be applicable to such executions for Members that do not qualify for the Liquidity Removal Tier. Thus, as under the Exchange's current pricing, the same fee would be charged to all Members for executions of orders that remove liquidity from the Exchange in securities priced below \$1.00 per share.

The Exchange proposes to add definitions of the terms ADV, Step-Up ADAV, and TCV, which are consistent with the definitions of those terms above, under a new "Definitions" section of the Fee Schedule in connection with the proposed Liquidity Removal Tier.¹² The Exchange notes that the proposed definitions of ADV, Step-Up ADAV, and TCV are substantially similar to the definitions of those terms used by other exchanges on their fee schedules in connection with similar volume-based pricing tiers.¹³ Additionally, like the Exchange

¹⁰ As proposed, the term "ADV" means average daily volume calculated as the number of shares added or removed, combined, per day.

¹¹ This proposed pricing is referred to by the Exchange on the Fee Schedule under the new description "Removed volume, Liquidity Removal Tier" with a Fee Code of "R1" to be provided by the Exchange on the monthly invoices provided to Members. The Exchange notes that because the determination of whether a Member qualifies for the Liquidity Removal Tier for a particular month will not be made until after the month-end, the Exchange will provide the Fee Code otherwise applicable to such transactions (*i.e.*, "R") on the execution reports provided to Members during the month and will only designate the Fee Code of "R1" on the monthly invoices, which are provided after such determination has been made.

¹² The Exchange also proposes to relocate the definition of "ADAV" from the "Notes" section to the proposed new "Definitions" section of the Fee Schedule for organization purposes.

¹³ See, *e.g.*, the Cboe EDGX Exchange, Inc. ("Cboe EDGX") equities trading fee schedule on its public website (available at https://www.cboe.com/us/equities/membership/fee_schedule/edgx/); the Cboe BZX Exchange, Inc. ("Cboe BZX") equities trading fee schedule on its public website (available at

³ See Exchange Rule 1.5(p).

⁴ The Exchange initially filed the proposed Fee Schedule changes on July 30, 2021 (SR-MEMX-2021-08). On August 2, 2021, the Exchange withdrew that filing and submitted this proposal.

currently does with respect to its calculation of ADAV and for purposes of determining qualification for the Exchange's Displayed Liquidity Incentive, the Exchange proposes to exclude from its calculations of ADV and TCX: (1) Any trading day that the Exchange's system experiences a disruption that lasts for more than 60 minutes during regular trading hours ("Exchange System Disruption Days"); and (2) the day that Russell Investments reconstitutes its family of indexes (the "Russell Reconstitution Day").¹⁴ The Exchange also proposes to specify on the Fee Schedule that routed shares are not included in the calculation of ADAV or ADV.¹⁵

The Exchange believes that the proposed Liquidity Removal Tier provides an incremental incentive for Members to strive for higher ADAV on the Exchange and/or maintain or strive for higher ADV on the Exchange in order to qualify for the proposed lower fee for executions of Removed Volume. As such, the proposed Liquidity Removal Tier is designed to encourage Members to maintain or increase their order flow directed to the Exchange, thereby contributing to a deeper and more liquid market to the benefit of all market participants and enhancing the attractiveness of the Exchange as a trading venue. The Exchange notes that the proposed lower fee for executions of Removed Volume applicable to Members that qualify for the Liquidity Removal Tier (*i.e.*, \$0.00265 per share) is comparable to, and competitive with, the fees charged for executions of liquidity-removing orders charged by at least one other exchange under similar volume-based tiers.¹⁶

https://markets.cboe.com/us/equities/membership/fee_schedule/bzx/).

¹⁴ The Exchange notes that excluding such days from the calculations of ADV and TCX is also consistent with the practice of other exchanges when calculating ADV and TCX. *See id.*

¹⁵ The Exchange currently excludes routed shares in the calculation of ADAV so this proposed change is clarifying this practice and also adopting it for the calculation of ADV. The Exchange notes that excluding routed shares from the calculations of ADAV and ADV is also consistent with the practice of other exchanges when calculating ADAV and ADV. *See, e.g.*, the Cboe BZX equities trading fee schedule on its public website (available at https://markets.cboe.com/us/equities/membership/fee_schedule/bzx/).

¹⁶ *See* the Cboe EDGX equities trading fee schedule on its public website (available at <https://www.cboe.com/us/equities/membership/feeschedule/edgx/>), which reflects fees charged under "Remove Volume Tiers"—tiers based on a member achieving certain step-up ADAV and ADV volume thresholds—ranging from \$0.0027 to \$0.00275 per share for removing volume from the Cboe EDGX exchange.

Increased Standard Fee for Removed Volume

In connection with the proposed adoption of the Liquidity Removal Tier, the Exchange also proposes to increase the standard fee charged for executions of Removed Volume. Currently, the Exchange charges a standard fee of \$0.00265 per share for executions of Removed Volume. The Exchange now proposes to increase the standard fee charged for executions of Removed Volume to \$0.0028 per share.¹⁷ The Exchange notes that Members would still be able to pay a fee of \$0.00265 per share for executions of Removed Volume by qualifying for the proposed Liquidity Removal Tier, as described above.

The purpose of increasing the standard fee for executions of Removed Volume is for business and competitive reasons, as the Exchange believes that increasing such fee as proposed would generate additional revenue to offset some of the costs associated with the Exchange's current pricing structure, which provides various rebates for liquidity-adding orders, and the Exchange's operations generally, in a manner that is consistent with the Exchange's overall pricing philosophy of encouraging added liquidity. The Exchange notes that despite the modest increase proposed herein, the Exchange's standard fee for executions of Removed Volume remains lower than, and competitive with, the standard fee to remove liquidity in securities priced at or above \$1.00 per share charged by several other exchanges.¹⁸

Allow Members To Aggregate Volume for Pricing Tiers

Lastly, the Exchange proposes to add a note to the Fee Schedule to allow affiliated Members to aggregate their volume for purposes of the Exchange's determination of ADAV and ADV with

¹⁷ This proposed pricing is referred to by the Exchange on the Fee Schedule under the existing description "Removed volume from MEMX Book" and such orders will continue to receive a Fee Code of "R" assigned by the Exchange.

¹⁸ *See, e.g.*, the Cboe BZX equities trading fee schedule on its public website (available at https://markets.cboe.com/us/equities/membership/fee_schedule/bzx/), which reflects a standard fee of \$0.0030 per share to remove liquidity in securities priced at or above \$1.00 per share; the Cboe EDGX equities trading fee schedule on its public website (available at https://markets.cboe.com/us/equities/membership/fee_schedule/edgx/), which reflects a standard fee of \$0.00285 per share to remove liquidity in securities priced at or above \$1.00 per share; the Nasdaq Price List—Trading Connectivity (available at <http://nasdaqtrader.com/Trader.aspx?id=PriceListTrading2>), which reflects a standard fee of \$0.0030 per share to remove liquidity in securities priced at or above \$1.00 per share.

respect to pricing tiers if such Members provide prior notice to the Exchange. Specifically, to the extent that two or more affiliated companies maintain separate memberships with the Exchange and can demonstrate their affiliation by showing they control, are controlled by, or are under common control with each other, the Exchange would permit such Members to count aggregate volume of such affiliates in calculating ADAV and ADV. As proposed, the Exchange will verify such affiliation using a Member's Form BD, which lists control affiliates. The purpose of this proposed change is to avoid disparate treatment of firms that have divided their various business activities between separate corporate entities as compared to firms that operate those business activities within a single corporate entity, as allowing affiliated Member firms to count their aggregate volume in calculating ADAV and ADV would produce the same result for purposes of the Exchange's volume-based tier pricing as if such affiliated Member firms were instead organized as a single corporate entity. The Exchange notes that this proposed change is consistent with the practice of other exchanges with respect to the aggregation of affiliated member firms' volume for purposes of ADAV and ADV calculations with respect to pricing tiers.¹⁹

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,²⁰ in general, and with Sections 6(b)(4) and 6(b)(5) of the Act,²¹ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

As discussed above, the Exchange operates in a highly fragmented and 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, and the Exchange represents only a small percentage of the overall market. 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,

¹⁹ *See supra* note 13.

²⁰ 15 U.S.C. 78f.

²¹ 15 U.S.C. 78f(b)(4) and (5).

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.”²²

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 incentivize market participants to direct their order flow to the Exchange, which the Exchange believes would enhance liquidity and market quality to the benefit of all Members and market participants.

Adoption of Liquidity Removal Tier

The Exchange believes that the proposed Liquidity Removal Tier is reasonable because it would provide Members with an additional incentive to achieve certain volume thresholds on the Exchange. Volume-based incentives and discounts have been widely adopted by exchanges, including the Exchange,²³ and are equitable and not unfairly discriminatory because they are open to all Members on an equal basis and provide additional benefits or discounts that are reasonably related to the value to 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 processes. The Exchange believes the proposed Liquidity Removal Tier is equitable and not unfairly discriminatory for these same reasons, as it is open to all Members and is designed to encourage Members to maintain or increase their order flow directed to the Exchange, thereby contributing to a deeper and more liquid market to the benefit of all market participants and enhancing the

attractiveness of the Exchange as a trading venue. Moreover, the Exchange believes the proposed Liquidity Removal Tier is a reasonable means to incentivize such increased activity, as it provides two different types of volume thresholds that Members may choose to achieve in order to receive the proposed lower fee for executions of Removed Volume—a Step-Up ADAV threshold, which can be met by a Member increasing their liquidity-adding volume on the Exchange (*i.e.*, ADAV) by at least the specified threshold above their July 2021 ADAV, and an ADV threshold, which can be met by a Member maintaining or increasing their overall (*i.e.*, liquidity-adding and liquidity-removing) volume executed on the Exchange to an amount equal to or greater than the specified TCV threshold. Thus, Members that do not increase their ADAV above their July 2021 ADAV by at least 0.05% of the TCV could still qualify for the Liquidity Removal Tier by maintaining or increasing their ADV at or above 0.30% of the TCV, and vice versa.

Additionally, the Exchange believes the proposed lower fee for executions of Removed Volume for qualifying Members (*i.e.*, \$0.00265 per share) is reasonable, in that it represents only a modest decrease from the proposed standard fee for such executions (*i.e.*, \$0.0028 per share) and is the same as the current standard fee for such executions. The Exchange believes that it is reasonable, consistent with an equitable allocation of fees, and not unfairly discriminatory to charge such lower fee for executions of Removed Volume to Members that qualify for the Liquidity Removal Tier in comparison with the standard fee in recognition of the benefits that such Members provide to the Exchange and market participants, as described above, particularly as the magnitude of the lower fee is not unreasonably high and is, instead, reasonably related to the enhanced market quality it is designed to achieve. Further, as noted above, competing exchanges offer tiered pricing structures similar to the proposed Liquidity Removal Tier, including schedules of rebates and fees that apply based upon Members achieving certain volume and/or growth thresholds, and the Exchange believes the proposed Liquidity Removal Tier’s criteria are reasonable when compared to such tiers provided for by other exchanges. For example, Cboe EDGX charges lower fees for removing volume from the Cboe EDGX exchange under its “Remove Volume Tiers” ranging from \$0.0027 to \$0.00275 per share, as

compared to its standard fee of \$0.00285 per share, but requires different, but similar, criteria than the Exchange’s proposed Liquidity Removal Tier, which are also based upon a member’s volume and/or growth patterns.²⁴

The Exchange further believes that it is reasonable, consistent with an equitable allocation of fees, and not unfairly discriminatory to charge Members that qualify for the Liquidity Removal Tier a fee of 0.05% of the total dollar value of the transaction for executions of orders that remove liquidity from the Exchange in securities priced below \$1.00 per share, as this is the same fee that would be applicable to such executions for all Members (*i.e.*, including those that do not qualify for the Liquidity Removal Tier), which is also the case under the Exchange’s current pricing.

The Exchange also believes the proposed Liquidity Removal Tier is fair, equitable, and not unfairly discriminatory because it is available to all Members. Further, the proposed Liquidity Removal Tier would provide a way for Members to continue to pay the same fee they currently do for executions of Removed Volume (*i.e.*, \$0.00265 per share) even though the Exchange is proposing to increase the standard fee to \$0.0028 per share. Additionally, as noted above, such fee is comparable to the fees charged for executions of liquidity-removing orders charged by Cboe EDGX under similar volume-based tiers.²⁵

The Exchange believes that adding the proposed definitions for the terms ADV, Step-Up ADAV, and TCV, as well as relocating the definition of ADAV, under a new “Definitions” section of the Fee Schedule is reasonable, equitable, and non-discriminatory because such definitions are substantially similar to the definitions of such terms used by other exchanges in connection with similar volume-based pricing tiers, as described above,²⁶ and their placement on the Fee Schedule is designed to ensure that the Fee Schedule is as clear and understandable as possible with respect to applicable pricing. Similarly, the Exchange believes that adding notes on the Fee Schedule specifying that routed shares are not included in the calculation of ADAV or ADV and that Exchange System Disruption Days and the Russell Reconstitution Day are excluded from the calculations of ADV and TCV is reasonable, equitable, and

²⁴ See the Cboe EDGX equities trading fee schedule on its public website (available at https://www.cboe.com/us/equities/membership/fee_schedule/edgx/).

²⁵ *Id.*

²⁶ See *supra* note 13.

²² Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

²³ See *supra* note 7.

non-discriminatory as such notes are intended to clarify the Exchange's calculation practices with respect to its volume-based pricing tiers, and such practices are consistent with the practices of other exchanges in this regard.²⁷

Increased Standard Fee for Removed Volume

The Exchange believes that the proposed change to increase the standard fee for executions of Removed Volume is reasonable, equitable, and consistent with the Act because such change is designed to generate additional revenue and decrease the Exchange's expenditures with respect to transaction pricing in order to offset some of the costs associated with the various rebates provided by the Exchange for liquidity-adding orders and the Exchange's operations generally, in a manner that is consistent with the Exchange's overall pricing philosophy of encouraging added liquidity, as described above. The Exchange also believes the proposed increased standard fee for executions of Removed Volume is reasonable and appropriate because it represents a modest increase from the current standard fee and, as noted above, remains lower than, and competitive with, the standard fee charged by several other exchanges to remove liquidity in securities priced at or above \$1.00 per share.²⁸ The Exchange further believes that the proposed increased standard fee for executions of Removed Volume is equitably allocated and not unfairly discriminatory because it will apply equally to all Members.

Allow Members To Aggregate Volume for Pricing Tiers

As noted above, the proposed language permitting aggregation of volume amongst affiliated Members for purposes of the ADAV and ADV calculations is intended to avoid disparate treatment of firms that have divided their various business activities between separate corporate entities as compared to firms that operate those business activities within a single corporate entity, as allowing affiliated Member firms to count their aggregate volume in calculating ADAV and ADV would produce the same result for purposes of the Exchange's volume-based tier pricing as if such affiliated Member firms were instead organized as a single corporate entity. By way of example, subject to appropriate information barriers, many firms that

are Members of the Exchange operate both a market making desk and a public customer business within the same corporate entity. In contrast, other firms may be part of a corporate structure that separates those business lines into different corporate affiliates, either for business, compliance or historical reasons. Those corporate affiliates, in turn, are required to maintain separate memberships with the Exchange. Absent the proposed policy, such corporate affiliates would not receive the same treatment as firms operating similar business lines within a single entity that is a Member of the Exchange. Accordingly, the Exchange believes that its proposed policy is fair and equitable, and not unreasonably discriminatory. In addition to ensuring fair and equal treatment of its Members, the Exchange does not want to create incentives for its Members to restructure their business operations or compliance functions simply due to the Exchange's pricing structure. Moreover, as noted above, this proposed policy is consistent with the practice of other exchanges with respect to the aggregation of affiliated Members' volume for purposes of determining ADAV and ADV with respect to pricing tiers.²⁹

For the reasons discussed above, the Exchange submits that the proposal satisfies the requirements of Sections 6(b)(4) and 6(b)(5) of the Act in that it provides for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities and is not designed to unfairly discriminate between customers, issuers, brokers, or dealers. As described more fully below in the Exchange's statement regarding the burden on competition, the Exchange believes that its transaction pricing is subject to significant competitive forces, and that the proposed fees and rebates described herein are appropriate to address such forces.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposal will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the proposal is intended to encourage Members to maintain or increase their order flow on the Exchange, thereby contributing to a deeper and more liquid market to the benefit of all market participants and enhancing the attractiveness of the Exchange as a trading venue. As a result, the Exchange believes the

proposal would enhance its competitiveness as a market that attracts actionable orders, thereby making it a more desirable destination venue for its customers. For these reasons, the Exchange believes that the proposal furthers the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes "more efficient pricing of individual stocks for all types of orders, large and small."³⁰

Intramarket Competition

The Exchange believes that the proposal would incentivize Members to maintain or increase their order flow on the Exchange, thereby contributing to a deeper and more liquid market 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 Members by providing more trading opportunities and encourages Members to send additional orders to the Exchange, thereby contributing to robust levels of liquidity, which benefits all market participants. The opportunity to qualify for the Liquidity Removal Tier, and thus receive the proposed lower fee for executions of Removed Volume, would be available to all Members that meet the associated volume requirement in any month. The Exchange believes that meeting the volume requirement of the Liquidity Removal Tier is attainable for several market participants, as Members must meet only one of two different types of volume thresholds, as described above, and the Exchange believes such thresholds are relatively low and reasonably related to the enhanced liquidity and market quality that the Liquidity Removal Tier is designed to promote. Similarly, the proposed increased standard fee for executions of Removed Volume and the ability for Members to aggregate volume amongst affiliated Member firms for purposes of the Exchange's determination of ADAV and ADV with respect to pricing tiers would apply equally to all Members. As such, the Exchange believes the proposed changes would not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intermarket Competition

As noted above, the Exchange operates in a highly competitive market in which market participants can

²⁷ See *supra* notes 14–15.

²⁸ See *supra* note 18.

²⁹ See *supra* note 13.

³⁰ See *supra* note 22.

readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. Members have numerous alternative venues that they may participate on and direct their order flow to, including 15 other equities exchanges and numerous alternative trading systems and other off-exchange venues. As noted above, no single registered equities exchange currently has more than approximately 16% of the total market share of executed volume of equities trading. Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow. 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 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, including with respect to executions of Removed Volume, and market 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.

As described above, the proposed Liquidity Removal Tier and the proposed increased standard fee for executions of Removed Volume are competitive proposals through which the Exchange is seeking to encourage additional order flow to be sent to the Exchange and generate additional revenue to offset some of the costs associated with the Exchange's current pricing structure and its operations generally, and such proposed rates applicable to executions of Removed Volume are comparable to, and competitive with, rates charged by other exchanges.³¹ As noted above, the proposed rate applicable to executions of orders in securities priced at or above \$1.00 per share for Members that qualify for the Liquidity Removal Tier would be the same rate applicable to such executions for all Members, as is the case under the Exchange's current pricing. Additionally, the proposed change to allow affiliated Members to aggregate their volume for purposes of the Exchange's determination of ADAV and ADV with respect to pricing tiers is designed to avoid disparate treatment of firms that have divided their various business activities between separate

corporate entities as compared to firms that operate those business activities within a single corporate entity, which is consistent with the practice of other exchanges, as discussed above.³² Accordingly, the Exchange believes the proposal would not burden, but rather promote, intermarket competition by enabling it to better compete with other exchanges that offer similar volume-based incentives and pricing with respect to executions of Removed Volume and volume aggregation amongst affiliates with respect to pricing tiers.

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."³³ The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition v. SEC*, 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' . . .".³⁴ 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

The Exchange neither solicited nor received comments on the proposed rule change.

³² See *supra* note 13.

³³ See *supra* note 22.

³⁴ *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)).

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 Act³⁵ and Rule 19b–4(f)(2)³⁶ 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 change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR–MEMX–2021–09 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–MEMX–2021–09. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and

³⁵ 15 U.S.C. 78s(b)(3)(A)(ii).

³⁶ 17 CFR 240.19b–4(f)(2).

³¹ See *supra* notes 18 and 24.

printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MEMX-2021-09 and should be submitted on or before September 1, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁷

Jill M. Peterson,
Assistant Secretary.

[FR Doc. 2021-17085 Filed 8-10-21; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-92583; File No. SR-NYSEArca-2021-52]

Self-Regulatory Organizations; NYSE Arca, Inc.; Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Amend the NYSE Arca Equities Fees and Charges

August 5, 2021.

I. Introduction

On June 14, 2021, NYSE Arca, Inc. ("NYSE Arca" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change (File No. SR-NYSEArca-2021-52) to amend the NYSE Arca Equities Fees and Charges ("Fee Schedule").³ The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.⁴ The

proposed rule change was published for comment in the **Federal Register** on July 6, 2021.⁵ The Commission received no comment letters regarding the proposed rule change. Pursuant to Section 19(b)(3)(C) of the Act,⁶ the Commission is hereby: (1) Temporarily suspending File No. SR-NYSEArca-2021-52; and (2) instituting proceedings to determine whether to approve or disapprove File No. SR-NYSEArca-2021-52.

II. Description of the Proposed Rule Change

The Exchange proposes to establish a new category of Retail Order executions for purposes of the Fee Schedule. Specifically, the Exchange proposes that no fees or credits would apply for Retail Order executions that are denoted "internalized" executions under certain circumstances.⁷ The Exchange proposes that no fees will be charged nor credits paid for Retail Orders where (i) each side of the executed order shares the same MPID, (ii) each side of the executed order is a Retail Order with a time-in-force of Day, and (iii) the above executed orders have an Average Daily Volume ("ADV") of at least 150,000 shares.

Prior to the proposed rule change, Retail Orders that were internalized⁸ on the Exchange were not identified in the Fee Schedule and were treated the like other Retail Orders, regardless of whether they were internalized executions, and regardless of ADV. Specifically, the Exchange provides a credit ranging from \$0.0035 to \$0.0038, depending on the step-up tier, to Retail Orders that provide liquidity, and charges no fee for Retail Orders that remove liquidity. Therefore, the proposal carves out a particular group of Retail Orders—internalized orders when such orders have an ADV of at least 150,000 shares—and eliminates the credits for those Retail Orders that provide liquidity. ETP Holders with an ADV under 150,000 of internalized Retail Orders would continue to receive the relevant credit for Retail Orders that provide liquidity.

III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,⁹ at any time within 60 days of the

date of filing of an immediately effective proposed rule change pursuant to Section 19(b)(1) of the Act,¹⁰ the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization ("SRO") 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. As discussed below, the Commission believes a temporary suspension of the proposed rule change is necessary and appropriate to allow for additional analysis of the proposed rule change's consistency with the Act and the rules thereunder.

When exchanges file their proposed rule changes with the Commission, including fee filings like the Exchange's present proposal, they are required to provide a statement supporting the proposal's basis under the Act and the rules and regulations thereunder applicable to the exchange.¹¹ The instructions to Form 19b-4, on which exchanges file their proposed rule changes, specify that such statement "should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements."¹²

Section 6 of the Act, including Sections 6(b)(4), (5), and (8), require the rules of an exchange to: (1) Provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange's facilities;¹³ (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers;¹⁴ and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.¹⁵

In justifying its proposal, the Exchange stated in its filing that its proposal is reasonable because it "is a reasonable attempt to increase liquidity on the Exchange and improve the Exchange's market share relative to its competitors."¹⁶ The Exchange also states that the proposal is an equitable allocation of fees and credits because "all ETP Holder that participate on the

³⁷ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 92291 (June 29, 2021), 86 FR 35551 (July 6, 2021) ("Notice").

⁴ 15 U.S.C. 78s(b)(3)(A). A proposed rule change may take effect upon filing with the Commission if it is designated by the exchange as "establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization." 15 U.S.C. 78s(b)(3)(A)(ii).

⁵ See Notice, *supra* note 3.

⁶ 15 U.S.C. 78s(b)(3)(C).

⁷ The Exchange defines internalized executions as an execution where two orders presented to the Exchange from the same ETP Holder (*i.e.*, MPID) are presented separately and not in a paired manner, but nonetheless inadvertently match with one another. See Notice, *supra* note 3, at 35552 note 13.

⁸ See *id.*

⁹ 15 U.S.C. 78s(b)(3)(C).

¹⁰ 15 U.S.C. 78s(b)(1).

¹¹ See 17 CFR 240.19b-4 (Item 3 entitled "Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change").

¹² See *id.*

¹³ 15 U.S.C. 78f(b)(4).

¹⁴ 15 U.S.C. 78f(b)(5).

¹⁵ 15 U.S.C. 78f(b)(8).

¹⁶ See Notice, *supra* note 3, at 35552.

Exchange will be able to internalize their Retail Orders on the Exchange at no cost, *i.e.*, they would not receive a credit or pay any fee for the execution of Retail Orders that are internalized.”¹⁷ Further, the Exchange states that the proposal is an equitable allocation of fees and credits because it would benefit all investors by deepening the Exchange’s liquidity pool, supporting the quality of price discovery, promoting market transparency, and improving investor protection.¹⁸ The Exchange states that the proposal is not unfairly discriminatory because ETP Holders are free to transact on other exchanges if they believe those exchanges offer better value.¹⁹ Finally, the Exchange states that the proposal is not unfairly discriminatory because it is available to all ETP holders on an equal and non-discriminatory basis and that “all similarly situated ETP Holders would be charged the same fee for executing Retail Orders that are internalized.”²⁰

In temporarily suspending the Exchange’s proposed rule change, the Commission intends to further consider whether the proposal to amend the NYSE Arca Fee Schedule is consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule change satisfies the standards under the Act and the rules thereunder requiring, among other things, that an exchange’s rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.²¹

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule change.²²

IV. Proceedings To Determine Whether To Approve or Disapprove the Proposed Rule Change

In addition to temporarily suspending the proposal, the Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C)²³ and 19(b)(2)(B) of the Act²⁴ to determine whether the Exchange’s proposed rule change should be approved or disapproved. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission’s analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,²⁵ the Commission is providing notice of the grounds for possible disapproval under consideration:

- Whether the Exchange has demonstrated how its proposed fee is consistent with Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities;”²⁶;
- Whether the Exchange has demonstrated how its proposed fee is consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange not be “designed to permit unfair discrimination between customers, issuers, brokers, or dealers”²⁷; and
- Whether the Exchange has demonstrated how its proposed fee is consistent with Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].”²⁸

²³ 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

²⁴ 15 U.S.C. 78s(b)(2)(B).

²⁵ 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. *See id.* The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding, or if the exchange consents to the longer period. *See id.*

²⁶ 15 U.S.C. 78f(b)(4).

²⁷ 15 U.S.C. 78f(b)(5).

²⁸ 15 U.S.C. 78f(b)(8).

As noted above, the proposal purports to amend the NYSE Arca Fee Schedule to eliminate the credits for providing liquidity for certain internalized Retail Orders when such orders have an ADV of at least 150,000 shares. However, the Exchange’s statements in support of the proposed rule change lack specificity and are at times contradictory. For example, the Exchange provides only broad general statements that the proposal is not unfairly discriminatory because all ETP Holders will be treated the same. However, this explanation fails to address why it is not unfairly discriminatory for ETP Holders with under 150,000 ADV of internalized Retail Orders to continue to receive a credit for providing liquidity while those with over 150,000 ADV of internalized Retail Orders no longer receive the same credit. Furthermore, the Exchange contends that the proposal is consistent with the Act because it will incentivize more Retail Order flow to the Exchange, thereby benefitting all investors. However, the Exchange does not explain how a proposal to eliminate an existing credit would achieve these goals.

Under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.”²⁹ The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,³⁰ and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.³¹

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposed fees are consistent with the Act, and specifically, with its requirements that exchange fees be reasonable and equitably allocated, not be unfairly discriminatory, and not impose a burden on competition.³²

²⁹ 17 CFR 201.700(b)(3).

³⁰ *See id.*

³¹ *See id.*

³² *See* 15 U.S.C. 78f(b)(4), (5), and (8).

¹⁷ *See id.* at 35553.

¹⁸ *See id.*

¹⁹ *See id.*

²⁰ *See id.*

²¹ *See* 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

²² For purposes of temporarily suspending the proposed rule change, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

V. Commission's Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by September 1, 2021. Rebuttal comments should be submitted by September 15, 2021. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.³³

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change.

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule changes, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File No. SR-NYSEArca-2021-52 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 No. SR-NYSEArca-2021-52. The file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the

³³ 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. See Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File No. SR-NYSEArca-2021-52 and should be submitted on or before September 1, 2021. Rebuttal comments should be submitted by September 15, 2021.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(3)(C) of the Act,³⁴ that File No. SR-NYSEArca-2021-52, be and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁵

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2021-17087 Filed 8-10-21; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-92581; File No. SR-CBOE-2021-029]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing of Amendment No. 1 and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, To Increase Position Limits for Options on Certain Exchange-Traded Funds and an Exchange-Traded Note

August 5, 2021.

I. Introduction

On April 21, 2021, Cboe Exchange, Inc. ("Exchange") filed with the

³⁴ 15 U.S.C. 78s(b)(3)(C).

³⁵ 17 CFR 200.30-3(a)(57) and (58).

Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to amend Interpretation and Policy .07 of Exchange Rule 8.30, Position Limits, to increase the position limits for options on the following exchange traded funds ("ETFs") and exchange traded note ("ETN") (collectively, "Exchange Traded Products" or "ETP(s)"): SPDR Gold Shares ("GLD"), iShares iBoxx \$ Investment Grade Corporate Bond ETF ("LQD"), iShares Silver Trust ("SLV"), iPath S&P 500 VIX Short-Term Futures ETN ("VXX"), ProShares Ultra VIX Short-Term Futures ETF ("UVXY"), and VanEck Vectors Gold Miners ETF ("GDX"). The proposed rule change was published for comment in the **Federal Register** on May 10, 2021.³ On June 17, 2021, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.⁵ On July 27, 2021, the Exchange submitted Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change as originally filed.⁶ The Commission is publishing this notice and order to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons and to institute proceedings pursuant to Section 19(b)(2)(B) of the Act⁷ to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposal, as Modified by Amendment No. 1

Currently, position limits for options on ETFs and ETNs traded on the Exchange, such as those subject to this

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 91767 (May 4, 2021), 86 FR 25026.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 92204, 86 FR 33395 (June 24, 2021). The Commission designated August 8, 2021, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to approve or disapprove, the proposed rule change.

⁶ In Amendment No. 1, the Exchange: (1) Reduced the proposed position limit for GLD options from 1,000,000 contracts to 500,000 contracts; and (2) provided additional justification and analysis in support of the proposal. The additional justification and analysis provided by Amendment No. 1 is included in the description below of the proposal as amended. The full text of Amendment No. 1 is available on the Commission's website at: <https://www.sec.gov/comments/sr-cboe-2021-029/sr-cboe2021029-9094584-246812.pdf>.

⁷ 15 U.S.C. 78s(b)(2)(B).

proposal, as amended, are determined pursuant to Exchange Rule 8.30, and generally vary according to the number of outstanding shares and past six-month trading volume of the underlying security. Options on the securities with the largest numbers of outstanding shares and trading volume have a standard option position limit of 250,000 contracts (with adjustments for splits, re-capitalizations, etc.) on the same side of the market.⁸ In addition, Interpretation and Policy .07 of Exchange Rule 8.30 currently sets forth separate position limits for options on certain ETFs that range from 300,000 to 3.6 million contracts.

Options on GLD, SLV, LQD, GDX, VXX, and UVXY are currently subject to the standard position limit of 250,000 contracts as set forth in Exchange Rule 8.30.⁹ The purpose of the proposed rule change, as modified by Amendment No.1, is to amend Interpretation and Policy .07 to Exchange Rule 8.30 to increase the position limits for options on GLD, SLV, LQD, GDX, VXX, and UVXY from 250,000 contracts to 500,000 contracts.¹⁰ The Exchange believes that the proposed position limit increases will lead to a more liquid and competitive market environment for these options that will benefit customers interested in trading these products.¹¹ The Exchange states that, to support the proposed position limit increases, it has considered, and provided statistics regarding, the liquidity of the underlying ETPs, the value of the underlying securities or index components and relevant marketplace, the share and option volume for the underlying ETPs, and, where applicable, the availability or comparison of economically equivalent products to options on the underlying ETPs.

Specifically, in support of its proposal to increase the position limits for options on GLD and SLV from 250,000 contracts to 500,000 contracts, the Exchange, among other things, compares the trading characteristics of GLD and SLV to those of the iShares MSCI Brazil Capped ETF (“EWZ”), the iShares 20+ Year Treasury Bond Fund

ETF (“TLT”), the iShares MSCI Japan ETF (“EWJ”), and the iShares iBoxx High Yield Corporate Bond Fund (“HYG”), all of which currently have a position limit of 500,000 contracts.¹² The Exchange states that the average daily trading volume (“ADV”) in calendar year 2020 for GLD was 12.3 million shares and SLV was 33.1 million shares compared to 29.2 million shares for EWZ, 11.5 million shares for TLT, 8.2 million shares for EWJ, and 30.5 million shares for HYG;¹³ the total shares outstanding as of April 5, 2021 for GLD was 354.3 million and SLV was 619.3 million compared to 173.8 million for EWZ, 103.7 million for TLT, 185.3 million for EWJ, and 254.5 million for HYG;¹⁴ and the fund market cap as of January 14, 2021 for GLD was \$70,195.7 million and SLV was \$14,228.4 million compared to \$6,506.8 million for EWZ, \$17,121.3 million for TLT, \$13,860.7 million for EWJ, and \$24,067.5 million for HYG.¹⁵

In addition, the Exchange states that it recognizes that the spot metal markets underlying SLV and GLD differ from the equities markets underlying EWZ, EWJ, TLT, and HYG, but that it does not believe that position limit increases for options on GLD and SLV will have any adverse impact on the underlying spot gold and silver markets.¹⁶ Specifically, the Exchange states that gold futures currently have a value of approximately \$93.2 billion in open interest, have experienced an ADV of approximately 264,000 contracts (equivalent to approximately 264 million GLD contracts) from January through May 2021, and currently are subject to a position limit of 6,000 contracts, which is notionally equivalent to 6,000,000 GLD option contracts.¹⁷ The Exchange similarly states that silver futures currently have a value of approximately \$25.7 billion in open interest, have

experienced an ADV of approximately 93,000 contracts (equivalent to approximately 465 million SLV contracts) from January through May 2021, and currently are subject to a position limit of 3,000 contracts, which is notionally equivalent to 15,000,000 SLV option contracts.¹⁸ The Exchange believes that the volume in and value of the gold and silver futures markets indicate that the underlying markets are sufficiently large and liquid enough to absorb potential price movements and large-sized trades as a result of position limit increases for options on GLD and SLV.¹⁹

The Exchange also provides data showing that the volume-weighted average of the absolute value of deltas for GLD and SLV options trades from March 2019 through June 2021 was approximately 0.34 per GLD options trade and approximately 0.28 per SLV options trade.²⁰ The Exchange believes these low absolute value deltas indicate that increases in GLD and SLV options trading would have minimal impact on the ability of the underlying metals markets to absorb any additional volume related to increased position limits and hedging activity.²¹

In support of its proposal to increase the position limits for options on VXX and UVXY from 250,000 contracts to 500,000 contracts, the Exchange, among other things, compares the trading characteristics of VXX and UVXY to those of EWZ, TLT, EWJ, and HYG, all of which currently have a position limit of 500,000 contracts.²² The Exchange states that the ADV in calendar year 2020 for VXX was 39.3 million shares and UVXY was 29.3 million shares compared to 29.2 million shares for EWZ, 11.5 million shares for TLT, 8.2 million shares for EWJ, and 30.5 million shares for HYG;²³ the total shares outstanding as of April 14, 2021 for VXX was 110.8 million and UVXY was 228.7 million compared to 173.8 million for EWZ, 103.7 million for TLT, 185.3 million for EWJ, and 254.5 million for HYG;²⁴ and the fund market cap as of January 14, 2021 for VXX was \$1,023 million and UVXY was \$1,580.6 million compared to \$6,506.8 million for EWZ, \$17,121.3 million for TLT, \$13,860.7

¹² See *id.* at 9–13. See also Exchange Rule 8.30, Interpretation and Policy .07. Prior to the submission of Amendment No. 1, the Exchange originally proposed to increase the position limit for options on GLD to 1,000,000 contracts.

¹³ See Amendment No. 1, *supra* note 6, at 11–12.

¹⁴ See *id.* at 9–10.

¹⁵ See *id.* at 9–12. The Exchange also states that demand for trading GLD and SLV options has increased whereas the position limits for these products have remained the same, which may impact the ability of Trading Permit Holders (“TPHs”) to effectively hedge against exposure to physical gold and silver. See *id.* at 13.

¹⁶ See *id.* at 14.

¹⁷ See *id.* The Exchange understands that its market-makers use both GLD and gold futures to hedge their GLD options positions, which the Exchange believes provides for a balance across the gold-related marketplaces, mitigating potential concerns that either the underlying or the futures market might experience additional pressure as a result of an increase in activity in the GLD options space. See *id.*

¹⁸ See *id.*

¹⁹ See *id.* at 14–15.

²⁰ See *id.* at 15.

²¹ See *id.* at 15–16.

²² See *id.* at 9–10, 19–20. See also Exchange Rule 8.30, Interpretation and Policy .07. The Exchange also states that, while VIX options share similar trading characteristics with options on VXX and UVXY, VIX options are not currently subject to position limits. See Amendment No. 1, *supra* note 6, at 20.

²³ See Amendment No. 1, *supra* note 6, at 19–20.

²⁴ See *id.* at 9–10.

⁸ See Interpretation and Policy .02(e) to Exchange Rule 8.30.

⁹ See Amendment No. 1, *supra* note 6, at 6; see also *id.* at 10, 12, 16, 17, 19, for descriptions provided by the Exchange regarding the composition, design, and investment objectives of the ETPs underlying each of the options subject to this proposal.

¹⁰ Pursuant to Exchange Rule 8.42, Interpretation and Policy .02, the text of which is not being amended by this proposal, the exercise limits for GLD, SLV, LQD, GDX, VXX, and UVXY options would be similarly increased as a result of this proposal.

¹¹ See Amendment No. 1, *supra* note 6, at 24.

million for EWJ, and \$24,067.5 million for HYG.²⁵ The Exchange also states that the 2020 ADV for trading in VIX futures was approximately 192,000 contracts and VIX futures currently have a value of approximately \$7.6 billion in open interest.²⁶ The Exchange believes that its proffered data indicates that the market for VXX and UVXY is sufficiently large and liquid enough to absorb price movements and large-sized trades.²⁷

The Exchange further states that the VIX futures that comprise both VXX and UVXY are a perfect hedge to the underlying delta risk, but that such futures are not recognized as hedges for options contract equivalent of the net delta (“OCEND”) purposes.²⁸ A TPH that is not delta neutral must be hedged to the extent that the OCEND stays within the applicable position limit.²⁹ According to the Exchange, due to the OCEND limitations and current position limits for options on VXX and UVXY, heightened demand for liquidity in VXX and UVXY options can cause TPHs that are hedged via the component futures to approach position limits more rapidly.³⁰ In order to stay within the applicable position limit, TPHs may shift out of futures hedges into hedges with options or may purchase or create shares of the underlying ETPs. As a result, TPHs may be unable to provide the most concise pricing to customers participating in these ETPs due to increased costs associated with transacting in additional or alternative hedging vehicles, and risk may concentrate in the ETP issuer rather than being spread across multiple market participants, which may exacerbate an already volatile market.³¹ The Exchange believes that increasing position limits for options on VXX and UVXY may assist in maintaining a fair and orderly market during times of higher market volatility, and may reduce any potential additional impact on the futures markets as a result of an increased demand (or, conversely, supply) for shares of the ETPs during periods of higher market volatility or illiquidity.³²

The Exchange further believes that the VIX futures markets, including in the

Trade at Settlement (“TAS”) VIX futures market, wherein VXX and UVXY are primarily rebalanced, maintain robust, liquid markets such that they can sufficiently handle any additional options delta exposure and resulting increase in volatility options trading, including during the rebalancing period.³³ Specifically, the Exchange states that it has observed that the ADV in the VIX futures TAS market has grown from approximately 32,200 contracts in 2018 to approximately 42,200 contracts in 2021.³⁴

In support of its proposal to increase the position limits for options on GDZ from 250,000 contracts to 500,000 contracts, the Exchange, among other things, compares the trading characteristics of GDZ to those of EWZ, TLT, EWJ, and HYG, all of which currently have a position limit of 500,000 contracts.³⁵ The Exchange states that the ADV in calendar year 2020 for GDZ was 39.4 million shares compared to 29.2 million shares for EWZ, 11.5 million shares for TLT, 8.2 million shares for EWJ, and 30.5 million shares for HYG;³⁶ the total shares outstanding as of April 5, 2021 for GDZ was 419.8 million compared to 173.8 million for EWZ, 103.7 million for TLT, 185.3 million for EWJ, and 254.5 million for HYG;³⁷ and the fund market cap as of January 14, 2021 for GDZ was \$16,170.5 million compared to \$6,506.8 million for EWZ, \$17,121.3 million for TLT, \$13,860.7 million for EWJ, and \$24,067.5 million for HYG.³⁸ The Exchange also states that many of the Brazil-based gold mining constituents included in GDZ are also included in EWZ, and that the Exchange has not identified any issues with the continued listing and trading of EWZ options or any adverse market impact on EWZ in connection with the current 500,000 position limit in place for EWZ options.³⁹ Further, the Exchange states that the components of the NYSE Arca Gold Miners Index—the price and yield performance of which GDZ seeks to replicate as closely as possible—can be used to create the GDZ ETF, and currently must each have a market capitalization greater than \$750 million, an ADV of at least 50,000 shares, and an average daily value traded of at least \$1 million in order to be eligible for inclusion in the index.⁴⁰

In support of its proposal to increase the position limit for LQD from 250,000 contracts to 500,000 contracts, the Exchange, among other things, compared the trading characteristics of LQD to those of EWZ, TLT, and EWJ, all of which currently have a position limit of 500,000 contracts.⁴¹ The Exchange provides data demonstrating that the ADV in calendar year 2020 for LQD was 14.1 million shares compared to 29.2 million shares for EWZ, 11.5 million shares for TLT, and 8.2 million shares for EWJ;⁴² the total shares outstanding as of April 5, 2021 for LQD was 308.1 million compared to 173.8 million for EWZ, 103.7 million for TLT, and 185.3 million for EWJ;⁴³ and the fund market cap as of January 14, 2021 for LQD was \$54,113.7 million compared to \$6,506.8 million for EWZ, \$17,121.3 million for TLT, and \$13,860.7 million for EWJ.⁴⁴ The Exchange also states that LQD tracks the performance of the Markit iBoxx USD Liquid Investment Grade Index, which is an index designed as a subset of the broader U.S. dollar-denominated corporate bond market and can be used in creating a basket of securities that equate to the LQD ETF, and which is comprised of over 8,000 bonds for which the outstanding face value of each must be greater than or equal to \$2 billion.⁴⁵

The Exchange states that the current position limits for the options subject to the proposal may have impeded the ability of market makers to make markets on the Exchange.⁴⁶ Specifically, the Exchange avers, the proposal is designed to encourage liquidity providers to provide additional liquidity to the Exchange and other market participants to shift liquidity from over-the-counter markets onto the Exchange, which, it believes, would enhance the process of price discovery conducted on the Exchange through increased order flow.⁴⁷ The proposal also would benefit market participants, the Exchange maintains, by providing them with the ability to more effectively execute their trading and hedging activities.⁴⁸

With regard to the concerns that position limits generally are meant to address, the Exchange represents that the structure of the underlying ETPs subject to this proposal, the considerable market capitalization of the ETPs and their underlying

²⁵ See *id.*

²⁶ See *id.* at 20.

²⁷ See *id.*

²⁸ See *id.*

²⁹ See *id.*

³⁰ See *id.* at 20–21.

³¹ See *id.* at 21.

³² See *id.* at 21–22. In contrast, the Exchange believes that the current position limits for VXX and UVXY options may, at times in which there is higher volatility and, thus, higher demand in connection with these options, reduce liquidity and create further volatility. See *id.* at 21.

³³ See *id.* at 22.

³⁴ See *id.*

³⁵ See *id.* at 9–10, 18. See also Exchange Rule 8.30, Interpretation and Policy .07.

³⁶ See Amendment No. 1, *supra* note 6, at 18.

³⁷ See *id.* at 9–10.

³⁸ See *id.* at 9–10, 18.

³⁹ See *id.* at 18.

⁴⁰ See *id.* at 17–18.

⁴¹ See *id.* at 9–10, 16–17. See also Exchange Rule 8.30, Interpretation and Policy .07.

⁴² See Amendment No. 1, *supra* note 6, at 16.

⁴³ See *id.* at 9–10.

⁴⁴ See *id.* at 9–10, 16.

⁴⁵ See *id.* at 16–17.

⁴⁶ See *id.* at 5.

⁴⁷ See *id.* at 5, 27–28.

⁴⁸ See *id.* at 5, 28.

component securities, and the liquidity of the market for options on these ETPs and the underlying component securities mitigate concerns regarding potential manipulation of the products and disruption of the underlying markets due to the increased position limits.⁴⁹ The Exchange also describes: (i) The creation and redemption process for ETFs (and a similar process for the ETN to which the proposal relates);⁵⁰ (ii) the arbitrage activity that ensues when such instruments are overpriced or are trading at a discount to the securities on which they are based and helps to keep the instrument's price in line with the value of its underlying portfolio; and (iii) how these processes, in the Exchange's view, serve to mitigate the potential price impact of the ETF or ETN shares that might otherwise result from increased position limits.⁵¹

In addition, the Exchange states that the options reporting requirements of Exchange Rule 8.43 would continue to be applicable to the options subject to this proposal.⁵² As set forth in Exchange Rule 8.43(a), each TPH must report to the Exchange certain information in relation to any customer who, acting alone, or in concert with others, on the previous business day maintained aggregate long or short positions on the same side of the market of 200 or more contracts in any single class of option contracts dealt in on the Exchange.⁵³ Further, Exchange Rule 8.43(b) requires each TPH (other than an Exchange market-maker or designated primary market-maker)⁵⁴ that maintains a position in excess of 10,000 non-FLEX equity option contracts on the same side of the market, on behalf of its own account or for the account of a customer, to report to the Exchange information as to whether such

positions are hedged, and provide documentation as to how such contracts are hedged.⁵⁵

The Exchange also represents that the existing surveillance procedures and reporting requirements at the Exchange and other self-regulatory organizations are capable of properly identifying disruptive and/or manipulative trading activity.⁵⁶ According to the Exchange, its surveillance procedures utilize daily monitoring of market activity via automated surveillance techniques to identify unusual activity in both options and the underlying products.⁵⁷ In addition, the Exchange states that its surveillance procedures have been effective for the surveillance of trading in the options subject to this proposal, and will continue to be employed.⁵⁸

The Exchange further states its belief that the current financial requirements imposed by the Exchange and by the Commission adequately address concerns that a TPH or its customer may try to maintain an inordinately large unhedged position in the options subject to this proposal.⁵⁹ Current margin and risk-based haircut methodologies, the Exchange states, serve to limit the size of positions maintained by any one account by increasing the margin and/or capital that a TPH must maintain for a large position held by itself or by its customer.⁶⁰ In addition, the Exchange notes that the Commission's net capital rule, Rule 15c3-1 under the Act,⁶¹ imposes a capital charge on TPHs to the extent of any margin deficiency resulting from the higher margin requirement.⁶²

III. Proceedings To Determine Whether To Approve or Disapprove SR-CBOE-2021-029, as Modified by Amendment No. 1, and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act⁶³ to determine whether the proposed rule change, as

modified by Amendment No. 1, should be approved or disapproved. Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the proposal, as discussed below. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comment on the proposed rule change, as modified by Amendment No. 1.

Pursuant to Section 19(b)(2)(B) of the Act,⁶⁴ the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of, and input from commenters with respect to, the consistency of the proposed rule change, as modified by Amendment No. 1, with the Act and, in particular, Section 6(b)(5) of the Act,⁶⁵ which requires that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Under the Commission's Rules of Practice, the "burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the self-regulatory organization that proposed the rule change."⁶⁶ The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,⁶⁷ and any failure of a self-regulatory organization to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.⁶⁸

Position and exercise limits serve as a regulatory tool designed to address manipulative schemes and adverse

⁴⁹ See *id.*

⁵⁰ With regard to the ETN option included in the proposal—VXX—the Exchange stated that there is no direct analogue to ETF "creation," but observed that the ETN issuer may sell additional VXX shares from its inventory. Regardless of whether VXX shares are redeemed or new VXX shares are issued, the Exchange stated, an issuer may transact in VIX futures in order to hedge its exposure, resulting in an arbitrage process similar to the one described for ETFs described above, thereby helping to keep an ETN's price in line with the value of its underlying index. See *id.* at 23.

⁵¹ See *id.* at 22–24.

⁵² See *id.* at 24–25.

⁵³ The report must include, for each such class of options, the number of option contracts comprising each such position and, in the case of short positions, whether covered or uncovered. See Exchange Rule 8.43(a).

⁵⁴ According to the Exchange, market-makers (including designated primary market-makers) are exempt from the referenced reporting requirement because market-maker information can be accessed through the Exchange's market surveillance systems. See Amendment No. 1, *supra* note 6, at 25.

⁵⁵ According to the Exchange, this information would include, but would not be limited to, the option position, whether such position is hedged and, if so, a description of the hedge. See *id.* at 24–25.

⁵⁶ See *id.* at 25.

⁵⁷ See *id.* at 25–26.

⁵⁸ See *id.* at 26 n.36. The Exchange represents that non-U.S. component securities that are not subject to a comprehensive surveillance agreement do not, in the aggregate, represent more than 50% of the weight of any of the underlying ETPs that are ETFs. See *id.* at 7.

⁵⁹ See *id.* at 26.

⁶⁰ See *id.*

⁶¹ 17 CFR 240.15c3-1.

⁶² See Amendment No. 1, *supra* note 6, at 26.

⁶³ 15 U.S.C. 78s(b)(2)(B).

⁶⁴ *Id.*

⁶⁵ 15 U.S.C. 78f(b)(5).

⁶⁶ Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

⁶⁷ See *id.*

⁶⁸ See *id.*

market impact surrounding the use of options.⁶⁹ As discussed above, the Exchange has proposed to increase the position and exercise limits for options on GLD, SLV, LQD, GDX, VXX, and UVXY from 250,000 contracts to 500,000 contracts. The proposed doubling of the position and exercise limits for these options would be a substantial increase from current levels, and raises the potential for adverse impacts in the underlying markets implicated by this proposal. The initial proposal did not provide sufficient information to explain why all of these underlying markets are sufficiently comparable to the markets underlying the option products currently subject to a 500,000 contract position limit or sufficient information to independently support a finding that all of the proposed position limit increases would not have an adverse market impact. Accordingly, the initial proposal did not provide an adequate basis for the Commission to conclude that the proposal would be consistent with Section 6(b)(5) of the Act.

The Exchange recently provided additional analysis and justification for its proposal in Amendment No. 1. Amendment No. 1 was submitted shortly before the expiration of the statutory deadline for the Commission to act on the Exchange's proposal, leaving the Commission, as well as any potential commenters, with insufficient time to carefully consider the new data and analysis before the deadline. In the proceedings that the Commission is instituting today, the Commission will be evaluating, among other things, the Exchange's amended statements, and invites comment on the extent to which they justify approval of the proposal.

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their data, views, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(5), or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of

data, views, and arguments, the Commission will consider, pursuant to Rule 19b-4 under the Act,⁷⁰ any request for an opportunity to make an oral presentation.⁷¹

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal, as modified by Amendment No. 1, in addition to any other comments they may wish to submit about the proposed rule change. In particular, the Commission seeks comment on whether the position and exercise limit for each option as proposed could impact markets adversely.

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change, as modified by Amendment No. 1, should be approved or disapproved by September 1, 2021. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by September 15, 2021. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File No. SR-CBOE-2021-029 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 No. SR-CBOE-2021-029. The file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the

⁷⁰ 17 CFR 240.19b-4.

⁷¹ Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Public Law 94-29 (June 4, 1975), grants to the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Acts Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-CBOE-2021-029 and should be submitted by September 1, 2021. Rebuttal comments should be submitted by September 15, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁷²

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2021-17086 Filed 8-10-21; 8:45 am]

BILLING CODE 8011-01-P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #17074 and #17075; Oklahoma Disaster Number OK-00150]

Administrative Declaration of a Disaster for the State of Oklahoma

AGENCY: Small Business Administration.
ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of OKLAHOMA dated 08/05/2021.

Incident: Flooding.

Incident Period: 06/07/2021.

DATES: Issued on 08/05/2021.

Physical Loan Application Deadline Date: 10/04/2021.

Economic Injury (EIDL) Loan Application Deadline Date: 05/05/2022.

ADDRESSES: Submit completed loan applications to:

U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration,

⁷² 17 CFR 200.30-3(a)(12); 17 CFR 200.30-3(a)(57).

⁶⁹ See, e.g., Securities Exchange Act Release No. 68086 (October 23, 2012), 77 FR 65600 (October 29, 2012) (SR-CBOE-2012-066).

409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205-6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the Administrator's disaster declaration, applications for disaster loans may be filed at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Okmulgee.

Contiguous Counties:

Oklahoma: Creek, McIntosh, Muskogee, Okfuskee, Tulsa, Wagoner.

The Interest Rates are:

	Percent
<i>For Physical Damage:</i>	
Homeowners with Credit Available Elsewhere	3.250
Homeowners without Credit Available Elsewhere	1.625
Businesses with Credit Available Elsewhere	5.760
Businesses without Credit Available Elsewhere	2.880
Non-Profit Organizations with Credit Available Elsewhere ...	2.000
Non-Profit Organizations without Credit Available Elsewhere	2.000
<i>For Economic Injury:</i>	
Businesses & Small Agricultural Cooperatives without Credit Available Elsewhere	2.880
Non-Profit Organizations without Credit Available Elsewhere	2.000

The number assigned to this disaster for physical damage is 17074 6 and for economic injury is 17075 0.

The States which received an EIDL Declaration # is Oklahoma.

(Catalog of Federal Domestic Assistance Number 59008)

Isabella Guzman,

Administrator.

[FR Doc. 2021-17072 Filed 8-10-21; 8:45 am]

BILLING CODE 8026-03-P

SOCIAL SECURITY ADMINISTRATION

[Docket No: SSA-2021-0023]

Agency Information Collection Activities: Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104-13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes one

revision of an OMB-approved information collection.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses or fax numbers. (OMB) Office of Management and Budget, Attn: Desk Officer for SSA

Comments: <https://www.reginfo.gov/public/do/PRAMain>. Submit your comments online referencing Docket ID Number [SSA-2021-0021].

(SSA), Social Security Administration, OLCA, Attn: Reports Clearance Director, 3100 West High Rise, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410-966-2830, Email address: OR.Reports.Clearance@ssa.gov.

Or you may submit your comments online through <https://www.reginfo.gov/public/do/PRAMain>, referencing Docket ID Number [SSA-2021-0023].

SSA submitted the information collection below to OMB for clearance. Your comments regarding this information collection would be most useful if OMB and SSA receive them 30 days from the date of this publication. To be sure we consider your comments, we must receive them no later than September 10, 2021. Individuals can obtain copies of this OMB clearance package by writing to OR.Reports.Clearance@ssa.gov.

1. Work-Disability Functional Assessment Battery (WD-FAB)—0960-NEW

Background

SSA uses continuing disability reviews (CDR) to determine continued eligibility of program benefits for Social Security disability insurance (SSDI), and Supplemental Security Income (SSI) recipients. SSA is requesting clearance to administer the Work-Disability Functional Assessment Battery (WD-FAB) assessment to a sample of working-age SSDI and SSI program recipients who are due for their CDR. The WD-FAB is a self-reported assessment measuring whole person-functioning at the activity level for eight work-related functional domains: (1) Basic Mobility; (2) Upper Body Function; (3) Fine Motor Function; (4) Community Mobility; (5) Communication and Cognition; (6)

Resilience and Sociability; (7) Self-Regulation; and (8) Mood and Emotion. SSA will use the data the WD-FAB collects to assess the feasibility and value of incorporating the WD-FAB into SSA's CDR process with the intent of improving the CDR process. Section 1110(a) of the Social Security Act (Act) gives the Commissioner of Social Security the authority to help fund research or demonstration projects relating to the prevention and reduction of dependency. SSA contracted with Westat to conduct the WD-FAB data collection.

WD-FAB Project Description

To assess the feasibility of incorporating the WD-FAB into the CDR process, this study will conduct two assessments. The first assessment is a baseline assessment of the WD-FAB and the second assessment, which we will conduct with the same individuals six months later, will detect any changes. Each survey will include three main components: Classification questions, WD-FAB questions, and follow-up questions. The classification questions and WD-FAB questions will be identical in each survey.

Survey 1 will cover questions in the following domains:

- Classification questions:
 - Demographic questions (age, gender, race, ethnicity, marital status, highest level of education completed);
 - Questions on general health, mental health status, and work-limiting conditions;
 - 4-item set of Healthy Days core questions included in the state-based Behavioral Risk Factor Surveillance System;
 - Questions from Form SSA-455, Disability Update Report
 - Veterans Item Health Survey;
 - Items from WD-FAB; and
 - 3-5 follow-up questions to solicit feedback on the WD-FAB about ease of use, clarity of instructions, and perceived burden.

Survey 2 will include the same classification questions included in Survey 1, and we will record responses using the WD-FAB Computer Assisted Telephone (CAT) system. CAT interviewers and respondents who complete the surveys via the web will access the same web version of the survey instruments ensuring data consistency between these two modes of data collection. The CAT methodology uses a computer interface that rapidly tailors questions to the unique ability level of each claimant, allowing for fewer items to be administered, while providing an assessment that is proven to be accurate, precise, comprehensive,

and efficient. Follow-up questions for Survey 2 will include 52 effort and symptom validity questions to examine certain symptoms related to function.

Data collection for Survey 1 will begin in November 2021 and extend for 12 weeks through January 2022. The target goal for Survey 1 is to obtain 2,400 completed surveys from a participant pool of at least 4,000 beneficiaries.

Data collection for Survey 2 will begin in April 2022, approximately 6 months after Survey 1, and continue for 3 months through June 2022. For Survey 2, we will initiate contact with the 2,400 beneficiaries who complete Survey 1. The target goal for Survey 2 is to obtain 1,600 completed surveys.

Recruitment

Participant recruitment will include multiple modes of contact. We will initiate contact by mailing a study invitation package. The study invitation package will include the following items:

1. An invitation letter explaining the study and notifying selected recipients that we will call them soon;
2. A study consent form explaining the background of the study, what will happen during the study, the risks and benefits associated with participating, and their rights as a study participant; and
3. Instructions to download the study smartphone app to facilitate study participation.

Following the mailing of the study invitation package, we will call recipients to conduct a short screener to ensure we are speaking to the sampled

recipient and confirm that the recipient is eligible for the study. Eligibility criteria include aged 18 or over, ability to understand English, and ability to provide informed consent.

To assess ability to provide informed consent, interviewers will read aloud a brief description of the study and then ask participants to name one thing participation involves. This vetted question will be a check for cognitive ability to provide consent. Failure to name one thing will deem the recipient ineligible for the study due to inability to provide informed consent.

If the recipient is able to provide informed consent, the interviewer will review the main points on the consent form over the phone with the beneficiary. This will include:

- The voluntary nature of the study;
- That the study will not directly benefit them;
- Their rights as study participants;
- That they can withdraw at any time;
- Information on who to call if they have questions about their rights as research participants.

The interviewer will then ask the recipient if they want to participate in the study and collect verbal informed consent. After collecting consent, interviewers will collect contact information from the recipient including home address, preferred telephone numbers, and email addresses. Interviewers will obtain permission to send reminders via text message for respondents with cell phones. We will send electronic reminders to participants about survey completion and to keep in touch with

respondents between each wave of data collection. We will confirm the recipient’s address to mail incentives after survey completion.

At the close of the screener, recipients will have the option of completing the survey online themselves or over the telephone with an interviewer. Recipients who opt to do the survey with an interviewer on the phone will be given the opportunity to do the survey immediately following the screener, or at a later date and time that is convenient for the recipient. The interviewer will schedule an appointment to call the recipient at their preferred date and time. We will ask recipients who opt to complete the survey on the web to provide a valid email address where they can receive information about how to access the web survey. The recipient will receive an email with the survey URL and instructions for logging on. Recipients who elect to complete Survey 1 or Survey 2 on their own via the web will also receive email reminders if they have not started the web survey within four days and another emailed reminder on day 5. We will administer the eligibility screener via telephone and obtain consent prior to each survey. Survey participants will receive a gift card in the amount of \$50 and \$75 as a reimbursement for completing Survey 1 and Survey 2, respectively. The respondents are Study participants who are receiving SSA disability payments.

Type of Request: Request for a new information collection.

WD-FAB SURVEY 1

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Total annual opportunity cost (dollars) **
Survey 1 competency screening and informed consent	4,500	1	5	375	* \$10.95	** \$4,106
Survey 1 (respondents)	5,600	1	50	4,667	* 10.95	** 51,104
Total	10,100	.....	.....	5,042	.....	55,210

WD-FAB SURVEY 2

Modality of Completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Total annual opportunity cost (dollars) **
Survey 2 competency screener	2,400	1	5	200	* \$10.95	** \$2,190
Survey 2 (respondents)	3,200	1	75	4,000	* 10.95	** 43,800
Total	5,600	.....	.....	4,200	.....	45,990

WD-FAB GRAND TOTAL BURDEN FIGURES

Modality of Completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars)*	Total annual opportunity cost (dollars)**
Totals	15,700	.....	.....	9,242	.....	\$101,200

* We based this figure on the average DI payments based on SSA's current FY 2021 data (<https://www.ssa.gov/legislation/2021FactSheet.pdf>).

** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

Dated: August 5, 2021.

Naomi Sipple,

Reports Clearance Officer, Social Security Administration.

[FR Doc. 2021-17067 Filed 8-10-21; 8:45 am]

BILLING CODE 4191-02-P

SURFACE TRANSPORTATION BOARD

[Docket No. MCF 21096]

Van Pool Transportation LLC— Acquisition of Control—Salter Transportation, Inc.

AGENCY: Surface Transportation Board.

ACTION: Notice tentatively approving and authorizing finance transaction.

SUMMARY: Van Pool Transportation LLC (Applicant), a Delaware limited liability company and a noncarrier, has filed an application for authority after-the-fact to acquire control of Salter Transportation, Inc. (Salter), from Stephen O. Gadd (Seller). The Board is tentatively approving and granting after-the-fact authorization of the transaction, and, if no opposing comments are timely filed, this notice will be the final Board action.

DATES: Comments may be filed by September 27, 2021. If any comments are filed, Applicant may file a reply by October 11, 2021. If no opposing comments are filed by September 27, 2021, this notice shall be effective on September 28, 2021.

ADDRESSES: Comments may be filed with the Board either via e-filing on the Board's website. In addition, one copy of any comments must be sent to Applicant's representative: Andrew K. Light, Scopelitis, Garvin, Light, Hanson & Feary, P.C., 10 W Market Street, Suite 1400, Indianapolis, IN 46204.

FOR FURTHER INFORMATION CONTACT: Amy Ziehm at (202) 245-0391. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION: According to the application,¹ Applicant is a Delaware limited liability company² that, prior to the transaction, owned and controlled two other passenger motor carriers—NRT Bus, Inc. (NRT), and Trombly Motor Coach Service, Inc. (Trombly).³ (Appl. 2.) Prior to the transaction, Seller held all the issued and outstanding equity share of Salter. (*Id.* at 3.) On June 12, 2020, Seller transferred all his ownership interest in Salter to Applicant.⁴ (Appl. 1, 4.) Salter held, and continues to hold, interstate passenger motor carrier authority in the United States through the Federal Motor Carrier Safety Administrative (FMCSA). (*Id.* at 4.)

Applicant provides the following description of the three carriers:

- Salter primarily provides non-regulated student school bus transportation services within the North Shore area of Massachusetts and in southern New Hampshire, and it occasionally provides charter services

¹ The application initially was filed on May 4, 2021. On June 3, 2021, the Board issued a decision requiring Applicant to submit additional information in support of the application. Applicant filed an unverified supplement to its application on June 30, 2021, and a verification of that supplement pursuant to 49 CFR 1182.2(c) on July 12, 2021. Therefore, for purposes of calculating the procedural schedule and statutory deadlines, the filing date of the application is July 12, 2021. See 49 CFR 1182.4(a).

² Further information about Applicant's corporate structure and ownership can be found in the Application. (See Appl. 5; *id.* at Ex. B.)

³ See Appl., May 4, 2021 *Van Pool Transp. LLC—Acquis. of Control—NRT Bus, Inc.*, MCF 21095 (seeking after-the-fact approval of its acquisition of NRT and Trombly).

⁴ Applicant states it did not seek approval of the transaction before it was completed because neither Applicant nor Seller were aware that the transaction was subject to the Board's jurisdiction. (Appl. 1.) Applicant now requests that the Board approve the transaction after-the-fact. (*Id.*) The Board has permitted parties to obtain after-the-fact licensing authority for a transaction when the failure to seek approval was without malice and by mistake. See *Winthrop Sargent—Acquis. of Control—Plymouth & Brockton St. Ry.*, MCF 21089, slip op. at 2 (STB served Jan. 3, 2020) (citing *Allied Indus. Dev. Corp.—Pet. for Declaratory Order*, FD 35477, slip op. at 6 (STB served Sept. 17, 2015), and *Gen. Ry.—Exemption for Acquis. of R.R. Line—in Osceola & Dickinson Cnty.*, Iowa, FD 34867, slip op. at 5 (STB served June 15, 2007)).

when its buses are not in use for school activities. At the time of the transaction, Salter utilized a fleet of approximately 120 passenger vehicles, consisting of school buses and mini-buses, and it used approximately 150 drivers. Currently, Salter utilizes a fleet of approximately 137 passenger vehicles, consisting of school buses and mini-buses, and it uses approximately 103 drivers. (Suppl. Appl. 2.)

- NRT primarily provides non-regulated student school bus transportation services in the Commonwealth of Massachusetts—in the counties of Essex, Middlesex, Norfolk, Suffolk, and Worcester—and occasionally provides charter services when its buses are not in use for school activities. At the time of the transaction, it utilized a fleet of approximately 1,490 passenger vehicles, consisting of school buses, mini-buses, and passenger vans, and it used approximately 1,100 drivers. It currently utilizes a fleet of approximately 1,490 passenger vehicles, consisting of school buses, mini-buses, and vans; and it uses approximately 1,221 drivers. (*Id.* at 3–4.)

- Trombly primarily provides non-regulated student school bus transportation services in the Commonwealth of Massachusetts—in the counties of Essex and Middlesex—and occasionally provides charter services when its buses are not in use for school activities. At the time of the transaction, it utilized a fleet of approximately 266 passenger vehicles, consisting of school buses, mini-buses, and passenger vans, and Trombly used approximately 280 drivers. Currently, it utilizes a fleet of approximately 266 passenger vehicles, consisting of school buses, mini-buses, and vans, and it uses approximately 142 drivers. (*Id.* at 4; Appl. 3.)⁵

⁵ Additional information about these motor carriers, including U.S. Department of Transportation (USDOT) numbers, motor carrier numbers, and USDOT safety fitness ratings, can be found in the supplement to the application. (See Suppl. Appl. 2–6, 9; *id.* at Corr. Ex. A.)

As a result of the transaction, Applicant owned and controlled 100% of the equity shares of Salter. (Appl. 4.)

Applicant claims that the transaction has not had and will not have a material, detrimental impact on the adequacy of transportation services available to the public. (*Id.* at 6.) Since the transaction closed on June 12, 2020, the services previously provided by Salter, NRT, and Trombly to the public have continued to be provided by them. (Suppl. Appl. 8.) Applicant represents that there have been no reductions in availability or scheduling of the charter services provided by Salter, NRT, or Trombly as a result of the transaction. (*Id.*)

Under 49 U.S.C. 14303(b), the Board must approve and authorize a transaction that it finds consistent with the public interest, taking into consideration at least: (1) The effect of the proposed transaction on the adequacy of transportation to the public, (2) total fixed charges that result, and (3) the interest of affected carrier employees. Applicant has submitted the information required by 49 CFR 1182.2, including information to demonstrate that the transaction is consistent with the public interest under 49 U.S.C. 14303(b), *see* 49 CFR 1182.2(a)(7), and a jurisdictional statement under 49 U.S.C. 14303(g) that the aggregate gross operating revenues of the involved carriers exceeded \$2 million during the 12-month period immediately preceding the filing of the application, *see* 49 CFR 1182.2(a)(5). (Appl. 5.)

Applicant states that Salter, NRT, and Trombly have continued to operate since the transaction. (Suppl. Appl. 8.) Applicant represents that the transportation services available to the public have been and will be maintained and possibly expanded. (*Id.*; Appl. 6.) Applicant further represents that it is experienced in the same market segments served by Salter—non-regulated student home to school transportation—and, because of Applicant’s passenger carrier management capacity, the transaction will result in improved operating efficiencies, increased equipment utilization rates, and cost savings. (Appl. 6; Suppl. Appl. 8.) Specifically, the transaction has allowed Salter, NRT, and Trombly to take advantage of increased purchasing power for such items as equipment, parts, fuel, and insurance. (Suppl. Appl. 8.) Thus, Applicant states, the transaction helped strengthen the financial position of all three carriers and has helped them effectively compete with other carriers in their respective geographic markets

with “good equipment and sound safety records.” (*Id.*)

Applicant states that although the transaction increased fixed charges, in the form of interest expenses, the increase has not and will not impact the provision of transportation services to the public. (Appl. 7.)

Finally, Applicant asserts that the transaction did not have a substantial impact on employees or labor conditions because Applicant has continued the existing operations of Salter, NRT, and Trombly. (Suppl. Appl. 9.) According to Applicant, any reduction in the number of drivers used by the passenger motor carriers is the results of Salter’s, NRT’s, and Trombly’s inability “to find, hire and retain additional qualified drivers,” in part due to the COVID-19 pandemic. (*Id.*)

The Board finds that the acquisition as described in the application, as supplemented, is consistent with the public interest and should be tentatively approved and authorized after-the-fact. If any opposing comments are timely filed, these findings will be deemed vacated, and, if a final decision cannot be made on the record as developed, a procedural schedule will be adopted to reconsider the application. *See* 49 CFR 1182.6. If no opposing comments are filed by the expiration of the comment period, this notice will take effect automatically and will be the final Board action.

This action is categorically excluded from environmental review under 49 CFR 1105.6(c).

Board decisions and notices are available at www.stb.gov.

It is ordered:

1. The transaction is approved and authorized after-the-fact, subject to the filing of opposing comments.

2. If opposing comments are timely filed, the findings made in this notice will be deemed vacated.

3. This notice will be effective September 28, 2021, unless opposing comments are filed by September 27, 2021. If any comments are filed, Applicant may file a reply by October 11, 2021.

4. A copy of this notice will be served on: (1) The U.S. Department of Transportation, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590; (2) the U.S. Department of Justice, Antitrust Division, 10th Street & Pennsylvania Avenue NW, Washington, DC 20530; and (3) the U.S. Department of Transportation, Office of General Counsel, 1200 New Jersey Avenue SE, Washington, DC 20590.

Decided: August 5, 2021.

By the Board, Board Members Begeman, Fuchs, Oberman, Primus, and Schultz.

Jeffrey Herzig,
Clearance Clerk.

[FR Doc. 2021-17132 Filed 8-10-21; 8:45 am]

BILLING CODE 4915-01-P

SURFACE TRANSPORTATION BOARD

[Docket No. MCF 21095]

Van Pool Transportation LLC— Acquisition of Control—NRT Bus, Inc. and Trombly Motor Coach Service Inc.

AGENCY: Surface Transportation Board.

ACTION: Notice tentatively approving and authorizing finance transaction.

SUMMARY: Van Pool Transportation LLC (Applicant), a Delaware limited liability company and a noncarrier, has filed an application for authority after-the-fact to acquire control of NRT Bus, Inc. (NRT), and Trombly Motor Coach Service Inc. (Trombly) from John J. McCarthy (Seller).

DATES: Comments may be filed by September 27, 2021. If any comments are filed, Applicant may file a reply by October 11, 2021. If no opposing comments are filed by September 27, 2021, this notice shall be effective on September 28, 2021.

ADDRESSES: Comments may be filed with the Board via e-filing on the Board’s website. In addition, one copy of any comments must be sent to Applicant’s representative: Andrew K. Light, Scopelitis, Garvin, Light, Hanson & Feary, P.C., 10 W Market Street, Suite 1400, Indianapolis, IN 46204.

FOR FURTHER INFORMATION CONTACT:

Amy Ziehm at (202) 245-0391. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION: The Board is tentatively approving and granting after-the-fact authorization of the transaction, and, if no opposing comments are timely filed in this docket or in the related action, *McCarthy—Acquisition of Control—Trombly Motor Coach Service Inc.*, Docket No. MCF 21094, this notice will be the final Board action.¹ According to the application,² Applicant is a Delaware

¹ In *McCarthy—Acquisition of Control—Trombly Motor Coach Service Inc.*, Docket No. MCF 21094, Seller has filed an application for after-the-fact authority to acquire Trombly in a transaction that occurred in 2013. Today, the Board is tentatively approving that transaction. However, if opposing comments are filed in that docket, it may necessitate further Board action in this docket as well.

² The application was initially filed on May 4, 2021. On June 3, 2021, the Board issued a decision

limited liability company³ that, prior to the transaction, did not own or control any passenger motor carriers. (Appl. 2.) Prior to the transaction, Seller held all the issued and outstanding equity shares of NRT and Trombly, two passenger motor carriers. (*Id.*) On September 30, 2019, Seller transferred all his ownership interest in NRT and Trombly to Applicant. (*Id.* at 1.) NRT and Trombly held, and continue to hold, interstate passenger motor carrier authority in the United States through the Federal Motor Carrier Safety Administration (FMCSA).⁴ (Appl. 3.)

Applicant provides the following description of the two carriers:

- NRT primarily provides non-regulated student school bus transportation services in the Commonwealth of Massachusetts—in the counties of Essex, Middlesex, Norfolk, Suffolk, and Worcester—and occasionally provides charter services when its buses are not in use for school activities. At the time of the transaction, it utilized a fleet of approximately 1,320 passenger vehicles, consisting of school buses, mini-buses, and passenger vans, and it used approximately 1,400 drivers. It currently utilizes a fleet of approximately 1,490 passenger vehicles, consisting of school buses, mini-buses, and vans; and it uses approximately 1,221 drivers. (Suppl. Appl. 2.)

- Trombly primarily provides non-regulated student school bus transportation services in the Commonwealth of Massachusetts—in the counties of Essex and Middlesex—and occasionally provides charter services when its buses are not in use for school activities. At the time of the transaction, it utilized a fleet of

approximately 266 passenger vehicles, consisting of school buses, mini-buses, and passenger vans, and Trombly used approximately 280 drivers. Currently, it utilizes a fleet of approximately 266 passenger vehicles, consisting of school buses, mini-buses, and vans, and it uses approximately 142 drivers. (*Id.* at 3.)⁵

As a result of the transaction, Applicant owned and controlled 100% of the equity and voting interest in NRT and Trombly. (Appl. 2.)

Applicant claims that the transaction has not had, and will not have, a material, detrimental impact on the adequacy of transportation services available to the public. (*Id.* at 6.) Since the transaction closed on September 30, 2019, the services previously provided by NRT and Trombly have continued to be provided by them. (*Id.* at 5.) Applicant represents that it anticipates that the transportation services provided to the public by NRT and Trombly will be maintained and possibly expanded. (*Id.* at 5–4.)

Under 49 U.S.C. 14303(b), the Board must approve and authorize a transaction that it finds consistent with the public interest, taking into consideration at least: (1) The effect of the proposed transaction on the adequacy of transportation to the public, (2) total fixed charges that result, and (3) the interest of affected carrier employees. Applicant has submitted the information required by 49 CFR 1182.2, including information to demonstrate that the transaction is consistent with the public interest under 49 U.S.C. 14303(b), *see* 49 CFR 1182.2(a)(7), and a jurisdictional statement under 49 U.S.C. 14303(g) that the aggregate gross operating revenues of the involved carriers exceeded \$2 million during the 12-month period immediately preceding the filing of the application, *see* 49 CFR 1182.2(a)(5). (Appl. 5.)

Applicant states that NRT and Trombly have continued to operate since the transaction. (*Id.* at 6.) Applicant represents that the transportation services available to the public will be maintained and possibly expanded. (*Id.*) Applicant further represents that it is experienced in the same market segments served by NRT and Trombly—non-regulated student home to school transportation—and, because of Applicant's passenger carrier management capacity, the transaction will result in improved operating efficiencies, increased equipment utilization rates, and cost savings. (*Id.*;

Suppl. Appl. 7.) Specifically, the transaction has allowed NRT and Trombly to take advantage of increased purchasing power for such items as equipment, parts, fuel, and insurance. (Suppl. Appl. 7.) Thus, Applicant states, the transaction has helped strengthen the financial position of both carriers and has helped them effectively compete with other carriers in their respective geographic markets with “good equipment and sound safety records.” (*Id.*)

Applicant states that although the transaction increased fixed charges, in the form of interest expenses, the increase has not and will not impact the provision of transportation services to the public. (Appl. 6–7.)

Finally, Applicant asserts that the transaction did not have a substantial impact on employees or labor conditions because Applicant has continued the existing operations of NRT and Trombly. (*Id.* at 7.) According to Applicant, the reduction in the number of drivers used by the passenger motor carriers is the results of NRT's and Trombly's inability “to find, hire and retain additional qualified drivers,” in part due to the COVID–19 pandemic. (Suppl. Appl. 8.)

The Board finds that the acquisition as described in the application, as supplemented, is consistent with the public interest and should be tentatively approved and authorized after-the-fact. If any opposing comments are timely filed, these findings will be deemed vacated, and, if a final decision cannot be made on the record as developed, a procedural schedule will be adopted to reconsider the application. *See* 49 CFR 1182.6. If no opposing comments are filed by the expiration of the comment period,⁶ this notice will take effect automatically and will be the final Board action.

This action is categorically excluded from environmental review under 49 CFR 1105.6(c).

Board decisions and notices are available at www.stb.gov.

It is ordered:

1. The transaction is approved and authorized after-the-fact, subject to the filing of opposing comments.

2. If opposing comments are timely filed, the findings made in this notice will be deemed vacated.

3. This notice will be effective September 28, 2021, unless opposing comments are filed by September 27, 2021. If any comments are filed,

requiring Applicant to submit additional information in support of its application. Applicant filed an unverified supplement to its application on June 30, 2021, and a verification to that supplement pursuant to 49 CFR 1182.2(c) on July 12, 2021. Therefore, for purposes of calculating the procedural schedule and statutory deadlines, the filing date of the application is July 12, 2021. *See* 49 CFR 1182.4(a).

³ Further information about Applicant's corporate structure and ownership can be found in the Application. (*See* Appl. 4; *id.* at Ex. B.)

⁴ Applicant states it did not seek approval of the transaction before it was completed because neither Applicant nor the Seller were aware that the transaction was subject to the Board's jurisdiction. (Appl. 1.) Applicant now requests that the Board approve the transaction after-the-fact. (*Id.*) The Board has permitted parties to obtain after-the-fact licensing authority for a transaction when the failure to seek approval was without malice and by mistake. *See Winthrop Sargent—Aquis. of Control—Plymouth & Brockton St. Ry.*, MCF 21089, slip op. at 2 (STB served Jan. 3, 2020) (citing *Allied Indus. Dev. Corp.—Pet. for Declaratory Order*, FD 35477, slip op. at 6 (STB served Sept. 17, 2015), and *Gen. Ry.—Exemption for Acquis. of R.R. Line—in Osceola & Dickinson Cnty.s., Iowa*, FD 34867, slip op. at 5 (STB served June 15, 2007)).

⁵ Additional information about these motor carriers, including U.S. Department of Transportation (USDOT) numbers, motor carrier numbers, and USDOT safety fitness ratings, can be found in the application. (*See* Appl. 3; *id.* at Ex. A.)

⁶ As noted in footnote 1, above, if opposing comments are filed in MCF 21094, it may necessitate further Board action in this docket as well.

Applicant may file a reply by October 11, 2021.

4. A copy of this notice will be served on: (1) The U.S. Department of Transportation, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590; (2) the U.S. Department of Justice, Antitrust Division, 10th Street & Pennsylvania Avenue NW, Washington, DC 20530; and (3) the U.S. Department of Transportation, Office of General Counsel, 1200 New Jersey Avenue SE, Washington, DC 20590.

Decided: August 5, 2021.

By the Board, Board Members Begeman, Fuchs, Oberman, Primus, and Schultz.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2021-17131 Filed 8-10-21; 8:45 am]

BILLING CODE 4915-01-P

SURFACE TRANSPORTATION BOARD

[Docket No. MCF 21094]

John J. McCarthy—Acquisition of Control—Trombly Motor Coach Service, Inc.

AGENCY: Surface Transportation Board.

ACTION: Notice tentatively approving and authorizing finance transaction.

SUMMARY: John J. McCarthy (Applicant), a noncarrier, has filed an application for authority after-the-fact to acquire control of Trombly Motor Coach Service Inc. (Trombly) from Michael J. Trombly (Seller). The Board is tentatively approving and granting after-the-fact authorization of the transaction, and, if no opposing comments are timely filed, this notice will be the final Board action.

DATES: Comments may be filed by September 27, 2021. If any comments are filed, Applicant may file a reply by October 11, 2021. If no opposing comments are filed by September 27, 2021, this notice shall be effective on September 28, 2021.

ADDRESSES: Comments may be filed with the Board via e-filing on the Board's website. In addition, one copy of any comments must be sent to Applicant's representative: Andrew K. Light, Scopelitis, Garvin, Light, Hanson & Feary, P.C., 10 W Market Street, Suite 1400, Indianapolis, IN 46204.

FOR FURTHER INFORMATION CONTACT: Amy Ziehm at (202) 245-0391. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION: According to the application,¹ Applicant is an individual who directly owned and controlled another passenger motor carrier, NRT Bus, Inc. (NRT), prior to the closing of the transaction. (Appl. 2.) NRT held and continues to hold interstate passenger motor carrier authority in the United States through the Federal Motor Carrier Safety Administration (FMCSA). (*Id.*) Under the transaction, which was completed on April 13, 2013, Seller transferred to Applicant all issued and outstanding equity shares of Trombly.² (Appl. 1, 3.)

Applicant provides the following description of the two carriers:

- Trombly primarily provides non-regulated student school bus transportation services in the Commonwealth of Massachusetts—in the counties of Essex and Middlesex—and occasionally provides charter services when its buses are not in use for school activities. At the time of the transaction, it utilized a fleet of approximately 150 passenger vehicles, consisting of school buses and mini-buses, and it used approximately 160 drivers. Currently, Trombly utilizes a fleet of approximately 266 passenger vehicles, consisting of school buses, mini-buses, and passenger vans. It currently uses approximately 142 drivers. (Suppl. Appl. 3.)

- NRT primarily provides non-regulated student school bus transportation services in the Commonwealth of Massachusetts—in the counties of Essex, Middlesex, Norfolk, Suffolk, and Worcester—and occasionally provides charter services when its buses are not in use for school activities. At the time of the transaction, it utilized a fleet of approximately 1,350

¹ The application initially was filed on May 4, 2021. On June 3, 2021, the Board issued a decision requiring Applicant to submit additional information in support of the application. Applicant filed an unverified supplement to its application on June 30, 2021, and a verification of that supplement pursuant to 49 CFR 1182.2(c) on July 12, 2021. Therefore, for purposes of calculating the procedural schedule and statutory deadlines, the filing date of the application is July 12, 2021. See 49 CFR 1182.4(a).

² Applicant states he did not seek approval of the transaction before it was completed because neither he nor Seller were aware that the transaction was subject to the Board's jurisdiction. (Appl. 1.) Applicant now requests that the Board approve the transaction after-the-fact. (Suppl. Appl. 1.) The Board has permitted parties to obtain after-the-fact licensing authority for a transaction when the failure to seek approval was without malice and by mistake. See *Winthrop Sargent—Acquis. of Control—Plymouth & Brockton St. Ry.*, MCF 21089, slip op. at 2 (STB served Jan. 3, 2020) (citing *Allied Indus. Dev. Corp.—Pet. for Declaratory Order*, FD 35477, slip op. at 6 (STB served Sept. 17, 2015), and *Gen. Ry.—Exemption for Acquis. of R.R. Line—in Osceola & Dickinson Cnty.*, Iowa, FD 34867, slip op. at 5 (STB served June 15, 2007)).

passenger vehicles, consisting of school buses, mini-buses, and passenger vans, and it used approximately 1,400 drivers. Currently, NRT utilizes a fleet of approximately 1,490 passenger vehicles, consisting of school buses, mini-buses, and vans; and it uses approximately 1,221 drivers. (*Id.* at 2.)³

As a result of the transaction, Applicant owned and controlled two regulated interstate passenger motor carriers that operate in the same territory. (*Id.* at 2–3, 5–6.)

Applicant claims that the transaction has not had, and will not have, a material, adverse impact on the adequacy of transportation services available to the public. (*Id.* at 7.) Applicant states that the services provided by Trombly prior to the transaction have been provided by Trombly under the same name since the transaction, just under different ownership, and will continue to be provided by Trombly going forward. (Appl. 4.)

Under 49 U.S.C. 14303(b), the Board must approve and authorize a transaction that it finds consistent with the public interest, taking into consideration at least: (1) The effect of the proposed transaction on the adequacy of transportation to the public, (2) total fixed charges that result, and (3) the interest of affected carrier employees. Applicant has submitted the information required by 49 CFR 1182.2, including information to demonstrate that the transaction is consistent with the public interest under 49 U.S.C. 14303(b), see 49 CFR 1182.2(a)(7), and a jurisdictional statement under 49 U.S.C. 14303(g) that the aggregate gross operating revenues of the involved carriers exceeded \$2 million during the 12-month period immediately preceding the filing of the application, see 49 CFR 1182.2(a)(5).

Applicant asserts that the transportation services available to the public will be maintained and improved as operating efficiencies are realized as a result of the transaction. (Appl. 4.) Since the transaction, Trombly has continued to provide transportation services to the public under the same name. (*Id.*) Applicant represents that Trombly has continued to operate under the control of Applicant, who is “an individual thoroughly experienced in school bus transportation operations.” (*Id.*) Applicant also represents that there has been no reduction in the charter

³ Additional information about these motor carriers, including U.S. Department of Transportation (USDOT) numbers, motor carrier numbers, and USDOT safety fitness ratings, can be found in the application. (See Appl. 2–3; *id.* at Ex. A.)

services provided by Trombly or NRT. (Suppl. Appl. 7.) He also states that the transaction resulted in improved operating efficiencies and cost savings derived from economies of scale for both Trombly and NRT. (*Id.*) Specifically, the transaction has allowed both NRT and Trombly to take advantage of increased purchasing power when acquiring new equipment, parts, fuel, and insurance. (*Id.*) These operating efficiencies and cost savings have helped the financial strength of both NRT and Trombly, allowing them to effectively compete in their respective geographic markets. (*Id.*)

Applicant states that fixed charges are not contemplated to have a material impact on the transaction. (Appl. 5.)

Moreover, Applicant asserts that the transaction did not have a substantial impact on employees or labor conditions because the operations of both Trombly and NRT have continued “substantially unchanged.” (Suppl. Appl. 7.) The transaction did result in a limited number of duplicative back-office positions, and those positions were phased out. (Appl. 5.) According to Applicant, any reduction in the number of drivers used by either company since the transaction is not the result of layoffs or reduction in the workforce at NRT or Trombly but rather the result of their inability “to find, hire and retain additional qualified drivers,” in part due to the COVID-19 pandemic. (Suppl. Appl. 8.)

The Board finds that the acquisition as described in the application, as supplemented, is consistent with the public interest and should be tentatively approved and authorized after-the-fact. If any opposing comments are timely filed, these findings will be deemed vacated, and, if a final decision cannot be made on the record as developed, a procedural schedule will be adopted to reconsider the application. See 49 CFR 1182.6. If no opposing comments are filed by the expiration of the comment period, this notice will take effect automatically and will be the final Board action.

This action is categorically excluded from environmental review under 49 CFR 1105.6(c).

Board decisions and notices are available at www.stb.gov.

It is ordered:

1. The transaction is approved and authorized after-the-fact, subject to the filing of opposing comments.

2. If opposing comments are timely filed, the findings made in this notice will be deemed vacated.

3. This notice will be effective September 28, 2021, unless opposing comments are filed by September 27,

2021. If any comments are filed, Applicant may file a reply by October 11, 2021.

4. A copy of this notice will be served on: (1) The U.S. Department of Transportation, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590; (2) the U.S. Department of Justice, Antitrust Division, 10th Street & Pennsylvania Avenue NW, Washington, DC 20530; and (3) the U.S. Department of Transportation, Office of General Counsel, 1200 New Jersey Avenue SE, Washington, DC 20590.

Decided: August 5, 2021.

By the Board, Board Members Begeman, Fuchs, Oberman, Primus, and Schultz.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2021-17130 Filed 8-10-21; 8:45 am]

BILLING CODE 4915-01-P

SURFACE TRANSPORTATION BOARD

[Docket No. MCF 21097]

Van Pool Transportation LLC—Acquisition of Control—Easton Coach Company, LLC

AGENCY: Surface Transportation Board.

ACTION: Notice Tentatively Approving and Authorizing Finance Transaction.

SUMMARY: Van Pool Transportation LLC (Van Pool) has filed an application to acquire control of Easton Coach Company, LLC (Easton), a regulated interstate motor carrier, from ECC Holding Company, Inc. (ECC), a noncarrier. The Board is tentatively approving and authorizing the transaction, and, if no opposing comments are timely filed, this notice will be the final Board action.

DATES: Comments must be filed by September 27, 2021. If any comments are filed, Applicant may file a reply by October 11, 2021. If no opposing comments are filed by September 27, 2021, this notice shall be effective on September 28, 2021.

ADDRESSES: Comments should be filed with the Surface Transportation Board via e-filing on the Board’s website. In addition, one copy of any comments must be sent to Applicant’s representative: Andrew K. Light, Scopelitis, Garvin, Light, Hanson & Feary, P.C., 10 W Market Street, Suite 1400, Indianapolis, IN 46204.

FOR FURTHER INFORMATION CONTACT:

Amy Ziehm at (202) 245-0391.

Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION: According to the application,¹ Van Pool is a Delaware limited liability company that is headquartered in Wilbraham, Mass.² (Appl. 2.) Van Pool currently owns and operates three passenger motor carriers that hold interstate passenger motor carrier authority through the Federal Motor Carrier Safety Administration (FMCSA):

- NRT Bus, Inc. (NRT), which primarily provides non-regulated student school bus transportation services in the Commonwealth of Massachusetts and occasional passenger charter services to the public;

- Trombly Motor Coach Service, Inc. (Trombly), which primarily provides non-regulated student school bus transportation services in the Commonwealth of Massachusetts and occasional passenger charter services to the public; and

- Salter Transportation, Inc. (Salter), which primarily provides non-regulated student school bus transportation services in New Hampshire and the Commonwealth of Massachusetts, and occasional passenger charter services to the public. (*Id.* at 3-5.)³

As a result of the transaction, Van Pool will acquire all issued and outstanding equity interest in Easton from ECC, a Delaware corporation that does not own or control any other interstate passenger motor carrier. (*Id.* at 5, 7.) According to Van Pool, Easton is

¹ On June 30, 2021, counsel for Van Pool filed an unverified letter correcting an error in the application regarding one of the related motor carriers’ U.S. Department of Transportation (USDOT) safety and fitness ratings. Then, on July 12, 2021, Van Pool submitted the required verification for the statements in the June 30, 2021 letter, pursuant to 49 CFR 1182.2(c). Therefore, the filing date of the application for purposes of calculating the procedural and statutory deadlines is July 12, 2021. See 49 CFR 1182.4(a).

² Further information about Applicant’s corporate structure and ownership can be found in the Application. (See Appl. 7-8; *id.* at Ex. B.)

³ Van Pool currently has two applications pending before the Board seeking authority, after-the-fact, to own and control NRT, Trombly, and Salter. See Appl., May 4, 2021, *Van Pool Transp. LLC—Acquis. of Control—NRT Bus, Inc.*, MCF 21095; Appl., May 4, 2021, *Van Pool Transp. LLC—Acquis. of Control—Salter Transp. Inc.*, MCF 21096.

Additional information about these motor carriers, including USDOT numbers, motor carrier numbers, and USDOT safety and fitness ratings can be found in the application and the corrected Exhibit A to the letter filed by counsel on June 30, 2021. (See Appl. 3-5; Corr. Ex. A, Letter from Gregory Ostendorf to Cynthia Brown, June 30, 2021, Docket No. MCF 21097.) In the application, Van Pool and counsel represented to the Board that Salter had a “Satisfactory” USDOT safety and fitness rating. That statement was incorrect. (See Corr. Ex. A, Letter from Gregory Ostendorf to Cynthia Brown.) Salter does not have a USDOT safety and fitness rating. (*Id.*) Van Pool and its counsel should take greater care in future proceedings before the Board to avoid incorrect representations of matters of fact.

a Delaware limited liability company that provides intrastate paratransit, shuttle, and line-run services pursuant to contracts with regional transportation authorities and other organizations in, primarily, New Jersey and eastern Pennsylvania. (*Id.* at 6.) It also provides private charter motor coach services, including coach and shuttle ground transportation services for passengers, primarily in eastern Pennsylvania. (*Id.*) Van Pool represents that Easton has approximately 750 passenger-carrying vehicles, including 21 motor coaches, and it utilizes approximately 800 drivers. (*Id.*) The geographic areas served by Easton do not overlap with the geographic areas serviced by NRT, Trombly, and Salter. (*Id.*)

Van Pool states that it intends to maintain and continue the services provided by Easton to the public. (*Id.* at 9.) It expects that the transaction will result in improved operating efficiencies, increased equipment utilization rates, and costs savings, all of which will help ensure the provision of adequate service to the public. (*Id.*)

Under 49 U.S.C. 14303(b), the Board must approve and authorize a transaction that it finds consistent with the public interest, taking into consideration at least: (1) The effect of the proposed transaction on the adequacy of transportation to the public, (2) total fixed charges that result from the proposed transaction, and (3) the interest of affected carrier employees. Van Pool has submitted the information required by 49 CFR 1182.2, including information to demonstrate that the transaction is consistent with the public interest under 49 U.S.C. 14303(b), *see* 49 CFR 1182.2(a)(7), and a jurisdictional statement under 49 U.S.C. 14303(g) that the aggregate gross operating revenues of the involved carriers exceeded \$2 million during the 12-month period immediately preceding the filing of the application, *see* 49 CFR 1182.2(a)(5). (*See* Appl. 7–13.)

Van Pool asserts that the transaction will not have a material, detrimental impact on the adequacy of transportation services currently available to the public. (*Id.* at 9.) Van Pool intends that the services provided by Easton currently available to the public will be maintained and that Easton will continue to operate under the same name, just within the holdings of Van Pool. (*Id.*) Van Pool further represents that it is experienced in the same market segments served by Easton—intrastate paratransit, shuttle, and line-run services—and, because of Van Pool’s passenger carrier management capacity, the transaction is expected to result in improved

operating efficiencies, increased equipment utilization rates, and cost savings. (*Id.*) Thus, Van Pool states, the transaction will help ensure the provision of adequate transportation services to the public. (*Id.* at 9–10.)

Van Pool claims that neither competition nor the public interest will be adversely affected by the proposed transaction. (*Id.* at 11–12.) Van Pool states that while demand for interstate passenger motor carriers has been reduced as a result for the COVID–19 pandemic, as the public health situation continues to improve, Van Pool expects that demand for Easton’s services will increase. (*Id.* at 12.) And, according to Van Pool, competition for such services is strong; Easton competes directly with other passenger charter services, including J&J Luxury Transportation, Hagey Coach & Tours, Martz Bus, Perkiomen Travel & Tours, and Trans-Bridge Lines. (*Id.*) In addition, Van Pool asserts that all charter service providers, including Easton, also compete with “other modes of passenger transportation, including rail, low-cost airlines, and passenger transportation network companies.” (*Id.*) Van Pool also states that Easton does not compete with any of the other three passenger motor carriers owned by Van Pool because “there is virtually no overlap in the service areas and/or customer bases among [NRT, Trombly, and Salter] and Easton in that regard.” (*Id.*)

Van Pool states that although the transaction will increase fixed charges in the form of interest expenses, the increase will not impact the provision of transportation services to the public. (*Id.* at 10.)

Finally, Van Pool asserts that the transaction will not have a substantial impact on employees or labor conditions because it intends to continue the existing operations of Easton. (*Id.*) Van Pool states that staffing redundancies, though, could potentially result in limited downsizing of back-office and/or managerial level personnel. (*Id.*)

The Board finds that the acquisition as described in the application, as supplemented, is consistent with the public interest and should be tentatively approved and authorized. If any opposing comments are timely filed, these findings will be deemed vacated, and, if a final decision cannot be made on the record as developed, a procedural schedule will be adopted to reconsider the application. *See* 49 CFR 1182.6. If no opposing comments are filed by the expiration of the comment period, this notice will take effect automatically and will be the final Board action.

This action is categorically excluded from environmental review under 49 CFR 1105.6(c).

Board decisions and notices are available at www.stb.gov.

It is ordered:

1. The transaction is approved and authorized, subject to the filing of opposing comments.

2. If opposing comments are timely filed, the findings made in this notice will be deemed vacated.

3. This notice will be effective September 28, 2021, unless opposing comments are filed by September 27, 2021. If any comments are filed, Applicant may file a reply by October 11, 2021.

4. A copy of this notice will be served on: (1) The U.S. Department of Transportation, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590; (2) the U.S. Department of Justice, Antitrust Division, 10th Street & Pennsylvania Avenue NW, Washington, DC 20530; and (3) the U.S. Department of Transportation, Office of General Counsel, 1200 New Jersey Avenue SE, Washington, DC 20590.

Decided: August 5, 2021.

By the Board, Board Members Begeman, Fuchs, Oberman, Primus, and Schultz.

Jeffrey Herzig,
Clearance Clerk.

[FR Doc. 2021–17133 Filed 8–10–21; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA–2021–0012]

Proposed First Renewal of Memorandum of Understanding (MOU) Assigning Certain Federal Environmental Responsibilities to the State of Nebraska, Including National Environmental Policy Act (NEPA) Authority for Certain Categorical Exclusions (CEs)

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of proposed first renewal of MOU; request for comments.

SUMMARY: The FHWA and the State of Nebraska, acting by and through its Department of Transportation (State), propose renewing the MOU providing participation of the State in the Categorical Exclusion Assignment program. This program allows FHWA to assign its authority and responsibility for determining whether certain designated activities within the

geographic boundaries of the State, as specified in the proposed MOU, are categorically excluded from preparation of an environmental assessment or an environmental impact statement under the National Environmental Policy Act.

DATES: Comments must be received on or before September 10, 2021.

ADDRESSES: You may submit comments, identified by Docket Number FHWA–2021–0012, by any of the methods described below. To ensure that you do not duplicate your submissions, please submit them by only one of the following means:

- **Federal eRulemaking Portal:** Go to <http://www.regulations.gov> and follow the online instructions for submitting comments.

- **Mail:** U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, Room W12–140, Washington, DC 20590–0001.

- **Hand Delivery or Courier:** U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9:00 a.m. and 5:00 p.m. ET, except Federal holidays.

- **Fax:** (202) 493–2251.

Instructions: You must include the agency name and docket number FHWA–2021–0012 at the beginning of your comments. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: For FHWA: Melissa Maiefski; by email at Melissa.Maiefski@dot.gov or by telephone at 402–742–8473. The Nebraska Division Office’s normal business hours are 8 a.m. to 5 p.m. (Central Standard Time), Monday through Friday, except Federal holidays. For the State of Nebraska: Brandie Neemann; by email at Brandie.Neemann@nebraska.gov or by telephone at 402–479–4795. The Nebraska Department of Transportation’s business hours are 8 a.m. to 5 p.m. (Central Standard Time), Monday through Friday, except State and Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

This document, a complete copy of the proposed first renewal MOU, background documents, and comments received may be viewed online through the Federal eRulemaking portal at <http://www.regulations.gov>. The website is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded by accessing the Office of the Federal

Register’s website at www.federalregister.gov and the Government Publishing Office’s website at www.govinfo.gov.

Background

Section 326 of Title 23, United States Code (U.S.C.), creates a program that allows the Secretary of the U.S. Department of Transportation (Secretary), to assign, and a State to assume, responsibility for determining whether certain highway projects are included within classes of action that are categorically excluded (CE) from requirements for environmental assessments or environmental impact statements pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* (NEPA). In addition, this program allows the assignment of other environmental review requirements applicable to Federal highway projects. The FHWA is authorized to act on behalf of the Secretary with respect to these matters.

The FHWA would execute the first renewal of Nebraska’s participation in this program through an MOU. Statewide decision making responsibility would be assigned for all activities identified in the MOU within the categories listed in 23 CFR 771.117(c) and those listed as examples in 23 CFR 771.111(d), and any activities added through FHWA rulemaking to those listed in 23 CFR 771.117(c) or example activities listed in 23 CFR 771.117(d) after the date of the execution of this MOU. In addition to the NEPA CE determination responsibilities, the MOU would assign to the State the responsibility for conducting Federal environmental review, consultation, and other related activities for projects that are subject to the MOU with respect to the following Federal laws and Executive Orders:

- Clean Air Act (CAA), 42 U.S.C. 7401–7671q. *Including determinations for project-level conformity if required for the project, except as specified in Stipulation II.B.2 of the MOU*
- Noise Control Act of 1972, 42 U.S.C. 4901–4918
- Compliance with the noise regulations in 23 CFR part 772 (except approval of the State noise policy in accordance with 23 CFR 772.7)
- Section 7 of the Endangered Species Act of 1973, 16 U.S.C. 1531–1544, and 1536
- Fish and Wildlife Coordination Act, 16 U.S.C. 661–667d
- Migratory Bird Treaty Act, 16 U.S.C. 703–712
- Bald and Golden Eagle Treaty Act, as amended, 16 U.S.C. 668–668c

- Section 106 of the National Historic Preservation Act of 1966, as amended, 54 U.S.C. 306108
- Archeological Resources Protection Act of 1979, 16 U.S.C. 470aa–mm.
- Title 54, Chapter 3125—Preservation of Historical and Archeological Data, 54 U.S.C. 312501–312508
- Native American Grave Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3001–3013; 18 U.S.C. 1170
- Section 4(f) of the Department of Transportation Act of 1966, 23 U.S.C. 138 and 49 U.S.C. 303; 23 CFR part 774, *except as specified in Stipulation II.B.2 of the MOU*
- American Indian Religious Freedom Act, 42 U.S.C. 1996
- Farmland Protection Policy Act (FPPA), 7 U.S.C. 4201–4209
- Clean Water Act, 33 U.S.C. 1251–1377, Sections 401, 404, and 319
- Rivers and Harbors Act of 1899, 33 U.S.C. 403
- Wild and Scenic Rivers Act, 16 U.S.C. 1271–1287
- Emergency Wetlands Resources Act, 16 U.S.C. 3921, 3931
- Wetlands Mitigation, 23 U.S.C. 103(b)(6)(m), 133(b)(3)
- FHWA wetland and natural habitat mitigation regulations, 23 CFR part 777
- Flood Disaster Protection Act, 42 U.S.C. 4001–4128
- Safe Drinking Water Act (SDWA), 42 U.S.C. 300f–300j–6
- Land and Water Conservation Fund (LWCF), Public Law 88–578, 78 Stat. 897 (known as Section 6(f))
- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601–9675
- Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. 9671–9675
- Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901–6992k
- Landscaping and Scenic Enhancement (Wildflowers), 23 U.S.C. 319
- E.O. 11990, Protection of Wetlands
- E.O. 11988, Floodplain Management (except approving design standards and determinations that a significant encroachment is the only practicable alternative under 23 CFR 650.113 and 650.115)
- E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations
- E.O. 11593, Protection and Enhancement of Cultural Resources
- E.O. 13007, Indian Sacred Sites
- E.O. 13175 Consultation and Coordination with Indian Tribal Governments

- E.O. 13122 and E.O. 13751, Invasive Species
- Planning and Environmental Linkages, 23 U.S.C. 168, except for those FHWA responsibilities associated with 23 U.S.C. 134 and 135
- Programmatic Mitigation Plans, 23 U.S.C. 169 except for those FHWA responsibilities associated with 23 U.S.C. 134 and 135.

The MOU allows the State to act in the place of FHWA in carrying out the functions described above, except with respect to government-to-government consultations with federally recognized Indian Tribes. The FHWA will retain responsibility for conducting formal government-to-government consultation with federally recognized Indian Tribes, which is required under some of the above-listed laws and Executive Orders. The State may also assist FHWA with formal consultations, with consent of a tribe, but FHWA remains responsible for the consultation.

This assignment includes transfer to the State of Nebraska the obligation to fulfill the assigned environmental responsibilities on any proposed projects meeting the criteria in Stipulation 1(B) of the MOU that were determined to be CEs prior to the effective date of the proposed MOU but that have not been completed as of the effective date of the MOU.

The FHWA will consider the comments submitted on the proposed first renewal MOU when making its decision on whether to execute this MOU. The FHWA will make the final, executed MOU publicly available.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 326; 42 U.S.C. 4331, 4332; 23 CFR 771.117; 40 CFR 1507.3, 1508.4.

Joseph A. Werning,
Division Administrator, Federal Highway Administration.

[FR Doc. 2021-17112 Filed 8-10-21; 8:45 am]

BILLING CODE 4910-22-P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Intent To Prepare a Draft Environmental Impact Statement for the Interstate 405 ExpressLanes Project, in Los Angeles County, California

AGENCY: Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Notice of Intent (NOI) to prepare a Draft Environmental Impact Statement (Draft EIS) for the Interstate 405 (I-405) ExpressLanes project.

SUMMARY: The FHWA, on behalf of the California Department of Transportation (Caltrans), is issuing this notice to advise the public that a Draft EIS will be prepared for the I-405 ExpressLanes project, a proposed highway project in Los Angeles County, California.

DATES: This notice will be accompanied by a 30-day public scoping comment period from Tuesday, August 3, 2021, to Wednesday, September 1, 2021. The deadline for comments is 5:00 p.m. (PST) on September 1, 2021. Three virtual public scoping meetings will be held on:

- Saturday, August 14, 2021; 10 a.m.–12 p.m.
- Tuesday, August 17, 2021; 6–8 p.m.
- Wednesday, August 18, 2021; 11:30 a.m.–1:30 p.m.

ADDRESSES: The virtual meeting link will be made available on the project website at www.metro.net/405expresslanes.

FOR FURTHER INFORMATION CONTACT: For Caltrans, contact Ronald Kosinski, Deputy District Director, Division of Environmental Planning, Caltrans District 7, 100 S Main Street, MS 16A, Los Angeles, CA 90012, (213) 507-4301, or email Ron.kosinski@dot.ca.gov. For FHWA, contact David Tedrick, telephone (916) 498-5024, or email David.tedrick@dot.gov.

SUPPLEMENTARY INFORMATION: Effective July 1, 2007, FHWA assigned, and Caltrans assumed, environmental responsibilities for this project pursuant to 23 U.S.C. 327. Caltrans, as the assigned National Environmental Policy Act (NEPA) agency, will prepare a Draft EIS on a proposal for a highway improvement project in Los Angeles County, California.

The Project proposes to improve traffic conditions on I-405 starting in the south at Interstate 10 (I-10) and terminating in the north at U.S. Highway 101 (US-101). The proposed Project will reduce congestion,

encourage carpooling and transit, improve trip reliability, reduce degradation of the carpool and general-purpose lanes, increase person throughput, and apply technology to help manage traffic. The range of improvements may include, but not be limited to, converting existing HOV lanes to Express Lanes or adding an additional Express Lane in each direction and converting existing HOV lanes to ExpressLanes.

Currently, the following alternatives are being considered, all approximately 10 miles in length:

- *Alternative 1:* The No-Build/No Action Alternative does not include improvements to the existing lanes along I-405 between I-10 and US-101.
- *Alternative 2:* Convert Existing HOV to One ExpressLane (Standard Lane and Shoulder Widths). This build alternative would convert the existing HOV lane in each direction, along I-405 between I-10 and US-101, to an ExpressLane. The northbound and southbound directions of the freeway would be restriped within the existing footprint to accommodate one 12-foot wide ExpressLane with a 4-foot wide buffer separating the ExpressLane from the 12-foot wide general-purpose lanes. Dynamic pricing would be deployed in the ExpressLane to ensure trip reliability and traffic flow. Installation of toll and communication infrastructure and modification/installation of overhead signs would be required. Alternative 2 proposes to widen the freeway, where necessary, to accommodate an additional weave lane at ExpressLane ingress/egress locations and maintain stopping sight distance at curves. Non-standard inside shoulders would be maintained in a few locations where constraints exist, and standard 10-foot outside shoulders would be provided where possible. Retaining walls would be provided where required to minimize and avoid right-of-way (ROW) acquisition. Other improvements include construction of retaining walls and sound walls, utility improvements, and drainage improvements.

- *Alternative 3:* Convert Existing HOV Lane to Two ExpressLanes (Non-Standard Lane and Shoulder Widths). This build alternative would convert the existing HOV lane to an ExpressLane and add a second ExpressLane in each direction between I-10 and US-101. The freeway would be widened and restriped to accommodate the two ExpressLanes with a buffer separating the ExpressLanes from the general-purpose lanes. Dynamic pricing would be deployed in the ExpressLanes to ensure trip reliability and traffic flow.

Installation of toll and communication infrastructure and modification/ installation of overhead signs would be required. Alternative 3 proposes to widen the freeway to the outside in order to accommodate the proposed two-lane ExpressLane facility as described. Non-standard lanes and shoulders would be provided to accommodate for the addition of the new ExpressLanes as part of Alternative 3. Retaining walls would be provided where required to minimize and avoid ROW acquisition. The reduction of shoulder and lane widths allows for accommodation of the proposed two-lane ExpressLane facility without significant proposed roadway widening. However, in locations with the following conditions, additional roadway widening may be required:

- 12-foot wide weaving lane at ExpressLane ingress/egress locations
- Widening of inside/outside shoulders to maintain sight distance

Other improvements include construction of retaining walls and sound walls, utility improvements, and drainage improvements.

- *Alternative 4:* Convert Existing HOV Lane to Two ExpressLanes (Standard Lanes and Shoulder Widths). This build alternative would convert the existing HOV lane, between I-10 and US-101, to an Express Lane in each direction, and a second Express Lane in each direction would also be added, while providing standard lane widths, shoulder widths and stopping sight distances. The freeway would be widened and restriped to accommodate the two ExpressLanes with a buffer separating the ExpressLanes from the general-purpose lanes. Dynamic pricing would be deployed in the ExpressLanes to ensure trip reliability and traffic flow. Installation of toll and communication infrastructure and modification/ installation of overhead signs would be required. Alternative 4 proposes to widen the freeway to the outside in order to accommodate the proposed standard two-lane Express Lane facility as described. Retaining walls would be provided where required to minimize and avoid ROW acquisition. Reconstruction of some existing freeway structures would be required to implement Alternative 4's standard roadway cross-section. Other improvements include construction of retaining walls and sound walls, utility improvements, and drainage improvements.

- *Alternative 5:* Add an Additional HOV Lane (Non-standard Lane and Shoulder Widths). This build alternative would add an additional HOV lane,

between I-10 and US-101, in each direction. The freeway would be widened and restriped to accommodate the two HOV lanes with a buffer separating the HOV lanes from the general-purpose lanes. Alternative 5 proposes to widen the freeway to the outside in order to accommodate the proposed two-lane HOV facility as described. Non-standard lanes and shoulders would be provided in order to accommodate for the addition of the new HOV lane as part of Alternative 5. Retaining walls would be provided where required to minimize and avoid ROW acquisition. The reduction of shoulder and lane widths allows for accommodation of the proposed two-lane HOV facility without significant proposed roadway widening. However, in locations with the following conditions, additional roadway widening may be required:

- 12-foot wide weaving lane at HOV ingress/egress locations
- Widening of inside/outside shoulder to maintain sight distance

Other improvements include construction of retaining walls and sound walls, utility improvements, and drainage improvements.

Anticipated Federal and State approvals include permits under the National Pollutant Discharge Elimination System (NPDES), Clean Water Act (CWA) Section 401 Water Quality, CWA Section 404 Nationwide Permit from the United States Army Corps of Engineers (USACE), California Fish and Game Code Section 1602 Lake or Streambed Alteration Agreement from the California Department of Fish and Wildlife (CDFW), Section 7 Consultation with the United States Fish and Wildlife Service (USFWS) for listed species under the Federal Endangered Species Act (FESA), and CDFW 2080.1 Consistency Determination for listed species under the California Endangered Species Act (CESA).

Letters describing the proposed action and soliciting comments will be sent to appropriate Federal, State, Participating Agencies, Tribal governments and groups, local agencies, and to private organizations and citizens who have previously expressed or are known to have interest in this proposal. The public scoping process will officially begin in August 2021. Virtual public scoping meetings will be held in August 2021. Comments may be submitted during the public scoping period via mail, email, the project website comment form, or the project hotline. Submit comments by mail to the following address: Ron Kosinski,

Deputy District Director, Caltrans District 7, 100 S Main Street, MS 16A, Los Angeles, CA 90012. Submit comments by email to 405expresslanes@metro.net. Submit comments via comment form on the project website at www.metro.net/405expresslanes. Submit oral comments by calling (213) 922-4860 to leave a voice recording. All comments must be received no later than September 1, 2021 at 5:00 p.m. In addition, a public hearing will be held once the Draft EIS is completed. Public notice will be given of the time and place of the meeting and hearing. The Draft EIS will be available for public and agency review and comment prior to the public hearing.

To ensure that the full range of issues related to this proposed action are addressed and all significant issues identified, comments, and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to Caltrans at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: August 4, 2021.

Rodney Whitfield,

Director, Financial Services, Federal Highway Administration, California Division.

[FR Doc. 2021-17057 Filed 8-10-21; 8:45 am]

BILLING CODE 4910-RY-P

DEPARTMENT OF TRANSPORTATION**Federal Motor Carrier Safety Administration**

[Docket No. FMCSA–1998–4334; FMCSA–2000–7918; FMCSA–2003–14504; FMCSA–2003–15268; FMCSA–2004–17984; FMCSA–2004–18885; FMCSA–2005–20027; FMCSA–2005–21254; FMCSA–2006–26066; FMCSA–2006–26653; FMCSA–2008–0106; FMCSA–2008–0340; FMCSA–2009–0086; FMCSA–2010–0385; FMCSA–2011–0010; FMCSA–2011–0102; FMCSA–2012–0279; FMCSA–2012–0337; FMCSA–2013–0022; FMCSA–2013–0027; FMCSA–2013–0028; FMCSA–2013–0029; FMCSA–2013–0169; FMCSA–2014–0004; FMCSA–2014–0006; FMCSA–2014–0008; FMCSA–2014–0298; FMCSA–2014–0300; FMCSA–2014–0301; FMCSA–2014–0304; FMCSA–2014–0305; FMCSA–2015–0055; FMCSA–2015–0350; FMCSA–2016–0024; FMCSA–2016–0213; FMCSA–2016–0377; FMCSA–2017–0014; FMCSA–2017–0019; FMCSA–2018–0018; FMCSA–2018–0208; FMCSA–2018–0209; FMCSA–2019–0004; FMCSA–2019–0005; FMCSA–2019–0011]

Qualification of Drivers; Exemption Applications; Vision

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 59 individuals from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) for interstate commercial motor vehicle (CMV) drivers. The exemptions enable these individuals to continue to operate CMVs in interstate commerce without meeting the vision requirement in one eye.

DATES: Each group of renewed exemptions were applicable on the dates stated in the discussions below and will expire on the dates provided below.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, fmcsamedical@dot.gov, FMCSA, DOT, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are from 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–1998–4334, FMCSA–2000–7918, FMCSA–2003–14504, FMCSA–2003–15268, FMCSA–2004–17984, FMCSA–2004–18885, FMCSA–2005–20027, FMCSA–2005–21254, FMCSA–2006–26066, FMCSA–2006–26653, FMCSA–2008–0106, FMCSA–2008–0340, FMCSA–2009–0086, FMCSA–2010–0385, FMCSA–2011–0010, FMCSA–2011–0102, FMCSA–2012–0279, FMCSA–2012–0337, FMCSA–2013–0022, FMCSA–2013–0027, FMCSA–2013–0028, FMCSA–2013–0029, FMCSA–2013–0169, FMCSA–2014–0004, FMCSA–2014–0006, FMCSA–2014–0008, FMCSA–2014–0298, FMCSA–2014–0300, FMCSA–2014–0301, FMCSA–2014–0304, FMCSA–2014–0305, FMCSA–2015–0055, FMCSA–2015–0350, FMCSA–2016–0024, FMCSA–2016–0213, FMCSA–2016–0377, FMCSA–2017–0014, FMCSA–2017–0019, FMCSA–2018–0018, FMCSA–2018–0208, FMCSA–2018–0209, FMCSA–2019–0004, FMCSA–2019–0005, or FMCSA–2019–0011 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 in Room W12–140 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 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at www.transportation.gov/privacy.

II. Background

On June 28, 2021, FMCSA published a notice announcing its decision to renew exemptions for 59 individuals from the vision requirement in 49 CFR 391.41(b)(10) to operate a CMV in interstate commerce and requested comments from the public (86 FR 34111). The public comment period ended on July 28, 2021, and no comments were received.

FMCSA has evaluated the eligibility of these applicants and determined that renewing these exemptions would

achieve a level of safety equivalent to, or greater than, the level that would be achieved by complying with the current regulation § 391.41(b)(10).

The physical qualification standard for drivers regarding vision found in § 391.41(b)(10) states that a person is physically qualified to drive a CMV if that person has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of a least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing red, green, and amber.

III. Discussion of Comments

FMCSA received no comments in this proceeding.

IV. Conclusion

Based on its evaluation of the 59 renewal exemption applications and comments received, FMCSA confirms its decision to exempt the following drivers from the vision requirement in § 391.41(b)(10).

In accordance with 49 U.S.C. 31136(e) and 31315(b), the following groups of drivers received renewed exemptions in the month of August and are discussed below. As of August 8, 2021, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following 51 individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (63 FR 66226, 64 FR 16517, 65 FR 66286, 66 FR 13825, 66 FR 17994, 68 FR 13360, 68 FR 15037, 68 FR 19598, 68 FR 33570, 69 FR 33997, 69 FR 53493, 69 FR 61292, 69 FR 62742, 70 FR 2701, 70 FR 12265, 70 FR 14747, 70 FR 16887, 70 FR 25878, 71 FR 62148, 71 FR 63379, 72 FR 184, 72 FR 1051, 72 FR 8417, 72 FR 11425, 72 FR 11426, 72 FR 12665, 72 FR 28093, 72 FR 36099, 73 FR 35197, 73 FR 48275, 73 FR 61925, 73 FR 75803, 73 FR 78423, 74 FR 6209, 74 FR 8302, 74 FR 9329, 74 FR 11991, 74 FR 15586, 74 FR 19267, 74 FR 20253, 74 FR 26466, 74 FR 28094, 75 FR 44051, 75 FR 77492, 75 FR 77942, 75 FR 77949, 75 FR 79083, 76 FR 4413, 76 FR 5425, 76 FR 9856, 76 FR 11215, 76 FR 15360, 76 FR 17483, 76 FR 20076, 76 FR 21796, 76 FR 29022, 76 FR 29026, 76 FR 32016, 76 FR 37173, 76 FR 44082, 77 FR 46153, 77 FR 60008, 77 FR 68202, 77 FR 70534, 77 FR 71671, 77 FR 74734, 78 FR 797, 78 FR 800, 78 FR 9772, 78 FR 12815, 78 FR 12822, 78 FR 16035, 78 FR 16762, 78 FR 18667, 78 FR 22596, 78 FR 22602, 78 FR 24798, 78 FR 27281, 78 FR 30954,

78 FR 32703, 78 FR 41188, 78 FR 46407, 78 FR 51268, 78 FR 57679, 78 FR 64274, 78 FR 77778, 79 FR 18392, 79 FR 29498, 79 FR 35212, 79 FR 41737, 79 FR 46153, 79 FR 47175, 79 FR 56102, 79 FR 65759, 79 FR 65760, 79 FR 69985, 79 FR 73686, 80 FR 603, 80 FR 2473, 80 FR 3305, 80 FR 3308, 80 FR 6162, 80 FR 8927, 80 FR 13070, 80 FR 14220, 80 FR 14223, 80 FR 15859, 80 FR 15863, 80 FR 16500, 80 FR 16502, 80 FR 18693, 80 FR 20562, 80 FR 22773, 80 FR 25766, 80 FR 25768, 80 FR 31957, 80 FR 33007, 80 FR 33011, 80 FR 36395, 80 FR 36398, 80 FR 45573, 80 FR 67481, 81 FR 14190, 81 FR 21655, 81 FR 39100, 81 FR 66718, 81 FR 80161, 81 FR 81230, 81 FR 90050, 81 FR 96165, 81 FR 96180, 82 FR 13043, 82 FR 13045, 82 FR 13048, 82 FR 13187, 82 FR 15277, 82 FR 17736, 82 FR 18949, 82 FR 18956, 82 FR 22379, 82 FR 23712, 82 FR 26224, 82 FR 32919, 82 FR 33542, 82 FR 37499, 83 FR 2306, 83 FR 15195, 83 FR 28325, 83 FR 34661, 83 FR 40638, 83 FR 53727, 83 FR 60954, 84 FR 2305, 84 FR 2311, 84 FR 2314, 84 FR 2323, 84 FR 2326, 84 FR 2328, 84 FR 5550, 84 FR 10389, 84 FR 12665, 84 FR 16320, 84 FR 16327, 84 FR 16336, 84 FR 21393, 84 FR 21397, 84 FR 21401, 84 FR 47057, 84 FR 52166):

Marvin D. Bass (KY)
 Raymond L. Bradshaw (TX)
 Joel A. Cabrera (FL)
 Richard D. Carlson (MN)
 David F. Cialdea (MA)
 Peter R. Clarke (WA)
 Marcus L. Conner (TX)
 Jon R. Davidson (CO)
 Donald W. Donaldson (GA)
 David L. Dykman (ID)
 Terry J. Edwards (MO)
 Barry J. Ferdinando (NH)
 Riche Ford (CO)
 Dale R. Goodell (SD)
 Thomas A. Grigsby (AR)
 Matthew J. Hahn (PA)
 Jay A. Harding (OR)
 Johnny K. Hiatt (NC)
 William G. Holland (AR)
 Abdalla M. Jalili (IL)
 Francisco J. Jimenez (TX)
 Curtis L. Lamb (KS)
 David C. Leoffler (CO)
 Richard D. Livingston (WI)
 Robert R. Martin (VA)
 Carl M. McIntire (OH)
 Edgar H. Meraz Gardea (NM)
 Leonard Morris (NJ)
 Timothy L. Morton (NC)
 George M. Nelson (OH)
 William L. Paschall (MD)
 John P. Perez (FL)
 Zeljko Popovac (VT)
 Roberto A. Ramos (TX)
 Donald W. Randall (OR)
 Larry F. Reber (OH)
 Larry D. Robinson (MO)
 Cory W. Schell (WA)

Lynn R. Schraeder (IA)
 Laverne F. Schulte, Jr. (OH)
 Richie J. Schwendy (IL)
 Martin Serrano (IL)
 Kyle C. Shover (NJ)
 Sammie Q. Soles, Jr. (MI)
 Charles T. Spears (VA)
 George R. Tieskoetter (IA)
 Jaime Valdez (TX)
 James K. Waites (AR)
 Robert A. Wegner (MN)
 Bryon L. Wright (DE)
 Dana J. York (PA)

The drivers were included in docket number FMCSA-1998-4334, FMCSA-2000-7918, FMCSA-2003-14504, FMCSA-2004-17984, FMCSA-2004-18885, FMCSA-2005-20027, FMCSA-2006-26066, FMCSA-2006-26653, FMCSA-2008-0106, FMCSA-2008-0340, FMCSA-2009-0086, FMCSA-2010-0385, FMCSA-2011-0010, FMCSA-2011-0102, FMCSA-2012-0279, FMCSA-2012-0337, FMCSA-2013-0022, FMCSA-2013-0027, FMCSA-2013-0028, FMCSA-2013-0169, FMCSA-2014-0004, FMCSA-2014-0006, FMCSA-2014-0008, FMCSA-2014-0298, FMCSA-2014-0300, FMCSA-2014-0301, FMCSA-2014-0304, FMCSA-2014-0305, FMCSA-2015-0350, FMCSA-2016-0024, FMCSA-2016-0213, FMCSA-2016-0377, FMCSA-2017-0014, FMCSA-2018-0018, FMCSA-2018-0208, FMCSA-2018-0209, FMCSA-2019-0004, and FMCSA-2019-0005. Their exemptions are applicable as of August 8, 2021 and will expire on August 8, 2023.

As of August 10, 2021, and in accordance with 49 U.S.C. 31136(e) and 31315(b), Carl V. Murphy, Jr. (TX) has satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (70 FR 30999, 70 FR 46567, 72 FR 40359, 74 FR 34074, 76 FR 44653, 79 FR 4531, 80 FR 41547, 82 FR 32919, 84 FR 52166).

This driver was included in docket number FMCSA-2005-21254. The exemption is applicable as of August 10, 2021 and will expire on August 10, 2023.

As of August 15, 2021, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following three individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (68 FR 37197, 68 FR 48989, 70 FR 42615, 72 FR 40360, 74 FR 34632, 76 FR 49531, 79 FR 4531, 80 FR 44185, 82 FR 32919, 84 FR 33801, 84 FR 47045, 84 FR 52166):

Christopher G. Jarvela (MI); Guillermo Rocha (CA); and Paul S. Yocum (IN)

The drivers were included in docket numbers FMCSA-2003-15268 and FMCSA-2019-0011. Their exemptions are applicable as of August 15, 2021 and will expire on August 15, 2023.

As of August 23, 2021, and in accordance with 49 U.S.C. 31136(e) and 31315(b), Twila G. Cole (OR) has satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (78 FR 34143, 78 FR 52602, 82 FR 32919, 84 FR 52166).

This driver was included in docket number FMCSA-2013-0029. The exemption is applicable as of August 23, 2021 and will expire on August 23, 2023.

As of August 25, 2021, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following two individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (80 FR 44188, 80 FR 62161, 82 FR 32919, 84 FR 52166):

Robert J. Falanga (FL) and Duane S. Lozinski (IA)

The drivers were included in docket number FMCSA-2015-0055. Their exemptions are applicable as of August 25, 2021 and will expire on August 25, 2023.

As of August 29, 2021, and in accordance with 49 U.S.C. 31136(e) and 31315(b), Patrick J. Conner (OK) has satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (82 FR 35043, 82 FR 47295, 84 FR 52166).

This driver was included in docket number FMCSA-2017-0019. The exemption is applicable as of August 29, 2021 and will expire on August 29, 2023.

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(e) and 31315(b).

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2021-17104 Filed 8-10-21; 8:45 am]

BILLING CODE 4910-EX-P

DEPARTMENT OF TRANSPORTATION**Federal Railroad Administration****[Docket Number FRA–2008–0065]****Petition for Extension of Special Approval**

Under part 211 of title 49 Code of Federal Regulations (CFR), this document provides the public notice that on July 24, 2021, the Maryland Department of Transportation Maryland Transit Administration MARC Train Service (MACZ) petitioned the Federal Railroad Administration (FRA) to extend a special approval of an alternate standard for periodic brake equipment maintenance, pursuant to 49 CFR 238.309(a)(2). The relevant FRA Docket Number is FRA–2008–0065.

Specifically, MACZ requests to continuing applying alternate standards for the CCB–KE–3.9 air brake system of the MARC HHP–8 locomotive fleet. This alternate standard to 49 CFR 229.29(e) and 238.309(a)(2) is to allow for the level two and level three maintenance intervals to be 2,944 days (8 years). MACZ explains its request is based on the successful history of the special approval, as well as the results of an age exploration study for the HHP–8 air brake system as outlined in Docket Numbers FRA–2008–0065 and FRA–2001–10596. The locomotives are expected to continue in passenger service for MACZ, operated and maintained by Amtrak on the Northeast Corridor, for the foreseeable future.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at www.regulations.gov.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Website:* <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation

(DOT), 1200 New Jersey Ave. SE, W12–140, Washington, DC 20590.

Communications received by September 27, 2021 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable. Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at <https://www.transportation.gov/privacy>. See also <https://www.regulations.gov/privacy-notice> for the privacy notice of www.regulations.gov.

Issued in Washington, DC.

John Karl Alexy,

*Associate Administrator for Railroad Safety
Chief Safety Officer.*

[FR Doc. 2021–17120 Filed 8–10–21; 8:45 am]

BILLING CODE 4910–06–P**DEPARTMENT OF TRANSPORTATION****Federal Railroad Administration****[Docket Number FRA–2021–0079]****Petition for Waiver of Compliance**

Under part 211 of title 49 Code of Federal Regulations (CFR), this document provides the public notice that on July 14, 2021, St. Mary's Railway West LLC. (SMW), petitioned the Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR part 240 (Qualification and Certification of Locomotive Engineers), and part 242 (Qualification and Certification of Conductors). FRA assigned the petition Docket Number FRA–2021–0079.

Specifically, SMW requests relief as part of its proposed implementation of and participation in FRA's Confidential Close Call Reporting System (C³RS) Program. SMW seeks to shield reporting employees and the railroad from mandatory punitive sanctions that would otherwise arise as provided in 49 CFR 240.117(e)(1)–(4); 240.305(a)(1)–(4) and (a)(6); 240.307; 242.403(b), (c), (e)(1)–(4), (e)(6)–(11), (f)(1)–(2); and 242.407. The C³RS Program encourages certified operating crew members to

report close calls and protect the employees and the railroad from discipline or sanctions arising from the incidents reported per the C³RS Implementing Memorandum of Understanding.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at www.regulations.gov.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested parties desire an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Website:* <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation

(DOT), 1200 New Jersey Ave. SE, W12–140, Washington, DC 20590.

Communications received by September 27, 2021 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable.

Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to www.regulations.gov, as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at <https://www.transportation.gov/privacy>. See also <https://www.regulations.gov/privacy-notice> for the privacy notice of www.regulations.gov.

Issued in Washington, DC.

John Karl Alexy,

*Associate Administrator for Railroad Safety,
Chief Safety Officer.*

[FR Doc. 2021–17119 Filed 8–10–21; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION**Office of the Secretary**

[Docket ID Number: DOT-OST-2014-0031]

Notice of Submission of Proposed Information Collection to OMB Agency Request for Renewal of a Previously Approved Collection: Airline Service Quality Performance—Part 234

AGENCY: Office of the Assistant Secretary for Research and Technology (OST-R), Bureau of Transportation Statistics (BTS), Department of Transportation (DOT).

ACTION: Notice and request for comments.

SUMMARY: In accordance with the *Paperwork Reduction Act of 1995* (44 U.S.C. chapter 35, as amended) this notice announces DOT's intention to renew Office of Management and Budget (OMB) Control Number 2138-0041 covering Airline Service Quality Performance On-time Performance and Mishandled Baggage reports that the largest U.S. air carriers file with DOT under Part 234 of title 14, Code of Federal Regulations (CFR).

DATES: Comments on this notice must be received by October 12, 2021. Interested persons are invited to submit comments regarding this proposal.

ADDRESSES: To ensure that you do duplicate your docket submissions, please submit them by only one of the following means:

- *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-2014-0031.)

- *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.

Privacy Act: Anyone is able to search the electronic form of all comments received into 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:

Cecelia Robinson, Office of Airline Information, RTS-42, Room E34-410, OST-R, BTS, 1200 New Jersey Avenue SE, Washington, DC 20590-0001, Telephone Number (202) 366-4405 (voice), Fax Number (202) 366-3383 or Email cecelia.robinson@dot.gov.

SUPPLEMENTARY INFORMATION: DOT collects information regarding flight performance and mishandled baggage, wheelchairs, and scooters from the largest U.S. air carriers under 14 CFR part 234. The air carriers required to provide this information to DOT consist of the U.S. air carriers that accounted for at least 0.5 percent of domestic scheduled-passenger revenues (Reporting Carriers) as most recently determined by the DOT's Office of Airline Information. An air carrier that is not a Reporting Carrier may voluntarily submit the flight performance and mishandled baggage, wheelchairs, and scooters information to the Department pursuant to 14 CFR 234.7.

Specifically, Reporting Carriers must submit Part 234 On-time Performance reports to DOT with information on domestic flight operations and performance as described in 14 CFR 234.4.¹ In addition, under 14 CFR 234.6, Reporting Carriers must submit Part 234 Mishandled Baggage reports to DOT that include the following information for covered domestic flights: (1) The number of bags mishandled in its custody, (2) the number of bags enplaned into the aircraft cargo compartment, (3) the number of mishandled wheelchairs and scooters mishandled in its custody, and (4) the number of wheelchairs and scooters enplaned into the aircraft cargo compartment.² Each Reporting Carrier is required to report the flight performance and mishandled baggage, wheelchair, and scooter information to DOT on a monthly basis for the covered flights it operates and for any covered flights held out under the Reporting Carrier's code (as the only U.S. carrier code) and

¹ The format and instructions for reporting this information are in Technical Reporting Directive #27—On-Time Performance, effective January 1, 2018, available at: <https://cms7.bts.dot.gov/sites/bts.dot.gov/files/docs/explore-topics-and-geography/topics/airlines-and-airports/207741/technical-directive-no-27-time-2018.pdf>.

² The format and instructions for reporting mishandled baggage and wheelchair and scooter information to DOT are in Technical Reporting Directive #30A—Mishandled Baggage and Wheelchairs and Scooters (Amended), effective January 1, 2019, available at: <https://www.bts.dot.gov/sites/bts.dot.gov/files/docs/explore-topics-and-geography/topics/airlines-and-airports/224606/technicaldirective30abaggage2019amended.pdf>.

operated by a codeshare partner of the Reporting Carrier.

DOT uses the information reported by airlines to provide airline performance information and statistics on the BTS website and in the Air Travel Consumer Report (ATCR), a monthly publication of DOT's Office of Aviation Consumer Protection (OACP). Air transportation consumers and other stakeholders use the information DOT publishes to understand and compare airlines' service quality performance, including airlines' rates of on-time performance and cancellation and rates of baggage and wheelchair and scooter mishandling.

DOT's Federal Aviation Administration (FAA) uses data reported by airlines in Part 234 On-time Performance reports to analyze air traffic delays. Wheels-up and wheels-down times are used by the FAA in conjunction with departure and arrival times to show the extent of ground delays. Actual elapsed flight time (wheels-down minus wheels-up time) is compared by the FAA to scheduled elapsed flight time to identify airborne delays. The reporting of the aircraft tail number allows the FAA to track an aircraft through the air network, which enables the FAA to study the ripple effects of delays at hub airports. The data can be analyzed by the FAA for airport design changes, new equipment purchases, and the planning of new runways or airports based on current and projected airport delays and traffic levels. The identification of the reason for delays allows the FAA, airport operators, and air carriers to pinpoint delays under their control.

DOT is publishing this notice to announce its intent to request extension of the previously approved information collections described above under OMB Control Number 2138-0041. Without further action, OMB authorization of the information collections would expire December 31, 2021.

The Paperwork Reduction Act of 1995 (PRA) and its implementing regulations, 5 CFR part 1320, require Federal agencies to issue two notices seeking public comment on information collection activities before OMB may approve paperwork packages. 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 it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to monetary penalty for failing to comply with a collection of information

if the collection of information does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

For each of these information collections, the title, a description of the respondents, and an estimate of the annual recordkeeping and periodic reporting burden are set forth below.

1. Airline Service Quality Performance Reports—Part 234 On-Time Performance

Respondents: Certificated air carriers that account for at least 0.5 percent of the domestic scheduled-service passenger revenues are required to report flight performance data for flights that they operate as described in 14 CFR 234.4; Certificated air carriers that account for at least 0.5 percent of domestic scheduled-service passenger revenues that market code-share flights carrying the carrier's code as the only U.S. carrier code are required to report flight performance data for these code-share flights as described in 14 CFR 234.4; Air carriers may voluntarily report flight performance data pursuant to 14 CFR 234.7.

Estimated Number of Respondents: 17 air carriers (4 of which market codeshare flights).

Frequency: Monthly.

Estimated Average Burden per Response: 10 hours for each respondent to report for the flights operated by the respondent plus an additional 16 hours if the respondent reports for flights operated by code-share partners.

Estimated Total Annual Burden: 2,808 hours (17 air carriers reporting the flight performance information for the flights they operate \times 10 hours per response \times 12 months = 2,040 hours) + (4 air carriers reporting the flight performance information for flights operated by their codeshare partners \times 16 hours per response \times 12 months = 768 hours). This estimate is based on the following information: 17 carriers reported the flight performance data for the flights they operated to DOT in calendar year 2019, 2020, and 2021. Currently, 4 carriers report flight performance data to DOT for their codeshare operations.

DOT estimates that respondents will encounter on average a 10-hour burden per month to report flight performance data to DOT for the flights they operate. DOT estimates the respondents that market codeshare flights will encounter on average an additional burden of 16 hours per month to report flight performance data to DOT for their codeshare operations. The burden estimates include staff time to manage and process the data and to submit the

report through DOT's electronic submission system.

2. Airline Service Quality Performance Reports—Part 234 Mishandled Baggage

Respondents: Certificated air carriers that account for at least 0.5 percent of the domestic scheduled-service passenger revenues are required to report mishandled baggage and wheelchairs and scooters data for flights that they operate as described in 14 CFR 234.6; Certificated air carriers that account for at least 0.5 percent of domestic scheduled-service passenger revenues that market code-share flights carrying the carrier's code as the only U.S. carrier code are required to report mishandled baggage and wheelchairs and scooters data for these code-share flights as described in 14 CFR 234.6; Air carriers may voluntarily report mishandled baggage and wheelchairs and scooters data pursuant to 14 CFR 234.7.

Estimated Number of Respondents: 17 air carriers (4 that market codeshare flights).

Frequency: Monthly.

Estimated Average Burden per Response: 10 hours for each respondent to report for the flights operated by the respondent plus an additional 16 hours if the respondent reports for flights operated by code-share partners.

Estimated Total Annual Burden: 2,825 hours (17 air carriers reporting the mishandled baggage and mishandled wheelchairs and scooters information for flights they operate \times 10 hours per response \times 12 months = 2,040 hours) + (4 air carriers reporting the mishandled baggage and mishandled wheelchairs and scooters information for flights operated by their codeshare partners \times 16 hours per response \times 12 months = 768 hours) + (.00138 hours for manual data entry related to wheelchair or scooters \times 12,000 manual entries = 17 hours). This estimate is based on the following information: 17 Carriers reported mishandled baggage and wheelchair and scooter information to DOT in calendar year 2019, 2020, and 2021. Currently, 4 carriers report mishandled baggage and wheelchair and scooter information to DOT for their codeshare operations.

DOT estimates that respondents will encounter on average 10-hours burden per month to report the mishandled baggage and wheelchair and scooter data to DOT for the flights they operate. DOT estimates that respondents that market codeshare flights will encounter on average an additional burden of 16 hours per month to report the mishandled baggage and wheelchair and scooter data to DOT for their codeshare

operations. The burden estimates include staff time to manage and process the data and to submit the report through DOT's electronic submission system.

In addition, the estimated total annual burden is based on the assumption that most respondents employ automated processes to record that an item enplaned is a wheelchair or scooter for the purposes of reporting data on wheelchairs and scooters to DOT. For a carrier that manually records this information, such as by having their agent type information describing a wheelchair or scooter into the airline's system, DOT estimates that the airline would spend approximately 5 seconds (.00138 hours) per item to manually enter the data.³ DOT estimates that 12,000 Wheelchairs and scooters total are recorded manually per year.

Administrative Issues

The *Confidential Information Protection and Statistical Efficiency Act of 2002* (44 U.S.C. 3501) requires a statistical agency to clearly identify information it collects for non-statistical purposes. BTS hereby notifies the respondents and the public that BTS uses the information it collects under this OMB approval for non-statistical purposes including, but not limited to, publication of both respondent's identity and its data, submission of the information to agencies outside BTS for review, analysis and possible use in regulatory and other administrative matters.

Comments Invited

We invite comments on: (a) Whether the collection of information is necessary for the proper performance of the functions of DOT, including whether the information will have practical utility; (b) the accuracy of DOT'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.

³ The Final Rule to Amend Rules Requiring Reporting of Mishandled Baggage, Regulatory Impact Analysis, October 18, 2016, estimated a data entry burden of 5 seconds per wheelchair or scooter recorded manually. See Docket No. RITA-2011-0001.

Issued at Washington, DC.

William A. Chadwick, Jr.,

*Director, Office of Airline Information,
Bureau of Transportation Statistics, Office of
the Assistant Secretary for Research and
Technology.*

[FR Doc. 2021-17092 Filed 8-10-21; 8:45 am]

BILLING CODE 4910-9X-P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Senior Executive Service Performance Review Board

AGENCY: Internal Revenue Service (IRS), Department of the Treasury.

ACTION: Notice.

SUMMARY: To announce a list of senior executives who comprise a standing roster that will serve on IRS's Fiscal Year 2021 Senior Executive Service (SES) Performance Review Boards.

DATES: This list is effective September 1, 2021.

FOR FURTHER INFORMATION CONTACT:

Sharnetta A. Walton, Director, Office of Executive Services at (202) 317-3817 or Malaika Green, Deputy Director, Office of Executive Services at (202) 317-3823, IRS, 1111 Constitution Avenue NW, Washington, DC 20224.

SUPPLEMENTARY INFORMATION: Pursuant to 5 U.S.C. 4314(c)(4), this board shall review and evaluate the initial appraisals of career senior executives' performance and provide recommendations to the appointing authority on performance ratings, pay adjustments and performance awards. The senior executives are as follows:

Justin L. Abold-LaBreche
David P. Alito
Robin D. Bailey, Jr.
Scott A. Ballint
Lisa J. Beard-Niemann
Robert J. Bedoya
Michael C. Beebe
Jennifer L. Best
Carol A. Campbell
John V. Cardone
Anthony S. Chavez
James P. Clifford
Amalia C. Colbert
Erin M. Collins
Lucinda J. Comegys
Kenneth C. Corbin
Robert S. Cox
Tracy L. Deleon
Brenda A. Dial
Joseph Dianto
Donald C. Drake
Elizabeth A. Dugger
Sheila Eason
Michelle L. Eldridge
James L. Fish

Sharyn M. Fisk
Nikole C. Flax
Julie A. Foerster
Jeff D. Gill
Linda K. Gilpin
Dagoberto Gonzalez
Dietra D. Grant
Darren J. Guillot
Valerie A. Gunter
Todd L. Harber
Barbara Harris
Gearl D. Harris
Keith A. Henley
Anita M. Hill
Robert E. Hill
John E. Hinding
Carrie Y. Holland
Yumin Hsu
Scott E. Irick
Barry W. Johnson
Nikki C. Johnson
William H. Kea, Jr.
Lou Ann Kelleher
Andrew J. Keyso, Jr.
Edward T. Killen
James C. Lee
Terry L. Lemons
Sunita Lough
Robert W. Malone
Heather C. Maloy
Lee D. Martin
Kevin Q. McIver
Karen A. Michaelis
Kevin M. Morehead
Robin L. Moses
Bryan L. Musselman
Frank A. Nolden
Douglas W. O'Donnell
Deborah T. Palacheck
Kaschit D. Pandya
Holly O. Paz
Scott D. Reisher
Bridget T. Roberts
James D. Robnett
Richard L. Rodriguez
Clifford R. Scherwinski
Frederick W. Schindler
Verline A. Shepherd
Nancy A. Sieger
Susan A. Simon
Eric D. Slack
Harrison Smith
Tommy A. Smith
Jeffrey J. Tribiano
Kathryn D. Vaughan
Shanna R. Webbers
Lavena B. Williams
Maha H. Williams
Lisa S. Wilson
Sheila D. Wright

This document does not meet the Treasury's criteria for significant regulations.

Douglas W. O'Donnell,

Deputy Commissioner for Services and Enforcement, Internal Revenue Service.

[FR Doc. 2021-17111 Filed 8-10-21; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Open Meeting of the Federal Advisory Committee on Insurance

AGENCY: Departmental Offices, U.S. Department of the Treasury.

ACTION: Notice of open meeting.

SUMMARY: This notice announces that the U.S. Department of the Treasury's Federal Advisory Committee on Insurance (FACI) will meet via videoconference on Thursday, September 9, 2021 from 11:00 a.m.–1:00 p.m. Eastern Time. The meeting is open to the public. The FACI provides non-binding recommendation and advice to the Federal Insurance Office (FIO) in the U.S. Department of Treasury.

DATES: The meeting will be held via videoconference on Thursday, September 9, 2021, from 11:00 a.m.—1:00 p.m. Eastern Time.

ADDRESSES: *Attendance:* The meeting will be held via videoconference and is open to the public. The public can attend remotely via live webcast here. The webcast will also be available through the FACI's website at here. Please refer to the FACI website for up-to-date information on this meeting. Requests for reasonable accommodations under Section 504 of the Rehabilitation Act should be directed to Mariam G. Harvey, Office of Civil Rights and Diversity, Department of the Treasury at (202) 622-0316, or mariam.harvey@do.treas.gov.

FOR FURTHER INFORMATION CONTACT: Jigar Gandhi, Senior Insurance Regulatory Policy Analyst, Federal Insurance Office, U.S. Department of the Treasury, 1500 Pennsylvania Ave. NW, Room 1410 MT, Washington, DC 20220, at (202) 622-3220 (this is not a toll-free number). Persons who have difficulty hearing or speaking may access this number via TTY by calling the toll-free Federal Relay Service at (800) 877-8339.

SUPPLEMENTARY INFORMATION: Notice of this meeting is provided in accordance with the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 10(a)(2), through implementing regulations at 41 CFR 102-3.150.

Public Comment: Members of the public wishing to comment on the business of the FACI are invited to submit written statements by either of the following methods:

Electronic Statements

- Send electronic comments to faci@treasury.gov.

Paper Statements

- Send paper statements in triplicate to the Federal Advisory Committee on

Insurance, U.S. Department of the Treasury, 1500 Pennsylvania Ave. NW, Room 1410 MT, Washington, DC 20220.

In general, the Department of the Treasury will make submitted comments available upon request without charge, including any business or personal information provided such as names, addresses, email addresses, or telephone numbers. Requests for public comments can be submitted via email to faci@treasury.gov. The Department of the Treasury will also make such statements available for public inspection and copying in the

Department of the Treasury's Library, 720 Madison Place NW, Room 1020, Washington, DC 20220, on official business days between the hours of 10:00 a.m. and 5:00 p.m. Eastern Time. You can make an appointment to inspect statements by telephoning (202) 622-2000. All statements received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. You should submit only information that you wish to make available publicly.

Tentative Agenda/Topics for Discussion: This will be the third FACI

meeting of 2021. In this meeting, the FACI will hear presentations and have opportunities to discuss topics related to ransomware attacks and cybersecurity issues in the insurance sector. The FACI will also receive status updates from each of its subcommittees and an update from FIO on its activities and consider any new business.

Dated: August 6, 2021.

Steven Seitz,

Director, Federal Insurance Office.

[FR Doc. 2021-17124 Filed 8-10-21; 8:45 am]

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Part II

Securities and Exchange Commission

Joint Industry Plan; Order Approving, as Modified, a National Market System Plan Regarding Consolidated Equity Market Data August 6, 2021.; Notice

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–92586; File No. 4–757]

Joint Industry Plan; Order Approving, as Modified, a National Market System Plan Regarding Consolidated Equity Market Data

August 6, 2021.

I. Introduction

On August 11, 2020, pursuant to Section 11A of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 608 of Regulation NMS thereunder,² Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe IEX Exchange, Inc., Investors Exchange LLC (“IEX”), Long Term Stock Exchange, Inc. (“LTSE”), MEMX LLC (“MEMX”), Nasdaq BX, Inc., Nasdaq ISE, LLC, Nasdaq PHLX LLC, Nasdaq Stock Market LLC (“Nasdaq”), New York Stock Exchange LLC (“NYSE”), NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., NYSE National, Inc., and Financial Industry Regulatory Authority, Inc. (“FINRA”) (collectively, the “SROs” or “Participants”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) a proposed new national market system plan governing the public dissemination of real-time consolidated equity market data for national market system (“NMS”) stocks (the “CT Plan or “Plan”). The CT Plan was published for comment in the *Federal Register* on October 13, 2020.³

On January 11, 2021, the Commission instituted proceedings, under Rule 608(b)(2)(i) of Regulation NMS,⁴ to determine whether to approve the CT Plan, disapprove the CT Plan, or approve the CT Plan with any changes or subject to any conditions the Commission deems necessary or appropriate after considering public comment.⁵ On April 8, 2021, the Commission extended the deadline for Commission action on the CT Plan and designated June 10, 2021, as the new

date by which the Commission would be required to take action.⁶ On June 9, 2021, the Commission further extended the deadline for Commission action on the CT Plan and designated August 9, 2021, as the date by which the Commission would be required to take action.⁷

This Order approves the CT Plan, with modifications that are described in detail below. The Commission concludes that the CT Plan, as modified, is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of a national market system, or is otherwise in furtherance of the purposes of the Act. A copy of the CT Plan, marked to reflect the modifications the Commission has made, is Attachment A to this Order.

II. Discussion and Commission Findings

A. Background

On May 6, 2020, the Commission ordered the SROs to act jointly in developing and filing with the Commission a proposed new national market system plan to govern the public dissemination of real-time, consolidated equity market data for NMS stocks (“Governance Order”)⁸ to replace the existing equity data plans.⁹ The Commission sought to address with the Governance Order, among other things, the inherent conflicts of interest between the self-regulatory organizations’ role in collecting and disseminating consolidated equity market data and their interests in selling proprietary data products. As the Commission stated in the Governance Order, since the adoption of Regulation NMS in 2005,

developments in technology and changes in the equities markets have heightened an

inherent conflict of interest between the Participants’ collective responsibilities in overseeing the Equity Data Plans and their individual interests in maximizing the viability of proprietary data products that they sell to market participants. This conflict of interest, combined with the concentration of voting power in the Equity Data Plans among a few large “exchange groups”—multiple exchanges operating under one corporate umbrella—has contributed to significant concerns regarding whether the consolidated feeds meet the purposes for them set out by Congress and by the Commission in adopting the national market system. Additionally, the Commission believes that the continued existence of three separate NMS plans for equity market data creates inefficiencies and unnecessarily burdens ongoing improvements in the provision of equity market data to market participants. Addressing the issues with the current governance structure of the Equity Data Plans . . . is a key step in responding to broader concerns about the consolidated data feeds.¹⁰

Moreover, as stated in the Governance Order, “[t]he Commission believes that the demutualization of the exchanges and the proliferation of proprietary exchange data products have heightened the conflicts between the SROs’ business interests in proprietary data offerings and their obligations as SROs under the national market system to ensure prompt, accurate, reliable, and fair dissemination of core data through the jointly administered Equity Data Plans.”¹¹

Thus, the Commission determined that the current governance structure of the existing Equity Data Plans is “inadequate to respond to changes in the market and in the ownership of exchanges, and to the evolving needs of investors and other market participants,”¹² and the Commission ordered the SROs to develop and file with the Commission a proposed new NMS plan regarding equity market data with a set of specified governance provisions designed to address the issues identified by the Commission,¹³ and to ensure the “prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to quotations for and transactions in such securities and the fairness and usefulness of the form and content of such information.”¹⁴

The Commission also acknowledged in the Governance Order that the SROs, “as the parties that have been operating the NMS plans, can provide unique

⁶ See Securities Exchange Act Release No. 91504 (Apr. 8, 2021), 86 FR 19667 (Apr. 14, 2021).

⁷ See Securities Exchange Act Release No. 92130 (June 9, 2021), 86 FR 31543 (June 14, 2021).

⁸ See Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data, Securities Exchange Act Release No. 88827 (May 6, 2020), 85 FR 28702 (May 13, 2020) (File No. 4–757).

⁹ The three equity data plans that currently govern the collection, consolidation, processing, and dissemination of SIP data are (1) the Consolidated Tape Association Plan (“CTA Plan”), (2) the Consolidated Quotation Plan (“CQ Plan”), and (3) the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation, and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis (“UTP Plan”) (collectively, the “Equity Data Plans”). See Governance Order, *supra* note 8, 85 FR at 28703 & n.34.

¹⁰ See Governance Order, *supra* note 8, 85 FR at 28702.

¹¹ See *id.* at 28704.

¹² *Id.* at 28702.

¹³ See *id.* at 28729–31.

¹⁴ 15 U.S.C. 78k–1(c)(1)(B).

¹ 15 U.S.C. 78k–1.

² 17 CFR 242.608.

³ See Notice of Filing of a National Market System Plan Regarding Consolidated Equity Market Data, Securities Exchange Act Release No. 90096 (Oct. 6, 2020), 85 FR 64565 (Oct. 13, 2020) (“Notice”).

⁴ 17 CFR 242.608(b)(2)(i).

⁵ See Order Instituting Proceedings to Determine Whether to Approve or Disapprove a National Market System Plan Regarding Consolidated Equity Market Data, Securities Exchange Act Release No. 90885 (Jan. 11, 2021), 86 FR 4142 (Jan. 15, 2021) (File No. 4–757) (“Order Instituting Proceedings”). Comments received in response to the Notice and Order Instituting Proceedings can be found on the Commission’s website at <https://www.sec.gov/comments/4-757/4-757.htm>.

insight in formulating the specific terms and provisions” of the new NMS plan for consolidated equity market data.¹⁵ Accordingly, the Governance Order did not dictate all of the specific terms of the new NMS plan and contemplated that the operational and other terms of the plan not directed by the Governance Order would be proposed by the SROs and considered by the Commission after public comment.¹⁶ The CT Plan filed by the SROs includes both provisions directed by the Commission in the Governance Order and other provisions that have been proposed by the SROs.

Below, this Order first addresses the threshold issue of the Commission’s authority to modify the CT Plan proposed by the SROs, and then it separately addresses each of the proposed provisions of the Plan, discussing the comments received and explaining the modifications, if any, that the Commission is making.

B. The Commission’s Authority To Modify the CT Plan

As noted above, the Commission is modifying the CT Plan proposed by the SROs. Several commenters argued that, before modifying the CT Plan, the Commission should publish notice for public comment of the specific changes it proposes. One commenter urges the Commission not to make substantial modifications to the CT Plan in an order purporting to approve the plan without providing the opportunity for public comment, asserting that public comment is required by the Administrative Procedure Act (“APA”).¹⁷ One commenter asserts that the Notice provides an insufficient opportunity for comment, arguing that the Commission has not stated its position regarding any of the 62 separate topics of interest identified in the Notice or proposed any specific textual changes upon which the SROs and other persons can meaningfully comment.¹⁸ This commenter further argues that this

approach does not comply with notice and comment obligations under the Act, Rule 608, or the APA.¹⁹

Another commenter also asserts that, if the Commission determines to approve the CT Plan with modifications, it should first publish the exact text of its proposed amendments and seek comment on them.²⁰ This commenter argues that the need to publish proposed modifications for comment is evidenced by the “numerous errors and potential unintended consequences visited on the current Equity Data Plans by the Commission’s hasty issuance” of the conflicts and confidentiality orders.²¹ This commenter argues that if the Commission does not publish the specific proposed modifications of the CT Plan, the SROs and other interested persons will be “deprived of the opportunity to comment that is afforded them by the Administrative Procedure Act.”²²

The Commission does not agree that it is required to publish notice of specific proposed plan language in order to modify a proposed NMS plan. Under Rule 608, the Commission can approve a proposed NMS plan “with such changes or subject to such conditions as the Commission may deem necessary or appropriate, if it finds that such plan . . . is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act.”²³ As set forth below, the Commission finds that each of its modifications of the CT Plan is necessary or appropriate. Moreover, the Commission asked extensive and detailed questions in the Notice that encompass each of the areas of the Plan the Commission is modifying and provided an opportunity for the public to comment on each of these topics as

well as the Plan as a whole. As discussed throughout this Order, the Commission has carefully considered the comments received in response to these questions, as well as all other comments received, before finding that each of the modifications made is necessary or appropriate in order to sufficiently address the core problem identified in the Governance Order.²⁴

The Commission believes that this process has provided the public sufficient notice of, and an opportunity to comment on, the areas of modification and it was not necessary to provide a second round of comment on the specific language of the modifications approved in this Order. And the Commission finds that, as modified, the CT Plan is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system.²⁵

C. The Provisions of the CT Plan

1. Recitals

The Recitals of the CT Plan set forth the procedural history of the CT Plan, the proposed schedule for implementation of the CT Plan, and the SROs’ acknowledgement of their regulatory obligations with respect to the CT Plan. As discussed below, the Commission is modifying certain of the Recitals with respect to the timeline for implementation of the CT Plan, as well as the Recital of the regulatory obligations of the SROs to the CT Plan.

(a) Implementation of the CT Plan

Paragraphs (b) and (c) of the Recitals set forth the implementation schedule for the CT Plan that the SROs have proposed. Paragraph (b) of the Recitals defines the “Effective Date” of the CT Plan as the later of the date that the Commission has approved the CT Plan or the date that the SROs have filed a certificate of formation with the State of Delaware to form the Company as a limited liability company (“LLC”). Paragraph (c) of the Recitals provides that the CT Plan will become operative as an NMS plan that governs the public dissemination of real-time consolidated equity market data on the “Operative Date,” which is defined as the first day of the month that is at least 90 days after the latest of five specified tasks has been accomplished:

²⁴ See *CSX Transp. v. Surface Transp. Bd.*, 584 F.3d 1076, 1081 (D.C. Cir. 2009); *City of Portland v. EPA*, 507 F.3d 706, 715 (D.C. Cir. 2007).

²⁵ See 17 CFR 242.608(b)(2).

¹⁵ Governance Order, *supra* note 8, 85 FR at 28711.

¹⁶ See *id.* at 28705, 28718 n.244.

¹⁷ See Letter from Patrick Sexton, EVP, General Counsel & Corporate Secretary, Cboe Global Markets, Inc. (Nov. 12, 2020) (“Cboe Letter”), at 9. This commenter argues that any changes to the governance of the SIP operating committees should be made through amendments to the current plans. See *id.* at 6 n.13. As the Commission explained in the Governance Order, one of its goals was to reduce redundancies, inefficiencies, and inconsistencies among the three existing Equity Data Plans by replacing them with a new, single plan. See Governance Order, *supra* note 8, 85 FR at 28710.

¹⁸ See Letter from Elizabeth K. King, Chief Regulatory Officer, ICE, General Counsel and Corporate Secretary, NYSE (Nov. 16, 2020) (“NYSE Letter I”), at 5, 32.

¹⁹ See NYSE Letter I, *supra* note 18, at 32. This commenter also generally asserts that the Commission cannot make a finding that the CT Plan is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act. See Letter from Elizabeth K. King, Chief Regulatory Officer, ICE, General Counsel and Corporate Secretary, NYSE (Feb. 4, 2021) (“NYSE Letter II”), at 2. As explained throughout this Order, the Commission disagrees and finds that, as modified, the CT Plan meets these standards.

²⁰ See Letter from Joan C. Conley, Senior Vice President and Corporate Secretary, Nasdaq (Nov. 12, 2020) (“Nasdaq Letter I”), at 3.

²¹ *Id.*

²² *Id.* at 7.

²³ 17 CFR 242.608(b)(2).

(i) SRO Voting Representatives and Non-SRO Voting Representatives of the Operating Committee have been selected;

(ii) Fees have been established by the Operating Committee, are effective as an amendment to the CT Plan pursuant to Rule 608 of Regulation NMS, and are ready to be implemented;

(iii) Agreements have been entered with the Processors currently performing under the CQ Plan, CTA Plan, and UTP Plan;

(iv) Agreements have been entered with an Administrator and all required contracts with vendors and subscribers have been finalized and systems to administer distributions and fees are in place; and

(v) The Operating Committee and, if applicable, the Commission have approved all policies and procedures that are necessary or appropriate.

In the Notice, the Commission sought comment on whether the timing provisions might result in undue delay in the effectiveness of the CT Plan.²⁶ The Commission asked whether the CT Plan should require that the certificate of formation be filed within a certain period of time, and whether 10 days would be an appropriate amount of time.²⁷ The Commission also asked several questions about the actions that would be required to be taken before the CT Plan becomes operative.

Specifically, the Commission sought comment on, among other things, whether the CT Plan should set deadlines for completion of each of the requisite actions, whether the Operating Committee should be required by the CT Plan to provide updates on the status of implementation, and, if so, whether such updates should be made public.²⁸ The Commission also sought comment on whether the CT Plan should require that the selection of the Operating Committee be the first action undertaken after the Effective Date.²⁹

In response to the Notice, the Commission received a number of comments supporting changes to the CT Plan to establish specified timeframes within which the requisite actions must occur for the CT Plan to be effective or operative.³⁰ These commenters express

concern that the absence of specified deadlines in the CT Plan will cause the SROs to unduly delay its implementation.³¹ Specifically, one commenter argues that it would be “nonsensical to rely on the SROs, many of whom have no incentive to change the current governance structure, to take actions on a timely basis to ensure the implementation of the Plan.”³² Another commenter acknowledges that the SROs will have significant control and influence over how and when the necessary steps to implement the CT Plan are completed and asserts that, without a reasonable deadline or target date for completion, there is a “significant risk” that implementation will be delayed indefinitely, undermining important public policy goals.³³ Another commenter similarly argues that the CT Plan fails to meet the core objectives of the Commission’s Governance Order because the required number of steps would delay full implementation of the plan for an indefinite period, possibly years.³⁴

Ryan, VP, Associate General Counsel, Fidelity Investments (Nov. 12, 2020) (“Fidelity Letter”), at 2–3; Letter from John Ramsay, Chief Market Policy Officer, IEX (Nov. 13, 2020) (“IEX Letter”), at 1–2; Letter from Rich Steiner, Head of Client Advocacy and Market Innovation, RBC Capital Markets (Nov. 12, 2020) (“RBC Letter”), at 4; Letter from Thomas M. Merritt, Deputy General Counsel, Virtu Financial, Inc. (Nov. 11, 2020) (“Virtu Letter”), at 2; Letter from Jeffrey T. Brown, Senior Vice President, Legislative and Regulatory Affairs, Charles Schwab & Co., Inc. (Nov. 12, 2020) (“Schwab Letter I”), at 2; Letter from Jeffrey T. Brown, Senior Vice President, Legislative and Regulatory Affairs, Charles Schwab & Co., Inc. (Feb. 11, 2021) (“Schwab Letter II”), at 5; Letter from Joe Wald, Managing Director, Co-Head of Electronic Trading, and Ray Ross, Managing Director, Co-Head of Electronic Trading, BMO Capital Markets Group (Nov. 18, 2020) (“BMO Letter I”), at 2–3; Letter from Joe Wald, Managing Director, Co-Head of Electronic Trading, and Ray Ross, Managing Director, Co-Head of Electronic Trading, BMO Capital Markets Group (Feb. 19, 2021) (“BMO Letter II”), at 2; Letter from Anders Franzon, General Counsel, MEMX (Feb. 5, 2021) (“MEMX Letter”), at 2–3; Letter from Hubert De Jesus, Managing Director, Global Head of Market Structure and Electronic Trading, and Samantha DeZur, Director, Global Public Policy, BlackRock (Feb. 5, 2021) (“BlackRock Letter II”), at 2; Letter from Jennifer W. Han, Managing Director & Counsel, Regulatory Affairs, Managed Funds Association (Nov. 18, 2020) (“MFA Letter”), at 4–5.

³¹ See, e.g., IEX Letter, *supra* note 30, at 1; MFA Letter, *supra* note 30, at 5; BMO Letter I, *supra* note 30, at 2; BMO Letter II, *supra* note 30, at 2; Fidelity Letter, *supra* note 30, at 3; Letter from Dorothy Donohue, Deputy General Counsel, Securities Regulation, Investment Company Institute (Nov. 12, 2020) (“ICI Letter I”), at 6–7; Letter from Dorothy Donohue, Deputy General Counsel, Securities Regulation, Investment Company Institute (Feb. 5, 2021) (“ICI Letter II”), at 2; RBC Letter, *supra* note 30, at 3; Letter from Kelvin To, Founder and President, Data Boiler Technologies, LLC (Nov. 12, 2020) (“Data Boiler Letter I”), at 20.

³² BMO Letter II, *supra* note 30, at 2.

³³ IEX Letter, *supra* note 30, at 1.

³⁴ See RBC Letter, *supra* note 30, at 3.

One commenter acknowledges that there will be “some work” in implementing the CT Plan, but states that the lack of deadlines and the number of conditions associated with the effective and operative dates are “very concerning.”³⁵ Another commenter recommends that the Commission closely monitor implementation and potentially penalize the SROs for unwarranted delays.³⁶ One commenter points to the National Market System Plan Governing the Consolidated Audit Trail (“CAT NMS Plan”) as a cautionary tale resulting from a lack of deadlines or accountability in meeting them,³⁷ while another commenter favorably promotes the CAT NMS Plan’s use of target deadlines for critical implementation deadlines, quarterly progress reports, and financial incentives.³⁸

Two commenters recommend making the Effective Date of the CT Plan the date of the Commission’s approval order,³⁹ without regard to the proposed delay for the administrative step of filing the LLC agreement with Delaware. One commenter does not express a view about the propriety of a 10 day requirement, but recommends that the SROs be required to file the LLC’s certificate of formation with Delaware “as promptly as the Commission determines is practicable following Commission approval” of the plan.⁴⁰ Another commenter anticipates no difficulty with filing the certificate of formation as an LLC and recommends ten business days as an appropriate timeframe.⁴¹

A number of commenters support imposing a one-year deadline for the Operative Date for the CT Plan.⁴² One commenter suggests that a deadline for implementation of one year from the date of Commission approval of the CT Plan is reasonable and states that, if additional time proves necessary, the

³⁵ SIFMA Letter I, *supra* note 30, at 3.

³⁶ See ICI Letter I, *supra* note 31, at 7; ICI Letter II, *supra* note 31, at 2. This commenter urges the Commission to provide financial incentives to the SROs either through fines or through not allowing the SROs to collect SIP fees for some period of time. See ICI Letter I, *supra* note 31, at 7.

³⁷ See Virtu Letter, *supra* note 30, at 2.

³⁸ See Fidelity Letter, *supra* note 30, at 3.

³⁹ See SIFMA Letter I, *supra* note 30, at 3; SIFMA Letter II, *supra* note 30, at 2; Virtu Letter, *supra* note 30, at 2.

⁴⁰ RBC Letter, *supra* note 30, at 3.

⁴¹ See Fidelity Letter, *supra* note 30, at 2–3.

⁴² See SIFMA Letter I, *supra* note 30, at 3; SIFMA Letter II, *supra* note 30, at 2; Fidelity Letter, *supra* note 30, at 4; IEX Letter, *supra* note 30, at 2; RBC Letter, *supra* note 30, at 4; Virtu Letter, *supra* note 30, at 2; Schwab Letter I, *supra* note 30, at 2; Schwab Letter II, *supra* note 30, at 5; BMO Letter I, *supra* note 30, at 2; MEMX Letter, *supra* note 30, at 2–3; BlackRock Letter II, *supra* note 30, at 2.

²⁶ See Notice, *supra* note 3, 85 FR at 64567 (Question 1).

²⁷ *Id.*

²⁸ See Notice, *supra* note 3, 85 FR at 64567 (Question 2).

²⁹ *Id.*

³⁰ See, e.g., Letter from Ellen Greene, Managing Director, Equity and Options Market Structure, SIFMA (Nov. 12, 2020) (“SIFMA Letter I”), at 3; Letter from Ellen Greene, Managing Director, Equity and Options Market Structure, SIFMA (Feb. 18, 2021) (“SIFMA Letter II”), at 2; Letter from Michael Blasi, SVP, Enterprise Infrastructure, and Krista

CT Plan can provide for obtaining an extension based on a showing of good cause.⁴³ One commenter states that, because the changes required of the plan are “primarily organizational rather than operational,” a period of no more than one year from the effective date to the operational date would be reasonable.⁴⁴ Another commenter supports a one-year deadline for the completion of the necessary steps to fully transition to operating under the CT Plan, subject to an extension only for good cause shown.⁴⁵ This commenter suggests that, immediately upon approval of the CT Plan, the Operating Committee, including the Non-SRO Voting Representatives, should be formed and begin meeting to complete the remaining prerequisites, including the adoption of fees.⁴⁶ This commenter acknowledges the timing complexity of adopting fees under the new CT Plan and selecting and onboarding a new Administrator, emphasizing that the one year deadline is an “ambitious project” that will require a commitment from both the SROs and industry participants to ensure a smooth transition.⁴⁷ Another commenter also supports requiring the CT Plan to become operational within one year and urges the Commission to finalize the proposal expeditiously.⁴⁸

Other commenters argue that there is no reasonable way to impose deadlines on any part of the process.⁴⁹ One of these commenters expresses concern that the Commission is “vastly underestimating” the amount of time needed to implement the new CT Plan, particularly given the Commission’s requirements with respect to an Administrator and a new fee schedule.⁵⁰ Another of these commenters argues that any deadline the Commission sets at this point would be “inherently arbitrary” and would do nothing to move the project forward, cautioning that, “rushing to complete an inherently complex project may result in costly errors.”⁵¹

In highlighting the difficulty in specifying deadlines for completing the Operative Date prerequisites, another commenter states that, because neither the SROs nor the Commission has

jurisdiction over the individuals that constitute the Advisory Committee, any timeframes imposed on the Advisory Committee members to select the Non-SRO Voting Representatives would be unenforceable and the Operating Committee cannot function until the Non-SRO Voting Representatives have been selected.⁵² This commenter further emphasizes the complexity and uncertainty of determining fees, selecting an independent Administrator through a request-for-proposal (“RFP”) process, and negotiating new contracts with processors, data vendors and subscribers.⁵³ This commenter states that because the RFP process is “so specialized and idiosyncratic,” there is “no way to reasonably impose time limits on any part of that process, let alone a time limit for the entire process overall.”⁵⁴

Other commenters recommend that the CT Plan require a detailed project plan with interim dates,⁵⁵ and public progress reports.⁵⁶ One of these commenters states that because implementation will be a complex undertaking, it will be important for both the Commission and outside stakeholders to have reasonable visibility into progress.⁵⁷ Another of these commenters argues that the SROs should be required to provide a detailed implementation plan with timeframes for each step and the rationale for each timeframe.⁵⁸ One of these commenters states that it will be important for the CT Plan to require the Operating Committee to provide periodic public updates on the status of implementation.⁵⁹ One commenter agrees, recommending that the CT Plan set “milestone dates while remaining flexible depending on progress.”⁶⁰ This

⁵² See NYSE Letter I, *supra* note 18, at 33.

⁵³ See *id.* at 33–35. This commenter further states that the 90-day period between the finalization of earlier actions and the operational date is “prudent” and is the current industry standard for announcing the implementation of changes to market data plans. See *id.* at 35–36.

⁵⁴ NYSE Letter I, *supra* note 18, at 35. As examples, this commenter points out that OPRA’s process to select a processor took two years even though OPRA ultimately decided to retain the same processor and cites the CAT NMS Plan for the risk that a selected administrator might be unable to perform the necessary functions, requiring that the RFP process be repeated. See *id.*

⁵⁵ See Fidelity Letter, *supra* note 30, at 2–3; IEX Letter, *supra* note 30, at 2.

⁵⁶ See Fidelity Letter, *supra* note 30, at 3; IEX Letter, *supra* note 30, at 2; BMO Letter I, *supra* note 30, at 3; BMO Letter II, *supra* note 30, at 2; ICI Letter I, *supra* note 31, at 7.

⁵⁷ See IEX Letter, *supra* note 30, at 2.

⁵⁸ See ICI Letter I, *supra* note 31, at 7.

⁵⁹ See BMO Letter I, *supra* note 30, at 3; BMO Letter II, *supra* note 30, at 2.

⁶⁰ Data Boiler Letter I, *supra* note 31, at 20. For example, this commenter argues against an overly

commenter favors periodic public updates on implementation from the Operating Committee.⁶¹

Additionally, two commenters suggest that the Commission should “clarify” that the fee schedules for the current Equity Data Plans will remain in effect and apply to the CT Plan until the CT Plan Operating Committee files a new schedule with the Commission and the Commission approves that schedule.⁶² Finally, one commenter also asserts that the implementation of the new CT Plan before the existing contracts between the Equity Data Plans and the Administrators and Processors expire would constitute a Fifth Amendment “taking.”⁶³

While the Commission recognizes the challenges associated with completing the actions required for implementation of the CT Plan, the Commission also believes that the SROs have the relevant expertise and experience—both with respect to operating NMS plans generally and with respect to the dissemination of equity market data specifically—to implement the CT Plan. In particular, the Commission found in the Governance Order that the SROs could provide “unique insight in formulating the terms and conditions of the New Consolidated Data Plan,”⁶⁴ even as it also highlighted the inherent conflicts of interest faced by SROs in the operation of the existing plans.⁶⁵ The Commission disagrees with the comment that it is “vastly underestimating” the time needed to implement the CT Plan,⁶⁶ and instead believes, consistent with the views of other market participants,⁶⁷ that the SROs should be able to use their extensive experience in operating the existing Equity Data Plans to complete the specific actions needed to implement the CT Plan within the timeframes specified below. Moreover, the Commission believes that fully implementing the CT Plan within prescribed deadlines is important, because implementation of the CT Plan is critical to reducing existing redundancies, inefficiencies, and inconsistencies in the current Equity

prescriptive timeframe, suggesting that the process for nomination and selection of Non-SRO Voting Representatives should not take more than 90 days, with a 30-day extension in case of an unprecedented event, such as a pandemic. See *id.* at 28.

⁶¹ See *id.* at 20.

⁶² SIFMA Letter I, *supra* note 30, at 3; IEX Letter, *supra* note 30, at 2.

⁶³ See Nasdaq Letter I, *supra* note 20, at 10–11.

⁶⁴ Governance Order, *supra* note 8, 85 FR at 28711.

⁶⁵ See, e.g., *id.* at 28713.

⁶⁶ See Choe Letter, *supra* note 17, at 6.

⁶⁷ See *supra* notes 42–48 and accompanying text.

⁴³ See IEX Letter, *supra* note 30, at 2.

⁴⁴ RBC Letter, *supra* note 30, at 4.

⁴⁵ See MEMX Letter, *supra* note 30, at 3.

⁴⁶ See *id.*

⁴⁷ See *id.*

⁴⁸ See BlackRock Letter II, *supra* note 30, at 2.

⁴⁹ See Nasdaq Letter I, *supra* note 20, at 10; Letter from Erika Moore, Vice President and Corporate Secretary, Nasdaq (Feb. 5, 2021) (“Nasdaq Letter II”), at 2; NYSE Letter I, *supra* note 18, at 33; Choe Letter, *supra* note 17, at 5.

⁵⁰ Choe Letter, *supra* note 17, at 6.

⁵¹ Nasdaq Letter I, *supra* note 20, at 11.

Data Plans and to modernizing plan governance.⁶⁸ Although one commenter recommends that the CT Plan explicitly provide for obtaining an extension based on a showing of good cause, in case good faith efforts by the Operating Committee are nonetheless unable to meet one or more of the specified deadlines,⁶⁹ the Commission does not believe that it is necessary or appropriate to add a provision to the CT Plan regarding an extension of these deadlines. Further, the Commission does not believe that it is necessary or appropriate to suggest at this time how it might view a future request for an extension from the Operating Committee or other affected parties.⁷⁰

Additionally, the Commission disagrees with the commenter's statement that, because neither the Commission nor the SROs have jurisdiction over Non-SRO Voting Representatives, placing timeframes on the selection of Non-SRO Voting Representatives by the existing Advisory Committee of the Equity Data Plans will be unenforceable and therefore futile.⁷¹ The Commission fully expects, based on the widespread support among market participants for providing voting power to non-SROs,⁷² that the Advisory Committee members will willingly undertake the task of selecting Non-SRO Voting Representatives. Moreover, the two-month deadline imposed on the selection of SRO and Non-SRO Voting Representatives in this provision is consistent with the timeframe set forth in the procedures proposed by the SROs in Section 4.2(b)(v) of the CT Plan for selection of Non-SRO Voting Representatives, and there is considerable overlap between the categories of market participants represented on the Advisory Committee and the categories of market participants who would be Non-SRO Voting Representatives.

Finally, the Commission disagrees with one commenter's statement that the timing of implementation of the CT Plan prior to the expiration of the

existing contracts between the current Equity Data Plans and the Administrators and Processors would constitute a "taking" without just compensation under the Fifth Amendment of the U.S. Constitution.⁷³ As the Commission stated in the Governance Order in response to similar concerns previously expressed by the same commenter,⁷⁴ the commenter fails to demonstrate how the proposal would "impermissibly interfere with a protected property interest."⁷⁵ Nor does the Commission anticipate any economic harm to the processors of the current Equity Data Plans.⁷⁶ And operation of the Equity Data Plans is a "fundamental component" of the national market system, which is itself highly regulated pursuant to the broad authority provided the Commission by Congress.⁷⁷ The Commission continues to believe that the commenter's argument that the implementation of the CT Plan would constitute a Fifth Amendment taking lacks merit.

Accordingly, the Commission finds that, to facilitate the implementation of the CT Plan on a timely basis, it is appropriate to modify the CT Plan, as discussed below, to add specified deadlines to paragraphs (b) and (c) of the Recitals of the CT Plan and to add new paragraph (d) to the Recitals.

First, with respect to the proposed definition of the Effective Date of the CT Plan, set forth in paragraph (b) of the Recitals, the Commission shares concerns raised by commenters about the uncertainty of the timing associated with defining the Effective Date as the later of the date of Commission approval or the SROs' filing of the required certificate with the State of Delaware.⁷⁸ The Commission agrees with commenters that the act of filing the certificate of formation of the LLC is administrative and can be accomplished expeditiously.⁷⁹ Accordingly, the Commission is modifying paragraph (b) of the Recitals of the CT Plan to define the Effective Date as the date of Commission approval of the CT Plan as an NMS plan governing the public dissemination of real-time consolidated

market data for Eligible Securities⁸⁰ pursuant to Rule 608 of Regulation NMS.⁸¹ The Commission finds that the modification of this provision is appropriate because Commission approval of the CT Plan, as modified, will finalize all of the terms of the CT Plan and because defining the Effective Date in this way will support timely implementation of the CT Plan and reduce the potential for unnecessary delay.

In addition, the Commission is modifying paragraph (b) of the Recitals of the CT Plan to require that the documents needed to create the LLC be filed by the SROs with the State of Delaware within 10 business days of the Effective Date. The Commission finds that this modification is appropriate because, once the language of the CT Plan as modified by the Commission is available to the SROs, 10 business days is a sufficient period of time for the SROs to execute the modified CT Plan and undertake the administrative step of filing the necessary formation documents for the CT Plan LLC with the State of Delaware.

With respect to the proposed definition of the Operative Date, the Commission agrees with commenters that the CT Plan should set forth a date certain for the CT Plan to become operational and should also specify deadlines for interim steps to be completed.⁸² The Commission believes that the language of paragraph (c) of the Recitals—which provides that the CT Plan will be operative on the first day of the month that is at least 90 days after the specified actions—could serve to unnecessarily delay implementation of the CT Plan because it fails to impose deadlines that will help ensure the completion of the requisite actions in a timely manner.⁸³

⁸⁰ Section 1.1(w) of Article I of the proposed CT Plan defines the term "Eligible Securities" as "(i) any equity security, as defined in Section 3(a)(11) of the Act, or (ii) a security that trades like an equity security, in each case that is listed on a national securities exchange."

⁸¹ 17 CFR 242.608.

⁸² See SIFMA Letter I, *supra* note 30, at 3; SIFMA Letter II, *supra* note 30, at 2; Fidelity Letter, *supra* note 30, at 4; IEX Letter, *supra* note 30, at 2; RBC Letter, *supra* note 30, at 4; Virtu Letter, *supra* note 30, at 2; Schwab Letter I, *supra* note 30, at 2; Schwab Letter II, *supra* note 30, at 5; BMO Letter I, *supra* note 30, at 2; MEMX Letter, *supra* note 30, at 2–3; BlackRock Letter II, *supra* note 30, at 2.

⁸³ While one commenter states that the proposed 90-day testing period is consistent with the current industry standard of announcing changes to market data plans before implementation, *see* NYSE Letter I, *supra* note 18, at 35–36, the Commission's concern is not with the 90-day period itself, but with the lack of any deadlines to determine when the 90-day period would begin. The Commission believes that any such testing period should take place within a prescribed period for

⁶⁸ See Governance Order, *supra* note 8, 85 FR at 28703–05, 28711.

⁶⁹ See IEX Letter, *supra* note 30, at 2; *see also* MEMX Letter, *supra* note 30, at 3 (supporting a one-year deadline with an extension only for good cause shown).

⁷⁰ There are well-known mechanisms in existing law by which affected parties make such requests. If such a request were made at some point in the future, the Commission would decide whether to grant or deny the relief sought under the facts and circumstances applicable at that time.

⁷¹ See NYSE Letter I, *supra* note 18, at 33.

⁷² See, e.g., IEX Letter, *supra* note 30, at 2; ICI Letter II, *supra* note 31, at 1; BMO Letter I, *supra* note 30, at 3; BMO Letter II, *supra* note 30, at 2.

⁷³ See Nasdaq Letter I, *supra* note 20, at 10–11.

⁷⁴ See Letter from Joan C. Conley, Senior Vice President and Corporate Secretary, Nasdaq (Feb. 28, 2020), at 13–14 (responding to the Commission's Proposed Order, *infra* note 483); *see also* Nasdaq Letter I, *supra* note 20, at 10–11.

⁷⁵ Governance Order, *supra* note 8, 85 FR at 28725, 28727.

⁷⁶ See *id.* at 28727.

⁷⁷ *Id.* at 28725.

⁷⁸ See SIFMA Letter I, *supra* note 30, at 3; SIFMA Letter II, *supra* note 30, at 2; Virtu Letter, *supra* note 30, at 2.

⁷⁹ See, e.g., Fidelity Letter, *supra* note 30, at 2–3.

In addition, the Commission shares the view of commenters, particularly those with experience with the operation of the current Equity Data Plans, that it is not unreasonable to require the CT Plan to become operational within one year of the date of Commission approval.⁸⁴ The Commission further agrees that meeting these deadlines is an “ambitious project” that will undoubtedly require a commitment from both the SROs and other industry participants.⁸⁵ As discussed below, while implementation of the CT Plan would, among other things, require selecting a new Administrator (which would in turn require new contracts with vendors and subscribers, as well as new billing systems) and would also require entering into new contracts with the existing Processors, the Commission believes that the SROs have the expertise and experience, with diligence and commitment, to enable the Operating Committee of the CT Plan to complete all of the required actions within one year while avoiding costly errors. Although the CT Plan would be a new NMS plan, significant expertise and experience would be directly transferrable from the operation of the Equity Data Plans to the implementation of the CT Plan. Not only have the SROs run the Equity Data Plans for decades, but the current processors for the Equity Data Plan would, as proposed by the SROs, be the processors for the CT Plan. Therefore, the Commission disagrees that setting deadlines would be “inherently arbitrary” or “may result in costly errors.”⁸⁶ A number of market participants, including market participants that have experience with the operation of the current Equity Data Plans,⁸⁷ have commented that it is appropriate for the Commission to set deadlines for implementation of the CT Plan and that the specific actions

implementation of the CT Plan, not simply at the end of an indefinite period in which other preliminary steps take place.

⁸⁴ See IEX Letter, *supra* note 30, at 2; MEMX Letter, *supra* note 30, at 2–3. See also SIFMA Letter I, *supra* note 30, at 3; SIFMA Letter II, *supra* note 30, at 2; Fidelity Letter, *supra* note 30, at 4; RBC Letter, *supra* note 30, at 4; Virtu Letter, *supra* note 30, at 2; Schwab Letter I, *supra* note 30, at 2; Schwab Letter II, *supra* note 30, at 5; BMO Letter I, *supra* note 30, at 2; BlackRock Letter II, *supra* note 30, at 2.

⁸⁵ MEMX Letter, *supra* note 30, at 3.

⁸⁶ Nasdaq Letter I, *supra* note 20, at 11.

⁸⁷ See IEX Letter, *supra* note 30, at 2; MEMX Letter, *supra* note 30, at 2–3. See also SIFMA Letter I, *supra* note 30, at 3; SIFMA Letter II, *supra* note 30, at 2; Fidelity Letter, *supra* note 30, at 4; RBC Letter, *supra* note 30, at 4; Virtu Letter, *supra* note 30, at 2; Schwab Letter I, *supra* note 30, at 2; Schwab Letter II, *supra* note 30, at 5; BMO Letter I, *supra* note 30, at 2; BlackRock Letter II, *supra* note 30, at 2.

required to fully implement the CT Plan, described below, can be accomplished within the timeframe that the Commission is prescribing. The Commission agrees with these commenters and believes, for the reasons discussed below, that the prescribed timeframes are achievable and that costly errors can be avoided. Therefore, the Commission is modifying paragraph (c) of the Recitals to the CT Plan to require the LLC Agreement to become operative as an NMS plan governing the public dissemination of real-time consolidated equity market data for Eligible Securities within 12 months of the Effective Date. The Commission finds that the modification to paragraph (c) of the Recitals of the CT Plan is appropriate because it will create a certain and achievable date for implementation and require the SROs to implement the CT Plan in a timely manner for the benefit of all market participants.

Paragraph (c) of the Recitals of the CT Plan also sets forth the five specified actions that must be completed before the Operative Date. The Commission is concerned that the sequence for completion of the required actions is not expressly clear from the CT Plan. If, for example, certain actions required prior to the Operative Date were taken before the selection of the entire Operating Committee, including Non-SRO Voting Representatives, those initial decisions would be made by the SROs alone, in a manner inconsistent with the Commission’s Governance Order.⁸⁸

To address this uncertainty, the Commission is modifying paragraph (c) of the Recitals by renumbering it as paragraph (d) and adding a specific deadline for each of the required actions. The Commission has modified renumbered paragraph (d) to add the following language: “[i]n support of ensuring that the CT Plan is fully operational by the Operative Date, the following actions shall be completed within the specified periods.” As discussed below, the Commission is modifying each of the requisite actions now set forth in subparagraphs (i)–(iv) of renumbered paragraph (d) of the Recitals to add specificity. The new language is intended to set forth the sequence for completion of the required actions, as well as to prescribe deadlines for completion. In addition, the Commission is adding new subparagraphs (v) and (vi) of renumbered paragraph (d) of the Recitals to specify the obligations of the Operating Committee. The Commission

⁸⁸ See Governance Order, *supra* note 8, 85 FR at 28714–20.

finds that the modifications to renumbered paragraph (d) of the Recitals are appropriate because they will provide clear timelines for the Operating Committee and greater certainty for other industry participants and because they will establish achievable objectives to facilitate CT Plan implementation.

Specifically, the Commission is modifying subparagraph (i) of renumbered paragraph (d) of the Recitals to provide that the SRO Voting Representatives and Non-SRO Voting Representatives of the Operating Committee must be determined pursuant to the requirements of Section 4.2 of Article IV of the CT Plan within two months of the Effective Date. This timeframe is consistent with subparagraph (v) of Section 4.2(b) of Article IV of the CT Plan, which, as proposed by the SROs, contemplates a process for selecting Non-SRO Voting Representatives that could be completed within two months. In light of these provisions of Section 4.2(b)(v) of the CT Plan, as well as the Commission’s belief that the Advisory Committee members have an incentive to facilitate non-SROs having a vote on plan governance, the Commission believes that the Advisory Committee of the current Equity Data Plans will proceed promptly to select, pursuant to Section 4.2 of the CT Plan, the Non-SRO Voting Representatives to serve on the Operating Committee. The Commission also believes that the SROs, who have already selected their representatives to the operating committees of the existing Equity Data Plans, and who have extensive experience in doing so, should be able to select their Voting Representatives to the CT Plan Operating Committee within the timeframe provided. Accordingly, the Commission finds that the modification to this provision is appropriate because it will establish a reasonable timeframe for selecting the Non-SRO and SRO Voting Representatives to form the Operating Committee—an indispensable first step of the implementation process.

The Commission is further modifying subparagraph (ii) of renumbered paragraph (d) of the Recitals to provide that the Operating Committee must file with the Commission pursuant to Rule 608 of Regulation NMS⁸⁹ an amendment to the CT Plan governing proposed fees with respect to the existing exclusive SIP model⁹⁰ within

⁸⁹ 17 CFR 242.608.

⁹⁰ Several commenters express views with respect to the interaction of the CT Plan with Commission Rule 614(e), the recently adopted Market Data

four months of the Effective Date, which is two months after the deadline for the formation of the Operating Committee. The Commission believes that the four-month period to file a proposed CT Plan fee schedule with the Commission is a reasonable and appropriate timeframe for several reasons. First, given the importance of market data fees to both SROs and other market participants, the Commission believes that the determination of CT Plan fees will be a critical priority for both SROs and Non-SRO Voting Representatives. Assessing fees to subscribers for access to the SIP data is one of the fundamental responsibilities of the Operating Committee and one of the issues most consequential to both SROs and other market participants. Second, the Commission believes that a number of persons selected to be members of the Operating Committee are likely to have detailed and substantial pre-existing knowledge and experience with the content and pricing of the equity data products that are disseminated under the current centralized SIP model. Third, the four-month period is a deadline solely for filing the proposed fees with the Commission and not a requirement that the fee schedule be approved by the Commission and implemented within the four month period. Instead, the required fee filing would commence the process for Commission consideration of the proposed fees, which will include an opportunity for public comment. Accordingly, the Commission finds that the modification to this provision is

Infrastructure Rule. 17 CFR 242.614(e). One of these commenters states, “[t]he timely implementation of the CT Plan would undoubtedly facilitate the success of any new market data infrastructure regime and, at the very least, will be important to ensure that, upon Commission approval, the implementation of any such regime is not impeded.” BMO Letter I, *supra* note 30, at 3. Another commenter, pointing to the lack of analysis of the impact of the Infrastructure rulemaking, suggests that the SROs acknowledge that the CT Plan may need to be amended to accommodate the competing consolidator model. *See* SIFMA Letter I, *supra* note 30, at 3. Other commenters express the view that the two initiatives are “inextricably intertwined.” Nasdaq Letter I, *supra* note 20, at 34–36 (incorporating its brief filed jointly with NYSE and CBOE); *see also* NYSE Letter I, *supra* note 18, at 3. Because the existing exclusive SIP model will continue to operate during the transition to the competing consolidator model, the participation of Non-SRO Voting Representatives in Operating Committee deliberations on the fee filing required by subparagraph (ii) of renumbered paragraph (d) of the Recitals would facilitate the determination of the fee schedule that will be needed to commence consolidated equity market data dissemination under the new CT Plan. In addition, the Non-SRO Voting Representatives’ participation would likely provide valuable perspectives on fees that may serve as a reference point for, among other things, future fees under the competing consolidator model.

appropriate because it provides sufficient time after the formation of the Operating Committee for proposed fees to be discussed by knowledgeable and experienced persons, agreed upon, and filed with the Commission.

The Commission is also modifying subparagraph (iii) of renumbered paragraph (d) of the Recitals to provide that the Operating Committee must enter into agreements with the Processors performing under the current Equity Data Plans within eight months of the Effective Date. The Processors performing under the current Equity Data Plans are performing pursuant to existing contracts, and the CT Plan as submitted by the SROs provides that the Operating Committee shall enter into agreements with those same Processors. While one commenter states that retaining the existing Processors would require, at a minimum, “negotiation of new contracts and related service level agreements,”⁹¹ the Commission believes that concerns about the need to renegotiate all of the terms of the existing contracts are not well founded because the CT Plan does not by its terms change any of the technical provisions of the existing Equity Data Plans with respect to the dissemination of consolidated equity market data. And the SROs have not suggested that the terms of the new contracts of the Processors will be materially different than the existing contracts under the Equity Data Plans. Consequently, the Commission believes that the technical and business terms of the new Processor contracts with the CT Plan are likely to be substantially identical to the existing contracts. Therefore, the Commission finds that the modification to this provision is appropriate because the Operating Committee should encounter little unavoidable difficulty in executing agreements with the Processors within the prescribed timeframe, and the change will facilitate timely implementation for the benefit of market participants.

Moreover, the Commission is modifying subparagraph (iv) of renumbered paragraph (d) of the Recitals to require that the proposed actions relating to the selection and duties of an Administrator, discussed in greater detail below, pursuant to Section 6.4 of Article VI and Section 4.3 of Article IV of the CT Plan, be completed within eight months of the Effective Date. The amended provision provides that the Administrator must be prepared to transition to the CT Plan, by finalizing new contracts with vendors and subscribers and having in place

systems to administer distributions and fees, before the Operative Date.

While commenters argue that deadlines could not reasonably be imposed on the process of selecting an Administrator and preparing to implement the CT Plan,⁹² the Commission disagrees. One commenter points to the difficulties attendant in selecting a processor for the CAT NMS Plan,⁹³ but the Commission does not view the circumstances to be analogous. In the case of the CAT NMS Plan, the SROs were tasked with implementing the first-ever consolidated audit trail for equities trading, a complex NMS system without precedent. Here, by contrast, the Operating Committee will be conducting an RFP process to select an Administrator to perform functions with which market participants, whether SROs or market data consumers, have extensive familiarity. Thus, the Commission believes that crafting the necessary requirements for the RFP and evaluating proposals submitted in response should be a substantially less complicated and time-consuming process than searching for a processor to build an entirely new and comprehensive database. Moreover, with respect to certain commenters’ concerns that it will be difficult to find an Administrator with the necessary expertise, the Commission understands that a number of different types of entities, such as accounting firms, market data administration firms, or consulting firms, would be capable of serving as Administrator to the CT Plan and providing the requisite billing, auditing, and licensing services. The Commission finds that the modifications to the provision are appropriate because, given the extensive experience of the SROs over several decades in supervising—or serving as—the administrators of the Equity Data Plans, the process of selecting an Administrator, as well as the duties assigned to the firm selected pursuant to the provisions of the CT Plan, should be able to be completed within the established timeframes.

In addition, the Commission is adding new subparagraph (v) of renumbered paragraph (d) of the Recitals to explicitly impose responsibility on the Operating Committee to ensure that all of the requirements set forth in the preceding subparagraphs of renumbered paragraph (d) have been satisfied prior to the Operative Date. In particular, the

⁹² *See* Nasdaq Letter I, *supra* note 20, at 10; Nasdaq Letter II, *supra* note 49, at 2; NYSE Letter I, *supra* note 18, at 33; Cboe Letter, *supra* note 17, at 5–6.

⁹³ *See* NYSE Letter I, *supra* note 18, at 35.

⁹¹ NYSE Letter, *supra* note 18, at 34.

provision provides that “before the Operative Date, the Operating Committee will be required to ensure that the Administrator and the Processors have developed, implemented, and suitably tested the systems necessary with respect to the existing exclusive SIP model⁹⁴—including dissemination systems, billing and audit systems, and appropriate contracts with Vendors and Subscribers—and, if applicable, the Operating Committee has expeditiously filed any necessary policies and procedures with the Commission. This new language is designed to impose on the Operating Committee not only the initial obligation to select an Administrator and Processors, but also the explicit ongoing responsibility to oversee the Administrator and Processors’ specific efforts to implement the CT Plan. The Commission finds that this modification is appropriate because the inclusion of this language establishes that the Operating Committee’s obligation to oversee the development of all systems, agreements, and policies and procedures necessary to facilitate the implementation of the CT Plan within the prescribed timeframe continues beyond the time when the Administrator and Processors have been selected.

Finally, the Commission is adding new subparagraph (vi) to renumbered paragraph (d) of the Recitals to impose on the Operating Committee the obligation to provide quarterly written progress reports to the Commission, and to make these reports publicly available, beginning three months after the Effective Date and continuing every three months until the Operative Date. These quarterly reports would be required to address the actions undertaken and the progress made toward completing each of the required actions listed in paragraph (d) with respect to implementation of the CT Plan. The Commission shares commenters’ views that transparency with respect to the progress made to satisfy the requirements of the CT Plan would benefit not only the Commission but also interested market participants.⁹⁵ The requirement to

provide progress reports in writing to the Commission on a quarterly basis and to make them publicly available is designed to help ensure that affected market participants are informed about the status of the steps that are taken to implement the CT Plan within the prescribed time periods. Providing periodic updates to the Commission should also facilitate holding the Operating Committee accountable for its progress in completing the interim steps towards satisfying the longer-range requirements.

The Commission believes that the required frequency of the progress reports, one report every three months, should be sufficient to identify for the Commission any notable delays in completing the interim steps needed to satisfy the deadlines established for CT Plan implementation without imposing unnecessary burdens on efforts to implement the CT Plan. The Commission believes that this requirement should not be overly burdensome to the Operating Committee or distract from its performance of the specified actions required by the CT Plan, because the quarterly reports would essentially reflect the analysis the Operating Committee would need to undertake in any event for its diligent oversight of the implementation process. The Commission finds that the modifications to renumbered paragraph (d) of the Recitals of the CT Plan are appropriate because the specified deadlines and sequence for completion prescribed by the provision will provide greater certainty regarding timeframes for the Operating Committee and other market participants and will establish achievable objectives to facilitate implementation of the CT Plan.

For the reasons discussed above, the Commission is approving paragraph (b), which has been renumbered as paragraph (c), and renumbered paragraph (d) of the Recitals of the CT Plan, as modified.

(b) SRO Duties to the CT Plan

Paragraph (f) of the Recitals, renumbered as paragraph (g) as a result of the modifications discussed above, sets forth the SROs’ statement of their regulatory obligations to the CT Plan. With respect to several provisions of the CT Plan discussed below,⁹⁶ a commenter expresses concern that the SROs are disclaiming any duty or

obligation to the CT Plan.⁹⁷ The Commission agrees with another commenter that the regulatory obligations of SROs with respect to the CT Plan are set by the federal securities laws and regulations,⁹⁸ but finds that it is appropriate to reiterate that the provisions of the CT Plan do not lessen any of the SROs’ regulatory obligations. Accordingly, the Commission is modifying this provision to add the following sentence, “No provision of this Agreement shall be construed to limit or diminish the obligations and duties of the Members as self-regulatory organizations under the federal securities laws and the regulations thereunder.”⁹⁹ The Commission finds that the modification to renumbered paragraph (g) of the Recitals of the CT Plan is appropriate because it ensures that the text of the CT Plan reflects the relationship between the CT Plan’s provisions and the SROs’ regulatory obligations. For the reasons discussed above, the Commission is approving this provision as modified.

(c) Other Provisions of the Recitals

Paragraph (a) of the Recitals establishes that the CT Plan is filed with the Commission in response to the Commission’s Governance Order. Paragraphs (d) and (e) of the Recitals as proposed establish that the current Equity Data Plans will continue to operate until the Operative Date.

The Commission received no comment on paragraphs (a), (d), and (e) of the Recitals as proposed. The Commission is approving paragraph (a) as proposed, and paragraphs (d) and (e), renumbered as paragraphs (e) and (f), otherwise as proposed.

2. Definitions

Article I of the CT Plan sets forth the defined terms used throughout the CT Plan and its Exhibits. In the Notice, the Commission sought comment on several of the proposed definitions.¹⁰⁰ Specifically, the Commission requested comment on the proposed scope and use of the following defined terms: “CT Feeds,” “Covered Persons,” “Fees,” “Member Observer,” and “Public Information.” After considering the comments received, the Commission

⁹⁴ This provision is designed to require the Operating Committee to oversee the Administrator’s and Processors’ efforts to test all pertinent systems prior to the transition from the existing Equity Data Plans to the CT Plan.

⁹⁵ See Fidelity Letter, *supra* note 30, at 3; IEX Letter, *supra* note 30, at 2; BMO Letter I, *supra* note 30, at 3; BMO Letter II, *supra* note 30, at 2; ICI Letter I, *supra* note 31, at 7. While one of these commenters urges the Commission to provide financial incentives to the SROs either through fines or through not allowing the SROs to collect SIP fees for some period of time, see ICI Letter I, *supra* note

31, at 7, the Commission believes that the required quarterly progress reports and the involvement of the Operating Committee, including the Non-SRO Voting Representatives, should be sufficient to ensure timely implementation of the CT Plan.

⁹⁶ See *infra* notes 443–454 and accompanying text.

⁹⁷ See MFA Letter, *supra* note 30, at 1–2.

⁹⁸ See Nasdaq Letter I, *supra* note 20, at 16–17.

⁹⁹ The “Members” of the LLC Agreement, as defined in the first paragraph of the LLC Agreement, are the SROs identified in Exhibit A to the LLC Agreement.

¹⁰⁰ See Notice, *supra* note 3, 85 FR at 64567–68 (Questions 4–8).

finds that it is appropriate to modify several of the proposed definitions.¹⁰¹

First, for the reasons discussed below in Section II.C.11(a) of this Order, the Commission is expanding the definition of “Company Indemnified Party,”¹⁰² set forth in Article I, Section 1.1(k) and referred to in Article XII, Section 12.2, Section 12.3, and Section 12.4 of the CT Plan,¹⁰³ to include Non-SRO Voting Representatives.

Second, for the reasons discussed below in Section II.C.5(k)(iii) of this Order, the Commission is modifying Article I, Section 1.1(n), of the CT Plan—the proposed definition of “Covered Persons”¹⁰⁴—to define the phrase “representatives of the Members” to include SRO Voting Representatives, alternate SRO Voting Representatives, and Member Observers, to expand the definition of Covered Persons to include SRO Applicant Observers, and to delete the phrase, “and the employers of Non-SRO Voting Representatives.” The term, Covered Persons, is referred to in Section 4.11 of Article IV of the CT Plan and Exhibit C to the CT Plan.¹⁰⁵

Third, for the reasons discussed below in Section II.C.5(d)(iii) of this Order, the Commission is modifying the definition of “Executive Session,”¹⁰⁶ set

forth in Article I, Section 1.1(z), to require that the other persons as deemed appropriate to attend Executive Session will be determined by “majority vote of” the SRO Voting Representatives. The term “Executive Session” is referred to in Article IV, Section 4.2(d), Section 4.3(c), and Section 4.4(g) of the CT Plan and Exhibit C to the CT Plan.

Fourth, for the reasons discussed below in Section II.C.5(j)(ii) of this Order, the Commission is modifying the definition of “Member Observer,”¹⁰⁷ set forth in Article I, Section 1.1(oo), to require that a Member Observer be an employee of a Member or any attorney to a Member, and to provide that a Member’s designation of a Member Observer is subject to the limitation contained in Article IV, Section 4.10(b)(i) of the CT Plan. The term “Member Observer” is referred to in Article IV, Section 4.4 and Section 4.7 of the CT Plan and Exhibit C to the CT Plan.¹⁰⁸

Fifth, for the reasons discussed below in Section II.C.5(k)(ii) of this Order, the Commission is modifying the definition of “Highly Confidential Information,” as set forth in Article I, Section 1.1(ii),¹⁰⁹ to replace the phrase, “personnel matters” with the phrase “personnel matters that affect the employees of the SROs or the Company.” The term “Highly Confidential Information” is referred to in Article IV, Section 4.4 and Section 4.10 of the CT Plan and Exhibit B to the CT Plan.

Finally, for the reasons discussed below in Section II.C.11(a) of this Order, the Commission is modifying Section 1.1(eee) of Article I of the CT Plan, referred to in Article XII, Section 12.2 of the CT Plan,¹¹⁰ to expand the definition of the term “Party to a Proceeding,”¹¹¹

Member Observers, SEC staff, and other persons as deemed appropriate by the SRO Voting Representatives.

¹⁰⁷ As proposed, Section 1.1(oo) of Article I defines the term “Member Observer” as any individual, other than a Voting Representative, that a Member, in its sole discretion, determines is necessary in connection with such Member’s compliance with its obligations under Rule 608(c) of Regulation NMS to attend Operating Committee and subcommittee meetings.”

¹⁰⁸ The term “Member Observer” is also referred to in Section 1.1(z) (“Executive Session”) of Article I of the CT Plan.

¹⁰⁹ The term “Highly Confidential Information” is also referred to in Section 1.1(l) (“Confidential Information”), and Section 1.1(kkk) (“Public Information”) of Article I of the CT Plan.

¹¹⁰ The term, “Party to a Proceeding,” is also referred to in Section 1.1(kk) (“Losses”) of Article I of the CT Plan.

¹¹¹ As proposed, Section 1.1(eee) of Article I defines the term, “Party to a Proceeding,” as a “Company Indemnified Party that is, was, or is threatened to be made, a party to a Proceeding, or is involved in a Proceeding, by reason of the fact that such Company Indemnified Party is or was a Member and/or an SRO Voting Representative.”

to include Non-SRO Voting Representatives.

Except for the modifications identified above, the Commission is approving Article I of the CT Plan as proposed.

3. Organization of LLC

The SROs propose to organize the new NMS plan for consolidated equity market data in the form of a Delaware limited liability company pursuant to a limited liability company agreement, entitled the Limited Liability Company Agreement (“LLC Agreement”) of CT Plan LLC (“Company” or “LLC”).¹¹² The Members (*i.e.*, the equity owners) of the LLC will be the 17 national securities exchanges for equities and FINRA,¹¹³ each of which will be a “Participant” of the CT Plan as an effective NMS plan for the dissemination of consolidated equity market data.

The CT Plan states that the purposes of the LLC are to engage in the following activities on behalf of the Members: (i) The collection, consolidation, and dissemination of Transaction Reports, Quotation Information, and such other information concerning Eligible Securities as the Members shall agree as provided therein; (ii) contracting for the distribution of such information; (iii) contracting for and maintaining facilities to support any activities permitted in the LLC Agreement and guidelines adopted thereunder, including the operation and administration of the System;¹¹⁴ (iv) providing for those other matters set forth in the LLC Agreement and in all guidelines adopted thereunder; (v) operating the System to comply with Applicable Laws; and (vi) engaging in any other business or activity that now or thereafter may be necessary, incidental, proper, advisable, or convenient to accomplish any of the foregoing purposes and that is not prohibited by the Delaware Limited Liability Company Act (“Delaware Act”), the Act, or other Applicable Law.¹¹⁵ The LLC Agreement itself, including its appendices, is the CT Plan. Under the CT Plan, the governing body

¹¹² See Article II, Section 2.1 of the CT Plan.

¹¹³ See Article III, Section 3.1 of the CT Plan. The names and addresses of each Member are set forth in Exhibit A to the CT Plan.

¹¹⁴ Section 1.1(yyy) of Article I of the proposed CT Plan defines the term “System” as “all data processing equipment, software, communications facilities, and other technology and facilities, utilized by the Company or the Processors in connection with the collection, consolidation, and dissemination of Transaction Reports, Quotation Information, and other information concerning Eligible Securities.”

¹¹⁵ See Article II, Section 2.4 of the CT Plan.

¹⁰¹ While one commenter suggests that the definition of “fees” should be “similar to the comprehensiveness in defining ‘royalties for copyright works’ in the music industry,” Data Boiler Letter I, *supra* note 31, at 22–23; Letter from Kelvin To, Founder and President, Data Boiler Technologies, LLC (Jul. 20, 2021) (“Data Boiler Letter II”), at 2, the commenter has not provided specific suggestions as to how this high-level analogy would be appropriately applied in the context of consolidated equity market data. Further, the Commission does not believe that the analogy is apt in the context of data that the SROs have a regulatory obligation to disseminate through an NMS plan.

¹⁰² As proposed, Section 1.1(k) defines the term “Company Indemnified Party” as “a Person, and any other Person of whom such Person is the legal representative, that is or was a Member or an SRO Voting Representative.”

¹⁰³ The term “Company Indemnified Party” is also referred to in Section 1.1(kk) (“Losses”) and Section 1.1(ccc) (“Party to a Proceeding”) of Article I of the CT Plan.

¹⁰⁴ As proposed, Section 1.1(n) of Article I defines the term “Covered Persons” as “representatives of the Members, the Non-SRO Voting Representatives, SRO Applicants, the Administrator, and the Processors; affiliates, employees, and agents of the Operating Committee, a Member, the Administrator, and the Processors; any third parties invited to attend meetings of the Operating Committee or subcommittees; and the employers of Non-SRO Voting Representatives. Covered Persons do not include staff of the SEC.”

¹⁰⁵ The term “Covered Persons” is also referred to in Section 1.1(l) (“Confidential Information”) of Article I of the CT Plan.

¹⁰⁶ As proposed, Section 1.1(z) of Article I defines the term, “Executive Session,” as a meeting of the Operating Committee pursuant to Section 4.4(g), which includes SRO Voting Representatives,

of the LLC would be the Operating Committee, which would comprise representatives of the Members and the Non-SRO Voting Representatives.¹¹⁶

In their Transmittal Letter, the SROs assert that, while the Governance Order requires Operating Committee approval for actions other than the selection of Non-SRO Voting Representatives and the decision to enter into Executive Session, certain provisions of the CT Plan that concern solely the operation of the LLC as an LLC and that are unrelated to consolidation and distribution of equity market data should require only a majority vote of the Members. Specifically, the SROs propose that the following actions require only a majority vote of the Members: (1) The selection of Officers of the LLC (other than the Chair and Secretary), if needed, and (2) certain decisions concerning the operation of the LLC as an LLC and approval of amendments to LLC-related provisions of the CT Plan, including provisions related to indemnification, dissolution of the LLC, and tax-related matters.¹¹⁷ The SROs assert that neither of these topics would affect the consolidation and distribution of equity market data and that, therefore, the Members should have the sole authority to make decisions related to these topics, with Commission approval where necessary.¹¹⁸

Several commenters raise concerns with the proposed LLC structure and the Members' exclusive powers thereunder.¹¹⁹ One commenter states that the LLC structure is "flawed" and "defies America's 'Free Enterprise' concept."¹²⁰ The commenter further states that, under the LLC structure proposed, the Members of the LLC will retain control over the actions under the CT Plan.¹²¹ Another commenter asserts that the CT Plan "appears perfectly designed to facilitate the continued neglect of the distribution of consolidated market data in order to

benefit the sale of SROs' proprietary market data feeds,"¹²² and states that the CT Plan would allow the SROs to prioritize the sale of their proprietary market data products over the interests and statutory purposes of the CT Plan.¹²³ This commenter asserts that the Plan "incentivizes the SROs to run the Plan and the LLC poorly to the extent they believe it is in their self-interest" and there is "no downside for an SRO to act in its self-interest contrary to the Plan as they are exculpated in taking any such action."¹²⁴ This commenter states that it fears that the CT Plan structure will not promote the goals of Section 11A, given the absence of any obligations on the SROs to operate the plan consistent with its statutory purpose,¹²⁵ and suggests that a balance must be struck with the principle of creating a governing arrangement that is reasonably designed to ensure that the CT Plan will carry out its statutory purpose.¹²⁶

One commenter states that the CT Plan does not include all of the necessary provisions for an LLC agreement to function appropriately as an NMS plan, but does not provide further details about what is missing.¹²⁷ Another commenter states that more detail needs to be provided on the types of decisions that would fall under "the operation of the CT Plan as an LLC" and "modifications to the LLC-related provisions of the CT Plan" in order to ensure that non-SRO representatives have an opportunity to participate in any material decisions related to the regulatory operations of the CT Plan.¹²⁸

Another commenter, however, supports the LLC structure as proposed, arguing that the Non-SRO Voting Representatives do not need to be members of the LLC in order to fulfill their role on the Operating Committee,¹²⁹ and that providing the Non-SRO Voting Representatives with an economic interest in the CT Plan is inappropriate because "it would provide individuals with a claim on revenues that they did nothing to generate and expose them to funding obligations that they would not be prepared to support."¹³⁰

The Governance Order did not specify the form or structure of the plan, and for the reasons discussed below, the Commission finds that it is appropriate for the SROs to organize this NMS plan as an LLC agreement. Foremost, an LLC agreement provides a formal legal structure through which the SROs will fulfill their obligations with respect to consolidated equity market data, which will necessarily entail, among other things, entering into contracts with the Administrator and the Processors, as well as, in all likelihood, outside counsel, accountants, and other parties. The Commission believes that structuring the CT Plan as an LLC will reduce ambiguities with respect to rights and obligations related to such contracts and with respect to the financial rights responsibilities of each SRO to the CT Plan and to each other.¹³¹ Moreover, the use of an LLC structure for a NMS plan is not novel. The most recent NMS plan approved by the Commission, CAT NMS Plan, employs an LLC structure,¹³² as does the Options Price Reporting Authority Plan ("OPRA Plan"),¹³³ and the Commission does not believe that it is necessary to prescribe a different legal structure here.

As described above, some commenters are concerned that the LLC Agreement as proposed would allow the SROs to continue to act exclusively in their own self-interest, rather than in the interest of the Plan, as significant powers would rest exclusively with the SROs. The Commission, however, does not believe that the choice of an LLC structure over other structures for the CT Plan will permit the SROs to act exclusively in their own self-interest. First, the terms of the LLC agreement must be consistent with the regulatory obligations of the SROs as set by the federal securities laws and regulations, and SROs also have direct obligations under the federal securities laws and regulations. And second, as required by the Governance Order, the CT Plan provides Non-SRO Voting Representatives with voting rights on the Operating Committee that is responsible for managing the activities

¹¹⁶ See Article IV, Section 4.1(a) of the CT Plan.

¹¹⁷ See Transmittal Letter, *supra* at 2.

¹¹⁸ See *id.*

¹¹⁹ See Data Boiler Letter I, *supra* note 31, at 4, 23, 25, 49; MFA Letter, *supra* note 30, at 1–2, 3; RBC Letter, *supra* note 30, at 10; BMO Letter II, *supra* note 30, at 2.

¹²⁰ Data Boiler Letter I, *supra* note 31, at 25. This commenter also states that because of CT Plan's role and public purpose, it should be a non-profit rather than LLC. See *id.* at 24. The commenter opines that a non-profit structure would be "better than an LLC in preserving an independent status when dealing with the establishment of fees, manners in entering into contracts with an Administrator and Processor(s), and other applicable policies and procedures. . . ." *Id.* at 19; see also Data Boiler Letter II, *supra* note 101, at 2.

¹²¹ See Data Boiler Letter I, *supra* note 31, at 21, 24, 30; see also RBC Letter, *supra* note 30, at 10.

¹²² MFA Letter, *supra* note 30, at 3.

¹²³ See MFA Letter, *supra* note 30, at 1–2 (stating, CT Plan as proposed is likely to "preserve the misaligned incentives that gave rise to the Order."); see also BMO Letter II, *supra* note 30, at 2.

¹²⁴ MFA Letter, *supra* note 30, at 3.

¹²⁵ See *id.* at 2.

¹²⁶ See *id.*

¹²⁷ See Data Boiler Letter I, *supra* note 31, at 25.

¹²⁸ Virtu Letter, *supra* note 30, at 5.

¹²⁹ See Nasdaq Letter I, *supra* note 20, at 14.

¹³⁰ *Id.* at 14–15.

¹³¹ As noted above, however, the terms of the CT Plan shall not be construed to limit or diminish the obligations and duties of the Members of the LLC as SROs under the federal securities laws. See text accompanying note 99, *supra*.

¹³² See Securities Exchange Act Release No. 79318 (Nov. 15, 2016), 81 FR 84696 (Nov. 23, 2016) (Order Approving the National Market System Plan Governing the Consolidated Audit Trail).

¹³³ See Securities Exchange Act Release No. 61367 (Jan. 15, 2010), 75 FR 3765 (Jan. 22, 2010) (Notice of Immediate Effectiveness of Proposed Amendment To Revise the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information To Serve as the Operating Agreement for OPRA LLC).

of the CT Plan, which will provide a means to mitigate the inherent conflicts of interests between the SROs' "collective responsibilities in overseeing the Equity Data Plans and their individual interest in maximizing the viability of proprietary data products that they sell to market participants."¹³⁴ Though one commenter suggests that a non-profit structure for the CT Plan would better ensure independence in decisions relating to fees and administrator contracts than, for example, an LLC, the Commission believes that the requirement of the Governance Order that non-SROs have a vote on matters before the Operating Committee, together with the SROs' obligations under the federal securities laws and regulations, is sufficient at this time to mitigate conflicts of interests in making such decisions, regardless of the corporate structure used.

Moreover, the Commission is modifying certain other provisions of the CT Plan to help ensure that the CT Plan meaningfully includes non-SROs in Operating Committee decision-making, consistent with the Governance Order.¹³⁵ Each of the following modifications is discussed in greater detail below.

First, as discussed below in Section II.C.5(d)(iii), the Commission is modifying the CT Plan to limit the circumstances under which the SRO Voting Representatives may meet outside the presence of the Non-SRO Voting Representatives in Executive Session. Second, as discussed below in Section II.C.5(g)(iii), the Commission is modifying the CT Plan to limit the topics that may be addressed in a legal subcommittee without the Non-SRO Voting Representatives present and to require certain records of legal subcommittee meetings be kept to enhance transparency and accountability regarding the use of that subcommittee. Third, as discussed below in Section II.C.5(h), the Commission is modifying the CT Plan to require that the creation and assignment of any officer positions and duties be subject to a vote of the Operating Committee, rather than by a majority vote of the SROs. Fourth, as discussed below in Section II.C.5(g)(iii), the Commission is modifying the CT Plan to apply the Exculpation provisions available to the SROs to Non-SRO Voting Representatives. And fifth, as discussed below in Section II.C.12(e),

the Commission is modifying the CT Plan to remove the provision that would allow the SROs to modify Article IX (Allocations), Article X (Records and Accounting; Reports), Article XI (Dissolution and Termination), and Article XII (Exculpation and Indemnification) by a majority vote of Members.

Finally, one commenter states that the CT Plan does not include all of the necessary provisions for an LLC agreement to function appropriately as an NMS plan.¹³⁶ The commenter does not, however, identify the areas in which it believes the agreement is deficient.

For the reasons stated above, the Commission finds that it is appropriate for the CT Plan to be structured as an LLC Agreement, and is approving Article II as proposed.

4. Membership (Obligations and Liabilities)

Pursuant to Article III, Section 3.2(a) of the CT Plan, any national securities association or national securities exchange whose market, facilities, or members, as applicable, trades Eligible Securities may become a Member by (i) providing written notice to the Company; (ii) executing a joinder to the LLC Agreement; (iii) paying a Membership Fee to the Company as determined pursuant to Section 3.2(b) ("Membership Fee"); and (iv) executing a joinder to any other agreements to which all of the other Members have been made party in connection with being a Member.¹³⁷ Membership Fees paid will be added to the general revenues of the Company.¹³⁸

Article III, Section 3.2 of the CT Plan specifies that the factors that will be considered in determining a Membership Fee are: (1) The portion of costs previously paid by the Company (or by the Members prior to the formation of the Company) for the development, expansion and maintenance of the System which, under generally accepted accounting principles ("GAAP"), would have been treated as capital expenditures and would have been amortized over the five years preceding the admission of the new member; and (2) an assessment of costs incurred and to be incurred by the LLC for modifying the System or any part thereof to accommodate the new member, which costs are not otherwise required to be paid or reimbursed by the

new Member.¹³⁹ The CT Plan prohibits a Member's transfer of its Membership Interest in the LLC, except in connection with the withdrawal of a Member from the LLC, as discussed below.¹⁴⁰

Pursuant to Article III, Section 3.4, any Member may voluntarily withdraw from the LLC by: (i) Providing not less than 30 days' prior written notice of such withdrawal to the LLC, (ii) causing the LLC to file with the Commission an amendment to effectuate the withdrawal,¹⁴¹ and (iii) transferring such Member's Membership Interest to the LLC.¹⁴² If a Member ceases to be a registered national securities association or registered national securities exchange, that Member automatically withdraws from the LLC.¹⁴³ Section 3.4 further provides that after withdrawal from Membership, the Member will remain liable for any obligations arising prior to withdrawal.¹⁴⁴ A withdrawing Member is entitled to receive a portion of the Net Distributable Operating Income attributable to the period prior to the Member's withdrawal.¹⁴⁵

Pursuant to proposed Sections 3.4(d)(iii) and (iv), a Member that has withdrawn from the LLC will no longer have the right to have its Transaction Reports, Quotation Information, or other information disseminated over the System, and the Capital Account of that Member will not be allocated profits and losses of the LLC. In addition, Article III of the CT Plan provides that no Member, unless authorized by the Operating Committee, has the authority to represent the LLC or to make any expenditure on behalf of the LLC; provided, however, that the Tax Matters Partner may represent, act for, sign for or bind the LLC as permitted under Sections 10.2 and 10.3 of the LLC Agreement.¹⁴⁶ In addition, the CT Plan provides that, following the Operative Date, each Member will be required to comply with the provisions of the Plan

¹³⁹ See Article III, Section 3.2(b) of the CT Plan. The proposed CT Plan provides that Participants of the CQ Plan, CTA Plan, and UTP Plan are not required to pay the Membership Fee. See Article III, Section 3.2(c) of the CT Plan.

¹⁴⁰ See Article III, Section 3.3 of the CT Plan.

¹⁴¹ Any withdrawal will not be effective until an amendment to the Agreement is approved by the Commission. See Article III, Section 3.4(c) of the CT Plan.

¹⁴² See Article III, Section 3.4(a) of the CT Plan.

¹⁴³ See Article III, Section 3.4(b) of the CT Plan. Article III, Section 3.5 of the CT Plan provides that a Member's bankruptcy under Section 18–304 of the Delaware Act shall not itself cause a withdrawal of such Member from the Company.

¹⁴⁴ See Article III, Section 3.4(d)(i) of the CT Plan.

¹⁴⁵ See Article III, Section 3.4(d)(ii) of the CT Plan.

¹⁴⁶ See Article III, Section 3.7(d) of the CT Plan.

¹³⁴ Governance Order, *supra* note 8, 85 FR at 28707, 28715–16.

¹³⁵ See, e.g., Governance Order, *supra* note 8, 85 FR at 28707.

¹³⁶ See Data Boiler Letter I, *supra* note 31, at 25

¹³⁷ See Article III, Section 3.2(a) of the CT Plan.

¹³⁸ See *id.*

and enforce compliance with the Plan by its members.¹⁴⁷

These provisions relating to joining and withdrawing from the CT Plan as a Member and enforcing compliance with the Plan are similar to those existing in other NMS Plans.¹⁴⁸ The Commission received no comments addressing these provisions. Accordingly, the Commission is approving Section 3.4, as proposed.

Article III of the CT Plan also sets forth the obligations and liabilities of the Members. Article III, Section 3.7(b) provides that Members will not be required to contribute capital or make loans to the LLC, nor will Members have any liability for the debts and liabilities of the LLC.¹⁴⁹ This section also states that it is the intent of the Members that no distribution to any Member pursuant to the LLC Agreement will be considered a return of money or other property paid or distributed in violation of the Delaware Act, and that any such payment will be considered a compromise within the meaning of Delaware Act, and the Member receiving any payment will not be required to return any payment to any person, provided that a Member will be required to return any payment made due to a clear accounting or similar error or as otherwise provide in Section 3.7(b).¹⁵⁰ Finally, Section 3.7(e) provides that no Member owes any duty (fiduciary or otherwise) to the LLC or to any other Member other than the duties expressly set forth in the LLC Agreement.

In the Notice, the Commission sought comment on Article III, Section 3.7 and the provision that states that SROs shall have no liability for the debt, liabilities, commitments, or any other obligations of the CT Plan or for any losses of the CT Plan. The Commission asked if the provision is consistent with the SROs' obligations to, and purposes of, the CT Plan. Several commenters express

concern with this provision.¹⁵¹ One commenter states that the Members should not receive special liability protections.¹⁵² Another commenter states that the liability carve-out for SROs is too broad.¹⁵³ This commenter states that the provisions in Article III, Section 3.7 would "significantly increase the likelihood that Plan activities would be contrary to the role and public purpose of the Plan as part of the national market system," thereby creating a conflict of interest with SROs' obligations with respect to the Plan under federal securities rules and regulations.¹⁵⁴ Another commenter views the provisions of Article III, Section 3.7 as allowing the LLC to have upside profit, but relieving the SROs of responsibility for any debt, liabilities, commitment, or any other obligations.¹⁵⁵ This commenter further states that the SROs have significant influence on how the LLC operates through control of the Operating Committee, but no consequence for that control, and recommends that Article III, Section 3.7(e) be removed from the CT Plan.¹⁵⁶

In contrast, one commenter states that the liability protections in Article III, Sections 3.7(b) and (e) are standard protections for the members of an LLC and are commonly included in LLC agreements.¹⁵⁷ This commenter further argues that the Non-SRO Voting Representatives do not need similar protection since they are not members of the LLC.¹⁵⁸ Another commenter states that the provisions in Article III are consistent with Delaware business organization law.¹⁵⁹ This commenter also argues that including the principle that no Member of the CT Plan is liable

for the obligations of the CT Plan "is not an attempt to avoid appropriate funding for the CT Plan,"¹⁶⁰ and states that the requirements in CT Plan that each Member make capital contributions for "reasonable administrative and other reasonable expenses" of the CT Plan and that each Member return its pro rata share of distributions from the CT Plan in the one year period prior to a default in payment to the Processors or Administrator are evidence of appropriate funding responsibilities for the CT Plan.¹⁶¹

While certain commenters object to the provisions that would absolve the Members of financial liabilities incurred by the LLC, arguing that the provisions are too broad and would allow the Members to act in their own self-interest, contrary to the purpose of the CT Plan,¹⁶² after careful consideration of the comments, the Commission is not modifying these provisions. As the Commission stated above, the SROs' regulatory obligations pursuant to the CT Plan flow from the federal securities laws and regulations, and the Commission has, as noted above, modified the language of the Recitals of the CT Plan to reiterate that the terms of the CT Plan cannot act to diminish those obligations.¹⁶³ Further, the language proposed by the SROs for Section 3.7(b) states that an SRO shall not have liability to the CT Plan as a Member *except* as provided in the Agreement or "Applicable Law" (a defined term in the CT Plan), which means that the express terms of this provision of the LLC agreement do not contemplate limiting any regulatory obligations SROs might have under the federal securities laws and regulations with respect to the operation of the CT Plan. Finally, the Commission does not believe that it is necessary to extend these provisions to apply to Non-SRO Voting Representatives, as one commenter suggests,¹⁶⁴ because while these persons serve on the Operating Committee, they have no financial obligation under the CT Plan and thus do not require the protections afforded to the Members in Article III. Accordingly, the Commission is approving Article III, Section 3.7 as proposed.

In the Notice, the Commission specifically sought comment on Article III, Section 3.7(e) of the CT Plan, which absolves Members of any duty to the

¹⁵¹ See Notice, *supra* note 3, 85 FR at 64568 (Question 11).

¹⁵² See RBC Letter, *supra* note 30, at 9. This commenter recommends that the CT Plan should make clear that the liability protection and indemnification provisions apply to non-SRO representatives acting in their role on the Operating Committee. See *id.* at 10. See also *infra* Section II.C.11 (discussing modification to the proposed CT Plan to provide indemnity to the Non-SRO Voting Representatives).

¹⁵³ See Virtu Letter, *supra* note 30, at 3.

¹⁵⁴ *Id.*

¹⁵⁵ See Data Boiler Letter I, *supra* note 31, at 24.

¹⁵⁶ See *id.*

¹⁵⁷ See NYSE Letter I, *supra* note 18, at 37. This commenter points to Section 4.8 of the CAT NMS Plan as precedent for including the limitation on liability provisions at Section 3.7(b) and (e) and states that, similar to the proposed CT Plan, the CAT NMS Plan extends liability protection and indemnification coverage only to SROs that created the LLC. See *id.* at 37–38. Another commenter notes that the OPRA Plan is an LLC with similar limitation on liability provisions. See Nasdaq Letter I, *supra* note 20, at 16 n.26.

¹⁵⁸ See NYSE Letter I, *supra* note 18, at 38.

¹⁵⁹ See Nasdaq Letter I, *supra* note 20, at 15 (citing Section 18–303 of the Delaware Act).

¹⁶⁰ *Id.* at 16.

¹⁶¹ *Id.*

¹⁶² See RBC Letter, *supra* note 30, at 9; Virtu Letter, *supra* note 30, at 3; see also Data Boiler Letter I, *supra* note 31, at 24.

¹⁶³ See *supra* Section II.C.1(b).

¹⁶⁴ See NYSE Letter I, *supra* note 18, at 38.

¹⁴⁷ See Article III, Section 3.6 of the CT Plan.

¹⁴⁸ See, e.g., CAT NMS Plan, Article III.

¹⁴⁹ However, in the event that the Processors or the Administrator have not been paid pursuant to the terms of the Processor Services Agreements and Administrative Services Agreement, the proposed CT Plan requires each Member to return to the Company its pro rata share of any moneys distributed to it by the Company until an aggregated amount equal to the amount owed has been recontributed to the Company. The Company will pay the amount(s) owed. See Article III, Section 3.7(b) of the CT Plan.

¹⁵⁰ See Article III, Section 3.7(c) of the CT Plan. The proposed CT Plan further provides that if any court of competent jurisdiction holds that any Member is obligated to make any such payment, such obligation shall be the obligation of such Member and not of the Operating Committee. See *id.*

LLC or other Members, and on the provision's potential impact on the CT Plan's responsibilities for the collection, processing, and dissemination of equity market data.¹⁶⁵ Two commenters object to the provision that relieves Members of a duty (fiduciary or otherwise) to the CT Plan or each other.¹⁶⁶ One of these commenters asserts that the SROs' disclaimer of duty or obligation to the CT Plan appears to be a "complete abdication" of responsibility to ensure that the Plan carries out its intended function, and that it is "unclear" why an SRO's representative to the CT Plan would not have a fiduciary duty to the LLC.¹⁶⁷ This commenter states that the SROs should, at a minimum, establish a duty in the CT Plan to promote the plan's function of assuring the widespread availability of equity market data on terms that are fair and reasonable, consistent with statutory requirements, or to promote the interests of fair and orderly markets and the protections of investors and the public interest.¹⁶⁸ This commenter encourages the SROs to adopt a fiduciary duty as well as to affirmatively articulate the duties that are owed to the CT Plan.¹⁶⁹ Another commenter similarly believes that the SROs should assume fiduciary duties to the LLC.¹⁷⁰

One commenter disagrees that the CT Plan should impose a fiduciary duty on Members.¹⁷¹ This commenter states that, while individuals or entities that manage a limited liability company may have fiduciary duties under Delaware law, a member generally does not have fiduciary duties so long as it does not exercise control over the company.¹⁷² This commenter argues that under the CT Plan, the Operating Committee, not the Members, have managerial responsibility for the operations of the CT Plan and the Members only have limited rights to take actions.¹⁷³ Further, the commenter explains, no individual Member of the CT Plan has the ability to control the actions of the CT Plan.¹⁷⁴ The commenter concludes that "it is unlikely that under Delaware law the Members of the CT Plan, when acting in such capacity, would owe fiduciary

duties to the CT Plan or the Members."¹⁷⁵ This commenter also argues that the proposed language of the CT Plan has no effect on the SROs' obligations under federal securities laws and that it is those obligations, rather than the SROs' obligations to the CT Plan and each other, that will ensure that the SROs comply with their responsibilities regarding the dissemination of real-time consolidated equity market data.¹⁷⁶

With respect to providing a disclaimer of fiduciary duty for Non-SRO Voting Representatives, this commenter states that there would be some logic in expanding the disclaimer of fiduciary duties to cover Non-SRO Voting Representatives, but that this would not address the discrepancy between the federal law obligations of the Members and the Non-SRO Voting Representatives.¹⁷⁷ This commenter states that Rule 608 of Regulation NMS "would require the Members to comply with the Plan, and enforce compliance by their broker members, but that neither that rule, nor any other provision of law, imposes corresponding duties on the Non-SRO Voting Representatives."¹⁷⁸

The Commission agrees that the proposed language of the CT Plan has no effect on the SROs' obligations under the federal securities laws, and that it is those obligations that will ensure compliance with SRO responsibilities regarding consolidated equity market data. As discussed above,¹⁷⁹ any disclaimer of fiduciary duty to the LLC cannot dilute, diminish, or otherwise alter the Members' regulatory responsibilities under the federal securities laws and rules because, as SROs and pursuant to the requirements under the national market system, the Members are prohibited from acting in contravention of Commission rules and regulations, which include rules for the protection of investors to ensure the "prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to quotations for and transactions in such securities and the fairness and usefulness of the form and content of such information."¹⁸⁰ However, the

Commission understands the concerns raised by commenters that the terms of the CT Plan fail to impose any express duty on the Members to act to promote the purpose of the Plan and expressly disclaim any such duty.¹⁸¹ To address this concern, as discussed above, the Commission is modifying the terms in the CT Plan's Recitals to explicitly state that no provision of the CT Plan shall be construed to limit or diminish the obligations of SRO Members to the CT Plan that arise pursuant to federal securities laws and regulations.¹⁸² The Commission is not, however, modifying the Plan to include a disclaimer of fiduciary duty for the Non-SRO Voting Representatives who serve on the Operating Committee, a possibility raised by one commenter,¹⁸³ because Non-SRO Voting Representatives will not have the same legal obligations as the SRO Voting Representatives and because they may also have separate legal duties to their employers.

5. Management of the LLC

(a) Duties and Powers of the Operating Committee

Article IV of the CT Plan establishes the overall governance structure for the management of the LLC. Article IV, Section 4.1(a) proposes that the LLC be managed by the Operating Committee.¹⁸⁴ Article IV, Section 4.1 also provides that the Operating Committee has the authority to take actions it deems necessary to accomplish the purposes of the LLC, including: (1) Proposing amendments or implementing policies and procedures;¹⁸⁵ (2) selecting, overseeing, specifying the role and responsibilities of, and evaluating the performance of the Administrator, the Processor, an auditor, and any other professional service providers;¹⁸⁶ (3) developing fair and reasonable fees for equity market data¹⁸⁷; (4) reviewing the performance of the Processor and ensuring public reporting of the Processors' performance and other metrics and information about the processors;¹⁸⁸ (5) assessing the marketplace for equity data products

¹⁸¹ See MFA Letter, *supra* note 30, at 2; RBC Letter, *supra* note 30, at 9.

¹⁸² See *supra* Section II.C.1(b).

¹⁸³ See Nasdaq Letter I, *supra* note 20, at 16–17.

¹⁸⁴ See Article IV, Section 4.1(a) of the CT Plan.

¹⁸⁵ See Article IV, Section 4.1(a)(i) of the CT Plan.

¹⁸⁶ See Article IV, Section 4.1(a)(ii) of the CT Plan. This section further provides that any expenditure for professional services paid by the Company must be authorized by the Operating Committee and must be for activities consistent with the CT Plan. See *id.*

¹⁸⁷ See Article IV, Section 4.1(a)(iii) of the CT Plan.

¹⁸⁸ See Article IV, Section 4.1(a)(iv) of the CT Plan. See also *infra* Section II.C.6.

¹⁶⁵ See Notice, *supra* note 3, 85 FR at 64568 (Question 12).

¹⁶⁶ See MFA Letter, *supra* note 30, at 2; RBC Letter, *supra* note 30, at 9.

¹⁶⁷ MFA Letter, *supra* note 30, at 2 (also stating that the SROs cannot both disclaim any duty to the LLC and maintain the current level of control over the LLC if the CT Plan is to function properly.).

¹⁶⁸ See *id.*

¹⁶⁹ See *id.*

¹⁷⁰ See RBC Letter, *supra* note 30, at 9.

¹⁷¹ See Nasdaq Letter I, *supra* note 20, at 16–17.

¹⁷² See *id.*

¹⁷³ See *id.*

¹⁷⁴ See *id.*

¹⁷⁵ *Id.*

¹⁷⁶ See *id.* at 16. This commenter further states that "since the Plan is a product of federal law, it would be inappropriate to subject its Members to state fiduciary duties, as this would give rise to a potential conflict between state and federal law."¹⁷⁷ *Id.*

¹⁷⁷ See *id.* at 17.

¹⁷⁸ *Id.* at 17; see also NYSE Letter I, *supra* note 18, at 7.

¹⁷⁹ See *supra* Section II.C.1(b).

¹⁸⁰ 15 U.S.C. 78k-1(c)(1)(B).

and ensuring that the CT Feeds are priced in a manner that is fair and reasonable, and designed to ensure the widespread availability of CT Feeds data to investors and market participants¹⁸⁹; (6) designing a fair and reasonable formula to be applied by the Administrator for allocating revenue, and reviewing and revising the formula as needed;¹⁹⁰ (7) interpreting the LLC Agreement and its provisions;¹⁹¹ and (8) other specific responsibilities provided for in the LLC Agreement.¹⁹²

One commenter expresses general support for the provision of the CT Plan that states that the responsibilities of the Operating Committee include interpreting the LLC Agreement and its provisions, with the caveats that “the Non-SRO Voting Representatives have the opportunity to meaningfully participate in the process of interpreting a provision of the plan”¹⁹³ and that the CT Plan should provide more detail on what role the Non-SRO representatives would have with respect to such decisions.¹⁹⁴ This commenter also recommends that the Operating Committee adopt policies and procedures distinguishing operational interpretations of the CT Plan from amendments required to be submitted to the Commission under Rule 608 of Regulation NMS.¹⁹⁵

One commenter states that the Operating Committee has “full and complete control over the business and affairs of the CT Plan, including interpretations of the CT Plan.”¹⁹⁶ This commenter argues that any interpretation of the CT Plan would be subject to a discussion at a meeting of the Operating Committee and that the minutes of such a meeting would include sufficient detail to inform the public of the matters under discussion and the views expressed (without attribution).¹⁹⁷ Another commenter states that the CT Plan’s language describing the power of the Operating Committee to “develop[] and maintain[] fair and reasonable Fees and consistent terms for the distribution, transmission, and aggregation of core

data” is confusing and recommends that “[i]f the intent of this language is to empower the Operating Committee to set fees, after public notice and comment, and subject to Commission approval, it should clearly say as much.”¹⁹⁸

In response to the comment addressing the Operating Committee’s authority to interpret the provisions of the CT Plan and stating that the Non-SRO Voting Representatives should participate in any interpretations,¹⁹⁹ the Commission notes that the terms of the CT Plan provide that the Non-SRO Voting Representatives, as members of the Operating Committee, will be able to participate in any discussions regarding interpretations and will have a vote on whether to adopt an interpretation. Further, the Commission believes that, while operational interpretations in order to implement the CT Plan are appropriately within the authority of the Operating Committee, any such interpretations must be consistent with terms of the CT Plan and may not in any way modify the CT Plan. Any change to a provision of the CT Plan would require an amendment pursuant to Rule 608 of Regulation NMS.²⁰⁰

Another commenter argues that the provision granting power to the Operating Committee to develop and maintain fair and reasonable fees is confusing and suggests that the provision expressly state that the Operating Committee has the authority to set fees, after public notice and comment, and subject to Commission approval.²⁰¹ The Commission does not believe such a clarification is necessary. Market Data Fees will be established at a later date as proposed amendments to the CT Plan.²⁰² Rule 608(b) under Regulation NMS sets forth the requirements for amending an NMS plan,²⁰³ and includes specific provisions relating to establishing and amending fees set forth in an NMS plan. Therefore, the Commission does not believe that this requirement needs to be restated in the CT Plan.

Finally, one commenter states that the Operating Committee should function as a legislature, with management to execute the Plan and “the SIP’s public purpose.”²⁰⁴ This commenter further states that the diversified Operating Committee will be ill-equipped to run daily operation management functions to the detriment of the LLC.²⁰⁵ The terms of the proposed CT Plan do, however, contemplate that the Operating Committee will act as a general decision-making body, while the Administrator and the Processors will be responsible for the day-to-day operational decisions.

For the reasons stated above, the Commission is approving Article IV, Section 4.1(a) as proposed.

Article IV, Section 4.1(b) proposes to permit the Operating Committee to delegate all or part of its administrative functions to (1) a subcommittee; (2) one or more of the Members; (3) one or more Non-SRO Voting Representatives; or (4) any other Persons (including the Administrator), provided that a delegation would not convey the authority to take action on behalf of the CT Plan.

Two commenters state that the CT Plan should clearly state the scope and nature of an “administrative function.”²⁰⁶ One commenter states that it supports allowing administrative functions to be delegated, as long as the Non-SRO Voting Representatives have an opportunity to participate in the decision to delegate the matter and any delegation to an SRO Voting Representative or subcommittee controlled by SRO Voting Representatives is subject to an augmented majority vote of the Operating Committee.²⁰⁷ This commenter also expresses concern about delegating undefined administrative functions solely to SRO Voting Representatives.²⁰⁸ The second commenter expresses similar concerns and suggests that administrative functions should not be permitted to be delegated to a subcommittee composed only of either SRO Voting Representatives or Non-SRO Voting Representatives, and that both groups should be represented on any

¹⁸⁹ See Article IV, Section 4.1(a)(v) of the CT Plan.

¹⁹⁰ See Article IV, Section 4.1(a)(vi) of the CT Plan.

¹⁹¹ See Article IV, Section 4.1(a)(vii) of the CT Plan.

¹⁹² See Article IV, Section 4.1(a)(viii) of the CT Plan.

¹⁹³ Virtu Letter, *supra* note 30, at 3.

¹⁹⁴ See *id.*

¹⁹⁵ See *id.*

¹⁹⁶ Nasdaq Letter I, *supra* note 20, at 17 (internal citations omitted). Another commenter similarly states that interpretation of the CT Plan is a decision for the SROs to make, not the Commission. See NYSE Letter I, *supra* note 18, at 38–39.

¹⁹⁷ See Nasdaq Letter I, *supra* note 20, at 17–18.

¹⁹⁸ RBC Letter, *supra* note 30, at 6.

¹⁹⁹ See Virtu Letter, *supra* note 30, at 3.

²⁰⁰ 17 CFR 242.608(b)(2). As proposed, Article XIII, Section 13.5(b) of the CT Plan, would permit the Members to implement amendments that relate to the functioning of Company as an LLC. As discussed below, the Commission is modifying this provision such that all amendments to the CT Plan must be filed with the Commission. See *supra* Section II.C.12(e).

²⁰¹ See RBC Letter, *supra* note 30, at 6.

²⁰² See *supra* Recitals paragraph (d)(ii) (requiring that within four months of the Effective Date of the CT Plan, the Operating Committee file proposed fees).

²⁰³ 17 CFR 242.608(b)(2).

²⁰⁴ Data Boiler Letter I, *supra* note 31, at 26.

²⁰⁵ See *id.* This commenter further states, “having members dominating the Legislative branch and assigning an ‘observer’ to scrutinize everything the Operating Committee may try to do, [would] indeed tie the hands of Executive branch.” *Id.*

²⁰⁶ See Virtu Letter, *supra* note 30, at 5; Data Boiler Letter I, *supra* note 31, at 29–30.

²⁰⁷ See Virtu Letter, *supra* note 30, at 5.

²⁰⁸ See *id.*

subcommittee to which administrative functions are delegated.²⁰⁹

One commenter rejects these concerns, explaining that there would be no delegation of the Operating Committee's voting authority, but instead solely a delegation of the authority to implement a decision by the Operating Committee, to develop a proposal for Operating Committee consideration, or to perform other ministerial functions on the Operating Committee's behalf.²¹⁰ This commenter further explains that an Operating Committee vote is necessary for any delegation of administrative functions and that this should mitigate concerns about undue delegation of authority to an SRO Voting Representative or Non-SRO Voting Representative.²¹¹ Finally, another commenter states that decisions relating to the administrative functions are for the SROs alone to make.²¹²

The Commission agrees with commenters that the concept of "administrative functions" of the Operating Committee should be limited to prohibit certain delegations of authority and is therefore modifying Section 4.1(b) to exclude from the functions that may be delegated those administrative functions to be performed by the independent Administrator pursuant to Section 6.1. The Commission finds that this modification is appropriate because the functions delegated to the independent Administrator, particularly those that involve administering Vendor and Subscribers contracts, performing audits, or assessing fees, necessarily involve access to sensitive information of significant commercial or competitive value and therefore raise heightened concerns about conflicts of interest that can be adequately addressed only if these functions are performed by the independent Administrator.

In response to the comment that suggests that any delegation to an SRO Voting Representative or subcommittee controlled by SRO Voting Representatives should be subject to a vote of the Operating Committee,²¹³ the Commission agrees and notes that the terms of the CT Plan state that delegations of administrative functions under this provision are subject to a vote of the Operating Committee. Additionally, in response to the comment that argues that administrative functions should not be delegated to a

subcommittee composed only of either SRO Voting Representatives or Non-SRO Voting Representatives,²¹⁴ the Commission recognizes the concern that SRO Voting Representatives or Non-SRO Voting Representatives could have exclusive control of an administrative function delegated under this provision. However, the Commission believes that this concern is mitigated by the requirement that a vote of the Operating Committee is required to approve any delegation of administrative functions. Further, the modification discussed above limits the types of functions that are eligible for delegation. The Commission agrees with the comment that states that a delegation under this provision does not convey any authority to take action.²¹⁵ Such authority resides with the Operating Committee, and Article IV, Section 4.1(b) of the CT Plan permits the Operating Committee to delegate authority only to implement a decision by the Operating Committee, develop a proposal for Operating Committee consideration, or perform other ministerial functions on the Operating Committee's behalf.

For the reasons discussed above, the Commission is approving Section 4.1(b) as modified.

Finally, Article IV, Section 4.1(c) provides that neither the Company nor the Operating Committee will have authority over any Member's proprietary systems or the collection and dissemination of quotation or transaction information in Eligible Securities in any Member's Market, or, in the case of FINRA, from FINRA Participants. The Commission received no comments on this provision of the CT Plan and is approving it as proposed.

(b) Composition and Selection of the Operating Committee

Article IV, Section 4.2 of the CT Plan addresses the composition and selection of the Operating Committee members.

(i) SRO Voting Representatives

Section 4.2(a) provides that each group of Members that are Affiliates (an "SRO Group")²¹⁶ and each Non-Affiliated SRO²¹⁷ will select an SRO Voting Representative to serve on the Operating Committee and vote on its

behalf.²¹⁸ The Commission is approving this Section as proposed.²¹⁹

(ii) Non-SRO Voting Representatives (A) Inclusion of Non-SRO Voting Representatives

Section 4.2(b) provides that Non-SRO Voting Representatives will also be permitted to serve and vote on Operating Committee matters.²²⁰ Several commenters express support for including Non-SRO Voting Representatives on the Operating Committee.²²¹ One commenter states that the requirement for voting representation by a diverse set of stakeholders is "a core element of the Governance Order, with the purpose of reducing conflicts of interest and providing 'more meaningful inclusion of key stakeholders' views in New Consolidated Data Plan decision making."²²² Another commenter similarly states that it supports expanding voting representation to non-SROs and having them participate as full voting members of the Operating Committee to allow non-SROs to have a role in the CT Plan's decision-making process and therefore help address conflicts of interest.²²³ Another commenter states that allowing only SROs to have a vote "would impair [the] credibility of CT Plan as a public utility."²²⁴ Another commenter states that giving Non-SRO Voting Representatives a vote on the Operating Committee will "break the current SRO voting monopoly."²²⁵

Other commenters oppose the CT Plan's provisions that grant non-SROs voting rights on the Operating Committee. Three commenters state that these provisions are contrary to Section 11A of the Act.²²⁶ These commenters

²¹⁸ See Article IV, Section 4.2(a) of the CT Plan. Each SRO Group and each Non-Affiliated SRO may designate an alternate individual or individuals who shall be authorized to vote on its behalf if the SRO Voting Representative is unable. Each SRO Voting Representative may serve as such at the discretion of the SRO Group or Non-Affiliated SRO that it represents. See *id.*

²¹⁹ Discussion of the allocation of SRO votes by SRO Group appears in Section ILC.5(c)(i), *infra.*

²²⁰ See Article IV, Section 4.2(b) of the CT Plan.

²²¹ See IEX Letter, *supra* note 30, at 2; ICI Letter II, *supra* note 31, at 1; BMO Letter I, *supra* note 30, at 3; BMO Letter II, *supra* note 30, at 2. See also Letter from Kenneth E. Bentsen, Jr., President and CEO, SIFMA (June 9, 2021), at 2.

²²² IEX Letter, *supra* note 30, at 2 (quoting the Commission's Governance Order, *supra* note 8, 85 FR at 28707).

²²³ See BMO Letter I, *supra* note 30, at 3; BMO Letter II, *supra* note 30, at 2.

²²⁴ Data Boiler Letter I, *supra* note 31, at 30.

²²⁵ Schwab Letter II, *supra* note 30, at 6.

²²⁶ See Choe Letter, *supra* note 17, at 2, 3–4 (arguing that only SROs have the authority to act jointly to file, amend, implement, and administer an NMS plan); NYSE Letter I, *supra* note 18, at 6–

²⁰⁹ See Data Boiler Letter I, *supra* note 31, at 29–30.

²¹⁰ See Nasdaq Letter I, *supra* note 20, at 22.

²¹¹ See *id.*

²¹² See NYSE Letter I, *supra* note 18, at 38–39.

²¹³ See Virtu Letter, *supra* note 30, at 5.

²¹⁴ See Data Boiler Letter I, *supra* note 31, at 26–27.

²¹⁵ See Nasdaq Letter I, *supra* note 20, at 22.

²¹⁶ For example, NYSE, NYSE American, NYSE Chicago, and NYSE National would be one SRO Group for purposes of the proposed CT Plan and would select one individual to represent the SRO Group on the Operating Committee.

²¹⁷ Currently, the Non-Affiliated SROs are FINRA, IEX, LTSE, and MEMX.

state that Section 11A of the Act authorizes the Commission to direct only the SROs to jointly develop and operate NMS plans, and does not provide the authority to give non-SROs voting power on the operating committee of an NMS plan.²²⁷ While acknowledging that the non-SROs should have some voice in the operations of the CT Plan, one commenter argues that Congress “determined to entrust the planning, development, operation, and regulation of NMS plans to SROs that have specific regulatory obligations to act in furtherance of the public interest.”²²⁸ This commenter also argues that, because Rule 608 provides that only SROs have the authority to act jointly to file and amend NMS plans, providing voting rights to non-SROs violates Rule 608.²²⁹ Another commenter argues that the Act leaves no discretion for the Commission to grant votes to non-SROs,²³⁰ and that providing votes to non-SROs would conflict with the design and purpose of the Act, which entrusted responsibility for the planning, development, operation, and regulation of the national market system to SROs, which are subject to comprehensive regulation,²³¹ rather than to non-SROs, whose representatives would have no obligation to act in the public interest and would be free to act in their own personal self-interest.²³² This commenter further states that the Non-SRO Voting Representatives would not have an obligation to protect investors or further the public interest, or to comply with the terms of the CT Plan, despite being voting members of the Operating Committee.²³³

7 (arguing that neither Section 11A nor Rule 608(a)(3) authorize non-SROs to act jointly along with SROs with respect to NMS plans); Nasdaq Letter I, *supra* note 20, at 1–2 (attaching and incorporating by reference all arguments made by Petitioners in their opening brief challenging the Order). The Commission has responded to the arguments made by Nasdaq in its brief. See Brief for the Respondent, Securities and Exchange Commission, *The Nasdaq Stock Market, et al. v. Securities and Exchange Commission* (Case No. 20–1181) (DC Cir. 2020).

²²⁷ See Choe Letter, *supra* note 17, at 2; Nasdaq Letter I, *supra* note 18, at 1–2. See also NYSE Letter I, *supra* note 18, at 6–7; NYSE Letter II, *supra* note 19, at 3.

²²⁸ Choe Letter, *supra* note 17, at 3.

²²⁹ See *id.* at 4.

²³⁰ See NYSE Letter I, *supra* note 18, at 7.

²³¹ See *id.*

²³² See *id.* at 7–8.

²³³ See NYSE Letter I, *supra* note 18, at 7 (“While these individuals are intended to ‘represent’ each of the six enumerated categories of non-SRO market participants, such individuals would not even have the obligation to further the purportedly represented non-SROs’ interest nor the public interest when voting on the Operating Committee,

The Commission specifically considered and addressed these arguments in the Governance Order.²³⁴ As stated therein, the Commission believes that it is within its authority under Section 11A to require the operating committee to include voting rights for non-SROs. In Section 11A(a)(2), Congress directed the Commission to use its authority under the Act to facilitate the establishment of the NMS in accordance with and in furtherance of its specific findings and objectives. Here, the Commission is acting pursuant to its authority under Section 11A(a)(3)(B) to further Congress’s express objective of assuring the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities.²³⁵ Section 11A(a)(3)(B) expressly permits the Commission to require SROs to “act jointly” with respect to a “matter[]” as to which they “share authority in planning, developing, operating, or regulating the national market system (or a subsystem thereof).”²³⁶ But Congress left to the Commission’s discretion the determination of which “matters” to require joint action and how such joint action should occur. The requirement for the CT Plan to include minority voting rights for non-SROs on the Operating Committee falls comfortably within that discretion.

The particular “matter” as to which the Commission is requiring joint action here—the planning, development, and operation of an NMS plan governing dissemination of consolidated equity market data—is designed to achieve the goals of Section 11A(c), in particular by ensuring the prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to quotations for and transactions in securities and the fairness and usefulness of the form and content of such information. Not only does that provision expressly contemplate the involvement of non-SROs,²³⁷ but as the Commission explained in the Governance Order, an operating committee that takes into account views from non-SRO members that are charged with carrying out the objectives of the CT Plan will have an

leaving each free to act in his or her own personal self-interest.”).

²³⁴ See Governance Order, *supra* note 8, 85 FR at 28715–16.

²³⁵ See 15 U.S.C. 78k–1(a)(3)(B).

²³⁶ *Id.*

²³⁷ See 15 U.S.C. 78k–1(c) (prohibiting any SRO “securities information processor, broker or dealer” from collecting, processing, distributing, or publishing market data in contravention of Commission rules).

overall improved governance structure that better supports those goals, because it will reflect a more diverse set of perspectives from a range of market participants, including significant subscribers of SIP core data products.²³⁸ As the Commission further stated, “including representatives from non-SROs alongside the SROs on the operating committee will enhance the ability of all relevant constituencies to work together to facilitate the goals of Section 11A of the Act.”²³⁹ These findings had substantial support in the comment file for the Governance Order, as a diverse set of commenters expressed the view that the governance of market data plans should include a broader array of viewpoints.²⁴⁰ And the Commission reiterates those findings here.

The Commission disagrees with comments that argue that because Section 11A of the Act and Rule 608 of Regulation NMS authorize the Commission to permit or require SROs to “act jointly” in planning, developing, and operating the NMS plans, the Commission has no authority to mandate that SROs provide minority voting rights for certain non-SROs on the operating committee of the new plan. Nothing in Section 11A precludes the involvement of non-SROs in the national market system.²⁴¹ Nor do the text or structure of Section 11A demonstrate that in permitting the Commission to authorize or require SROs to “act jointly” with respect to matters over which they share authority, Congress intended to entrust the development or operation of the NMS exclusively to SROs. “Act jointly” does not clearly connote “act jointly and exclusively.”²⁴² Likewise, the

²³⁸ See Governance Order, *supra* note 8, 85 FR at 28715–16.

²³⁹ *Id.* at 28716.

²⁴⁰ See *id.* at 28706.

²⁴¹ To the contrary, Section 11A expressly contemplates the involvement of non-SROs. See, e.g., Section 11A(b), 15 U.S.C. 78k–1(b) (regarding Securities Information Processors); Section 11A(c), 15 U.S.C. 78k–1(c) (prohibiting any SRO “securities information processor, broker or dealer” from collecting, processing, distributing, or publishing market data in contravention of Commission rules); Section 11A(d)(3), 15 U.S.C. 78k–1(d)(3) (listing brokers, dealers, securities information processors, issuers, and investors with “other persons interested in or likely to participate in the establishment, operation, or regulation of the national market system”).

²⁴² Indeed, history indicates that there is a different congressional intent behind the inclusion of this language. As the Commission has explained, the “act jointly” provision “enables the Commission to require joint activity that otherwise might be asserted to have an impact on competition, where the activity serves the public interest and the interests of investors.” Order Directing the Exchanges and the National Association of

Commission's grant of authority to SROs in Rule 608(a)(3) authorizes SROs to act jointly but, in doing so, does not by implication limit the Commission's authority to set forth a governance structure that includes non-SROs with some measure of voting power on an NMS plan operating committee. Rather, as the Governance Order notes, both Section 11A and Rule 608 are silent as to the participation of non-SROs in the operation of the plan.

Further, the Commission does not believe, as suggested by some commenters, that permitting non-SROs to serve on the Operating Committee will impede the SROs' ability to act jointly or interfere with their ability to operate the national market system. The CT Plan simply requires the SROs to include Non-SRO Voting Representatives in the decision-making process for plan action.²⁴³ Additionally, nothing in the legislative history of Section 11A indicates that Congress sought to preclude the Commission from directing the SROs to provide non-SROs with a voice in NMS plan governance, particularly where, as here, the Commission has reasonably concluded that doing so will promote the Plan's effectiveness, consistent with Section 11A's enumerated goals.

Further, the Commission does not believe that allowing a broader representation of market participants in the governance of the CT Plan by including non-SROs as voting members on the Operating Committee will diminish the SROs' ability to ensure that the CT Plan meets the requirements of Section 11A of the Act and Rule 608 of Regulation NMS. As discussed below, the proposed voting structure, provides the SROs, by themselves, sufficient voting power to ensure that the Plan meets the requirements of Section 11A and Rule 608. In addition, the inclusion of non-SROs as voting members does not create a risk that the CT Plan could

be amended in a manner inconsistent with the SROs' regulatory obligations or with the Act, as any substantive amendments to the CT Plan would require Commission approval, and the Commission would determine if each such amendment was consistent with the Act and Rule 608. Therefore, the Commission continues to believe that inclusion of Non-SRO Voting Representatives on the Operating Committee would not interfere with the Commission's ability to exercise its oversight over the CT Plan.

(B) Categories of Non-SRO Voting Representatives

Article IV, Section 4.2(b) provides that one Non-SRO Voting Representative will be chosen from each of the following categories to serve on the Operating Committee, with the right to vote on Operating Committee matters: (A) An institutional investor; (B) a broker-dealer with a predominantly retail investor customer base; (C) a broker-dealer with a predominantly institutional investor customer base; (D) a securities market data vendor that is not affiliated or associated with a Member, broker-dealer, or investment adviser with third-party clients; (E) an issuer of NMS stock that is not affiliated or associated with a Member, broker-dealer, or investment adviser with third-party clients; and (F) a Retail Representative.²⁴⁴

One commenter states it is "not against" the proposed categories of Non-SRO Voting Representatives, but argues that the representatives' ability to introduce new and useful innovation to reform the SIP should be emphasized.²⁴⁵ Another commenter expresses support, in particular, for the inclusion of an institutional investor, such as an asset manager, on the Operating Committee.²⁴⁶ One commenter opposes the proposed restriction that would prohibit the Non-SRO Voting Representative representing issuers from being affiliated with an SRO, a broker-dealer, or an investment adviser.²⁴⁷ This commenter argues that

such a limitation would "eliminate a significant portion of qualified issuer representatives with the industry experience necessary to be effective non-SRO members," and would unreasonably discriminate against ETF issuers as they are typically affiliated with a broker-dealer or investment adviser, denying representation to a significant segment of the market.²⁴⁸

Another commenter disagrees with the proposed restriction that would prohibit the Non-SRO Voting Representative representing Market Data Vendors from being affiliated or associated with a Member, broker-dealer, or investment adviser with third-party clients.²⁴⁹ The commenter explains that many market data vendors partner with broker-dealers to create, and have available, technology that will complement traditional vending technology. The commenter argues that if these vendors are excluded from the pool of possible adviser candidates, no employees of major vendors would be eligible to serve, and that would eliminate many candidates that have the depth and breadth of understanding that comes from working for a large vendor. The commenter suggests that the restriction on who is eligible to serve as the securities Market Data Vendor Non-SRO Voting Representative be revised so that the individual representing the vendor community may not be associated with or in a direct control relationship with a broker-dealer.²⁵⁰

Although some commenters object to the restriction that the securities market data vendor representative and the issuer representative cannot be affiliated with SROs, broker-dealers, and investment advisers with third-party clients,²⁵¹ the Commission continues to believe that these restrictions are appropriate. These restrictions would operate to prevent certain affiliates of SROs, broker-dealers, or investment advisers from gaining additional representation on the Operating Committee by virtue of their affiliations. Under the CT Plan, SROs would have two-thirds of the votes on the Operating Committee, broker-dealers would have two representatives on the Operating Committee, and institutional investors would have one representative on the Operating Committee. Allowing a person from an issuer or market data

Global Public Policy, BlackRock (Nov. 12, 2020) ("BlackRock Letter I"), at 3.

²⁴⁸ *Id.*

²⁴⁹ See Letter from Sherry Madera, Chief Industry & Government Affairs Officer, Refinitiv (Nov. 12, 2020) ("Refinitiv Letter"), at 1–2.

²⁵⁰ *See id.*

²⁵¹ See BlackRock Letter I, *supra* note 247, at 3; Refinitiv Letter, *supra* note 249, at 1–2.

Securities Dealers, Inc. to Submit a Phase-in Plan to Implement Decimal Pricing in Equity Securities and Options, Securities Exchange Act Release No. 42914 (June 8, 2000), 65 FR 38010, 38012 (June 19, 2000); *see also* Application Pursuant to Section 11A(a)(3)(B) of the Securities Exchange Act of 1934, Securities Exchange Act Release No. 41843 (Sept. 8, 1999), 64 FR 50126, 50127 (Sept. 15, 1999); Order Directing Options Exchanges To Submit an Inter-Market Linkage Plan, Securities Exchange Act Release No. 42029 (Oct. 19, 1999), 64 FR 57674, 57675 (Oct. 26, 1999). In other words, Congress permitted the Commission to authorize SROs to engage in joint action that may otherwise give rise to antitrust concerns in circumstances in which they are acting "with respect to matters as to which they share authority . . . in planning, developing, operating, or regulating a national market system (or a subsystem thereof) or one of more facilities thereof."

²⁴³ See Governance Order, *supra* note 8, 85 FR at 28715.

²⁴⁴ See Article IV, Section 4.2(b) of the CT Plan. For purposes of the CT Plan, a Retail Representative is an individual who (1) represents the interests of retail investors, (2) has experience working with or on behalf of retail investors, (3) has the requisite background and professional experience to understand the interests of retail investors, the work of the Operating Committee of the Company, and the role of market data in the U.S. equity market, and (4) is not affiliated with a Member or broker-dealer. *See id.*

²⁴⁵ Data Boiler Letter I, *supra* note 31, at 28.

²⁴⁶ See ICI Letter II, *supra* note 31, at 1.

²⁴⁷ See Letter from Hubert De Jesus, Managing Director, Global Head of Market Structure and Electronic Trading, and Samantha DeZur, Director,

vendor affiliated with an SRO to serve as a Non-SRO Voting Representative would increase SRO representation and correspondingly diminish the representation of non-SROs on the Operating Committee.

The Commission also believes that it is important that the securities market data vendor representative and the issuer representative not be affiliated with a broker-dealer or an investment adviser with third-party clients so that there are entities with potentially diverse views on the Operating Committee. The Commission believes that adding an issuer representative that is not affiliated with an investment adviser would be more likely to add a different and valuable perspective than a second representative affiliated with an investment adviser. Similarly, the Commission believes that, although it is likely that the affiliation restrictions for a market data vendor representative would prevent at least some qualified and experienced persons from serving in that role, the Commission believes that this disadvantage is justified by the benefits of having a non-affiliated market data vendor, because the non-affiliated market data vendor would be more likely to add a different and valuable perspective to the deliberations of the Operating Committee than a third Non-SRO Voting Representative that is affiliated with a broker-dealer and would also be less likely to be affected by the same potential conflicts of interest. Moreover, as stated in the Governance Order, the Commission believes that even with these restrictions, the Operating Committee will be able to attract knowledgeable representatives of securities market data vendors and issuers, as the CT Plan will address issues and make important decisions that will impact these constituencies.²⁵² The Commission believes that the opportunity to have a voice on the operating committee of an NMS plan responsible for issues related to market data will be highly coveted and that there will be qualified nominees willing to serve as representatives from organizations that are not affiliated with SROs, broker-dealers, or institutional investors.

The Commission therefore concludes that including representatives from these categories of Non-SRO Voting Representatives, as set forth in the CT Plan as proposed, will provide a diversity of views on the Operating Committee such that perspectives from key stakeholders in matters related to equity market data are heard.

²⁵² See Governance Order, *supra* note 8, 85 FR at 28718.

Accordingly, the Commission is approving the provision of Article IV, Section 4.2(b) that enumerates the categories of Non-SRO Voting Representatives as proposed.

(C) Term Limits

Article IV, Section 4.2(b) of the CT Plan provides that Non-SRO Voting Representatives are eligible to serve for two-year terms for a maximum of two terms total, whether consecutive or non-consecutive.²⁵³ Under this provision, after the expiration of a Non-SRO Voting Representative's term, a replacement will be selected by a majority of the then-serving Non-SRO Voting Representatives.²⁵⁴ The CT Plan provides for a staggered start of the Non-SRO Voting Representatives official terms,²⁵⁵ but provides that those Non-SRO Voting Representatives whose official terms would not begin until the Third Quarterly Operating Committee Meeting after the Effective Date, would temporarily serve as a Non-SRO Voting Representative upon their selection and would still be eligible to be selected for another two-year term.²⁵⁶

Several commenters express views on the term limits proposed in Article IV, Section 4.2(b).²⁵⁷ One commenter states that the maximum term limit imposed on Non-SRO Voting Representatives in the CT Plan could adversely affect the operations of the Operating Committee by barring members with more experience from serving on it and by making it more difficult to attract qualified candidates for all the categories of Non-SRO Voting Representatives.²⁵⁸ Another commenter recommends allowing Non-SRO Voting Representatives to serve two two-year terms and then take a break for two years before being eligible to serve

²⁵³ See Article IV, Section 4.2(b) of the CT Plan.

²⁵⁴ See Article IV, Section 4.2(b)(i) and (ii) of the CT Plan. See also *infra* Section II.C.5(b)(ii)(D).

²⁵⁵ Specifically, the proposed CT Plan provides that the terms for the Issuer Representative, the Retail Representative, and the Institutional Representative would begin at the First Quarterly Operating Committee Meeting and the Securities Market Data Vendor Representative, the Broker-Dealer with a predominantly retail customer base Representative and the Broker-Dealer with a predominantly institutional investor base Representative would begin at the Third Quarterly Operating Committee Meeting. See Article IV, Section 4.2(b)(i) of the CT Plan.

²⁵⁶ See Article IV, Section 4.2(b) of the CT Plan.

²⁵⁷ See RBC Letter, *supra* note 30, at 8; MFA Letter, *supra* note 30, at 3–4; BlackRock Letter I, *supra* note 247, at 2; ICI Letter I, *supra* note 31, at 3–4; SIFMA Letter I, *supra* note 30, at 3; SIFMA Letter II, *supra* note 30, at 2; Virtu Letter, *supra* note 30, at 4; Letter from Marcia E. Asquith, Executive Vice President, Board and External Relations, FINRA (Nov. 12, 2020) (“FINRA Letter I”), at 7–8; MEMX Letter, *supra* note 30, at 3.

²⁵⁸ See RBC Letter, *supra* note 30, at 8.

again.²⁵⁹ The commenter believes that this term structure will “promote qualified participation by non-SROs, while preserving an egalitarian process which allows for a rotation of representatives and provides any interested candidate the opportunity to serve.”²⁶⁰ Another commenter recommends that Non-SRO Voting Representatives be permitted to serve two consecutive terms and then serve again after a one-term break, arguing that there is a limited pool of individuals with adequate experience and knowledge that can serve and that there are benefits from institutional knowledge gained from serving on the Operating Committee.²⁶¹ In addition, one commenter believes that a Non-SRO Voting Representative should be permitted to serve more than two terms, provided there is a sufficiently lengthy (e.g., two years) cooling-off process.²⁶² This commenter believes that the cooling-off process should provide a check on any firm's or individual's influence and would foster a sufficiently deep pool of candidates.²⁶³

Similarly, another commenter that supports a maximum term limit for Non-SRO Voting Representatives to allow for fresh perspectives from new industry representatives recommends that Non-SRO Voting Representatives be permitted to serve three consecutive two-year terms with ability to serve the same term limits after a two-year break.²⁶⁴ This commenter believes that the maximum term of four years proposed in the CT Plan would “impede meaningful and informed participation of Non-SRO Representatives” and “does not allow sufficient time for the representative to provide meaningful contribution as it may take new members . . . some time to get up to speed on the many diverse and complex issues.”²⁶⁵ Another commenter states that it supports term limits to “incentivize a healthy rotation of industry experts on the [Operating] Committee,” but it does not believe that the term limits proposed “offer enough runway for experts to get up to speed

²⁵⁹ See BlackRock Letter I, *supra* note 247, at 2.

²⁶⁰ *Id.*

²⁶¹ See MFA Letter, *supra* note 30, at 3–4.

²⁶² See ICI Letter I, *supra* note 31, at 3–4.

²⁶³ See *id.*

²⁶⁴ See SIFMA Letter I, *supra* note 30, at 3;

SIFMA Letter II, *supra* note 30, at 2.

²⁶⁵ SIFMA Letter I, *supra* note 30, at 3; see also SIFMA Letter II, *supra* note 30, at 2. FINRA similarly supports a longer maximum term to “ensure that Non-SRO Voting Representatives are able to gain knowledge and experience with the specifics of SIP operations, which can be very technical in nature, and allow them to provide more meaningful input into the CT Plan's operations.” FINRA Letter I, *supra* note 257, at 7–8.

and to participate meaningfully in the work of the [Operating] Committee,” and recommends permitting Non-SRO Voting Representatives to serve three two-year terms.²⁶⁶ Another commenter states that there is a sufficient number of qualified people to serve on the Operating Committee such that it is not necessary to have any person serve for more than six years, whether terms are consecutive or not.²⁶⁷ This commenter supports allowing Non-SRO Voting Representatives to serve for two three-year terms, arguing that such a term would provide continuous fresh ideas to the Operating Committee.²⁶⁸

Other commenters address when the Non-SRO Voting Representatives should commence their duties on the Operating Committee.²⁶⁹ One commenter suggests that the Operating Committee be established with both SRO and non-SRO voting representation before the CT Plan becomes effective to allow non-SROs the ability to participate in the process of operationalizing the CT Plan.²⁷⁰ Another commenter recommends that the Non-SRO Voting Representatives’ terms begin at the first meeting of the Operating Committee and that the terms be staggered such that three Non-SRO Voting Representatives would serve for three years and three Non-SRO Voting Representatives would serve for two years to allow all representatives to be present from the start.²⁷¹ Other commenters similarly support staggered terms. One commenter argues that staggered terms would reduce the distractions that could occur if all the Non-SRO Voting Representatives were replaced every two to four years.²⁷² Another commenter believes that the terms for Non-SRO Voting Representatives should be staggered so that no more than half of the representatives are elected in one year.²⁷³ Similarly, another commenter recommends staggering terms “by at least one or two years to ensure

sufficient continuity and consistency in representation.”²⁷⁴

Several commenters recommend imposing term limits on SRO Voting Representatives.²⁷⁵ One commenter believes that by applying term limits to Non-SRO Voting Representatives only, the CT Plan could advantage SROs relative to non-SROs with respect to relevant information and experience.²⁷⁶ Another commenter states that SRO Voting Representatives should be subject to the same term limits as Non-SRO Voting Representatives.²⁷⁷ Another commenter similarly states that allowing SRO Voting Representatives to serve indefinitely may be “counterproductive.”²⁷⁸

Other commenters disagree that SRO Voting Representatives should be subject to term limits. Two commenters objecting to term limits for SRO Voting Representatives explain that these representatives do not serve as individuals, but as representatives of a legal entity, and must vote based on that entity’s position.²⁷⁹ Therefore, one commenter argues, changing the individual would not serve to bring new perspectives to the Operating Committee.²⁸⁰ Another commenter stated that whether term limits apply to either Non-SRO Voting Representatives or SRO Voting Representatives is a decision for the SROs to make, not the Commission.²⁸¹

In the Governance Order, the Commission explained that term limits for Non-SRO Voting Representatives must balance the advantages of institutional knowledge with the potential benefits to be derived from new perspectives.²⁸² Further, the Commission stated that it believed that a term of two years, with the potential for additional terms, would provide sufficient time for a member to become familiar with the issues dealt with by the operating committee.²⁸³ Several commenters, however, argue that Non-

SRO Voting Representatives would need to be permitted to serve for longer than two two-year terms to get fully up to speed on all the complex matters covered by the CT Plan before rotating off the Operating Committee.²⁸⁴

After considering the concerns raised by commenters, the Commission is modifying Section 4.2(b) of the CT Plan to provide that Non-SRO Voting Representatives shall serve no more than two consecutive three-year terms, but shall be eligible, after a period of three years of non-service, to serve additional terms, subject to the requirement that three years of non-service must follow every set of two three-year terms of service.²⁸⁵ The Commission finds that the modification from two two-year terms to two three-year terms is appropriate because the Commission believes that these longer terms will better allow Non-SRO Voting Representatives to obtain sufficient experience with the operation of the CT Plan and to make informed contributions as members of the Operating Committee. The Commission also finds that—in order to preserve an appropriate balance between retaining institutional knowledge and allowing new perspectives to be heard—it is appropriate to require that, after serving a defined amount of time, Non-SRO Voting Representatives should be required to observe a “cooling-off” period before serving again so as to allow others the opportunity to serve. In response to a commenter’s claim that the SROs should have discretion to set Non-SRO Voting Representatives’ term limits, the Commission believes, as it stated in the Governance Order, that the determination of term limits for Non-SROs falls within its statutory authority under Section 11A of the Act.²⁸⁶ Moreover, the Commission believes that full participation by the Non-SRO Voting Representatives on the Operating Committee is a critical component of the

²⁷⁴ BlackRock Letter I, *supra* note 247, at 2; *see also* Virtu Letter, *supra* note 30, at 4.

²⁷⁵ *See* RBC Letter, *supra* note 30, at 8; Virtu Letter, *supra* note 30, at 4; MFA Letter, *supra* note 30, at 3–4.

²⁷⁶ *See* RBC Letter, *supra* note 30, at 8.

²⁷⁷ *See* MFA Letter, *supra* note 30, at 3–4.

²⁷⁸ Virtu Letter, *supra* note 30, at 4.

²⁷⁹ *See* FINRA Letter I, *supra* note 257, at 7–8; Nasdaq Letter I, *supra* note 20, at 23.

²⁸⁰ *See* Nasdaq Letter I, *supra* note 20, at 23. This commenter also argues that imposing term limits on SRO Voting Representatives would interfere with the SRO’s ability to discharge its responsibilities under the Act through the individual that it believes best able to exercise those functions. *See id.*

²⁸¹ *See* NYSE Letter I, *supra* note 18, at 38–39.

²⁸² *See* Governance Order, *supra* note 8, 85 FR at 28720.

²⁸³ *See id.*

²⁸⁴ *See* RBC Letter, *supra* note 30, at 8; MFA Letter, *supra* note 30, at 3–4; BlackRock Letter I, *supra* note 247, at 2; SIFMA Letter I, *supra* note 30, at 3; SIFMA Letter II, *supra* note 30, at 2; Virtu Letter, *supra* note 30, at 4; Fidelity Letter, *supra* note 30, at 4; FINRA Letter I, *supra* note 257, at 7–8. Some of these commenters proposed alternative terms. *See* SIFMA Letter I, *supra* note 30, at 3; SIFMA Letter II, *supra* note 30, at 2; Virtu Letter, *supra* note 30, at 4; Fidelity Letter, *supra* note 30, at 4; FINRA Letter I, *supra* note 257, at 7–8; MEMX Letter, *supra* note 30, at 3.

²⁸⁵ The Commission is modifying references to the Non-SRO Voting Representatives’ term limits in Article IV, Sections 4.2(b)(iii) and (b)(vii) of the CT Plan to reflect this modification for consistency. *See infra* Section II.C.5(b)(ii)(C).

²⁸⁶ *See supra* note 281. *See also* Brief for the Respondent, Securities and Exchange Commission, *The Nasdaq Stock Market, et al. v. Securities and Exchange Commission* (Case No. 20–1181) (DC Cir. 2020).

²⁶⁶ Virtu Letter, *supra* note 30, at 4.

²⁶⁷ *See* Fidelity Letter, *supra* note 30, at 4.

²⁶⁸ *See id.*

²⁶⁹ *See* RBC Letter, *supra* note 30, at 4; BlackRock Letter II, *supra* note 30, at 1–2; ICI Letter II, *supra* note 31, at 2; Data Boiler Letter I, *supra* note 31, at 31.

²⁷⁰ *See* BlackRock Letter II, *supra* note 30 at 1–2; *see also* Data Boiler Letter I, *supra* note 31, at 31 (stating that Non-SRO Voting Representatives should be selected before the Effective Date so they can assist with implementation of governance policies and procedures).

²⁷¹ *See* ICI Letter II, *supra* note 31, at 2.

²⁷² *See* Data Boiler Letter I, *supra* note 31, at 31.

²⁷³ *See* MEMX Letter, *supra* note 30, at 3. To accomplish this, the commenter suggests modifying the initial term of three of the Non-SRO Voting Representatives. *See id.*

governance of the CT Plan and that permitting the SROs to set the terms of Non-SRO Voting Representatives would grant the SROs influence over the Non-SRO Voting Representatives and diminish the independence and effectiveness of Non-SRO Voting Representatives as they serve on the Operating Committee.

The Commission, however, disagrees with comments suggesting that term limits should also apply to SRO Voting Representatives.²⁸⁷ Rather, the Commission agrees with those comments that argue that the SRO Voting Representatives serve on the Operating Committee as representatives of a legal entity and vote at the direction of that entity. The SROs are, by virtue of their status as SROs, permanent participants in the CT Plan, and the Commission does not expect that varying the identity of the individuals representing a given SRO Group or Non-Affiliated SRO on the Operating Committee is likely to vary the views expressed or the votes cast by that SRO Group or Non-Affiliated SRO on the Operating Committee. The Non-SRO Voting Representatives, by contrast, will vary over time, and most will be employees of a set of firms that will vary over time, and the Commission expects that these individuals may have different perspectives regarding market data issues. Therefore, the Commission finds that imposing term limits on SRO Voting Representatives would not be appropriate, because it does not believe that doing so would bring fresh perspectives to the Operating Committee or further promote the goals of the CT Plan in the same manner as it would for Non-SRO Voting Representatives.

The Commission agrees with comments that suggest that all Non-SRO Voting Representatives should commence their duties upon selection and that the terms of Non-SRO Voting Representatives should be staggered,²⁸⁸ and the Commission believes that Sections 4.2(b)(ii) and (iii) of the CT Plan allow for both. Specifically, Section 4.2(b)(ii) provides that the terms of the Non-SRO Voting Representatives will begin on a staggered basis with half of the Non-SRO Voting Representatives beginning their term with the First Quarterly Meeting of the Operating Committee and half beginning their term with the Third Quarterly Meeting.

²⁸⁷ See RBC Letter, *supra* note 30, at 8; Virtu Letter, *supra* note 30, at 4; MFA Letter, *supra* note 30, at 3–4.

²⁸⁸ See RBC Letter, *supra* note 30, at 4; BlackRock Letter I, *supra* note 247, at 2; BlackRock Letter II, *supra* note 30, at 1–2; ICI Letter II, *supra* note 31, at 2; Data Boiler Letter I, *supra* note 31, at 31.

However, Section 4.2(b)(iii) also states that, although the official term for certain of the Non-SRO Voting Representatives will not begin until the Third Quarterly Meeting, these Non-SRO Voting Representatives will temporarily serve on the Operating Committee, including having voting rights, before the official commencement of their terms and may be selected for a second full term. Therefore, all Non-SRO Voting Representatives will participate in, and have votes on, the Operating Committee as of the First Quarterly Meeting, even though the official term for half of the Non-SRO Voting Representatives will not begin to run until the Third Quarterly Meeting. Thus, the expiration of the Non-SRO Voting Representatives' terms will be staggered by approximately six months pursuant to this scheme.

In response to comments recommending that the terms of Non-SRO Voting Representatives be staggered by at least one or two years to ensure continuity and consistency in representation,²⁸⁹ the Commission believes that the scheme for staggered terms proposed in the CT Plan, in combination with the Commission's modifications to the CT Plan's provisions regarding term length and term limits for Non-SRO Voting Representatives, as discussed above, appropriately balances the goal of continuity of service among Non-SRO Voting Representatives with the goal of providing for a rotation of Non-SRO Voting Representatives over time to help ensure a diversity of non-SRO viewpoints on the CT Plan Operating Committee. While it is possible that every Non-SRO Voting Representative would serve two three-year terms, leading to complete turnover among those representatives over the course of a single year in the future, it is also possible that the terms of Non-SRO Voting Representatives will, over time, naturally become staggered as some representatives serve single terms or, for personal or business reasons, do not complete a full term. Moreover, prescribing a significant staggering of terms at the outset of CT Plan operations would require granting materially longer initial terms to certain categories of Non-SRO Voting Representatives and materially shorter initial terms to others, without a meaningful distinction on which to base that disparity. Therefore,

²⁸⁹ See BlackRock Letter I, *supra* note 247, at 2; MEMX Letter, *supra* note 30, at 3; Data Boiler Letter I, *supra* note 31, at 28.

the Commission is not modifying the approach proposed in the CT Plan.

Finally, one commenter argues that the Non-SRO Voting Representatives should be empowered to participate in the governance of the current Equity Data Plans, as soon as those representatives are selected.²⁹⁰ While the Commission believes that adding the perspectives of Non-Voting SRO Representatives will be an important improvement to the governance structure for equity market data, the Commission does not believe that adding the Non-SRO Voting Representatives to the operating committees of the currently existing Equity Data Plans can be accomplished in the context of approving the proposed CT Plan or under the auspices of the Governance Order. The Commission agrees, however, that the input of Non-SRO Voting Representatives should be included in the governance of consolidated equity market data plans as soon as practicable, and the Commission has, as discussed above,²⁹¹ sought to address this issue by adding deadlines to the CT Plan for the achievement of the steps necessary for implementation.

For the reasons discussed above, the Commission is approving the provisions of Article IV, Section 4.2(b) of the CT Plan that govern the terms of members of the Operating Committee as modified.

(D) Process for Selecting Non-SRO Voting Representatives

Article IV, Section 4.2(b)(i) provides that the initial Non-SRO Voting Representatives will be selected by a majority vote of the then-current members of the Advisory Committee. This section further provides that the Advisory Committee Members will follow the procedures set forth in the CT Plan applicable for selection of Non-SRO Voting Representatives for those whose terms are expiring for selection of the initial Non-SRO Voting Representatives.²⁹²

The Commission is modifying this Section to expressly permit Advisory Committee Members to nominate themselves to serve as Non-SRO Voting Representatives regardless of their length of service on the Advisory Committee, as well as to nominate other candidates. As proposed, under the procedure in Section 4.2(b)(v), although the Advisory Committee Members would be permitted to nominate themselves, only Members would be permitted to nominate other candidates.

²⁹⁰ See RBC Letter, *supra* note 30, at 4.

²⁹¹ See *supra* Section II.C.1(a).

²⁹² See Article IV, Section 4.2(b)(i) of the CT Plan.

The Commission finds that it is appropriate to allow the Advisory Committee Members to nominate candidates, in addition to themselves, because the Advisory Committee Members have the background, based on their experience with the Equity Data Plans, to select nominees from the industry who have the knowledge that is essential to effectively serve on the Operating Committee. The Commission also finds that it is appropriate to modify the CT Plan to expressly state that Advisory Committee Members may nominate themselves, regardless of the length of their prior service, because service in an advisory capacity under the Equity Data Plans should not preclude a person's eligibility to serve on the CT Plan's Operating Committee as a voting representative under the CT Plan. To provide otherwise could prevent candidates who have direct experience with the operation of an NMS plan for consolidated equity market data, and who could provide continuity of ideas on the initial CT Plan Operating Committee, from being considered for Non-SRO Voting Representative positions. For these reasons, the Commission is approving Article IV, Section 4.2(b)(i) as modified.

Article IV, Section 4.2(b)(v) proposes a procedure for nominating and electing Non-SRO Voting Representatives following their initial selection. Pursuant to the proposed procedure, the Operating Committee must post a notice on its website seeking nominations from the public for an upcoming position at least two months prior to the expiration of a Non-SRO Voting Representative's term. Members may submit individuals for consideration, and Non-SRO Voting Representatives may nominate themselves if they have not already served their maximum term.²⁹³ The Non-SRO Voting Representatives will review the nominations and confirm by majority vote that a nominated individual meets the requirements for the category up for election at least one month prior to expiration of the term for the position to be filled.²⁹⁴ Within a week of the Non-SRO Voting Representatives' confirmation of eligible nominees, the Operating Committee must post the list of nominees on its website and solicit comment from the public.²⁹⁵ The Non-SRO Voting Representatives will then consider and

²⁹³ See Article IV, Section 4.2(b)(v)(A) of the CT Plan.

²⁹⁴ See Article IV, Section 4.2(b)(v)(B) of the CT Plan.

²⁹⁵ See Article IV, Section 4.2(b)(v)(C) of the CT Plan. The Non-SRO Voting Representative will screen the comments for appropriateness prior to their posting on the LLC's website. See *id.*

discuss the comments received and elect an individual by majority vote.²⁹⁶ In the event that no nominee receives a majority vote, the individual with the lowest number of votes will be eliminated from consideration, and a new vote will be taken. The Non-SRO Voting Representatives will repeat this process until an individual receives a majority vote.²⁹⁷ Because Non-SRO Voting Representatives are elected to represent a category of market participants, in the event representatives leave their jobs or change duties such that they are in a position unrelated to the category that they represent, they must submit their resignation to the Chair of the Operating Committee. If representatives do not tender their resignation under such circumstances, they may be removed upon a vote of the Operating Committee.²⁹⁸ Each Non-SRO Voting Representative must agree in writing to comply with the provisions of the CT Plan relating to conflicts of interests²⁹⁹ and confidentiality.³⁰⁰

The Commission is modifying Article IV, Section 4.2(b)(v)(A) of the CT Plan in three respects. First, the Commission modifying this section to provide that SRO Voting Representatives, rather than Members, will be permitted to submit names for consideration for open Non-SRO Voting Representative positions.³⁰¹ The Commission finds that this modification is appropriate because, while the Members of the CT Plan are the SRO entities, the CT Plan generally is organized such that it is the SRO Voting Representatives that act on behalf of the SROs in the operation of the CT Plan.

Second, the Commission is modifying this provision to permit Non-SRO

²⁹⁶ See *id.* Non-SRO Voting Representatives whose terms are expiring may vote in an election for an open position, provided they are not nominees for the position. See Article IV, Section 4.2(b)(v)(D) of the CT Plan.

²⁹⁷ See Article IV, Section 4.2(b)(v)(E) of the CT Plan.

²⁹⁸ See Article IV, Section 4.2(b)(vi) of the CT Plan. The proposed CT Plan provides that if a Non-SRO Voting Representative resigns or is removed from the Operating Committee, a replacement will be selected by a majority vote of the then-serving Non-SRO Voting Representatives, and will serve out the remainder of the term. If the remainder of the term is less than a year, the individual will serve an additional two-year term, and if the remainder of the term is more than one year, the selection process outlined in Section 4.2(b)(v) will be followed. See Article IV, Section 4.2(b)(vii) of the CT Plan.

²⁹⁹ See Article IV, Section 4.10 and Exhibit B of the CT Plan.

³⁰⁰ See Exhibit C of the CT Plan.

³⁰¹ The Commission is also making a non-substantive change to this Section of the CT Plan to insert "the names of" before "individuals" for clarity.

Voting Representatives to submit the names of individuals for consideration during the nominating process. The Commission finds that this modification is appropriate because it permits the Non-SRO Voting Representatives to use the same process as SRO Voting Representatives to nominate candidates for consideration to fill open Non-SRO Voting Representative positions. Without this modification, Non-SRO Voting Representatives would need to use the public process to nominate candidates, while the SRO Voting Representatives could directly nominate candidates. The Commission does not believe that such asymmetrical treatment of members of the Operating Committee is justified.

Third, the Commission is modifying this provision to replace the language that permits Non-SRO Voting Representatives to nominate themselves "if they have not served the maximum number of terms" with the phrase "if they are not then completing a second consecutive term." The Commission finds that this modification is appropriate because Non-SRO Voting Representatives cannot serve more than two consecutive three-year terms and they therefore cannot nominate themselves to serve if they are completing a second consecutive term.³⁰²

One commenter states that Non-SRO Voting Representative seats should go to whoever can contribute to positive innovations in market data infrastructure, and questions whether allowing Non-SRO Voting Representatives to nominate themselves would further this end.³⁰³ The Commission does not share this concern because it believes that non-SRO market participants—for whom equity market data is a crucial aspect of business operations—will have a strong interest in the prompt, accurate, reliable, and fair collection, processing, distribution, and publication of consolidated equity market data. Thus, the Commission believes that it will be in the Non-SRO Voting Representatives' interest to select persons to serve on the Operating Committee who will further advance improvements and innovations in market data infrastructure. And the Commission further believes that the

³⁰² See *supra* Section II.C.5(b)(ii)(C).

³⁰³ See Data Boiler Letter I, *supra* note 31, at 31, 32. This commenter also questions whether there would be a bias toward top elite firms, see Data Boiler Letter II, *supra* note 101, at 1, and states Non-SRO Voting Representatives should earn their seats by bringing in new and useful innovation, and if they do not do so, they should not be granted a seat regardless of how many terms or years they have served. See *id.* at 32.

public process for nominations, and the turnover of Non-SRO Voting Representatives required by the term limits included in the CT Plan, will help ensure that no set of individuals becomes permanently entrenched as Non-SRO Voting Representatives by virtue of the ability to nominate themselves.

Another commenter states that the ability of Non-SRO Voting Representatives to select themselves without SRO approval is inconsistent with the statutory authorization for the national market system under Section 11A and Rule 608, as well as with the authority granted to SROs under Sections 6 and 19 of the Act.³⁰⁴ As previously stated, the Commission believes that it has broad authority under Section 11A of the Act to grant non-SROs voting rights with regard to the governance of the CT Plan. The Commission believes that the requirement that non-SRO members of the Operating Committee collectively select replacement non-SRO members will help to ensure that the individuals selected will represent their constituencies' views on important market data issues, and that the most effective and knowledgeable advocates for their views will serve on the Operating Committee.

For the reasons discussed above, the Commission is approving the provisions of Article IV, Section 4.2(b)(v) as modified.

(iii) SRO Applicant Observers

Article IV, Section 4.2(c) of the CT Plan provides that entities that have not yet been registered with the Commission as national securities exchanges may appoint an individual to attend regularly scheduled Operating Committee Meetings (an "SRO Applicant Observer") if such an entity has submitted, and the Commission has published, a Form 1 to be registered as a national securities exchange or national securities association, or if such an entity is a national securities exchange that is not a Member and the Commission has published the exchange's proposed rule change to

³⁰⁴ See Nasdaq Letter I, *supra* note 20, at 19; Nasdaq Letter II, *supra* note 49, at 1. See also MFA Letter, *supra* note 30, at 3. The Commission believes that in its comment letter, MFA may have misunderstood the proposed CT Plan to permit the SROs to exclusively select the Non-SRO Voting Representatives. As a result, MFA opposes providing such authority to the SROs and suggests alternatives for more equitable selection of Non-SRO Voting Representatives. See *id.* at 3. However, in fact, it is the Non-SRO Voting Representatives that exclusively select the Non-SRO Voting Representatives. See Article IV, Section 4.2(b)(iv) of the CT Plan.

operate a Market.³⁰⁵ The CT Plan further provides that if the SRO Applicant's Form 1 or proposed rule change is withdrawn, returned, or otherwise not actively pending before the Commission, the SRO Applicant will no longer be permitted to attend Operating Committee meetings.³⁰⁶

The Commission finds that is reasonable to allow an entity to attend meetings of the Operating Committee as a non-voting observer when it has filed a Form 1 or proposed rule change to operate a Market and the Commission has published notice of that filing. The Commission believes that attending meetings of the Operating Committee as an observer will allow an equities market pending registration to be aware of and familiarize itself with issues before the Operating Committee before it becomes a national securities exchange or national securities association. The Commission received no comments on Section 4.2(c) of the CT Plan and is approving this Section as proposed.

(iv) Prohibiting Voting by Non-Operational Equity Trading Venues

The CT Plan provides that in the event that a Non-Affiliated SRO, or that all national securities exchanges in an SRO Group, cease operations as a market (or have not commenced operation of a market), those entities will not be permitted to appoint an SRO Voting Representative. Such a Non-Affiliated SRO or SRO Group will, however, be permitted to attend meetings of the Operating Committee as an observer, except for Executive Sessions.³⁰⁷ If such a Non-Affiliated SRO or SRO Group does not commence operations within six months of attending the first Operating Committee as a non-operational exchange(s), it will no longer be permitted to attend Operating Committee meetings until it resumes operations as a market.³⁰⁸

The Commission did not receive any comments on this provision of the CT Plan. The Commission believes that this provision will help ensure that only those SROs that are contributing to the generation or collection of the core data disseminated by the CT Plan will have a vote on CT Plan decisions. Accordingly, the Commission is approving the provision as proposed.

³⁰⁵ See Article IV, Section 4.2(c) of the CT Plan. The SRO Applicant may select an alternate to act on behalf of the SRO Applicant in his or her absence. See *id.*

³⁰⁶ See *id.*

³⁰⁷ See Article IV, Section 4.2(d) of the CT Plan.

³⁰⁸ See *id.*

(c) Operating Committee Action/Voting Structure

Article IV, Section 4.3 of the CT Plan sets forth the voting allocation and voting structure for actions of the Operating Committee.

(i) Allocation of Votes to the SROs

Article IV, Section 4.3(a)(i) provides that each SRO Voting Representative will have one vote to cast on behalf of the SRO Group or Non-Affiliated SRO that he or she represents with a second vote provided if the SRO Group or Non-Affiliated SRO has a market center or centers that trade more than 15 percent of consolidated equity market share³⁰⁹ for four of the six consecutive months preceding a vote of the Operating Committee.³¹⁰

Several commenters object to the proposed allocation of voting rights.³¹¹ One commenter argues that the CT Plan's provisions for SRO group voting violate the Act and that the concept of "exchange groups" is found nowhere in the Act.³¹² Another commenter argues that the proposed exchange-group structure for SRO voting would impermissibly impair the ability of SROs to act jointly in administering the CT Plan and is inconsistent with both the Act and Rule 608.³¹³ This commenter further argues that the proposed allocation would dilute each affiliated exchange's voting power relative to unaffiliated exchanges³¹⁴ and that limiting votes to exchange groups would be a change from the Commission's "long-standing practice of treating each SRO individually for regulatory purposes, regardless of its

³⁰⁹ Article IV, Section 4.3(a)(i) of the CT Plan defines "consolidated equity market share" as the average daily dollar equity trading volume of Eligible Securities of an SRO Group or Non-Affiliated SRO as a percentage of the average daily trading volume of all the SRO Groups and Non-Affiliated SROs.

³¹⁰ Article IV, Section 4.3(a)(i) of the CT Plan states that FINRA is not considered a market center under this section of the proposed CT Plan solely by virtue of facilitating trades through any trade reporting facility that FINRA operates in affiliation with a national securities designed to report transactions otherwise than on an exchange.

³¹¹ See Choe Letter, *supra* note 17, at 4; NYSE Letter I, *supra* note 18, at 8; NYSE Letter II, *supra* note 19, at 3; Nasdaq Letter I, *supra* note 20, at 1–2 (attaching and incorporating by reference all arguments made by Petitioners in their opening brief challenging the Governance Order). The Commission has responded to the arguments made by Nasdaq in their brief in its own brief before the U.S. Circuit Court for the District of Columbia Circuit. See Brief for the Respondent, Securities and Exchange Commission, *The Nasdaq Stock Market, et al. v. Securities and Exchange Commission* (Case No. 20–1181) (D.C. Cir. 2020).

³¹² See Choe Letter, *supra* note 17, at 4.

³¹³ See NYSE Letter I, *supra* note 18, at 8; NYSE Letter II, *supra* note 19, at 3.

³¹⁴ See NYSE Letter I, *supra* note 18, at 10.

corporate affiliation with other SROs.”³¹⁵ This commenter also opposes tying the number of votes cast by each Non-Affiliated SRO and SRO Group to market share, arguing that an SRO’s statutory responsibilities “bear no relationship to its market share,”³¹⁶ and specifically opposes the proposed 15% threshold as well, stating that it is “arbitrary and may quickly become meaningless.”³¹⁷

While one commenter argues that the concept of an exchange group is not created by statute or rule,³¹⁸ there is no statutory or regulatory provision that mandates “one SRO, one vote” either. Individual exchanges that historically had only one vote on NMS plans are now a part of groups that can control blocs of four or five votes. As the Commission stated in the Governance Order, “in its oversight of the Equity Data Plans, [it] is unaware of an individual affiliated exchange member” ever having “cast its vote differently than the votes cast by its affiliated exchanges.”³¹⁹ Further, in response to the comment that the proposed allocation would dilute each affiliated exchange’s voting power relative to unaffiliated exchanges, the Commission believes that this bloc voting has diluted the voting power of unaffiliated SROs over time, and that this concentration of “voting power in a small number of exchange group stakeholders, which also has inherent conflicts of interest,” has “perpetuated disincentives for the Equity Data Plans to make improvements to the SIP data products.”³²⁰

The Commission also disagrees with the comment that the Commission has treated affiliated exchanges as separate entities for regulatory purposes in the past, and therefore, should not treat them as a group for purposes of voting on the CT Plan’s Operating Committee. The Commission agrees that each SRO has individual obligations with respect to compliance with its responsibility pursuant to Sections 6, 15A, 17, and 19 of the Act to comply with the statutory and regulatory requirements that apply to its operation and self-regulation of its

³¹⁵ *Id.* at 9. NYSE provides examples of the Commission’s practice of treating individual exchanges separately, including its requirements for separate pools of liquidity, separate fee schedules, and separate proposed rule changes. *See id.* at 9–10.

³¹⁶ *Id.* at 9 (“An SRO with 1% market share has the same obligations as one with 18% market share, yet under the [CT] Plan’s voting structure, the latter SRO would have double the votes of the former.”).

³¹⁷ *Id.*

³¹⁸ *See supra* note 312 and accompanying text.

³¹⁹ Governance Order, *supra* note 8, 85 FR at 28713.

³²⁰ *Id.*

individual market center.³²¹ But both the applicable legal requirements and the function being performed here by the SROs differ in the context of the responsibility of the SROs to jointly operate the NMS plans pursuant to Section 11A of the Act and to disseminate consolidated market data, to which different SROs may contribute in varying degrees. The Commission therefore believes that it is appropriate to approach this circumstance differently. And, for the reasons discussed, the Commission finds it appropriate to treat affiliated exchanges under common management and control as one SRO Group limited to one vote, or at most two, in the context of NMS plan governance.

Moreover, the Commission’s treatment of corporate affiliations varies based on the particular facts and circumstances and regulatory implications and concerns. Sometimes, the Commission treats affiliated entities independently. Other times, the Commission takes into account corporate relationships when deciding how to regulate.³²² Because of the concentrated power affiliated SROs exert in the governance structure of consolidated equity market data, as demonstrated by the indisputable fact that affiliated SROs vote as blocs, the Commission has determined that affiliated exchanges under common management and control should be treated as one SRO Group limited to one vote, or at most two votes, in the context of NMS plan governance.

The Commission believes that reallocating votes by SRO Group should help to ensure the prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to quotations for and transactions in NMS stocks and the fairness and usefulness of the form and content of that information. The Commission disagrees that the proposed exchange-group structure for SRO voting would impermissibly impair the ability of SROs to act jointly in administering the CT Plan and is inconsistent with both the Act and Rule 608. The Commission believes, as it stated in the Governance Order, that the allocation of voting power to exchanges, either individually or in groups, based

³²¹ 15 U.S.C. 78f; 15 U.S.C. 78o–3; 15 U.S.C. 78q; 15 U.S.C. 78s.

³²² *See, e.g.,* Securities Exchange Act Release Nos. 90209 (Oct. 15, 2020), 85 FR 67044, 67047–48 (Oct. 21, 2020), *pet. for review* docketed, No. 20–1470 (D.C. Cir. 2021) (Commission action concluding that an asset, service, or function may be a “facility” of an exchange despite being owned or operated by a legal entity other than the particular entity holding the exchange license); 39086 (Sept. 17, 1997), 62 FR 50036 (Sept. 24, 1997) (similar).

on common management or control falls within its statutory authority under Section 11A of the Act.³²³

In response to the comment that objects to tying market share to the number of votes an SRO Group or Non-Affiliated SRO is allocated, arguing that an SRO’s regulatory responsibilities have no bearing on market share of the SRO,³²⁴ the Commission disagrees, because using a threshold amount of consolidated equity market share of more than 15 percent over a specified period of time to provide a second vote to an SRO Group or Non-Affiliated SRO reflects the significance within the national market system of those exchanges that, in their roles as SROs, oversee trading activity that generates a significant amount of equity market data.

For the reasons stated above, the Commission is approving Sections 4.3(a)(i) as proposed.

(ii) Allocation of Votes to Non-SROs³²⁵

Article IV, Section 4.3(a)(ii) provides that, at all times, the Non-SRO Voting Representatives will have one-half the aggregate number of votes that the SRO Voting Representatives have. In other words, the SRO Voting Representatives will, in aggregate, have two-thirds of the voting power on the Operating Committee, and the Non-SRO Voting Representatives will, in aggregate, have one-third of the voting power. The number of votes attributed to the Non-SRO Voting Representatives will increase or decrease as necessary to preserve this ratio, in fractional share if necessary.

One commenter expresses support for the allocation of voting power on the Operating Committee as proposed in Sections 4.3(a)(i) and (ii), stating that the proposed allocation of voting power between the Non-SRO Voting Representatives and SRO Voting Representatives is consistent with the Act and the Governance Order.³²⁶ Another commenter suggests that there should be “consideration to increase Non-SRO representation if SROs on the [Operating Committee] increases or perhaps adjusted if the ‘weight’ of the user community increase/decreases in certain categories.”³²⁷ In response, the Commission notes that the number of

³²³ *See* Brief for the Respondent, Securities and Exchange Commission, *The Nasdaq Stock Market, et al. v. Securities and Exchange Commission* (Case No. 20–1181) (D.C. Cir. 2021).

³²⁴ *See* NYSE Letter I, *supra* note 18, at 9.

³²⁵ *See also supra* Section II.C.5(b)(ii) (discussing Non-SRO Voting Representatives’ participation on the Operating Committee).

³²⁶ *See* ICI Letter II, *supra* note 31, at 1–2.

³²⁷ Data Boiler Letter I, *supra* note 31, at 28.

votes for Non-SRO Voting Representatives will always be one-half of the SRO Voting Representatives' votes. Therefore, if the number of SRO Voting Representatives, and their aggregates votes, increases, the votes of the Non-SRO Voting Representatives will similarly increase.

The Commission believes that the proposed allocation of votes to Non-SRO Voting Representatives will provide the Non-SRO Voting Representatives a meaningful presence and opportunity to vote on Operating Committee matters, while assuring that their voting power does not equal or exceed that of the SRO Voting Representatives. Accordingly, the Commission is approving Article IV, Sections 4.3(a)(ii) as proposed.

(iii) Operating Committee Actions and Voting

Article IV, Section 4.3(b) of the CT Plan provides that, with limited exceptions, action by the Operating Committee requires an "augmented majority vote," meaning a two-thirds majority of all votes on the Operating Committee, provided that this vote also includes a majority of the SRO Voting Representative votes. And Article IV, Section 4.3(c) provides that the only Operating Committee actions that would not require an augmented majority vote are: (1) The selection of Non-SRO Voting Representatives³²⁸; (2) the decision to enter into Executive Session³²⁹; (3) decisions concerning the operation of the Company as an LLC³³⁰; (4) modifications to LLC-related provisions of the Agreement pursuant to Section 13.5 of the CT Plan³³¹; and (5) the selection of Officers of the Company, other than the Chair, pursuant to Section 4.8.³³²

³²⁸ See Article IV, Section 4.2(b) of the CT Plan (providing that Non-SRO Voting Representatives will be selected by a majority vote of the then-serving Non-SRO Voting Representatives).

³²⁹ See Article IV, Section 4.4(g) of the CT Plan (providing that the decision to enter into Executive Session will be subject to a majority vote of the SRO Voting Representatives).

³³⁰ See Article X, Section 10.3 of the CT Plan (providing that any compromise or settlement of any tax audit or litigation affecting members, as well as any material proposed inaction or election to be taken by the Partnership Representative, require a majority vote of Members); and Article XI, Section 11.2 of the CT Plan (providing that the distribution of proceeds from the liquidation of the Company to Members is subject to a majority vote of the Members).

³³¹ See Article XIII, Section 13.5(b) of the CT Plan (providing that Articles IX, X, XI, and XII may be modified upon approval by a majority of Members).

³³² See Article IV, Section 4.8 of the CT Plan (providing that, the Members may, from time to time, designate and appoint one or more persons as an Officer of the Company by a majority vote of the Members).

The Commission received comments on this aspect of the CT Plan. One commenter expressly supports requiring an augmented majority vote that requires at least two-thirds of the votes of SRO Voting Representatives and Non-SRO Voting Representatives, and a majority of the SRO Voting Representatives' votes.³³³ Another commenter recommends that the Commission amend the existing Equity Data Plans to adopt augmented majority voting.³³⁴ One commenter states that the CT Plan does not address instances where recusal of a Non-SRO Voting Representative would result in the Non-SROs having less than one third of the aggregate votes of the Operating Committee and "strongly suggest[s]" that the CT Plan be amended to provide that the votes of the Non-SROs will always equal one-third of the votes of the Operating Committee, even if one or more Non-SRO representatives has recused.³³⁵ Another commenter expresses concern about the proposed augmented majority voting scheme, particularly as it would be applied to Operating Committee actions, such as interpreting the CT Plan's provisions.³³⁶ This commenter believes that the augmented voting requirement should apply to the SROs only to the extent needed to carry out their explicit regulatory obligations under the law, rather than to meet general responsibilities under the Plan.³³⁷

Other commenters state that the augmented majority vote will interfere with the SROs ability to comply with the Act.³³⁸ One commenter argues that

³³³ See Data Boiler Letter I, *supra* note 31, at 30. This commenter, however, expresses concern that "numbers are always a problem as SRO counts increase as exchanges are added or merged, whereas Non-SRO counts stay at six." *Id.* at 30. This commenter also states that dividing the voting rights two-thirds and one-third between SROs and Non-SROs "may result in a divide along partisan line . . . only passing trivia matters" and the "division would lead the SIP to run astray because of the bureaucracy." *Id.* at 4, 13, 30. See also Data Boiler Letter II, *supra* note 101, at 1.

³³⁴ See RBC Letter, *supra* note 30, at 4.

³³⁵ Virtu Letter, *supra* note 30, at 7.

³³⁶ See RBC Letter, *supra* note 30, at 6–7.

³³⁷ See *id.* This commenter further suggests that "the proposed Plan specify the limited matters requiring augmented voting, and state that all other matters—including procedural votes thereon—are to be decided by majority vote of the Operating Committee. This simple majority standard should also extend to any votes requiring a quorum. Otherwise, the SROs would have the ability to thwart decisions of the Operating Committee by denying the Operating Committee a quorum." *Id.*

³³⁸ See Nasdaq Letter I, *supra* note 20, at 1–2 (attaching and incorporating by reference all arguments made by Petitioners in their opening brief challenging the Governance Order). The Commission responded to the arguments made by Nasdaq in their brief. See Brief for the Respondent, Securities and Exchange Commission, *The Nasdaq*

the "Commission's mandate that votes be allocated by exchange group would prevent SROs from fulfilling their duty under the Act to act jointly to implement the CT Plan. This is because that voting structure could result in a situation where actions and plan amendments might be approved by the individuals representing non-SROs and a minority of the SROs, even if those actions or amendments were opposed by a *majority* of the individual SROs." ³³⁹ Another commenter echoes this concern stating, "it is feasible that a *minority* of individual SROs would be able to adopt proposals over the objection of a *majority* of individual SROs" under the proposed augmented majority voting scheme, and consequently, "it would be possible for the non-SRO voting representatives and a minority of Non-Affiliated SROs to force through plan actions and amendments without the assent of a majority of individual SROs." ³⁴⁰ This commenter further states that allowing the CT Plan Operating Committee to act with only the concurrence of a minority of the individual SROs would subvert the ability of the SROs to act jointly pursuant to Section 11A.³⁴¹

Contrary to commenters' concerns, and as explained in the Governance Order, the Commission believes that the requirement for an augmented majority vote strikes an appropriate balance between the plan receiving meaningful input from a broad range of stakeholders while also providing the SROs with voting power to help ensure that Plan actions meet the requirements of Section 11A of the Act and Rule 608 of Regulation NMS. Specifically, the proposed augmented majority voting structure provides the SROs in the aggregate with two-thirds of the voting power on the operating committee—and non-SRO members of the Operating Committee in aggregate with one-third of the voting power—with proportionate fractional votes allocated to non-SRO members of the Operating Committee as necessary to preserve this ratio at all times. Further, as proposed, an "augmented majority vote," requires a two-thirds majority of all votes on the Operating Committee, provided that this vote also includes a majority of the votes allocated to the SROs.

In response to those comments that the augmented majority vote could

Stock Market, et al. v. Securities and Exchange Commission (Case No. 20–1181) (D.C. Cir. 2021).

³³⁹ Cboe Letter, *supra* note 17, at 4 (emphasis in original).

³⁴⁰ NYSE Letter I, *supra* note 18, at 8–9; see also NYSE Letter II, *supra* note 19, at 3.

³⁴¹ See NYSE Letter I, *supra* note 18, at 9; NYSE Letter II, *supra* note 19, at 3.

result in a scenario in which a proposal is adopted with the support of a supermajority of votes on the Operating Committee and a majority of the votes allocated to the SROs, but without the support of a majority of the individual exchanges,³⁴² the Commission notes, as it did in the Governance Order,³⁴³ that this outcome is intended to be permissible. The Commission believes that in order to break the voting monopoly currently held by the three SRO Groups, and give non-SROs a meaningful voice on the Operating Committee, requiring that plan action be supported by a supermajority of the Operating Committee (which would include a majority of the votes allocated to SROs along with sufficient non-SRO votes to achieve the supermajority), and that it not be constrained by the votes of one or two SRO Groups, is appropriate.

In response to comments that suggest modifications to the voting allocation between SRO Voting Representatives and Non-SRO Voting Representatives to account for a recusal by a Non-SRO Voting Representative or a change in the number of SROs Members,³⁴⁴ the Commission does not believe it is necessary to modify the CT Plan. In the event a Non-SRO Voting Representative must recuse itself pursuant to the terms of the CT Plan, proposed Article IV, Section 4.4(c) provides that if a Voting Representative is recused, he or she will not count in the calculation to determine if there is a quorum necessary for the Operating Committee to vote.³⁴⁵

For the reasons stated above, the Commission is approving Article IV, Section 4.3(b) of the CT Plan as proposed. The Commission is, however, modifying Section 4.3(c) of the CT Plan to limit the circumstances in which the Operating Committee could act without an augmented majority vote. Specifically, for the reasons discussed in Section II.C.5(d)(iii), *infra*, the Commission is modifying Section 4.3(c)(ii) of the CT Plan to provide that an augmented majority vote is required before a topic not specifically listed in Section 4.4(g)(i) of the CT Plan as appropriate for discussion in Executive Session may be discussed in Executive Session. In addition, for the reasons discussed in Section II.C.12(e), *infra*, the Commission is modifying Section 4.3(c) of the CT Plan to delete the reference to

modifications to LLC-related provisions of the Agreement pursuant to Section 13.5(b) of the CT Plan, as well as, for the reasons discussed in Section II.C.5(h), *infra*, the reference to the selection of Officers, other than the Chair, pursuant to Section 4.8 of the CT Plan, as circumstances where an augmented majority vote is not required.

For the reasons discussed, the Commission is approving Section 4.3 of the CT Plan as modified.

(d) Meetings of the Operating Committee

Article IV, Section 4.4 of the CT Plan addresses meetings of the Operating Committee.

(i) Conduct of Meetings and Attendance

Section 4.4(a) provides that meetings of the Operating Committee may be attended by the Voting Representatives, Member Observers, SRO Applicant Observers, SEC staff, and other persons as deemed appropriate by the Operating Committee.³⁴⁶ As proposed, Member Observers would be entitled to receive notice of all meetings of the Company and to attend and participate in any discussion, but would not be entitled to vote on any matter.³⁴⁷

As discussed above,³⁴⁸ in Article I, Section 1.1(oo) of the CT Plan, the exchanges have proposed to define a new type of individual, a Member Observer, who may attend meetings of the CT Plan. As proposed, a Member Observer would be an “individual other than a Voting Representative, that a Member, in its sole discretion, determines is necessary in connection with such Member’s compliance with its obligations under Rule 608(c) of Regulation NMS to attend Operating Committee and subcommittee meetings.”³⁴⁹ In the Notice, the Commission solicited commenters’ views on whether an SRO would reasonably find it necessary to select a Member Observer to comply with its obligations under Rule 608(c) of Regulation NMS and under what circumstances, if any, the representation of an SRO on the Operating Committee by its selected SRO Voting Representative would be an insufficient means for the SRO to fulfill its obligations under Rule 608 of

Regulation NMS.³⁵⁰ The Commission also asked whether persons who hold certain positions within an SRO should be prohibited from serving as Member Observers, and whether, if Member Observers are necessary, only persons who perform certain roles within an SRO (*e.g.*, legal or compliance personnel) should be able to serve as Member Observers.³⁵¹ Lastly, the Commission solicited further comment on whether the CT Plan should limit the number of Member Observers that each SRO would be permitted to name or the frequency with which the person serving as a Member Observer can be changed.³⁵²

In response to the questions in the Notice, the Commission received several comment letters regarding the proposed inclusion of Member Observers.³⁵³ Several commenters support including Member Observers in the CT Plan.³⁵⁴ Specifically, one commenter supports including Member Observers to “account for the practical realities involved with the day-to-day operation of, and the SROs’ participation in, the Equity Market Data Plans, which will be equally as relevant for the CT Plan if it is approved.”³⁵⁵ The commenter explains that Member Observers are necessary because the SRO Voting Representative collaborates with others within their organization to make the best and most informed decisions, acknowledging that, while the SRO Voting Representative may cast the vote, staff and senior management from various departments within the organization provide input into decisions made, as needed.³⁵⁶ Another commenter that supports permitting SROs to designate Member Observers describes the SRO Voting Representative as a generalist and states that the SRO Voting Representative may be asked to opine on a wide variety of topics (legal, technical, regulatory, system, and business matters) that require the expertise of specialists in those areas.³⁵⁷ This commenter states

³⁵⁰ See *id.* at 64568.

³⁵¹ See *id.*

³⁵² See *id.*

³⁵³ See FINRA Letter I, *supra* note 257, at 4; Nasdaq Letter I, *supra* note 18, at 6, 13–14; NYSE Letter I, *supra* note 18, at 38; ICI Letter I, *supra* note 31, at 4; BMO Letter I, *supra* note 30, at 4; SIFMA Letter I, *supra* note 30, at 4–5; MFA Letter, *supra* note 30, at 4; Schwab Letter I, *supra* note 30, at 5; BlackRock Letter I, *supra* note 247, at 4–5; Fidelity Letter, *supra* note 30, at 5; RBC Letter, *supra* note 30, at 7; Data Boiler Letter I, *supra* note 31, at 5.

³⁵⁴ See FINRA Letter I, *supra* note 257, at 2–3; Nasdaq Letter I, *supra* note 20, at 26–27; Fidelity Letter, *supra* note 30, at 5; ICI Letter I, *supra* note 31, at 4; SIFMA Letter I, *supra* note 30, at 4.

³⁵⁵ FINRA Letter I, *supra* note 257, at 3.

³⁵⁶ See *id.*

³⁵⁷ See Nasdaq Letter I, *supra* note 20, at 14.

³⁴² See Choe Letter, *supra* note 17, at 4; NYSE Letter I, *supra* note 18, at 9; NYSE Letter II, *supra* note 19, at 3.

³⁴³ See Governance Order, *supra* note 8, 85 FR at 28713.

³⁴⁴ See Virtu Letter, *supra* note 30, at 7; Data Boiler Letter I, *supra* note 31, at 30.

³⁴⁵ See Article IV, Section 4.4(c) of the CT Plan.

³⁴⁶ The time and location of meetings will be determined by the Operating Committee. See Article IV, Section 4.4(a) of the CT Plan. The location of meetings will be in a location capable of holding the number of attendees of such meetings, or such other locations as may from time to time be determined by the Operating Committee. See Article IV, Section 4.4(e) of the CT Plan.

³⁴⁷ See Article IV, Section 4.4(a) of the CT Plan.

³⁴⁸ See *supra* Section II.C.2.

³⁴⁹ See Notice, *supra* note 3, 85 FR at 64576.

that most Member Observers would be employees of the Member charged with that Member's compliance obligations under Rule 608(c).³⁵⁸ This commenter also states that other Member Observers may be outside counsel, experts reporting to counsel, or other individuals advising the Member on compliance or other obligations.³⁵⁹ Another commenter contends that whether the SROs should be permitted to have Member Observers is a decision for the SROs to make, not the Commission, stating that, while the Commission has a role in supervising and enforcing SRO obligations, Commission rules establish that the SROs make operational decisions such as these.³⁶⁰

Some commenters state that it would be inappropriate to restrict Member Observers to those who serve a particular role in the SRO, to limit the number of Member Observers that an SRO could name, or to limit the frequency with which such appointment of Member Observers could be changed.³⁶¹ Two commenters argue that such limitations would be arbitrary, as there is no way to predict when expert assistance may be necessary, and they further assert that such restrictions would not provide any benefit and would otherwise restrict the SROs' ability to make decisions about how to fulfill their regulatory responsibilities.³⁶² One commenter argues that any restrictions on the ability to call on such expertise when needed would interfere with the ability of the Operating Committee to address complex legal, regulatory, and technical issues as they arise.³⁶³ While one commenter does not recommend limiting the number of Member Observers permitted, it suggests that the Operating Committee members provide a reasonable basis for inviting Member Observers, taking into account criteria such as the person's area of expertise, potential or actual conflicts of interest, and the Operating Committee's agenda for the meeting.³⁶⁴

The Commission also received several comment letters expressing concerns regarding Member Observers as proposed in the CT Plan.³⁶⁵ One

commenter states that without reasonable constraints, Member Observers may dilute the voice of Non-SRO Voting Representatives and enhance the SROs' ability to operate the CT Plan in their own interests instead of consistent with the statutory purposes for which the Plan exists.³⁶⁶ One commenter states that Member Observers should be limited so that an SRO cannot "stack the deck" with multiple Member Observers.³⁶⁷ Another commenter expresses concern that if Member Observers participate in Operating Committee meetings, it could exacerbate or create conflicts of interest and place the Non-SRO Voting Representatives at a competitive disadvantage, as they would not have a similar ability to consult with outside persons who have expertise in the matter being discussed.³⁶⁸

Several commenters state that Non-SRO Voting Representatives should also be permitted to invite observers to attend Operating Committee meetings, Executive Sessions, and subcommittee meetings.³⁶⁹ These commenters argue that better informed colleagues could advise Non-SRO Voting Representatives before, during, and after Operating Committee meetings, resulting in more informed discussions. Specifically, one commenter states that permitting Non-SRO observers would provide for broader participation, improve transparency, and enhance the quality of guidance, as well as assist in creating a pool of potential Non-SRO Voting Representatives.³⁷⁰ One commenter recommends that the CT Plan provide all Voting Representatives with the ability to request an observer to participate in Operating Committee meetings, so long as the Voting Representative specifies the purpose for their inclusion, including the relevancy to the topic under discussion, and subject to the Operating Committee's approval.³⁷¹

After careful consideration of the comments received, the Commission believes that it is appropriate for SROs to be permitted to designate Member Observers under the CT Plan. The Commission agrees that there may be

instances in which an SRO Voting Representative will require input from, or benefit from collaboration with, individuals with specialized views, experience with day-to-day operations, or expertise (including legal, regulatory, and technical knowledge) who are not designated as the SRO Voting Representative in order to facilitate an SRO's compliance with its regulatory obligations with respect to the CT Plan.³⁷²

The Commission also finds that it is appropriate to modify the definition of Member Observer because the role of a Member Observer is intended to include certain individuals employed by the Member, or its counsel. Specifically, the Commission is modifying the definition of "Member Observer" in Section 1.1(o) of CT Plan to remove the reference to "individual" and replace it with "employee of a Member" and adding "or any attorney to a Member" to provide for an employee or counsel that a Member determines is necessary in connection with the Member's compliance under Rule 608(c).³⁷³ Additionally, because Member Observers are permitted to attend Operating Committee meetings and subcommittee meetings, the Commission is deleting "in its sole discretion" from the definition of Member Observer and adding language that would prohibit a Member from designating as a Member Observer an individual who is responsible for or involved with the procurement for, or development, modeling, pricing, licensing, or sale of, proprietary equity market data products (called "PDP" in the CT Plan)³⁷⁴ offered to customers of the CT Feeds, consistent with the Commission's modifications to Section 4.10(b)(i).³⁷⁵ Specifically, the Commission is adding the following clause to the definition of Member Observer: "provided that the designation of the Member Observer is consistent with the prohibition in Section 4.10(b)(i)." The Commission finds that this modification is appropriate to mitigate the effect of an SRO's conflicts of interests on the

³⁷² The Commission further notes that Sections 4.4(a) and 4.7(b) of the CT Plan, respectively, permit other persons as deemed appropriate by the Operating Committee to attend general session meetings and subcommittee meetings.

³⁷³ See Section 1.1(o) of the CT Plan, as modified.

³⁷⁴ Section 1.1(fff) of Article I defines the term "PDP" as "a Member or non-Member's proprietary market data product that includes Transaction Reports and Quotation Information data in Eligible Securities from a Member's Market or a Trading Center, and if from a Member, is filed with the Commission."

³⁷⁵ See *infra* Section II.C.5(j)(iii).

note 30, at 4; MFA Letter, *supra* note 30, at 4; BlackRock Letter I, *supra* note 247, at 4; Fidelity Letter, *supra* note 30, at 5; RBC Letter, *supra* note 30, at 7; Data Boiler Letter I, *supra* note 31, at 5.

³⁶⁶ See MFA Letter, *supra* note 30, at 4.

³⁶⁷ Data Boiler Letter I, *supra* note 31, at 6, 38.

³⁶⁸ See RBC Letter, *supra* note 30, at 8.

³⁶⁹ See ICI Letter I, *supra* note 31, at 5; ICI Letter II, *supra* note 31, at 2; Schwab Letter I, *supra* note 30, at 2; BlackRock Letter I, *supra* note 247, at 3; Fidelity Letter *supra* note 30, at 5; RBC Letter, *supra* note 30, at 7–8.

³⁷⁰ See BlackRock Letter I, *supra* note 247, at 3.

³⁷¹ See RBC Letter, *supra* note 30, at 8–9.

³⁵⁸ See *id.* at 27.

³⁵⁹ See *id.*

³⁶⁰ See NYSE Letter I, *supra* note 18, at 38–39.

³⁶¹ See FINRA Letter I, *supra* note 257, at 4; Nasdaq Letter I, *supra* note 20, at 27; ICI Letter I, *supra* note 31, at 5.

³⁶² See FINRA Letter I, *supra* note 257, at 4; Nasdaq Letter I, *supra* note 20, at 27.

³⁶³ See Nasdaq Letter I, *supra* note 20, at 14.

³⁶⁴ See ICI Letter I, *supra* note 31, at 5.

³⁶⁵ See ICI Letter I, *supra* note 31, at 4–5; BMO Letter, *supra* note 30, at 3–4; SIFMA Letter I, *supra*

operation of the CT Plan. Specifically, to the extent that a Member offers proprietary market data products and designates an employee that has a financial interest that is tied directly to the Member's proprietary data business, that individual has an inherent conflict of interest and cannot be designated as a Member Observer.

In response to comments regarding Member Observer limitations, the Commission believes that, because it is difficult to predict who, when, and how many individuals may be called upon to assist with CT Plan related matters, it is appropriate not to limit the number of Member Observers an SRO may appoint. However, the Commission believes that participation of Member Observers in CT Plan meetings is appropriately limited by the requirement that appointment of a Member Observer be "necessary in connection with a Member's compliance with its obligations under Rule 608(c) of Regulation NMS to attend Operating Committee and subcommittee meetings."³⁷⁶ The Commission further believes that this requirement, in addition to the provisions permitting other persons to attend CT Plan meetings as discussed below and the non-voting status of Member Observers, would reasonably preclude the SROs from diluting the role and contributions of Non-SRO Voting Representatives and bolstering their own agendas.

While the Commission believes it is appropriate to allow Member Observers to participate in Operating Committee meetings, the Commission is modifying Article IV, Section 4.4(a) to eliminate the requirement that the Operating Committee provide notice of all meetings of the Company to Member Observers. The Commission finds that this modification is appropriate because the proposed requirement would place an unnecessary burden on the Operating Committee, and believes that it is appropriate instead for the SROs, on whose behalf the Member Observers will attend Operating Committee meetings, to provide notice of meetings to their Member Observers. Additionally, the Commission is modifying this subsection to provide that Member Observers may not attend or participate in Operating Committee meetings if their attendance or participation would be inconsistent with the conflicts of interest provisions requiring recusal. The Commission finds that this modification is appropriate because it is consistent with, and serves the same purposes as, modifications the Commission is

making to Article IV, Section 4.10(b), discussed below, which make the CT Plan's conflicts of interest provisions applicable to Member Observers, just as they apply to SRO Voting Representatives and any alternate SRO Voting Representative.³⁷⁷

Finally, because Non-SRO Voting Representatives will serve on the Operating Committee in their individual capacity and do not have regulatory obligations paralleling those of the SROs, the Commission does not believe that Non-SRO Voting Representatives require a similar observer provision in the CT Plan. However, the Commission notes that Section 4.4(a) of the CT Plan permits other persons as deemed appropriate by the Operating Committee to attend Operating Committee meetings and that Section 4.7(b) of the CT Plan similarly permits other persons as deemed appropriate by the Operating Committee to attend subcommittee meetings.³⁷⁸ The Commission believes that a Non-SRO Voting Representative may draw upon these provisions to seek the approval of the Operating Committee to permit attendance by an informed colleague or other person at a CT Plan meeting when the Non-SRO Voting Representative believes that discussion of a matter may benefit from that person's additional expertise or input.

For the reasons stated above, the Commission is approving Section 4.4(a), as modified.

(ii) The Chair of the Operating Committee

Article IV, Section 4.4(e) provides for the selection of a Chair of the Operating Committee. As proposed, a Chair will be elected from among the SRO Voting Representatives to serve a one-year term beginning on the date of the first quarterly meeting of the Operating Committee following the Operative Date.³⁷⁹ An election to select the Chair of the Operating Committee will be held every year.³⁸⁰ Pursuant to the CT Plan, to elect a Chair, the Operating Committee will elicit nominations for individuals to be considered for the Chair position.³⁸¹ If no candidate is elected by an augmented majority vote of the Operating Committee, the

candidate with the lowest number of votes will be eliminated from consideration, and the Operating Committee will take another vote and repeat this process until a candidate is elected by an augmented majority vote of the Operating Committee.³⁸² In the event two candidates remain and neither is elected by an augmented majority vote of the Operating Committee, the candidate receiving the most votes from SRO Voting Representatives will be elected.³⁸³ The Chair of the Operating Committee will have the authority to enter into contracts on the Company's behalf and otherwise bind the Company, but only as directed by the Operating Committee.³⁸⁴ In addition, the Chair will designate a person to serve as Secretary of the Operating Committee to record minutes of each meeting.³⁸⁵

The Commission finds that the provisions governing the nomination of candidates and the selection of a Chair of the Operating Committee, as well as the proposed term for service as Chair, are appropriate. These provisions provide for a nomination and selection process that allows input from all members of the Operating Committee. The Commission further believes that a one-year term will allow for frequent rotation of the duties and responsibilities that are associated with the Chair position. Additionally, the Commission finds that the specified authority of the Chair of the Operating Committee is appropriate in that it allows the Chair to enter into agreements on behalf of the Company, thus streamlining the process of contracting with the Company, but does not permit the Chair to act except as directed by the Operating Committee. The Commission also finds that because the Chair has authority to act only at the direction of the Operating Committee, it is not unreasonable to require that the Chair be an SRO Voting Representative, as this will not undermine the voting power that the Non-SRO Voting Representatives have with respect to action by the Operating Committee. The Commission received no comments addressing these provisions and is approving Article IV, Section 4.4(e) as proposed.

(iii) Executive Session

Article IV, Section 4.4(g) of the CT Plan provides that, notwithstanding any other provision of the CT Plan, the SRO

³⁷⁷ See Article IV, Section 4.10(b) of the CT Plan. See also *infra* Section II.C.5(j) (discussing the Commission's modification to the proposed CT Plan to make the recusal provisions of Article IV, Section 4.10(b) applicable to Member Observers and the rationale therefore).

³⁷⁸ See Article IV, Sections 4.4(a) and 4.7(b) of the CT Plan.

³⁷⁹ See Article IV, Section 4.4(e) of the CT Plan.

³⁸⁰ See *id.*

³⁸¹ See Article IV, Section 4.4(e)(i) of the CT Plan.

³⁸² See Article IV, Section 4.4(e)(ii) of the CT Plan.

³⁸³ See *id.*

³⁸⁴ See Article IV, Section 4.4(e) of the CT Plan.

³⁸⁵ See *id.*

³⁷⁶ Section 1.1(o) of the CT Plan, as modified.

Voting Representatives, Member Observers, SEC staff, and other persons as deemed appropriate by the SRO Voting Representatives may meet in an Executive Session to discuss an item of business for which it is appropriate to exclude Non-SRO Voting Representatives. A request to meet in Executive Session must be included on the written agenda for an Operating Committee meeting, along with identification of the item to be discussed and a clearly stated rationale as to why that item would be appropriate for discussion in Executive Session.³⁸⁶ A majority vote of the SRO Voting Representatives would be required to create an Executive Session.³⁸⁷ The SRO Voting Representatives would be permitted to discuss only the topic for which the Executive Session was created and would disband upon fully discussing the topic.³⁸⁸

Article IV, Section 4.4(g)(i) of the CT Plan also provides that topics discussed in Executive Session should be limited to the following: (1) Any topic that requires discussion of Highly Confidential Information; (2) Vendor or Subscriber Audit Findings; and (3) Litigation matters.³⁸⁹ Section 4.4(g)(ii) adds a catch-all provision stating that this list of enumerated items “is not dispositive of all matters that may by their nature require discussion in an Executive Session,” adding, however, that “the mere fact that a topic is controversial or a matter of dispute does not, by itself, make a topic appropriate for Executive Session.”³⁹⁰ This section further provides that the minutes for an Executive Session must include the reason for including any item in Executive Session.³⁹¹ As proposed, any action that requires a vote in Executive Session would require a majority of the vote of the SRO Voting Representatives eligible to vote on such action.³⁹²

In the Notice, the Commission sought comment on whether the specified items proposed in the CT Plan are appropriate topics for Executive Session, including whether the proposed provision that the topics identified in the CT Plan are “not dispositive of all matters that may by their nature require discussion in an

Executive Session” would allow the SROs excessive discretion to meet in Executive Session.³⁹³ In response, the Commission received numerous comments. In particular, certain commenters express the view that the topics proposed as appropriate for Executive Session are too broad,³⁹⁴ and recommend eliminating the language in Section 4.4(g)(ii) that would permit the SROs to enter into Executive Session for matters that by their nature require discussions in Executive Session.³⁹⁵ One commenter believes that the “broad and open-ended use of Executive Sessions” proposed in the CT Plan is inconsistent with the SEC’s goals of transparency, effective operations of the Plan, and eliminating conflicts of interest.³⁹⁶ This commenter states that “[s]anctioning the ability of competitors to meet in secret to discuss confidential business raises antitrust concerns,”³⁹⁷ and believes that there should be a presumption against use of Executive Session except upon a showing of need and explanation why Non-SRO Voting Representatives should not be included.³⁹⁸

One commenter states that the proposed list of topics for discussion in Executive Session is too broad and should be tightened to ensure that such sessions are not abused and used to cut non-SROs out of discussions.³⁹⁹ Another commenter asserts that the broad list of topics proposed for Executive Session “essentially grants the SROs unfettered discretion about what topics are appropriate for Executive Session.”⁴⁰⁰ This commenter believes that the determination of what

³⁹³ Notice, *supra* note 3, 85 FR at 64569 (Question 21).

³⁹⁴ See RBC Letter, *supra* note 30, at 9; Schwab Letter I, *supra* note 30, at 2; Schwab Letter II, *supra* note 30, at 5–6; Virtu Letter, *supra* note 30, at 5; SIFMA Letter I, *supra* note 30, at 4; SIFMA Letter II, *supra* note 30, at 4; MEMX Letter, *supra* note 30, at 4.

³⁹⁵ See ICI Letter I, *supra* note 31, at 6; ICI Letter II, *supra* note 31, at 2; BMO Letter I, *supra* note 30, at 5; SIFMA Letter I, *supra* note 30, at 4; SIFMA Letter II, *supra* note 30, at 4; BlackRock Letter I, *supra* note 247, at 5; Fidelity Letter, *supra* note 30, at 4.

³⁹⁶ RBC Letter, *supra* note 30, at 9.

³⁹⁷ *Id.*

³⁹⁸ See *id.* at 10–11. This commenter also believes that the Commission should amend the existing Equity Data Plans to adopt the same Executive Session policies it includes in the CT Plan. See *id.* at 4.

³⁹⁹ See Schwab Letter I, *supra* note 30, at 2; Schwab Letter II, *supra* note 30, at 5–6.

⁴⁰⁰ Virtu Letter, *supra* note 30, at 5. This commenter also questions why Non-SRO Voting Representatives should be excluded from discussions of litigation matters if they sign a non-disclosure agreement. See *id.*; see also RBC Letter, *supra* note 30, at 11 (stating that information of a sensitive nature can be addressed by the confidentiality policies of the CT Plan).

belongs in Executive Session should not be left to the discretion of the SROs.⁴⁰¹ One commenter states that Executive Sessions could be used to circumvent the policy underlying the Market Data Structure reforms.⁴⁰² Another commenter believes that use of Executive Sessions should be narrowly tailored given that Executive Session presents an exception to the general rule that non-SROs will participate with SROs in operation of the CT Plan.⁴⁰³ This commenter believes that Executive Sessions should be reserved for instances where there is a direct conflict of interest for participation by Non-SRO Voting Representatives.⁴⁰⁴ Another commenter states that it recognizes that there may be circumstances for SRO-only deliberations in Executive Session, but is concerned that overuse of Executive Session would limit transparency of the CT Plan’s governance.⁴⁰⁵ This commenter supports either limiting the topics that can be discussed to the three enumerated topics⁴⁰⁶ or changing the mechanism for approval of a topic as appropriate for Executive Session.⁴⁰⁷

One commenter recommends eliminating the broad language in the CT Plan that would permit Executive Sessions for “matters that by their nature require discussions in Executive Session.”⁴⁰⁸ Another commenter states that this provision risks providing SROs with “excessive discretion to limit or prevent the participation of Non-SRO Voting Representative in certain CT Plan matters” and thus believes that the list of permissible topics for Executive Session should be listed specifically in the CT Plan.⁴⁰⁹ Another commenter states that this provision gives the SROs too much latitude to meet outside the presence of the Non-SRO Voting Representatives and creates inherent conflicts of interest, and recommends

⁴⁰¹ See Virtu Letter, *supra* note 30, at 5.

⁴⁰² See ICI Letter I, *supra* note 31, at 6; ICI Letter II, *supra* note 31, at 2.

⁴⁰³ See Fidelity Letter, *supra* note 30, at 4.

⁴⁰⁴ See *id.*

⁴⁰⁵ See MEMX Letter, *supra* note 30, at 4.

⁴⁰⁶ See *id.*; see also Fidelity Letter, *supra* note 30, at 4.

⁴⁰⁷ See MEMX Letter, *supra* note 30, at 4.

⁴⁰⁸ See ICI Letter I, *supra* note 31, at 6; ICI Letter II, *supra* note 31, at 2.

⁴⁰⁹ BMO Letter I, *supra* note 30, at 5; see also SIFMA Letter I, *supra* note 30, at 4; SIFMA Letter II, *supra* note 30, at 4. Additionally, one commenter asserts that “personnel matters” under the definition of Highly Confidential Information, which, as proposed, the SROs can discuss in Executive Session, should be limited to matters that exclusively affect the employees of SROs or the LLC. See SIFMA Letter I, *supra* note 30, at 4.

³⁸⁶ See Article IV, Section 4.4(g) of the CT Plan. The rationale provided may be that the topic falls within the list of topics in Section 4.4(g)(i). See *id.*

³⁸⁷ See Article IV, Section 4.4(g) of the CT Plan.

³⁸⁸ See *id.*

³⁸⁹ See Article IV, Section 4.4(g)(i)(A)–(C) of the CT Plan.

³⁹⁰ Article IV, Section 4.4(g)(ii) of the CT Plan.

³⁹¹ See *id.*

³⁹² See Article IV, Section 4.4(g)(iv) of the CT Plan.

eliminating it.⁴¹⁰ One commenter states that the presence of the Commission staff at Executive Session meetings, as well as the requirement that a written agenda for an Executive Session must be provided at an Operating Committee meeting, will help ensure that Executive Sessions are used properly, but continues to have concerns that use of Executive Sessions will limit information available to Non-SRO Voting Representatives and impair the effectiveness of their participation on the Operating Committee.⁴¹¹ Another commenter believes that in order to preserve the independence of Voting Representatives, Member Observers should not participate in Executive Sessions unless a Voting Representative requests the Member Observer to testify on a particular matter during the Executive Session.⁴¹²

One commenter, however, supports the use of Executive Sessions as proposed in the CT Plan and states that Executive Sessions have been used rarely in recent years and that the requirement that the basis for using Executive Session must be publicly disclosed in the Operating Committee Agenda will ensure that Executive Sessions will be used only when necessary.⁴¹³

The Commission agrees with comments that the scope of matters that could be discussed in Executive Session, outside the presence of the Non-SRO Voting Representatives, is too broad as proposed in the CT Plan.⁴¹⁴ While the Commission acknowledges that, as stated by one commenter,⁴¹⁵ Executive Sessions are rarely used today, the Commission believes that the CT Plan must be clearer regarding the scope of topics eligible for discussion in Executive Session and that the CT Plan language should be narrowly tailored to permit the SRO Voting Representatives to meet outside the presence of the Non-SRO Voting Representatives—who are full members of the Operating Committee—to discuss only limited matters that exclusively concern the SROs or that pose direct conflicts of interest with respect to non-SRO participation. In particular, the Commission believes that the proposed

“catch-all” language in Section 4.4(g)(ii)—providing that certain matters may, by their nature, require discussion in an Executive Session—is too broad to serve the limited purpose of Executive Sessions. In addition, though the Commission believes that the requirement for a written agenda and the presence of Commission staff at Executive Sessions may curb the potential misuse of Executive Sessions, the Commission believes that the topics that may be discussed in Executive Session should be specifically enumerated in the CT Plan to provide transparent and clear boundaries. Accordingly, the Commission is modifying Article IV, Section 4.4(g) in several ways to clarify who may attend Executive Sessions and to explicitly state the topics regarding which SRO Voting Representatives may meet in Executive Session.

First, the Commission is deleting the phrase in Section 4.4(g) that provides that Executive Sessions may be held “[n]otwithstanding any other provision” of the CT Plan. The Commission finds that this modification is appropriate because it will serve to make all other provisions of the CT Plan—most importantly the provisions regarding conflicts of interest and confidentiality—applicable to Executive Sessions. Permitting the SROs to meet in Executive Session without the conflicts of interest and the confidentiality policies being applicable would substantially undermine the effectiveness of those policies and the Commission’s goals in reforming the governance of the Equity Data Plans. This concern is magnified where, as here, the SROs have proposed an open-ended set of topics that could be discussed in Executive Session.

Second, the Commission is modifying Section 4.4(g) to require that the “other persons” authorized to attend Executive Sessions will be determined collectively “by majority vote of the SRO Voting Representatives.” The Commission finds that this modification is appropriate because it is unclear how the SRO Voting Representatives would “deem appropriate” other persons to attend Executive Session as proposed; this modification will resolve that ambiguity. Further, this modification will ensure that any selection of “other persons” authorized to attend Executive Sessions will be made in a manner consistent with the allocation of voting power by SRO Group, as set forth in Section 4.3(a)(i) of the CT Plan.

Third, the Commission is modifying Section 4.4(g) to provide that topics appropriate for discussion in Executive Session must not only be topics for

which it is appropriate to exclude Non-SRO Voting Representatives, as the CT Plan proposes, but must also fall within a list of enumerated topics, as discussed below.⁴¹⁶ The Commission finds that this modification is appropriate because coupling the requirement that Non-SRO Voting Representatives may only be excluded from discussions of an item of business for which it is appropriate to exclude them with a list of specific topics appropriate for discussion in Executive Session will appropriately narrow the discussions that may be held in Executive Session so that Non-SRO Voting Representatives are not excluded from Operating Committee discussions without sufficient justification.

Fourth, the Commission is modifying the list of topics appropriate for discussion in Executive Session in Section 4.4(g)(i) of the CT Plan to exclude discussions regarding contract negotiations with Processors or the Administrator. The CT Plan as proposed provides that any topic that requires discussion of Highly Confidential Information is appropriate for Executive Session,⁴¹⁷ which would include discussions regarding the Company’s contract negotiations with the Processors or Administrator; personnel matters; information concerning the intellectual property of Members or customers; and any document subject to the Attorney-Client Privilege or Work Product Doctrine.⁴¹⁸ The Commission finds that this modification is appropriate because discussions regarding contract negotiations with Processors or the Administrator are integral to the management and operation of the CT Plan, for which the Operating Committee, including the Non-SRO Voting Representatives, is responsible. The Commission believes that inclusion of views from the Non-

⁴¹⁰ See BlackRock Letter I, *supra* note 247, at 5; see also Data Boiler Letter II, *supra* note 101, at 1.

⁴¹¹ See Fidelity Letter, *supra* note 30, at 4.

⁴¹² See Data Boiler Letter I, *supra* note 31, at 31.

⁴¹³ See Nasdaq Letter I, *supra* note 20, at 25–26.

⁴¹⁴ See RBC Letter, *supra* note 30, at 9; Schwab Letter I, *supra* note 30, at 2; Schwab Letter II, *supra* note 30, at 5–6; Virtu Letter, *supra* note 30, at 5; SIFMA Letter I, *supra* note 30, at 4; SIFMA Letter II, *supra* note 30, at 4; MEMX Letter, *supra* note 30, at 4.

⁴¹⁵ See Nasdaq Letter I, *supra* note 20, at 25–26.

⁴¹⁶ The Commission is also modifying Article IV, Section 4.4(g)(i) of the CT Plan to state that the items for discussion within an Executive Session shall be limited to the topics enumerated in subsections 4.4(g)(i)(A)–(E) and for which it is appropriate to exclude Non-SRO Voting Representatives. So, for example, as an enumerated topic eligible for discussion in Executive Session, a litigation matter may be discussed in Executive Session if it involves a matter for which it is appropriate to exclude the Non-SRO Voting Representatives. The Commission believes that, as a practical matter, it is likely that discussions of litigation matters that are not appropriate to include Non-SRO Voting Representatives will take place in the forum of a legal subcommittee of the Operating Committee. See *infra* Section II.C.5(k)(iii).

⁴¹⁷ See Article IV, Section 4.4(g)(i)(A) of the CT Plan.

⁴¹⁸ See Article I, Section 1.1(ii) of the CT Plan (defining “Highly Confidential Information” as “any highly sensitive Member-specific, customer-specific, individual-specific, or otherwise sensitive information relating to the Operating Committee, Members, Vendors, Subscribers, or customers that is not otherwise Restricted Information”).

SRO Voting Representatives at this critical stage of development of CT Plan operations is important, as decisions made in these contracts negotiations may have important consequences for the categories of market participants whose views Non-SRO Voting Representatives represent on the Operating Committee. Further, with respect to these contract negotiations, there are not issues that would uniquely affect the SROs and warrant excluding the Non-SRO Voting Representatives from such discussions.

Fifth, the Commission is modifying Section 4.4(g)(i) to add two topics to the list of items eligible for discussion in Executive Session. The Commission is adding discussion of “[r]esponses to regulators with respect to inquiries, examinations, or findings” as new Section 4.4(g)(i)(D). The Commission believes that it is appropriate to permit the SRO Voting Representatives to discuss responses to regulators with respect to inquiries, examinations, or findings in Executive Session, because the SROs have unique regulatory obligations with respect to the operation of the CT Plan. However, this provision is not intended to prevent or limit the Non-SRO Voting Representatives from receiving copies of any regulatory inquiries, examinations, or findings directed to the Operating Committee of CT Plan (as opposed to those directed solely to one or more SROs). As voting members of the Operating Committee that is charged with the operation of the CT Plan, Non-SRO Voting Representatives need to be informed of inquiries, examinations, and findings that are directed to the Operating Committee in order to be active and informed participants on the Operating Committee with respect to ongoing and future operations of the CT Plan. For example, a regulatory inquiry, examination, or finding might identify areas of non-compliance with the terms of the Plan, shortcomings in the performance of the Administrator or Processors, or areas in which amendments to the CT Plan might be necessary or appropriate, and the full Operating Committee should be aware of such issues because the full Operating Committee will vote on any CT Plan actions taken or proposed in response. The Commission believes, however, that because the SROs have unique obligations for, and potential liability for, meeting regulatory obligations in the operation of the CT Plan, SRO Voting Representatives should be permitted to discuss outside the presence of the Non-SRO Voting Representatives any reply by the SROs

to regulators regarding any inquiry, examination, or finding.

The Commission is also adding Section 4.4(g)(i)(E), which would permit discussion in Executive Session of “[o]ther discrete matters approved by a vote of the Operating Committee.” The Commission finds that this modification is appropriate because it recognizes that not every topic that may be appropriate for Executive Session can be foreseen, and because some provision must therefore be made in the CT Plan for unanticipated topics suitable for Executive Session. The Commission believes that allowing matters that have been presented to, and approved by, the Operating Committee for discussion in Executive Session strikes a balance by providing leeway for unanticipated topics to be discussed in Executive Session, while also giving the Non-SRO Voting Representatives an opportunity to review the topic being considered and vote as part of the Operating Committee on whether the topic is appropriate for discussion in Executive Session.

Finally, as recommended by several commenters,⁴¹⁹ the Commission is modifying Section 4.4(g)(ii) to remove the language that states the list of topics considered appropriate for Executive Session “is not dispositive of all matters that may by their nature require discussion in an Executive Session.” The Commission finds that this modification is appropriate because the language in Section 4.4(g)(ii) of the CT Plan is too broad and leaves it to the SRO Voting Representatives’ discretion which additional topics would require discussion in Executive Session. This provision has the potential to be used by the SRO Voting Representatives to limit transparency to discuss significant topics outside the presence of the Non-SRO Voting Representatives. For this reason, the Commission is approving Section 4.4(g) of the CT Plan as modified.

While one commenter suggests that Non-SRO Voting Representatives should be permitted to attend Executive Sessions if they sign a non-disclosure agreement,⁴²⁰ the Commission is declining to include such a provision in light of the other modifications the Commission has made to the Executive Session provisions of the CT Plan, which are discussed above. These modifications are designed to limit the

⁴¹⁹ See RBC Letter, *supra* note 30, at 9; Schwab Letter I, *supra* note 30, at 2; Schwab Letter II, *supra* note 30, at 5–6; Virtu Letter, *supra* note 30, at 5; SIFMA Letter I, *supra* note 30, at 4; SIFMA Letter II, *supra* note 30, at 4; MEMX Letter, *supra* note 30, at 4.

⁴²⁰ See *supra* note 400.

permissible topics for Executive Sessions to those for which it appropriate to exclude Non-SRO Voting Representatives, such as matters that exclusively concern the SROs or that pose direct conflicts of interest with respect to non-SRO participation. Because the reason for excluding Non-SRO Voting Representatives in such instances would not be a concern about confidentiality, a non-disclosure agreement would not sufficiently resolve the underlying concerns.

(iv) Other Provisions

The CT Plan provides that the Chair of the Operating Committee may call a special meeting of the Operating Committee on at least 24 hours’ notice to each Voting Representative and all persons eligible to attend Operating Committee meetings.⁴²¹

Article IV, Section 4.4(c) of the CT Plan sets forth quorum requirements for a vote of the Operating Committee. Specifically, the CT Plan requires that a quorum of all Voting Representatives be present for a vote of the Operating Committee, and that a quorum is equal to the minimum votes necessary to obtain approval under Section 4.3(b), *i.e.*, Voting Representatives reflecting two-thirds of Operating Committee votes eligible to vote on an action and Non-SRO Voting Representatives reflecting 50% of SRO Voting Representative votes eligible to vote on that action. A Voting Representative will only be considered present if he or she is either in physical attendance at the meeting or participating by conference telephone or other electronic means that enables each Voting Representative to hear and be heard by all others present at the meeting.⁴²² This section further provides that if a Voting Representative has been recused from voting on a particular action, he or she will not be considered for purposes of determining whether a quorum is present.⁴²³

Article IV, Section 4.4(d) of the CT Plan requires that at least one week prior to a meeting, a summary of any action sought to be resolved at a meeting must be sent to each Voting Representative entitled to vote on the matter via electronic mail, portal notification, or regular U.S. or private mail (or if one week is not practicable, then with as much time as may be reasonably practicable under the

⁴²¹ See Article IV, Section 4.4(b) of the CT Plan.

⁴²² See Article IV, Section 4.4(c)(ii) of the CT Plan.

⁴²³ See Article IV, Section 4.4(c)(i) of the CT Plan.

circumstances).⁴²⁴ Finally, Article IV, Section 4.4(f) of the CT Plan provides that meetings may be held by conference telephone or other electronic means that enables each Voting Representative to hear and be heard by all others present at the meeting.

The Commission believes that the provisions in Article IV, Sections 4.4(b)–(d) and (f) of the CT Plan relating to special meetings of the Operating Committee, quorum requirements, notice of actions to be resolved at Operating Committee meetings, and the mediums through which meetings may be held, are reasonable. The Commission received no comments addressing these Sections and is approving these provisions as proposed.

(e) Certain Transactions

Article IV, Section 4.5 of the CT Plan states that the CT Plan is not prohibited from employing or dealing with persons in which an SRO or any of its affiliates has a connection or a direct or indirect interest. Specifically, the section provides that the fact that a Member or any of its affiliates is directly or indirectly interested in or connected with any person employed by the Company to render or perform a service, or from which or to whom the Company may buy or sell any property, shall not prohibit the Company from employing or dealing with such person.

In the Notice, the Commission sought comment on this provision, asking, among other things, if there are specific types of employment relationships or business dealings that should be permitted, and similarly if there are ones that should be prohibited.⁴²⁵ The Commission also asked for commenters' views regarding whether the CT Plan should require the relevant SROs to maintain information barriers between themselves and the affiliates or persons that have employment relationships or business dealings with the CT Plan, and if so, what type of information barriers would be appropriate.⁴²⁶ The Commission further asked whether Section 4.5 could permit conflicts of interests that should be disclosed under the conflicts of interest policy, and if so, what modifications to that policy, if any, should be made.⁴²⁷ Finally the Commission asked if commenters thought that any additional disclosure, recusal, or voting procedures should be required before the CT Plan employs or deals with persons in which an SRO or

any of its affiliates has a direct or indirect interest or connection.⁴²⁸

In response to the questions posed in the Notice, one commenter states that permitting the LLC to engage with a person with whom a Member or its affiliate may have a connection would “significantly increase the likelihood that Plan activities would be contrary to the role and public purpose of the Plan as part of the national market system,” and would create a conflict of interest with the SROs' obligations with respect to the CT Plan under federal securities rules and regulations.⁴²⁹ While another commenter expresses a similar concern, it acknowledges that there may be limited circumstances in which it would be appropriate for Members of the CT Plan to employ or transact with its affiliates.⁴³⁰ This commenter suggests that there be robust disclosures of, and guardrails around, the terms of such activity to ensure that no further conflicts arise. Specifically, the commenter recommends, in addition to the disclosure requirements, that the CT Plan adopt detailed policies and procedures that articulate the specific circumstances where it would be appropriate for the Member to employ an SRO-affiliated entity, and that mandate recusals when there is a potential conflict of interest.⁴³¹ Another commenter also supports a clearly defined conflicts of interest policy and recusal for certain transactions and prefers that structure to prohibiting the CT Plan from transacting with a Member or its affiliate.⁴³²

In response to the Commission's question regarding information barriers, one commenter states that, while the disclosure requirements may, to an extent, elicit relevant information to mitigate conflicts of interest resulting from certain business activities, it recommends additional measures to address such conflicts.⁴³³ The commenter recommends that the SROs be required to maintain information barriers between themselves and the affiliates or persons that have employment relationships or business dealing with the CT Plan.⁴³⁴ Additionally, the commenter suggests that any necessary recusals should be required before the CT Plan employs or deals with persons in which an SRO or

any of its affiliates has a direct or indirect interest or connection.⁴³⁵

Regarding the types of employment relationships or business dealings that Section 4.5 may permit, one commenter argues that the provision allows for the Company to employ a Member or its affiliate to continue to serve as a Processor of the CT Plan.⁴³⁶ The commenter states that selecting an SRO to serve as a Processor of the Plan would allow the Operating Committee to apply the cutting-edge technology that Members have developed to the dissemination of consolidated data, which could result in a beneficial relationship.⁴³⁷ The commenter opposes any limitation on the CT Plan's ability to contract with a Member, arguing that it would jeopardize this relationship.⁴³⁸ Thus, the commenter recommends that any potential conflicts of interest concerns be addressed in the CT Plan's related policies or contractual agreements, rather than by prohibiting the Plan's ability to engage with an entity that, in the commenter's view, may be best equipped to provide the service.⁴³⁹

The Commission recognizes that an SRO or its affiliates may at times, and based on its experience or expertise, provide the best (or only) option in supporting the business operations of the CT Plan. In particular, the current processors for the existing Equity Data Plans are affiliates of SROs. Accordingly, the Commission believes that prohibiting the employment or dealings with an individual or entity because of a direct or indirect affiliation or connection with a Member could be detrimental to the CT Plan, despite the potential conflict of interest. The Commission, however, agrees with comments that conflicts of interest should be managed by the CT Plan's policies, and the Commission believes that Section 4.10 of the CT Plan, discussed below, provides the framework for handling conflicts of interest and recusals. In particular, Section 4.10(b)(iii) requires a Member's recusal, including the recusal of its representatives and its affiliates and their representatives, from voting on matters in which it or its affiliates is (i) seeking a position or contract with the Company or (ii) has a position or contract with the Company, and whose

⁴²⁴ This requirement may be waived by a vote of the Operating Committee. *See id.*

⁴²⁵ *See Notice, supra* note 3, 85 FR at 64569 (Question 22).

⁴²⁶ *See id.* at 64569–70 (Question 22).

⁴²⁷ *See id.* at 64570 (Question 22).

⁴²⁸ *See id.*

⁴²⁹ RBC Letter, *supra* note 30, at 9.

⁴³⁰ *See* Virtu Letter, *supra* note 30, at 6.

⁴³¹ *See id.*

⁴³² *See* Data Boiler Letter I, *supra* note 31, at 32–33.

⁴³³ *See* BMO Letter I, *supra* note 30, at 4.

⁴³⁴ *See id.*

⁴³⁵ *See id.* The Commission notes that this comment letter applies to both the discussion regarding Certain Transactions, as well as Article IV, Section 4.6 (Company Opportunities) of the CT Plan.

⁴³⁶ *See* Nasdaq Letter I, *supra* note 20, at 23.

⁴³⁷ *See id.*

⁴³⁸ *See id.*

⁴³⁹ *See id.*

performance is being evaluated by the Company. As discussed below, the Commission believes that the recusal policy appropriately balances the potential influence a Member may have in employing or dealing with an affiliated person or entity, while also permitting the CT Plan to consider a broad range of individuals or entities that would best support the CT Plan's interests. Additionally, the Commission believes that the Administrator of the CT Plan, which will be required to be independent of any entity that offers for sale its own proprietary data products for Eligible Securities, can play an important role in reducing the effect of conflicts of interest on the operation of the CT Plan. Further, as noted above, the Commission is modifying the CT Plan to make explicit that no provision of the CT Plan shall be construed to limit or diminish the obligations and duties of the Members as self-regulatory organizations under the federal securities laws and the regulations thereunder.⁴⁴⁰ As discussed above, the Commission believes that the provisions of Section 4.10 and the requirement for an independent Administrator sufficiently address the concerns raised by commenters with respect to the transactions permitted by Section 4.5, and is approving Article IV, Section 4.5 as proposed.

(f) Company Opportunities

Article IV, Section 4.6(a) of the CT Plan provides that each Member, its affiliates, and each of its respective equity holders, controlling persons, and employees may have business interests and engage in business activities in addition to those relating to the Company. Section 4.6(b) provides that none of the SROs shall be obligated to recommend or take any action that prefers the interest of the CT Plan or any other Member over its own interests, and it also provides that none of the SROs will be obligated to inform or present to the CT Plan any opportunity, relationship, or investment. This provision defines investments or other business relationships with persons engaged in the business of the CT Plan other than through the CT Plan as "Other Business." Separately, Exhibit B of the CT Plan provides a list of questions and instructions tailored to elicit responses that disclose potential conflicts of interest.

In the Notice, the Commission asked whether, in response to the questions set forth in Exhibit B, the SROs would be required to disclose certain opportunities, relationships, or

investments, and whether these disclosures would sufficiently mitigate any conflicts of interest. In the Notice, the Commission also requested comment on, among other things, the specific types of business activities that would be covered by the provision, and whether any of these business activities could create a conflict of interest with an SRO's obligations with respect to the CT Plan under the federal securities laws, rules, and regulations. The Commission also asked if any potential conflicts of interest are sufficiently mitigated by the conflicts of interest policy and, if not, how the CT Plan should address such conflicts of interest.⁴⁴¹

The Commission further solicited comment on whether the CT Plan should require that an SRO's representatives (*i.e.*, SRO Voting Representative or Member Observer, as applicable) be recused from discussion of, or voting on, matters relating to opportunities, relationships, or investments when the SRO's interests may be in conflict with the goals of the CT Plan.⁴⁴² Lastly, the Commission asked if commenters believe that Section 4.6(b) could be interpreted in a manner that could result in the SROs acting inconsistently with their obligations under the federal securities laws, rules, and regulations, and whether the language could result in an SRO voting against needed improvements to the provision of consolidated equity market data.⁴⁴³

In response to the questions presented in the Notice, one commenter argues that the provisions would permit the SROs to disclaim a duty or obligation to the CT Plan and appear to be a "complete abdication" of responsibility in ensuring that the CT Plan carries out its intended function.⁴⁴⁴ The commenter suggests that the SROs should, at a minimum, establish a duty in the CT Plan to promote the plan's function of "assuring the widespread availability of equity market data on terms that are fair and reasonable, consistent with statutory requirements, or to promote the interests of fair and orderly markets and the protections of investors and the public interest."⁴⁴⁵

Another commenter asserts that the CT Plan does not address situations in which an SRO's interest conflicts with its obligations to the Plan, and recommends that an SRO Voting

Representative be recused from voting on matters relating to opportunities, relationships or investments when the interests of the SRO Voting Representative conflict with the interests of the CT Plan.⁴⁴⁶

Regarding SRO engagement in Other Business that may be in competition with the CT Plan, one commenter argues that imposing limits on the business activities of the SROs is not within the scope of the CT Plan, is unwarranted, and would require specific rulemaking by the Commission. The commenter further asserts that the CT Plan is not an appropriate vehicle for substantive regulation of SRO operations.⁴⁴⁷ In response to the Commission's question regarding whether Other Business activities would create a conflict of interest with an SRO's obligations pursuant to federal securities laws, the commenter affirms that each Member has obligations under the federal securities laws, and states that it is those requirements, rather than obligations to the CT Plan, that will ensure that Members comply with their responsibilities regarding the dissemination of real-time consolidated equity market data.⁴⁴⁸ Additionally, the commenter maintains that the required disclosures set forth in Exhibit B are adequate to identify and mitigate any potential conflict of interest.⁴⁴⁹

In response to whether Section 4.6(b) could be interpreted in a manner that results in an SRO acting inconsistently with its obligations under the federal securities laws, rules, and regulations, one commenter contends that the subsection is intended to be a waiver of the corporate opportunities doctrine. According to the commenter, the doctrine generally provides "that a person with fiduciary duties may not divert to themselves or their affiliates any business opportunity that belongs to the company."⁴⁵⁰ The commenter claims that the Members "likely do not have fiduciary duties to the CT Plan under default Delaware law, and Section 3.7(e) further clarifies that the Member do not have such duties."⁴⁵¹ For these reasons, the commenter believes that, while the Members likely are not subject to the corporate opportunities doctrine, because the Members are large companies with complex business dealings, the CT Plan should be explicit that a Member cannot

⁴⁴⁶ See SIFMA Letter I, *supra* note 30, at 4–5; SIFMA Letter II, *supra* note 30, at 2.

⁴⁴⁷ See Nasdaq Letter I, *supra* note 20, at 23.

⁴⁴⁸ See *id.* at 24.

⁴⁴⁹ See *id.*

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.*

⁴⁴¹ See Notice, *supra* note 3, 85 FR at 64570 (Question 23).

⁴⁴² See *id.* (Question 24).

⁴⁴³ See *id.* (Question 25).

⁴⁴⁴ MFA Letter, *supra* note 30, at 2.

⁴⁴⁵ *Id.*

⁴⁴⁰ See *supra* Section II.C.1(b).

be sued for breach of the corporate opportunities doctrine by the Plan or the Members of the CT Plan.⁴⁵² The commenter further asserts that an express waiver does not affect any of the obligations that the SROs have under the federal securities laws.⁴⁵³

The Commission agrees that no provision of the CT Plan, as modified, dilutes or diminishes any Member's regulatory obligations under the federal securities laws, rules, and regulations. While Section 4.6 may permit a Member to engage in Other Business that may be complementary or competitive with the Company, SROs must act consistently with their statutory and regulatory obligations. Accordingly, the Commission does not believe it is necessary to include a fiduciary duty provision in the CT Plan. However as discussed above, the Commission is modifying the Recitals of the CT Plan to explicitly state that no provision of the CT Plan shall be construed to limit or diminish the obligations and duties of the Members as SROs under the federal securities laws and the regulations thereunder.⁴⁵⁴

The Commission further believes the conflicts of interest provisions set forth in Section 4.10 of the CT Plan, along with the required disclosures in Exhibit B, would serve to mitigate potential conflicts of interest arising from Other Business activities. As the Commission has previously stated, the Commission believes that by requiring full disclosure of all material facts necessary to identify the nature of a potential conflict of interest and the effect it may have on the CT Plan action, all parties, including the Commission and the public, will be better positioned to evaluate competing interests among any of the parties involved in governing, operating, and overseeing the CT Plan, as those competing interests could materially affect the ability to carry out the purposes of the CT Plan.⁴⁵⁵ Accordingly, the Commission is approving Article IV, Section 4.6 as proposed.

(g) Subcommittees

Section 4.7 of Article IV of the CT Plan governs the Operating Committee's discretion to create and disband subcommittees, as well as the selection of subcommittee chairs, permissible attendees at subcommittee meetings and special provisions applicable to meetings of a legal subcommittee.

(i) Selection of Subcommittee Chairs

Paragraph (a) of Section 4.7 permits the Operating Committee to determine the duties, responsibilities, powers, and composition of any of its subcommittees. This paragraph also grants the Chair of the Operating Committee the authority to select the chair of any subcommittee from SRO Voting Representatives or Member Observers, with input from the Operating Committee.

In the Notice, the Commission sought comment on, among other things, whether Non-SRO Voting Representatives should be permitted to serve as the chair of a subcommittee.⁴⁵⁶ In response, most commenters addressing this issue agree that Non-SRO Voting Representatives should be permitted to serve as the chair of a subcommittee.⁴⁵⁷ One commenter states that chairs should be selected from all Operating Committee members.⁴⁵⁸ Another commenter states that it is appropriate for Non-SRO Voting Representatives to serve as subcommittee chairs, and that subcommittees should be chaired by the individual who is the most qualified and an expert in the area of the subcommittee.⁴⁵⁹ One commenter states that subcommittee chairs should be selected by the members of the subcommittee,⁴⁶⁰ while another commenter states that decisions about whether Non-SRO Voting Representatives should be permitted to chair a subcommittee should be left to the discretion of the SROs.⁴⁶¹ Several other commenters also express the view that a Non-SRO Voting Representative should be permitted to serve as the chair of a subcommittee.⁴⁶² Another commenter states that it does not object to Non-SRO Voting Representatives serving as the chair of a subcommittee, but, as discussed below, argues that Non-SRO Voting Representatives should be prohibited from serving on the legal subcommittee, as that would "potentially waive the attorney-client privilege."⁴⁶³

The Commission believes that Non-SRO Voting Representatives should be

eligible to serve as the chair of a subcommittee of the CT Plan's Operating Committee. Non-SRO Voting Representatives are full members of the Operating Committee and should not be excluded from serving as subcommittee chairs, particularly in light of the expertise that a specific Non-SRO Voting Representative might bring to a given subcommittee. In addition, the proposed exclusion of Non-SRO Voting Representatives from serving as subcommittee chairs would be contrary to the objectives of the Commission's Governance Order to broaden participation in the governance of the NMS plan for consolidated equity market data.⁴⁶⁴ Further, apart from objecting to the participation of Non-SRO Voting Representatives on the legal subcommittee,⁴⁶⁵ which is addressed below,⁴⁶⁶ the SROs provide no rationale for limiting the Non-SRO Voting Representatives' participation in this categorical manner. Accordingly, the Commission is modifying Section 4.7(a) of the CT Plan to expressly provide that Non-SRO Voting Representatives are eligible to serve as chairs of subcommittees to the Operating Committee. The Commission finds that this modification to Section 4.7(a) is appropriate because it supports the objective of broader participation in Plan governance as set forth in the Governance Order.⁴⁶⁷

In the Commission's view, however, Member Observers should not be eligible to serve as subcommittee chairs, and the Commission is therefore modifying Section 4.7(a) of the CT Plan to preclude Member Observers from serving as subcommittee chairs. The Commission finds this modification to be appropriate because, based on its observation of the operation of the existing Equity Data Plans, the Commission expects that important, substantive decisions of the CT Plan Operating Committee are likely to be based on work discussed and developed through subcommittees. Accordingly, the Commission believes that the chairs of those subcommittees should be selected from among the voting members of the Operating Committee, rather than delegated to persons who may be serving as a Member Observer on an ad hoc basis and for limited purposes. The Commission also notes that the CT Plan permits Members Observers to attend and participate in

⁴⁵⁶ See Notice, *supra* note 3, 85 FR at 64570 (Question 26).

⁴⁵⁷ See, e.g., RBC Letter, *supra* note 30, at 9; Schwab Letter I, *supra* note 30, at 3; Schwab Letter II, *supra* note 30, at 5; Virtu Letter, *supra* note 30, at 6.

⁴⁵⁸ See RBC Letter, *supra* note 30, at 9.

⁴⁵⁹ See Virtu Letter, *supra* note 30, at 5.

⁴⁶⁰ See Data Boiler Letter I, *supra* note 31, at 35.

⁴⁶¹ See NYSE Letter I, *supra* note 18, at 38–39.

⁴⁶² See SIFMA Letter I, *supra* note 30, at 5; SIFMA Letter II, *supra* note 30, at 2; MEMX Letter, *supra* note 30, at 4; Schwab Letter I, *supra* note 30, at 3; Schwab Letter II, *supra* note 30, at 5.

⁴⁶³ Nasdaq Letter I, *supra* note 20, at 25.

⁴⁶⁴ See Governance Order, *supra* note 8, 85 FR at 28714–20.

⁴⁶⁵ See Nasdaq Letter I, *supra* note 20, at 25.

⁴⁶⁶ See text accompanying notes 486–490, *infra*.

⁴⁶⁷ See Governance Order, *supra* note 8, 85 FR at 28714–20.

⁴⁵² See *id.* at 25.

⁴⁵³ See *id.*

⁴⁵⁴ See *supra* Section.II.C.1(b).

⁴⁵⁵ See Conflicts of Interest Approval Orders, *infra* note 509, 85 FR at 28120 and 85 FR at 28047.

meetings of CT Plan subcommittees, as well as meetings of the Operating Committee, and the Commission therefore believes that precluding Member Observers from serving as subcommittee chairs will not limit the ability of the CT Plan to benefit from the specific expertise that persons selected as Member Observers possess.

Finally, the Commission believes that, along with the authority to determine the duties, responsibilities, powers, and composition of any subcommittees, the Operating Committee, rather than solely the Chair of the Operating Committee, should have the authority to select subcommittee chairs. Accordingly, the Commission is modifying Section 4.7(a) of the CT Plan to provide that the Operating Committee, rather than the Chair of the Operating Committee, will select the chair of each subcommittee, and to delete the phrase, “with input from the Operating Committee,” to conform to this change. The Commission finds that this modification is appropriate because it further aligns the CT Plan with the objectives of the Governance Order to foster broader participation in plan governance.⁴⁶⁸

For the reasons discussed above, the Commission is approving Section 4.7(a) of the CT Plan as modified.

(ii) Permissible Attendees of Subcommittee Meetings

Paragraph (b) of Section 4.7 of the CT Plan states that SRO Voting Representatives, Non-SRO Voting Representatives, Member Observers, SEC staff, and other persons as deemed appropriate by the Operating Committee may attend subcommittee meetings.

The Commission sought comment on whether the relative balance of membership should be the same in the subcommittees.⁴⁶⁹ In response, the Commission received several comments on this proposed provision. One commenter suggests there should be balanced participation among all Voting Representatives.⁴⁷⁰ This commenter expresses concern that subcommittees “could conceivably make decisions without input from or regard for the Operating Committee as a whole, including non-SRO Voting Representatives.”⁴⁷¹ Another commenter states that, generally, both Non-SRO Voting Representatives and SRO Voting Representatives should be permitted to serve on subcommittees.⁴⁷² This commenter expresses the view that

Non-SRO Voting Representative input may not always be essential, but is concerned that an SRO-only subcommittee could discuss important administrative matters without non-SRO input.⁴⁷³ One commenter states that decisions about the composition requirements for subcommittees should be left to the discretion of the SROs.⁴⁷⁴

The Commission agrees that both SRO Voting Representatives and Non-SRO Voting Representatives should be permitted to serve on any subcommittees of the Operating Committee, albeit, as discussed below, with some provision to limit participation on a legal subcommittee.⁴⁷⁵ The Commission disagrees, however, with the view that it is necessary to require balanced participation on any subcommittees to prevent a subcommittee from making decisions without input or regard for the Operating Committee as a whole. First, any SRO Voting Representative or Non-SRO Voting Representative can voluntarily participate on any subcommittee, other than a legal subcommittee, as discussed below. Second, a subcommittee would have no decision making authority under the terms of the CT Plan—subcommittees would be permitted to make recommendations, but all actions of the CT Plan are subject to the vote of the Operating Committee. The Commission further disagrees with the view that the composition of subcommittees should be left to the discretion of the SROs,⁴⁷⁶ because the potential exclusion of the Non-SRO Voting Representatives who would like to participate on a subcommittee would not be consistent with the objectives of the Commission’s Governance Order.⁴⁷⁷

The Commission finds that Section 4.7(b), which permits SRO Voting Representatives, Non-SRO Voting Representatives, Member Observers, SEC staff, and other persons as deemed appropriate by the Operating Committee to attend subcommittee meetings, is reasonably designed to help ensure that all interested participants of Operating Committee meetings are provided an opportunity to participate in subcommittee meetings if they so choose. Accordingly, the Commission is approving Section 4.7(b) as proposed.

(iii) Legal Subcommittee

Article IV, Section 4.7(c) provides that SRO Voting Representatives, Member Observers, and other persons as deemed appropriate by the SRO Voting Representatives may meet in a subcommittee to discuss an item subject to attorney-client privilege of the CT Plan or that is attorney work product of the CT Plan.

The Commission requested comment in the Notice on the scope of the “other persons” who may be deemed appropriate by the SRO Voting Representatives to discuss an item that is subject to attorney-client privilege of the CT Plan or that is attorney work product of the CT Plan, including whether there should be any limitations.⁴⁷⁸ One commenter expresses the view that Non-SRO Voting Representatives should not serve on a legal subcommittee as their presence could result in a waiver of attorney-client privilege.⁴⁷⁹ This commenter further states that “[p]lacing any sort of limitation on the ability of the Members to consult with counsel or the persons whom counsel may consult in order to provide legal advice to the Members would place an arbitrary and capricious limitation on the attorney-client relationship, and is beyond the power of the Commission.”⁴⁸⁰

One commenter questions why Non-SRO Voting Representatives should be excluded from discussions of litigation matters if they sign a non-disclosure agreement.⁴⁸¹ Another commenter believes that the same considerations that apply to subcommittee deliberations generally also would apply to subcommittee discussions that may be subject to attorney-client privilege or the attorney-work-product doctrine.⁴⁸² Further, commenters responding to the Commission’s Notice of Proposed Order,⁴⁸³ raise related points. One of these commenters expresses concerns that the Executive Session could be used to shield discussions by invoking privilege,⁴⁸⁴

⁴⁷⁸ See Notice, *supra* note 3, 85 FR at 64570 (Question 27).

⁴⁷⁹ See Nasdaq Letter I, *supra* note 20, at 25.

⁴⁸⁰ *Id.* at 26.

⁴⁸¹ See Virtu Letter, *supra* note 30, at 5.

⁴⁸² See FINRA Letter I, *supra* note 257, at 6.

⁴⁸³ See Notice of Proposed Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data, Securities Exchange Act Release No. 87906 (Jan. 8, 2020), 85 FR 2164 (Jan. 14, 2020) (“Proposed Order”).

⁴⁸⁴ See Letter from Joseph Kinahan, Managing Director, Client Advocacy and Market Structure, TD Ameritrade, Inc. (Feb. 24, 2020), at 7; *see also* Schwab Letter I, *supra* note 30, at 2.

⁴⁶⁸ *See id.*

⁴⁶⁹ See Notice, *supra* note 3, 85 FR at 64570 (Question 26).

⁴⁷⁰ See RBC Letter, *supra* note 30, at 8.

⁴⁷¹ *Id.*

⁴⁷² See ICI Letter I, *supra* note 31, at 6.

⁴⁷³ *See id.*

⁴⁷⁴ See NYSE Letter I, *supra* note 18, at 38–39.

⁴⁷⁵ See *infra* Section II.C.5(g)(iii).

⁴⁷⁶ See NYSE Letter I, *supra* note 18, at 38–39.

⁴⁷⁷ See Governance Order, *supra* note 8, 85 FR at 28714–20.

and another states that one of the few legitimate uses of Executive Session would be to discuss legal issues.⁴⁸⁵

The Commission believes the Non-SRO Voting Representatives must participate as full members of the CT Plan's Operating Committee. The Commission thus shares the concern some commenters have raised that the legal subcommittee may, if a blanket prohibition on Non-SRO Voting Representative participation applies, be used as a forum for SROs to inappropriately make decisions relating to plan business under the pretext that all such discussions necessarily invoke the attorney-client privilege. The Commission believes that, while the Operating Committee of the CT Plan should be able to engage in discussions regarding legal advice of plan counsel outside the presence of Commission staff, it does not believe that all matters involving the plan's attorney-client privilege are necessarily appropriate for discussion outside the presence of the Non-SRO Voting Representatives, who are full members of the Operating Committee. To the extent that the Operating Committee retains legal counsel to advise it with respect to the operation of the CT Plan—for example, to provide advice on whether proposed Operating Committee actions are consistent with or required by the Plan, or whether proposed actions or Plan amendments are consistent with or required by the federal securities laws—the Commission believes that Non-SRO Voting Representatives, as full members of the Operating Committee, must participate in those discussions with Plan counsel and be informed by the advice counsel provides to the Operating Committee. Moreover, commenters do not explain how the presence of Non-SRO Voting Representatives would waive the Plan's attorney-client privilege when the Non-SRO Voting Representatives themselves are full members of the Operating Committee of the CT Plan.

The Commission recognizes, however, that even though Non-SRO Voting Representatives should be permitted to attend legal subcommittee meetings unless there is a legitimate reason to preclude their attendance, there are specific circumstances in which it would be appropriate for the SROs to meet collectively with counsel outside the presence of the Non-SRO Voting Representatives to discuss CT Plan business. The Commission further finds that it is appropriate to apply limits to the ability of the SROs to exclude Non-SRO Voting Representatives from legal

subcommittee meetings and discussions so that those subcommittee meetings do not become the equivalent of an Executive Session meeting that inappropriately excludes Non-SRO Voting Representatives.⁴⁸⁶

The Commission therefore believes that the CT Plan should explicitly state the basis on which Non-SRO Voting Representatives could be excluded from the legal subcommittee meetings so that these circumstances are narrowly drawn to help ensure that such meetings are called on an appropriate basis. The Commission believes that such meetings should be limited to those that bear on matters that exclusively affect the SROs with respect to: (1) Litigation matters or responses to regulators with respect to inquiries, examinations, or findings; and (2) other discrete legal matters approved by the Operating Committee.⁴⁸⁷

Accordingly, in an effort to reflect the status of Non-SRO Voting Representatives as full members of the Operating Committee, while also reflecting the unique responsibilities of the SROs under the federal securities laws, the Commission is modifying paragraph (c) of Section 4.7 of the CT Plan to provide that Non-SRO Voting Representatives may be excluded from legal subcommittee meetings and discussions only under specified circumstances. As modified, Section 4.7(c) of the CT Plan would permit the SROs to exclude Non-SRO Voting Representatives from discussions within the legal subcommittee only to the extent that those meetings and discussions bear on matters that exclusively affect the SROs with respect to: (1) Litigation matters or responses to regulators with respect to inquiries, examinations, or findings; and (2) other discrete legal matters approved by the Operating Committee.⁴⁸⁸ The Commission believes that litigation matters or responses to regulators with respect to inquiries, examinations, or findings affect the SROs uniquely, given

⁴⁸⁶ The Commission notes that while Commission staff historically have attended Executive Sessions, staff have not attended legal subcommittee meetings.

⁴⁸⁷ Of course, nothing in the CT Plan would prevent an SRO from seeking advice from its own internal or external legal counsel regarding any matter of CT Plan business.

⁴⁸⁸ The Notice, in the context of the CT Plan provisions regarding Executive Session, sought comment about the circumstances under which it would be appropriate to exclude Non-SRO Voting Representatives from CT Plan meetings. See Notice, *supra* note 3, 85 FR at 64569 (Question 21). Moreover, the Governance Order contemplated that a valid use of Executive Session might be attorney-client communications relating to matters that exclusively affect the SROs with respect to the Commission's oversight of the CT Plan. See Governance Order, *supra* note 8, 85 FR at 28727.

that the SROs have not only the express regulatory obligation as SROs for operation of the CT Plan, but they also, unlike the Non-SRO Voting Representatives, have financial responsibility for the CT Plan itself. As noted above with respect to a similar provision relating to the use of Executive Session,⁴⁸⁹ the Commission believes that—while Non-SRO Voting Representatives could be precluded from participating in legal subcommittee discussions regarding SRO responses to regulatory inquiries, examinations, or findings—to serve as active and informed participants on the Operating Committee, Non-SRO Voting Representatives would need to be informed about any regulatory inquiries, examinations, or findings that relate to the CT Plan. Consequently, this provision is not intended to prevent or limit the Non-SRO Voting Representatives' access to regulatory inquiries, examinations, or findings directed to the CT Plan or its Operating Committee.

Moreover, the Commission is mindful that not every appropriate use of an SRO-only legal subcommittee meeting can be precisely foreseen, so the Commission's modification to this section of the CT Plan also provides that other discrete legal matters may be approved by the Operating Committee for SRO-only consideration in the legal subcommittee on a case-by-case basis. The Commission believes that this provision is designed to help ensure that the Operating Committee is sufficiently informed and can make reasonable decisions about unforeseen matters that may arise and exclusively affect the SROs. The Commission finds that these modifications to Section 4.7(c) of the CT Plan are appropriate because they are consistent with the objective of the Governance Order to include Non-SRO Voting Representatives as full members of the Operating Committee,⁴⁹⁰ while also recognizing, given the SROs' unique regulatory responsibilities, that certain legal matters relevant to the operating of the CT Plan may exclusively affect the SROs.

Additionally, the Commission is modifying paragraph (c) of Section 4.7 of Article IV, to require that the "other persons as deemed appropriate by the SRO Voting Representatives" to attend meetings of the legal subcommittee will be determined collectively "by majority vote of the SRO Voting Representatives." The Commission

⁴⁸⁹ See *supra* Section II.C.5(d)(iii).

⁴⁹⁰ See Governance Order, *supra* note 8, 85 FR at 28714–20.

⁴⁸⁵ See Refinitiv Letter, *supra* note 249, at 3.

finds that this modification is appropriate because it is designed ensure that any vote taken pursuant to Section 4.7(c) will be taken in a manner consistent with the allocation of voting power by SRO Group, as set forth in Section 4.3(a)(i) of the CT Plan.

For the reasons discussed above, the Commission is approving Section 4.7(c) of the CT Plan as modified.

(iv) Transparency of Subcommittee Meetings

One commenter expresses concern that the work of subcommittees under the CT Plan lacks transparency and accountability.⁴⁹¹ To address these failings, this commenter recommends that all subcommittees should: “(1) have a clearly identified purpose; (2) balanced participation among all Voting Representatives; (3) Chairs drawn from all Operating Committee members; (4) be required to keep minutes and distribute those minutes to the Operating Committee; and (5) be time- and product-limited.”⁴⁹²

The Commission believes that the activities of the CT Plan’s Operating Committee’s subcommittees, if any, should be transparent to the Operating Committee. Transparency should help to ensure that the subcommittee meetings, including the legal subcommittee meetings, further the objectives of the CT Plan, as discussed in the Commission’s Governance Order,⁴⁹³ particularly with respect to the full participation of Non-SRO Voting Representatives in the operation of the CT Plan. The Commission therefore is modifying the CT Plan, by adding new paragraph (d) to Section 4.7, to require that all subcommittees prepare minutes of all meetings and make those minutes available to all members of the Operating Committee.⁴⁹⁴ In addition, for each meeting of a legal subcommittee, discussed above, the Commission is modifying the CT Plan by including language in new paragraph (d) to Section 4.7 to require that the minutes include (i) attendance at the meeting; (ii) the subject matter of each item discussed; (iii) sufficient non-privileged information to identify the rationale for referring the matter to the legal

subcommittee, (iv) the privilege or privileges claimed with respect to that item; and (v) for each matter, if applicable, sufficient non-privileged information to identify the basis on which the matter was determined to exclusively affect the SROs. The Commission finds that modifying Section 4.7 to add new paragraph (d) is appropriate because these elements of information—similar to those required for privilege logs, with respect to legal subcommittee meetings—will provide for transparency and accountability, particularly regarding the use of the legal subcommittee, while preserving the attorney-client privilege with respect to discussions at legal subcommittee meetings. For the reasons discussed above, the Commission is approving new Section 4.7(d) of the CT Plan.

(h) Officers

Section 4.8 of Article IV of the CT Plan governs the selection of CT Plan Officers by the SROs, with such authority and duties as the SROs may delegate to them. Paragraph (a) of Section 4.8 provides that, other than the Chair and the Secretary, the SROs may, from time to time, designate and appoint one or more persons as Officers of the LLC by a majority vote of the SROs. This provision further provides the SROs with sole discretion by majority vote to assign titles, determine compensation, if any, and revoke the delegation of authority at any time.

In the Notice, the Commission sought comment on, among other things, whether it is appropriate for decisions about Officers and their attendant duties to be made solely by the SROs.⁴⁹⁵ The Commission received several comments on this issue. Some commenters criticize the proposed provision that grants the power to select Officers solely to the SROs,⁴⁹⁶ and one of these commenters argues that the selection (including appointment and removal) of Officers should be subject to an augmented majority vote.⁴⁹⁷

One commenter states that the “selection of Officers of the plan is one of the most important functions of the Participants, and it is vital that Non-SRO representatives have a voice in this critical and material decision.”⁴⁹⁸ This commenter further states that “permitting only the SROs to control the appointment of Officers would be

inconsistent with the CT Plan’s objective of providing a meaningful role to Non-SROs in the governance of the collection, processing, and dissemination of equity market data.”⁴⁹⁹ Another commenter states that the absence of SRO duties and obligations in the CT Plan is particularly problematic in light of the significant control the SROs would retain over control of the Company and the CT Plan, including the ability to select Officers.⁵⁰⁰

One commenter counters that matters relating to Officers would have no bearing on the governance of the CT Plan or the collection, processing, and dissemination of equity market data.⁵⁰¹ This commenter states, instead, that these matters pertain solely to the LLC form and structure and, because only the SROs are Members of the LLC, only the SROs can vote on such matters.⁵⁰² Another commenter argues that the power to appoint and remove persons as Officers of the CT Plan, delegate duties to such persons, and approve salary or other compensation for such persons belongs solely to the SROs.⁵⁰³

The Commission disagrees that decisions regarding the selection, appointment, and removal of Officers of the CT Plan, as well as Officers’ authority, duties, and compensation, have no bearing on the governance or operation of the CT Plan. The SROs have proposed to structure the new NMS plan for consolidated equity market data as an LLC and to conduct all operations of that NMS plan directly through or under the auspices of that LLC. Thus, particularly depending on the nature, breadth, and scope of authority and duties assigned to the Officers of the LLC, those Officers could be, and would likely be, directly involved in the fulfillment by the SROs of their duties with respect to consolidated market data through the operation of the CT Plan. In addition, the SROs do not identify any LLC-specific functions for which an Officer might be selected that do not relate to the operation of the CT Plan and there is nothing in the CT Plan, as proposed by the SROs, that expressly limits the functions of any Officers selected to “organizational aspects of the LLC’s existence.”⁵⁰⁴ The SROs’ unilateral decision to propose the CT Plan in the form of an LLC Agreement of which the SROs alone are members does not in

⁴⁹¹ See RBC Letter, *supra* note 30, at 8.

⁴⁹² *Id.*

⁴⁹³ See Governance Order, *supra* note 8, 85 FR at 28714–20.

⁴⁹⁴ Separately, Section 4.9 of the proposed CT Plan provides that nothing in the LLC Agreement shall limit or impede the rights of the Commission to access information of the Company or any of the Members pursuant to the federal securities laws and, as discussed below, the Commission is modifying Section 4.9 to provide that the Commission shall have access to all information “and records.” See *infra* Section ILC.5(i).

⁴⁹⁵ See Notice, *supra* note 3, 85 FR at 64570 (Question 28).

⁴⁹⁶ See Virtu Letter, *supra* note 30, at 6; MFA Letter, *supra* note 30, at 2; Data Boiler Letter I, *supra* note 31, at 26.

⁴⁹⁷ See Virtu Letter, *supra* note 30, at 5.

⁴⁹⁸ *Id.* at 6.

⁴⁹⁹ *Id.* at 5.

⁵⁰⁰ See MFA Letter, *supra* note 30, at 2.

⁵⁰¹ See NYSE Letter I, *supra* note 18, at 36.

⁵⁰² See *id.*

⁵⁰³ See Nasdaq Letter I, *supra* note 20, at 11–12.

⁵⁰⁴ *Id.* at 10.

any way justify reserving to the SROs alone the ability to direct operations of the CT Plan by selecting the Officers of the CT Plan. Such a structure would significantly undermine the Commission's objective to broaden participation in the plan governance, with Non-SRO Voting Representatives serving as full members of the Operating Committee, as set forth in the Commission's Governance Order.⁵⁰⁵ In addition, the provision of decision making authority in Section 4.8 based on the vote of the majority of Members, rather than on the vote of the majority of SRO Voting Representatives, is inconsistent with the voting structure reflected in the Commission's Governance Order, which allocates voting rights by SRO Group, rather than by exchange license.⁵⁰⁶

Consequently, the Commission believes that it is imperative that it be the Operating Committee by augmented majority vote, and not solely the SRO Members by majority vote, that decides on the creation and assignment of any officer positions and duties under the CT Plan. Accordingly, the Commission is modifying Section 4.8 of the CT Plan⁵⁰⁷ to require that the designation, appointment, delegation of authority and duties, and removal of Officers, and the revocation of any officer positions and duties, be subject to a vote of the Operating Committee. As discussed in the Governance Order, the voting scheme directed by the Commission, while it grants votes to Non-SRO Voting Representatives, nonetheless preserves for the SROs sufficient voting power at all times to act jointly on behalf of the CT Plan, which would include the selection of Officers of the CT Plan.⁵⁰⁸

The Commission therefore finds that modification of Section 4.8 of the CT Plan is appropriate because it should help to ensure meaningful participation in the governance of the CT Plan by Non-SRO Voting Representatives, including with respect to the selection of Officers who may be tasked to implement significant decisions of the Operating Committee. For the reasons

⁵⁰⁵ See Governance Order, *supra* note 8, 85 FR at 28714–20.

⁵⁰⁶ See *id.* at 28716.

⁵⁰⁷ The Commission is also modifying Section 4.8 to substitute the phrase, "Except as provided for in Section 4.4(e)" for the language, "In addition to the Chair and Secretary," that was proposed by the SROs. This modification is intended to make clear that the annual election of the Chair (from among the SRO Voting Representatives) and the selection of the Secretary (by the Chair) as set forth in Section 4.4(e) would not be affected by the Commission's modifications to Section 4.8.

⁵⁰⁸ See Governance Order, *supra* note 8, 85 FR at 28716.

discussed above, the Commission is approving Section 4.8, as modified.

(i) Commission Access to Information and Records

Section 4.9 of Article IV of the CT Plan, as proposed, provides that the CT Plan "shall not be interpreted to limit or impede the rights of the Commission to access information of the Company or any of the Members (including their employees) pursuant to U.S. federal securities laws and the rules and regulations promulgated thereunder." The Commission received no comment on this provision. Because the term "information" is not defined in the CT Plan, the Commission is modifying Section 4.9 of Article IV of the CT Plan to add the phrase, "and records," to state explicitly that this Agreement does not in any manner limit the Commission's existing rights under the federal statutes, regulations, and rules to access such records. Accordingly, the Commission finds that this modification to Section 4.9 of the CT Plan is appropriate because it is consistent with the Commission's statutory authority for oversight of the governance and operation of the CT Plan. For the reasons discussed above, the Commission is approving Section 4.9 of the CT Plan, as modified.

(j) Disclosure of Potential Conflicts of Interest; Recusal

(i) General Provisions

Article IV, Section 4.10 of the CT Plan sets forth the disclosure requirements with respect to conflicts of interest, and the provisions for recusal, as approved by the Commission.⁵⁰⁹ Specifically, Section 4.10(a) provides that the Members, the Processors, the Administrator, the Non-SRO Voting Representatives, and each service provider or subcontractor (each a "Disclosing Party") engaged in Company business that has access to Restricted or Highly Confidential Information, as defined in the Plan,⁵¹⁰ shall be subject to the disclosure requirements as described in Section 4.10(c) and Exhibit B to the Plan. Exhibit B to the CT Plan provides a list of questions and instructions tailored to elicit responses that disclose potential conflicts of interest. Section 4.10(a) also

⁵⁰⁹ See Securities Exchange Act Release Nos. 88823 (May 6, 2020), 85 FR 28046 (May 12, 2020); 88824 (May 6, 2020), 85 FR 28119 (May 12, 2020) (collectively, the "Conflicts of Interest Approval Orders"). In the Governance Order, the Commission ordered the SROs to incorporate into the CT Plan provisions consistent with the Conflicts of Interest Approval Orders. See Governance Order, *supra* note 8, 85 FR at 28726.

⁵¹⁰ See *infra* Section II.C.5(k).

states that the Operating Committee, a Member, Processors, or Administrator may not use a service provider or subcontractor unless that service provider or subcontractor has agreed in writing to provide the disclosures. Section 4.10(a)(i) states that a conflict of interest may exist when personal, business, financial, or employment relationships could be perceived by a reasonable, objective observer to affect the ability of a person to be impartial.⁵¹¹ Section 4.10(a)(ii) requires that the disclosures be updated following a material change in information and that a Disclosing Party update annually any inaccurate information prior to the first quarterly meeting. Section 4.10(a)(iii) requires that the Disclosing Parties provide the Administrator with their disclosures and any required updates and that the Administrator will ensure that the disclosures are posted to the Company's website. Finally, Section 4.10(a)(iv) requires that the Company arrange for Disclosing Parties that are not Members or Non-SRO Voting Representatives to comply with the required disclosures and recusal pursuant to Section 4.10 and Exhibit B of the CT Plan.⁵¹²

The Commission received a number of comment letters addressing the conflicts of interest policy in general.⁵¹³ Most commenters support including conflicts of interest provisions. Specifically, one commenter states that the CT Plan should require the Operating Committee to adopt detailed policies and procedures articulating, among other things, specific circumstances where it is appropriate for the Plan to deal with or employ an SRO affiliated entity, disclosure requirements, and a process mandating recusal of an individual SRO in circumstances where there is a potential conflict of interest.⁵¹⁴ This commenter argues that the policies should also apply to transactions with Non-SRO Voting Representatives or any of their affiliates.⁵¹⁵ Another commenter states that a conflicts of interest policy must

⁵¹¹ See Article IV, Section 4.10(a) of the CT Plan.

⁵¹² See Article IV, Section 4.10 of the CT Plan.

⁵¹³ See Choe Letter, *supra* note 17; BlackRock Letter I, *supra* note 247; RBC Letter, *supra* note 30; Virtu Letter, *supra* note 30; Fidelity Letter, *supra* note 30; Nasdaq Letter I, *supra* note 20; Data Boiler Letter I, *supra* note 31; ICI Letter I, *supra* note 31; FINRA Letter I, *supra* note 30; SIFMA Letter I, *supra* note 30; NYSE Letter I, *supra* note 18; BMO Letter, *supra* note 30; MFA Letter, *supra* note 30; NYSE Letter II, *supra* note 19; ICI Letter II, *supra* note 31; Schwab Letter II, *supra* note 30; SIFMA Letter II, *supra* note 30; Letter from Patrick Flannery, Chief Executive Officer and Co-Founder, MayStreet (Feb. 19, 2021) ("MayStreet Letter"); BMO Letter II, *supra* note 30.

⁵¹⁴ See Virtu Letter, *supra* note 30, at 6.

⁵¹⁵ See *id.*

be rigorous enough to ensure that SROs take actionable steps to mitigate such conflicts.⁵¹⁶ The commenter also contends that the policy cannot be based solely on disclosure and recommends additional steps, such as recusal and explicit prohibition of certain action and certain persons.⁵¹⁷ Another commenter agrees, stating that the proposed disclosures are not sufficiently transparent and that self-disclosure to mitigate conflicts would not be effective.⁵¹⁸

In contrast, several commenters oppose including the conflicts of interest policy in the CT Plan.⁵¹⁹ The commenters argue that the conflicts of interest policy is inconsistent with Section 11A of the Act and Rule 608.⁵²⁰ Specifically, one commenter states that the proposed policy would preclude the SROs from fulfilling their obligations under securities laws, in particular Rule 608, and is inconsistent with Rule 608(b)(2), and that therefore the CT Plan cannot be approved by the Commission.⁵²¹ Another commenter requests that, if the Commission approves the CT Plan, it exclude the conflicts of interest policy from the Plan. Alternatively, the commenter suggests that the Commission publish the exact text of its intended amendments and seek comment before issuing any approval.⁵²²

One commenter argues that the policies, as amended by the Commission, are vague and onerous and impede the ability of the Operating Committee to conduct its business.⁵²³ In support of its concern, the commenter states that “representatives for the current equity data plans have been engaged in ongoing discussions with Commission staff for six months to establish how the policies applicable to those plans should be interpreted.”⁵²⁴ Another commenter states that the required disclosures of the SRO Voting Representative, Processors, and the Administrator under the conflicts of interest policy would impose

substantial costs without any benefit, as those parties do not have any regulatory obligations under the Act, and that, as the Processors and Administrator are agents of the CT Plan, they are obligated contractually and not under the Plan.⁵²⁵ The commenter further states that required disclosures of service providers and subcontractors would also impose onerous and burdensome requirements, while providing few, if any, benefits. In particular, the commenter claims that the service providers and subcontractors that would have access to Restricted or Highly Confidential Information would likely be accounting or legal firms, both of which have no role or responsibilities in the governance of the CT Plan.⁵²⁶

The Commission agrees with the comments that support a robust conflicts of interest and recusal policy in the CT Plan. As the Commission stated in the Conflicts of Interest Approval Orders, detailed, clear, and meaningful disclosures that provide insight into otherwise non-transparent structures and operations can raise awareness of potential conflicts of interest inherent in the current equity market data structure, and increased access to information can facilitate public confidence in Plan operations.⁵²⁷ The Commission continues to believe that full disclosure of all material facts necessary for market participants and the public to understand the conflicts of interest is one important approach to dealing with those conflicts.

In response to commenters’ objections to the conflicts of interest policy, the Commission continues to believe, as it stated in the Conflicts of Interest Approval Orders, that because Administrators and Processors will have access to highly sensitive and commercially valuable non-public information that would be of substantial value to a Member’s proprietary data business, it is appropriate to provide insight into some of the key potential conflicts of interest faced by the parties engaged in Plan business.⁵²⁸ Similarly, the Commission has also stated that service providers and subcontractors can be affiliated with a Member that offers proprietary data products and connectivity services and that, because they may have access to competitively

sensitive and commercially valuable Plan-related information, the potential for competitive harm exists if they share such information with the Member or its affiliates. Thus, the Commission continues to find that it is appropriate to include service providers and subcontractors within the conflicts of interest policies, as they would be under the direction of a Member, engaged in Plan business, and have access to Restricted or Highly Confidential Information.⁵²⁹

Further, the Commission disagrees with commenters’ assertions that the proposed conflicts of interest policy is inconsistent with Section 11A of the Act and Rule 608. Section 11A of the Act directs the Commission to facilitate the establishment of a national market system for trading in securities,⁵³⁰ under which consolidated data about quotations for and transactions in securities is collected and disseminated by the Equity Data Plans governed and operated by the SROs. As the Commission stated in the Governance Order, the demutualization of exchanges and the proliferation of proprietary exchange data products have heightened the conflicts between the SROs’ business interests in proprietary data offerings and their obligations as SROs under the national market system to ensure the prompt, accurate, reliable, and fair dissemination of core data through the jointly administered Equity Data Plans.⁵³¹ In requiring that the CT Plan include the particular disclosure provisions identified in the Governance Order,⁵³² the Commission reasonably exercised its authority under Section 11A to address the conflicts inherent in the dual responsibilities exchange representatives have with respect to proprietary data products and consolidated equity data products. Furthermore, the Commission reasonably required additional disclosure of the relevant conflicts of interest, as well as safeguards to mitigate the possibility that a Member’s proprietary data business could benefit from commercially valuable data obtained by its SRO Voting Representative or other employees that have responsibilities to the Plan.

Additionally, with respect to Rule 608, that rule provides that the Commission shall approve a proposed plan or plan amendment, “with such changes or subject to such conditions as

⁵¹⁶ See BMO Letter II, *supra* note 30, at 2.

⁵¹⁷ See BMO Letter I, *supra* note 30, at 3.

⁵¹⁸ See Data Boiler Letter I, *supra* note 31, at 5, 49.

⁵¹⁹ See Cboe Letter, *supra* note 17; NYSE Letter I, *supra* note 18; Nasdaq Letter I, *supra* note 20.

⁵²⁰ See NYSE Letter I, *supra* note 18, at 12, 15; NYSE Letter II, *supra* note 19, at 4; Nasdaq Letter I, *supra* note 20, at 1–2; Cboe Letter, *supra* note 17, at 2–4.

⁵²¹ See NYSE Letter I, *supra* note 18, at 15, 20.

⁵²² See Nasdaq Letter I, *supra* note 20, at 2–3, 7, 13.

⁵²³ See Cboe Letter, *supra* note 17, at 6–7. See also Nasdaq Letter I, *supra* note 20, at 6–7 (stating that the policy is unclear whether certain SRO employees are barred from attending meetings).

⁵²⁴ Cboe Letter, *supra* note 17, at 7.

⁵²⁵ See NYSE Letter I, *supra* note 18, at 30.

⁵²⁶ See *id.* at 30–32.

⁵²⁷ See Conflicts of Interest Approval Orders, *supra* note 509, 85 FR at 28120 and 85 FR at 28047 (agreeing with the Members that potential conflicts of interest are inherent in the current market data governance structure where exchanges can offer proprietary market data products while they also act as Members in running the public market data stream).

⁵²⁸ See Conflicts of Interest Approval Orders, *supra* note 509, 85 FR at 28126 and 85 FR at 28053.

⁵²⁹ See Conflicts of Interest Approval Orders, *supra* note 509, 85 FR at 28121 and 85 FR at 28048.

⁵³⁰ See 15 U.S.C. 78k-1(a)(1).

⁵³¹ See Governance Order, *supra* note 8, 85 FR at 28704.

⁵³² See *id.* at 28726.

the Commission may deem necessary or appropriate.”⁵³³ The Commission provided a notice and comment period with respect to the proposed CT Plan and has acted within its discretion in determining that certain modifications are appropriate after considering comments received in response to the Notice. Further, the Commission does not believe that the conflict of interest policies are vague or onerous. Consistent with its findings in the Conflicts of Interest Approval Orders,⁵³⁴ the Commission concludes that the conflicts of interest policy of the CT Plan, as modified, would facilitate detailed, clear, and meaningful disclosures that would provide insight into otherwise non-transparent structures and operations of the Plan.

Finally, certain commenters argue that the Conflicts of Interest Approval Orders constituted impermissible rulemaking that required notice and comment because the Commission made substantial and material changes to the conflicts of interest policies proposed by the SROs for the Equity Data Plans,⁵³⁵ and that therefore the conflicts of interest policy should not be included in the CT Plan. The Commission disagrees with the assertion that the separate Conflicts of Interest Approval Orders constituted impermissible rulemaking, and the Commission responded to these objections both in the Conflicts of Interest Approval Orders and in subsequent litigation. In any event, those procedural objections have no bearing on the adequacy of the procedure resulting in this Order. The Governance Order required the SROs to include in the CT Plan provisions consistent with the Conflicts of Interest Approval Orders,⁵³⁶ and the public has had the opportunity to consider and comment on the provisions proposed for the CT Plan on multiple occasions. The provisions were published in the Conflicts of Interest Approval Orders, and the Governance Order issued the

same day required that similar provisions be included in the New Consolidated Data Plan.⁵³⁷ Additionally, the CT Plan, including the proposed conflicts of interest policy was published for comment,⁵³⁸ providing interested persons with a further opportunity to consider the proposed language of the conflicts of interest policy and to express their views. Furthermore, the Order Instituting Proceedings provided yet another opportunity to comment on the relevant provisions of the proposed CT Plan.⁵³⁹

(ii) Applicability to Member Observers

In the Notice, the Commission solicited comment on whether the same disclosure requirements and recusal provisions that apply to Members and other identified persons would sufficiently mitigate any conflicts of interest faced by Member Observers, and if not, what additional disclosures or recusal provisions commenters believe would be appropriate.⁵⁴⁰

In response, several commenters support extending the policies to include Member Observers.⁵⁴¹ Specifically, these commenters recommend that all observers be subject to the conflicts of interest policy and procedures of the CT Plan.⁵⁴² In contrast, one commenter objects to the application of the conflicts of interest policy to Member Observers, stating that most Member Observers are employees of the Member charged with that Member’s compliance obligations under Rule 608(c), and as such are already included in the disclosures of the Member.⁵⁴³ The commenter further argues that the identity and affiliation of a Member Observer would be disclosed in meeting minutes and that reasonable questions regarding the Member Observer’s affiliation could be addressed at the Operating Committee meeting.⁵⁴⁴

After considering the comments received, the Commission believes that the provisions regarding disclosures of potential conflicts of interest and recusal should be modified to apply to all Member Observers. Specifically, because Member Observers, under the definition modified by the Commission,

will be an employee of a Member or any attorney to a Member,⁵⁴⁵ the Commission believes that the potential conflicts of interests that apply to the Member would equally apply to the Member Observer. The Commission does not agree with the assertion that all relevant information regarding a Member Observer would necessarily be included in the disclosures as the proposed Member disclosures require only the names of the Voting Representative and any alternate Voting Representative designated by the Member. As required in Exhibit B, a Member is also required to provide the name of each designated individual and a narrative description of each such persons’ role within the Member organization, and the Commission believes that these disclosures should include Member Observers. Additionally, because Member Observers are by definition permitted to attend Operating Committee meetings, subcommittee meetings, and Executive Sessions,⁵⁴⁶ they may have access to competitively sensitive and commercially valuable information related to the CT Plan.

The Commission believes that Member Observers should also be subject to Section 4.10, the disclosures pursuant to Exhibit B, and the recusal requirements of the conflicts of interest policy. Specifically, the Commission finds that it is appropriate to modify Section 4.10(a) of the CT Plan to expressly require that all Member Observers be included in the Members’ disclosures because Member Observers may face conflicts of interest similar to those faced by SRO Voting Representatives. The Commission is also making a corresponding modification to Exhibit B of the CT Plan to expressly include Member Observers. The Commission finds that these modifications are appropriate because a Member Observer can have his or her own conflicts of interest, and consequently, a Member should also be required to respond to questions regarding whether its Member Observers have additional relationships or material economic interests that could be perceived by a reasonable objective observer to present a potential conflict of interest with their responsibilities to the Company and to provide a detailed narrative discussion of all material facts necessary to identify the potential conflicts of interest and the effects they may have on the CT Plan. Additionally, because the Commission is requiring

⁵⁴⁵ See *supra* Section II.C.5(d)(i).

⁵⁴⁶ See Article I, Sections 1.1(z) & 1.1(oo) of the CT Plan.

⁵³³ 17 CFR 242.608(b)(2).

⁵³⁴ See Conflicts of Interest Approval Orders, *supra* note 509, 85 FR at 28120 and 85 FR at 28047.

⁵³⁵ See Choe Letter, *supra* note 17, at 6–7; Nasdaq Letter I, *supra* note 20, at 28–29 (stating that the policies are unlawful and that the proposed Plan would perpetuate the arbitrary and capricious rulemaking undertaken by the Commission when it failed to provide notice or seek comment on its own modifications to the policy language proposed by the Equity Data Plans); NYSE Letter I, *supra* note 18, at 14 (stating that both policies are subject to pending litigation and that it would be inappropriate to mandate continued effectiveness following a judicial determination that they are contrary to law). These commenters also undertook a legal challenge to the Conflicts of Interest Approval Orders.

⁵³⁶ See Governance Order, *supra* note 8, 85 FR at 28726.

⁵³⁷ See *id.*

⁵³⁸ See Notice, *supra* note 3, 85 FR at 64583–84.

⁵³⁹ See Order Instituting Proceedings, *supra* note 5.

⁵⁴⁰ See Notice, *supra* note 3, 85 FR at 64570–71.

⁵⁴¹ See RBC Letter, *supra* note 30; ICI Letter I, *supra* note 31; Fidelity Letter, *supra* note 30.

⁵⁴² See RBC Letter, *supra* note 30, at 8–9; ICI Letter I, *supra* note 31, at 5; Fidelity Letter, *supra* note 30, at 5.

⁵⁴³ See Nasdaq Letter I, *supra* note 20, at 27.

⁵⁴⁴ See *id.*

that Member Observers be included in a Member's conflicts disclosures, and because the Member disclosures as proposed would have required the name and narrative description of only the Voting Representative and alternate SRO Voting Representative, the Commission finds that it is appropriate to modify Exhibit B (a)(iii) to replace references to "representatives" with "persons" to account for the new category of Member Observer, in addition to the Voting Representative and alternate SRO Voting Representative.

(iii) Recusals

Article IV, Section 4.10(b) of the CT Plan discusses recusals and expressly prohibits a Member from appointing as its Voting Representative a person that is responsible for or involved with procurement for, or development, modeling, pricing, licensing, or sale of, PDP offered to customers of the CT Feeds, if the person has a financial interest (including compensation) that is tied directly to the Disclosing Party's market data business or the procurement of market data, and if that compensation would cause a reasonable objective observer to expect the compensation to affect the impartiality of the representative.⁵⁴⁷ Section 4.10(b)(ii) further requires recusal of a Disclosing Party from participating in Company activities if the individual has not submitted the required disclosure,⁵⁴⁸ and Section 4.10(b)(iii) states that a Disclosing Party, including its representatives(s), and its Affiliates and their representatives(s), is recused from voting on matters in which it or its Affiliate is seeking a position or contract with the Company or has a position or contract with the Company and whose performance is being evaluated.⁵⁴⁹ The subsection also states that all recusals will be reflected in the meeting minutes.⁵⁵⁰

The Commission received several comments regarding the recusal provisions. One commenter expresses the view that the CT Plan as proposed is unclear regarding whether individuals that work on the proprietary operations of an SRO would be required to be recused from acting as a Member Observer. The commenter suggests that there be a clear approach to Member Observers that limits those individuals eligible for appointment to persons who

are not involved in the management, marketing, sale or development of proprietary equity data products at the SRO.⁵⁵¹ Several commenters made similar statements, recommending that persons who hold positions with an SRO, particularly those who are responsible for equity data products offered separately by the SRO, or who receive compensation tied to the sale of proprietary market data, should be prohibited from serving as a Member Observer, which in turn would help to address potential conflicts of interest.⁵⁵² In support of this recommendation, one commenter believes that, because Member Observers are permitted to attend Executive Sessions and receive highly confidential information, an individual responsible for the sale of proprietary market data would face an inherent conflict of interest.⁵⁵³

In contrast, one commenter argues that the recusal provisions of the conflicts of interest policy would impair the SROs' abilities to choose how to manage their businesses and fulfill their regulatory responsibilities.⁵⁵⁴ The commenter is particularly concerned with the standard of "impartiality" regarding appointment of a potential Voting Representative, stating that the Commission does not define impartiality in this context and assumes that the SRO is only appropriately impartial when there is a total separation between its involvement in an NMS plan and its proprietary data activities.⁵⁵⁵ The commenter further argues that there is no requirement under Section 11A of the Act or Rule 608 for an SRO to be impartial when discharging its obligations to act jointly in the planning, development, operation, and regulations of an NMS plan.⁵⁵⁶

The Commission continues to believe that, while it is an SRO rather than an individual SRO employee that has obligations to the CT Plan, to the extent an exchange that offers proprietary equity market data products appoints as its representative to the CT Plan an individual responsible for the sale of proprietary market data, that person has an inherent conflict of interest arising from his or her financial interest in the

exchange's proprietary data business.⁵⁵⁷ The Commission believes that such an individual's financial interest in the exchange's proprietary data businesses, as well as the exchange's own commercial interest, could influence the individual's and the exchange's decision-making regarding the CT Plan's operations. As the Commission has previously stated, in light of this conflict, even if such individuals have the requisite expertise, the Commission believes that it is appropriate to prohibit a Member from appointing such an individual as its SRO Voting Representative to the CT Plan.⁵⁵⁸

Separately, as discussed above,⁵⁵⁹ the Commission believes that certain discussions under the CT Plan may include Member Observers. The Commission believes that because Member Observers may attend CT Plan meetings and potentially receive and assess Highly Confidential Information, a Member Observer who is responsible for and has a financial interest (including compensation) in an exchange's proprietary market data products has an inherent conflict of interest. Thus, the Commission believes that Member Observers should be subject to the same restriction as SRO Voting Representatives and is therefore modifying the text of Section 4.10(b)(i) of the CT Plan to include any Members Observer, as well as any alternate SRO Voting Representative.⁵⁶⁰ The Commission finds that this modification is appropriate because it will prohibit a Member from appointing to either role a person that is responsible for or involved with the procurement for, or development, modeling, pricing, licensing, or sale of, PDP offered to customers of the CT Feeds if the person has a financial interest (including compensation) that is tied directly to the Member's market data business or the procurement of market data, and if that compensation would cause a reasonable

⁵⁵⁷ See Conflicts of Interest Approval Orders, *supra* note 509, 85 FR at 28128 and 85 FR at 28054.

⁵⁵⁸ See Conflicts of Interest Approval Orders, *supra* note 509, 85 FR at 28128 and 85 FR at 28055.

⁵⁵⁹ See *supra* Section II.C.5(d)(i).

⁵⁶⁰ Pursuant to Article IV, Section 4.10(b) of the CT Plan, a Member is prohibited from appointing as its Voting Representative a person that is responsible for or involved with the procurement for, or development, modeling, pricing, licensing, or sale of, PDP offered to customers of the CT Feeds if the person has a financial interest (including compensation) that is tied directing to the Member's market data business or the procurement of market data and if that compensation would cause a reasonable objective observer to expect the compensation to affect the impartiality of the representative. Accordingly, the Commission is specifying that a Member would similarly be prohibited from appointing such a person as an alternate Voting Representative.

⁵⁵¹ See SIFMA Letter I, *supra* note 30, at 4; SIFMA Letter II, *supra* note 30, at 2.

⁵⁵² See BMO Letter, *supra* note 30, at 4; ICI Letter I, *supra* note 31, at 5; ICI Letter II, *supra* note 31, at 2; Fidelity Letter, *supra* note 30, at 5; FINRA Letter I, *supra* note 257, at 5; BlackRock Letter I, *supra* note 247, at 4-5.

⁵⁵³ See BlackRock Letter I, *supra* note 247, at 4-5.

⁵⁵⁴ See NYSE Letter I, *supra* note 18, at 18.

⁵⁵⁵ See *id.*

⁵⁵⁶ See *id.* at 19.

⁵⁴⁷ See Article IV, Section 4.10(b) of the CT Plan.

⁵⁴⁸ See Article IV, Section 4.10(b)(ii) of the CT Plan.

⁵⁴⁹ See Article IV, Section 4.10(b)(iii) of the CT Plan.

⁵⁵⁰ See Article IV, Section 4.10(b)(iv) of the CT Plan.

objective observer to expect the compensation to affect the impartiality of the representative.

Separately, in the Notice, the Commission asked whether the disclosure requirements under Section 4.10 and Exhibit B would elicit sufficient relevant information to mitigate conflicts of interest that may result from Members engaging in certain business activities outside of the business activities of the CT Plan as provided for in Section 4.6.⁵⁶¹ Although the Commission received comment letters acknowledging that the disclosure requirements may elicit relevant information to identify and mitigate potential conflicts of interest, one commenter recommends that an SRO Voting Representative be recused from voting on matters relating to opportunities, relationships, or investments when the interests of the Member employing the voting representative conflicts with the interests of the CT Plan.⁵⁶² This Order addresses these comments in Section II.C.5(f) above, regarding Company Opportunities.⁵⁶³

(iv) Effect of Pending Petitions for Review

Finally, the Commission also solicited comment on Section 4.10(d) of the CT Plan, which provides that if the Commission's Conflicts of Interest Approval Orders are stayed or overturned by a court, the requirements of Section 4.10 and Exhibit B shall not apply.⁵⁶⁴ The Commission sought commenters' views on whether such a provision is necessary or appropriate for the CT Plan and whether the CT Plan should, at a minimum, contain provisions for addressing conflicts of interests that are not subject to elimination, or provisions specifying that the CT Plan must be amended to include a new policy with respect to conflicts of interest before the existing policy can be removed.⁵⁶⁵ One commenter supports retaining the current provisions of Section 4.10 in the event that the Conflicts of Interest Approval Orders are stayed or overturned so that conflicts remain disclosed.⁵⁶⁶

As the Commission previously stated in the Conflicts of Interest Approval Orders, the Commission believes that by

requiring full disclosure of all material facts necessary to identify the nature of a potential conflict of interest and the effect it may have on Plan action, all parties, including the Commission and the public, will be better positioned to evaluate competing interests among any of the parties involved in governing, operating, and overseeing the CT Plan, as those competing interests could materially affect their ability to carry out the purposes of the Plan.⁵⁶⁷

The Commission is modifying Section 4.10 to remove subsection (d), which provides that if the Commission's Conflicts of Interest Approval Orders are stayed or overturned, the requirements of Section 4.10 and Exhibit B would not be applicable. The Commission finds that it is appropriate to remove this provision from the CT Plan. The U.S. Court of Appeals for the D.C. Circuit has dismissed the petitions for review of the Conflicts of Interest Approval Orders that were pending when the SROs filed the proposed CT Plan.⁵⁶⁸ Moreover, even if a court were to vacate the Conflicts of Interest Approval Orders, the CT Plan would be able to file an amendment with the Commission to align the policy with the court's decision, and the Commission could, on its own initiative, propose an amendment as well.

For the reasons discussed above, the Commission is approving Article IV, Section 4.10 of the CT Plan and Exhibit B, as modified.

(k) Confidentiality Policy

(i) General Provisions

Article IV, Section 4.11 of the CT Plan sets forth the proposed confidentiality policy.⁵⁶⁹ As proposed, Section 4.11(a) provides that the Members and Non-SRO Voting Representatives are subject to the policy as set forth in Exhibit C to the Plan (the "Confidentiality Policy"). The provision further states that the Company will arrange for Covered Persons that are neither Members nor Non-SRO Voting Representatives to comply with the Confidentiality Policy under their respective agreements with the Company, a Member, the

Administrator, or the Processors. Section 4.11(b) states that if the Commission's Confidentiality Policy Approval Orders are stayed or overturned by a court, the requirements of Section 4.11 and related Confidentiality Policy in Exhibit C shall not apply.⁵⁷⁰

For the reasons discussed below, the Commission is modifying the CT Plan to delete Section 4.11(b) from the CT Plan,⁵⁷¹ and the Commission is therefore renumbering Section 4.11(a) of the CT Plan as Section 4.11. As discussed below, the requirements of the Confidentiality Policy apply to all Covered Persons. For consistency with Exhibit C, the Commission finds that it is appropriate to modify the first sentence of renumbered Section 4.11 to replace the phrase "The Members and Non-SRO Voting Representatives" with the phrase "All Covered Persons." Additionally, because the defined term Covered Persons, as modified by the Commission⁵⁷² will include Member Observers, the Commission finds that it is appropriate to modify the second sentence of renumbered Section 4.11 to replace the term "Members" with the phrase "SRO Voting Representatives and Member Observers." As modified, Section 4.11 of the CT Plan will state that the Company "will arrange for Covered Persons that are not SRO Voting Representatives, Member Observers, or Non-SRO Voting Representatives to comply with the Confidentiality Policy under their respective agreements with either the Company, a Member, the Administrator, or the Processors."

Separately, Exhibit C to the CT Plan⁵⁷³ describes the purpose and scope of the Confidentiality Policy, the procedures regarding the custodian and designations of all documents, and the procedures concerning Restricted Information,⁵⁷⁴ Highly Confidential Information,⁵⁷⁵ and Confidential

⁵⁷⁰ See Article IV, Section 4.11(b) of the CT Plan.

⁵⁷¹ See *infra* Section II.C.5(k)(iv) (discussing the effect of pending petitions for review).

⁵⁷² See *infra* Section II.C.5(k)(iii) (discussing the defined term Covered Persons).

⁵⁷³ See Exhibit C to the CT Plan.

⁵⁷⁴ Article I, Section 1.1(mmm) of the CT Plan defines Restricted Information as highly sensitive customer-specific financial information, customer-specific audit information, other customer financial information, and personal identifiable information.

⁵⁷⁵ Article I, Section 1.1(ii) of the CT Plan defines Highly Confidential Information as highly sensitive Member-specific, customer-specific, individual-specific, or otherwise sensitive information relating to the Operating Committee, Members, Vendors, Subscribers, or customers that is not otherwise Restricted Information. Highly Confidential Information includes: the Company's contract negotiations with the Processors or Administrator; personnel matters; information concerning the

⁵⁶¹ See Notice, *supra* note 3, 85 FR at 64571.

⁵⁶² See SIFMA Letter I, *supra* note 30, at 4–5; SIFMA Letter II, *supra* note 30, at 2; Nasdaq Letter I, *supra* note 20, at 24.

⁵⁶³ See *supra* Section II.C.5(f).

⁵⁶⁴ See Article IV, Section 4.10(d) of the CT Plan.

⁵⁶⁵ See Notice, *supra* note 3, 85 FR at 64571 (Question 32).

⁵⁶⁶ See RBC Letter, *supra* note 30, at 11.

⁵⁶⁷ See Conflicts of Interest Approval Orders, *supra* note 509, 85 FR at 28120 and 85 FR at 28047.

⁵⁶⁸ See *New York Stock Exchange, et al. vs. Securities and Exchange Commission*, Nos. 20–1242, 20–1243, 20–1244, —F.4th—, 2021 WL 2654987, *1–4 (D.C. Cir., June 29, 2021).

⁵⁶⁹ See Securities Exchange Act Release Nos. 88825 (May 6, 2020), 85 FR 28090 (May 12, 2020); 88826 (May 6, 2020), 85 FR 28069 (May 12, 2020) (collectively, the "Confidentiality Policy Approval Orders"). In the Governance Order, the Commission ordered the SROs to incorporate into the CT Plan provisions consistent with the Confidentiality Policy Approval Orders. See Governance Order, *supra* note 8, 85 FR at 28726.

Information.⁵⁷⁶ Section (a)(ii) of Exhibit C states that the Confidentiality Policy applies to all Covered Persons,⁵⁷⁷ and provides that Covered Persons must adhere to the policy and may not receive Company data and information until they affirm in writing that they have read and undertake to abide by the terms of the Confidentiality Policy.

The Commission received several comments regarding the Confidentiality Policy.⁵⁷⁸ Generally, commenters support having a confidentiality policy in the CT Plan. Specifically, one commenter states that not all confidential information is the same and favors having tailored procedures for Restricted, Highly Confidential, and Confidential Information.⁵⁷⁹ The commenter further states that the specified procedures should also permit all Voting Representatives, and not just SRO Voting Representatives, to have access to Restricted and Highly Confidential Information so that they are able to make informed decisions, and that a strong confidentiality policy would improve the flow of information to decision-makers, including all Voting Representatives, which in turn would improve those decisions.⁵⁸⁰

In contrast, several commenters oppose having such a policy in the CT Plan.⁵⁸¹ These commenters state that the

Confidentiality Policy is inconsistent with Section 11A of the Act and Rule 608,⁵⁸² and that the Confidentiality Policy would frustrate the purposes of the Act and the national market system.⁵⁸³ Generally, these commenters state that by restricting an SRO Voting Representative from sharing CT Plan information with other personnel at an SRO—in the commenters' words, putting the SRO Voting Representative on an "informational island"⁵⁸⁴—the Confidentiality Policy would preclude Members from fulfilling their obligations under the securities laws, including Rule 608.⁵⁸⁵ One of these commenters argues that if the Commission determines to approve the Plan with amendments, it should publish the exact text of the intended amendments and seek comment prior to issuing an approval. The commenter states that the necessity of seeking comment is demonstrated by the "numerous errors and potential unintended consequences" in the Conflicts of Interest Approval Orders and Confidentiality Policy Approval Orders currently applicable to the Equity Data Plans.⁵⁸⁶

Both here and in the Confidentiality Policy Approval Orders, the Commission has followed the procedures in Rule 608 for approval of an NMS plan. Moreover, what one commenter describes as "errors" and "unintended consequences" in the Confidentiality Policy Approval Orders of the Equity Data Plans reflect instead a fundamental disagreement over whether any restrictions may be imposed on the use by SROs of commercially sensitive information garnered through their participation in the Equity Data Plans. And what one commenter⁵⁸⁷ asserts is guidance from Commission staff that is inconsistent with the Confidentiality Policy Approval Orders reflects instead the staff's good faith efforts to engage with the SROs and their counsel regarding their proposed "interpretations" of the Confidentiality Policy Approval Orders.

One commenter also states that the Confidentiality Policy imposes unreasonable burdens and risks upon the SROs, their representatives, and their senior management by failing to recognize that the SRO, not its voting representative, is the CT Plan's Member and that the SRO itself and its senior management are ultimately responsible for all aspects of the SRO's operations, including participating in national market system plans and compliance with Rule 608.⁵⁸⁸

In response to commenters' concerns, the Commission notes that the SRO Voting Representative may, subject to certain conditions, share confidential information with individuals within the SRO. Depending on the type of confidential information, the provisions provide that Confidential Information may be disclosed "in furtherance of the interests of the Company," Highly Confidential Information may be disclosed when employees are "authorized to receive it," or when "required by law,"⁵⁸⁹ and Restricted Information may be disclosed by the Administrator when it determines that it is appropriate to share a customer's financial information with the Operating Committee after redacting the customer's name and other personal information. Accordingly, if the SRO's Voting Representative has a legitimate need to share Plan information with, for example, the SRO's senior management, the CT Plan's provisions provide the means to do so.

Separately, one commenter claims that Section (b)(i)(B) of Exhibit C—which provides that the Administrator may, under delegated authority, designate documents as Restricted, Highly Confidential, or Confidential—is unlawful. Specifically, this commenter argues that, because the Administrator has no obligations under the securities laws and would only be acting as an agent of the Members, the Administrator's obligations are solely to the Operating Committee pursuant to its contract to perform functions required to allow the Members to meet their obligations under the securities laws.⁵⁹⁰ The commenter further contends that the Confidentiality Policy is unclear as to how the Operating Committee could provide oversight of the Administrator's designation of documents as Restricted, Highly Confidential, or Confidential, given the restrictions on sharing Restricted, Highly Confidential, and

intellectual property of Members or customers; and any document subject to the Attorney-Client Privilege or Work Product Doctrine.

⁵⁷⁶ Article I, Section 1.1(l) of the CT Plan describes Confidential Information to mean, except to the extent covered by the definitions for Restricted Information, Highly Confidential Information, or Public Information: (i) any non-public data or information designated as Confidential by the Operating Committee pursuant to Section 4.3; (ii) any document generated by a Member or Non-SRO Voting Representative and designated by that Member or Non-SRO Voting Representative as Confidential; and (iii) the individual views and statements of Covered Persons and SEC staff disclosed during a meeting of the Operating Committee or any subcommittees thereunder.

⁵⁷⁷ Article I, Section 1.1(n) of the CT Plan defines Covered Persons.

⁵⁷⁸ See Choe Letter, *supra* note 17, at 6–8; BlackRock Letter I, *supra* note 247, at 5; RBC Letter, *supra* note 30, at 9–11; Fidelity Letter, *supra* note 30, at 5; Nasdaq Letter I, *supra* note 20, at 2–7, 28–29; Data Boiler Letter I, *supra* note 31, at 38; ICI Letter I, *supra* note 31, at 4; FINRA Letter I, *supra* note 257, at 5–6; SIFMA Letter I, *supra* note 30, at 4; NYSE Letter I, *supra* note 18, at 12, 15–18, 20–29; BMO Letter, *supra* note 30, at 4; MFA Letter, *supra* note 30, at 4; NYSE Letter II, *supra* note 19, at 4–5; ICI Letter II, *supra* note 31, at 2; Schwab Letter I, *supra* note 30, at 2; MayStreet Letter, *supra* note 513, at 4.

⁵⁷⁹ See RBC Letter, *supra* note 30, at 11.

⁵⁸⁰ See *id.* In support, this commenter also suggests that Non-SRO Voting Representatives could be required to sign non-disclosure agreements. See *id.*

⁵⁸¹ See Choe Letter, *supra* note 17, at 6–8; NYSE Letter I, *supra* note 18, at 12; NYSE Letter II, *supra* note 19, at 4; Nasdaq Letter I, *supra* note 20, at 2–3.

⁵⁸² See Choe Letter, *supra* note 17, at 6; NYSE Letter I, *supra* note 18, at 12, 15; NYSE Letter II, *supra* note 19, at 4; Nasdaq Letter I, *supra* note 20, at 1–2.

⁵⁸³ See NYSE Letter I, *supra* note 18, at 20; NYSE Letter II, *supra* note 19, at 2; Nasdaq Letter I, *supra* note 20, at 1–2, 7; Choe Letter, *supra* note 17, at 2, 6.

⁵⁸⁴ See Choe Letter, *supra* note 17, at 8; NYSE Letter I, *supra* note 18, at 17.

⁵⁸⁵ See NYSE Letter I, *supra* note 18, at 15, 17; NYSE Letter II, *supra* note 19, at 4; Nasdaq Letter I, *supra* note 20, at 3; Choe Letter, *supra* note 17, at 8.

⁵⁸⁶ Nasdaq Letter I, *supra* note 20, at 3.

⁵⁸⁷ See NYSE Letter I, *supra* note 18, at 24 & Attachment A.

⁵⁸⁸ See Nasdaq Letter I, *supra* note 20, at 3.

⁵⁸⁹ See *infra* Section II. C. 5(k)(ii) (discussing modifications to Treatment of Highly Confidential Information).

⁵⁹⁰ See NYSE Letter I, *supra* note 18, at 27; NYSE Letter II, *supra* note 19, at 5.

Confidential Information.⁵⁹¹ Accordingly, the commenter recommends that the Commission propose and publish for comment provisions authorizing the Operating Committee to direct the Administrator and Processors to apply confidentiality designations to such documents, which the Members could jointly administer and implement through CT Plan contracts with the Administrator and Processors.⁵⁹²

The provisions of the CT Plan and Confidentiality Policy define and specify the types of Restricted, Highly Confidential, and Confidential Information. The Commission notes that the Administrator would be required to adhere to the defined terms and policy provisions as discussed below, rather than having unfettered discretion to categorize information under the Confidentiality Policy. Moreover, the Commission believes that permitting the Operating Committee, rather than the Administrator, to determine what information should be treated as Restricted, Highly Confidential, or Confidential would both fatally undermine the Confidentiality Policy and wholly defeat the purpose of having an independent Administrator that is not compromised by the core conflict faced by SROs that sell their own proprietary equity data products.

Finally, one commenter argues that, while Exhibit C to the CT Plan includes the same provisions as the Confidentiality Policy Approval Orders, the CT Plan, if approved, would “perpetuate the arbitrary and capricious rulemaking undertaken by the Commission when it failed to provide notice or seek comment on its own modifications to the policy language proposed by the Equity Data Plans.”⁵⁹³ Accordingly, the commenter recommends that the confidentiality provisions be excluded from the Plan. The Commission, however, disagrees with the procedural objections raised to the separate Confidentiality Policy Approval Orders, and the Commission has responded to the procedural objections both in the Confidentiality Policy Approval Orders and in subsequent litigation. In any event, those procedural objections have no bearing on the adequacy of the procedure resulting in this Order. Here, the Commission noticed the SROs’ proposed CT Plan, provided an opportunity for comment, and posed detailed and specific questions with respect to particular issues raised by the

proposed CT Plan’s provisions, including the Confidentiality Policy. Moreover, because the Confidentiality Policy Approval Orders were issued on the same day as the Governance Order, the language of the confidentiality policies of the Equity Data Plans as approved was available to commenters when discussing whether similar provisions should be included in the CT Plan. The Commission’s modifications here both directly respond to the public comments received and more fully accomplish the CT Plan’s stated purpose, consistent with the changes made by the Commission in the Confidentiality Policy Approval Orders. These changes are well within the Commission’s discretion in deciding that additional measures are necessary or appropriate to address the conflict between an SRO both selling proprietary data in its commercial capacity and discharging its obligation to collect and disseminate consolidated data through a national market system plan.

(ii) Treatment of Restricted, Highly Confidential, and Confidential Information

Restricted Information.

Section (b)(ii) of Exhibit C provides the procedures concerning Restricted Information, generally prohibiting a Covered Person in possession of Restricted Information from disclosing it to others, including Agents, and provides that this prohibition does not apply to disclosures to the staff of the SEC or as otherwise required by Applicable Law, or to other Covered Persons as expressly provided for by the policy. Section (b)(ii) further states that Restricted Information will be kept in confidence by the Administrator and Processors and will not be disclosed to the Operating Committee or any subcommittee thereof or during Executive Session. However, Restricted Information may be shared if the Administrator determines that it is appropriate to share a customer’s financial information with the Operating Committee and first anonymizes the information. The Administrator may disclose the identity of a customer in Executive Session if, in good faith, the Administrator determines that it is necessary to disclose the customer’s identity in order to obtain input or feedback from the Operating Committee or a subcommittee thereof about a matter of importance to the Company. In such case, the Administrator will change the

designation from Restricted Information to Highly Confidential Information.⁵⁹⁴

As proposed, Section (b)(ii) of Exhibit C does not include a clause that is present in the Confidentiality Policy Approval Orders. That clause permits the Administrators of the existing Equity Data Plans to share with the staff of the SEC Restricted Information related to any willful, reckless, or grossly negligent conduct by a customer discovered by an Administrator, upon majority vote of the Operating Committee in Executive Session, and that clause served as a specific exception to the general provision in that same paragraph that “Restricted Information will be kept in confidence by the Administrator and Processor and will not be disclosed to the Operating Committee or any subcommittee thereof, or during Executive Session, or to the Advisory Committee.”⁵⁹⁵ The Commission in the Confidentiality Policy Approval Orders also modified Section 3(b)(i) of the Equity Data Plans’ confidentiality policies to more broadly provide that “Covered Persons in possession of Restricted Information are prohibited from disclosing it to others, including Agents,” but specifically further provided that this prohibition “does not apply to disclosure to the staff of the SEC or as otherwise required by law, or to Covered Persons as expressly provided for by this Policy.”⁵⁹⁶ Although the CT Plan as proposed does not contain the specific exception that appears in the Equity Data Plans regarding the sharing by the Administrator of Restricted Information regarding certain customer conduct, the Commission believes that the broader language of Section (b)(ii) of Exhibit C to the CT Plan, which provides that the restrictions on sharing of Restricted Information do not apply to disclosure to the staff of the Commission, is sufficient to ensure that Restricted Information regarding any willful, reckless or grossly negligent conduct by a customer can be shared with the Commission.

Some commenters oppose the language in Sections (b)(ii) and (b)(iii)(A)(1) of Exhibit C that limits a Covered Person’s ability to disclose Restricted Information and Highly Confidential Information to others, “including agents.”⁵⁹⁷ Generally, these commenters are concerned that the

⁵⁹⁴ See Section (b)(ii)(B) of Exhibit C of the CT Plan.

⁵⁹⁵ Confidentiality Policy Approval Orders, *supra* note 569, 85 FR at 28103 and 85 FR at 28081.

⁵⁹⁶ Confidentiality Policy Approval Orders, *supra* note 569, 85 FR at 28098 and 85 FR at 28077.

⁵⁹⁷ See NYSE Letter I, *supra* note 18, at 15, 23; Nasdaq Letter I, *supra* note 20, at 4–6.

⁵⁹¹ See NYSE Letter I, *supra* note 18, at 27.

⁵⁹² See *id.* at 28.

⁵⁹³ Nasdaq Letter I, *supra* note 20, at 3.

restriction is broad and impedes the ability of the Plan Administrator and Processors to perform tasks—such as hiring independent auditors and outside counsel to perform administrative functions—necessary for a Member to comply with its obligations pursuant to Rule 608.⁵⁹⁸ For example, these commenters argue that for the Administrator to provide services to the CT Plan, such as audited financial statements, the Administrator must be able to provide Restricted Information and Highly Confidential Information to an independent auditor, but would be restricted from doing so under the Confidentiality Policy.⁵⁹⁹ One commenter argues that the policies are impermissibly vague and states that it has had ongoing discussions with Commission staff to establish how the policies should be interpreted.⁶⁰⁰ Another commenter similarly states that it has raised policy interpretation questions with Commission staff.⁶⁰¹ The commenter argues that the staff's response to the questions is not sufficiently clear and is inconsistent with the plain language of the Confidentiality Policy Approval Orders, and the commenter recommends that the Commission eliminate or substantially modify the prohibition on providing confidential information to agents and publish a new proposal for comment.⁶⁰²

After considering comments received, the Commission finds that it is appropriate to modify Exhibit C to the CT Plan to provide for additional sharing of protected information in certain circumstances. As discussed above, commenters raise concerns that the Confidentiality Policy improperly limits the Administrator's and

Processors' ability to share Restricted Information with others, including agents, impeding the ability of an agent to perform its specific services to the CT Plan. The Commission has carefully considered these commenters' concerns and finds that it is appropriate to permit such disclosure when the Operating Committee, consistent with the purposes and goals of the CT Plan, determines that it is appropriate to do so, because there may be instances in which Restricted Information is required to be disclosed to a Covered Person or third party in the service of the CT Plan. Accordingly, the Commission is adding new subparagraph (C) to Section (b)(ii) of Exhibit C to provide that the Operating Committee may authorize the disclosure of specified Restricted Information to specific Covered Persons or third parties, if it determines that doing so is in furtherance of the interests of the Plan, which is to ensure the prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to quotations for and transactions in such securities and the fairness and usefulness of the form and content of such information, consistent with Section 11A of the Act.⁶⁰³

The new subparagraph (C) also requires that Covered Persons and third parties authorized by the Operating Committee that receive or have access to Restricted Information must segregate the information, retain it in confidence, and use it only in a manner consistent with the terms of the Confidentiality Policy. The Commission finds that this modification is appropriate because it will provide additional safeguards to ensure that highly sensitive customer and personally identifiable information is properly protected and not misused. Finally, new subparagraph (C) provides that such authorization will be granted on a case-by-case basis, unless the Operating Committee grants standing approval to allow disclosure of specified recurring information to specific Covered Persons. The Commission finds that this modification is appropriate because it promotes efficiency by allowing for the disclosure of Restricted Information to specific Covered Persons on an ongoing basis, where appropriate, without having to continually seek Operating Committee approval.

Highly Confidential Information.

As proposed, Section (b)(iii)(A) of Exhibit C permits Highly Confidential Information to be disclosed in Executive Session or to the subcommittee established pursuant to Section 4.7(c) of

the CT Plan, and provides that Covered Persons in possession of Highly Confidential Information are prohibited from disclosing it to others, including Agents, except to other Covered Persons who need the information to fulfill their responsibilities to the Company. The prohibition does not apply to disclosures to the SEC staff or as otherwise required by law, or to other Covered Persons authorized to receive it. Thus, Highly Confidential Information may be disclosed to Commission staff unless it is protected by the Attorney-Client Privilege or the Work Product Doctrine. This section further states that the Operating Committee cannot authorize any other disclosure of Highly Confidential Information.

Section (b)(iii)(B) provides that in the event that a Covered Person is determined by an affirmative vote of the Operating Committee to have disclosed Highly Confidential Information, "the Operating Committee will determine the appropriate remedy for the breach based on the facts and circumstances of the event. For an SRO Voting Representative or Member Observer, remedies include a letter of complaint to the SEC, which may be made public by the Operating Committee. For a Non-SRO Voting Representative, remedies include removal of that Non-SRO Voting Representative."⁶⁰⁴

As noted above, some commenters express concerns that the Confidentiality Policy would preclude Members from fulfilling their obligations under the securities laws. Specifically, commenters argue that the SROs—not the individual Voting Representatives—have responsibilities under the Act and rules of the Commission and must be able to determine what information is available to individuals within an SRO in order to satisfy the SRO's regulatory obligations.⁶⁰⁵ Another commenter agrees, arguing that the Confidentiality Policy, as written, wrongly assumes that the SRO Voting Representative has sole responsibility for all CT Plan decisions without the ability of that individual to seek guidance from the SRO's senior management, technical advice from other SRO employees, or legal advice from SRO corporate counsel.⁶⁰⁶ The commenter is concerned that under the proposed Confidentiality Policy an SRO's senior management would not be able to access information that may be

⁵⁹⁸ See NYSE Letter I, *supra* note 18, at 23–24; NYSE Letter II, *supra* note 19, at 4–5; Nasdaq Letter I, *supra* note 20, at 5–6; Cboe Letter, *supra* note 17, at 8 (stating that policy could be read to prohibit the sharing of certain types of confidential information with outside legal counsel, auditors, or other service providers that have a need to access that information).

⁵⁹⁹ See NYSE Letter I, *supra* note 18, at 23–24. See also Nasdaq Letter I, *supra* note 20, at 6 (stating that its auditors have expressed concerns about whether the policy is consistent with professional obligations that require them to subject their work to peer review and that may therefore require making Restricted or Highly Confidential Information available to persons who are not Covered Persons).

⁶⁰⁰ See Cboe Letter, *supra* note 17, at 7–8 (arguing that the policies would limit access to certain confidential information to the particular individual who is representing an SRO and would further limit the ability of an individual SRO representative to share information and consult with other employees of the SRO that is the actual plan participant).

⁶⁰¹ See NYSE Letter I, *supra* note 18, at 23.

⁶⁰² See NYSE Letter I, *supra* note 18, at 24; NYSE Letter II, *supra* note 19, at 5.

⁶⁰³ 15 U.S.C. 78k–1(c)(1)(B).

⁶⁰⁴ Exhibit C, Section (b)(iii)(B) of the CT Plan.

⁶⁰⁵ See NYSE Letter I, *supra* note 18, at 16–17; NYSE Letter II, *supra* note 19, at 4–5; Nasdaq Letter I, *supra* note 20, at 3.

⁶⁰⁶ See Nasdaq Letter I, *supra* note 20, at 3.

necessary to make decisions related to the Plan if that information is determined to be Highly Confidential Information or Confidential Information. For example, the commenter states that an SRO's senior management would be denied access to privileged information and prevented from participating in decisions regarding legal strategy and litigation involving the CT Plan or regulatory interactions with the Commission.⁶⁰⁷ Thus, these commenters conclude that the Commission may not approve an NMS plan that prohibits SROs' senior management from having access to information that may be necessary to their informed decision-making related to regulatory obligations.⁶⁰⁸

In response to commenters' concerns regarding the provisions governing disclosure of Highly Confidential Information, the Commission finds that it is appropriate to modify Section (b)(iii)(A) of Exhibit C to the CT Plan to specify the instances in which Highly Confidential Information can be shared. Specifically, the Commission is removing the language in subparagraph (A)(1) that permits disclosure to "Covered Persons who need the Highly Confidential Information to fulfill their responsibilities to the Company." The Commission believes that this language is too general to provide a meaningful limitation on the sharing of commercially sensitive information or to provide useful guidance regarding what disclosures are permissible. The Commission therefore believes that the CT Plan should clearly specify the situations where Highly Confidential Information *may* be disclosed. Accordingly, the Commission is modifying the second sentence in Section (b)(iii)(A) of Exhibit C to state, "Covered Persons in possession of Highly Confidential Information are prohibited from disclosing it to others, including Agents, except as provided below." The Commission finds that this modification is appropriate because the general prohibition on sharing, paired with specific instances of permissible sharing, which are discussed below, would specify and establish clear and limited circumstances for permitted disclosure of Highly Confidential Information.

In connection with these changes, the Commission is also modifying subparagraph (A)(1) of Section (b)(iii) of Exhibit C to remove the language that states that the prohibition does not apply to disclosures "or as otherwise

required by law (such as those required to receive the information to ensure the Member complies with its regulatory obligations), or to other Covered Persons authorized to receive it." In response to commenters' request for greater clarity, the Commission finds that it is appropriate to remove this broad language. Accordingly, the Commission is adding, in new subparagraph (A)(2), that Highly Confidential Information may be disclosed as required by Applicable Law.⁶⁰⁹ The Commission believes that this modification is appropriate because it provides greater specificity as to when Highly Confidential Information may be disclosed, consistent with the defined term.

The Commission is also modifying Exhibit C to the CT Plan to re-number the subparagraphs in Section (b)(iii) so that subparagraph (A)(2) will now be subparagraph (A)(3), and to add new Section (b)(iii)(A)(4), which specifies the circumstances under which SRO

⁶⁰⁹ As defined in the CT Plan in Article I, Section 1.1(e), "Applicable Law" means all applicable provisions of (a) constitutions, treaties, statutes, laws (including the common law), rules, regulations, decrees, ordinances, codes, proclamations, declarations or orders of any Governmental Authority; (b) any consents or approvals of any Governmental Authority; and (c) any orders, decisions, advisory or interpretative opinions, injunctions, judgments, awards, decrees of, or agreements with, any Governmental Authority. Article I, Section 1.1(hh) of the CT Plan defines "Governmental Authority" to mean (a) the U.S. federal government or government of any state of the U.S., (b) any instrumentality or agency of any such government, (c) any other individual, entity or organization authorized by law to perform any executive, legislative, judicial, regulatory, administrative, military or police functions of any such government, or (d) any intergovernmental organization of U.S. entities, but "Governmental Authority" excludes any self-regulatory organization registered with the Commission.

Although one commenter asks for the Commission's "endorsement" of the conclusion that a disclosure "required by law" would encompass the disclosure of financial information in connection with an audit, *see* Nasdaq Letter I, *supra* note 20, at 6, other provisions of the CT Plan as modified would permit sharing of information that is required for the preparation of an exchange's financial statements. As discussed above, the Commission is modifying the CT Plan to provide that the Operating Committee may authorize disclosure of Restricted Information under certain circumstances. *See* text accompanying note 603, *supra*. And as discussed immediately below, the Commission is also modifying the proposed CT Plan to provide for disclosure of Highly Confidential Information by SRO Voting Representatives to officers of the Member they represent who have direct or supervisory responsibilities for the Member's participation in the CT Plan. *See also* Section (b)(iii)(A)(4) of Exhibit C to the CT Plan, as modified. For the same reasons, the phrase "required by Applicable Law" does not authorize disclosure of Restricted Information or Highly Confidential Information on the basis of a determination by a Covered Person, or any other person, that disclosure of the information is required to ensure that a Member complies with its regulatory obligations.

Voting Representatives are permitted to share Highly Confidential Information with officers of their SRO or agents of the Member. Specifically, new Section (b)(iii)(A)(4) provides that SRO Voting Representatives may share certain types of Highly Confidential Information with officers of their Member SRO who have direct or supervisory responsibility for the SRO's participation in the Company, or with Agents for that Member, provided that such information may not be used in the development, modeling, pricing, licensing, or sale of, PDP. The Commission finds that this modification is appropriate because it recognizes that certain officers and agents of the SRO may require relevant CT Plan information in order to comply with regulatory obligations. However, the Commission believes that such individuals should be limited to officers of a Member who have a direct or supervisory responsibility for the SRO's participation in the CT Plan, or with agents for the Member that support the SRO's participation in the CT Plan, and that the information shared must not be used in the development, modeling, pricing, licensing, or sale of, PDP.

New Section (b)(iii)(A)(4) also specifies certain types of Highly Confidential Information that an SRO Voting Representative may share. Specifically, the Commission believes it is appropriate to identify the types of Highly Confidential Information permitted to be disclosed by the SRO Voting Representative as: (i) The Company's contract negotiations with the Processor(s) or Administrator; (ii) communications with, and work product of, counsel to the Company; and (iii) information concerning personnel matters that affect the employees of the SRO or of the Company. The Commission finds that it is appropriate for an SRO Voting Representative to share the contract negotiations with the Processor(s) or Administrator because the SRO will directly interact with the Processor(s) and Administrator pursuant to such contracts and would need to know the terms and conditions to ensure that it complies with the requirements of the CT Plan. Similarly, the Commission finds that it is appropriate for communications and work product of counsel to the Company to be shared because counsel would be representing the SROs, and SRO officers would need to be informed in order to provide relevant information to counsel or make decisions related to Plan matters.

With respect to the definition of "personnel matters" as used in the definition of Highly Confidential Information, two commenters raise

⁶⁰⁷ *See* NYSE Letter I, *supra* note 18, at 17.

⁶⁰⁸ *See id.*; NYSE Letter II, *supra* note 19, at 5. *See also* Nasdaq Letter I, *supra* note 20, at 3.

concerns that the definition is too broad and that the definition of Highly Confidential Information should include only those personnel matters that affect the employees of the SROs or of the Company.⁶¹⁰ The Commission believes that it is appropriate to modify this aspect of the definition of Highly Confidential Information so that the definition of personnel matters is limited to personnel matters that affect the employees of the SROs or the Company and thus is not construed broadly to include, for example, the performance of outside persons under contract with the CT Plan, which may be significant matters in which Non-SRO Voting Representatives, as full members of the Operating Committee, should be able to participate. The Commission further finds that it is appropriate for information regarding personnel matters that affect the employees of the SROs or of the Company to be shared with officers of the SROs because the SROs are the Members of the LLC and are responsible for compliance with the terms of the CT Plan and Rule 608.

The Commission, however, does not believe that information concerning the intellectual property of Members or customers should be shared. For example, customer audit information is excluded and may not be shared as it contains highly sensitive information and could be commercially valuable. Additionally, the Commission does not believe that SRO officers require detailed audit information regarding individual customers' use of and payment for consolidated data to comply with the provisions of the CT Plan or with their regulatory obligations under Plan. The policies that would support the prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to quotations for and transactions in such securities and the fairness and usefulness of the form and content of such information would not require detailed knowledge about specific amounts of an individual, identified customer's use of and payment for Plan data. Rather, appropriate policies for the CT Plan should be based on relevant information about the data usage and payments of different categories of customers. For similar reasons, the Commission does not believe that officers of an SRO would require information concerning the intellectual property of another Member, as SROs are in competition with each other, and sharing such

information would not be in furtherance of the purposes of the CT Plan.

The Commission's modifications to this subparagraph also provide that, to the extent that an SRO Voting Representative discloses Highly Confidential Information pursuant to Section (b)(iii)(A)(4), the individual will be required to maintain a log documenting each instance of such disclosure, including the information shared, the persons receiving the information, and the date the information was shared. The Commission is further modifying this subparagraph to add a requirement that Covered Persons who receive or have access to Highly Confidential Information pursuant to the new subparagraph must segregate the information, retain it in confidence, and use it only in a manner consistent with the terms of the Confidentiality Policy. The Commission believes that the requirement to log Highly Confidential Information when it is shared and to segregate the shared information, retain it in confidence, and use it only in a manner consistent with the terms of the Confidentiality Policy will provide greater transparency and accountability regarding the sharing of Highly Confidential Information of the CT Plan.⁶¹¹ The Commission finds that these modifications are appropriate because they will help to guard against misuse of that information for commercial or other purposes.

The Commission is similarly modifying Section (b)(iii)(A) of Exhibit C to add new subparagraph (5), which will allow the Operating Committee to authorize the disclosure of specified Highly Confidential Information to specific third parties that are acting as Agents of the Company. The Commission finds that this modification is appropriate because it recognizes that certain Agents of the Company may at times require necessary information to make informed decisions regarding the CT Plan and to assist a Member's compliance with its regulatory obligations. Subparagraph (5) will also require that third parties that receive or have access to Highly Confidential Information must segregate the information, retain it in confidence, and use it only in a manner consistent with the terms of the Confidentiality

Policy.⁶¹² The language further provides that authorization will be on a case-by-case basis, unless the Operating Committee grants standing approval to allow disclosure of specified recurring information to specific third parties. The Commission finds that these modifications are appropriate because they are designed to ensure that the disclosed information is properly protected and not misused and because they will promote an efficient process by allowing for the ongoing disclosure of Highly Confidential Information to a specific Agent without having to continually seek Operating Committee approval.

Confidential Information.

As proposed, Section (b)(iv) of Exhibit C provides that Confidential Information may be disclosed during a meeting of the Operating Committee or any subcommittee thereof, and a Covered Person may disclose Confidential Information to other persons to allow such other persons to fulfill their responsibilities to the Company. Section (b)(iv)(D) of Exhibit C provides that a Covered Person that is a representative of a Member may be authorized by the Operating Committee to disclose particular Confidential Information to other employees or agents of the Member or its affiliates only in furtherance of the interests of the Company as needed for that Covered Person to perform his or her function on behalf of the Company.

One commenter raises concerns with Section (b)(iv)(A) of Exhibit C, arguing that no Covered Person other than Members has responsibilities to the CT Plan, and as such, the provision would imply that "Confidential Information cannot be shared at all, or at a minimum, casts substantial doubt on what can be shared."⁶¹³ The commenter states that it has discussed with Commission staff how Confidential Information may be shared with service providers who need access to such information but have no such responsibilities to the Plan.⁶¹⁴ The commenter acknowledges that, in response, Commission staff stated its view that sharing Confidential Information is permissible because the Operating Committee can authorize its disclosure if the disclosure is not inconsistent with the goals and aims of

⁶¹¹ The Commission notes that Section (b)(iii)(A)(1) of Exhibit C to the CT Plan specifies that the prohibition of disclosing Highly Confidential Information does not apply to disclosures made to the staff of the Commission. Additionally, Section (b)(iii)(A)(2) of Exhibit C permits disclosure of Highly Confidential Information as required by Applicable Law.

⁶¹² For example, the Operating Committee, when granting access to Highly Confidential Information to a third party (other than the Commission), could accomplish this by requiring the recipient to sign an agreement to abide by these requirements for storage and restrictions on use.

⁶¹³ NYSE Letter I, *supra* note 18, at 24.

⁶¹⁴ See *id.* at 25.

⁶¹⁰ See Schwab Letter I, *supra* note 30, at 2; SIFMA Letter I, *supra* note 30, at 4.

the Confidentiality Policy.⁶¹⁵ Nonetheless, the commenter believes that the provision impedes the functioning of the national market system and requests that the Commission propose to eliminate or substantially modify the restriction and solicit comment.⁶¹⁶

In response to the commenter's concern, the Commission is modifying certain provisions of the Confidentiality Policy. Specifically, the Commission is modifying Section (b)(iv)(A) of Exhibit C, to state that Covered Persons may disclose Confidential Information only to other persons who need to receive such information to fulfill their responsibilities pursuant to the CT Plan, including oversight of the CT Plan. The Commission notes that, as defined in the CT Plan, Confidential Information may include non-public data or information designated as Confidential by the Operating Committee pursuant to Article IV, Section 4.3. The Commission finds that this modification is appropriate because, consistent with the current practices of the Equity Data Plans, financial information necessary for the leadership of an SRO to make decisions regarding the SRO's participation in the Plan—namely, Plan expenses and revenues—will be designated as Confidential and thus permitted to be shared. Consistent with other provisions of the Confidentiality Policy as discussed above, the Commission is also modifying this section of the Confidentiality Policy to provide that recipients of Confidential Information must segregate the information, retain it in confidence, and use it only in a manner consistent with the terms of the Confidentiality Policy. The Commission is also modifying Section (b)(iv)(B) of Exhibit C, which authorizes disclosure of Confidential Information by an affirmative vote of the Operating Committee, to add language to clarify that such authorization must be on a case-by-case basis, unless the Operating Committee grants standing approval to allow disclosure of specified recurring information to specific Covered Persons. The Commission finds that these modifications are appropriate because expressly including these requirements for handling Confidential Information will provide additional safeguards regarding disclosure of Confidential Information and help to guard against misuse of this information for commercial or other purposes.

⁶¹⁵ See *id.*

⁶¹⁶ See *id.*

(iii) Covered Persons

In the Notice, the Commission solicited comment primarily focused on the applicability of the Confidentiality Policy to Member Observers. Specifically, the Commission asked whether Section 4.11(a) should be modified to expressly apply to Member Observers and if the definition of Member Observer should be more narrowly tailored to limit the individuals within an SRO that have access to Highly Confidential or Confidential Information.⁶¹⁷ Among other questions, the Commission also asked if Member Observers should be prohibited from receiving Restricted or Highly Confidential Information, excluded from being present when such information is discussed, or required to demonstrate a legitimate or particularized need for specific Restricted or Highly Confidential Information before being granted access.⁶¹⁸

Separately, in the Notice, the Commission also solicited comment on the definition of Covered Persons. As proposed, the CT Plan defines “Covered Persons” as the representatives of the Members, the Non-SRO Voting Representatives, SRO Applicants, the Administrator, and the Processors; affiliates, employees, and Agents of the Operating Committee, a Member, the Administrator, and the Processors; any third parties invited to attend meetings of the Operating Committee or subcommittees; and the employers of Non-SRO Voting Representatives. Covered Persons do not include staff of the SEC. Specifically, the Commission asked whether other types of representatives, such as Member Observers, should be specifically included in the definition.⁶¹⁹

In response, the Commission received several comment letters discussing Covered Persons.⁶²⁰ One commenter notes that, as proposed, the definition of “Covered Persons” includes representatives of the Members as well as employees of a Member, and states that Member Observers would be implicitly included in the definition.⁶²¹ However, the commenter does not oppose explicitly adding Member Observers for clarity and agrees that

⁶¹⁷ See Notice, *supra* note 3, 85 FR at 64571 (Question 33).

⁶¹⁸ See *id.* at 64567 (Question 5).

⁶¹⁹ See *id.* at 64567 (Question 5).

⁶²⁰ See ICI Letter I, *supra* note 31, at 4 n.9; ICI Letter II, *supra* note 31, at 2; FINRA Letter I, *supra* note 257, at 3; MayStreet Letter, *supra* note 513, at 4; Data Boiler Letter I, *supra* note 31, at 22; Nasdaq Letter I, *supra* note 20, at 4–5; NYSE Letter I, *supra* note 18, at 21.

⁶²¹ See FINRA Letter I, *supra* note 257, at 3.

individuals qualifying as Member Observers should be subject to the Confidentiality Policy.⁶²² Other commenters also support expressly including Member Observers in the definition of Covered Persons, stating that the CT Plan's Confidentiality Policy should apply to all Member Observers,⁶²³ particularly given the significant role a Member Observer may have in Plan deliberations and subcommittee recommendation formation.⁶²⁴

In response to the Commission's question regarding whether Member Observers given access to confidential information should be required to demonstrate a legitimate or particularized need for such access, one commenter states that Members Observers and others given access to confidential information should be required to demonstrate the need for such access.⁶²⁵ Similarly, another commenter states that protecting confidential and proprietary information from misuse is important and believes that Member Observers should be required to demonstrate a legitimate or particularized need for Restricted or Highly Confidential Information before being granted access to such information.⁶²⁶

Separately, one commenter raises concerns regarding Section (a)(ii) of Exhibit C, which requires all Covered Persons that are natural persons to affirm in writing that they have read the policy and undertake to abide by its terms before receiving Company data and information.⁶²⁷ Specifically, the commenter argues that it imposes onerous and impractical burdens on agents of the Members that would be providing services to the Plan, including auditors, bankers, and outside counsel and that it conflicts with independent professional standards and obligations, and standard market practice.⁶²⁸ The commenter states that existing customer relationship documents, such as engagement letters, are more than sufficient to protect the confidentiality of Restricted, Highly Confidential, or Confidential Information that such agents may need to perform services for the CT Plan.⁶²⁹ Accordingly, the

⁶²² See *id.*

⁶²³ See ICI Letter I, *supra* note 31, at 4; ICI Letter II, *supra* note 31, at 2; Nasdaq Letter I, *supra* note 20, at 13; BMO Letter, *supra* note 30, at 4; MFA Letter, *supra* note 30, at 4; MayStreet Letter, *supra* note 513, at 4.

⁶²⁴ See MayStreet Letter, *supra* note 513, at 4.

⁶²⁵ See RBC Letter, *supra* note 30, at 10–11.

⁶²⁶ See BMO Letter, *supra* note 30, at 4.

⁶²⁷ See NYSE Letter I, *supra* note 18, at 21.

⁶²⁸ See *id.* at 21–22.

⁶²⁹ See *id.* at 22.

commenter recommends that the Commission propose and solicit comment on changes to the CT Plan that would eliminate the current requirement, or alternatively that the Commission propose revisions that would modify the undertaking such that Covered Persons must agree to abide with the Confidentiality Policy so long as it does not conflict with the applicable professional standards of conduct and such that a single representative may sign such an undertaking on behalf of an entire firm.⁶³⁰

One commenter states that while the Confidentiality Policy provisions purport to cover the Non-SRO Voting Representatives and their employers, such parties have no regulatory obligations under the CT Plan, and the commenter is concerned that Members do not have a way to monitor Non-SRO Voting Representatives' and their employers' compliance.⁶³¹ The commenter thus questions whether Non-SRO Voting Representatives and their employers should be included in the definition of Covered Persons, and subsequently subject to the Confidentiality Policy. Specifically, the commenter states that Rule 608(c) would obligate the Members to monitor Non-SRO Voting Representatives and their employers, but SROs have no authority over the Non-SRO Voting Representatives, their employers, nor the ability to monitor or enforce compliance, and no authority to impose sanctions for violations.⁶³² Accordingly, the commenter recommends removing both Non-SRO Voting Representatives and their employers from the definition of Covered Persons, and separately requiring that the Non-SRO Voting Representatives enter into contractual agreements with the CT Plan to protect the confidentiality of the CT Plan information.⁶³³

The Commission agrees that the definition of Covered Persons should specify the individuals that would be included in "representatives of the Members." Specifically, the Commission believes that the definition should be clarified to include SRO Voting Representatives, alternate SRO Voting Representatives, and Member

Observers. As any individual qualifying as one of these representatives may attend Operating Committee and subcommittee meetings and potentially receive and have access to confidential information, the Commission believes that they should be subject to the provisions of Section 4.11 and Exhibit C of the CT Plan and thus explicitly included as a Covered Person. Similarly, because the CT Plan also permits SRO Applicant Observers to attend Operating Committee meetings,⁶³⁴ the Commission likewise believes that the same provisions and policy should apply equally to this category of individuals. For the reasons stated above, the Commission finds that it is appropriate to modify Article I, Section 1.1(n), the proposed definition of Covered Persons, to clarify that the phrase "representatives of the Members" includes SRO Voting Representatives, alternate SRO Voting Representatives, and Member Observers, and to expand the definition of Covered Persons to include SRO Applicant Observers.

In response to comments regarding inclusion of Non-SRO Voting Representatives and their employers in the definition of Covered Persons, the Commission believes that Non-SRO Voting Representatives should be included in that definition, but agrees that the employers of Non-SRO Voting Representatives should not be included. As Non-SRO Voting Representatives will serve as full members of the Operating Committee and charged with carrying out the objectives of the CT Plan, Non-SRO Voting Representatives will have greater access to confidential information, including but not limited to contract negotiations with outsourced service providers, such as firms and persons that provide audit services, accounting services, or legal services to the CT Plan, Administrator, or Processors. As the Commission stated in the Confidentiality Policy Approval Orders, all parties that generate, receive, or have access to sensitive plan-related information by virtue of their service to the plan, or their affiliation with a party that has access, should be subject to the same standards to protect the confidentiality of that information.⁶³⁵ For the reasons stated above, the Commission finds that the inclusion of the Non-SRO Voting Representatives in the definition of Covered Persons, and in turn subjecting them to the Confidentiality Policy, is appropriate because it will strengthen the

confidentiality of information protections afforded by the policy.

By contrast, the Commission is modifying the CT Plan to delete "employers of Non-SRO Voting Representatives" from the definition of Covered Persons because Non-SRO Voting Representatives will not be authorized to share non-public Plan information with their employers, and those employers will not otherwise be entitled to access non-public Plan information. Further, a Non-SRO Voting Representative's employer will have no regulatory duties or responsibilities to the CT Plan and no corresponding need to receive confidential Plan information. Excluding the employers of Non-SRO Voting Representatives from the definition of Covered Persons would permit the sharing of Confidential Information with those employers only when specifically authorized by the Operating Committee in a manner permitted by the Confidentiality Policy. While the Commission previously modified the definition of Covered Persons under the existing Equity Data Plans to include the employer of an Advisory Committee member to protect the confidentiality of Plan information in a manner similar to how a Member's SRO employer is required to protect the confidentiality of Plan information,⁶³⁶ the role of Non-SRO Voting Representatives as full members of the Operating Committee provides them with significantly greater access to confidential Plan information, and the Commission believes that this greater access to protected information makes it appropriate to modify the CT Plan. Accordingly, the Commission is modifying Article 1, Section 1.1 (n) to remove "employers of Non-SRO Voting Representative" from the definition of Covered Persons. The Commission finds that the modification to remove the employers of Non-SRO Voting Representatives from the definition of Covered Persons is appropriate, because Non-SRO Voting Representatives will participate on the operating committee in their individual capacity, and their employer will not be authorized to have access to confidential Plan information.

(iv) Effect of Pending Petitions for Review

The Commission also solicited comment on Section 4.11(b), which states that if the Commission's Confidentiality Policy Approval Orders are stayed or overturned by a court, the requirements of Section 4.11 and related Confidentiality Policy in Exhibit C

⁶³⁰ See *id.* at 22–23. See also Nasdaq Letter I, *supra* note 20, at 6 (acknowledging that while the Confidentiality Policy Approval Orders states that disclosures "required by law or professional ethics obligations" are permitted, the approved Confidentiality Policy included as Exhibit C to the Plan does not reference professional ethics obligations).

⁶³¹ See NYSE Letter I, *supra* note 18, at 26; NYSE Letter II, *supra* note 19, at 5.

⁶³² See NYSE Letter I, *supra* note 18, at 26.

⁶³³ See *id.*

⁶³⁴ See Article IV, Section 4.4(a) of the CT Plan.

⁶³⁵ See Confidentiality Policy Approval Orders, *supra* note 569, 85 FR at 28093 and 85 FR at 28071.

⁶³⁶ See Confidentiality Policy Approval Orders, *supra* note 569, 85 FR at 28093 and 85 FR at 28072.

would no longer be applicable.⁶³⁷ The Commission sought commenters' views on whether such a provision is necessary or appropriate for the CT Plan and whether the CT Plan should, at a minimum, contain provisions for identifying and protecting confidential information that are not subject to elimination, or provisions specifying that the CT Plan must be amended to include a new policy with respect to confidential information before the existing policy can be removed.⁶³⁸ One commenter supports retaining the current provisions of the Confidentiality Policy in the event that the Confidentiality Policy Approval Orders are stayed or overturned so that information remains protected.⁶³⁹

As the Commission previously stated in the Confidentiality Policy Approval Orders, the Commission believes that the CT Plan should include a confidentiality policy.⁶⁴⁰ The Commission continues to believe that a confidentiality policy is necessary and that the policy must balance protection against the potential misuse of confidential information with the strong interest in public transparency of the operations of the CT Plan in light of the important function the CT Plan will serve in the national market system.⁶⁴¹ Accordingly the Commission is modifying Section 4.11 to remove subsection (b), which provides that if the Commission's Confidentiality Policy Approval Orders are stayed or overturned, the requirements of Section 4.11 and Exhibit C would not be applicable. The Commission finds that it is appropriate to remove this provision in the CT Plan. The U.S. Court of Appeals for the D.C. Circuit has dismissed the petitions for review of the Confidentiality Policy Approval Orders that were pending when the SROs filed the proposed CT Plan.⁶⁴² Moreover, even if a court were to vacate the Confidentiality Policy Approval Orders, the CT Plan would be able to file an amendment with the Commission to align the policy with the court's decision, and the Commission could, on its own initiative, propose an amendment as well.

⁶³⁷ See Notice, *supra* note 3, 85 FR at 64571 (Question 34).

⁶³⁸ See *id.*

⁶³⁹ See RBC Letter, *supra* note 30, at 11.

⁶⁴⁰ See Confidentiality Policy Approval Orders, *supra* note 569, 85 FR at 28092 and 85 FR at 28070.

⁶⁴¹ See Confidentiality Policy Approval Orders, *supra* note 569, 85 FR at 28090 and 85 FR at 28069.

⁶⁴² See *New York Stock Exchange, et al. vs. Securities and Exchange Commission*, Nos. 20-1242, 20-1243, 20-1244, —F.4th—, 2021 WL 2654987, *1-4 (D.C. Cir., June 29, 2021).

For the reasons discussed above, the Commission is approving Article IV, Section 4.11 of the CT Plan and Exhibit C, as modified.

6. The Processors; Information; Indemnification

(a) General Functions of the Processors

Article V of the CT Plan sets forth the provisions related to the Processors. Pursuant to Article V, Section 5.1, the Company, under the direction of the Operating Committee, shall be required to enter into agreements with the Processors obligating the Processors to perform certain processing functions on behalf of the Company (the "Processor Services Agreements").⁶⁴³ The CT Plan specifies that, among other things, the Company shall require the Processors to collect from the Members, and consolidate and disseminate to Vendors and Subscribers, Transaction Reports and Quotation Information in Eligible Securities in a manner designed to ensure the prompt, accurate, and reliable collection, processing, and dissemination of information with respect to all Eligible Securities in a fair and non-discriminatory manner.⁶⁴⁴

In the Notice, the Commission solicited comment on Article V, Section 5.1 and, in particular, on whether further details on the terms and responsibilities of the Processors should be specified in the body of the CT Plan.⁶⁴⁵ One commenter states that the minimum technical and operational requirements for the Processors, along with any contractual terms and responsibilities, should either be detailed in the CT Plan or made publicly available (*e.g.*, on the CT Plan website).⁶⁴⁶ This commenter argues that, today, public disclosure regarding Processor operations and standards of service is inadequate.⁶⁴⁷ Another commenter states that the Processor functions described in Section 5.1 are insufficient and suggests additional functions and responsibilities to be specified in the CT Plan, including provisions related to business continuity and disaster recovery for the SIPs and to providing analytical support

⁶⁴³ See Article V, Section 5.1 of the CT Plan.

⁶⁴⁴ See *id.*

⁶⁴⁵ See Notice, *supra* note 3, 85 FR at 64571 (Question 35).

⁶⁴⁶ See BlackRock Letter I, *supra* note 247, at 4.

⁶⁴⁷ See *id.* This commenter states that "[f]ull disclosure of performance standards improves transparency over the operation of the SIP and increases public confidence in the technical capability and operational resiliency of our market data system." *Id.*

for the consolidated audit trail project.⁶⁴⁸

In contrast, one commenter states that codifying technical standards of the Processors in the CT Plan would interfere with the Operating Committee's ability to respond to changing technology conditions.⁶⁴⁹ This commenter states that "[i]t is the responsibility of the Operating Committee to establish standards and adjust them in light of changing technology."⁶⁵⁰ Another commenter argues that the decision to include detailed terms about the responsibilities of the Processors in the LLC Agreement itself, as opposed to in the Processor Services Agreements, is a decision that should be left to the SROs rather than the Commission.⁶⁵¹ Citing to Rule 608(a)(3)(iii) of Regulation NMS,⁶⁵² this commenter states that it is the SROs—and not the Commission—that are authorized to act jointly in "[i]mplementing or administering an effective [NMS] plan."⁶⁵³

In the Notice, the Commission also solicited comment on whether the terms of the CT Plan should require the Processors to ensure the "fairness and usefulness of the form and content" of consolidated and disseminated transaction and quotation information.⁶⁵⁴ Two commenters state that the terms of the CT Plan should require the Processors to ensure the "fairness and usefulness of the form and content" of such information.⁶⁵⁵ One of these commenters states that including this obligation on Processors would "add a layer of much needed accountability to the process."⁶⁵⁶

In response to commenters that seek additional detail in the CT Plan on the Processor operations and standards of service, the Commission believes that it is reasonable for detailed disclosures of the Processor functions to be addressed in the Processor Services Agreements rather than to be incorporated as requirements in the body of the CT Plan, which would require a formal amendment of the CT Plan each time

⁶⁴⁸ See Data Boiler Letter I, *supra* note 31, at 4, 12, 40.

⁶⁴⁹ See Nasdaq Letter I, *supra* note 20, at 29.

⁶⁵⁰ *Id.*

⁶⁵¹ See NYSE Letter I, *supra* note 18, at 39.

⁶⁵² 17 CFR 242.608(a)(3)(iii).

⁶⁵³ See NYSE Letter I, *supra* note 18, at 39.

⁶⁵⁴ See Notice, *supra* note 3, 85 FR at 64571 (Question 36).

⁶⁵⁵ See Data Boiler Letter I, *supra* note 31, at 40; Virtu Letter, *supra* note 30, at 7. One of the commenters suggests that "mandating the use of time-lock encryption to make market data available securely in synchronized time" is a way to ensure the fairness and usefulness of SIP information. Data Boiler Letter I, *supra* note 31, at 40.

⁶⁵⁶ Virtu Letter, *supra* note 30, at 7.

the requirements changed. The Commission agrees with the comment that codifying technical standards of the Processors in the CT Plan would interfere with the Operating Committee's ability to respond to changing technology conditions.⁶⁵⁷ Moreover, setting forth detailed rights and obligations of the Processors in service agreements outside of the CT Plan would be consistent with the framework utilized in the current NMS plans.⁶⁵⁸ Further, the Operating Committee of the CT Plan, including Non-SRO Voting Representatives, will have visibility into the process of setting the requirements in the Processor Services Agreements. The Commission also expects that establishing the technical and operational requirements of the Processors will be an iterative process between the Operating Committee and the Processors. Setting forth the requirements in the CT Plan itself may unnecessarily hinder the ability of the Operating Committee and the Processors to negotiate and modify the technical details of the functions and responsibilities of the Processors in response to, among other things, changing technology conditions.

While one commenter argues that public disclosure of Processor operations and standards of service are currently inadequate, Article IV, Section 4.1 of the CT Plan would expressly require the Operating Committee to ensure the public reporting of Processors' performance and other metrics and information about the Processors.⁶⁵⁹ With respect to this public reporting requirement, the Commission continues to believe that, as it stated in the Proposed Order, "making this information public would provide all market participants with a view of how well or poorly a processor is performing across various metrics, which would allow market participants to provide meaningful input to the operating committee and to the Commission."⁶⁶⁰ The Commission further continues to believe that, if performance metrics are made public, the Operating Committee of the CT Plan will have enhanced incentives to ensure that the Processors are functioning well and that the CT Plan is providing prompt, accurate, and reliable publication of information with respect

to quotations for and transactions in NMS stocks.⁶⁶¹

Regarding comments that the terms of the CT Plan should require the Processors to ensure the "fairness and usefulness of the form and content" of consolidated and disseminated transaction and quotation information, the Commission believes that Article IV, Section 4.1 of the CT Plan incorporates this requirement, as it requires the Operating Committee to implement "policies and procedures as necessary to ensure prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to Transaction Reports and Quotation Information in Eligible Securities and the *fairness and usefulness of the form and content of that information.*"⁶⁶² For the reasons discussed above, the Commission is approving Article V, Section 5.1, as proposed.

(b) Evaluation of the Processors

Article V, Section 5.2 of the CT Plan requires that the Processors' performance of their functions under the Processor Services Agreements shall be subject to review at any time as determined by an affirmative vote of the Operating Committee, pursuant to Article IV, Section 4.3 of the CT Plan; provided, however, that a review will be conducted at least once every two calendar years but not more than once each calendar year.⁶⁶³ If the Processors have materially defaulted in their obligations under the Processor Services Agreements and such default has not been cured within the applicable cure period pursuant to the Processor Services Agreements, the CT Plan provides that the review period limitations will not apply.⁶⁶⁴ Furthermore, the CT Plan provides that the Operating Committee may review the Processors at staggered intervals.⁶⁶⁵

In the Notice, the Commission solicited comment on the Processors' performance review process.⁶⁶⁶ One commenter states that Processor reviews are important and "should not be done out of formality."⁶⁶⁷ This commenter, without identifying a specific area of deficiency, believes that the review

mechanism as proposed in the CT Plan "would cause continuous arguments rather than concrete improvements of SIP performance."⁶⁶⁸ As a solution, the commenter suggests that the Processor assessment should "review potential implications/threats as a result of upcoming techs . . . and be used to plan ahead for the future."⁶⁶⁹

The Commission believes that the provisions of the CT Plan setting forth the Processors' biennial review requirement, and the Operating Committee's ability to change the frequency of the review for circumstances in which the Processors have materially defaulted in their obligations, are reasonably designed to ensure that the Processors meet their performance obligations under the Processor Services Agreements. Indeed, the biennial review requirement is similar to the long-standing review process under the current Equity Data Plans,⁶⁷⁰ and the Commission believes that the biennial review requirement has provided a sufficient sample time period for the operating committees of the existing Equity Data Plans to evaluate the performance of the Processors without overburdening the operating committees with frequent reviews that might produce little additional information. Regarding a commenter's suggestion that the assessment should review technological developments in anticipation of future implications,⁶⁷¹ the Commission believes that the CT Plan reasonably leaves the determination of the metrics used to evaluate the Processors to the discretion of the Operating Committee. Pursuant to Article IV, Section 4.1, the Operating Committee is expressly tasked with evaluating the performance of the Processors.⁶⁷² Section 4.1 also requires the Operating Committee to assess the marketplace for equity data products and ensure that the CT Feeds are designed to ensure the widespread availability of CT Feeds data to investors and market participants. The Commission continues to believe that, as it stated in the Proposed Order, "[i]mposing a direct responsibility on the operating committee to keep abreast of changes in the marketplace regarding demands for and pricing of equity market data, and to ensure that SIP data meets those demands and are widely distributed at fair and reasonable prices,

⁶⁶¹ See *id.*

⁶⁶² Article IV, Section 4.1(a)(i) of the CT Plan (emphasis added).

⁶⁶³ See Article V, Section 5.2 of the CT Plan. See also Article IV, Section 4.1(a)(ii) of the CT Plan, which requires the Operating Committee to ensure the public reporting of Processors' performance and other metrics and information about the Processors.

⁶⁶⁴ See Article V, Section 5.2 of the CT Plan.

⁶⁶⁵ See *id.*

⁶⁶⁶ See Notice, *supra* note 3, 85 FR at 64571 (Question 37).

⁶⁶⁷ Data Boiler Letter I, *supra* note 31, at 40–41.

⁶⁶⁸ *Id.*

⁶⁶⁹ *Id.* at 40.

⁶⁷⁰ See Section V.A of the UTP Plan and Section V(d) of the CT Plan.

⁶⁷¹ See Data Boiler Letter I, *supra* note 31, at 40–41.

⁶⁷² See Article IV, Section 4.1(a)(ii) of the CT Plan.

⁶⁵⁷ See *supra* note 649.

⁶⁵⁸ See, e.g., Article V(c) of the CTA Plan, available at <https://www.ctaplan.com/plans>; Article V, Section 5.1 of the OPRA Plan, available at <https://www.opraplan.com/document-library>.

⁶⁵⁹ See Article IV, Section 4.1(a)(iv) of the CT Plan.

⁶⁶⁰ Proposed Order, *supra* note 7, 85 FR at 2183.

should help ensure that the SIPs' data feeds support the findings and goals of Section 11A of the Act."⁶⁷³ For the reasons discussed above, the Commission is approving Article V, Section 5.2, as proposed.

(c) Process for Selecting New Processors

Article V, Section 5.3 of the CT Plan requires that the Operating Committee, by an affirmative vote pursuant to Section 4.3 of the CT Plan, establish procedures for selecting a new Processor (the "Processor Selection Procedures").⁶⁷⁴ The CT Plan requires that the Processor Selection Procedures be established no later than upon the termination or withdrawal of a Processor or the expiration of a Processor Services Agreement with a Processor.⁶⁷⁵ The Processor Selection Procedures are required to set forth, at a minimum: (i) The minimum technical and operational requirements to be fulfilled by the Processor; (ii) the criteria for selecting the Processor; (iii) the entities (other than Voting Representatives) that are eligible to comment on the selection of the Processor; and (iv) the entity that will: (A) Draft the Operating Committee's request for proposal for a new Processor; (B) assist the Operating Committee in evaluating bids for the new Processor; and (C) otherwise provide assistance and guidance to the Operating Committee in the selection process.⁶⁷⁶ The Operating Committee, as part of the process of establishing the Processor Selection Procedures, is permitted to solicit and consider the timely comment of any entity affected by the operation of the CT Plan.⁶⁷⁷

In the Notice, the Commission solicited comment on the requirement to establish the Processor Selection Procedures, including the ability to seek comment on the selection of the Processor and whether to require a subcommittee of disinterested members of the Operating Committee ("disinterested subcommittee") to vote and select a new Processor.⁶⁷⁸ One commenter supports allowing the public to comment on the selection of a new Processor because this commenter expects the CT Plan to be "run as a public utility."⁶⁷⁹ This commenter also questions the value of including in the Processor Selection Procedures a

requirement that a disinterested subcommittee vote and select a new Processor, asserting that this requirement "would add more hands in the pool asking for resources" and states that, at most, the subcommittee should be allowed only to "consult" and have no authority to vote.⁶⁸⁰

With respect to the comment in support of public comment on the selection of a new Processor, Section 5.3 provides that the Operating Committee may solicit and consider public comment as part of the process of establishing the Processor Selection Procedures, and the Processor Selection Procedures are required to set forth the entities (other than the Voting Representatives) that are eligible to comment on the selection of the Processor.⁶⁸¹ The Commission also believes that the inclusion of Non-SRO Voting Representatives as full members of the Operating Committee, together with the Commission's modification of the proposed CT Plan in Section 4.4(g)(i) to prohibit discussions regarding contract negotiations with Processors in Executive Session, will help ensure that the Operating Committee considers broad industry viewpoints in the process of establishing the Processor Selection Procedures. As a result, the Commission believes that the CT Plan, as modified, addresses this issue.

With respect to the comment on the value of requiring a disinterested subcommittee to vote and select a new Processor, Section 5.3 provides the Operating Committee with the responsibility to establish the procedures for selecting a Processor, including whether to include a disinterested subcommittee as part of the Processor Selection Procedures. The Commission believes that this authority is reasonable and does not believe it is necessary to require the Operating Committee to use a disinterested subcommittee, because the inclusion of Non-SRO Voting Representatives on the Operating Committee will help address conflicts of interest in the decision-making process to select a new Processor (which could, if the Operating Committee so chooses, include a disinterested subcommittee). Additionally, the Commission notes that, while the current Equity Data Plans do not require the use of a disinterested subcommittee in the selection of a new Processor, the use of a disinterested subcommittee regarding certain critical plan matters, including the selection of

a Processor, is a common practice under the current Equity Data Plans. Finally, with respect to the comment that the disinterested subcommittee should have no authority to vote on the selection of the Processor and can only be consulted on the matter, it is the Operating Committee that is authorized by Article IV, Section 4.1 of the CT Plan to select the Processors,⁶⁸² and the Commission does not believe that it is necessary to preclude any disinterested subcommittee formed by the Operating Committee from holding a vote to, for example, recommend a Processor candidate to the Operating Committee.

The Commission believes that the provisions for the establishment of the Processor Selection Procedures are reasonably designed to ensure that the Operating Committee establishes a process that governs the selection of a new Processor through a fair, transparent, and competitive process. By setting forth the minimum requirements for Processor Selection Procedures, the CT Plan sets forth a reasonable outline of the Processor selection process without unnecessarily hindering the flexibility of the Operating Committee in determining the appropriate procedural requirements for future Processor selections. Additionally, the requirements of Section 5.3 of the CT Plan are similar to those of the UTP Plan.⁶⁸³ For the reasons discussed above, the Commission is approving Article V, Section 5.3, as proposed.

(d) Transmission of Information to Processor by Members

Article V, Section 5.4 of the CT Plan sets forth the manner in which each Member is responsible for promptly collecting and transmitting to the Processors accurate Quotation Information and Transaction Reports as set forth in the Processor Services Agreements.⁶⁸⁴ In particular, this section requires Members to include the following elements in their Quotation Information: (i) Identification of the Eligible Security, using the listing market's symbol; (ii) the price bid and offered, together with size; (iii) for FINRA, the FINRA participant along with the FINRA participant's market participant identification or Member from which the quotation emanates; (iv) appropriate timestamps; (v) identification of quotations that are not firm; and (vi) through appropriate codes

⁶⁷³ Proposed Order, *supra* note 483, 85 FR at 2183.

⁶⁷⁴ See Article V, Section 5.3 of the CT Plan.

⁶⁷⁵ See Article V, Section 5.3(a) of the CT Plan.

⁶⁷⁶ See Article V, Section 5.3(b) of the CT Plan.

⁶⁷⁷ See Article V, Section 5.3(a) of the CT Plan.

⁶⁷⁸ See Notice, *supra* note 3, 85 FR at 64571-72 (Question 38).

⁶⁷⁹ Data Boiler Letter I, *supra* note 31, at 41.

⁶⁸⁰ *Id.*

⁶⁸¹ See Article VI, Section 5.3(b)(iv) of the CT Plan.

⁶⁸² See Article IV, Section 4.1(a)(ii) of the CT Plan.

⁶⁸³ See Section V.E of the UTP Plan, available at https://utpplan.com/utp_plan.

⁶⁸⁴ See Article V, Section 5.4(a)(i) of the CT Plan.

and messages, withdrawals and similar matters.⁶⁸⁵ In the case of a national securities exchange, the Quotation Information includes the reporting Participant's matching engine publication timestamp.⁶⁸⁶ In the case of FINRA, the Quotation Information includes the quotation publication timestamp that FINRA's bidding or offering member reports to FINRA's quotation facility in accordance with FINRA rules.⁶⁸⁷

In addition, Section 5.4 requires Members to report the following elements in their Transaction Reports: (i) Identification of the Eligible Security, using the listing market's symbol; (ii) the number of shares in the transaction; (iii) the price at which the shares were purchased or sold; (iv) the buy/sell/cross indicator; (v) appropriate timestamps; (vi) the market of execution; and (vii) through appropriate codes and messages, late or out-of-sequence trades, corrections, and similar matters.⁶⁸⁸ Each Member must also (a) transmit Transaction Reports to the Processors as soon as practicable, but not later than ten seconds, after the time of execution, (b) establish and maintain collection and reporting procedures and facilities reasonably designed to comply with this requirement, and (c) designate as "late" any last sale price not collected and reported as described above or as to which the Member has knowledge that the time interval after the time of execution is significantly greater than the time period referred to above.⁶⁸⁹ The CT Plan provides that Members shall seek to reduce the time period for reporting last sale prices to the Processors as conditions warrant.⁶⁹⁰ The CT Plan also sets forth the symbols used to denote the applicable Member.⁶⁹¹

Section 5.4 excludes the following types of transactions from being required to be reported to the Processors: (i) Transactions that are part of a primary distribution by an issuer or of a registered secondary distribution or

of an unregistered secondary distribution; (ii) transactions made in reliance on Section 4(a)(2) of the Securities Act of 1933; (iii) transactions in which the buyer and the seller have agreed to trade at a price unrelated to the current market for the security (*e.g.*, to enable the seller to make a gift); (iv) the acquisition of securities by a broker-dealer as principal in anticipation of making an immediate exchange distribution or exchange offering on an exchange; (v) purchases of securities pursuant to a tender offer; (vi) purchases or sales of securities effected upon the exercise of an option pursuant to the terms thereof or the exercise of any other right to acquire securities at a pre-established consideration unrelated to the current market; and (vi) transfers of securities that are expressly excluded from trade reporting under FINRA rules.⁶⁹²

Furthermore, Section 5.4 provides that each Member agrees to indemnify the Company, each other Member, the Processors, the Administrator, the Operating Committee, and each of their respective directors, officers, employees, agents, and affiliates (each, a "Member Indemnified Party") against any liabilities as a result of a system error or disruption at a Member's Market affecting the information reported to the Processor by such Member and disseminated by the Processor to vendors and subscribers.⁶⁹³

In the Notice, the Commission solicited comment on whether the CT Plan should set minimum standards for the timely dissemination of information applicable to the Processors and, if so, the minimum standards that would be appropriate.⁶⁹⁴ One commenter argues the maximum ten second transaction reporting requirement to the Processors under Section 5.4(b)(iv) of the CT Plan is "not acceptable" and has the "potential to be frequently exploited."⁶⁹⁵ This commenter states that "thousands of trades can occur in 50± milliseconds,"⁶⁹⁶ and refers to the CAT NMS Plan as requiring broker-dealers to comply with a 50±

milliseconds standard.⁶⁹⁷ The commenter further states that the "SROs should pledge to provide SIP(s) the fastest connection and be mandated to maintain a maximum connectivity disparity ratio not more than 2.5 times."⁶⁹⁸

With respect to the comment on reducing the maximum ten-second transaction reporting limit, the Commission notes that the ten-second reporting requirement is consistent with the current Equity Data Plans.⁶⁹⁹ As stated in the Governance Order, the Commission believed that, "at least initially, most of the detailed provisions relating to the operation of the existing [NMS plans] could be imported into the [CT] Plan."⁷⁰⁰ The Commission also believes that the commenter fails to take into account that the language in Section 5.4 specifies that Members must transmit all Transaction Reports to the Processors "as soon as practicable,"⁷⁰¹ which means that transaction reporting to the Processors will in nearly all circumstances occur faster than the ten-second reporting limit. If the Operating Committee determines that the ten-second reporting limit, or any other provision related to the transmission of information to the Processors, needs to be amended, the Operating Committee may amend the CT Plan according to Article XIII, Section 13.5. Indeed, Article IV, Section 4.1 specifies that one of duties of the Operating Committee is proposing amendments to the CT Plan as necessary to ensure the prompt processing, distribution, and publication of information with respect to Transaction Reports in NMS stocks.⁷⁰²

Therefore, the Commission believes that the provisions of Section 5.4 relating to each Member's obligations to collect and transmit to the Processors accurate and reliable Quotation Information and Transaction Reports are reasonably designed to facilitate the collection and dissemination of consolidated equity market data for NMS stocks for the beneficial use of investors and the market. Accordingly, the Commission is approving Article V, Section 5.4, as proposed.

⁶⁸⁵ See Article V, Section 5.4(a)(ii) of the CT Plan.

⁶⁸⁶ See Article V, Section 5.4(d)(iii)(A) of the CT Plan.

⁶⁸⁷ See Article V, Section 5.4(d)(iii)(B) of the CT Plan. The CT Plan specifies that if FINRA's quotation facility provides a proprietary feed of its Quotation Information, then the quotation facility shall also furnish the Processors with the time of the quotation as published on the quotation facility's proprietary feed. See *id.* FINRA shall convert any quotation times reported to it to nanoseconds and shall furnish such times to the Processors in nanoseconds since Epoch. See *id.*

⁶⁸⁸ See Article V, Section 5.4(b)(ii)(A)–(G) of the CT Plan.

⁶⁸⁹ See Article V, Section 5.4(d)(iv) of the CT Plan.

⁶⁹⁰ See *id.*

⁶⁹¹ See Article V, Section 5.4(c) of the CT Plan.

⁶⁹² See Article V, Section 5.4(b)(v)(A)–(G) of the CT Plan.

⁶⁹³ See Article V, Section 5.4(d)(i) of the CT Plan. Section 5.4(d)(ii) of the CT Plan specifies the procedures for addressing claims by a Member Indemnified Party.

⁶⁹⁴ See Notice, *supra* note 3, 85 FR at 64572 (Question 39).

⁶⁹⁵ Data Boiler Letter I, *supra* note 31, at 12. This commenter also suggested several minimum performance standards of the Processors related to the use of "time-lock encryption" that would enable both the proprietary data feeds and the SIPs to be available securely in synchronized time. See *id.* at 42.

⁶⁹⁶ *Id.* at 12.

⁶⁹⁷ See *id.* at 42.

⁶⁹⁸ *Id.* at 7, 42.

⁶⁹⁹ See Section VIII.B of the UTP Plan and Section VIII(a) of the CTA Plan.

⁷⁰⁰ Governance Order, *supra* note 8, 85 FR at 28711. The Commission further stated in the Governance Order that the CT Plan "could retain the same SIP processors under the same terms and conditions, thereby eliminating what otherwise would be a significant burden for the development of the [CT] Plan." *Id.*

⁷⁰¹ Article V, Section 5.4(b)(iv) of the CT Plan.

⁷⁰² See Article IV, Section 4.1(a)(i) of the CT Plan.

(e) Operational Issues

Article V, Section 5.5 of the CT Plan requires each Member to be responsible for collecting and validating quotes and last sale reports within its own system prior to transmitting this data to the Processors.⁷⁰³ This section also requires each Member to promptly notify the Processors whenever a level of trading activity or unusual market conditions prevent such Member from collecting and transmitting Transaction Reports or Quotation Information to the Processor, or where a trading halt or suspension in an Eligible Security is in effect in its market.⁷⁰⁴ This provision further requires the Member to resume collecting and transmitting Transaction Reports and Quotation Information to the Processors as soon as the condition or event is terminated.⁷⁰⁵ In the event of a system malfunction that prevents a Member or its members from transmitting Transaction Reports or Quotation Information to the Processors, the Member is required to promptly notify the Processors of such event or condition.⁷⁰⁶ Upon receiving such a notification, Section 5.5 of the CT Plan requires the Processors to take appropriate action, including either closing the quotation or purging the system of the affected quotations.⁷⁰⁷

In the Notice, the Commission solicited comment on whether the CT Plan should set minimum standards for the timely dissemination of information applicable to the Processors.⁷⁰⁸ One commenter states that the requirement for Members to promptly notify the Processors of market events in Section 5.5 is “insufficient as a performance standard” and states that “promptly” does not equal “immediacy” for reporting such events to the Processors.⁷⁰⁹

The Commission does not agree with the comment that prompt notification is insufficient as a performance standard for reporting market events to the Processors. The commenter did not explain the basis for its statement. The Commission believes that changing technology conditions mean that

prescribing a specific definition of “prompt” in this context might lead over time to an outdated standard for reporting market events to the Processors, and the Commission therefore believes that the prompt notification requirement, which is consistent with the UTP Plan, is a reasonable standard that is designed to provide the Processors with timely notice of any reporting issues by a Member.⁷¹⁰ Accordingly, the Commission is approving Article V, Section 5.5, as proposed.

7. The Administrator

As discussed in detail below, the Commission is modifying Article VI of the CT Plan to create a new stand-alone Section 6.2 to govern the independence of the Administrator, which results in the renumbering of the sections of this Article. The modified numbering is as follows: Section 6.1, General Functions of the Administrator; Section 6.2, Independence of the Administrator; Section 6.3, Evaluation of the Administrator; and Section 6.4, Process for Selecting New Administrator.

(a) General Functions of the Administrator

Article VI of the CT Plan sets forth the provisions relating to the Administrator. Pursuant to Article VI, Section 6.1, the LLC, under the direction of the Operating Committee, will be required to enter into an agreement with the Administrator obligating the Administrator to perform certain administrative functions on behalf of the LLC, including: Recordkeeping; administering vendor and subscriber contracts; administering fees, including billing, collection, and auditing of vendors and subscribers; administering distributions; tax functions of the LLC; and the preparation of the LLC’s audited financial reports (the “Administrative Services Agreement”).⁷¹¹

In the Notice, the Commission solicited comment on Article VI, Section 6.1 and whether further details on the terms and responsibilities of the Administrator should be specified in the CT Plan.⁷¹² One commenter states that the CT Plan should specify in detail the minimum performance standards applicable to the Administrator.⁷¹³ Another commenter states that the

minimum technical and operational requirements for the Administrator, along with any contractual terms and responsibilities, should either be detailed in the CT Plan or made publicly available (e.g., on the CT Plan website).⁷¹⁴ This commenter argues that, today, public disclosure regarding Administrator operations and standards of service are inadequate.⁷¹⁵ Finally, one commenter states that the CT Plan should clarify the level of discretion the Administrator has to “mobilize budget.”⁷¹⁶

In contrast, one commenter argues that the decision to include detailed terms about the responsibilities of the Administrator in the LLC Agreement itself, as opposed to in the Administrative Services Agreement, is a decision that should be left to the SROs rather than the Commission.⁷¹⁷ Citing Rule 608(a)(3)(iii) of Regulation NMS,⁷¹⁸ this commenter states that it is the SROs—and not the Commission—that are authorized to act jointly in “[i]mplementing or administering an effective [NMS] plan.”⁷¹⁹

In the Notice, the Commission also solicited comment on whether the Administrator’s duties with respect to the preparation of the CT Plan’s audited financial reports should include unaudited reports.⁷²⁰ One commenter states that including the preparation of unaudited financial reports as a duty of the Administrator is unnecessary because “SROs may not care to discuss any unaudited matters with non-SROs, thereby pushing the matter down the road until actual audits are performed.”⁷²¹ This commenter further states that unaudited information may be claimed as confidential, thereby preventing appropriate access.⁷²²

The Commission believes that it is reasonable for detailed disclosures of the Administrator functions and standards of service to be addressed in the Administrative Services Agreement rather than incorporated as requirements in the CT Plan, which would require a formal amendment of the CT Plan each time the requirements changed.⁷²³ The Commission expects that establishing the technical and

⁷⁰³ See Article V, Section 5.5(a) of the CT Plan. Section 5.5 also provides that each Member may utilize a dedicated Member line into the Processors to transmit Transaction Reports and Quotation Information to the Processors. See Article V, Section 5.5(b) of the CT Plan.

⁷⁰⁴ See Article V, Section 5.5(c) of the CT Plan.

⁷⁰⁵ See *id.*

⁷⁰⁶ See *id.*

⁷⁰⁷ See *id.*

⁷⁰⁸ See Notice, *supra* note 3, 85 FR at 64572 (Question 39).

⁷⁰⁹ Data Boiler Letter I, *supra* note 31, at 42. This commenter also states that the proprietary data feeds and SIPs “ought to be in synch [sic] before, during, and after such event(s).” *Id.*

⁷¹⁰ See Section VII.D of the UTP Plan.

⁷¹¹ See Article VI, Section 6.1 of the CT Plan.

⁷¹² See Notice, *supra* note 3, 85 FR at 64572 (Question 40).

⁷¹³ See SIFMA Letter I, *supra* note 30, at 3. This commenter further states that such minimum performance standards “will be needed if the competing consolidator model is adopted by the Commission.” *Id.*

⁷¹⁴ See BlackRock Letter I, *supra* note 247, at 4.

⁷¹⁵ See *id.*; see also *supra* note 647.

⁷¹⁶ Data Boiler Letter I, *supra* note 31, at 44.

⁷¹⁷ See NYSE Letter I, *supra* note 18, at 39.

⁷¹⁸ 17 CFR 242.608(a)(3)(iii).

⁷¹⁹ NYSE Letter I, *supra* note 18, at 39.

⁷²⁰ See Notice, *supra* note 3, 85 FR at 64572 (Question 41).

⁷²¹ Data Boiler Letter I, *supra* note 31, at 4, 43.

⁷²² *Id.*

⁷²³ Moreover, the Commission notes that it did not receive any comments specifying the minimum technical and operational requirements for the Administrator.

operational requirements of the Administrator will be an iterative process between the Operating Committee and the Administrator. Setting forth the requirements in the CT Plan itself may unnecessarily hinder the ability of the Operating Committee and the Administrator to negotiate and modify the technical details of the functions and responsibilities of the Administrator in response to, among other things, changing administrative needs of the CT Plan.

While one commenter argues that public disclosure of Administrator operations and standards of service are currently inadequate, the Commission believes that fully setting forth the contractual relationship between the CT Plan and the Administrator in the Administrative Services Agreement would provide greater specificity and transparency regarding the functions of the Administrator as compared to the current Equity Data Plans, which do not specifically contemplate a separate Administrative Services Agreement. Moreover, the Operating Committee of the CT Plan, including Non-SRO Voting Representatives, will have visibility into the process of setting the requirements in the Administrative Services Agreement. Regarding the comment that the CT Plan should clarify the level of discretion for the Administrator to “mobilize budget,” the Commission believes that Section 6.1, as proposed, reasonably addresses the general functions of the Administrator, which include administering financial matters of the CT Plan, and that further determinations of the specific functions of the Administrator should be subject to contractual negotiations between the Operating Committee and the Administrator in order not to impede the ability of the Operating Committee to negotiate terms and attract qualified administrative service providers for the role of Administrator. Accordingly, the Commission is approving Section 6.1 of the CT Plan as proposed.

(b) Independence of the Administrator

Article VI, Section 6.3 of the CT Plan as proposed requires that the Administrator selected by the Operating Committee may not be owned or controlled by a corporate entity that, either directly or via another subsidiary, offers for sale its own PDP.⁷²⁴

The Commission received a number of comments regarding the requirement that the CT Plan use an independent Administrator. A number of commenters express support for the independent Administrator

requirement.⁷²⁵ One of these commenters states that, in order to eliminate conflicts of interest associated with the management of consolidated equity market data, there should be a “complete separation of the administrator of CT [Plan] data from proprietary data interests.”⁷²⁶ This commenter states that the CT Plan “should be administered by a team that is completely unaffiliated with Member exchanges.”⁷²⁷ This commenter further states that, in the past, there have been complaints that the exchange administrators “allowed their proprietary data interests to negatively influence the promotion and management of the consolidated tape.”⁷²⁸ Another commenter argues that moving to an independent single plan Administrator will “minimize any real or perceived conflicts that exist today with the non-independent administrators.”⁷²⁹ This commenter further states that under the independence requirement, the independent Administrator “should have no formal or informal role with any of the exchanges or their affiliates or subsidiaries, and no immediately past, present, or planned future business relationship with any of the exchanges or their affiliates or subsidiaries.”⁷³⁰

In contrast, other commenters oppose the independent Administrator requirement and reiterate many of the same concerns these commenters expressed in response to the Proposed Order.⁷³¹ First, commenters opposing the requirement states that the Commission fails to provide any evidence of problems in the current Administrator framework for the existing Equity Data Plans.⁷³² One commenter argues that the

⁷²⁵ See Refinitiv Letter, *supra* note 249, at 3; ICI Letter II, *supra* note 31, at 1; Schwab Letter II, *supra* note 30, at 2; MFA Letter, *supra* note 30, at 1.

⁷²⁶ Refinitiv Letter, *supra* note 249, at 3.

⁷²⁷ *Id.*; see also ICI Letter II, *supra* note 31, at 1.

⁷²⁸ Refinitiv Letter, *supra* note 249, at 3.

⁷²⁹ Schwab Letter II, *supra* note 30, at 6.

⁷³⁰ *Id.*

⁷³¹ See NYSE Letter I, *supra* note 18, at 11; NYSE Letter II, *supra* note 19, at 4; Cboe Letter, *supra* note 17, at 5; Appendix B of Nasdaq Letter I, *supra* note 20, at 52–57 (attaching and incorporating by reference all arguments made by Nasdaq and other petitioners in their opening brief challenging the Governance Order); see also Opening Brief for Petitioners, *The Nasdaq Stock Market, et al. v. Securities and Exchange Commission* (Case No. 20–1181) (DC Cir. 2020). The Commission responded to the arguments made by Nasdaq and other petitioners in their brief. See Brief for the Respondent, Securities and Exchange Commission, *The Nasdaq Stock Market, et al. v. Securities and Exchange Commission* (Case No. 20–1181) (D.C. Cir. 2021).

⁷³² See NYSE Letter I, *supra* note 18, at 11; NYSE Letter II, *supra* note 19, at 4; Appendix B of Nasdaq Letter I, *supra* note 20, at 53.

Commission’s concern of conflicts of interest faced by the existing administrators is unsupported by evidence.⁷³³ This commenter argues that, as a result, the independent Administrator requirement is contrary to the purposes of the Act and Rule 608(b) of Regulation NMS,⁷³⁴ as “it is not necessary or appropriate in the public interest, for the protection of investors, or the maintenance of fair and orderly markets; it would disrupt the mechanisms of the national market system; and it is contrary to the purposes of the Act.”⁷³⁵ This commenter further states that the Commission “did not allow the SROs to consider other ways to address the potential conflict, such as through information barriers, which are commonly allowed under Commission rules, or the use of confidentiality requirements.”⁷³⁶ Another commenter states that concerns about conflicts and confidentiality should be addressed in the context of the conflicts and confidentiality policies, or contractual agreements, not by limiting “the ability of the CT Plan to contract with the entity best able to provide the required services.”⁷³⁷

The Commission disagrees with the commenters’ views that the Commission has not provided evidence of problems in the current Administrator framework for the existing Equity Data Plans. The Commission continues to believe, as it stated in the Governance Order, that “an entity that acts as the administrator while also offering for sale its own proprietary data products faces a substantial, inherent conflict of interest, because it would have access to sensitive SIP customer information of significant commercial value.”⁷³⁸ Additionally, the Commission in the Governance Order described these issues and cited the concerns of market participants that the audit function of the Administrator creates special conflicts when managed by an affiliate of an SRO, with the potential for the misuse of audit data to advance the

⁷³³ See NYSE Letter I, *supra* note 18, at 11; NYSE Letter II, *supra* note 19, at 4.

⁷³⁴ 17 CFR 242.608(b).

⁷³⁵ NYSE Letter I, *supra* note 18, at 11.

⁷³⁶ *Id.* at 12; see also NYSE Letter II, *supra* note 19, at 4. This commenter states that prior to the issuance of the Governance Order, the current Administrators to the existing Equity Data Plans had already implemented information barriers designed to protect SIP customer information, and “the Commission has not articulated any deficiencies with this information barrier approach.” NYSE Letter I, *supra* note 18, at 12.

⁷³⁷ Nasdaq Letter I, *supra* note 20, at 23.

⁷³⁸ Governance Order, *supra* note 8, 85 FR at 28722.

⁷²⁴ See Article VI, Section 6.3 of the CT Plan.

business objectives of the SROs.⁷³⁹ And as the Commission stated in the Proposed Order, “Participants and Participant representatives have been privy to confidential information of substantial commercial or competitive value, including, among other things, information about core data usage, the SIPs’ customer lists, financial information, and subscriber audit results.”⁷⁴⁰ Indeed, during the general session of the Equity Data Plan meeting for the third quarter of 2020, a third-party auditor was suggested as an option for addressing a conflict of interest issue raised by the Advisory Committee members regarding the audit practices of the current non-independent Administrators.⁷⁴¹ Furthermore, as it stated in the Governance Order, the Commission understands that the current Administrators to the existing Equity Data Plans have significant latitude with respect to the information they may request during contract approval process for use of SIP market data, some of which may be highly sensitive.⁷⁴² The Commission continues to believe, as it stated in the Governance Order, that the “independent Administrator requirement would address concerns regarding the potential use of SIP subscriber audit data to pursue commercial interests outside of the [CT] Plan.”⁷⁴³

The Commission also continues to believe that the conflicts of interest faced by a non-independent Administrator are so great that these conflicts cannot be sufficiently mitigated by policies and procedures alone.⁷⁴⁴ Unlike the exchanges that offer for sale their own proprietary equity market data products, an independent Administrator would not have the competing objective of maximizing its own proprietary data products’ profitability.⁷⁴⁵ The Commission therefore continues to believe that in order to mitigate conflicts of interest associated with the management of consolidated equity market data, the administration of the CT Plan must be separated from proprietary equity market data interests. Regarding the comment concerning past, present, and future business relationships between

the Administrator and any of the exchanges or their affiliates,⁷⁴⁶ the independent Administrator requirement will address one inherent conflict of interest by removing SROs with proprietary data businesses that compete with the SIP from consideration in the role of the Administrator.⁷⁴⁷ Moreover, the Commission believes that the disclosures required under the CT Plan’s conflicts of interest policy will raise awareness of potential conflicts of interest between the Administrator and the Members and facilitate public confidence in the CT Plan operations.

As it stated in the Governance Order, the Commission believes that “the independence requirement would separate the independent Administrator from an exchange’s commercial interests and allow it to focus on the regulatory objectives of Section 11A of the Act.”⁷⁴⁸ Additionally, because the relevant conflict of interest for an Administrator would arise from administration of the SIPs while selling overlapping proprietary equity market data products, the Commission continues to believe that the independence requirement for the Administrator must prohibit an entity from serving as Administrator of the CT Plan if it is owned or controlled by a corporate entity that, either directly or via another subsidiary, offers for sale its own PDP.

Second, commenters opposing the independence requirement state that adopting this requirement would be costly and disruptive to the administration of SIP data.⁷⁴⁹ One of these commenters states that the costs for SROs and market participant subscribers to switch to an independent administrator “clearly outweighs any benefits.”⁷⁵⁰ This commenter describes the “decades of experience” the current Administrators bring to the existing Equity Data Plans and asserts that CT Plan would “throw away all of that experience and require the Operating Committee to hire as Administrator a new, unproven, inexperienced entity.”⁷⁵¹ This commenter further states that the “new Administrator

would be starting from zero, and would have to build entirely new system infrastructure, train new personnel to perform tasks that the existing Administrators already perform, and create and then enter into new agreements with subscribers.”⁷⁵² Similarly, another commenter argues that identifying a new independent Administrator and transitioning the administrative services provided by the current Administrators to that entity “will take a significant amount of time and resources.”⁷⁵³

The Commission acknowledges, as it stated in the Governance Order, that the current Administrators have “significant experience and familiarity with the SIPs’ practices and systems,” and “that there will be a transition period with additional costs to onboard the new Administrator, including system infrastructure (e.g., network connectivity to exchanges, hosting, and database upgrades) and human capital (e.g., contract management, hiring personnel, service support, and consolidating policies).”⁷⁵⁴ The Commission believes, however, that the relevant expertise that has been developed by the SROs currently serving as administrators of the existing Equity Data Plans can be leveraged by the CT Plan, since those SROs will continue to be members of the CT Plan Operating Committee and will be able to advise and facilitate the onboarding process of the new Administrator.⁷⁵⁵ Furthermore, as it stated in the Governance Order, the Commission continues to believe that any industry experience loss in the audit process due to the transition to an independent Administrator would be specific to the previous administrative policies and procedures under the existing Equity Data Plans instead of the CT Plan.⁷⁵⁶ On balance, the Commission continues to believe that eliminating the substantial conflict of interest presented by having an entity serve as Administrator while directly or indirectly offering for sale its own equity market data products justifies the independent Administrator requirement in the CT Plan.⁷⁵⁷

⁷³⁹ See *id.* at 28723.

⁷⁴⁰ Proposed Order, *supra* note 483, 85 FR at 2185.

⁷⁴¹ See Summary of CQ/CTA/UTP General Session, at 3 (Nov. 19, 2020), available at https://www.utpplan.com/DOC/2020-11-19_Summary_CTA-UTP_General_Session.pdf.

⁷⁴² See Governance Order, *supra* note 8, 85 FR at 28724.

⁷⁴³ *Id.* at 28723.

⁷⁴⁴ See *id.* at 28722–23.

⁷⁴⁵ See *id.* at 28723.

⁷⁴⁶ See Schwab Letter II, *supra* note 30, at 6.

⁷⁴⁷ NYSE and Nasdaq currently act as Administrators of the existing Equity Data Plans. Under the independence provision, NYSE and Nasdaq will be excluded from operating as the Administrators of the CT Plan.

⁷⁴⁸ Governance Order, *supra* note 8, 85 FR at 28723.

⁷⁴⁹ See NYSE Letter I, *supra* note 18, at 11; NYSE Letter II, *supra* note 19, at 4; Cboe Letter, *supra* note 17, at 5, Appendix B of Nasdaq Letter I, *supra* note 20, at 54.

⁷⁵⁰ NYSE Letter I, *supra* note 18, at 11; see also NYSE Letter II, *supra* note 19, at 4.

⁷⁵¹ NYSE Letter I, *supra* note 18, at 11.

⁷⁵² *Id.*

⁷⁵³ Cboe Letter, *supra* note 17, at 5. This commenter further states that “transitioning these administrative services to a new entity may require significant effort to ensure that the transition is seamless for market participants and does not create new potentially disruptive inefficiencies in the administration of the [CT] Plan.” *Id.*

⁷⁵⁴ Governance Order, *supra* note 8, 85 FR at 28723.

⁷⁵⁵ See Paragraph (d)(iv) of the Recitals to the CT Plan.

⁷⁵⁶ See Governance Order, *supra* note 8, 85 FR at 28724.

⁷⁵⁷ See *id.*

In response to the comment about search costs for identifying a new independent Administrator,⁷⁵⁸ the Commission continues to believe, as it stated in the Governance Order, “that there is a broad range of financial service firms, unaffiliated with an SRO, with specialized capabilities to oversee market data administrative functions of the CT Plan, such as licensing, billing, contract administration and client relationship management, and record keeping.”⁷⁵⁹

The Commission also continues to believe that despite the implementation costs of selecting a new independent Administrator, the selection of an independent Administrator is an important step to help ensure that the CT Plan furthers the objectives of Section 11A of the Act.⁷⁶⁰ Further, the Commission continues to believe, as it stated in the Governance Order, “based on its oversight experience and as described by commenters,” that “these costs are justified because the inherent conflicts of interest identified by the Commission, whereby an entity acts as a plan administrator while also offering its own competing products to the SIPs, either directly or via a subsidiary, raises significant concerns regarding access to confidential subscriber information.”⁷⁶¹ Access to such confidential subscriber information and its use for purposes outside the scope of the CT Plan by an SRO-affiliated Administrator undermines the fair administration of equity market data in the public interest.⁷⁶²

Third, commenters opposing the independence requirement ask why this requirement would disqualify current exchange administrators to the Equity Data Plans but not similarly disqualify non-SRO data vendors from filling the Administrator role, when those entities might face conflict of interest concerns similar to those of exchange Administrators.⁷⁶³ One of the commenters argues that the independence requirement imposes an unfair burden on competition because “it would not prohibit non-SRO data vendors from filling the Administrator role, even though such vendors may separately sell market data and could also theoretically benefit from access to

subscriber lists.”⁷⁶⁴ Regarding this concern, the Commission did not mandate in the Governance Order that non-SRO data vendors serve as the new independent Administrator. Nor are such entities the only viable alternative Administrator. As discussed above, the Commission chose to address one substantial, inherent conflict of interest when it decided that any plan Administrator cannot be owned or controlled by a corporate entity that offers for sale its own proprietary equity market data products. The CT Plan, under the direction of the Operating Committee, can exercise discretion in selecting the new Administrator.⁷⁶⁵ Furthermore, the Commission does not believe that the Operating Committee of the CT Plan would have any incentive to choose as the Administrator a non-SRO entity that would face a financial conflict of interest and act as a direct competitor to the SROs’ proprietary data business.

Given the importance of the independent Administrator requirement as described above, the Commission is modifying CT Plan as proposed to relocate from Section 6.3 the language specifying the independent Administrator requirement to a new standalone section in Article VI, Section 6.2. Accordingly, new Section 6.2 of the CT Plan will state that “[t]he Administrator may not be owned or controlled by a corporate entity that, either directly or via another subsidiary, offers for sale its own PDP.” The Commission believes that this modification will eliminate uncertainty as to the application of the independent Administrator requirement. This modification will specify that the requirement for the Administrator to be independent does not apply only at the time that the Operating Committee selects the Administrator, but is an ongoing requirement of the CT Plan. For the reasons described above, the Commission is approving the independent Administrator requirement, as modified, in renumbered Article VI, Section 6.2 of the CT Plan.

(c) Evaluation of the Administrator

Article VI, Section 6.2 of the CT Plan as proposed sets forth the provisions for the evaluation of an Administrator, which are substantially similar to the provisions relating to the evaluation of the Processors described above.⁷⁶⁶ This

section specifies that the Administrator’s performance of its functions under the Administrative Services Agreement will be subject to review at any time as determined by an affirmative vote of the Operating Committee pursuant to Section 4.3 of the CT Plan; provided, however, that a review must be conducted at least once every two calendar years but not more frequently than once each calendar year.⁷⁶⁷ If the Administrator has materially defaulted in its obligations under the Administrative Services Agreement and that default has not been cured within the applicable cure period pursuant to the Administrative Services Agreement, the CT Plan provides that the review period limitations will not apply.⁷⁶⁸ Furthermore, the CT Plan provides that the Operating Committee must appoint a subcommittee or other persons to conduct the review of the Administrator and that the reviewer must provide the Operating Committee with a written report of its findings and recommendations, including with respect to the continuing operation of the Administrator.⁷⁶⁹ The CT Plan specifies that the Administrator must assist and participate in the process of the review.⁷⁷⁰ The CT Plan provides that the Operating Committee, upon completing a review of the Administrator, must notify the Commission of any recommendations it may approve as a result of the review and supply the Commission with copies of any related reports.⁷⁷¹

In the Notice, the Commission solicited comment on Article VI, Section 6.2 of the CT Plan as proposed and the proposed frequency of reviews of the Administrator.⁷⁷² One commenter states that the proposed review period of every two years is appropriate if there is no performance issue.⁷⁷³ This commenter also states that more clarity on the Administrator evaluation criteria would “improve the soundness the CT Plan.”⁷⁷⁴

The Commission believes that the provisions for the evaluation of the Administrator are reasonably designed to ensure that the Administrator meets its performance obligations under the Administrative Service Agreement. The Commission also believes that the requirement for the Operating Committee to appoint a subcommittee

⁷⁵⁸ See Choe Letter, *supra* note 17, at 5.

⁷⁵⁹ Governance Order, *supra* note 8, 85 FR at 28724.

⁷⁶⁰ *See id.*

⁷⁶¹ *Id.*

⁷⁶² *See id.*

⁷⁶³ See NYSE Letter I, *supra* note 18, at 12; NYSE Letter II, *supra* note 19, at 4; Appendix B of Nasdaq Letter I, *supra* note 20, at 54.

⁷⁶⁴ NYSE Letter I, *supra* note 18, at 11; *see also* NYSE Letter II, *supra* note 19, at 4.

⁷⁶⁵ See Article IV, Section 4.1(a)(ii) of the CT Plan.

⁷⁶⁶ See *supra* Section II.C.6(a).

⁷⁶⁷ See Article VI, Section 6.2 of the CT Plan.

⁷⁶⁸ *See id.*

⁷⁶⁹ *See id.*

⁷⁷⁰ *See id.*

⁷⁷¹ *See id.*

⁷⁷² See Notice, *supra* note 3, 85 FR at 64572 (Question 42).

⁷⁷³ See Data Boiler Letter I, *supra* note 31, at 44.

⁷⁷⁴ *Id.*

or other persons to conduct the review is a commonly performed practice under the current Equity Data Plans and will promote efficient allocation of the Operating Committee's time and resources. Furthermore, the Commission believes that the requirement that the Operating Committee notify the Commission of any recommendations it may approve as a result of a review of the Administrator and supply the Commission with copies of any related reports will promote transparency and enhance Commission oversight of the Administrator's performance of its obligations to the CT Plan.

The Commission agrees with the comment that the biennial review timeframe is appropriate if there are no Administrator performance issues.⁷⁷⁵ As described above, Section 6.2 as proposed provides that the timeframe limitations will not apply if the Administrator has materially defaulted, without cure, in its obligations under the Administrative Services Agreement. The Commission also believes that the biennial review timeframe provides a sufficient sample time period for the Operating Committee to evaluate the performance of the Administrator, without overburdening the Operating Committee with frequent reviews that might produce little additional information. Regarding the comment requesting additional clarity on the Administrator evaluation criteria,⁷⁷⁶ the Commission believes that the CT Plan appropriately assigns the responsibility of evaluating the performance of the Administrator to the Operating Committee, which is responsible for the operation of the CT Plan, and reasonably sets forth the parameters the Operating Committee must use to ensure that the Administrator meets its performance obligations under the Administrative Service Agreement, without prescribing the specific measurements of Administrator performance in a way that would require an amendment of the CT Plan to respond to market developments.⁷⁷⁷ Moreover, the commenter did not explain in detail the clarification it was seeking on the evaluation criteria. For the foregoing reasons, the Commission is approving Article VI, Section 6.2, as proposed, but is renumbering it as Section 6.3 of the CT Plan.

(d) Process for Selecting New Administrator

Article VI, Section 6.3 of the CT Plan as proposed sets forth the provisions for the selection of an Administrator, which are similar to the procedures for selecting a new Processor.⁷⁷⁸ In particular, Section 6.3 specifies that the Operating Committee shall establish procedures for selecting a new Administrator, by an affirmative vote pursuant to Section 4.3 of the CT Plan (the "Administrator Selection Procedures").⁷⁷⁹ Section 6.3 further provides that the Administrator Selection Procedures must set forth, at a minimum: (i) The minimum technical and operational requirements to be fulfilled by the Administrator; (ii) the criteria to be considered in selecting the Administrator; (iii) the entities (other than Voting Representatives) that are eligible to comment on the selection of the Administrator; and (iv) the entity that will: (A) Draft the Operating Committee's request for proposal for a new Administrator; (B) assist the Operating Committee in evaluating bids for the new Administrator; and (C) otherwise provide assistance and guidance to the Operating Committee in the selection process.⁷⁸⁰ Finally, Section 6.3 provides that the Operating Committee, as part of the process in establishing the Administrator Selection Procedures, is permitted to solicit and consider the timely comment of any entity affected by the operation of the CT Plan.⁷⁸¹

In the Notice, the Commission solicited comment on Article VI, Section 6.3 of the CT Plan as proposed and whether the Administrator Selection Procedures should set forth additional terms, such as specifying a maximum time period to select a new Administrator.⁷⁸² One commenter states that the CT Plan should clarify the protocols to transition to a new Administrator and specify the maximum time period to select a new Administrator.⁷⁸³ The commenter also

states that the Administrator should not "just be any major accounting, law, or consulting firm."⁷⁸⁴ Finally, the commenter states that the public should be allowed to comment on the selection of a new Administrator.⁷⁸⁵

In response to the comment regarding transition protocols for a new Administrator, the Commission believes that details regarding transition protocols are reasonably described in paragraph (d)(iv) of the Recitals to the CT Plan, which discusses the transition from the prior administrators under the existing Equity Data Plans to the new independent Administrator.⁷⁸⁶ With respect to future changeovers in the Administrator role, the Commission believes that it is appropriate for the Operating Committee to evaluate and determine the specific appropriate transition protocols in close partnership with the new independent Administrator, as transition protocols may be highly detailed and depend on the particular service provider selected as the Administrator. Therefore, the Commission believes that setting forth specific requirements in the CT Plan, at this stage, may unnecessarily hinder the ability of the CT Plan, under the direction of the Operating Committee, and the Administrator to determine the appropriate transition protocols.

With respect to the comment on prescribing a maximum period of time to select a new Administrator,⁷⁸⁷ the Commission does not believe that it is necessary for Section 6.3 to set the maximum period of time for the Operating Committee to establish the Administrator Selection Procedures, because the Commission has separately modified the CT Plan to provide deadlines for implementation of the CT Plan, including for selecting, and entering into a contract with, an Administrator.⁷⁸⁸ Furthermore, the Commission did not receive any comments on a specific maximum

⁷⁸⁴ *Id.* at 4, 44.

⁷⁸⁵ *See id.* at 44.

⁷⁸⁶ *See supra* Section II.C.1.

⁷⁸⁷ *See* Data Boiler Letter I, *supra* note 31, at 44.

⁷⁸⁸ Paragraph (d)(iv) of the Recitals of the CT Plan provides that within eight months of the Effective Date, the Operating Committee must have selected and entered into an agreement with an Administrator and such Administrator shall prepare to transition from prior the Administrators under the Equity Data Plans such that, before the Operative Date, it is able to provide services under the Administrative Services Agreement, as determined by the Operating Committee pursuant to Section 4.3, including that (1) new contracts between the CT Plan and Vendors and the CT Plan and Subscribers have been finalized such that all Vendors and Subscribers under the Equity Data Plans are ready to transition to such new contracts, (2) the Administrator has in place a system to administer distributions, and (3) the Administrator has in place a system to administer fees.

⁷⁷⁸ *See* Article V, Section 5.3 of the CT Plan.

⁷⁷⁹ *See* Article VI, Section 6.4 of the CT Plan. The CT Plan requires that the Administrator Selection Procedures be established prior to the Operative Date, upon the termination or withdrawal of the Administrator, or upon the expiration of the Administrative Services Agreement. *See id.* *See also* paragraph (d)(iv) of the Recitals to the CT Plan, as modified by the Commission (stating that the Operating Committee shall enter into an agreement with the Administrator pursuant to Section 6.3 of the CT Plan within eight months of the Effective Date).

⁷⁸⁰ *See* Article VI, Section 6.4 of the CT Plan.

⁷⁸¹ *See id.*

⁷⁸² *See* Notice, *supra* note 3, 85 FR at 64572 (Question 43).

⁷⁸³ *See* Data Boiler Letter I, *supra* note 31, at 44.

⁷⁷⁵ *See id.*

⁷⁷⁶ *See id.*

⁷⁷⁷ *See* Article IV, Section 4.1(a)(ii) of the CT Plan.

period of time to select a new Administrator.

With respect to the comment on limiting the type of professional service firms that may serve the role of the independent Administrator,⁷⁸⁹ the Commission believes that the CT Plan should not limit the scope of firms based solely on the type or size of the firm, but should instead use the criteria required to be considered in selecting the Administrator pursuant to the Administrator Selection Procedures adopted by the Operating Committee. Finally, regarding the commenter's statement in support of public comment on the selection of a new Administrator,⁷⁹⁰ Section 6.3 provides that the Operating Committee may solicit and consider comment as part of the process of establishing the Administrator Selection Procedures, and the Administrator Selection Procedures are required to set forth the entities (other than the Voting Representatives) that are eligible to comment on the selection of the Administrator.⁷⁹¹ The Commission also believes that the inclusion of Non-SRO Voting Representatives as full members of the Operating Committee, together with the Commission's modification of the proposed CT Plan in Section 4.4(g)(i) to prohibit discussions in Executive Session regarding contract negotiations with the Administrator, will help ensure that the Operating Committee considers broad industry viewpoints in the process of establishing the Administrator Selection Procedures. As a result, the Commission believes that the CT Plan, as modified, addresses this issue.

Although the provisions for the establishment of the Administrator Selection Procedures are reasonably designed to ensure that the Operating Committee establishes a process that governs the selection of a new Administrator through a fair, transparent, and competitive process, the Commission is modifying a sentence in Article VI, Section 6.3 of the CT Plan. In particular, Section 6.3 states that the Administrator Selection Procedures shall be established by the *Voting Representatives* pursuant to Article IV, Section 4.3 of the CT Plan. The Commission is modifying Section 6.3 by replacing the phrase "Voting Representatives" with the phrase "Operating Committee" in order to remove any inconsistency and potential confusion in this section regarding the

vote that would be required to establish the Administrator Selection Procedures. As described above, Section 4.3 governs the action of the Operating Committee, which has the specific authority under the CT Plan for selecting, overseeing, and specifying the role and responsibilities of the Administrator.⁷⁹² The reference to Voting Representatives is the only instance found in Section 6.3 when discussing the body responsible for establishing the Administrator Selection Procedures, and modifying the provision to instead refer to the Operating Committee will make clear that an augmented majority vote of the Operating Committee is necessary to establish those procedures. Accordingly, for the reasons discussed above, the Commission is approving Article VI, Section 6.3, as modified and renumbered as Section 6.4 of the CT Plan.

8. Regulatory Matters

Article VII of the CT Plan sets forth the provisions governing regulatory matters. Section 7.1 of Article VII addresses regulatory and operational halts. Section 7.1(a) provides that a Member must notify the Processor if it has concerns about its ability to collect and transmit quotes, orders, or last sale prices, or where it has declared an Operational Halt or suspension of trading in one or more Eligible Securities, pursuant to the procedures adopted by the Operating Committee.

Sections 7.1(b)–(f) provide procedures for the initiation of a regulatory halt and the resumption of trading following a regulatory halt. In particular, Section 7.1(d) provides that the Primary Listing Market will determine when to resume trading. In making that determination, the Primary Listing Market will make a good-faith determination and consider the totality of information to determine whether resuming trading would promote a fair and orderly market. Section 7.1(d) further provides that the Primary Listing Market retains discretion to delay the resumption of trading if it believes that trading will not resume in a fair and orderly manner.

In the Notice, the Commission sought comment on these provisions.⁷⁹³ One commenter argues that "good faith" is "too loose of a requirement."⁷⁹⁴ The Commission, however, believes that the proposed good-faith standard set forth in Section 7.1 is appropriate because it addresses potential concerns that

primary listing markets may be subject to commercial pressures in making decisions to call regulatory halts or resume trading thereafter and also because it is combined with the requirement that the primary listing markets consider the broader interests of the national market system with respect to declaring regulatory trading halts and resuming trading thereafter, thereby promoting the maintenance of fair and orderly markets and enhancing the protection of investors.⁷⁹⁵ Section 7.1(b)(ii) of the CT Plan requires the primary listing market to also consider the severity of the issue, its expected duration, and potential impact on market participants. Section 7.1(b)(ii) also requires the primary listing market to consult with, or seek input from, as feasible, the affected trading centers, processors, and others when making any such determinations. Moreover, Section 7.1(c)(iv) and Section 7.1(d)(1) each require the primary listing market to consider whether its determination would promote a fair and orderly market. Consequently, the Commission has determined that a good-faith determination, based on the totality of information and focusing on the promotion of fair and orderly markets, is reasonably designed to ensure that trading is halted and resumed in an appropriate manner. Additionally, consistent with its recent approval of the same provisions regarding trading halts in the existing Equity Data Plans, the Commission finds that the provisions of Section 7.1 are reasonably designed "to enhance the resiliency of the national market system by clearly memorializing the coordinated actions to be taken by the Participants during such events so that trading may resume in a fair and orderly manner."⁷⁹⁶ Accordingly, the Commission is approving Section 7.1 as proposed.

⁷⁹⁵ For example, Article VIII(a) of the CTA Plan does not prevent "any Participant that is an exchange from halting or suspending trading, or any Participant that is a national securities association from suspending the furnishing of quotation information, in any Eligible Security for any reason it deems adequate. Any Participant which does so halt or suspend trading or the furnishing of quotation information shall immediately advise the Processor of its actions and the reasons therefor, and also advise the Processor when such halt or suspension is terminated." Moreover, Article X of the UTP Plan permits the Listing Market to declare a regulatory halt, "[w]henver, in the exercise of its regulatory functions, the Listing Market for an Eligible Security determines that a Regulatory Halt is appropriate" and to terminate a halt, "[w]henver the Listing Market determines."

⁷⁹⁶ Securities Exchange Act Release Nos. 92070 (May 28, 2021), 86 FR 29849, 29851 (June 3, 2021) (File No. SR-CTA/CQ-2021-01); and 92071 (May 28, 2021), 86 FR 29846, 29848 (June 3, 2021) (File No. S7-24-89).

⁷⁸⁹ See Data Boiler Letter I, *supra* note 31, at 4, 44.

⁷⁹⁰ See *id.*

⁷⁹¹ See Article VI, Section 6.3(d) of the CT Plan.

⁷⁹² See Article IV, Section 4.1(a)(ii) of the CT Plan.

⁷⁹³ See Notice, *supra* note 3, 85 FR at 64572 (Question 46).

⁷⁹⁴ Data Boiler Letter I, *supra* note 31, at 45.

Section 7.2 of Article VII of the CT Plan governs the hours of operation during which time quotations and Transaction Reports must be entered by Members and will be disseminated by the Processor. The Commission received no comment on Section 7.2. The Commission finds that the requirements of this provision with respect to regulatory halts are consistent with the provisions of the existing Equity Data Plans previously approved by the Commission,⁷⁹⁷ and that maintaining the same hours of operation for the CT Plan will avoid the need for market participants to adjust their systems to accept market data at other times, thereby reducing the risk of market disruption. For these reasons, the Commission is approving Section 7.2 as proposed.

9. Financial Matters

(a) Capital Contributions

Article VIII of the CT Plan sets forth the provisions related to the maintenance of capital accounts for the Members, additional capital contributions to the LLC, and the distribution of revenues of the LLC to the Members. Specifically, Article VIII, Section 8.1 of the CT Plan requires a separate capital account to be established and maintained by the Company for each Member.⁷⁹⁸ In addition, the CT Plan specifies the formula for crediting and debiting a Member's capital account.⁷⁹⁹ The CT Plan provides that a Member's capital account will be credited for (i) the Member's capital contributions (at fair market value in the case of contributed property),⁸⁰⁰ (ii) allocations of Company profits and gain to such Member pursuant to Section 10.2; and (iii) any recaptured tax credits, or portion thereof, to the extent such increase to the tax basis of a Member's interest in the Company may be allowed pursuant to the federal tax code.⁸⁰¹ Furthermore, the CT Plan provides that a Member's capital account will be decreased by (x) the amount of distributions (at fair market value in the case of property distributed in kind) to such Member, (y) allocations of Company losses to such

⁷⁹⁷ See Securities Exchange Act Release Nos. 92070 (May 28, 2021), 86 FR 29849, 29851 (June 3, 2021) (File No. SR-CTA/CQ-2021-01); and 92071 (May 28, 2021), 86 FR 29846, 29848 (June 3, 2021) (File No. S7-24-89).

⁷⁹⁸ See Article VIII, Section 8.1(a) of the CT Plan.

⁷⁹⁹ See *id.*

⁸⁰⁰ The CT Plan specifies that the fair market value of contributed, distributed, or revalued property shall be agreed to by the Operating Committee or, if there is no such agreement, by an appraisal. See Article VIII, Section 8.1(b) of the CT Plan.

⁸⁰¹ See Article VIII, Section 8.1(a) of the CT Plan.

Member and (z) any tax credits as may be required to be charged to the tax basis of a Member's interest pursuant to the federal income tax code.⁸⁰²

Article VIII, Section 8.2 of the proposed CT specifies that no Member will be obligated or permitted to make any additional contribution to the capital of the Company except with the approval of the Operating Committee. The CT Plan specifies that the Members agree to make additional capital contributions from time to time as appropriate in respect of reasonable administrative and other reasonable expenses of the Company.⁸⁰³

Article VIII, Section 8.3 of the CT Plan requires the distributions of revenues of the LLC to the Members at the times and in the aggregate amounts set forth in Exhibit D to the CT Plan. The CT Plan provides that distributions to Members may be made in cash or, if determined by the Operating Committee, in-kind.⁸⁰⁴ The CT Plan also specifies that the Operating Committee may reserve amounts for anticipated expenses or contingent liabilities of the LLC.⁸⁰⁵ Finally, the CT Plan provides that if additional capital contributions are called for, and any Member fails to provide the full amount of such additional capital contributions, any distributions to be made to such defaulting Member shall be reduced by the amount of any required but unpaid capital contribution due from such Member.⁸⁰⁶

The provisions in the CT Plan related to the maintenance of capital accounts for the Members, additional capital contributions to LLC, and the distribution of revenues of the LLC to the Members are reasonable and customary for LLC agreements, and the Commission received no comments addressing Article VIII. The Commission has, however, identified two incorrect cross references in Article VIII, Section 8.1. In particular, Section 8.1(a) twice incorrectly cites to Section 10.2 (Tax Status; Returns) instead of Section 9.2 (Allocation of Profits and Losses) of the CT Plan when describing provisions related to allocations of profits and losses. The Commission is therefore modifying Section 8.1(a) to correct these incorrect cross references. For the reasons discussed above, the Commission is approving Article VIII as modified.

⁸⁰² See *id.*

⁸⁰³ See Article VIII, Section 8.2 of the CT Plan.

⁸⁰⁴ See Article VIII, Section 8.3 of the CT Plan.

⁸⁰⁵ See *id.*

⁸⁰⁶ See *id.*

(b) Allocations

Article IX of the CT Plan sets forth the provisions related to the allocation of profits and losses of the LLC to Members. Pursuant to Article XI, Section 9.1, the profits and losses of the Company must be determined for each fiscal year in a manner consistent with GAAP. Article XI, Section 9.2 further provides that all profits and losses of the Company must be allocated among the Members in accordance with Exhibit D of the CT Plan. Section 9.2 also specifies the procedures for certain allocation events in accordance with federal tax code regulations.⁸⁰⁷

Exhibit D of the CT Plan outlines the methodology for revenue sharing among Members. Specifically, paragraph (a) of Exhibit D specifies that each Member will receive an annual payment (if any) for each calendar year that is equal to the sum of the Member's Trading Shares (as defined in the CT Plan) and Quoting Shares (as defined in the CT Plan), in each Eligible Security for such calendar year.⁸⁰⁸ In the event that total Net Distributable Operating Income (as defined below) is negative for a given calendar year, each Member will receive an annual bill for such calendar year in accordance with the same formula for determining annual payments to the Members.⁸⁰⁹ Moreover, the Company will cause the Administrator to provide the Members with written estimates of each Member's percentage of total volume within five business days of the end of each calendar month.⁸¹⁰

Paragraphs (b), (c), and (e) through (i) of Exhibit D set forth the definitions used for determining the revenue sharing among Members, including "Security Income Allocation,"⁸¹¹ "Voting Percentage,"⁸¹² "Trading

⁸⁰⁷ See Article IX, Section 9.2(b)-(d) of the CT Plan.

⁸⁰⁸ See Paragraph (a) of Exhibit D of the CT Plan.

⁸⁰⁹ See *id.*

⁸¹⁰ See *id.*

⁸¹¹ Paragraph (b) of Exhibit D of the CT Plan defines "Security Income Allocation" as "multiplying (i) the Net Distributable Operating Income under [Exhibit D] for the calendar year by (ii) the Volume Percentage for such Eligible Security (the "Initial Allocation"), and then adding or subtracting any amounts specified in the reallocation set forth [in Exhibit D]."

⁸¹² Paragraph (c) of Exhibit D of the CT Plan defines "Volume Percentage" as "dividing (A) the square root of the dollar volume of Transaction Reports disseminated by the Processors in such Eligible Security during the calendar year by (B) the sum of the square roots of the dollar volume of Transaction Reports disseminated by the Processors in each Eligible Security during the calendar year."

Share,”⁸¹³ “Trading Rating,”⁸¹⁴ “Quoting Share,”⁸¹⁵ “Quote Rating,”⁸¹⁶ and “Quote Credit.”⁸¹⁷

Paragraph (d) of Exhibit D specifies a cap on the Net Distributable Operating Income of the CT Plan. In particular, if the Initial Allocation of Net Distributable Operating Income equals an amount greater than \$4.00 multiplied by the total number of qualified Transaction Reports⁸¹⁸ in such Eligible Security during the calendar year, the excess amount will be subtracted from the Initial Allocation for such Eligible Security and reallocated among all Eligible Securities in direct proportion to the dollar volume of Transaction Reports disseminated by the Processors in Eligible Securities during the calendar year.⁸¹⁹

Paragraph (j) of Exhibit D specifies the formula for determining the Net Distributable Operating Income for any calendar year. Generally, the Net Distributable Operating Income is equal to: (1) All cash revenues, funds, and proceeds received by the Company during such calendar year, including all revenues from (A) the CT Feeds and (B)

⁸¹³ Paragraph (e) of Exhibit D of the CT Plan defines “Trading Share” as “multiplying (i) an amount equal to fifty percent of the Security Income Allocation for the Eligible Security by (ii) the Member’s Trade Rating in the Eligible Security.”

⁸¹⁴ Paragraph (f) of Exhibit D of the CT Plan defines “Trade Rating” as “taking the average of (A) the Member’s percentage of the total dollar volume of Transaction Reports disseminated by the Processors in the Eligible Security during the calendar year, and (B) the Member’s percentage of the total number of qualified Transaction Reports disseminated by the Processors in the Eligible Security during the calendar year.”

⁸¹⁵ Paragraph (g) of Exhibit D of the CT Plan defines “Quoting Share” as “multiplying (A) an amount equal to fifty percent of the Security Income Allocation for the Eligible Security by (B) the Member’s Quote Rating in the Eligible Security.”

⁸¹⁶ Paragraph (h) of Exhibit D of the CT Plan defines “Quote Rating” as “dividing (A) the sum of the Quote Credits earned by the Member in such Eligible Security during the calendar year by (B) the sum of the Quote Credits earned by all Members in such Eligible Security during the calendar year.”

⁸¹⁷ Paragraph (i) of Exhibit D of the CT Plan states that a “Member shall earn one ‘Quote Credit’ for each second of time (with a minimum of one full second) multiplied by dollar value of size that an automated best bid (offer) transmitted by the Member to the Processors during regular trading hours is equal to the price of the National Best Bid and Offer in the Eligible Security and does not lock or cross a previously displayed ‘automated quotation’ (as defined under Rule 600 of Regulation NMS). The dollar value of size of a quote shall be determined by multiplying the price of a quote by its size.”

⁸¹⁸ Paragraph (d) of Exhibit D of the CT Plan provides that “[a] Transaction Report with a dollar volume of: (i) \$5,000 or more shall constitute one qualified Transaction Report” and that “[a] Transaction Report with a dollar volume of less than \$5,000 shall constitute a fraction of a qualified Transaction Report that equals the dollar volume of the Transaction Report divided by \$5,000.”

⁸¹⁹ See Paragraph (d) of Exhibit D of the CT Plan.

FINRA quotation data and last sale information for securities classified as OTC Equity Securities under FINRA’s Rule 6400 Series (“FINRA OTC Data”) ((A) and (B) collectively, the “Data Feeds”), and (C) any membership fees; less (2) 6.25% of the revenue received by the Company during such calendar year attributable to the segment of the Data Feeds reflecting the dissemination of information with respect to Network C Securities and FINRA OTC Data; less (3) reasonable working capital and contingency reserves for such calendar year, as determined by the Operating Committee, and all costs and expenses of the Company during such calendar year.⁸²⁰

Paragraph (k) of Exhibit D specifies that once a new Member implements a Processor-approved electronic interface with the Processors, the Member will become eligible to receive revenue.⁸²¹ Paragraph (l) of Exhibit D specifies that, generally, all quarterly payments or billings must be made to each eligible Member within 45 days after the end of each calendar quarter in which the Member is eligible to receive revenue.⁸²² Additionally, the Company will cause the Administrator to provide Members with written estimates of each Member’s quarterly Net Distributable Operating Income within 45 calendar days of the end of the quarter, and estimated quarterly payments or billings must be based on such estimates.⁸²³

Paragraph (m) of Exhibit D specifies that the Company will cause the Administrator to submit to the Members a quarterly itemized statement setting forth the basis upon which Net Distributable Operating Income was calculated.⁸²⁴ Finally, the Company, subject to the voting requirements pursuant to Article IV, Section 4.3, will cause the Administrator to engage an independent auditor to audit the Administrator’s costs or other calculation(s).⁸²⁵

In the Notice, the Commission solicited comment on Article IX, including allocations to the Members,⁸²⁶

⁸²⁰ See Paragraph (j) of Exhibit D of the CT Plan.

⁸²¹ See Paragraph (k) of Exhibit D of the CT Plan.

⁸²² Paragraph (l) of Exhibit D also specifies conditions for the quarterly payments or billings to Members and interest accrual procedures.

⁸²³ See Paragraph (l) of Exhibit D of the CT Plan.

⁸²⁴ Paragraph (m) of Exhibit D of the CT Plan also specifies that the “Net Distributable Operating Income shall be adjusted annually based solely on the quarterly itemized statement audited pursuant to the annual audit. The Company shall cause the Administrator to pay or bill Members for the audit adjustments within thirty days of completion of the annual audit.”

⁸²⁵ See Paragraph (m) of Exhibit D of the CT Plan.

⁸²⁶ See Notice, *supra* note 3, 85 FR at 64572 (Question 47).

and the definition of the term “Net Distributable Operating Income” in paragraph (j) of Exhibit D to the CT Plan.⁸²⁷ One commenter argues that the provision in paragraph (j) of Exhibit D of the CT Plan, which provides that 6.25% of revenue received by the LLC be paid to FINRA as compensation for FINRA OTC Data, is an “antiquated revenue allocation provision” that serves no ongoing purpose and should be removed.⁸²⁸ In response, one commenter objects to the suggestion that FINRA OTC Data be removed from the CT Plan, arguing that the suggestion is outside the scope of the Commission’s proposal and related directive.⁸²⁹ This commenter further argues that it would be inappropriate to modify the CT Plan to restructure the data covered by the CT Plan or the revenue allocation provisions in response to that suggestion.⁸³⁰

While the Commission acknowledges the commenters’ concerns with respect to the inclusion in the CT Plan of the 6.25% revenue allocation to FINRA, the Commission believes that the provisions of the Commission’s recently adopted Market Data Infrastructure Rule will ultimately resolve this issue.⁸³¹ First, new Rule 614 does not include OTC data within the definition of “core data” to be disseminated by the effective NMS plan(s) for equity market data.⁸³² And second, Rule 614(e) specifically requires the effective NMS plan(s) for equity market data to file an amendment conforming the plan(s) to the new consolidation model under the Market Data Infrastructure Rule.⁸³³ Thus, when the CT Plan becomes the effective NMS plan for dissemination of equity market data under the Market Data Infrastructure Rule, the CT Plan will no longer include OTC data within the definition of “core data,” and no revenue allocation of CT Plan revenues

⁸²⁷ See *id.* at 64573 (Question 54).

⁸²⁸ Nasdaq Letter I, *supra* note 20, at 31. This commenter also briefly describes a history of the revenue allocation formula and shares its previous proposals for modifying the revenue allocation formula. See *id.* at 29–30. In particular, the commenter states that it (i) favors revising the revenue allocation formula to reward exchanges that display quotes that result in an execution; and (ii) proposes removing the Over-the-Counter Bulletin Board (“OTCBB”) data from the Nasdaq SIP to lower costs. See *id.* at 30.

⁸²⁹ See Letter from Marcia E. Asquith, Executive Vice President, Board and External Relations, FINRA (Nov. 24, 2020) (“FINRA Letter II”), at 4.

⁸³⁰ See FINRA Letter II, *supra* note 829, at 4–6 (emphasizing that there are important benefits of including OTC equities data in the data feeds provided under the UTP Plan).

⁸³¹ See Market Data Infrastructure, Securities Exchange Act Release No. 90610 (Dec. 9, 2020), 86 FR 18596 (File No. S7–03–20) (Final Rule).

⁸³² See *id.* at 18614–15.

⁸³³ See *id.* at 18681.

for OTC data will be necessary or appropriate. Consequently, because the Commission believes that the other provisions of the CT Plan related to the allocation of profits and losses of the LLC to the Members are similar to the UTP Plan, the Commission does not believe it is necessary at this time to modify the CT Plan's proposed revenue allocation. The Commission has, however, identified five incorrect cross references in Article IX, Section 9.2. In particular, Section 9.2(d) incorrectly cites to Section 10.2 (Tax Status; Returns) instead of Section 9.2 when describing provisions related to allocations. The Commission is therefore modifying Section 9.2(d) to correct these cross references. For the reasons discussed above, the Commission is approving Article IX as modified.

(c) Records and Accounting

Article X of the CT Plan sets forth the LLC's obligations and policies related to accounting and tax matters. Article X, Section 10.1 of the CT Plan specifies that the Operating Committee shall determine all matters concerning accounting procedures of the Company and maintain an accounting system that enables the Company to produce accounting records and information substantially consistent with GAAP.⁸³⁴ The CT Plan also specifies that the fiscal year of the Company will be the calendar year unless applicable law requires a different fiscal year.⁸³⁵

Article X, Section 10.2 of the CT Plan specifies that the Company is intended to be treated as a partnership for federal, state, and local income tax purposes.⁸³⁶

Article X, Section 10.3 of the CT Plan sets forth provisions regarding the functions and duties of an entity appointed as the "Partnership Representative" of the Company as required by the federal tax code.⁸³⁷ This section requires that all federal, state, and local tax audits and litigation shall be conducted under the direction of the Partnership Representative.⁸³⁸ The Partnership Representative is required to use reasonable efforts to notify each Member of all significant matters that may come to its attention and to forward to each Member copies of all significant

written communications it receives in such capacity.⁸³⁹ The Partnership Representative must also consult with the Members before taking any material actions with respect to tax matters and must not compromise or settle any tax audit or litigation affecting the Members without the approval of a majority of Members.⁸⁴⁰ Any material proposed action, inaction, or election to be taken by the Partnership Representative requires the prior approval of a majority of Members.⁸⁴¹

The Commission received no comments addressing Article X and notes that these provisions of the CT Plan relating to accounting and tax matters of the LLC are similar to those existing in other NMS plans.⁸⁴² Accordingly, the Commission is approving the provisions of Article X as proposed.

10. Dissolution and Termination

(a) Dissolution of the LLC

Article XI, Section 11.1 of the CT Plan specifies the events that would trigger the dissolution of the LLC. In particular, Section 11.1 requires the dissolution of the Company as a result of one of the following events: (i) Unanimous written consent of the Members to dissolve the Company; (ii) the sale or other disposition of all or substantially all the Company's assets outside the ordinary course of business; (iii) an event which makes it unlawful or impossible for the Company business to be continued; (iv) the withdrawal of one or more Members such that there is only one remaining Member; or (v) the entry of a decree of judicial dissolution under Section 18–802 of the Delaware Act.

In the Notice, the Commission solicited comment on whether the terms for the dissolution and termination of the LLC should require consideration by or the consent of the Non-SRO Voting Representatives.⁸⁴³ One commenter states that the dissolution and termination of the LLC should require consideration and consent of the broader industry, beyond just Non-SRO Voting Representatives.⁸⁴⁴ Another commenter states that "[t]he existence and operation of the CT Plan is required by the Commission and therefore the dissolution of the CT Plan is only possible if the Commission is approving

an alternative plan for the dissemination of information."⁸⁴⁵

With respect to the concern that the dissolution and termination of the LLC should require broader industry consideration and consent, any cessation of the operations of the LLC as the structure through which the SROs fulfill their regulatory obligations with respect to consolidated equity market data typically would require a filing with the Commission pursuant to Rule 608(b)(1) and (2) of Regulation NMS,⁸⁴⁶ which would be noticed for public comment before Commission action to approve or disapprove the filing, providing an opportunity for all interested market participants to share their views with the Commission. Moreover, the triggering events for the dissolution of the LLC are similar to those existing in other NMS plans, and none of the terms of the existing NMS plans structured as an LLC agreement expressly specify broad industry consideration prior to dissolution and termination.⁸⁴⁷ For the reasons discussed above, the Commission is approving Article XI, Section 11.1 of the CT Plan as proposed.

(b) Liquidation and Distribution

Article XI, Section 11.2 of the CT Plan sets forth the procedures for the liquidation and distribution of assets following the dissolution of the LLC. Specifically, in the event of the dissolution of the LLC, Section 11.2 requires the Members to appoint a liquidating trustee to wind up the affairs of the Company by (i) selling its assets in an orderly manner (so as to avoid the loss normally associated with forced sales), and (ii) applying and distributing the proceeds of such sale, together with other funds held by the Company: (a) First, to the payment of all debts and liabilities of the Company; (b) second, to the establishments of any reserves reasonably necessary to provide for any contingent recourse liabilities and obligations; (c) third, to the Members in accordance with Exhibit D (Distributions) of the CT Plan; and (d) fourth, to the Members as determined by a majority of Members.

The procedures for the liquidation and distribution of assets following the dissolution of the LLC are similar to those existing in other NMS plans.⁸⁴⁸ The Commission received no comments addressing this provision and is

⁸³⁴ See Article X, Section 10.1(a), (b) of the CT Plan.

⁸³⁵ See Article X, Section 10.1(a) of the CT Plan.

⁸³⁶ See Article X, Section 10.2(a) of the CT Plan. The CT Plan specifies that all tax returns shall be prepared in a manner consistent with the Distributions made in accordance with Exhibit D of the CT Plan. See Article X, Section 10.2(b) of the CT Plan.

⁸³⁷ See Article X, Section 10.3(a) of the CT Plan.

⁸³⁸ See *id.*

⁸³⁹ See Article X, Section 10.3(b) of the CT Plan.

⁸⁴⁰ See *id.*

⁸⁴¹ See Article X, Section 10.3(c) of the CT Plan.

⁸⁴² See Article IX, Sections 9.2, 9.3, and 9.5 of the CAT NMS Plan; Article VIII, Sections 8.1, 8.2, and 8.4 of the OPRA Plan.

⁸⁴³ See Notice, *supra* note 3, 85 FR at 64572 (Question 48).

⁸⁴⁴ See Data Boiler Letter I, *supra* note 31, at 45.

⁸⁴⁵ Nasdaq Letter I, *supra* note 20, at 12.

⁸⁴⁶ 17 CFR 242.608(b)(1) and (2).

⁸⁴⁷ See Article X, Section 10.1 of the CAT NMS Plan; Article IX, Section 9.1 of the OPRA Plan.

⁸⁴⁸ See Article X, Section 10.2 of the CAT NMS Plan; Article IX, Section 9.2 of the OPRA Plan.

approving Article XI, Section 11.2 of the CT Plan as proposed.

(c) Termination

Article XI, Section 11.3 of the CT Plan sets forth termination procedures following the dissolution of the LLC. Specifically, Section 11.3 provides that each Member will receive a statement prepared by the independent accountants retained on behalf of the Company that sets forth (i) the assets and liabilities of the Company as of the date of the final distribution of the Company's assets under Section 10.2 of the CT Plan and (ii) the net profit or net loss for the fiscal period ending on such date. The CT Plan further specifies that, upon compliance with the distribution process set forth in Section 10.2 of the CT Plan, the Members will cease to be such, and the liquidating trustee is required to execute, acknowledge, and file a certificate of cancellation of the Company.⁸⁴⁹ Finally, the CT Plan provides that upon completion of the dissolution, winding up, liquidation, and distribution of the liquidation proceeds, the Company will terminate.⁸⁵⁰

The termination procedures following the dissolution of the LLC are similar to those existing in other NMS plans,⁸⁵¹ and the Commission received no comments addressing this provision. The Commission has, however, identified two incorrect cross references in Article XI, Section 11.3. In particular, Section 11.3 incorrectly cites to Section 10.2 (Tax Status; Returns) instead of Section 11.2 (Liquidation and Distribution) of the CT Plan when describing provisions related to the liquidation of the LLC. The Commission is therefore modifying Section 11.3 to correct these incorrect cross references. For the reasons discussed above, the Commission is approving Article XI, Section 11.3 as modified.

11. Exculpation and Indemnification

(a) Exculpation and Indemnification

Article XII, Section 12.1 and Section 12.2 of the CT Plan provide broad liability, exculpation, and indemnification protections for SROs and SRO Voting Representatives. Specifically, Section 12.1 provides that the liability of each Member and each individual currently or formerly serving as an SRO Voting Representative (each, an "Exculpated Party") will be limited to the maximum extent permitted by law "for any loss suffered in connection

with a breach of any fiduciary duty, errors in judgment or other acts or omissions by such Exculpated Party." The provision explicitly does not extend to "Non-Exculpated Items"—acts or omissions that involve "gross negligence, willful misconduct or a knowing violation of law" or "losses resulting from such Exculpated Party's Transaction Reports, Quotation Information or other information reported to the Processors by such Exculpated Party." Moreover, Section 12.1(b), among other things, explicitly permits an Exculpated Party, in making decisions authorized to be in its sole discretion, to "consider such interests and factors as it desires (including its own interests)" and asserts that the Exculpated Party "shall have no duty or obligation (fiduciary or otherwise) to give any consideration to any interest of or factors affecting the Company or the Members."

Section 12.2 provides indemnification to SROs and SRO Voting Representatives ("Company Indemnified Party") for losses from being a Party to a Proceeding, so long as the CT Plan is not a claimant against the Company Indemnified Party and the claim does not involve Non-Exculpated Items. Paragraph (c) of Section 12.2 expressly acknowledges that "indemnification provided in this Article XII could involve indemnification for negligence or under theories of strict liability." Paragraph (d) of Section 12.2 makes clear that the CT Plan is primarily responsible for "advancement of expenses, or for providing insurance" for any Company Indemnified Party's claim for indemnification.

In the Notice, the Commission sought comment on whether the indemnification and exculpation provisions of the CT Plan should also cover Non-SRO Voting Representatives.⁸⁵² In response, the Commission received several comments addressing this issue. Most commenters addressing the issue argue that the CT Plan should extend liability protection and indemnification coverage to Non-SRO Voting Representatives acting in their role on the Operating Committee. One commenter recommends that the CT Plan should state that no liability can be imputed to Non-SRO Voting Representatives acting in their role on the Operating Committee and that Non-SRO Voting Representatives would be entitled to indemnification against any claims made against them related to their role on the Operating

Committee.⁸⁵³ Other commenters suggest that the exculpation and indemnification protections under Article XII of the CT Plan be extended to non-SRO representatives.⁸⁵⁴ One of these commenters states that it is "customary and widespread in corporate situations to minimize potential personal liability for the directors of a company" and that Non-SRO Voting Representatives "may be equally exposed to the risk of litigation and penalties."⁸⁵⁵ Further, this commenter is concerned that without comparable protection from liabilities, "the CT Plan may find it difficult to attract and retain qualified representatives, decreasing the pool of interested candidates,"⁸⁵⁶ and Non-SRO Voting Representatives may potentially be hindered from freely providing input on CT Plan matters.⁸⁵⁷

One commenter states that, since Non-SRO Voting Representatives are individuals, their ability to shoulder liability is of concern.⁸⁵⁸ This commenter also does not believe that the rights and responsibilities of an Exculpated Party under Article XII, Section 12.1(b) are consistent with the SROs' obligations with respect to the operation of an NMS plan.⁸⁵⁹

One commenter states that the liability carve-out for SROs is too broad and supports a limitation on liability for SROs carrying out "quintessentially regulatory functions" of the CT Plan.⁸⁶⁰ This commenter argues that it is neither appropriate nor warranted for SROs to have a "blanket limitation on liability for non-regulatory activities."⁸⁶¹ This commenter contends that the vast majority of activities carried out by the SROs—from technology services, to operations, to maintenance—would not involve "quintessentially regulatory functions" and SRO liability should not be limited for those functions.⁸⁶² Another commenter argues that the SROs should be precluded from receiving any special liability protections.⁸⁶³ One commenter states the Plan "incentivizes the SROs to run the Plan and the LLC poorly to the

⁸⁵³ See SIFMA Letter I, *supra* note 30, at 5; SIFMA Letter II, *supra* note 30, at 2.

⁸⁵⁴ See BlackRock Letter I, *supra* note 247, at 3; RBC Letter, *supra* note 30, at 10; ICI Letter I, *supra* note 31, at 6 ("these protections are typically provided for the members of any governing body").

⁸⁵⁵ BlackRock Letter I, *supra* note 247, at 3–4.

⁸⁵⁶ *Id.* at 4.

⁸⁵⁷ See *id.*

⁸⁵⁸ See Data Boiler Letter I, *supra* note 31, at 5, 46.

⁸⁵⁹ See *id.* at 46, 49.

⁸⁶⁰ Virtu Letter, *supra* note 30, at 3.

⁸⁶¹ *Id.*

⁸⁶² *Id.*

⁸⁶³ See RBC Letter, *supra* note 30, at 9.

⁸⁴⁹ See Article XI, Section 11.3 of the CT Plan.

⁸⁵⁰ See *id.*

⁸⁵¹ See Article X, Section 10.3 of the CAT NMS Plan; Article IX, Section 9.3 of the OPRA Plan.

⁸⁵² See Notice, *supra* note 3, 85 FR at 64572 (Question 49).

extent they believe it is in their self-interest” and there is “no downside for an SRO to act in its self-interest contrary to the Plan as they are exculpated in taking any such action.”⁸⁶⁴

Other commenters support the proposed provisions, arguing that the limitation of liability provisions are standard protections for members in LLC agreements.⁸⁶⁵ One of these commenters cites the OPRA and CAT LLC Plans as precedent for extending liability protection and indemnification coverage only to the SROs that created the LLC.⁸⁶⁶ These commenters argue that Non-SRO Voting Representatives do not need the same liability protections because they are not Members of the LLC.⁸⁶⁷

For several reasons, the Commission disagrees with the argument that Non-SRO Voting Representatives do not need the liability, exculpation, and indemnification protections that the CT Plan provides solely to SROs.⁸⁶⁸ First, the Commission believes that the Non-SRO Voting Representatives could have liability exposure arising from their service as voting members of the Operating Committee, for example, in the case of a third-party civil action for damages against the CT Plan, which might, among other things, require Non-SRO Voting Representatives to engage the services of counsel. Thus, the Commission does not agree that liability exposure inures to the SROs solely as a result of their status as Members of the LLC. Instead, the Commission believes that the risk of liability also arises from the actions taken by the Operating Committee in its governance of the CT Plan and would, therefore, potentially affect both the SROs and the Non-SRO Voting Representatives of the Operating Committee.

Second, the Commission believes that the commenter’s reliance on the OPRA Plan and the CAT NMS Plan as precedent for extending liability protection and indemnification coverage only to the SROs that created the LLC is misplaced.⁸⁶⁹ While the OPRA Plan and the CAT NMS Plan do, in fact, provide such protection only to the SROs as Members of the LLC, the comparison is inapt because neither of those NMS plans has any non-SRO voting members of its operating committee. Therefore, neither the OPRA

Plan nor the CAT NMS Plan has had to address the issue in question.

Third, the Commission shares the commenter’s view that it is customary to provide such protection to members of governing boards.⁸⁷⁰ More importantly, the Commission agrees that the failure to provide liability, exculpation, and indemnification protections to the Non-SRO Voting Representatives could make it more difficult to attract qualified individuals to serve in the capacity of voting members of the Operating Committee and, further, could hinder such individuals’ meaningful participation, for example by hindering their ability to freely share ideas if they choose to serve. The Commission believes that this potential result would be inconsistent with the objectives of the Governance Order to broaden participation in Plan governance to addressing the core problem described above.⁸⁷¹ Moreover, Delaware law permits non-Members of an LLC agreement to receive such protections. Specifically, Section 18–108 of the Delaware Act provides that subject to the standards and restrictions, if any, set forth in its LLC agreement, “a limited liability company may, and shall have the power to, indemnify and hold harmless any member or manager or other person from and against any and all claims and demands whatsoever.” (Emphasis added.) Consequently, Section 18–108 of the Delaware Act provides flexibility to the contracting parties to specify the rights and obligations with respect to indemnification provisions in an LLC agreement.

Accordingly, the Commission believes that, to promote the objectives of the Governance Order to broaden participation in Plan governance,⁸⁷² the CT Plan should explicitly provide the same protections to Non-SRO Voting Representatives that Article XII, Section 12.1 and Section 12.2 of the CT Plan currently provide only to SROs as Members of the LLC. To that end, the Commission is modifying several proposed definitions to explicitly include Non-SRO Voting Representatives. First, the Commission is modifying Article I, Section 1.1(k) of the CT Plan to include Non-SRO Voting Representatives in the definition of “Company Indemnified Party.” Next, the Commission is modifying Article XII, Section 12.1 of the CT Plan to include Non-SRO Voting

Representatives in the definition of “Exculpated Party.” In addition, the Commission is modifying Section 1.1(eee) of Article I of the CT Plan to include Non-SRO Voting Representatives in the definition of the term, “Party to a Proceeding.” The Commission finds that each of these modifications is appropriate to provide Non-SRO Voting Representatives with the same indemnification protections that are available to SRO Voting Representatives, because the modifications will remove a significant disincentive for persons to serve as Non-SRO Voting Representatives, thereby helping to support participation on the Operating Committee of a broad array of market participants. For these reasons, the Commission is approving Article I, Section 1.1(k), as modified; Article I, Section 1.1(eee), as modified; and Article XII, Section 12.1, as modified.

Finally, with respect to paragraph (b) of Section 12.1, which (1) explicitly permits an Exculpated Party, in making decisions authorized to be in its sole discretion, to consider its own interests and (2) asserts that the Exculpated Party has “no duty or obligation (fiduciary or otherwise) to give any consideration to any interest of or factors affecting the Company or the Members,” the Commission reiterates its view, expressed above and added by the Commission to the Recitals of the CT Plan, that “no provision of this Agreement shall be construed to limit or diminish the obligations and duties of the Members as self-regulatory organizations under the federal securities laws and the regulations thereunder.”⁸⁷³

Because the modified definition of “Company Indemnified Party” in Section 1.1(k) of the CT Plan expands the indemnification provisions of Section 12.2 to include Non-SRO Voting Representatives,⁸⁷⁴ no further modification to Section 12.2 is necessary, and the Commission is approving Section 12.2 of the CT Plan as proposed.

(b) Advance Payment

Article XII, Section 12.3 of the CT Plan provides for the payment of reasonable expenses incurred by a Company Indemnified Party who is a named defendant or respondent to a Proceeding, except that such Company Indemnified Party must repay such amount if it is ultimately determined that he or she is not entitled to indemnification. The Commission

⁸⁶⁴ MFA Letter, *supra* note 30, at 3.

⁸⁶⁵ See Nasdaq Letter I, *supra* note 20, at 15–16; NYSE Letter I, *supra* note 18, at 37–38.

⁸⁶⁶ See NYSE Letter I, *supra* note 18, at 37–38.

⁸⁶⁷ See *id.* at 38.

⁸⁶⁸ See Nasdaq Letter I, *supra* note 20, at 15–16; NYSE Letter I, *supra* note 18, at 37–38.

⁸⁶⁹ See NYSE Letter I, *supra* note 18, at 37–38.

⁸⁷⁰ See BlackRock Letter I, *supra* note 247, at 3–4.

⁸⁷¹ See Governance Order, *supra* note 8, 85 FR at 28714–20.

⁸⁷² See *id.*

⁸⁷³ See *supra* Section II.C.1(b) (discussing paragraph (g) of the Recitals of the CT Plan).

⁸⁷⁴ See *supra* discussion in Section II.C.2.

received no comment on this provision. As discussed above, the Commission is modifying Article I, Section 1.1(k) of the CT Plan to define the term, “Company Indemnified Person,” to include Non-SRO Voting Representatives. This provision is approved as proposed.

(c) Appearance as a Witnesses

Article XII, Section 12.4 of the CT Plan provides for the payment or reimbursement of reasonable out-of-pocket expenses incurred by a Company Indemnified Party in connection with appearance as a witness or other participation in a Proceeding at a time when the Company Indemnified Party is not a named defendant or respondent in the Proceeding. The Commission received no comment on this provision. As the Commission is modifying Article I, Section 1.1(k) of the CT Plan to define the term, “Company Indemnified Person,” to include Non-SRO Voting Representatives, as discussed above, Section 12.4 is approved as proposed.

(d) Nonexclusivity of Rights

Article XII, Section 12.5 of the CT Plan provides that the right to indemnification and the advancement and payment of expenses conferred in Article XII shall not be exclusive of any other right a Company Indemnified Person may have or hereafter acquire. The Commission received no comment on this Section 12.5. As the Commission is modifying the CT Plan to define the term, “Company Indemnified Person,” to include Non-SRO Voting Representatives, as discussed above, this provision is approved as proposed.

12. Miscellaneous Provisions

(a) Expenses

Article XIII, Section 13.1 of the CT Plan governs the payment of expenses by the CT Plan and requires that all such expenses must be paid before any allocations may be made to the Members. Section 13.1 further provides that Members will be responsible for reserves for contingent liabilities and that each Member shall be responsible for the costs of any technical enhancements “made at its request and solely for its use,” unless another Member subsequently makes use of the enhancement. The Commission received no comment on Section 13.1 and is approving the provision as proposed.

(b) Entire Agreement

Article XIII, Section 13.2 of the CT plan provides that the CT Plan will supersede the existing Equity Data Plans and all other prior agreements with respect to consolidated equity market data. The Commission received no

comment on Section 13.2 and, because the provision is consistent with the requirements of the Commission’s Governance Order,⁸⁷⁵ is approving the provision as proposed.

(c) Notices and Addresses

Article XIII, Section 13.3 of the CT Plan provides that all communications must be written and sets forth the permissible methods of delivery. The Commission received no comment on Section 13.3 and is approving the provision as proposed.

(d) Governing Law

Article XIII, Section 13.4 of the CT Plan provides that Delaware law will be the governing law for the CT Plan. Specifically, the CT Plan states that the Agreement will be “governed by and construed in accordance with the Delaware Act and internal laws and decisions of the State of Delaware, without regard to the conflicts of laws principles thereof” but will also be subject to “any applicable provisions of the Act and any rules and regulations promulgated thereunder.” Section 13.4 further states that, “[f]or the avoidance of doubt, nothing in this Agreement waives any protection or limitation of liability afforded any of the Members or any of their Affiliates by common law, including the doctrines of self-regulatory organization immunity and federal preemption.”

In the Notice, the Commission sought comment on this provision.⁸⁷⁶ The Commission received one comment on Section 13.4. The commenter asks whether the language regarding the limitation of liability may be inconsistent with the exculpation and indemnification provisions of Article XII.⁸⁷⁷ The Commission does not believe that the provisions of Section 13.4 are inconsistent either with the provisions of Article XII or with federal securities law. Article XII of the CT Plan speaks to the agreed exculpation and indemnification provisions of the LLC Agreement, but, as the Commission has discussed above, the provisions of the CT Plan cannot limit or diminish the obligations and duties of the Members

⁸⁷⁵ See Governance Order, *supra* note 8, 85 FR at 28729 (“The New Consolidated Data Plan shall provide for the orderly transition of functions and responsibilities from the three existing Equity Data Plans and shall provide that dissemination of, and fees for, SIP data will continue to be governed by the provisions of the Equity Data Plans until the New Consolidated Data Plan is ready to assume responsibility for the dissemination of SIP data and fees of the New Consolidated Data Plan have become effective.”).

⁸⁷⁶ See Notice, *supra* note 3, 85 FR at 64573 (Question 51).

⁸⁷⁷ See Data Boiler Letter I, *supra* note 31, at 5, 46.

as self-regulatory organizations under the federal securities laws and the regulations thereunder.⁸⁷⁸ Similarly, the general reference in Section 13.4 to the common law, including what the CT Plan describes as the “doctrines of self-regulatory organization immunity and federal preemption,” cannot enlarge or otherwise modify any case law that defines the scope of SRO liability.⁸⁷⁹ For the reasons discussed above, the Commission is approving this provision, as proposed.

(e) Amendments

Article XIII, Section 13.5 of the CT Plans governs amendments to the CT Plan. Paragraph (a) of Section 13.5 states that the CT Plan may be modified when authorized by the Operating Committee pursuant to Section 4.3, subject to the requirements of Section 11A of the Act and Rule 608 of Regulation NMS. Paragraph (b) of Section 13.5 carves out an exception to the general rule set forth in the preceding paragraph, stating, “[n]otwithstanding Section 13.5(a), Articles IX, X, XI, and XII may be modified upon approval by a majority of Members; *provided, however*, that Operating Committee approval pursuant to Section 4.3 will be required for modifications to the allocation.” (Emphasis in original.) Paragraph (c) of Section 13.5 sets forth the process for Ministerial Amendments, in which the Chair of the Operating Committee may modify the CT Plan by filing an amendment with the Commission unilaterally, so long as 48-hours advance notice is provided to the Operating Committee. Paragraph (d) of

⁸⁷⁸ See *supra* Section II.C.1(b).

⁸⁷⁹ With respect to the judicial doctrine of regulatory immunity, the Commission has taken the position that immunity from suit “is properly afforded to the exchanges when engaged in their traditional self-regulatory functions—where the exchanges act as regulators of their members,” including “the core adjudicatory and prosecutorial functions that have traditionally been accorded absolute immunity, as well as other functions that materially relate to the exchanges’ regulation of their members,” but should not “extend to functions performed by an exchange itself in the operation of its own market, or to the sale of products and services arising out of those functions.” Order Setting Aside Action by Delegated Authority and Approving a Proposed Rule Change, Securities Exchange Act Release No. 88008 (Jan. 21, 2020), 85 FR 4726, 4735 (Jan. 27, 2020) (File No. SR-BatsBZX-2017-34) (citing Brief of the Securities and Exchange Commission, *Amicus Curiae*, No. 15-3057, *City of Providence v. Bats Global Markets, Inc.* (2d Cir. 2016), at 22). The Court of Appeals for the Second Circuit recently reached a similar conclusion. See *City of Providence v. Bats Global Markets, Inc.*, 878 F.3d 36, 48 (2d Cir. 2017) (“When an exchange engages in conduct to operate its own market that is distinct from its oversight role, it is acting as a regulated entity—not a regulator. Although the latter warrants immunity, the former does not.”).

Section 13.5 defines the term, “Ministerial Amendment.”

In the Notice, the Commission sought comment on whether amendments to Articles IX through XII of the CT Plan should be subject to the approval only of SROs, as provided for in Article XIII, Section 13.5(b), rather than the full Operating Committee.⁸⁸⁰ The Commission received several comments in response. One commenter opposes this provision, stating that amendments to Articles IX (Allocations), X (Records and Accounting; Reports), XI (Dissolution and Termination), and XII (Exculpation and Indemnification) should not be subject to the approval only of SROs.⁸⁸¹

Another commenter agrees, expressing the concern that the CT Plan gives “nearly unfettered discretion” to the SROs to determine what decisions are appropriate for the Operating Committee and requests that the Commission require more detail in the Plan on the activities that will be solely decided by SROs.⁸⁸² This commenter states, as an example, that decisions related to indemnification and the selection of Officers are “highly material” to the operation of the CT Plan and as proposed require only a simple majority vote of the SRO representatives.⁸⁸³ This commenter further argues that the CT Plan lacks sufficient detail regarding the nature and scope of decisions that are ministerial versus material.⁸⁸⁴ Consequently, this commenter argues that more detail needs to be provided on the types of decisions that would fall under “the operation of the CT Plan as an LLC” and “modifications to the LLC-related provisions of the CT Plan” in order to ensure that non-SRO representatives have an opportunity to participate in any material decisions related to the regulatory operations of the CT Plan.⁸⁸⁵ This commenter supports a requirement for the Operating Committee to adopt policies and procedures distinguishing operational interpretations of the CT Plan from amendments required to be submitted to the Commission under Rule 608 of Regulation NMS.⁸⁸⁶

On the other hand, one commenter states that the amendment rights provided to the Members by this Section are limited to provisions of this Agreement that affect only the economic

interests of the Members (Articles IX and X), the protections of the Members as among themselves (Article XII), and the ongoing existence of the CT Plan (Article XI).⁸⁸⁷ This commenter argues that the provisions relating to the economic interests of the Members, exculpations and indemnification, and the ongoing operation of the CT Plan do not affect the dissemination of public information.⁸⁸⁸

The Commission disagrees with the view that the amendments covered by Section 13.5(b) do not affect the dissemination of public information and thus may be appropriately decided by the SROs alone, without Non-SRO Voting Representative participation through Operating Committee consideration. Rather, the Commission believes that several of the provisions that the SROs propose should be subject to amendment without a filing with the Commission materially affect the Non-SRO Voting Representatives that the Commission believes must be full members of the CT Plan’s Operating Committee. For example, for the reasons set forth above, the Commission finds that the exculpation and indemnification provisions of Article XII must be extended not only to the SROs, but to the Non-SRO Voting Representatives on the Operating Committee as well. As another example, Article X, Section 10.1 of the CT Plan sets forth the Operating Committee’s responsibilities with respect to the accounting procedures and records of the CT Plan, and the Commission believes that it is appropriate for the Operating Committee, including the Non-SRO Voting Representatives, to consider any proposed changes to those responsibilities.

More generally, the Commission believes that, to help ensure that all amendments to the CT Plan are consistent with its goals and purposes, as well as with the objectives of the Commission’s Governance Order,⁸⁸⁹ the entire Operating Committee, rather than the SROs alone, should share in decision making relating to amendment of the CT Plan. And the Commission notes that all amendments to an NMS plan must be filed with the Commission pursuant to Rule 608 of Regulation NMS.⁸⁹⁰

Accordingly, the Commission is modifying the CT Plan by deleting

proposed paragraph (b) of Section 13.5 to remove the ability of the SRO members of the LLC to make amendments to certain provisions of the CT Plan without an augmented majority vote of the Operating Committee and to reiterate that all amendments to the CT Plan must be filed with the Commission under Rule 608 of Regulation NMS. To be consistent, the Commission is also modifying subparagraph (v) of renumbered Section 13.5(c) to delete the language that reads, “or upon approval by a majority of the Members pursuant to Section 13.5(b), as applicable.” The Commission finds that these modifications to Article XIII, Section 13.5 of the CT Plan are appropriate because they will help to ensure that the Operating Committee, as a whole, participates in all aspects of the governance of the CT Plan and that all amendments to the CT Plan are filed with the Commission as required by Rule 608 of Regulation NMS.

Finally, the Commission believes that the advance notice provided to the Operating Committee relating to any Ministerial Amendments filed with the Commission by the Chair of the Operating Committee pursuant to paragraph (c) of Section 13.5 should be provided in writing. Written notification should help to ensure that all members of the Operating Committee of the CT Plan are adequately informed in a timely manner regarding even ministerial actions taken on behalf of the Operating Committee. Consequently, the Commission is modifying the text of renumbered Section 13.5(b) of Article XIII to require that advance notice to the Operating Committee be in writing, and finds that this modification is appropriate because it will help to ensure informed governance of the CT Plan. For the reasons above, the Commission is approving Section 13.5, as modified.

(f) Successors

Article XIII, Section 13.6 of the CT Plan provides that the CT Plan shall bind and inure “to the benefit of the Members and their respective legal representatives and successors.” The Commission received no comment on Section 13.6, and is approving the provision as proposed.

(g) Limitation on Rights of Others

Article XIII, Section 13.7 of the CT Plan provides that the CT Plan shall not be enforceable by any creditor of the CT Plan and shall not create any legal rights, remedies, or claims. The Commission received no comment on Section 13.7, and is approving the provision as proposed.

⁸⁸⁰ See Notice, *supra* note 3, 85 FR at 64573 (Question 52).

⁸⁸¹ See Data Boiler Letter I, *supra* note 31, at 47.

⁸⁸² Virtu Letter, *supra* note 30, at 2.

⁸⁸³ *Id.*

⁸⁸⁴ See *id.*

⁸⁸⁵ See *id.* at 5.

⁸⁸⁶ See *id.* at 3–4.

⁸⁸⁷ See Nasdaq Letter I, *supra* note 20, at 11.

⁸⁸⁸ See *id.* at 11–12.

⁸⁸⁹ See Governance Order, *supra* note 8, 85 FR at 28714–20.

⁸⁹⁰ 17 CFR 242.608. In fact, neither the CAT NMS Plan nor the OPRA Plan contains a provision permitting the SROs to amend the LLC agreement for the plan outside of the Rule 608 process.

(h) Counterparts

Article XIII, Section 13.8 of the CT Plan provides that the Members to the CT Plan may execute the CT Plan individually in “any number of counterparts.” The Commission received no comment on Section 13.8 and, because this is the manner in which NMS plans are typically executed, the Commission is approving the provision as proposed.

(i) Headings

Article XIII, Section 13.9 of the CT Plan provides that CT Plan headings are for “reference purposes only and shall not be deemed to be a part of this Agreement or to affect the meaning or interpretation of any provisions of this Agreement.” The Commission received no comment on Section 13.9 and is approving the provision as proposed.

(j) Validity and Severability

Article XIII, Section 13.10 of the CT Plan provides that any determination that any provision of the CT Plan is invalid or unenforceable shall not affect the validity or enforceability of any other provisions of the CT Plan, all of which shall remain in full force and effect. The Commission received no comment on Section 13.10, and is approving the provision as proposed.

(k) Statutory References

Article XIII, Section 13.11 of the CT Plan provides that the references in the CT Plan to a particular statute or regulation, or a provision thereof, “shall be deemed to refer to such statute or regulation, or provision thereof, or to any similar or superseding statute or regulation, or provision thereof, as is from time to time in effect.” The Commission received no comment on Section 13.11, and is approving the provision as proposed.

(l) Modifications To Be in Writing

Article XIII, Section 13.12 of the CT Plan provides that any amendment, modification, or alteration of the CT Plan must in writing and must be adopted in accordance with the provisions of Section 13.5. The Commission received no comment on Section 13.12 and is approving the provision as proposed.

III. Conclusion

For the reasons discussed above, the Commission finds that the CT Plan, as modified, is consistent with the requirements of Section 11A of the Act,⁸⁹¹ and Rule 608 thereunder,⁸⁹² that

the provisions of an NMS plan be necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of, a national market system, or otherwise in furtherance of the purposes of the Act.

It is therefore ordered, that pursuant to Section 11A of the Act,⁸⁹³ and the rules and regulations thereunder, that the CT Plan (File No. 4–757), as modified, be and it hereby is approved and declared effective, and the Participants are authorized to act jointly to implement the CT Plan as a means of facilitating a national market system.

By the Commission.

J. Matthew DeLesDernier,
Assistant Secretary.

Attachment A**LIMITED LIABILITY COMPANY AGREEMENT****OF****CT PLAN LLC****a Delaware limited liability company**

(As modified by the Commission; additions are italicized; deletions are [bracketed].)

This LIMITED LIABILITY COMPANY AGREEMENT (this “Agreement”) dated as of the [●] day of [●], [●] is made and entered into by and among the parties identified in Exhibit A, as Exhibit A may be amended from time to time (the “Members”), which are the members of CT Plan LLC, a Delaware limited liability company (the “Company”). The Members shall constitute the “members” (as that term is defined in the Delaware Act) of the Company.

RECITALS

(a) On May 6, 2020, the Commission ordered the Members to act jointly in developing and filing with the Commission by August 11, 2020, a proposed new single national market system (“NMS”) plan to govern the public dissemination of real-time consolidated equity market data for NMS stocks. See Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data, Release No. 34–88827 (May 6, 2020), 85 FR 28702 (May 13, 2020) (File No. 4–757) (the “Order”). This Agreement is being filed with the Commission, as directed in the Order.

(b) This Agreement will become effective [after the last of the following has occurred (the “Effective Date”):

(i) this Agreement is approved by the Commission pursuant to Rule 608 of Regulation NMS as an NMS plan governing the public dissemination of real-time consolidated market data for Eligible Securities (the “Effective Date”) on the date that it is approved by the Commission pursuant to Rule 608 of Regulation NMS.

Within ten (10) business days of the Effective Date, [; and

(ii) [the Members [have]shall form[ed] the Company as a limited liability company pursuant to the Delaware Act by filing a certificate of formation (the “Certificate”) with the Delaware Secretary of State.

(c) [Following the Effective Date, t]This Agreement will become operative as an NMS Plan that governs the public dissemination of real-time consolidated equity market data for Eligible Securities [on the first day of the month that is at least 90 days after the last of the following have occurred]within twelve months of the Effective Date (the “Operative Date”).[:]

(d) *In support of ensuring that the CT Plan is fully operational by the Operative Date, the following actions shall be completed within the specified periods:*

(i) *Within two months of the Effective Date, the SRO Voting Representatives and Non-SRO Voting Representatives of the Operating Committee shall be[have been] determined pursuant to Section 4.2 of the Agreement;*

(ii) [Fees have been established by]Within four months of the Effective Date, the Operating Committee[, are effective] shall file with the Commission proposed fees with respect to the existing exclusive SIP model as an amendment to this Agreement pursuant to Rule 608 of Regulation NMS[, and are ready to be implemented on the Operative Date];

(iii) *Within eight months of the Effective Date, the Operating Committee shall enter[Company has entered] into an agreement with the Processors currently performing under the CQ Plan, CTA Plan, and UTP Plan;*

(iv) *Within eight months of the Effective Date, the Operating Committee shall enter[Company has entered] into an agreement with an Administrator selected pursuant to Section 6.3]4 of this Agreement and such Administrator [has completed the]shall prepare to transition from prior Administrators under the CQ Plan, CTA Plan, and UTP Plan such that, before the Operative Date, it is able to provide services under the Administrative Services Agreement, as determined by the Operating Committee pursuant to Section 4.3 of this Agreement, including that (1) new contracts between the Company and Vendors and the Company and Subscribers have been finalized such that all Vendors and Subscribers under the CQ Plan, CTA Plan, and UTP Plan are ready to transition to such new contracts[by the Operative Date], (2) the Administrator has in place a system to administer Distributions, and (3) the Administrator has in place a system to administer Fees; [and]*

(v) *Before the Operative Date, the Operating Committee [and, if applicable, the Commission, have approved all]will be required to ensure that the Administrator and the Processors have developed, implemented, and suitably tested the systems necessary with respect to the existing exclusive SIP model—including dissemination systems, billing and audit systems, and appropriate contracts with Vendors and Subscribers—and, if applicable, the Operating Committee has expeditiously filed any necessary policies and procedures [that are necessary or appropriate for the*

⁸⁹¹ 15 U.S.C. 78k–1.

⁸⁹² 17 CFR 242.608.

⁸⁹³ 15 U.S.C. 78k–1.

operation of the Company]with the Commission; and

(vi) Beginning three months after the Effective Date, and continuing every three months thereafter until the Operative Date, the Operating Committee shall provide a written report to the Commission, and shall make that report publicly available, on the actions undertaken and progress made toward completing each of the actions listed above in this subsection (d).

[(d)](e) Until the Operative Date, the Members will continue to operate pursuant to the CQ Plan, CTA Plan, and UTP Plan with respect to the public dissemination of real-time consolidated equity market data for Eligible Securities rather than this Agreement.

[(e)](f) As of the Operative Date, the Members shall conduct, through the Company, the Processor and Administrator functions related to the public dissemination of real-time consolidated equity market data for Eligible Securities required by the Commission to be performed by the Members under the Exchange Act.

[(f)](g) It is understood and agreed that, in performing their obligations and duties under this Agreement, the Members are performing and discharging functions and responsibilities related to the operation of the national market system for and on behalf of the Members in their capacities as self-regulatory organizations, as required under the Section 11A of the Exchange Act, and pursuant to Rule 603(b) of Regulation NMS thereunder. It is further understood and agreed that this Agreement and the operations of the Company shall be subject to ongoing oversight by the Commission. *No provision of this Agreement shall be construed to limit or diminish the obligations and duties of the Members as self-regulatory organizations under the federal securities laws and the regulations thereunder.*

Article I.

DEFINITIONS

Section 1.1 Definitions.

As used throughout this Agreement and the Exhibits:

(a) "Administrator" means the Person selected by the Company to perform the administrative functions described in this Agreement pursuant to the Administrative Services Agreement.

(b) "Advisory Committee Member" means an individual selected pursuant to Section III(e)(ii)(A) of the CTA Plan and Section IV(E)(b)(i) of the UTP Plan to be a member of the Advisory Committees of the CTA Plan and UTP Plan.

(c) "Affiliate" means, as to any Person, any other Person that, directly or indirectly, Controls, is Controlled by, or is under common Control with such Person. Affiliate or Affiliated, when used as an adjective, shall have a correlative meaning.

(d) "Agent" means, for purposes of Exhibit C, agents of the Operating Committee, a Member, the Administrator, and the Processors, including, but not limited to, attorneys, auditors, advisors, accountants, contractors or subcontractors.

(e) "Applicable Law" means all applicable provisions of (a) constitutions, treaties,

statutes, laws (including the common law), rules, regulations, decrees, ordinances, codes, proclamations, declarations or orders of any Governmental Authority; (b) any consents or approvals of any Governmental Authority; and (c) any orders, decisions, advisory or interpretative opinions, injunctions, judgments, awards, decrees of, or agreements with, any Governmental Authority.

(f) "Best Bid and Offer" has the meaning ascribed to the term "best bid and best offer" by Rule 600(b)(8) of Regulation NMS.

(g) "Capital Contributions" means any cash, cash equivalents, or other property that a Member contributes to the Company with respect to its Membership Interest.

(h) "Chair" shall mean the individual elected pursuant to Section 4.4(e).

(i) "Code" means the Internal Revenue Code of 1986, as amended.

(j) "Commission" or "SEC" means the U.S. Securities and Exchange Commission.

(k) "Company Indemnified Party" means a Person, and any other Person of whom such Person is the legal representative, that is or was a Member [or], an SRO Voting Representative, or a Non-SRO Voting Representative.

(l) "Confidential Information" means, except to the extent covered by the definitions for Restricted Information, Highly Confidential Information, or Public Information: (i) Any non-public data or information designated as Confidential by the Operating Committee pursuant to Section 4.3; (ii) any document generated by a Member or Non-SRO Voting Representative and designated by that Member or Non-SRO Voting Representative as Confidential; and (iii) the individual views and statements of Covered Persons and SEC staff disclosed during a meeting of the Operating Committee or any subcommittees thereunder.

(m) "Control" means, with respect to any Person, the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person, whether through the ownership of voting securities (or other ownership interest), by contract or otherwise.

(n) "Covered Persons" means representatives of the Members (*including the SRO Voting Representative, alternate SRO Voting Representative, and Member Observers*), the Non-SRO Voting Representatives, SRO Applicants, *SRO Applicant Observers*, the Administrator, and the Processors; A[a]ffiliates, employees, and Agents of the Operating Committee, a Member, the Administrator, and the Processors; *and any third parties invited to attend meetings of the Operating Committee or subcommittees; and the employers of Non-SRO Voting Representatives*. Covered Persons do not include staff of the SEC.

(o) "CQ Plan" means the Restated CQ Plan.

(p) "CT Feeds" means the CT Quote Data Feed(s) and the CT Trade Data Feed(s).

(q) "CT Quote Data Feed(s)" means the service(s) that provides Vendors and Subscribers with (i) National Best Bids and Offers and their sizes and the Members' identifiers providing the National Best Bids and Offers; (ii) each Member's Best Bids and Offers and their sizes and the Member's identifier; and (iii) in the case of FINRA, the

identifier of the FINRA Participant(s) that constitute(s) FINRA's Best Bids and Offers, in each case for Eligible Securities.

(r) "CT Trade Data Feed(s)" means the service(s) that provides Vendors and Subscribers with Transaction Reports for Eligible Securities.

(s) "CTA Plan" means the Second Restatement of the CTA Plan.

(t) "Current" means, with respect to Transaction Reports or Quotation Information, such Transaction Reports or Quotation Information during the fifteen (15) minute period immediately following the initial transmission thereof by the Processors.

(u) "Delaware Act" means the Delaware Limited Liability Company Act, Title 6, Chapter 18, §§ 18-101, *et seq.*, and any successor statute, as amended.

(v) "Distribution" means a distribution to the Members of revenues of the Company under this Agreement pursuant to Section 8.3 and Exhibit D of the Agreement.

(w) "Eligible Security" means (i) any equity security, as defined in Section 3(a)(11) of the Exchange Act, or (ii) a security that trades like an equity security, in each case that is listed on a national securities exchange.

(x) "ET" means Eastern Time.

(y) "Exchange Act" means the Securities Exchange Act of 1934, as amended.

(z) "Executive Session" means a meeting of the Operating Committee pursuant to Section 4.4(g), which includes SRO Voting Representatives, Member Observers, SEC Staff, and other persons as deemed appropriate by *majority vote* of the SRO Voting Representatives.

(aa) "Extraordinary Market Activity" means a disruption or malfunction of any electronic quotation, communication, reporting, or execution system operated by, or linked to, the Processors or a Trading Center or a member of such Trading Center that has a severe and continuing negative impact, on a market-wide basis, on quoting, order, or trading activity or on the availability of market information necessary to maintain a fair and orderly market. For purposes of this definition, a severe and continuing negative impact on quoting, order, or trading activity includes (i) a series of quotes, orders, or transactions at prices substantially unrelated to the current market for the security or securities; (ii) duplicative or erroneous quoting, order, trade reporting, or other related message traffic between one or more Trading Centers or their members; or (iii) the unavailability of quoting, order, transaction information, or regulatory messages for a sustained period.

(bb) "Fees" means fees charged to Vendors and Subscribers for Transaction Reports and Quotation Information in Eligible Securities.

(cc) "Final Decision of the Operating Committee" means an action or inaction of the Operating Committee as a result of the vote of the Operating Committee, but will not include the individual votes of a Voting Representative.

(dd) "FINRA" means the Financial Industry Regulatory Authority, Inc.

(ee) "FINRA Participant" means a FINRA member that utilizes the facilities of FINRA pursuant to applicable FINRA rules.

(ff) "Fiscal Year" means the fiscal year of the Company adopted pursuant to Section 10.1(a) of this Agreement.

(gg) "GAAP" means United States generally accepted accounting principles in effect from time to time, consistently applied.

(hh) "Governmental Authority" means (a) the U.S. federal government or government of any state of the U.S., (b) any instrumentality or agency of any such government, (c) any other individual, entity or organization authorized by law to perform any executive, legislative, judicial, regulatory, administrative, military or police functions of any such government, or (d) any intergovernmental organization of U.S. entities, but "Governmental Authority" excludes any self-regulatory organization registered with the Commission.

(ii) "Highly Confidential Information" means any highly sensitive Member-specific, customer-specific, individual-specific, or otherwise sensitive information relating to the Operating Committee, Members, Vendors, Subscribers, or customers that is not otherwise Restricted Information. Highly Confidential Information includes: The Company's contract negotiations with the Processors or Administrator; personnel matters that affect the employees of SROs or the Company; information concerning the intellectual property of Members or customers; and any document subject to the Attorney-Client Privilege or Work Product Doctrine.

(jj) "Limit Up Limit Down" means the Plan to Address Extraordinary Market Volatility pursuant to Rule 608 of Regulation NMS under the Exchange Act.

(kk) "Losses" means losses, judgments, penalties (including excise and similar taxes and punitive damages), fines, settlements, and reasonable expenses (including reasonable attorneys' fees) actually incurred by such Company Indemnified Party as a Party to a Proceeding.

(ll) "Market" means (i) in respect of FINRA or a national securities association, the facilities through which FINRA Participants display quotations and report transactions in Eligible Securities to FINRA and (ii) in respect of each national securities exchange, the marketplace for Eligible Securities that such exchange operates.

(mm) "Market-Wide Circuit Breaker" means a halt in trading in all stocks in all Markets under the rules of a Primary Listing Market.

(nn) "Material SIP Latency" means a delay of quotation or last sale price information in one or more securities between the time data is received by the Processors and the time the Processors disseminate the data, which delay the Primary Listing Market determines, in consultation with, and in accordance with, publicly disclosed guidelines established by the Operating Committee, to be (a) material and (b) unlikely to be resolved in the near future.

(oo) "Member Observer" means any [individual,] employee of a Member (other than a Voting Representative), or any attorney to a Member, that a Member[, in its sole discretion,] determines is necessary in connection with such Member's compliance with its obligations under Rule 608(c) of

Regulation NMS to attend Operating Committee and subcommittee meetings, provided that the designation of the Member Observer is consistent with the prohibition in Section 4.10(b)(i).

(pp) "Membership Fee" means the fee to be paid by a new Member pursuant to Section 3.2.

(qq) "Membership Interest" means an interest in the Company owned by a Member.

(rr) "Nasdaq" means The Nasdaq Stock Market LLC.

(ss) "National Best Bid and Offer" has the meaning ascribed to the term "national best bid and national best offer" by Rule 600(b)(43) of Regulation NMS.

(tt) "National securities association" means a securities association that is registered under Section 15A of the Exchange Act.

(uu) "National securities exchange" means a securities exchange that is registered under Section 6 of the Exchange Act.

(vv) "Network A Security" means an Eligible Security for which NYSE is the Primary Listing Market.

(ww) "Network B Security" means an Eligible Security for which a national securities exchange other than NYSE or Nasdaq is the Primary Listing Market.

(xx) "Network C Security" means an Eligible Security for which Nasdaq is the Primary Listing Market.

(yy) "Non-Affiliated SRO" means a Member that is not affiliated with any other Member.

(zz) "Non-SRO Voting Representative" means an individual selected pursuant to Section 4.2(b) to serve on the Operating Committee.

(aaa) "NYSE" means the New York Stock Exchange LLC.

(bbb) "Officer" means each individual designated as an officer of the Company pursuant to Section 4.8.

(ccc) "Operating Committee" means the committee established under Article IV of this Agreement, each member of which shall be deemed a "manager" (as defined in the Delaware Act) and shall be referred to herein as a Voting Representative.

(ddd) "Operational Halt" means a halt in trading in one or more securities only on a Member's Market declared by such Member and is not a Regulatory Halt.

(eee) "Party to a Proceeding" means a Company Indemnified Party that is, was, or is threatened to be made, a party to a Proceeding, or is involved in a Proceeding, by reason of the fact that such Company Indemnified Party is or was a Member[, and/or], an SRO Voting Representative, or a Non-SRO Voting Representative.

(fff) "PDP" means a Member or non-Member's proprietary market data product that includes Transaction Reports and Quotation Information data in Eligible Securities from a Member's Market or a Trading Center, and if from a Member, is filed with the Commission.

(ggg) "Person" means an individual, corporation, partnership, joint venture, limited liability company, Governmental Authority, unincorporated organization, trust, association, or other entity.

(hhh) "Primary Listing Market" means the national securities exchange on which an

Eligible Security is listed. If an Eligible Security is listed on more than one national securities exchange, Primary Listing Market means the exchange on which the security has been listed the longest.

(iii) "Proceeding" means any threatened, pending or completed suit, proceeding, or other action, whether civil, criminal, administrative, or arbitrative, or any appeal in such action or any inquiry or investigation that could lead to such an action.

(jjj) "Processor(s)" means the entity(ies) selected by the Company to perform the processing functions described in this Agreement and pursuant to the Processor Services Agreement(s), including the operation of the System.

(kkk) "Public Information" means: (i) any information that is not either Restricted Information or Highly Confidential Information or that has not been designated as Confidential Information; (ii) any Confidential Information that has been approved by the Operating Committee for release to the public; (iii) the duly approved minutes of the Operating Committee with detail sufficient to inform the public on matters under discussion and the views expressed thereon (without attribution); (iv) Vendor, Subscriber and performance metrics; (v) Processor transmission metrics; and (vi) any information that is otherwise publicly available, except for information made public as a result of a violation of the Company's Confidentiality Policy or Applicable Law. Public Information includes, but is not limited to, any topic discussed during a meeting of the Operating Committee, an outcome of a topic discussed, or a Final Decision of the Operating Committee.

(lll) "Regulatory Halt" means a halt declared by the Primary Listing Market in trading in one or more securities on all Trading Centers for regulatory purposes, including for the dissemination of material news, news pending, suspensions, or where otherwise necessary to maintain a fair and orderly market. A Regulatory Halt includes a trading pause triggered by Limit Up Limit Down, a halt based on Extraordinary Market Activity, a trading halt triggered by a Market-Wide Circuit Breaker, and a SIP Halt.

(mmm) "Restricted Information" means highly sensitive customer-specific financial information, customer-specific audit information, other customer financial information, and personal identifiable information.

(nnn) "Quotation Information" means all bids, offers, displayed quotation sizes, market center identifiers and, in the case of FINRA, the identifier of the FINRA Participant that entered the quotation, all withdrawals, and all other information pertaining to quotations in Eligible Securities required to be collected and made available to the Processors pursuant to this Agreement.

(ooo) "Regular Trading Hours" has the meaning provided in Rule 600(b)(68) of Regulation NMS. Regular Trading Hours can end earlier than 4:00 p.m. ET in the case of an early scheduled close.

(ppp) "Retail Representative" means an individual who (1) represents the interests of retail investors, (2) has experience working with or on behalf of retail investors, (3) has

the requisite background and professional experience to understand the interests of retail investors, the work of the Operating Committee of the Company, and the role of market data in the U.S. equity market, and (4) is not affiliated with a Member or broker-dealer.

(qqq) "Self-regulatory organization" or "SRO" has the meaning provided in Section 3(a)(26) of the Exchange Act.

(rrr) "SIP Halt" means a Regulatory Halt to trading in one or more securities that a Primary Listing Market declares in the event of a SIP Outage or Material SIP Latency.

(sss) "SIP Halt Resume Time" means the time that the Primary Listing Market determines as the end of a SIP Halt.

(ttt) "SIP Outage" means a situation in which a Processor has ceased, or anticipates being unable, to provide updated and/or accurate quotation or last sale price information in one or more securities for a material period that exceeds the time thresholds for an orderly failover to backup facilities established by mutual agreement among the Processors, the Primary Listing Market for the affected securities, and the Operating Committee unless the Primary Listing Market, in consultation with the affected Processor and the Operating Committee, determines that resumption of accurate data is expected in the near future.

(uuu) "SRO Applicant" means (1) any Person that is not a Member and for which the Commission has published a Form 1 to be registered as a national securities exchange or national securities association to operate a Market, or (2) a national securities exchange that is not a Member and for which the Commission has published a proposed rules change to operate a Market.

(vvv) "SRO Group" means a group of Members that are Affiliates.

(www) "SRO Voting Representative" means an individual designated by each SRO Group and each Non-Affiliated SRO pursuant to Section 4.2(a) to vote on behalf of such SRO Group or such Non-Affiliated SRO.

(xxx) "Subscriber" means a Person that receives Current Transaction Reports or Quotation Information from the Processors or a Vendor and that itself is not a Vendor.

(yyy) "System" means all data processing equipment, software, communications facilities, and other technology and facilities, utilized by the Company or the Processors in connection with the collection, consolidation, and dissemination of Transaction Reports, Quotation Information, and other information concerning Eligible Securities.

(zzz) "Taxes" means taxes, levies, imposts, charges, and duties (including withholding tax, stamp, and transaction duties) imposed by any taxing authority together with any related interest, penalties, fines, and expenses in connection with them.

(aaaa) "Trading Center" has the same meaning as that term is defined in Rule 600(b)(82) of Regulation NMS.

(bbbb) "Transaction Reports" means reports required to be collected and made available pursuant to this Agreement containing the stock symbol, price, and size of the transaction executed, the Market in which the transaction was executed, and

related information, including a buy/sell/cross indicator, trade modifiers, and any other required information reflecting completed transactions in Eligible Securities.

(cccc) "Transfer" means to directly sell, transfer, assign, pledge, encumber, hypothecate, or similarly dispose of, either voluntarily or involuntarily, by operation of law or otherwise, or to enter into any contract, option, or other arrangement or understanding with respect to the sale, transfer, assignment, pledge, encumbrance, hypothecation, or similar disposition of any Membership Interests owned by a Person or any interest (including a beneficial interest) in any Membership Interests owned by a Person. "Transfer" when used as a noun shall have a correlative meaning.

(dddd) "UTP Plan" means the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis.

(eeee) "Vendor" means a Person that the Administrator has approved to re-distribute Current Transaction Reports or Quotation Information to the Person's employees or to others.

(ffff) "Voting Representative" means an SRO Voting Representative or a Non-SRO Voting Representative.

Section 1.2 Interpretation.

For purposes of this Agreement: (a) the words "include," "includes," and "including" shall be deemed to be followed by the words "without limitation"; (b) the word "or" is not exclusive; and (c) the words "herein," "hereof," "hereby," "hereto," and "hereunder" refer to this Agreement as a whole. The definitions given for any defined terms in this Agreement shall apply equally to both the singular and plural forms of the terms defined. Whenever the context may require, any pronoun shall include the corresponding masculine, feminine, and neuter forms. Unless the context otherwise requires, references herein: (x) to Articles, Sections, and Exhibits mean the Articles and Sections of, and Exhibits attached to, this Agreement; (y) to an agreement, instrument, or other document mean such agreement, instrument, or other document as amended, supplemented, and modified from time to time to the extent permitted by the provisions thereof; and (z) to a statute mean such statute as amended from time to time and includes any successor legislation thereto and any rules and regulations promulgated thereunder. This Agreement shall be construed without regard to any presumption or rule requiring construction or interpretation against the party drafting an instrument or causing any instrument to be drafted. The Exhibits referred to herein shall be construed with, and as an integral part of, this Agreement to the same extent as if they were set forth verbatim herein.

Article II.

ORGANIZATION

Section 2.1 Formation.

(a) The Members formed the Company as a limited liability company on [•], [•]

pursuant to the Delaware Act by filing a certificate of formation (the "Certificate") with the Delaware Secretary of State.

(b) This Agreement shall constitute the "limited liability company agreement" (as that term is used in the Delaware Act) of the Company. The rights, powers, duties, obligations, and liabilities of the Members shall be determined pursuant to the Delaware Act and this Agreement. To the extent that the rights, powers, duties, obligations, and liabilities of any Member are different by reason of any provision of this Agreement than they would be under the Delaware Act in the absence of such provision, this Agreement shall, to the extent permitted by the Delaware Act, control.

Section 2.2 Name.

The name of the Company is "CT Plan LLC" and all Company business shall be conducted in that name or such other name or names as the Operating Committee may designate; provided, that the name shall always contain the words "Limited Liability Company" or the abbreviation "L.L.C." or the designation "LLC."

Section 2.3 Registered Office; Registered Agent; Principal Office; Other Offices.

(a) The registered office of the Company required by the Delaware Act to be maintained in the State of Delaware shall be the office of the initial registered agent named in the Certificate or such other office (which need not be a place of business of the Company) as the Operating Committee may designate from time to time in the manner provided by the Delaware Act and Applicable Law.

(b) The registered agent for service of process of the Company in the State of Delaware shall be the initial registered agent named in the Certificate or such other Person or Persons as the Operating Committee may designate from time to time in the manner provided by the Delaware Act and Applicable Law.

(c) The principal office of the Company shall be located at such place as the Operating Committee may designate from time to time, which need not be in the State of Delaware, and the Company shall maintain its books and records there. The Company shall give prompt notice to each of the Members of any change to the principal office of the Company.

(d) The Company may have such other offices as the Operating Committee may designate from time to time.

Section 2.4 Purpose; Powers.

(a) The purposes of the Company are to engage in the following activities on behalf of the Members:

(i) the collection, consolidation, and dissemination of Transaction Reports, Quotation Information, and such other information concerning Eligible Securities as the Members shall agree as provided herein;

(ii) contracting for the distribution of such information;

(iii) contracting for and maintaining facilities to support any activities permitted in this Agreement and guidelines adopted hereunder, including the operation and administration of the System;

(iv) providing for those other matters set forth in this Agreement and in all guidelines adopted hereunder;

(v) operating the System to comply with Applicable Laws; and

(vi) engaging in any other business or activity that now or hereafter may be necessary, incidental, proper, advisable, or convenient to accomplish any of the foregoing purposes and that is not prohibited by the Delaware Act, the Exchange Act, or other Applicable Law.

(b) The Company shall have all the powers necessary or convenient to carry out the purposes for which it is formed, including the powers granted by the Delaware Act.

(c) It is expressly understood that each Member shall be responsible for the collection of Transaction Reports and Quotation Information within its Market and that nothing in this Agreement shall be deemed to govern or apply to the manner in which each Member does so.

Section 2.5 Term.

The term of the Company commenced as of the date the Certificate was filed with the Secretary of State of the State of Delaware, and shall continue in existence perpetually until the Company is dissolved in accordance with the provisions of the Certificate or this Agreement. Notwithstanding the foregoing, this Agreement shall not become effective until the Effective Date.

Section 2.6 No State-Law Partnership.

The Members intend that the Company not be a partnership (including a limited partnership) or joint venture, and that no Member be a partner or joint venturer of any other Member by virtue of this Agreement for any purposes other than as set forth in Sections 10.2 and 10.3, and neither this Agreement nor any other document entered into by the Company or any Member relating to the subject matter of this Agreement shall be construed to suggest otherwise.

Article III.

MEMBERSHIP

Section 3.1 Members.

The Members of the Company shall consist of the Persons identified in Exhibit A, as updated from time to time to reflect the admission of new Members pursuant to this Agreement.

Section 3.2 New Members.

(a) Any national securities association or national securities exchange whose market, facilities, or members, as applicable, trades Eligible Securities may become a Member by (i) providing written notice to the Company, (ii) executing a joinder to this Agreement, at which time Exhibit A shall be amended to reflect the addition of such association or exchange as a Member, (iii) paying a Membership Fee to the Company as determined pursuant to Section 3.2(b), and (iv) executing a joinder to any other agreements to which all of the other Members have been made party in connection with being a Member. Membership Fees paid shall be added to the general revenues of the Company.

(b) The Membership Fee shall be based upon the following factors:

(i) the portion of costs previously paid by the Company (or by the Members prior to the formation of the Company) for the development, expansion, and maintenance of the System which, under GAAP, would have been treated as capital expenditures and would have been amortized over the five years preceding the admission of the new Member (and for this purpose all such capital expenditures shall be deemed to have a five-year amortizable life); and

(ii) an assessment of costs incurred and to be incurred by the Company for modifying the System or any part thereof to accommodate the new Member, which are not otherwise required to be paid or reimbursed by the new Member.

[(a)](c) Participants of the CQ Plan, CTA Plan, and UTP Plan are not be required to pay the Membership Fee.

Section 3.3 Transfer of Membership Interests.

Except as set forth in Section 3.4, a Member shall not have the right to Transfer (whether in whole or in part) its Membership Interest in the Company.

Section 3.4 Withdrawal From Membership.

(a) Any Member may voluntarily withdraw from the Company at any time on not less than 30 days' prior written notice (the "Withdrawal Date"), by (i) providing such notice of such withdrawal to the Company, (ii) causing the Company to file with the Commission an amendment to effectuate the withdrawal and (iii) Transferring such Member's Membership Interest to the Company.

(b) A Member shall automatically be withdrawn from the Company upon such Member no longer being a registered national securities association or registered national securities exchange. Such Member's Membership Interest will automatically transfer to the Company. The Company shall file with the Commission an amendment to effectuate the withdrawal.

(c) A withdrawal of a Member shall not be effective until approved by the Commission after filing an amendment to the Agreement in accordance with Section 13.5.

(d) From and after the Withdrawal Date of such Member:

(iii) Such Member shall remain liable for any obligations under this Agreement of such Member (including indemnification obligations) arising prior to the Withdrawal Date (but such Member shall have no further obligations under this Agreement or to any of the other Members arising after the Withdrawal Date);

(iv) Such Member shall be entitled to receive a portion of the Net Distributable Operating Income (if any) in accordance with Exhibit D attributable to the period prior to the Withdrawal Date of such Member;

(v) Such Member shall cease to have the right to have its Transaction Reports, Quotation Information, or other information disseminated over the System; and

(vi) Profits and losses of the Company shall cease to be allocated to the Capital Account of such Member.

Section 3.5

Member Bankruptcy.

In the event a Member becomes subject to one or more of the events of bankruptcy enumerated in Section 18-304 of the Delaware Act, that event by itself shall not cause a withdrawal of such Member from the Company so long as such Member continues to be a national securities association or national securities exchange.

Section 3.6 Undertaking by All Members.

Following the Operative Date, each Member shall be required, pursuant to Rule 608(c) of Regulation NMS, to comply with the provisions hereof and enforce compliance by its members with the provisions hereof.

Section 3.7 Obligations and Liability of Members.

(a) Except as otherwise provided in this Agreement or Applicable Law, no Member shall be obligated to contribute capital or make loans to the Company.

(b) Except as provided in this Agreement or Applicable Law, no Member shall have any liability whatsoever in its capacity as a Member, whether to the Company, to any of the Members, to the creditors of the Company or to any other Person, for the debts, liabilities, commitments or any other obligations of the Company or for any losses of the Company. Notwithstanding the foregoing, to the extent that amounts have not been paid to the Processors or Administrator under the terms of the Processor Services Agreements and Administrative Services Agreement, respectively, or this Agreement, as and when due, (i) each Member shall be obligated to return to the Company its pro rata share of any moneys distributed to such Member in the one year period prior to such default in payment (such pro rata share to be based upon such Member's proportionate receipt of the aggregate distributions made to all Members in such one year period) until an aggregate amount equal to the amount of any such defaulted payments has been re-contributed to the Company and (ii) the Company shall promptly pay such amount to the Processors or Administrator, as applicable.

(c) In accordance with the Delaware Act, a member of a limited liability company may, under certain circumstances, be required to return amounts previously distributed to such member. It is the intent of the Members that no distribution to any Member pursuant to this Agreement shall be deemed a return of money or other property paid or distributed in violation of the Delaware Act. The payment of any such money or distribution of any such property to a Member shall be deemed to be a compromise within the meaning of the Delaware Act, and the Member receiving any such money or property shall not be required to return any such money or property to any Person; provided, however, that a Member shall be required to return to the Company any money or property distributed to it in clear and manifest accounting or similar error or as otherwise provided in Section 3.7(b). However, if any court of competent jurisdiction holds that, notwithstanding the

provisions of this Agreement, any Member is obligated to make any such payment, such obligation shall be the obligation of such Member and not of the Operating Committee.

(d) No Member (unless duly authorized by the Operating Committee) has the authority or power to represent, act for, sign for or bind the Company or to make any expenditure on behalf of the Company; provided, however, that the Tax Matters Partner may represent, act for, sign for or bind the Company as permitted under Sections 10.2 and 10.3 of this Agreement.

(e) To the fullest extent permitted by law, no Member shall, in its capacity as a Member, owe any duty (fiduciary or otherwise) to the Company or to any other Member other than the duties expressly set forth in this Agreement.

Article IV.

MANAGEMENT OF THE COMPANY

Section 4.1 Operating Committee.

(a) Except for situations in which the approval of the Members is required by this Agreement, the Company shall be managed by the Operating Committee. Unless otherwise expressly provided to the contrary in this Agreement, no Member shall have authority to act for, or to assume any obligation or responsibility on behalf of, the Company, without the prior approval of the Operating Committee. Without limiting the generality of the foregoing and except as otherwise expressly provided in this Agreement, the Operating Committee shall have full and complete discretion to manage and control the business and affairs of the Company, to make all decisions affecting the business and affairs of the Company, and to take all such actions as it deems necessary or appropriate to accomplish the purposes of the Company, including the following:

(i) proposing amendments to this Agreement or implementing other policies and procedures as necessary to ensure prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to Transaction Reports and Quotation Information in Eligible Securities and the fairness and usefulness of the form and content of that information;

(ii) selecting, overseeing, specifying the role and responsibilities of, and evaluating the performance of, the Administrator, the Processors, an auditor, and other professional service providers, provided that any expenditures for professional services that are paid for from the Company's revenues must be for activities consistent with the terms of this Agreement and must be authorized by the Operating Committee;

(iii) developing and maintaining fair and reasonable Fees and consistent terms for the distribution, transmission, and aggregation of core data;

(iv) reviewing the performance of the Processors and ensuring the public reporting of Processors' performance and other metrics and information about the Processors;

(v) assessing the marketplace for equity market data products and ensuring that the CT Feeds are priced in a manner that is fair and reasonable, and designed to ensure the

widespread availability of CT Feeds data to investors and market participants;

(vi) designing a fair and reasonable revenue allocation formula for allocating plan revenues to be applied by the Administrator, and overseeing, reviewing, and revising that formula as needed;

(vii) interpreting the Agreement and its provisions; and

(viii) carrying out such other specific responsibilities as provided under this Agreement.

(b) The Operating Committee may delegate all or part of its administrative functions under this Agreement, *excluding those administrative functions to be performed by the Administrator pursuant to Section 6.1*, to a subcommittee, to one or more of the Members, to one or more Non-SRO Voting Representatives, or to other Persons (including the Administrator), and any Person to which administrative functions are so delegated shall perform the same as agent for the Company, in the name of the Company. For the avoidance of doubt, no delegation to a subcommittee shall contravene Section 4.3 and no subcommittee shall take actions requiring approval of the Operating Committee pursuant to Section 4.3 unless such approval shall have been obtained. Any authority delegated hereunder is subject to the provisions of Section 4.3 hereof.

(c) It is expressly agreed and understood that neither the Company nor the Operating Committee shall have authority in any respect of any Member's proprietary systems. Neither the Company nor the Operating Committee shall have any authority over the collection and dissemination of quotation or transaction information in Eligible Securities in any Member's Market, or, in the case of FINRA, from FINRA Participants.

Section 4.2 Composition and Selection of Operating Committee.

(a) SRO Voting Representatives. The Operating Committee shall include one SRO Voting Representative designated by each SRO Group and each Non-Affiliated SRO to vote on behalf of such SRO Group or such Non-Affiliated SRO. Each SRO Group and each Non-Affiliated SRO may designate an alternate individual or individuals who shall be authorized to vote on behalf of such SRO Group or such Non-Affiliated SRO, respectively, in the absence of the designated SRO Voting Representative.

(b) Non-SRO Voting Representatives. The Operating Committee shall include one Non-SRO Voting Representative from each of the following categories: (A) An institutional investor; (B) a broker-dealer with a predominantly retail investor customer base; (C) a broker-dealer with a predominantly institutional investor customer base; (D) a securities market data vendor that is not affiliated or associated with a Member, broker-dealer, or investment adviser with third-party clients; (E) an issuer of NMS stock that is not affiliated or associated with a Member, broker-dealer, or investment adviser with third-party clients; and (F) a Retail Representative. Non-SRO Voting Representatives shall serve [for]no more than two consecutive three-year terms[for a

maximum of two terms total, whether consecutive or non-consecutive], *but shall be eligible after a period of three years of non-service to serve additional terms, subject to the same term limit requirements*. Non-SRO Voting Representatives will be selected pursuant to the following procedures:

(i) The initial Non-SRO Voting Representative for each category shall be selected by a majority vote of the Advisory Committee Members. The Advisory Committee Members shall follow the procedure set forth in subparagraph (b)(v) below, *except that in addition to nominating others, Advisory Committee Members may nominate themselves, regardless of the length of their service on the Advisory Committees*.

(ii) Although the Non-SRO Voting Representatives will be selected at the same time, the Non-SRO Voting Representatives' terms will be staggered to allow for continuity of representation. The Non-SRO Voting Representatives' terms will begin in accordance with the following timeline after the Effective Date of the Agreement:

(A) Issuer Representative: First Quarterly Operating Committee Meeting after Effective Date;

(B) Retail Representative: First Quarterly Operating Committee Meeting after Effective Date;

(C) Institutional investor: First Quarterly Operating Committee Meeting after Effective Date;

(D) Securities market data vendor: Third Quarterly Operating Committee Meeting after Effective Date;

(E) Broker-dealer with a predominantly retail investor customer base: Third Quarterly Operating Committee Meeting after Effective Date; and

(F) Broker-dealer with a predominantly institutional investor customer base: Third Quarterly Operating Committee Meeting after Effective Date.

(iii) Although certain Non-SRO Voting Representatives' official, [two]three-year terms will not begin until the Third Quarterly Operating Committee Meeting after the Effective Date, such Non-SRO Voting Representatives will temporarily serve as a Non-SRO Voting Representative as of their selection. Such Non-SRO Voting Representatives may still be selected for another [two]three-year term.

(iv) After the expiration of a Non-SRO Voting Representative's term, an individual will be selected by a majority of the then-serving Non-SRO Voting Representatives to fill the position.

(v) Procedure for Nominating and Electing Non-SRO Voting Representatives.

(A) At least two months prior to the expiring term of a Non-SRO Voting Representative, the Operating Committee shall post a notice on its website requesting nominations from the public for the upcoming open position. [Members]Each SRO Voting Representative and Non-SRO Voting Representative may submit the names of individuals for consideration during the nomination process, and the Non-SRO Voting Representative may nominate themselves as long as they [have not served the maximum number of terms]are not then completing a second consecutive term.

(B) At least one month prior to the expiring term of a Non-SRO Voting Representative, the Non-SRO Voting Representatives shall review the nominated individuals to confirm, by a majority vote, the nominated individuals that meet the requirements of the category up for election.

(C) Within a week of the Non-SRO Voting Representatives finalizing the list of eligible individuals, the Operating Committee shall post a notice on the Company website listing the individuals nominated for the open position and requesting comment from the public. After the Non-SRO Voting Representatives screen comments for appropriateness, the public comments will be posted on the Company's website. Prior to electing an individual from the list of nominations, the Non-SRO Voting Representatives will consider and discuss the public comments.

(D) The Non-SRO Voting Representatives whose terms are expiring may vote in the election for an open position; provided, however, that a Non-SRO Voting Representative may not vote in the election for an open position for which they are nominated.

(E) In the event that no nominated individual receives a majority of votes, the individual(s) with the lowest number of votes will be eliminated from consideration. The Non-SRO Voting Representatives will repeat this process until an individual receives a majority of votes. In the event two candidates remain, the Person receiving the most votes will be elected.

(vi) A Non-SRO Voting Representative may resign from the Operating Committee by tendering their resignation to the Chair of the Operating Committee. In the event a Non-SRO Voting Representative leaves his or her employment or changes his or her duties within the firm to a position unrelated to the category he or she represents before the expiration of his or her term, the Non-SRO Voting Representative shall tender his or her resignation to the Chair of the Operating Committee or be removed upon an affirmative vote of the Operating Committee pursuant to Section 4.3.

(vii) In the event a Non-SRO Voting Representative resigns or is removed from the Operating Committee, the Operating Committee shall, as soon as practicable, follow the procedure set forth in subparagraph (b)(v). The individual selected shall serve out the remaining term of the resigning Non-SRO Voting Representative and, if the remaining term after selection is less than one year, such individual will automatically serve an additional [two]three-year term. If the remaining term after selection is greater than one year, the Operating Committee shall follow the procedure set forth in subparagraph (b)(v) at the end of the term. Under either circumstance, such individual may be elected for one additional [two]three-year term before reaching the term limit.

(viii) Each Non-SRO Voting Representative will agree in writing to comply with the requirements of Section 4.10 and Exhibit B thereto and the Confidentiality Policy set forth in Exhibit C.

(c) An SRO Applicant will be permitted to appoint one individual to attend (subject to

Section 4.4(i)) regularly scheduled Operating Committee meetings in the capacity of a non-voting observer (each, an "SRO Applicant Observer"). Each SRO Applicant may designate an alternate individual or individuals who shall be authorized to act as the SRO Applicant Observer on behalf of the SRO Applicant in the absence of the designated SRO Applicant Observer. If the SRO Applicant's Form 1 petition or Section 19(b)(1) filing is withdrawn, returned, or is otherwise not actively pending with the Commission for any reason, then the SRO Applicant will no longer be eligible to have an SRO Applicant Observer attend Operating Committee meetings.

(d) Notwithstanding anything to the contrary herein, (i) a national securities exchange that has ceased operations as a Market (or has yet to commence operation as a Market) and that is a Non-Affiliated SRO will not be permitted to designate an SRO Voting Representative and (ii) an SRO Group in which all national securities exchanges have ceased operations as a Market (or have yet to commence operation as a Market) will not be permitted to designate an SRO Voting Representative. Such SRO Group or Non-Affiliated SRO may attend the Operating Committee as an observer but may not attend the Executive Session of the Operating Committee. In the event such an SRO Group or Non-Affiliated SRO does not commence operation as a Market for six months after first attending an Operating Committee meeting, such SRO Group or Non-Affiliated SRO may no longer attend the Operating Committee until it commences/re-commences operation as a Market.

Section 4.3 Action of Operating Committee.

(a) The SRO Voting Representatives and Non-SRO Voting Representatives shall be allocated votes as follows:

(i) Each SRO Voting Representative shall be authorized to cast one vote on behalf of the SRO Group or Non-Affiliated SRO that he or she represents, provided, however, that each SRO Voting Representative representing an SRO Group or Non-Affiliated SRO whose combined market center(s) have consolidated equity market share of more than fifteen (15) percent during four of the six calendar months preceding an Operating Committee vote shall be authorized to cast two votes. For purposes of this Section 4.3(a)(i),

"consolidated equity market share" means the average daily dollar equity trading volume of Eligible Securities of an SRO Group or Non-Affiliated SRO as a percentage of the average daily dollar equity trading volume of all of the SRO Groups and Non-Affiliated SROs, as reported under this Agreement. For the avoidance of doubt, FINRA shall not be considered to operate a market center within the meaning of this Section 4.3(a)(i) solely by virtue of facilitating trade reporting of Eligible Securities through the FINRA/Nasdaq Trade Reporting Facility Carteret, the FINRA/Nasdaq Trade Reporting Facility Chicago, the FINRA/NYSE Trade Reporting Facility, or any other trade reporting facility that FINRA may operate from time to time in affiliation with a registered national securities exchange to provide a mechanism for FINRA

Participants to report transactions in Eligible Securities effected otherwise than on an exchange.

(ii) With respect to any action on which the Non-SRO Voting Representatives may vote, the aggregate number of votes attributed to the Non-SRO Voting Representatives eligible to vote on such action shall at all times equal one half of the aggregate number of votes attributed to the votes of the SRO Voting Representatives who are eligible to vote on such action, and the number of Non-SRO Voting Representative votes shall increase or decrease as necessary to maintain the ratio between votes attributed to the SRO Voting Representatives and votes attributed to the Non-SRO Voting Representatives. Votes attributed to Non-SRO Voting Representatives will be allocated equally among Non-SRO Voting Representatives eligible to vote, in fractional shares if necessary.

(b) All actions of the Operating Committee will require an augmented majority vote consisting of the affirmative vote of not less than (2/3rd) two-thirds of all votes allocated in the manner described in Section 4.3(a) to Voting Representatives who are eligible to vote on such action, combined with a majority (greater than (50) fifty percent of the votes) of all votes allocated in the manner described in Section 4.3(a) to SRO Voting Representatives who are eligible to vote on such action.

(c) Notwithstanding Section 4.3(b), the following actions will not require an augmented majority vote of the Operating Committee:

- (i) the selection of Non-SRO Voting Representatives pursuant to Section 4.2(b);
- (ii) the decision to enter Executive Session pursuant to Section 4.4(g)[;], *except for matters considered pursuant to Section 4.4(g)(i)(E); and*
- (iii) decisions concerning the operation of the Company as an LLC as specified in Section 10.3 and Section 11.2;
- (iv) modifications to LLC-related provisions of the Agreement pursuant to Section 13.5(b); and
- (v) the selection of Officers of the Company, other than the Chair, pursuant to Section 4.8].

Section 4.4 Meetings of the Operating Committee.

(a) Subject to Section 4.4(g), meetings of the Operating Committee may be attended by each Voting Representative, Member Observers, SRO Applicant Observers, SEC staff, and other persons as deemed appropriate by the Operating Committee. Meetings shall be held at such times and locations as shall from time to time be determined by the Operating Committee. Member Observers shall be entitled to [receive notice of all meetings of the Company and to] attend and participate in any discussion at any such meeting, *unless attendance or participation would be inconsistent with the provisions of Section 4.10(b)*, but shall not be entitled to vote on any matter.

(b) Special meetings of the Operating Committee may be called by the Chair on at least 24 hours' notice to each Voting

Representative and all persons eligible to attend Operating Committee meetings.

(c) Any action requiring a vote can be taken at a meeting only if a quorum of all Voting Representatives is present. A quorum is equal to the minimum votes necessary to obtain approval under Section 4.3(b), *i.e.*, Voting Representatives reflecting 2/3rd of Operating Committee votes eligible to vote on such action and SRO Voting Representatives reflecting 50% of SRO Voting Representative votes eligible to vote on such action.

(i) Any Voting Representative recused from voting on a particular action (i) mandatorily pursuant to Section 4.10(b) or (ii) upon a Voting Representative's voluntary recusal, shall not be considered in the numerator or denominator of the calculations in paragraph (c) for determining whether a quorum is present.

(ii) A Voting Representative is considered present at a meeting only if such Voting Representative is either in physical attendance at the meeting or participating by conference telephone or other electronic means that enables each Voting Representative to hear and be heard by all others present at the meeting.

(d) A summary of any action sought to be resolved at a meeting shall be sent to each Voting Representative entitled to vote on such matter at least one week prior to the meeting via electronic mail, portal notification, or regular U.S. or private mail (or if one week is not practicable, then with as much time as may be reasonably practicable under the circumstances); provided, however, that this requirement to provide a summary of any action prior to a meeting may be waived by the vote of the percentage of the Committee required to vote on any particular matter, under Section 4.3 above.

(e) Beginning with the first quarterly meeting of the Operating Committee following the Operative Date, the Chair of the Operating Committee shall be elected for a one-year term from the constituent SRO Voting Representatives (and an election for the Chair shall be held every year). Subject to the requirements of Section 4.3 hereof, the Chair shall have the authority to enter into contracts on behalf of the Company and otherwise bind the Company, but only as directed by the Operating Committee. The Chair shall designate a Person to act as Secretary to record the minutes of each meeting. The location of meetings shall be in a location capable of holding the number of attendees of such meetings, or such other locations as may from time to time be determined by the Operating Committee.

(i) To elect a Chair, the Operating Committee will elicit nominations for those individuals to be considered for Chair.

(ii) In the event that no nominated Person is elected by an affirmative vote of the Operating Committee pursuant to Section 4.3, the Person(s) with the lowest number of votes will be eliminated from consideration. The Operating Committee will repeat this process until a Person is elected by affirmative vote of the Operating Committee pursuant to Section 4.3. In the event two candidates remain and neither is elected by an affirmative vote of the Operating

Committee pursuant to Section 4.3, the Person receiving the most votes from SRO Voting Representatives will be elected.

(f) Meetings may be held by conference telephone or other electronic means that enables each Voting Representative to hear and be heard by all others present at the meeting.

(g) [Notwithstanding any other provision of this Agreement,]SRO Voting Representatives, Member Observers, SEC Staff, and other persons as deemed appropriate by a *majority vote* of the SRO Voting Representatives may meet in Executive Session of the Operating Committee to discuss an item of business *that falls within the topics identified in subsection (i) below and* for which it is appropriate to exclude Non-SRO Voting Representatives. A request to create an Executive Session must be included on the written agenda for an Operating Committee meeting, along with the clearly stated rationale as to why such item to be discussed would be appropriate for Executive Session. The creation of an Executive Session will be by a majority vote of SRO Voting Representatives with votes allocated pursuant to Section 4.3(a)(1). The Executive Session shall only discuss the topic for which it was created and shall be disbanded upon fully discussing the topic.

(i) Items for discussion within an Executive Session [should] *shall* be limited to [such] *the following topics* as:

(A) Any topic that requires discussion of Highly Confidential Information, *except for discussions regarding contract negotiations with the Processors or the Administrator;*

(B) Vendor or Subscriber Audit Findings; [and]

(C) Litigation matters[.];

(D) *Responses to regulators with respect to inquiries, examinations, or findings; and*

(E) *Other discrete matters approved by the Operating Committee.*

(ii) [The list provided in subparagraph (i) is not dispositive of all matters that may by their nature require discussion in an Executive Session.]The mere fact that a topic is controversial or a matter of dispute does not, by itself, make a topic appropriate for Executive Session. The minutes for an Executive Session shall include the reason for including any item in Executive Session.

(iii) Requests to discuss a topic in Executive Session must be included on the written agenda for the Operating Committee meeting, along with the clearly stated rationale for each topic as to why such discussion is appropriate for Executive Session. Such rationale may be that the topic to be discussed falls within the list provided in subparagraph (g)(i).

(iv) Any action that requires a vote in Executive Session will require a majority of the votes allocated in the manner described in Section 4.3(a) to SRO Voting Representatives eligible to vote on such action.

Section 4.5 Certain Transactions.

The fact that a Member or any of its Affiliates is directly or indirectly interested in or connected with any Person employed by the Company to render or perform a

service, or from which or to whom the Company may buy or sell any property, shall not prohibit the Company from employing or dealing with such Person.

Section 4.6 Company Opportunities.

(a) Each Member, its Affiliates, and each of their respective equity holders, controlling persons and employees may have business interests and engage in business activities in addition to those relating to the Company. Neither the Company nor any Member shall have any rights by virtue of this Agreement in any business ventures of any such Person.

(b) Each Member expressly acknowledges that (i) the other Members are permitted to have, and may presently or in the future have, investments or other business relationships with Persons engaged in the business of the Company other than through the Company (an "Other Business"), (ii) the other Members have and may develop strategic relationships with businesses that are and may be competitive or complementary with the Company, (iii) the other Members shall not be obligated to recommend or take any action that prefers the interests of the Company or any Member over its own interests, (iv) none of the other Members will be prohibited by virtue of their ownership of equity in the Company or service on the Operating Committee (or body performing similar duties) from pursuing and engaging in any such activities, (v) none of the other Members will be obligated to inform or present to the Company any such opportunity, relationship, or investment, (vi) such Member will not acquire or be entitled to any interest or participation in any Other Business as a result of the participation therein of any of the other Members, and (vii) the involvement of another Member in any Other Business in and of itself will not constitute a conflict of interest by such Person with respect to the Company or any of the Members.

Section 4.7 Subcommittees.

(a) Subject to Section 4.1, the Operating Committee shall have the power and right, but not the obligation, to create and disband subcommittees of the Operating Committee and to determine the duties, responsibilities, powers, and composition of such subcommittees. Subcommittee chairs will be selected by [the Chair of] the Operating Committee from SRO Voting Representatives or [Member Observers with input from the Operating Committee] *Non-SRO Voting Representatives.*

(b) SRO Voting Representatives, Non-SRO Voting Representatives, Member Observers, SEC Staff, and other persons as deemed appropriate by the Operating Committee may attend meetings of any subcommittees.

(c) Notwithstanding paragraph (b), SRO Voting Representatives, Member Observers, and other persons as deemed appropriate by *majority vote* of the SRO Voting Representatives may meet in a subcommittee to discuss an item [subject to the attorney-client privilege of the Company or that is attorney work product of the Company] *that exclusively affects the Members with respect to: (1) litigation matters or responses to regulators with respect to inquiries,*

examinations, or findings; and (2) other discrete legal matters approved by the Operating Committee.

(d) All subcommittees shall prepare minutes of all meetings and make those minutes available to all members of the Operating Committee. In the case of the legal subcommittee, those minutes shall include (i) attendance at the meeting; (ii) the subject matter of each item discussed; (iii) the rationale for referring the matter to the legal subcommittee; (iv) the privilege or privileges claimed with respect to that item; and (v) for each matter, if applicable, the basis on which the matter was determined to exclusively affect the SROs.

Section 4.8 Officers.

(a) [In addition to the Chair and Secretary, the Members] Except as provided in Section 4.4(e), the Operating Committee may (but need not), from time to time, designate and appoint one or more persons as an Officer of the Company] by a majority vote of the Members]. Other than the Chair, no Officer need be a Voting Representative. Any Officers so designated shall have such authority and perform such duties as the [Members] Operating Committee may, from time to time, delegate to them. Any such delegation may be revoked at any time by [a majority vote of the Members in their sole discretion. The Members] the Operating Committee. The Operating Committee may assign titles to particular Officers. Each Officer shall hold office until such Officer's successor shall be duly designated or until such Officer's death, resignation, or removal as provided in this Agreement. Any number of offices may be held by the same individual. Officers shall not be entitled to receive salary or other compensation, unless approved by the [Members] by a majority vote] Operating Committee.

(b) Any Officer may resign at any time. Such resignation shall be made in writing and shall take effect at the time specified in the notice, or if no time be specified, at the time of its receipt by the [Members] Operating Committee. The acceptance of a resignation shall not be necessary to make it effective.

(c) Any Officer may be removed at any time [upon the majority vote of the Members] by the Operating Committee.

Section 4.9 Commission Access to Information and Records.

Nothing in this Agreement shall be interpreted to limit or impede the rights of the Commission to access information and records of the Company or any of the Members (including their employees) pursuant to U.S. federal securities laws and the rules and regulations promulgated thereunder.

Section 4.10 Disclosure of Potential Conflicts of Interest; Recusal.

(a) Disclosure Requirements. The Members (including any Member Observers), the Processors, the Administrator, the Non-SRO Voting Representatives, and each service provider or subcontractor engaged in Company business (including the audit of Subscribers' data usage) that has access to Restricted or Highly Confidential information (for purposes of this section, "Disclosing

Parties") shall complete the applicable questionnaire to provide the required disclosures set forth in subsection (c) below to disclose all material facts necessary to identify potential conflicts of interest. The Operating Committee, a Member, Processors, or Administrator may not use a service provider or subcontractor on Company business unless that service provider or subcontractor has agreed in writing to provide the disclosures required by this section and has submitted completed disclosures to the Administrator prior to starting work. If state laws, rules, or regulations, or applicable professional ethics rules or standards of conduct, would act to restrict or prohibit a Disclosing Party from making any particular required disclosure, a Disclosing Party shall refer to such law, rule, regulation, or professional ethics rule or standard and include in response to that disclosure the basis for its inability to provide a complete response. This does not relieve the Disclosing Party from disclosing any information it is not restricted from providing.

(i) A potential conflict of interest may exist when personal, business, financial, or employment relationships could be perceived by a reasonable objective observer to affect the ability of a person to be impartial.

(ii) Updates to Disclosures. Following a material change in the information disclosed pursuant to Section 4.10(a), a Disclosing Party shall promptly update its disclosures. Additionally, a Disclosing Party shall update annually any inaccurate information prior to the Operating Committee's first quarterly meeting of a calendar year.

(iii) Public Dissemination of Disclosures. The Disclosing Parties shall provide the Administrator with its disclosures and any required updates. The Administrator shall ensure that the disclosures are promptly posted to the Company's website.

(iv) The Company will arrange for Disclosing Parties that are not Members or Non-SRO Voting Representatives to comply with the required disclosures and recusals under this Section 4.10 and Exhibit B in their respective agreements with either the Company, a Member, the Administrator, or the Processors.

(b) Recusal.

(i) A Disclosing Party that is a Member may not appoint as its Voting Representative, alternate SRO Voting Representative, or Member Observer, a person that is responsible for or involved with the procurement for, or development, modeling, pricing, licensing, or sale of, PDP offered to customers of the CT Feeds if the person has a financial interest (including compensation) that is tied directly to the Disclosing Party's market data business or the procurement of market data and if that compensation would cause a reasonable objective observer to expect the compensation to affect the impartiality of the representative.

(ii) A Disclosing Party (including its representative(s), employees, and agents) will be recused from participating in Company activities if it has not submitted a required disclosure form or the Operating Committee votes that its disclosure form is materially

deficient. The recusal will be in effect until the Disclosing Party submits a sufficiently complete disclosure form to the Administrator.

(iii) A Disclosing Party, including its representative(s), and its Affiliates and their representative(s), are recused from voting on matters in which it or its Affiliate (i) is seeking a position or contract with the Company or (ii) have a position or contract with the Company and whose performance is being evaluated by the Company.

(iv) All recusals, including a person's determination of whether to voluntarily recuse himself or herself, shall be reflected in the meeting minutes.

(c) Required Disclosures. As part of the disclosure regime, the Members, the Processors, the Administrator, Non-SRO Voting Representatives, and service providers and subcontractors must respond to questions that are tailored to elicit responses that disclose the potential conflicts of interest as set forth in Exhibit B.

[(d) If the Commission's approval order of the conflicts of interest policies filed by the CQ Plan, CTA Plan, or UTP Plan is stayed or overturned by a Governmental Authority, the requirements of this Section 4.10 and Exhibit B shall not apply.]

Section 4.11 Confidentiality Policy.

[(a) The Members and Non-SRO Voting Representatives] All Covered Persons are subject to the Confidentiality Policy set forth in Exhibit C to the Plan. The Company will arrange for Covered Persons that are not [Members] SRO Voting Representatives, Member Observers, or Non-SRO Voting Representatives to comply with the Confidentiality Policy under their respective agreements with either the Company, a Member, the Administrator, or the Processors.

[(b) If the Commission's approval order of the confidentiality policy filed by the CQ Plan, CTA Plan, or UTP Plan is stayed or overturned by a Governmental Authority, the requirements of this Section 4.11 and Exhibit C shall not apply.]

Article V.

THE PROCESSORS; INFORMATION; INDEMNIFICATION

Section 5.1 General Functions of the Processors.

Subject to the general direction of the Operating Committee, as more fully set forth in the agreement to be entered into between the Company and the Processors (the "Processor Services Agreements"), the Company shall require the Processors to perform certain processing functions on behalf of the Company. Among other things, the Company shall require the Processors to collect from the Members, and consolidate and disseminate to Vendors and Subscribers, Transaction Reports and Quotation Information in Eligible Securities in a manner designed to assure the prompt, accurate, and reliable collection, processing, and dissemination of information with respect to all Eligible Securities in a fair and non-discriminatory manner.

Section 5.2 Evaluation of the Processors.

The Processors' performance of their functions under the Processor Services Agreements shall be subject to review at any time as determined by a vote of the Operating Committee pursuant to Section 4.3; provided, however, that a review shall be conducted at least once every two calendar years but not more frequently than once each calendar year (unless the Processors have materially defaulted in their obligations under the Processor Services Agreements and such default has not been cured within the applicable cure period set forth in the Processor Services Agreements, in which event such limitation shall not apply). The Operating Committee may review the Processors at staggered intervals.

Section 5.3 Process for Selecting New Processors.

(a) No later than upon the termination or withdrawal of a Processor or the expiration of a Processor Services Agreement with a Processor, the Operating Committee shall establish procedures for selecting a new Processor (the "Processor Selection Procedures"). The Operating Committee, as part of the process of establishing Processor Selection Procedures, may solicit and consider the timely comment of any entity affected by the operation of this Agreement.

(b) The Processor Selection Procedures shall be established by the affirmative vote of the Operating Committee pursuant to Section 4.3, and shall set forth, at a minimum:

- (i) the entity that will:
 - (A) draft the Operating Committee's request for proposal for bids on a new Processor;
 - (B) assist the Operating Committee in evaluating bids for the new Processor; and
 - (C) otherwise provide assistance and guidance to the Operating Committee in the selection process;
- (ii) the minimum technical and operational requirements to be fulfilled by the Processor;
- (iii) the criteria to be considered in selecting the Processor; and
- (iv) the entities (other than Voting Representatives) that are eligible to comment on the selection of the Processor.

Section 5.4 Transmission of Information to Processors by Members.

- (a) Quotation Information.
 - (i) Each Member shall, during the time it is open for trading, be responsible for promptly collecting and transmitting to the Processors accurate Quotation Information in Eligible Securities through any means set forth in the Processor Services Agreements to ensure that the Company complies with its obligations under the Processor Services Agreements.
 - (ii) Quotation Information shall include:
 - (A) identification of the Eligible Security, using the Listing Market's symbol;
 - (B) the price bid and offered, together with size;
 - (C) for FINRA, the FINRA Participant along with the FINRA Participant's market participant identification or Member from which the quotation emanates;
 - (D) appropriate timestamps;
 - (E) identification of quotations that are not firm; and

(F) through appropriate codes and messages, withdrawals and similar matters.

- (iii) In addition, Quotation Information shall include:
 - (A) in the case of a national securities exchange, the reporting Participant's matching engine publication timestamp; or
 - (B) in the case of FINRA, the quotation publication timestamp that FINRA's bidding or offering member reports to FINRA's quotation facility in accordance with FINRA rules. In addition, if FINRA's quotation facility provides a proprietary feed of its quotation information, then the quotation facility shall also furnish the Processors with the time of the quotation as published on the quotation facility's proprietary feed. FINRA shall convert any quotation times reported to it to nanoseconds and shall furnish such times to the Processors in nanoseconds since Epoch.

- (b) Transaction Reports.
 - (i) Each Member shall, during the time it is open for trading, be responsible for promptly transmitting to the Processor Transaction Reports in Eligible Securities executed in its Market by means set forth in the Processor Services Agreements.
 - (ii) Transaction Reports shall include:
 - (A) identification of the Eligible Security, using the Listing Market's symbol;
 - (B) the number of shares in the transaction;
 - (C) the price at which the shares were purchased or sold;
 - (D) the buy/sell/cross indicator;
 - (E) appropriate timestamps;
 - (F) the Market of execution; and
 - (G) through appropriate codes and messages, late or out-of-sequence trades, corrections, and similar matters.

(iii) In addition, Transaction Reports shall include the time of the transaction as identified in the Participant's matching engine publication timestamp. However, in the case of FINRA, the time of the transaction shall be the time of execution that a FINRA member reports to a FINRA trade reporting facility in accordance with FINRA rules. In addition, if the FINRA trade reporting facility provides a proprietary feed of trades reported by the trade reporting facility to the Processor, then the FINRA trade reporting facility shall also furnish the Processors with the time of the transmission as published on the facility's proprietary feed. The FINRA trade reporting facility shall convert times that its members report to it to nanoseconds and shall furnish such times to the Processors in nanoseconds since Epoch.

(iv) Each Member shall (a) transmit all Transaction Reports in Eligible Securities to the Processors as soon as practicable, but not later than 10 seconds, after the time of execution, (b) establish and maintain collection and reporting procedures and facilities reasonably designed to comply with this requirement, and (c) designate as "late" any last sale price not collected and reported in accordance with the above-referenced procedures or as to which the Member has knowledge that the time interval after the time of execution is significantly greater than the time period referred to above. The Members shall seek to reduce the time period for reporting last sale prices to the Processors as conditions warrant.

(v) The following types of transactions are not required to be reported to the Processors pursuant to this Agreement:

- (A) transactions that are part of a primary distribution by an issuer or of a registered secondary distribution or of an unregistered secondary distribution;
- (B) transactions made in reliance on Section 4(a)(2) of the Securities Act of 1933;
- (C) transactions in which the buyer and the seller have agreed to trade at a price unrelated to the current market for the security (e.g., to enable the seller to make a gift);
- (D) the acquisition of securities by a broker-dealer as principal in anticipation of making an immediate exchange distribution or exchange offering on an exchange;
- (E) purchases of securities pursuant to a tender offer;
- (F) purchases or sales of securities effected upon the exercise of an option pursuant to the terms thereof or the exercise of any other right to acquire securities at a pre-established consideration unrelated to the current market; and
- (G) transfers of securities that are expressly excluded from trade reporting under FINRA rules.

(c) The following symbols shall be used to denote the applicable Member:

Code	Member
A	NYSE American LLC.
Z	Cboe BZX Exchange, Inc.
Y	Cboe BYX Exchange, Inc.
B	Nasdaq BX, Inc.
W	Cboe Exchange, Inc.
M	NYSE Chicago, Inc.
J	Cboe EDGA Exchange, Inc.
K	Cboe EDGX Exchange, Inc.
I	Nasdaq ISE, LLC.
V	Investors' Exchange LLC.
D	Financial Industry Regulatory Authority, Inc.
Q	The Nasdaq Stock Market LLC.
C	NYSE National, Inc.
N	New York Stock Exchange LLC.
P	NYSE Arca, Inc.
X	Nasdaq PHLX LLC.
L	Long-Term Stock Exchange Inc.
U	MEMX LLC.

- (d) Indemnification.
 - (i) Each Member agrees, severally and not jointly, to indemnify and hold harmless and defend the Company, each other Member, the Processors, the Administrator, the Operating Committee, and each of their respective directors, officers, employees, agents, and Affiliates (each, an "Member Indemnified Party") from and against any and all loss, liability, claim, damage, and expense whatsoever incurred or threatened against such Member Indemnified Party as a result of a system error or disruption at such Member's Market affecting any Transaction Reports, Quotation Information, or other information reported to the Processors by such Member and disseminated by the Processors to Vendors and Subscribers. This indemnity shall be in addition to any liability that the indemnifying Member may otherwise have.
 - (ii) Promptly after receipt by a Member Indemnified Party of notice of the commencement of any action, such Member Indemnified Party will, if it intends to make

a claim in respect thereof against an indemnifying Member, notify the indemnifying Member in writing of the commencement thereof; provided, however, that the failure to so notify the indemnifying Member will only relieve the indemnifying Member from any liability which it may have to any Member Indemnified Party to the extent such indemnifying Member is actually prejudiced by such failure. In case any such action is brought against any Member Indemnified Party and it promptly notifies an indemnifying Member of the commencement thereof, the indemnifying Member will be entitled to participate in, and, to the extent that it elects (jointly with any other indemnifying Member similarly notified), to assume and control the defense thereof with counsel chosen by it. After notice from the indemnifying Member of its election to assume the defense thereof, the indemnifying Member will not be liable to such Indemnified Party for any legal or other expenses subsequently incurred by such Member Indemnified Party in connection with the defense thereof but the Member Indemnified Party may, at its own expense, participate in such defense by counsel chosen by it without, however, impairing the indemnifying Member's control of the defense. If the indemnifying Member has assumed the defense in accordance with the terms hereof, the indemnifying Member may enter into a settlement or consent to any judgment without the prior written consent of the Member Indemnified Party if (i) such settlement or judgment involves monetary damages only, all of which will be fully paid by the indemnifying Member and without admission of fault or culpability on behalf of any Member Indemnified Party, and (ii) a term of the settlement or judgment is that the Person or Persons asserting such claim unconditionally and irrevocably release all Member Indemnified Parties from all liability with respect to such claim; otherwise, the consent of the Member Indemnified Party shall be required in order to enter into any settlement of, or consent to the entry of a judgment with respect to, any claim (which consent shall not be unreasonably withheld, delayed, or conditioned).

Section 5.5 Operational Issues.

(a) Each Member shall be responsible for collecting and validating quotes and last sale reports within its own system prior to transmitting this data to the Processors.

(b) Each Member may utilize a dedicated Member line into the Processors to transmit Transaction Reports and Quotation Information to the Processors.

(c) Whenever a Member determines that a level of trading activity or other unusual market conditions prevent it from collecting and transmitting Transaction Reports or Quotation Information to the Processor, or where a trading halt or suspension in an Eligible Security is in effect in its Market, the Member shall promptly notify the Processors of such condition or event and shall resume collecting and transmitting Transaction Reports and Quotation Information to it as soon as the condition or event is terminated. In the event of a system malfunction resulting in the inability of a Member or its

members to transmit Transaction Reports or Quotation Information to the Processors, the Member shall promptly notify the Processors of such event or condition. Upon receiving such notification, the Processors shall take appropriate action, including either closing the quotation or purging the system of the affected quotations.

Article VI.

THE ADMINISTRATOR

Section 6.1 General Functions of the Administrator.

Subject to the general direction of the Operating Committee, as more fully set forth in the agreement entered into between the Company and the Administrator (the "Administrative Services Agreement"), the Administrator shall perform administrative functions on behalf of the Company including recordkeeping; administering Vendor and Subscriber contracts; administering Fees, including billing, collection, and auditing of Vendors and Subscribers; administering Distributions; tax functions of the Company; and the preparation of the Company's audited financial reports.

Section 6.2 Independence of the Administrator.

The Administrator may not be owned or controlled by a corporate entity that, either directly or via another subsidiary, offers for sale its own PDP.

Section 6.[2]3 Evaluation of the Administrator.

The Administrator's performance of its functions under the Administrative Services Agreement shall be subject to review at any time as determined by an affirmative vote of the Operating Committee pursuant to Section 4.3; provided, however, that a review shall be conducted at least once every two calendar years but not more frequently than once each calendar year (unless the Administrator has materially defaulted in its obligations under the Administrative Services Agreement and such default has not been cured within the applicable cure period set forth in the Administrative Services Agreement, in which event such limitation shall not apply). The Operating Committee shall appoint a subcommittee or other Persons to conduct the review. The Company shall require the reviewer to provide the Operating Committee with a written report of its findings and to make recommendations (if necessary), including with respect to the continuing operation of the Administrator. The Administrator shall be required to assist and participate in such review. The Operating Committee shall notify the Commission of any recommendations it may approve as a result of the review of the Administrator and shall supply the Commission with a copy of any reports that may be prepared in connection therewith.

Section 6.[3]4 Process for Selecting New Administrator

Prior to the Operative Date, upon the termination or withdrawal of the Administrator, or upon the expiration of the Administrative Services Agreement, the

Operating Committee shall establish procedures for selecting a new Administrator (the "Administrator Selection Procedures"). [The Administrator selected by the Operating Committee may not be owned or controlled by a corporate entity that, either directly or via another subsidiary, offers for sale its own PDP.] The Operating Committee, as part of the process of establishing Administrator Selection Procedures, may solicit and consider the timely comment of any entity affected by the operation of this Agreement. The Administrator Selection Procedures shall be established by the [Voting Representatives] *Operating Committee* pursuant to Section 4.3, and shall set forth, at a minimum:

- (a) the entity that will:
 - (i) draft the Operating Committee's request for proposal for bids on a new Administrator;
 - (ii) assist the Operating Committee in evaluating bids for the new Administrator; and
 - (iii) otherwise provide assistance and guidance to the Operating Committee in the selection process.
- (b) the minimum technical and operational requirements to be fulfilled by the Administrator;
- (c) the criteria to be considered in selecting the Administrator; and
- (d) the entities (other than Voting Representatives) that are eligible to comment on the selection of the Administrator.

Article VII.

REGULATORY MATTERS

Section 7.1 Regulatory and Operational Halts.

(a) Operational Halts. A Member shall notify the Processors if it has concerns about its ability to collect and transmit quotes, orders, or last sale prices, or where it has declared an Operational Halt or suspension of trading in one or more Eligible Securities, pursuant to the procedures adopted by the Operating Committee.

(b) Regulatory Halts.

(i) The Primary Listing Market may declare a Regulatory Halt in trading for any security for which it is the Primary Listing Market:

(A) as provided for in the rules of the Primary Listing Market;

(B) if it determines there is a SIP Outage, Material SIP Latency, or Extraordinary Market Activity; or

(C) in the event of national, regional, or localized disruption that necessitates a Regulatory Halt to maintain a fair and orderly market.

(ii) In making a determination to declare a Regulatory Halt under subparagraph (b)(i), the Primary Listing Market will consider the totality of information available concerning the severity of the issue, its likely duration, and potential impact on Member Firms and other market participants and will make a good-faith determination that the criteria of subparagraph (b)(i) have been satisfied and that a Regulatory Halt is appropriate. The Primary Listing Market will consult, if feasible, with the affected Trading Center(s), the other Members, or the Processors, as applicable, regarding the scope of the issue and what steps are being taken to address the

issue. Once a Regulatory Halt under subparagraph (b)(i) has been declared, the Primary Listing Market will continue to evaluate the circumstances to determine when trading may resume in accordance with the rules of the Primary Listing Market.

(c) Initiating a Regulatory Halt.

(i) The start time of a Regulatory Halt is when the Primary Listing Market declares the halt, regardless of whether an issue with communications impacts the dissemination of the notice.

(ii) If a Processor is unable to disseminate notice of a Regulatory Halt or the Primary Listing Market is not open for trading, the Primary Listing Market will take reasonable steps to provide notice of a Regulatory Halt, which shall include both the type and start time of the Regulatory Halt, by dissemination through:

(A) PDP;

(B) posting on a publicly-available Member website; or

(C) system status messages.

(iii) Except in exigent circumstances, the Primary Listing Market will not declare a Regulatory Halt retroactive to a time earlier than the notice of such halt.

(iv) Resumption of Trading After Regulatory Halts Other Than SIP Halts. The Primary Listing Market will declare a resumption of trading when it makes a good-faith determination that trading may resume in a fair and orderly manner and in accordance with its rules.

(v) For a Regulatory Halt that is initiated by another Member that is a Primary Listing Market, a Member may resume trading after the Member receives notification from the Primary Listing Market that the Regulatory Halt has been terminated.

(d) Resumption of Trading After SIP Halt.

(i) The Primary Listing Market will determine the SIP Halt Resume Time. In making such determination, the Primary Listing Market will make a good-faith determination and consider the totality of information to determine whether resuming trading would promote a fair and orderly market, including input from the Processors, the other Members, or the operator of the system in question (as well as any Trading Center(s) to which such system is linked), regarding operational readiness to resume trading. The Primary Listing Market retains discretion to delay the SIP Halt Resume Time if it believes trading will not resume in a fair and orderly manner.

(ii) The Primary Listing Market will terminate a SIP Halt with a notification that specifies a SIP Halt Resume Time. The Primary Listing Market shall provide a minimum notice of a SIP Halt Resume Time, as specified by the rules of the Primary Listing Market, during which period market participants may enter quotes and orders in the affected securities. During Regular Trading Hours, the last SIP Halt Resume Time before the end of Regular Trading Hours shall be an amount of time as specified by the rules of the Primary Listing Market. The Primary Listing Market may stagger the SIP Halt Resume Times for multiple symbols in order to reopen in a fair and orderly manner.

(iii) During Regular Trading Hours, if the Primary Listing Market does not open a

security within the amount of time as specified by the rules of the Primary Listing Market after the SIP Halt Resume Time, a Member may resume trading in that security. Outside Regular Trading Hours, a Member may resume trading immediately after the SIP Halt Resume Time.

(e) Member to Halt Trading During Regulatory Halt. A Member will halt trading for any security traded on its Market if the Primary Listing Market declares a Regulatory Halt for the security.

(f) Communications. Whenever, in the exercise of its regulatory functions, the Primary Listing Market for an Eligible Security determines it is appropriate to initiate a Regulatory Halt, the Primary Listing Market will notify all other Members and the affected Processors of such Regulatory Halt as well as provide notice that a Regulatory Halt has been lifted using such protocols and other emergency procedures as may be mutually agreed to between the Members and the Primary Listing Market. The affected Processors shall disseminate to Members notice of the Regulatory Halt (as well as notice of the lifting of a Regulatory Halt) (i) through the CT Feeds or (ii) any other means the affected Processors, in its sole discretion, considers appropriate. Each Member shall be required to continuously monitor these communication protocols established by the Operating Committee and the Processors during market hours, and the failure of a Member to do so shall not prevent the Primary Listing Market from initiating a Regulatory Halt in accordance with the procedures specified herein.

Section 7.2 Hours of Operation of the System.

(a) Quotation Information shall be entered, as applicable, by Members as to all Eligible Securities in which they make a market during Regular Trading Hours on all days the Processors are in operation. Transaction Reports shall be entered between 9:30 a.m. and 4:00:10 p.m. ET by Members as to all Eligible Securities in which they execute transactions during Regular Trading Hours on all days the Processors are in operation.

(b) Members that execute transactions in Eligible Securities outside of Regular Trading Hours, shall report such transactions as follows:

(i) transactions in Eligible Securities executed between 4:00 a.m. and 9:29:59 a.m. ET and between 4:00:01 p.m. and 8:00 p.m. ET, shall be designated with an appropriate indicator to denote their execution outside normal market hours;

(ii) transactions in Eligible Securities executed after 8:00 p.m. and before 12:00 a.m. (midnight) shall be reported to the Processors between the hours of 4:00 a.m. and 8:00 p.m. ET on the next business day (T+1), and shall be designated "as/of" trades to denote their execution on a prior day, and be accompanied by the time of execution;

(iii) transactions in Eligible Securities executed between 12:00 a.m. (midnight) and 4:00 a.m. ET shall be transmitted to the Processors between 4:00 a.m. and 9:30 a.m. ET, on trade date, shall be designated with an appropriate indicator to denote their execution outside normal market hours, and

shall be accompanied by the time of execution; and

(iv) transactions reported pursuant to this Section 7.3 shall be included in the calculation of total trade volume for purposes of determining Net Distributable Operating Revenue, but shall not be included in the calculation of the daily high, low, or last sale.

(c) Late trades shall be reported in accordance with the rules of the Member in whose Market the transaction occurred and can be reported between the hours of 4:00 a.m. and 8:00 p.m. ET.

(d) The Processors shall collect, process and disseminate Quotation Information in Eligible Securities at other times between 4:00 a.m. and 9:30 a.m. ET, and after 4:00 p.m. ET, when any Member or FINRA Participant is open for trading, until 8:00 p.m. ET (the "Additional Period"); provided, however, that the National Best Bid and Offer quotation will not be disseminated before 4:00 a.m. or after 8:00 p.m. ET. Members that enter Quotation Information or submit Transaction Reports to the Processors during the Additional Period shall do so for all Eligible Securities in which they enter quotations.

Article VIII.

CAPITAL CONTRIBUTIONS; CAPITAL ACCOUNTS

Section 8.1 Capital Accounts.

(a) A separate capital account ("Capital Account") shall be established and maintained by the Company for each Member in accordance with section 704(b) of the Code and Treasury Regulation section 1.704-1(b)(2)(iv). There shall be credited to each Member's Capital Account (i) the Capital Contributions (at fair market value in the case of contributed property) made by such Member (which shall be deemed to be zero for the initial Members), (ii) allocations of Company profits and gain (or items thereof) to such Member pursuant to Section [10]9.2 and (iii) any recaptured tax credits, or portion thereof, to the extent such increase to the tax basis of a Member's interest in the Company may be allowed pursuant to the Code. Each Member's Capital Account shall be decreased by (x) the amount of distributions (at fair market value in the case of property distributed in kind) to such Member, (y) allocations of Company losses to such Member (including expenditures which can neither be capitalized nor deducted for tax purposes, organization and syndication expenses not subject to amortization and loss on sale or disposition of the Company's assets, whether or not disallowed under sections 267 or 707 of the Code) pursuant to Section [10]9.2 and (z) any tax credits, or portion thereof, as may be required to be charged to the tax basis of a Membership Interest pursuant to the Code. Capital Accounts shall not be adjusted to reflect a Member's share of liabilities under section 752 of the Code.

(b) The fair market value of contributed, distributed, or revalued property shall be agreed to by the Operating Committee or, if there is no such agreement, by an appraisal.

(c) The foregoing provisions and the other provisions of this Agreement relating to the

maintenance of Capital Accounts are intended to comply with Treasury Regulation section 1.704–1(b) promulgated under section 704(b) of the Code, and shall be interpreted and applied in a manner consistent with such Treasury Regulations.

Section 8.2 Additional Capital Contributions.

Except with the approval of the Operating Committee or as otherwise provided in this Section 8.2, no Member shall be obligated or permitted to make any additional contribution to the capital of the Company. The Members agree to make additional Capital Contributions from time to time as appropriate in respect of reasonable administrative and other reasonable expenses of the Company.

Section 8.3 Distributions.

Except as set forth in this Section 8.3 and Section 11.2, and subject to the provisions of Section 13.1, Distributions shall be made to the Members at the times and in the aggregate amounts set forth in Exhibit D.

Notwithstanding any provisions to the contrary contained in this Agreement, the Company shall not make a Distribution to a Member on account of its interest in the Company if such Distribution would violate Section 18–607 of the Delaware Act or other Applicable Law. Distributions may be made in cash or, if determined by the Operating Committee, in-kind. The Operating Committee may reserve amounts for anticipated expenses or contingent liabilities of the Company. In the event that additional Capital Contributions are called for, and any Member fails to provide the full amount of such additional Capital Contributions as set forth in the relevant resolution of the Operating Committee, any Distributions to be made to such defaulting Member shall be reduced by the amount of any required but unpaid Capital Contribution due from such Member.

Article IX.

ALLOCATIONS

Section 9.1 Calculation of Profits and Losses.

To the fullest extent permitted by Applicable Law, the profits and losses of the Company shall be determined for each fiscal year in a manner consistent with GAAP.

Section 9.2 Allocation of Profits and Losses.

(a) Except as otherwise set forth in this Section 9.2, for Capital Account purposes, all items of income, gain, loss, and deduction shall be allocated among the Members in accordance with Exhibit D.

(b) For federal, state and local income tax purposes, items of income, gain, loss, deduction, and credit shall be allocated to the Members in accordance with the allocations of the corresponding items for Capital Account purposes under this Section 9.2, except that items with respect to which there is a difference between tax and book basis will be allocated in accordance with Section 704(c) of the Code, the Treasury Regulations thereunder and Treasury Regulations Section 1.704–1(b)(4)(i).

(c) Notwithstanding any provision set forth in this Section 9.2, no item of deduction or loss shall be allocated to a Member to the extent the allocation would cause a negative balance in such Member's Capital Account (after taking into account the adjustments, allocations and distributions described in Treasury Regulations Sections 1.704–1(b)(2)(ii)(d)(4), (5) and (6)) that exceeds the amount that such Member would be required to reimburse the Company pursuant to this Agreement or Applicable Law.

(d) In the event any Member unexpectedly receives any adjustments, allocations, or distributions described in Treasury Regulations Sections 1.704–1(b)(2)(ii)(d)(4), (5) and (6), items of the Company's income and gain shall be specially allocated to such Member in an amount and manner sufficient to eliminate as quickly as possible any deficit balance in its Capital Account created by such adjustments, allocations or distributions in excess of that permitted under Section [10]9.2(c). Any special allocations of items of income or gain pursuant to this Section [10]9.2(d) shall be taken into account in computing subsequent allocations pursuant to this Section [10]9.2 so that the net amount of any items so allocated and all other items allocated to each Member pursuant to this Section [10]9.2 shall, to the extent possible, be equal to the net amount that would have been allocated to each such Member pursuant to the provisions of this Section [10]9.2 if such unexpected adjustments, allocations or distributions had not occurred.

Article X.

RECORDS AND ACCOUNTING; REPORTS

Section 10.1 Accounting.

(a) The Operating Committee shall maintain a system of accounting which enables the Company to produce accounting records and information substantially consistent with GAAP. The Fiscal Year of the Company shall be the calendar year unless Applicable Law requires a different Fiscal Year.

(b) All matters concerning accounting procedures shall be determined by the Operating Committee.

Section 10.2 Tax Status; Returns.

(a) It is the intent of this Company and the Members that this Company shall be treated as a partnership for federal, state and local income tax purposes. Neither the Company nor any Member shall make an election for the Company to be classified as other than a partnership pursuant to Treasury Regulations Section 301.7701–3 or otherwise.

(b) The Company shall cause federal, state, and local income tax returns for the Company to be prepared and timely filed with the appropriate authorities and shall arrange for the timely delivery to the Members of such information as is necessary for such Members to prepare their federal, state and local tax returns. All tax returns shall be prepared in a manner consistent with the Distributions made in accordance with Exhibit D.

Section 10.3 Partnership Representative.

(a) The Operating Committee shall appoint an entity as the "Partnership Representative"

of the Company for purposes of Section 6223 of the Code and the Treasury Regulations promulgated thereunder, and all federal, state, and local Tax audits and litigation shall be conducted under the direction of the Partnership Representative.

(b) The Partnership Representative shall use reasonable efforts to inform each Member of all significant matters that may come to its attention by giving notice thereof and to forward to each Member copies of all significant written communications it may receive in such capacity. The Partnership Representative shall consult with the Members before taking any material actions with respect to tax matters, including actions relating to (i) an IRS examination of the Company commenced under Section 6231(a) of the Code, (ii) a request for administrative adjustment filed by the Company under Section 6227 of the Code, (iii) the filing of a petition for readjustment under Section 6234 of the Code with respect to a final notice of partnership adjustment, (iv) the appeal of an adverse judicial decision, and (v) the compromise, settlement, or dismissal of any such proceedings.

(c) The Partnership Representative shall not compromise or settle any tax audit or litigation affecting the Members without the approval of a majority of Members. Any material proposed action, inaction, or election to be taken by the Partnership Representative, including the election under Section 6226(a)(1) of the Code, shall require the prior approval of a majority of Members.

Article XI.

DISSOLUTION AND TERMINATION

Section 11.1 Dissolution of Company.

The Company shall dissolve, and its assets and business shall be wound up, upon the occurrence of any of the following events:

(a) Unanimous written consent of the Members to dissolve the Company;

(b) The sale or other disposition of all or substantially all the Company's assets outside the ordinary course of business;

(c) An event which makes it unlawful or impossible for the Company business to be continued;

(d) The withdrawal of one or more Members such that there is only one remaining Member; or

(e) The entry of a decree of judicial dissolution under § 18–802 of the Delaware Act.

Section 11.2 Liquidation and Distribution.

Following the occurrence of an event described in Section 11.1, the Members shall appoint a liquidating trustee who shall wind up the affairs of the Company by (i) selling its assets in an orderly manner (so as to avoid the loss normally associated with forced sales), and (ii) applying and distributing the proceeds of such sale, together with other funds held by the Company: (a) first, to the payment of all debts and liabilities of the Company; (b) second, to the establishments of any reserves reasonably necessary to provide for any contingent recourse liabilities and obligations; (c) third, to the Members in accordance with Exhibit D; and (d) fourth, to the Members as determined by a majority of Members.

Section 11.3 Termination.

Each of the Members shall be furnished with a statement prepared by the independent accountants retained on behalf of the Company, which shall set forth the assets and liabilities of the Company as of the date of the final distribution of Company's assets under Section [10]11.2 and the net profit or net loss for the fiscal period ending on such date. Upon compliance with the distribution plan set forth in Section [10]11.2, the Members shall cease to be such, and the liquidating trustee shall execute, acknowledge, and cause to be filed a certificate of cancellation of the Company. Upon completion of the dissolution, winding up, liquidation, and distribution of the liquidation proceeds, the Company shall terminate.

Article XII.**EXCULPATION AND INDEMNIFICATION****Section 12.1 Exculpation.**

Each Member, by and for itself, each of its Affiliates and each of its and their respective equity holders, directors, officers, controlling persons, partners, employees, successors and assigns, hereby acknowledges and agrees that it is the intent of the Company and each Member that the liability of each Member and each individual currently or formerly serving as an SRO Voting Representative or *Non-SRO Voting Representative* (each, an "Exculpated Party") be limited to the maximum extent permitted by Applicable Law or as otherwise expressly provided herein. In accordance with the foregoing, the Members hereby acknowledge and agree that:

(a) To the maximum extent permitted by Applicable Law or as otherwise expressly provided herein, no present or former Exculpated Party or any of such Exculpated Party's Affiliates, heirs, successors, assigns, agents or representatives shall be liable to the Company or any Member for any loss suffered in connection with a breach of any fiduciary duty, errors in judgment or other acts or omissions by such Exculpated Party; provided, however, that this provision shall not eliminate or limit the liability of such Exculpated Party for (i) acts or omissions which involve gross negligence, willful misconduct or a knowing violation of law, or (ii) as provided in Section 5.4(d) hereof, losses resulting from such Exculpated Party's Transaction Reports, Quotation Information or other information reported to the Processors by such Exculpated Party (collectively "Non-Exculpated Items"). Any Exculpated Party may consult with counsel and accountants in respect of Company affairs, and provided such Person acts in good faith reliance upon the advice or opinion of such counsel or accountants, such Person shall not be liable for any loss suffered in reliance thereon.

(b) Notwithstanding anything to the contrary contained herein, whenever in this Agreement or any other agreement contemplated herein or otherwise, an Exculpated Party is permitted or required to take any action or to make a decision in its "sole discretion" or "discretion" or that it deems "necessary," or "necessary or appropriate" or under a grant of similar

authority or latitude, the Exculpated Party may, insofar as Applicable Law permits, make such decision in its sole discretion (regardless of whether there is a reference to "sole discretion" or "discretion"). The Exculpated Party (i) shall be entitled to consider such interests and factors as it desires (including its own interests), (ii) shall have no duty or obligation (fiduciary or otherwise) to give any consideration to any interest of or factors affecting the Company or the Members, and (iii) shall not be subject to any other or different standards imposed by this Agreement, or any other agreement contemplated hereby, under any Applicable Law or in equity.

Section 12.2 Right to Indemnification.

(a) Subject to the limitations and conditions provided in this Article XII and to the fullest extent permitted by Applicable Law, the Company shall indemnify each Company Indemnified Party for Losses as a result of the Company Indemnified Party being a Party to a Proceeding. Notwithstanding the foregoing, no such indemnification shall be available in the event the Company is a claimant against the Company Indemnified Party.

(b) Indemnification under this Article XII shall continue as to a Company Indemnified Party who has ceased to serve in the capacity that initially entitled such Company Indemnified Party to indemnity hereunder; provided, however, that the Company shall not be obligated to indemnify a Company Indemnified Party's Non-Exculpated Items.

(c) The rights granted pursuant to this Article XII shall be deemed contract rights, and no amendment, modification, or repeal of this Article XII shall have the effect of limiting or denying any such rights with respect to actions taken or Proceedings arising prior to any amendment, modification, or repeal. It is expressly acknowledged that the indemnification provided in this Article XII could involve indemnification for negligence or under theories of strict liability.

(d) The Company shall be the primary obligor in respect of any Company Indemnified Party's claim for indemnification, for advancement of expenses, or for providing insurance, subject to this Article XII. The obligation, if any, of any Member or its Affiliates to indemnify, to advance expenses to, or provide insurance for any Company Indemnified Party shall be secondary to the obligations of the Company under this Article XII (and the Company's insurance providers shall have no right to contribution or subrogation with respect to the insurance plans of such Member or its Affiliates).

Section 12.3 Advance Payment.

Reasonable expenses incurred by a Company Indemnified Party who is a named defendant or respondent to a Proceeding shall be paid by the Company in advance of the final disposition of the Proceeding upon receipt of an undertaking by or on behalf of such Company Indemnified Party to repay such amount if it shall ultimately be determined that he or she is not entitled to be indemnified by the Company.

Section 12.4 Appearance as a Witness.

Notwithstanding any other provision of this Article XII, the Company shall pay or reimburse reasonable out-of-pocket expenses incurred by a Company Indemnified Party in connection with his appearance as a witness or other participation in a Proceeding at a time when he is not a named defendant or respondent in the Proceeding.

Section 12.5 Nonexclusivity of Rights.

The right to indemnification and the advancement and payment of expenses conferred in this Article XII shall not be exclusive of any other right which any Company Indemnified Person may have or hereafter acquire under any law (common or statutory), provision of the Certificate or this Agreement or otherwise.

Article XIII.**MISCELLANEOUS****Section 13.1 Expenses.**

The Company shall pay all current expenses, including any Taxes payable by the Company, whether for its own account or otherwise required by law (including any costs of complying with applicable tax obligations), third-party service provider fees, and all administrative and processing expenses and fees, as well as any other amounts owing to the Processors under the Processor Services Agreements, to the Administrator under the Administrative Services Agreement, or to the Processors, Administrator, or FINRA under Exhibit D to this Agreement, before any allocations may be made to the Members. Appropriate reserves, as unanimously determined by the Members, may be charged to the Capital Account of the Members for (i) contingent liabilities, if any, as of the date any such contingent liabilities become known to the Operating Committee, or (ii) amounts needed to pay the Company's operating expenses, including administrative and processing expenses and fees, before any allocations are made to the Member. Each Member shall bear the cost of implementation of any technical enhancements to the System made at its request and solely for its use, subject to reapportionment should any other Member subsequently make use of the enhancement, or the development thereof.

Section 13.2 Entire Agreement.

Upon the Operative Date, this Agreement supersedes the CQ Plan, the CTA Plan, and the UTP Plan and all other prior agreements among the Members with respect to the subject matter hereof. This instrument contains the entire agreement with respect to such subject matter.

Section 13.3 Notices and Addresses.

Unless otherwise specified herein, all notices, consents, approvals, reports, designations, requests, waivers, elections, and other communications (collectively, "Notices") authorized or required to be given pursuant to this Agreement shall be in writing and may be delivered by certified or registered mail, postage prepaid, by hand, by any private overnight courier service, or notification through the Company's web

portal. Such Notices shall be mailed or delivered to the Members at the addresses set forth on Exhibit A or such other address as a Member may notify the other Members of in writing. Any Notices to be sent to the Company shall be delivered to the principal place of business of the Company or at such other address as the Operating Committee may specify in a notice sent to all of the Members. Notices shall be effective (i) if mailed, on the date three days after the date of mailing, (ii) if hand delivered or delivered by private courier, on the date of delivery, or (iii) if sent by through the Company's web portal, on the date sent; provided, however, that notices of a change of address shall be effective only upon receipt.

Section 13.4 Governing Law.

This Agreement shall be governed by and construed in accordance with the Delaware Act and internal laws and decisions of the State of Delaware, without regard to the conflicts of laws principles thereof; provided, however, that the rights and obligations of the Members, the Processors and the Administrator, and of Vendors, Subscribers, and other Persons contracting with the Company in respect of the matters covered by this Agreement, shall at all times also be subject to any applicable provisions of the Exchange Act and any rules and regulations promulgated thereunder. For the avoidance of doubt, nothing in this Agreement waives any protection or limitation of liability afforded any of the Members or any of their Affiliates by common law, including the doctrines of self-regulatory organization immunity and federal preemption.

Section 13.5 Amendments.

(a) Except as this Agreement otherwise provides, this Agreement may be modified from time to time when authorized by the Operating Committee pursuant to Section 4.3, subject to the approval of the Commission or when such modification otherwise becomes effective pursuant to Section 11A of the Exchange Act and Rule 608 of Regulation NMS.

(b) [Notwithstanding Section 13.5(a), Articles IX, X, XI, and XII may be modified upon approval by a majority of Members; provided, however, that Operating Committee approval pursuant to Section 4.3 will be required for modifications to the allocation of all items of income, gain, loss, and deduction in accordance with Exhibit D.

(c) [In the case of a Ministerial Amendment, the Chair of the Company's Operating Committee may modify this Agreement by submitting to the Commission an appropriate amendment that sets forth the modification; provided, however, that 48-hours advance notice of the amendment to the Operating Committee *in writing* is required. Such an amendment shall become effective upon filing with the Commission in accordance with Section 11A of the Exchange Act and Rule 608 of Regulation NMS.

[(d)](c) "Ministerial Amendment" means an amendment to this Agreement that pertains solely to any one or more of the following:

(i) admitting a new Member to the Company;

(ii) changing the name or address of a Member;

(iii) incorporating a change that the Commission has implemented by rule and that requires no conforming language to the text of this Agreement;

(iv) incorporating a change (A) that the Commission has implemented by rule, (B) that requires conforming language to the text of this Agreement, and (C) whose conforming language to the text of this Agreement has been approved by the affirmative vote of the Operating Committee pursuant to Section 4.3;

(v) incorporating a change (A) that a Governmental Authority requires relating to the governance or operation of an LLC, (B) that requires conforming language to the text of this Agreement, and (C) whose conforming language to the text of this Agreement has been approved by the affirmative vote of the Operating Committee pursuant to Section 4.3] or upon approval by a majority of Members pursuant to Section 13.5(b), as applicable]; or

(vi) incorporating a purely technical change, such as correcting an error or an inaccurate reference to a statutory provision, or removing language that has become obsolete.

Section 13.6 Successors.

This Agreement shall be binding upon and inure to the benefit of the Members and their respective legal representatives and successors.

Section 13.7 Limitation on Rights of Others.

None of the provisions of this Agreement shall be for the benefit of or enforceable by any creditor of the Company. Furthermore, except as provided in Section 3.7(b), the Members shall not have any duty or obligation to any creditor of the Company to make any contribution to the Company or to issue any call for capital pursuant to this Agreement. Nothing in this Agreement shall be deemed to create any legal or equitable right, remedy or claim in any Person not a party hereto (other than any Person indemnified under Article XII).

Section 13.8 Counterparts.

This Agreement may be executed by the Members in any number of counterparts, no one of which need contain the signature of all Members. As many such counterparts as shall together contain all such signatures shall constitute one and the same instrument.

Section 13.9 Headings.

The section and other headings contained in this Agreement are for reference purposes only and shall not be deemed to be a part of this Agreement or to affect the meaning or interpretation of any provisions of this Agreement.

Section 13.10 Validity and Severability.

If any provision of this Agreement shall be held invalid or unenforceable, that shall not affect the validity or enforceability of any other provisions of this Agreement, all of which shall remain in full force and effect.

Section 13.11 Statutory References.

Each reference in this Agreement to a particular statute or regulation, or a provision thereof, shall be deemed to refer to such statute or regulation, or provision thereof, or to any similar or superseding statute or regulation, or provision thereof, as is from time to time in effect.

Section 13.12 Modifications to be in Writing.

This Agreement constitutes the entire understanding of the parties hereto with respect to the subject matter hereof, and no amendment, modification or alteration shall be binding unless the same is in writing and adopted in accordance with the provisions of Section 13.5.

[Signature Pages Follow]

IN WITNESS WHEREOF, the undersigned Members have executed this Agreement as of the day and year first above written.

EXHIBIT A

Members of CT Plan LLC Member Name and Address

Cboe BYX Exchange, Inc., 400 South LaSalle Street, Chicago, Illinois 60605.
Cboe BZX Exchange, Inc., 400 South LaSalle Street, Chicago, Illinois 60605.
Cboe EDGA Exchange, Inc., 400 South LaSalle Street, Chicago, Illinois 60605.
Cboe EDGX Exchange, Inc., 400 South LaSalle Street, Chicago, Illinois 60605.
Cboe Exchange, Inc., 400 South LaSalle Street, Chicago, Illinois 60605.
Financial Industry Regulatory Authority, Inc., 1735 K Street NW, Washington, DC 20006.
Investors' Exchange LLC, 3 World Trade Center 58th Floor, New York, New York 10007.
Long-Term Stock Exchange, Inc., 300 Montgomery St., Ste. 790, San Francisco, CA 94104.
MEMX LLC, 111 Town Square Place, Suite 520, Jersey City, New Jersey 07310.
Nasdaq BX, Inc., One Liberty Plaza, 165 Broadway, New York, New York 10006.
Nasdaq ISE, LLC, One Liberty Plaza, 165 Broadway, New York, New York 10006.
Nasdaq PHLX LLC, FMC Tower, Level 8, 2929 Walnut Street, Philadelphia, Pennsylvania 19104.
The Nasdaq Stock Market LLC, One Liberty Plaza, 165 Broadway, New York, NY 10006.
New York Stock Exchange LLC, 11 Wall Street, New York, New York 10005.
NYSE American LLC, 11 Wall Street, New York, New York 10005.
NYSE Arca, Inc., 11 Wall Street, New York, New York 10005.
NYSE Chicago, Inc., 11 Wall Street, New York, New York 10005.
NYSE National, Inc., 11 Wall Street, New York, NY 10005.

Exhibit B

Disclosures

(a) The Members must respond to the following questions and instructions:

(i) Is the Member for profit or not-for-profit? If the Member is for profit, is it publicly or privately owned? If privately owned, list any owner with an interest of 5% or more of the Member, where to the Member's knowledge, such owner, or any affiliate controlling, controlled by, or under common control with the owner, subscribes,

directly or through a third-party vendor, to CT Feeds and/or Member PDP.

(ii) Does the Member offer PDP? If yes, list each product, describe its content, and provide a link to where fees for each product are disclosed.

(iii) Provide the names of the Voting Representative[and], any alternate Voting Representatives, *and any Member Observers* designated by the Member. Also provide a narrative description of such [representatives]persons' roles within the Member organization, including the title of each individual as well as any direct responsibilities related to the development, dissemination, sales, or marketing of the Member's PDP, and the nature of those responsibilities sufficient for the public to identify the nature of any potential conflict of interest that could be perceived by a reasonable objective observer as having an effect on the operation of the Company. If such [representatives]persons work in or with the Member's PDP business, describe such [representatives]persons' roles and describe how that business and such [representatives]persons' Company responsibilities impacts their compensation. In addition, describe how such [representatives]persons' responsibilities with the PDP business may present a conflict of interest with their responsibilities to the Company.

(iv) Does the Member, its Voting Representative, [or] its alternate Voting Representative, *its Member Observers*, or any affiliate have additional relationships or material economic interests that could be perceived by a reasonable objective observer to present a potential conflict of interest with their responsibilities to the Company? If so, provide a detailed narrative discussion of all material facts necessary to identify the potential conflicts of interest and the effects they may have on the Company.

(b) The Processors must respond to the following questions and instructions:

(i) Is the Processor an affiliate of or affiliated with any Member? If yes, disclose the Member(s) and describe the nature of the affiliation. Include an entity-level organizational chart depicting the Processor and its affiliates.

(ii) Provide a narrative description of the functions directly performed by senior staff, the manager employed by the Processor to provide Processor services to the Company, and the staff that reports to that manager.

(iii) Does the Processor provide any services for any Member's PDP, other NMS Plans, or creation of consolidated equity data information for its own use? If Yes, disclose the services the Processor performs and identify which NMS Plans. Does the Processor have any profit or loss responsibility for a Member's PDP or any other professional involvement with persons the Processor knows are engaged in a Member's PDP business? If so, describe.

(iv) List the policies and procedures established to safeguard Restricted Information, Highly Confidential Information, and Confidential Information that is applicable to the Processor.

(v) Does the Processor, or its representatives, have additional relationships

or material economic interests that could be perceived by a reasonable objective observer to present a potential conflict of interest with the representatives' responsibilities to the Company? If so, provide a detailed narrative discussion of all material facts necessary to identify the potential conflicts of interest and the effects they may have on the Company.

(c) The Administrator must respond to the following questions and instructions:

(i) Provide a narrative description of the functions directly performed by senior staff, the administrative services manager, and the staff that reports to that manager.

(ii) Does the Administrator provide any services for any Member's PDP? If yes, what services? Does the Administrator have any profit or loss responsibility, or licensing responsibility, for a Member's PDP or any other professional involvement with persons the Administrator knows are engaged in the Member's PDP business? If so, describe.

(iii) List the policies and procedures established to safeguard Restricted Information, Highly Confidential Information, and Confidential Information that is applicable to the Administrator.

(iv) Does the Administrator, or its representatives, have additional relationships or material economic interests that could be perceived by a reasonable objective observer to present a potential conflict of interest with the representatives' responsibilities to the Company? If so, provide a detailed narrative discussion of all material facts necessary to identify the potential conflicts of interest and the effects they may have on the Company.

(d) The Non-SRO Voting Representatives must respond to the following questions and instructions:

(i) Provide the Non-SRO Voting Representative's title and a brief description of the Non-SRO Voting Representative's role within the firm as well as any direct responsibilities related to the procurement of PDP or CT Feeds or the development, dissemination, sales, or marketing of PDP, and the nature of those responsibilities sufficient for the public to identify the nature of any potential conflict of interest that could be perceived by a reasonable objective observer as having an effect on the operation of the Company. If such representatives work in or with their employer's market data business, describe such Non-SRO Voting Representative's roles and describe how that business impacts their compensation. In addition, describe how such representatives' responsibilities with the market data business may present a conflict of interest with their responsibilities to the Company.

(ii) Does the Non-SRO Voting Representative have responsibilities related to the firm's use or procurement of market data?

(iii) Does the Non-SRO Voting Representative have responsibilities related to the firm's trading or brokerage services?

(iv) Does the Non-SRO Voting Representative's firm use the CT Feeds? Does the Non-SRO Voting Representative's firm use a Member's PDP?

(v) Does the Non-SRO Voting Representative's firm offer PDP? If yes, list each product, described its content, and provide information about the fees for each product.

(vi) Does the Non-SRO Voting Representative's firm have an ownership interest of 5% or more in one or more Members? If yes, list the Member(s).

(vii) Does the Non-SRO Voting Representative actively participate in any litigation against the CQ Plan, CTA Plan, UTP Plan, or the Company?

(viii) Does the Non-SRO Voting Representative or the Non-SRO Voting Representative's firm have additional relationships or material economic interests that could be perceived by a reasonable objective observer to present a potential conflict of interest with their responsibilities to the Company. If so, provide a detailed narrative discussion of all material facts necessary to identify the potential conflicts of interest and the effects they may have on the Company.

(e) Each service provider or subcontractor that has agreed in writing to provide required disclosures and be treated as a Disclosing Party shall respond to the following questions and instructions:

(i) Is the service provider or subcontractor affiliated with a Member, Processor, Administrator, or employer of a Non-SRO Voting Representative? If yes, disclose with whom the person is affiliated and describe the nature of the affiliation.

(ii) If the service provider's or subcontractor's compensation is on a commission basis or is tied to specific metrics, provide a detailed narrative summary of how compensation is determined for performing work on behalf of the Company.

(iii) Is the service provider or subcontractor subject to policies and procedures (including information barriers) concerning the protection of confidential information that includes affiliates? If so, describe. If not, explain their absence.

(iv) Does the service provider or subcontractor, or its representative, have additional relationships or material economic interests that could be perceived by a reasonable objective observer to present a potential conflict of interest with its responsibilities to the Company? If so, provide a detailed narrative discussion of all material facts necessary to identify the potential conflicts of interest and the effects they may have on the Company.

(f) The responses to these questions will be posted on the Company's website. If a Disclosing Party has any material changes in its responses, the Disclosing Party must promptly update its disclosures. Additionally, the Disclosing Parties must update the disclosures on an annual basis to reflect any changes. This annual update must be made before the first quarterly session meeting of each calendar year, which is generally held in mid-February.

Exhibit C

Confidentiality Policy

(a) Purpose and Scope.

(i) The purpose of this Confidentiality Policy is to provide guidance to the Operating Committee, and all subcommittees thereof, regarding the confidentiality of any data or information (in physical or electronic form) generated by, accessed by, or

transmitted to the Operating Committee or any subcommittee, as well as discussions occurring at a meeting of the Operating Committee or any subcommittee.

(ii) This Policy applies to all Covered Persons. All Covered Persons must adhere to the principles set out in this Policy and all Covered Persons that are natural persons may not receive Company data and information until they affirm in writing that they have read this Policy and undertake to abide by its terms.

(iii) Covered Persons may not disclose Restricted, Highly Confidential, or Confidential information except as consistent with this Policy and directed by the Operating Committee.

(iv) The Administrator and Processors will establish written confidential information policies that provide for the protection of information under their control and the control of their Agents, including policies and procedures that provide systemic controls for classifying, declassifying, redacting, aggregating, anonymizing, and safeguarding information, that is in addition to, and not less than, the protection afforded herein. Such policies will be reviewed and approved by the Operating Committee pursuant to Section 4.3, publicly posted, and made available to the Operating Committee for review and approval every two years thereafter or when changes are made, whichever is sooner.

(v) Information will be classified solely based on its content.

(b) Procedures.

(i) General

(A) The Administrator and Processors will be the custodians of all documents discussed by the Operating Committee and will be responsible for maintaining the classification of such documents pursuant to this Policy.

(B) The Administrator may, under delegated authority, designate documents as Restricted, Highly Confidential, or Confidential, which will be determinative unless altered by an affirmative vote of the Operating Committee pursuant to Section 4.3.

(C) The Administrator will ensure that all Restricted, Highly Confidential, or Confidential documents are properly labeled and, if applicable, electronically safeguarded.

(D) All contracts between the Company and its Agents shall require Company information to be treated as Confidential Information that may not be disclosed to third parties, except as necessary to effect the terms of the contract or as required by law, and shall incorporate the terms of this Policy, or terms that are substantially equivalent or more restrictive, into the contract.

(ii) Procedures Concerning Restricted Information. Except as provided below, Covered Persons in possession of Restricted Information are prohibited from disclosing it to others, including Agents. This prohibition does not apply to disclosures to the staff of the SEC or as otherwise required by Applicable Law, or to other Covered Persons as expressly provided for by this Policy. Restricted Information will be kept in confidence by the Administrator and Processors and will not be disclosed to the Operating Committee or any subcommittee

thereof, or during Executive Session, except as follows:

(A) If the Administrator determines that it is appropriate to share a customer's financial information with the Operating Committee or a subcommittee thereof, the Administrator will first anonymize the information by redacting the customer's name and any other information that may lead to the identification of the customer.

(B) The Administrator may disclose the identity of a customer that is the subject of Restricted Information in Executive Session only if the Administrator determines in good faith that it is necessary to disclose the customer's identity in order to obtain input or feedback from the Operating Committee or a subcommittee thereof about a matter of importance to the Company. In such an event, the Administrator will change the designation of the information at issue from "Restricted Information" to "Highly Confidential Information," and its use will be governed by the procedures for Highly Confidential Information in subparagraph (iii) below.

(C) *If it determines that doing so is in furtherance of the interests of the Plan, the Operating Committee may authorize the disclosure of specified Restricted Information to specific Covered Persons or third parties. Covered Persons and third parties authorized by the Operating Committee that receive or have access to Restricted Information must segregate the information, retain it in confidence, and use it only in a manner consistent with the terms of this policy. Authorization shall be on a case-by-case basis, unless the Operating Committee grants standing approval to disclose specified recurring information to specific Covered Persons.*

(iii) Procedures Concerning Highly Confidential Information

(A) Disclosure of Highly Confidential Information:

(1) Highly Confidential Information may be disclosed in Executive Session of the Operating Committee or to the subcommittee established pursuant to Section 4.7(c). Covered Persons in possession of Highly Confidential Information are prohibited from disclosing it to others, including Agents, except [to other Covered Persons who need the Highly Confidential Information to fulfill their responsibilities to the Company] *as provided below*. This prohibition does not apply to disclosures to the staff of the SEC [or as otherwise required by law (such as those required to receive the information to ensure the Member complies with its regulatory obligations), or to other Covered Persons authorized to receive it].

(2) Highly Confidential Information may be disclosed, *as required by Applicable Law*.

(3) *Highly Confidential Information may be disclosed to the staff of the SEC, unless it is protected by the Attorney-Client Privilege or the Work Product Doctrine. Any disclosure of Highly Confidential Information to the staff of the SEC will be accompanied by a FOIA Confidential Treatment request.*

(4) *SRO Voting Representatives may share the following types of Highly Confidential Information with officers of their Member SRO who have direct or supervisory*

responsibility for the SRO's participation in the Company—or with Agents for that Member—provided that such information may not be used in the development, modeling, pricing, licensing, or sale of PDP: Information regarding the Company's contract negotiations with the Processor(s) or Administrator; communications with, and work-product of, counsel to the Company; and information concerning personnel matters that affect the employees of the SRO or of the Company. Each SRO Voting Representative that shares Highly Confidential Information pursuant to this subparagraph (4) shall maintain a log reflecting each instance of such sharing, including the information shared, the persons receiving the information, and the date the information was shared. Covered Persons who receive or have access to Highly Confidential Information pursuant to this subparagraph (4) must segregate the information, retain it in confidence, and use it only in a manner consistent with the terms of this policy.

(5) *The Operating Committee may authorize the disclosure of specified Highly Confidential Information to specific third parties acting as Agents of the Company. Third parties authorized by the Operating Committee that receive or have access to Highly Confidential Information must segregate the information, retain it in confidence, and use it only in a manner consistent with the goals of this policy. Authorization shall be on a case-by-case basis, unless the Operating Committee grants standing approval to allow disclosure of specified recurring information to specific third parties.*

[(3)](6) Apart from the foregoing, the Operating Committee has no power to authorize any other disclosure of Highly Confidential Information.

(B) In the event that a Covered Person is determined by an affirmative vote of the Operating Committee pursuant to this Policy to have disclosed Highly Confidential Information, the Operating Committee will determine the appropriate remedy for the breach based on the facts and circumstances of the event. For an SRO Voting Representative or Member Observer, remedies include a letter of complaint submitted to the SEC, which may be made public by the Operating Committee. For a Non-SRO Voting Representative, remedies include removal of that Non-SRO Voting Representative.

(iv) Procedures Concerning Confidential Information

(A) Confidential Information may be disclosed during a meeting of the Operating Committee or any subcommittee thereof. Additionally, a Covered Person may disclose Confidential Information only to other persons *who need to* [allow such other persons] *receive such information to fulfill their responsibilities to the [Company] Plan, including oversight of the Plan. The recipient must segregate the information, retain it in confidence, and use it only in a manner consistent with the terms of this policy. A Covered Person also may disclose Confidential Information to the staff of the SEC, as authorized by the Operating*

Committee as described below, or as may be otherwise required by law.

(B) The Operating Committee may authorize the disclosure of Confidential Information by an affirmative vote of the Operating Committee pursuant to Section 4.3. *Authorization shall be on a case-by-case basis, unless the Operating Committee grants standing approval to allow disclosure of specified recurring information to specific Covered Persons.* Notwithstanding the foregoing, the Operating Committee will not authorize the disclosure of Confidential Information that is generated by a Member or Non-SRO Voting Representative and designated by such Member or Non-SRO Voting Representative as Confidential, unless such Member or Non-SRO Voting Representative consents to the disclosure.

(C) Non-SRO Voting Representatives may be authorized by the Operating Committee to disclose particular Confidential Information only in furtherance of the interests of the Company, to enable them to consult with industry representatives or technical experts, provided that the Non-SRO Voting Representatives take any steps requested by the Operating Committee to prevent further dissemination of that Confidential Information, including providing the individual(s) consulted with a copy of this Policy and requesting that person to maintain the confidentiality of such information in a manner consistent with this policy.

(D) A Covered Person that is a representative of a Member may be authorized by the Operating Committee to disclose particular Confidential Information to other employees or agents of the Member or its affiliates only in furtherance of the interests of the Company as needed for such Covered Person to perform his or her function on behalf of the Company. A copy of this Policy will be made available to recipients of such information who are employees or agents of a Member or its affiliates that are not Covered Persons, who will be required to abide by this Confidentiality Policy.

(E) A Covered Person may disclose their own individual views and statements that may otherwise be considered Confidential Information without obtaining authorization of the Operating Committee, provided that in so disclosing, the Covered Person is not disclosing the views or statements of any other Covered Person or Member that are considered Confidential Information.

(F) A person that has reason to believe that Confidential Information has been disclosed by another without the authorization of the Operating Committee or otherwise in a manner inconsistent with this Policy may report such potential unauthorized disclosure to the Chair of the Operating Committee. In addition, a Covered Person that discloses Confidential Information without the authorization of the Operating Committee will report such disclosure to the Chair of the Operating Committee. Such self-reported unauthorized disclosure of Confidential Information will be recorded in the minutes of the meeting of the Operating Committee and will contain: (a) The name(s) of the person(s) who disclosed such Confidential Information, and (b) a

description of the Confidential Information disclosed. The name(s) of the person(s) who disclosed such Confidential Information will also be recorded in any publicly available summaries of Operating Committee minutes.

Exhibit D

Distributions

Cost Allocation and Revenue Sharing

(a) **PAYMENTS.** In accordance with Paragraph (I) of this Exhibit D, each Member will receive an annual payment (if any) for each calendar year that is equal to the sum of the Member's Trading Shares and Quoting Shares (each as defined below), in each Eligible Security for such calendar year. In the event that total Net Distributable Operating Income (as defined below) is negative for a given calendar year, each Member will receive an annual bill for such calendar year to be determined according to the same formula (described in this paragraph) for determining annual payments to the Members. Unless otherwise stated in this agreement, a year shall run from January 1st to December 31st and quarters shall end on March 31st, June 30th, September 30th, and December 31st. The Company shall cause the Administrator to provide the Members with written estimates of each Member's percentage of total volume within five business days of the end of each calendar month.

(b) **SECURITY INCOME ALLOCATION.** The "Security Income Allocation" for an Eligible Security shall be determined by multiplying (i) the Net Distributable Operating Income under this Agreement for the calendar year by (ii) the Volume Percentage for such Eligible Security (the "Initial Allocation"), and then adding or subtracting any amounts specified in the reallocation set forth below.

(c) **VOLUME PERCENTAGE.** The "Volume Percentage" for an Eligible Security shall be determined by dividing (A) the square root of the dollar volume of Transaction Reports disseminated by the Processors in such Eligible Security during the calendar year by (B) the sum of the square roots of the dollar volume of Transaction Reports disseminated by the Processors in each Eligible Security during the calendar year.

(d) **CAP ON NET DISTRIBUTABLE OPERATING INCOME.** If the Initial Allocation of Net Distributable Operating Income in accordance with the Volume Percentage of an Eligible Security equals an amount greater than \$4.00 multiplied by the total number of qualified Transaction Reports in such Eligible Security during the calendar year, the excess amount shall be subtracted from the Initial Allocation for such Eligible Security and reallocated among all Eligible Securities in direct proportion to the dollar volume of Transaction Reports disseminated by the Processors in Eligible Securities during the calendar year. A Transaction Report with a dollar volume of \$5,000 or more shall constitute one qualified Transaction Report. A Transaction Report with a dollar volume of less than \$5,000 shall constitute a fraction of a qualified Transaction Report that equals the dollar volume of the Transaction Report divided by \$5,000.

(e) **TRADING SHARE.** The "Trading Share" of a Member in an Eligible Security shall be determined by multiplying (i) an amount equal to fifty percent of the Security Income Allocation for the Eligible Security by (ii) the Member's Trade Rating in the Eligible Security.

(f) **TRADE RATING.** A Member's "Trade Rating" in an Eligible Security shall be determined by taking the average of (A) the Member's percentage of the total dollar volume of Transaction Reports disseminated by the Processors in the Eligible Security during the calendar year, and (B) the Member's percentage of the total number of qualified Transaction Reports disseminated by the Processors in the Eligible Security during the calendar year.

(g) **QUOTING SHARE.** The "Quoting Share" of a Member in an Eligible Security shall be determined by multiplying (A) an amount equal to fifty percent of the Security Income Allocation for the Eligible Security by (B) the Member's Quote Rating in the Eligible Security.

(h) **QUOTE RATING.** A Member's "Quote Rating" in an Eligible Security shall be determined by dividing (A) the sum of the Quote Credits earned by the Member in such Eligible Security during the calendar year by (B) the sum of the Quote Credits earned by all Members in such Eligible Security during the calendar year.

(i) **QUOTE CREDITS.** A Member shall earn one "Quote Credit" for each second of time (with a minimum of one full second) multiplied by dollar value of size that an automated best bid (offer) transmitted by the Member to the Processors during regular trading hours is equal to the price of the National Best Bid and Offer in the Eligible Security and does not lock or cross a previously displayed "automated quotation" (as defined under Rule 600 of Regulation NMS). The dollar value of size of a quote shall be determined by multiplying the price of a quote by its size.

(j) **NET DISTRIBUTABLE OPERATING INCOME.** The "Net Distributable Operating Income" for any particular calendar year shall mean:

(i) all cash revenues, funds and proceeds received by the Company during such calendar year (other than Capital Contributions by the Members or amounts paid pursuant to Section 3.7(b) of this Agreement), including all revenues from (A) the CT Feeds, which includes the dissemination of information with respect to Eligible Securities to foreign marketplaces, and (B) FINRA quotation data and last sale information for securities classified as OTC Equity Securities under FINRA's Rule 6400 Series (the "FINRA OTC Data") ((A) and (B) collectively, the "Data Feeds"), and (C) any Membership Fees; less

(ii) 6.25% of the revenue received by the Company during such calendar year attributable to the segment of the Data Feeds reflecting the dissemination of information with respect to Network C Securities and FINRA OTC Data (but, for the avoidance of doubt, not including revenue attributable to the segment of the Data Feeds reflecting the dissemination of information with respect to Network A Securities and Network B Securities), which amount shall be paid to

FINRA as compensation for the FINRA OTC Data;¹ less

(iii) reasonable working capital reserves and reasonable reserves for contingencies for such calendar year, as determined by the Operating Committee, and all costs and expenses of the Company during such calendar year, including:

(A) all amounts payable during such calendar year to the Administrator pursuant to the Administrative Services Agreement or this Agreement;

(B) all amounts payable during such calendar year to the Processors pursuant to the Processor Services Agreements or this Agreement; and

(C) all amounts payable during such calendar year to third-party service providers engaged by or on behalf of the Company.

(k) **INITIAL ELIGIBILITY.** At the time a Member implements a Processor-approved electronic interface with the Processors, the Member will become eligible to receive revenue.

(l) **QUARTERLY DISTRIBUTIONS.** The Company shall cause the Administrator to provide

Members with written estimates of each Member's quarterly Net Distributable Operating Income within 45 calendar days of the end of the quarter, and estimated quarterly payments or billings shall be made on the basis of such estimates. All quarterly payments or billings shall be made to each eligible Member within 45 days following the end of each calendar quarter in which the Member is eligible to receive revenue; provided, that each quarterly payment or billing shall be reconciled against a Member's cumulative year-to-date payment or billing received to date and adjusted accordingly; further, provided, that the total of such estimated payments or billings shall be reconciled at the end of each calendar year and, if necessary, adjusted by March 31st of the following year. Interest shall be included in quarterly payments and in adjusted payments made on March 31st of the following year. Such interest shall accrue monthly during the period in which revenue was earned and not yet paid and will be based on the 90-day Treasury bill rate in effect at the end of the quarter in which the payment is made. Monthly interest shall start accruing 45 days following the month in which it is earned and accrue until the date on which the payment is made.

(m) **ITEMIZED STATEMENTS.** In conjunction with calculating estimated quarterly and reconciled annual payments under this Exhibit D, the Company shall cause the Administrator to submit to the Members a quarterly itemized statement setting forth the basis upon which Net Distributable Operating Income was calculated. Such Net Distributable Operating Income shall be adjusted annually based solely on the quarterly itemized statement audited pursuant to the annual audit. The Company shall cause the Administrator to pay or bill Members for the audit adjustments within thirty days of completion of the annual audit. Upon the affirmative vote of Voting Representatives pursuant to Section 4.3, the Company shall cause the Administrator to engage an independent auditor to audit the Administrator's costs or other calculation(s).

Exhibit E

Fees

To be determined by the Operating Committee under this Agreement

[FR Doc. 2021-17113 Filed 8-10-21; 8:45 am]

BILLING CODE 8011-01-P

¹ All costs associated with collecting, consolidating, validating, generating, and disseminating the FINRA OTC Data are borne directly by FINRA and not the Company and the Members.



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Part III

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48 CFR Chapter 1

Federal Acquisition Regulations; Final Rules

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR-2021-0051, Sequence No. 4]

Federal Acquisition Regulation; Federal Acquisition Circular 2021-07; Introduction

AGENCY: Department of Defense (DoD), General Services Administration (GSA),

and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of final rules.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) in this Federal Acquisition Circular (FAC) 2021-07. A companion document, the *Small Entity Compliance Guide* (SECG), follows this FAC.

DATES: For effective dates see the separate documents which follow.

FOR FURTHER INFORMATION CONTACT: The analyst whose name appears in the table below in relation to the FAR case. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755 or GSARegSec@gsa.gov.

RULES LISTED IN FAC 2021-07

Item	Subject	FAR Case	Analyst
I	Section 508-Based Standards in Information and Communication Technology	2017-011	Jackson.
II	Revision of Limitations on Subcontracting	2016-011	Uddowla.
III	Scope of Review by Procurement Center Representatives	2020-012	Jones.
IV	Good Faith in Small Business Subcontracting	2019-004	Bowman.
V	Technical Amendments.		

ADDRESSES: The FAC, including the SECG, is available via the internet at <https://www.regulations.gov>.

SUPPLEMENTARY INFORMATION: Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these FAR rules, refer to the specific item numbers and subjects set forth in the documents following these item summaries. FAC 2021-07 amends the FAR as follows:

Item I—Section 508-Based Standards in Information and Communication Technology (FAR Case 2017-011)

This final rule amends the FAR to implement the Access Board’s final rule published January 17, 2017. Section 508 of the Rehabilitation Act of 1973 requires the FAR to incorporate revised accessibility standards developed by the Access Board for information and communication technology (ICT). The Access Board is also known as the Architectural and Transportation Barriers Compliance Board. This rule ensures that Federal employees with disabilities have comparable access to, and use of, such information and data relative to other Federal employees. Section 508 also requires Federal agencies to ensure that members of the public with disabilities have comparable access to publicly available information and data.

Item II—Revision of Limitations on Subcontracting (FAR Case 2016-011)

This rule amends the FAR to implement regulatory changes made by the Small Business Administration (SBA) in its final rule published in the **Federal Register** at 81 FR 34243, on May 31, 2016. SBA’s final rule implements the statutory requirements of section 1651 of the National Defense Authorization Act for Fiscal Year 2013. Section 1651 revised and standardized the limitations on subcontracting, including the nonmanufacturer rule, that apply to small business concerns under FAR part 19 procurements. Section 1651 shifts the limitations on subcontracting from the concept of a required percentage of work to be performed by a prime contractor to the concept of a limit on the percentage of the overall award amount to be spent by the prime on subcontractors. Significantly, section 1651 excludes from this calculation the percentage of the award amount that the prime contractor spends on subcontractors who are similarly situated entities. This rule implements the revised and standardized limitations on subcontracting through the use of a single FAR clause for every small business program, instead of continuing to implement through multiple FAR clauses that were specific to a particular small business program. This rule also revises the FAR clause implementing the nonmanufacturer rule to reflect the

standardized requirements across all the small business programs.

This rule may have a positive economic impact on small businesses. Through the ability to meet the limitations by means of subcontracts with similarly situated entities, this rule will make it possible for small businesses to compete for larger contracts than they could in the past.

Item III—Scope of Review by Procurement Center Representatives (FAR Case 2020-012)

This final rule amends the FAR to implement section 1811 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328), as implemented in the Small Business Administration (SBA) final rule published at 84 FR 65647 on November 29, 2019. Section 1811 allows SBA’s procurement center representatives to review any solicitation for a contract or task order, without regard to whether it is set aside for small business concerns, or reserved in the case of a multiple-award contract, or whether it would result in a bundled or consolidated contract or order.

Item IV—Good Faith in Small Business Subcontracting (FAR Case 2019-004)

This final rule amends the FAR to implement section 1821(c) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (15 U.S.C 637 note, Pub. L. 114-328), as implemented in the Small Business

Administration (SBA) final rule published at 84 FR 65647, dated November 29, 2019.

Specifically, the final FAR rule at FAR 19.705–7 includes examples of a good faith effort to comply with the subcontracting plan, and examples of a failure to make a good faith effort. Failure to make a good faith effort to comply with the plan may result in assessment of liquidated damages.

Additionally, the final rule amends the FAR to require that prime contractors with a commercial subcontracting plan include indirect costs in their subcontracting goals. Previously, prime contractors were required to include indirect costs in the summary subcontract report (SSR) but not in their subcontracting goals, which led to inconsistencies when comparing the SSR to the goals in the commercial subcontracting plan. Including indirect costs in both the SSR and subcontracting goals established in the commercial subcontracting plan will allow for consistency.

Item V—Technical Amendments

Editorial changes are made at FAR 42.709–1 through 42.709–7, 52.242–3, and 52.245–1.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Federal Acquisition Circular (FAC) 2021–07 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator of National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2021–07 is effective August 11, 2021 except for Items I through V, which are effective September 10, 2021.

John M. Tenaglia,
Principal Director, Defense Pricing and Contracting, Department of Defense.

Jeffrey A. Koses,
Senior Procurement Executive/Deputy CAO,
Office of Acquisition Policy, U.S. General Services Administration.

Karla Smith Jackson,
Assistant Administrator for Procurement,
National Aeronautics and Space Administration.

[FR Doc. 2021–16362 Filed 8–10–21; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 7, 10, 11, 12 and 39

[FAC 2021–07; FAR Case 2017–011; Item I; Docket No. FAR–2017–0011, Sequence No. 1]

RIN 9000–AN46

Federal Acquisition Regulation: Section 508–Based Standards in Information and Communication Technology

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to incorporate recent revisions and updates to accessibility standards issued by the U.S. Access Board.

DATES: Effective September 10, 2021.

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, at 202–208–4949, or by email at michaelo.jackson@gsa.gov for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or GSARegSec@gsa.gov. Please cite FAC 2021–07, FAR Case 2017–011.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule at 85 FR 17831 on March 31, 2020, to implement the U.S. Access Board’s revisions by strengthening FAR requirements for accessibility to electronic and information technology (now generally referred to as “information and communication technology” or “ICT”) provided by the Federal Government. Among other things, section 508 of the Rehabilitation Act of 1973 mandates that Federal agencies “develop, procure, maintain, or use” ICT in a manner that ensures that Federal employees with disabilities have comparable access to, and use of, such information and data relative to Federal employees who are not individuals with disabilities. Section 508 also requires Federal agencies to ensure that members of the public with disabilities have comparable access to, and use of, information and data relative

to members of the public who are not individuals with disabilities.

The Access Board, also known as the Architectural and Transportation Barriers Compliance Board, is tasked with issuing accessibility standards for ICT covered under section 508, and updating these standards periodically to reflect technological changes. The Federal Acquisition Regulatory Council, in turn, is required to revise the FAR to incorporate the Access Board’s accessibility standards or any amendments thereto.

In December 2000, the Access Board published its initial set of accessibility standards at 65 FR 80500, (December 21, 2000). Thereafter, a final FAR rule was published incorporating the Access Board’s accessibility standards at 66 FR 20894 (April 25, 2001).

The Access Board completed a multiyear effort to “refresh” its initial, existing set of accessibility standards under section 508 to address advances in ICT, harmonize with accessibility standards developed by standards organizations worldwide, and ensure consistency with the Access Board’s regulations that had been promulgated since the late 1990s. The revised section 508 Accessibility Standards support the access needs of individuals with disabilities, while also considering the costs of procuring ICT that complies with section 508.

The Access Board’s final rule was published in the **Federal Register** at 82 FR 5790 on January 18, 2017. This final rule updates the FAR to ensure that the updated standards are appropriately considered in Federal ICT acquisitions. The final rule includes a “safe harbor” provision for existing (*i.e.*, legacy) ICT, which considers legacy ICT in existence on or before January 18, 2018, to be compliant if it meets the earlier standard issued pursuant to section 508 of the Rehabilitation Act of 1973 (see E202.2 of Revised Standards) and the legacy ICT is not altered after January 18, 2018. In other words, such “untouched” ICT need not be modified or upgraded to conform to the revised 508 standards as long as it already conforms to the original 508 standards. However, ICT acquired on or before January 18, 2018, will need to be upgraded or modified to conform to the new standard if such ICT is altered after January 18, 2018, or does not comply with the original 508 standards. In addition, ICT acquired after January 18, 2018, must be upgraded or modified to conform to the new standard. The upgrades and modifications would be included in requirements documents issued by the agency.

Two respondents submitted comments on the proposed rule.

II. Discussion and Analysis

For details on the proposed changes to the FAR, see the proposed rule. The Councils reviewed the comments received in response to the proposed rule. Two respondents submitted public comments supporting the issuance of the rule. No changes were made to the final rule as a result of public comments. The Councils acknowledge support for the rule. However, clarifying changes were made to the language at section 7.105 to detail information that should be included in the acquisition plan when an exception or an exemption to the standards apply. At FAR section 39.204, paragraph (a)(3), examples are included of the portions of ICT that are “operable parts” by adding the text “*i.e.*, hardware-based user controls for activating, deactivating, or adjusting ICT”.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This rule does not create new solicitation provisions or contract clauses or impact any existing provisions or clauses. This rule amends FAR part 39, Acquisition of Information Technology, and other references to Government requirements for information and communication technology. The objective of the rule is to update the FAR text to align with the accessibility standards revisions made by the Access Board at 36 CFR 1194.1. The accessibility standards are currently applicable to all information and communication technology acquisitions. As such, determinations and findings under 41 U.S.C. 1905 to 1907 regarding the applicability of this rule to acquisitions at or below the SAT or to acquisitions for commercial and COTS items are not required.

Section 508 requirements will continue to apply when acquiring ICT through contracts at or below the SAT, or contracts for the acquisition of commercial items, including COTS items.

IV. Expected Impact of the Rule

This final rule amends the FAR to incorporate recent revisions and updates to the accessibility standards issued by the U.S. Access Board pursuant to section 508. These revisions and updates provide benefits that would accrue to Federal agencies, including productivity increases by Federal employees and time saved from reduced

phone calls to Federal agencies. Additionally, persons with disabilities using public-facing Federal information and data (*e.g.*, Federal websites) would experience improved access and time savings. There are also substantial unquantifiable benefits. For example, enhanced ICT accessibility for persons with disabilities can be expected to improve access and use of mission-critical ICT, productivity, ability to achieve professional potential, independent living, increase civic engagement, decrease stigma, promote equality, and enhance integration into American society. Updating the FAR to incorporate the revised 508 accessibility standards is also expected to provide benefits to ICT firms that are difficult to quantify and thus were not monetized. For example, harmonization with national and international consensus standards is likely to assist American ICT companies by helping to achieve economies of scale created by wider use of these technical standards.

This rule codifies changes made by the U.S. Access Board. As such, the monetized costs and benefits in the Final Regulatory Impact Analysis (FRIA), which accompanied the U.S. Access Board’s Final ICT Rule, are now realized at the Federal contract level.

The Access Board’s FRIA estimates that, under the expected cost scenario, incremental compliance costs to Federal agencies for procured ICT under the revised 508 accessibility standards over a 10-year timeframe will be \$79.0 million per year using a 7% discount rate, and \$82.8 million per year using a 3% discount rate. These costs will largely be incurred from compliance with the revised 508 accessibility standards for procured ICT products and services.

With respect to monetized benefits attributable to procured ICT, the Access Board’s FRIA estimates that, under the expected scenario, benefits for procured ICT (and, hence, this final rule) are likely to have an annualized value of \$33.1 million over a 10-year timeframe using a 7% discount rate, and \$35.2 million using a 3% discount rate.

To access the U.S. Access Board’s FRIA, go to the Access Board’s website (<https://www.access-board.gov/ict/fria.html>) or the electronic docket for the Access Board’s Final ICT rule at the Federal eRulemaking Portal (<https://www.regulations.gov/docket/ATBCB-2015-0002>).

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is

necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD, GSA, and NASA will send the rule and the “Submission of Federal Rules Under the Congressional Review Act” form to each House of the Congress and to the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget has determined that this is not a major rule under 5 U.S.C. 804.

VII. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601–612. The FRFA is summarized as follows:

This final rule amends the FAR to incorporate recent revisions and updates to the accessibility standards issued by the Architectural and Transportation Barriers Compliance Board (referred to as the “U.S. Access Board”) pursuant to section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d). Section 508 generally mandates that Federal agencies develop, procure, maintain, and use information and communication technology (ICT) in a manner that ensures Federal employees and members of the public with disabilities have access to, and use of, information and data that is comparable to the access to, and use of, the information and data by Federal employees and members of the public who are not individuals with disabilities. The U.S. Access Board periodically reviews and revises these accessibility standards to reflect technological advances and other changes to ICT that occur over the passage of time.

There were no significant issues raised by the public in response to the Initial Regulatory Flexibility Analysis.

The rule applies to all contractors and subcontractors, regardless of size. Based on fiscal year 2018 data from the Federal Procurement Data System (FPDS), it is estimated that there are approximately 22,809 contractors that manufacture, sell, or lease ICT supplies or services required to comply with section 508 standards. Approximately 12,845 of these contractors

are small businesses. As a result of incorporating the updated accessibility standards, the monetized costs and benefits in the Final Regulatory Impact Analysis, which accompanied the U.S. Access Board's Final ICT Rule, are now realized at the Federal contract level for small businesses. However, there are unquantifiable impacts at the Federal contract level for small businesses in the final rule. For instance, small businesses will have to analyze whether the ICT they or their resellers plan to sell to the Federal Government complies with the revised 508 accessibility standards. Manufacturers may want to redesign their supplies and services to make them fully compliant, to have a better chance for their items to be purchased by the Government. The final rule may decrease demand for some supplies and services that are not fully compliant, potentially leading to decreased sales for small entities manufacturing or selling those items. Conversely, the final rule may increase demand for some supplies and services that are fully compliant and meet agencies' business needs, potentially leading to increased sales for small businesses manufacturing or selling those items. To meet the requirements of the law, small businesses cannot be exempt from any part of the rule.

This rule does not include any new reporting or recordkeeping requirements. There is a compliance requirement; entities will need to familiarize themselves with the differences between the 2000 and 2017 standards in order to assess the impact on procurements and comply with the revised functional performance criteria and technical accessibility standards beyond those currently mandated in FAR subpart 39.2.

There are no known significant alternatives to the rule for effective implementation of this statutory requirement. Since the statute imposes private enforcement, where individuals with disabilities can file civil rights lawsuits, the Government has little flexibility in promulgating alternatives to the Access Board's standards. The impact of this rule may be significant for small entities that are not currently in compliance with existing standards.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VIII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

List of Subjects in 48 CFR Parts 2, 7, 10, 11, 12, and 39

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 7, 10, 11, 12, and 39 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 7, 10, 11, 12, and 39 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 2—DEFINITIONS OF WORDS AND TERMS

- 2. In section 2.101, amend paragraph (b)(2) by—
 - a. Removing the definition “Electronic and information technology (EIT)”;
 - and
 - b. Adding in alphabetical order the definition “Information and communication technology (ICT)” to read as follows:

2.101 Definitions.

- * * * * *
- (b) * * *
- (2) * * *

Information and communication technology (ICT) means information technology and other equipment, systems, technologies, or processes, for which the principal function is the creation, manipulation, storage, display, receipt, or transmission of electronic data and information, as well as any associated content. Examples of ICT include but are not limited to the following: Computers and peripheral equipment; information kiosks and transaction machines; telecommunications equipment; customer premises equipment; multifunction office machines; software; applications; websites; videos; and electronic documents.

* * * * *

PART 7—ACQUISITION PLANNING

■ 3. Amend section 7.103 by revising paragraph (q) to read as follows:

7.103 Agency-head responsibilities.

* * * * *

(q) Ensuring that acquisition planners specify needs and develop plans, drawings, work statements, specifications, or other product or service requirements (e.g., help desks, call centers, training services, and automated self-service technical support) descriptions that address information and communication

technology (ICT) accessibility standards (see 36 CFR 1194.1) in proposed acquisitions and that these standards are included in requirements planning (see subpart 39.2).

* * * * *

■ 4. Amend section 7.105 by redesignating paragraph (b)(5)(iv) as paragraph (b)(5)(v) and adding a new paragraph (b)(5)(iv) to read as follows.

7.105 Contents of written acquisition plans.

- * * * * *
- (b) * * *
- (5) * * *

(iv) For information technology acquisitions, identify the applicable ICT accessibility standard(s). When an exception or an exemption to the standard(s) applies, the plan must list the exception and/or exemption, and the item(s) to which it applies. For those items listing 39.204 or 39.205(a)(1) or (2), the corresponding accessibility standard does not need to be identified. See subpart 39.2 and 36 CFR 1194.1.

* * * * *

PART 10—MARKET RESEARCH

■ 5. Amend section 10.001 by revising paragraph (a)(3)(ix) to read as follows:

10.001 Policy.

- (a) * * *
- (3) * * *

(ix) Assess the availability of supplies or services that meet all or part of the applicable information and communication technology accessibility standards at 36 CFR 1194.1 (see subpart 39.2).

* * * * *

PART 11—DESCRIBING AGENCY NEEDS

■ 6. Amend section 11.002 by revising paragraph (f) to read as follows:

11.002 Policy.

* * * * *

(f) In accordance with section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d), the contracting officer shall obtain from the requiring activity the requirement documents, which must identify—

(1) The needs of current and future users with disabilities to determine how—

(i) Users with disabilities will perform the functions supported by the information and communication technology (ICT);

(ii) The ICT will be developed, installed, configured and maintained to support users with disabilities;

(2) The applicable ICT accessibility standards (see subpart 39.2); and
 (3) Any ICT accessibility standards that cannot be met due to an exception or an exemption for any component or portion of the product (see 7.105(b)(5)(iv), 39.204, and 39.205).

PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 7. Amend section 12.202 by revising paragraph (d) to read as follows:

12.202 Market research and description of agency need.

(d) Requirements documents shall identify the applicable information and communication technology accessibility standards at 36 CFR 1194.1 (see 11.002(f) and subpart 39.2).

PART 39—ACQUISITION OF INFORMATION TECHNOLOGY

■ 8. Amend section 39.000 by revising paragraph (b) to read as follows:

39.000 Scope of part.

(b) Information and communication technology (see 2.101(b)).

■ 9. Revise section 39.001 to read as follows:

39.001 Applicability.

This part applies to the acquisition of—

(a) Information technology by or for the use of agencies except for acquisitions of information technology for national security systems. However, acquisitions of information technology for national security systems shall be conducted in accordance with 40 U.S.C. 11302 with regard to requirements for performance and results-based management; the role of the agency Chief Information Officer in acquisitions; and accountability. These requirements are addressed in OMB Circular No. A–130; and

(b) Information and communication technology by or for the use of agencies or for the use of the public, unless an exception (see 39.204) or an exemption (see 39.205) applies. See 36 CFR 1194.1.

39.101 [Amended]

■ 10. In section 39.101 amend paragraph (a)(1)(i) by removing the word “accommodations” and adding the word “accessibility” in its place.

■ 11. Revise subpart 39.2 heading to read as follows:

Subpart 39.2—Information and Communication Technology

* * * * *

■ 12. Amend section 39.201 by—
 ■ a. Revising paragraph (a); and
 ■ b. Removing from paragraph (c) introductory text the term “EIT” and adding the term “ICT” in its place.

The revision reads as follows:

39.201 Scope of subpart.

(a) This subpart implements section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d), and the Architectural and Transportation Barriers Compliance Board’s (U.S. Access Board) information and communication technology (ICT) accessibility standards at 36 CFR 1194.1.

* * * * *

■ 13. Revise sections 39.203 and 39.204, and add section 39.205 to read as follows:

39.203 Applicability.

(a) *General.* Unless an exception at 39.204 or an exemption at 39.205 applies, acquisitions for ICT supplies and services shall meet the applicable ICT accessibility standards at 36 CFR 1194.1.

(b) *Indefinite-quantity contracts.* Confirmation of an exception or a determination of an exemption is not required prior to award of an indefinite-quantity contract, except for requirements that are to be satisfied by initial award. The contract must identify which supplies and services the contractor indicates as compliant and show where full details of compliance can be found (e.g., vendor’s or other exact website location).

(c) *Task order or delivery order.* At the time of issuance of a task order or delivery order under an indefinite-quantity contract, the requiring and ordering activities shall ensure compliance with the ICT accessibility standards and document an exception or exemption if applicable. Any task order or delivery order, or portion thereof, issued for a noncompliant ICT item shall be supported by the appropriate exception or exemption documented by the requiring activity.

(d) *Commercial items.* When acquiring commercial items, an agency must comply with those ICT accessibility standards that can be met with supplies or services that are available in the commercial marketplace and that best address the agency’s needs, but see 39.205(a)(3).

(e) *Legacy ICT.* Any component or portion of existing ICT (i.e., ICT that was procured, maintained, or used on or before January 18, 2018) is not required

to comply with the current ICT accessibility standards if it—

(1) Complies with an earlier standard issued pursuant to section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d), which is set forth in Appendix D to 36 CFR 1194.1; and

(2) Has not been altered (i.e., a change that affects interoperability, the user interface, or access to information or data) after January 18, 2018.

(f) *Alterations of legacy ICT.* When altering any component or portion of existing ICT, after January 18, 2018, the component or portion must be modified to conform to the current ICT accessibility standards in 36 CFR 1194.1.

39.204 Exceptions.

(a) The requirements in 39.203 do not apply to acquisitions for—

(1) *National security systems.* ICT operated by agencies as part of a national security system, as defined by 40 U.S.C. 11103(a);

(2) *Incidental contract items.* ICT acquired by a contractor incidental to a contract, i.e., for in-house use by the contractor to perform the contract; or

(3) *Maintenance or monitoring spaces.* The portions of ICT that are operable parts (i.e., hardware-based user controls for activating, deactivating, or adjusting ICT) or status indicators, and that are located in spaces frequented only by service personnel for maintenance, repair, or occasional monitoring of equipment.

(b) The contracting officer shall receive, as a part of the requirements documentation, written confirmation from the requiring activity that an exception, in accordance with paragraph (a)(1), (2), or (3) of this section, applies to the ICT supply or service (see 7.105(b)(5)(iv)). This documentation shall be maintained in the contract file.

39.205 Exemptions.

(a) *Allowable exemptions.* An agency may grant an exemption for the following:

(1) *Undue burden.* When an agency determines the acquisition of ICT conforming with all the applicable ICT accessibility standards would impose an undue burden on the agency, compliance with the ICT accessibility standards is only required to the extent that it would not impose an undue burden. In determining whether conformance to one or more ICT accessibility standards would impose an undue burden, an agency shall consider the extent to which conformance would impose significant difficulty or expense considering the agency resources

available to the program or component for which the ICT supply or service is being procured.

(2) *Fundamental alteration.* When an agency determines that acquisition of ICT that conforms with all applicable ICT accessibility standards would result in a fundamental alteration in the nature of the ICT, such acquisition is required to conform only to the extent that conformance will not result in a fundamental alteration in the nature of the ICT.

(3) *Nonavailability of conforming commercial items.* Where there are no commercial items that fully conform to the ICT accessibility standards, the agency shall procure the supplies or service available in the commercial marketplace that best meets the ICT accessibility standards consistent with the agency's needs.

(b) *Alternative means of access.* An agency shall provide individuals with disabilities access to and use of information and data by an alternative means to meet the identified needs when an exemption in paragraphs (a)(1), (2), or (3) of this section applies.

(c) *Documentation.* When an exemption applies, the contracting officer shall obtain, as part of the requirements documentation, a written determination from the requiring activity explaining the basis for the exemption in paragraphs (a)(1), (2) or (3) of this section. This documentation shall be maintained in the contract file.

(1) *Undue burden.* A determination of undue burden shall address why and to what extent compliance with applicable ICT accessibility standards constitutes an undue burden.

(2) *Fundamental alteration.* A determination of fundamental alteration shall address the extent to which compliance with the applicable ICT accessibility standards would result in a fundamental alteration in the nature of the ICT.

(3) *Nonavailability of conforming commercial items.* A determination of commercial items nonavailability shall include—

(i) A description of the market research performed;

(ii) A listing of the requirements that cannot be met; and

(iii) The rationale for determining that the ICT to be procured best meets the ICT accessibility standards in 36 CFR 1194.1, consistent with the agency's needs.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 19 and 52

[FAC 2021-07; FAR Case 2016-011; Item II; Docket No. 2016-0011; Sequence No. 1]

RIN 9000-AN35

Federal Acquisition Regulation: Revision of Limitations on Subcontracting

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement revised and standardized limitations on subcontracting, including the nonmanufacturer rule, that apply to small business concerns.

DATES: Effective September 10, 2021.

FOR FURTHER INFORMATION CONTACT: Ms. Mahruha Uddowla, Procurement Analyst, at 703-605-2868 or by email at mahruha.uddowla@gsa.gov, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755 or GSARegSec@gsa.gov. Please cite FAC 2021-07, FAR Case 2016-011.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule at 83 FR 62540 on December 4, 2018, to implement regulatory changes made by the Small Business Administration (SBA) in its final rule published in the **Federal Register** at 81 FR 34243 on May 31, 2016, which became effective on June 30, 2016. SBA's final rule implements the statutory requirements of section 1651 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (15 U.S.C. 657s). Section 1651 revised and standardized the limitations on subcontracting, including the nonmanufacturer rule, that apply to small business concerns under FAR part 19. Twenty-nine respondents submitted comments on the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils)

reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of Significant Changes

This final rule makes the following significant changes from the proposed rule:

- *The definition of "similarly situated entity".* The definition of "similarly situated entity" is revised at FAR 19.001 and in FAR clause 52.219-14, Limitations on Subcontracting. It now provides an example of entities having the same small business program status and to specify that the entity must be small under the size standard associated with the North American Industry Classification System (NAICS) code the prime contractor assigned to the subcontract.

- *Applicable dollar threshold.* The final rule reflects the clarification that the nonmanufacturer rule and the limitations on subcontracting apply to set-asides and sole source awards made pursuant to subparts 19.8, 19.13, 19.14, and 19.15, as well as awards using the HUBZone price evaluation preference pursuant to subpart 19.13, regardless of dollar value.

- *HUBZone price evaluation preference.*

- Paragraph (e)(2) is added to FAR 19.507, Solicitation provisions and contract clauses, to clarify that, in solicitations and contracts using the HUBZone price evaluation preference, the contracting officer shall insert the clause at FAR 52.219-14, Limitations on Subcontracting. Paragraph (h)(1)(ii)(B) is added to specify that the contracting officer shall insert the clause at FAR 52.219-33, Nonmanufacturer Rule, in solicitations and contracts when the HUBZone price evaluation preference is used. For the FAR clauses at 52.219-14 and 52.219-33, the prescription also states that the contracting officer shall not insert the clause in the resultant contract if the prospective contractor waived the use of the price evaluation preference or is an other than small business.

- The clause at FAR 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns, is revised to remove the proposed rule definition of "similarly situated entity", and to delete (instead of revising) the new redundant paragraphs (d) and (e), which pertained to the limitation on subcontracting.

- *Limitations on Subcontracting.* FAR clause 52.219-14, Limitations on Subcontracting, is revised to clarify that

this clause applies to contracts using the HUBZone price evaluation preference to award to a HUBZone small business concern unless the concern waived the evaluation preference. Additionally, to provide clarification on calculating the 50 percent limitation for contracts that include both services and supplies (*i.e.*, “mixed contracts”), paragraph (e)(1) of the clause at FAR 52.219–14 is revised to specify that when a contract is assigned a NAICS code for services, the 50 percent limitation shall only apply to the services portion of the contract. Paragraph (e)(2) is revised to specify that when a contract is assigned a NAICS code for supplies, the 50 percent limitation shall only apply to the supply portion of the contract.

- **Nonmanufacturer Rule.** FAR clause 52.219–33, Nonmanufacturer Rule, is revised to clarify the clause applies to contracts using the HUBZone price evaluation preference to award to a HUBZone small business concern unless the concern waived the evaluation preference. Paragraph (c)(2) is revised to remove text concerning an item for a kit that is not produced by small business concerns in the United States or its outlying areas.

- **Revisions to include recent FAR changes.** Prior to publication of this final rule, FAR part 19 and its associated provisions and clauses were substantially revised as a result of FAC 2020–05 (published February 27, 2020, and effective March 30, 2020). As a result, some revisions in the proposed rule are no longer included in this final rule, because the revisions have already been made to the FAR in FAC 2020–05. Other revisions appear in a different location due to the changed landscape of FAR part 19. The final rule also contains revisions that were not in the proposed rule due to changes made in FAC 2020–05. For example, prior to March 30, 2020, the FAR did not include coverage of the limitations on subcontracting and nonmanufacturer rule in subparts 19.8, 19.13, 19.14, and 19.15; FAC 2020–05 added coverage tailored for each of those subparts. Due to the standardization of the limitations on subcontracting and nonmanufacturer rule, this final rule removes the coverage from those subparts and consolidates the coverage in subpart 19.5. In addition, as of March 30, 2020, FAR part 19 includes coverage for orders issued directly to one small business under a reserve. This final rule provides guidance on the applicability of the limitations on subcontracting and nonmanufacturer rule for this new topic.

B. Analysis of Public Comments

1. Support for the Rule

Comment: Several respondents expressed support for the rule.

Response: The Councils acknowledge the expressions of support.

2. Faster Implementation

Comment: Several respondents expressed disappointment at the time it took to publish the proposed rule. More specifically, two respondents noted that it had taken over 2 years to publish the proposed rule. One respondent requested immediate implementation of the rule by means of a class deviation for the civilian agencies or an “interim final rule,” noting that it is burdensome for small businesses if one agency has a class deviation in place while others do not. Another respondent also requested issuance of an “interim final rule” and recommended that the FAR Council coordinate with SBA on SBA’s pending rulemaking and issue its own final rule that matches SBA’s final rule.

Response: The Councils acknowledge the length of time between the opening of FAR case 2016–011 and publication of the proposed rule. More time was required to publish the proposed rule due to changes in the rulemaking process that occurred in 2017 to more fully consider the regulatory or deregulatory impact of the rulemaking. The Councils have taken steps to try to shorten the time required to implement SBA’s rules in the FAR. Beginning in 2019, the Councils started working on proposed FAR rules after SBA publishes a proposed rule, instead of waiting for a final rule from SBA. This approach should allow more timely publication of FAR rules implementing SBA rules.

3. Simplified Acquisition Threshold vs. Dollar Value

Comment: Several respondents recommended changing all references to “\$150,000” to “the simplified acquisition threshold (SAT).” Furthermore, two respondents highlighted the fact that SBA updated its regulation at 13 CFR 121.406(d) to reference the term “the simplified acquisition threshold” and that the FAR at 48 CFR 2.101 contains the definition of the SAT.

Response: This final rule has been revised to include recent amendments to the FAR, including the removal of many of the references to the dollar value “\$150,000” (reference FAC 2020–05).

4. Other Pending FAR Rules

Comment: Two respondents pointed out that the proposed text for FAR

52.219–4(e) does not account for the joint venture options afforded to HUBZone small business concerns under SBA’s regulations and requires further revisions to bring the clause into alignment with SBA’s limitations on subcontracting rules for HUBZone joint ventures. Specifically, the respondents are concerned the SBA’s requirement that a HUBZone joint venture partner perform 40 percent of the joint venture’s work, is not being addressed.

Response: A separate FAR case, 2017–019, Policy on Joint Ventures, will address the respondents’ concern. The final rule will address the policy that a HUBZone joint venture partner must perform 40 percent of the joint venture’s work.

5. HUBZone Price Evaluation Preference

Comment: One respondent stated that the clause at FAR 52.219–4 places HUBZone distributors at a significant disadvantage by effectively preventing them from taking advantage of the HUBZone price evaluation preference, because it is not possible for a HUBZone nonmanufacturer to obtain a waiver of the nonmanufacturer rule from SBA for a full-and-open contract. The respondent also stated that the HUBZone nonmanufacturer should be permitted to supply a product of any business when utilizing the HUBZone price evaluation preference. The respondent further stated that if the clause at FAR 52.219–4 continues to require full compliance with the nonmanufacturer rule for HUBZone distributors, then the waiver rules must be modified to permit SBA to issue a waiver of the nonmanufacturer rule, upon request of a HUBZone firm, for a full and open contract when the price evaluation preference is utilized. The respondent further stated that if HUBZone distributors are not permitted to supply products of any size business, the clause at FAR 52.219–4 should be modified to permit HUBZone distributors to provide products of any type of small business rather than the current requirement to supply products made by other HUBZone small businesses.

Response: This final rule is implementing SBA’s final rule published in the **Federal Register** at 81 FR 34243 on May 31, 2016, and the changes requested by the respondent would not be consistent with that SBA rule. An award made using the HUBZone price evaluation preference is considered a HUBZone contract (see 13 CFR 126.600(c) and FAR 2.101). SBA’s regulations regarding the limitations on subcontracting and the nonmanufacturer rule apply to

HUBZone contracts (see 13 CFR 125.6). The Councils have updated the final rule at FAR 19.507(e) and (h) to clarify that solicitations and contracts using the HUBZone price evaluation preference to award to a HUBZone small business concern must include the FAR clauses at 52.219–14, Limitations on Subcontracting, and 52.219–33, Nonmanufacturer Rule. The Councils have also updated the paragraphs entitled “Applicability” in these clauses to clarify their applicability to contracts awarded to a HUBZone small business concern using the HUBZone price evaluation preference and that the limitations on subcontracting and nonmanufacturer rule do not apply if the price evaluation preference is waived by the offeror.

6a. Similarly Situated Entities— Definition

Comment: One respondent requested clarification on which subcontractors count as similarly situated entities. The respondent specifically requested additional examples regarding “standard small business set-asides.”

Response: SBA’s regulation at 13 CFR 125.1 states that “for small business set-aside, partial set-aside, or reserve” a similarly situated entity is “a subcontractor that is a small business concern.” Therefore, the definition of “similarly situated entity” in this final FAR rule has been revised to clarify that, for a small business set-aside, a similarly situated entity is a small business, without regard to socioeconomic status.

6b. Similarly Situated Entities— Loophole for 8(a) Participants

Comment: One respondent stated the proposed rule circumvents FAR 19.808–1(e) by allowing a new ANC or Indian Tribe to win a sole-source follow-on contract and then to subcontract it to the incumbent without competing it, which would increase costs to the Government. The respondent requested language be added to FAR 52.219–14(e)(1) through (4) to prohibit treatment of such a subcontractor as a similarly situated entity.

Response: The FAR does not direct subcontracting decisions of prime contractors. Additionally, SBA’s regulation does not provide that a prime contractor must compete a subcontract before it can award a subcontract, whether or not the award is to a similarly situated entity. This final rule will not be revised to incorporate the requested language as the rule is consistent with SBA’s regulations.

6c. Treatment of Similarly Situated Entity Subcontractors

Comment: One respondent acknowledged the proposed rule properly provides that first-tier subcontracts awarded to a “similarly situated entity” are excluded from the calculation of the 50 percent subcontract amount that cannot be exceeded. However, the respondent points out, the clauses then provide that all work further subcontracted by such similarly situated entity does count toward the 50 percent subcontract amount that cannot be exceeded. The respondent believes this formulation creates an inconsistency among small business programs and an administrative burden for prime contractors and urges that this further limitation be deleted.

Response: SBA’s regulation at 13 CFR 125.6(c) limits similarly situated entities to the first-tier subcontractors. Therefore, this final rule also contains this limitation. Determining compliance with the limitations on subcontracting by including in the calculation subcontracts beyond the prime contractor and first-tier subcontractor creates the possibility that the first-tier subcontractor may subcontract 100% of the work it received from the prime to an entity that is not similarly situated. This would create a loophole for entities that are not small business concerns and would not have qualified to receive the prime contract, to benefit as subcontractors from Government contracts that are set aside for performance by small business concerns. To address these concerns, SBA’s regulations apply the limitations on subcontracting collectively to the prime and any similarly situated first-tier subcontractor. Any work performed by a similarly situated first-tier subcontractor will count toward compliance with the applicable limitation on subcontracting. For purposes of determining whether the prime and its subcontractor complied with the applicable limitation on subcontracting, work that is not performed by the employees of the prime contractor or employees of first-tier similarly situated subcontractors will count as subcontracts performed by non-similarly situated entities. Using similarly situated subcontractors gives the prime contractor greater flexibility but does require monitoring and oversight by the prime contractor to ensure the benefits flow to the intended recipients. The final rule has been revised at FAR 52.219–14 to provide additional clarity on this issue.

6d. Similarly Situated Entities— Interpretation of the Rule

Comment: One respondent requested clarification of its understanding of the proposed rule regarding the prime contractor not completing 50 percent of the work because it subcontracted to a similarly situated entity.

Response: A prime contractor may subcontract more than 50 percent of the work to a similarly situated entity and still comply with the limitations on subcontracting. SBA’s regulation at 13 CFR 125.6(c) provides three examples to illustrate when the prime contractor meets, or fails to meet, the limitations on subcontracting. One example describes an award for supplies to a service-disabled veteran-owned small business (SDVOSB) that subcontracts to a similarly situated entity for 51 percent of the work, which does not violate the limitations on subcontracting. However, any work that the similarly situated entity further subcontracts will be counted toward the 50 percent subcontract limit.

7a. Application of the Limitations on Subcontracting and Nonmanufacturer Rule at or Below the SAT

Comment: Two respondents submitted substantially similar comments suggesting that set-asides below the SAT in all small business and small business socioeconomic categories should be exempt from any limitations on subcontracting, including the nonmanufacturer rule. Another respondent stated the original intent of the nonmanufacturer rule was to promote U.S. innovation in manufacturing and technology by allowing small U.S. manufacturers to compete with large business for Federal Government contracts. This respondent also stated the recent SBA change to raise the value of application of the nonmanufacturer rule to the SAT contradicts this intent and threatens the U.S. Defense Industrial Base.

Response: This rule implements SBA’s policy on the limitations on subcontracting and the nonmanufacturer rule. The rule reflects distinct statutory authorities for setting aside small business procurements and small business socioeconomic category procurements below and above the threshold at 15 U.S.C. 644(j).

For small business socioeconomic category procurements (*i.e.*, a set-aside or sole source contract for 8(a) participants, women-owned small businesses, HUBZone small businesses, or SDVOSBs), the limitations on subcontracting, and the nonmanufacturer rule, apply to

procurements regardless of contract value. The Small Business Act at 15 U.S.C. 657s established the applicability of the limitations on subcontracting and the nonmanufacturer rule for contracts awarded to “covered” small business (or socioeconomic category) concerns “under section 637(a), 637(m), 644(a), 657a, or 657f” of Title 15. Contracts with “covered” concerns under 15 U.S.C. 637(a), 637(m), 657a, and 657f include set-aside or sole source contracts, and any evaluation-preference contracts, regardless of dollar value, for specific small business socioeconomic categories, *i.e.*, small disadvantaged businesses participating in the section 8(a) business development program, women-owned small businesses, HUBZone small businesses, and SDVOSBs.

Set-aside contracts with small business concerns below the threshold (*i.e.*, the simplified acquisition threshold) at 15 U.S.C. 644(j) are not designated as “covered” in section 657s (see SBA’s implementing regulations 13 CFR 125.6(a)). For this reason, contracts resulting from small business set-asides below this threshold would be exempt from the limitations on subcontracting and the nonmanufacturer rule.

7b. Application of the Limitations on Subcontracting and Nonmanufacturer Rule to Commercial Items

Comment: Two respondents commented that the limitations on subcontracting, including those related to the nonmanufacturer rule, should not apply to acquisitions for commercial items and commercially available off-the-shelf (COTS) items because the complex and confusing limits conflict with the straightforward nature of commercial and COTS acquisitions.

Response: The Councils do not concur with this comment. Section 1651 of the NDAA for FY 2013 is silent on its applicability to commercial and COTS items. The corresponding final rule implemented by the SBA in its regulation did not exempt acquisitions of commercial or COTS items from the limitations on subcontracting. Further, the revisions to the limitations on subcontracting reflected in this final FAR rule actually facilitate access to the Federal marketplace for small businesses, simplify the process of tracking costs spent by prime contractors on subcontractors, and make the application of limitations on subcontracting consistent across the small business programs. Exclusion of acquisitions for commercial and COTS items will limit the full realization of these improvements for small businesses and hinder their

participation in Federal procurements as both prime contractors and subcontractors.

8. Limitations on Subcontracting Too Restrictive

Comment: One respondent suggests the proposed rule restricts opportunities for small businesses and discourages subcontracting arrangements. The same respondent recommends eliminating all limitations between prime contractors and subcontractors, regardless of business size.

Response: The rule does not restrict small business subcontracting opportunities nor does it discourage subcontracting arrangements. Rather, the proposed rule provides small businesses with greater flexibility in how they choose to comply with the limitations on subcontracting. Moreover, the new rules make it easier for small business prime contractors to do business with Federal agencies by giving them more choices that are less burdensome and less costly for pursuing and winning larger contracts than before. The rule implements an SBA final rule intended to ensure that the benefits of set-aside contracts flow to the intended beneficiaries. The recommended elimination of all limitations on subcontracting is counter to that intent and is beyond the scope of this rule.

9. Mixed Contracts

Comment: One respondent noted that 13 CFR 125.6(b) discusses the limitations on subcontracting with respect to mixed contracts (*i.e.*, contracts for both supplies and services). The proposed revision to the clause at FAR 52.219–14 failed to address mixed contracts. The respondent proposed bringing the FAR into alignment with SBA’s regulation by adding another subparagraph to address mixed contracts.

Response: According to SBA’s final rule published in the **Federal Register** at 81 FR 34243, on May 31, 2016, SBA’s regulation at 13 CFR 125.6(b) states that, “where a contract combines services and supplies, the contracting officer shall select the appropriate NAICS code” that best describes the principal purpose of the product or service being acquired. The contracting officer’s selection of the applicable NAICS code determines which limitation on subcontracting applies. Thus, for a prime contract that includes both services and supplies, the NAICS code assigned by the contracting officer determines the relevant amount for purposes of calculating compliance with the limitation on subcontracting; *e.g.*,

when a NAICS code for services is assigned, the limitation on subcontracting for services applies to the services portion of the contract. Likewise, for subcontracts, the prime contractor will assign the NAICS. To provide clarification on calculating the 50 percent limitation for contracts that include both services and supplies (*i.e.*, “mixed contracts”), this final rule revises the clause at 52.219–14, Limitations on Subcontracting, to specify that when a contract is assigned a NAICS code for services, the 50 percent limitation applies only to the services portion of the contract, and that when a contract is assigned a NAICS code for supplies, the 50 percent limitation applies only to the supply portion of the contract.

10. Revisions to the Clause on the Nonmanufacturer Rule

Comment: One respondent indicated that the proposed solicitation provision does not state that the nonmanufacturer rule requirements can be waived by SBA, either on an individual or class basis; and furthermore, the provision does not state that nonmanufacturers need to have no more than 500 employees. The respondent further stated that the SBA has proposed to eliminate its rule about “kit assemblers,” and suggested that the Council similarly remove all rules about “kit assemblers.”

Response: The Councils reviewed the area of the rule identified by the respondent and found that the SBA waiver information for the nonmanufacturer rule is not appropriate for inclusion in the contract clause at 52.219–33, Nonmanufacturer Rule. FAR 19.507(h)(2) instructs contracting officers not to use 52.219–33 when SBA has waived the nonmanufacturer rule. Individual and class waivers of the nonmanufacturer rule are addressed in the final rule at FAR 19.505(c).

The size standard for nonmanufacturers is located in the solicitation provisions that contain the requirement for offerors to represent size status (*e.g.*, 52.219–1, Small Business Program Representations). There is no need to include it in the clause at 52.219–33, which does not address representation of size status.

The Councils found that removing the text on kit assemblers from the FAR is premature in this final rule, and must be addressed in a separate case. Therefore, the suggested revisions have not been included in the final rule.

11. Orders Under Multiple Award Contracts

Comment: One respondent stated that clarification should be provided for orders set aside for small business under multiple-award contracts regarding whether, for the purpose of applying the limitations on subcontracting and the nonmanufacturer rule, the value is determined at the contract level or at the order level. The respondent further expressed a preference for having the value determined at the individual order level, so that the nonmanufacturer rule would only apply to orders above the simplified acquisition threshold.

Response: The prescriptions for the clauses at FAR 52.219–14, Limitations on Subcontracting, and 52.219–33, Nonmanufacturer Rule, specify use of the clauses when “any portion of the requirement is set aside for small business and is expected to exceed the simplified acquisition threshold”. The prescriptions also specify use of the clauses in multiple-award contracts when orders may be set aside for small business because the clauses apply to orders that are set aside for small business under multiple-award contracts. The applicability of the limitations on subcontracting and the nonmanufacturer rule is determined partly by whether the contract or the order is being set aside for small business. If an order is set aside for small business, the clause applies to the order if it exceeds the simplified acquisition threshold (see 52.219–14(c)(4) and 52.219–33(b)(2)(iii)). Alternatively, if a multiple-award contract is set aside for small business, the clause applies to the contract if it exceeds the simplified acquisition threshold.

12a. Additional SBA Rule—Hazardous Waste Industry

Comment: Six respondents stated the hazardous waste industry should be excluded from the limitations on subcontracting as disposal facilities and transportation costs are prohibitively expensive for small businesses to own and operate. Therefore, small businesses subcontract out these services, which would cause them to exceed the limitations on subcontracting.

Two respondents stated environmental remediation requires the purchase of significant materials, which is similar to construction. The respondents requested these materials be excluded from the limitations on subcontracting.

Response: These changes are included in SBA’s final rule at 13 CFR 125.6(a), published in the **Federal Register** on

November 29, 2019 (84 FR 65647). SBA’s rule updates the limitations on subcontracting. A new FAR case would have to be opened to implement the additional changes, which require public comment under 41 U.S.C. 1707 prior to implementation in the FAR. Therefore, the suggested changes are not incorporated in this final rule.

12b. Additional SBA Rule—Independent Contractors

Comment: Two respondents suggested additional language be added to the proposed rule to define an independent contractor. One respondent requested that the term “independent contractor” be removed from the rule. One respondent recommended that independent contractors should not be subject to FAR 44.201–1, Consent requirements.

Response: SBA made clarifications regarding independent contractors in its final rule, published in the **Federal Register** on November 29, 2019 (84 FR 65647), which updates the limitations on subcontracting. Those changes are beyond the scope of this FAR case. A new FAR case would have to be opened to implement additional changes in the FAR, including publication for notice and comment if necessary. The suggested changes are not consistent with the SBA’s regulations which are being implemented in this final FAR rule, and therefore will not be included in this final FAR rule.

12c. Additional SBA Rule—Exclusion of Materials and Other Direct Costs From the Limitation on Subcontracting for Services

Comment: Four respondents stated the cost of materials and other direct costs for services should be excluded from the limitations on subcontracting, which would treat these contracts the same as supply contracts.

Response: This rule implements SBA’s final rule published in the **Federal Register** at 81 FR 34243 on May 31, 2016, which does not provide an exclusion for the cost of materials or other direct costs. These changes are in SBA’s final rule, published in the **Federal Register** on November 29, 2019 (84 FR 65647), which updates the limitations on subcontracting. A new FAR case would have to be opened to implement the additional changes.

12d. Additional SBA Rule—Inconsistencies Between FAR and SBA

Comment: Two respondents stated that because of SBA’s proposed rule published December 4, 2018, 83 FR 62516, the FAR will be inconsistent with SBA’s regulations once again,

which will create new confusion. They requested the FAR Council issue an interim final rule.

Response: SBA’s final rule published November 29, 2019, 84 FR 6564, made updates to the limitations on subcontracting. A new FAR case would have to be opened to implement the SBA’s November 29, 2019 changes. The FAR Council may issue an interim rule without first publishing a proposed rule only when urgent and compelling circumstances exist, which justify changing the FAR prior to seeking public comment.

13. Information Technology Value Added Resellers

Comment: One respondent requested a clarification of whether the nonmanufacturer rule applies to Information Technology Value Added Resellers (ITVAR), NAICS code 541519.

Response: An ITVAR provides a total solution to information technology acquisitions by providing multi-vendor hardware and software along with significant value added services. SBA’s regulation at footnote 18 within 13 CFR 121.201 states that the nonmanufacturer rule applies to an ITVAR procurement unless SBA has issued a class or contract-specific waiver of the nonmanufacturer rule.

14. Out of Scope

Comment: One respondent stated DoD Class Deviation 2019–O0003, Limitations on Subcontracting for Small Business, contains a requirement stating, if the contract falls below the SAT, it is not a complete waiver of the nonmanufacturer rule because the small business must still provide the end item of any domestic firm. The respondent noted this same requirement is not present in the current SBA regulations, nor in the current proposed rule change and encourages the Councils to proceed with issuing a final rule that does not include this restriction. A second respondent recommended that clear definitions of subcontract and subcontractor should be provided to regulate the use of independent contractors (consultants) and ancillary services, as well as to formulate policies and mechanisms with respect to consent to subcontract, flow down of contract provisions, and other FAR requirements. A third respondent asked if the proposed regulation would take precedence over a specified agency’s clause.

Response: These comments are beyond the scope of this rule. SBA’s waiver of the nonmanufacturer rule (13 CFR 121.406(b)(7)) has no effect on requirements external to the Small

Business Act which involve domestic sources of supply, such as the Buy American Act or the Trade Agreements Act. Class deviations issued by individual agencies do not impact the text of this rule. In many instances the definition of subcontractor used in the FAR varies depending on which statutes or FAR regulations apply. It is not possible to use the same definition across all the parts of the FAR. Agency regulations and guidance must be consistent with the FAR unless an authorized deviation (see FAR 1.404) is in place.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

The Federal Acquisition Regulatory (FAR) Council has made the following determinations with respect to the rule's application of section 1651 of the NDAA for FY 2013 to contracts at or below the simplified acquisition threshold (SAT) and for the acquisition of commercial items, including commercially available off-the-shelf (COTS) items. Discussion of these determinations is set forth below.

A. Applicability to Contracts at or Below the SAT

Pursuant to 41 U.S.C. 1905, a provision of law is not applicable to acquisitions at or below the SAT unless the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1905 and states that the law applies to acquisitions at or below the SAT; or (iii) the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT. If none of these conditions are met, the FAR is required to include the statutory requirement(s) on a list of provisions of law that are inapplicable to acquisitions at or below the SAT.

The purpose of this rule is to implement section 1651 of the NDAA for FY 2013. Section 1651 provides revised limitations on subcontracting that apply across all small business programs. It also requires that the limitations on subcontracting be determined based on the percentage of the overall award amount that a prime contractor spends on its subcontractors. In addition, section 1651 provides that the percentage of the award amount that the prime contractor spends on subcontractors who are similarly situated entities is not considered subcontracted for purposes of the

limitations on subcontracting in section 1651.

These statutory requirements are reflected in SBA's final rule published in the **Federal Register** at 81 FR 34243, on May 31, 2016, which did not exempt acquisitions at or below the SAT that are set aside for, or awarded on a sole-source basis to, 8(a) program participants, HUBZone, service-disabled veteran-owned, women-owned, or economically disadvantaged women-owned small business concerns; or that use the HUBZone price evaluation preference to award to a HUBZone small business concern. SBA's final rule did exempt acquisitions at or below the SAT that are set aside for small businesses.

The law is silent on the applicability of these requirements to acquisitions at or below the SAT and does not independently provide for criminal or civil penalties; nor does it include terms making express reference to 41 U.S.C. 1905 and its application to acquisitions at or below the SAT. Therefore, it does not apply to acquisitions at or below the SAT unless the FAR Council makes a written determination as provided at 41 U.S.C. 1905.

Application of the law to acquisitions at or below the SAT will maximize the positive impact set-aside and sole-source contracts provide for small businesses in the socioeconomic programs (e.g., HUBZone, 8(a), service-disabled veteran-owned, and women-owned small business programs) by ensuring these benefits extend to the many contracts valued below the SAT. According to the Federal Procurement Data System, an average of 283,374 contracts per year resulted from FAR part 19 set-asides and sole-source awards at or below the simplified acquisition threshold during fiscal years 2016–2018. Failure to apply section 1651 below the SAT would exclude a significant number of acquisitions, contrary to the goal of promoting opportunities for small businesses in the Federal marketplace to the maximum extent possible. Further, the FAR clauses imposing limitations on subcontracting and the nonmanufacturer rule are currently prescribed for use in solicitations and contracts at or below the SAT that are set aside for, or awarded on a sole-source basis to, 8(a) program participants, HUBZone, service-disabled veteran-owned, women-owned, or economically disadvantaged women-owned small business concerns; or that use the HUBZone price evaluation preference to award to a HUBZone small business concern. Making section 1651 applicable to acquisitions at or below the SAT would allow the amended

versions of those clauses, reflecting the requirements of section 1651, to be incorporated into such solicitations and contracts. Exclusion of the amended clauses from those documents would create confusion among contractors and the Federal contracting workforce. Finally, under the FAR clauses currently incorporated into those documents, contractors are already required to comply with the limitations on subcontracting and the nonmanufacturer rule. The new requirements will result in substantial savings for contractors.

For these reasons, it is in the best interest of the Federal Government to apply the requirements of the rule to acquisitions at or below the SAT.

B. Applicability to Contracts for the Acquisition of Commercial Items

Pursuant to 41 U.S.C. 1906, acquisitions of commercial items (other than acquisitions of COTS items, which are addressed in 41 U.S.C. 1907) are exempt from a provision of law unless the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1906 and states that the law applies to acquisitions of commercial items; or (iii) the FAR Council makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of commercial items from the provision of law. If none of these conditions are met, the FAR is required to include the statutory requirement(s) on a list of provisions of law that are inapplicable to acquisitions of commercial items.

The purpose of this rule is to implement section 1651 of the NDAA for FY 2013. Section 1651 provides revised limitations on subcontracting that apply across all small business programs. It also requires that the limitations on subcontracting be determined based on the percentage of the overall award amount that a prime contractor spends on its subcontractors. In addition, section 1651 provides that the percentage of the award amount that the prime contractor spends on subcontractors who are similarly situated entities is not considered subcontracted for purposes of the limitations on subcontracting in section 1651.

These statutory requirements are reflected in SBA's final rule published in the **Federal Register** at 81 FR 34243, on May 31, 2016, which did not exempt acquisitions of commercial items.

The law is silent on the applicability of these requirements to acquisitions of commercial items and does not independently provide for criminal or

civil penalties; nor does it include terms making express reference to 41 U.S.C. 1906 and its application to acquisitions of commercial items. Therefore, it does not apply to acquisitions of commercial items unless the FAR Council makes a written determination as provided at 41 U.S.C. 1906.

The law furthers the Administration's goal of simplifying the acquisition process and facilitating easier access to the Federal marketplace, in this case for small business contractors who make up an important component of the Government's industrial base. It advances the interests of small business prime contractors by making it easier to comply with the limitations on subcontracting, potentially allowing those contractors to compete for larger contracts than they could in the past. The law also advances the interests of small business subcontractors by encouraging small business prime contractors to award more subcontracts to similarly situated small businesses. Exclusion of a large segment of Federal contracting, such as acquisitions for commercial items, would limit the full implementation of these objectives. Further, the primary FAR clauses implementing the limitations on subcontracting and the nonmanufacturer rule are currently prescribed for use in solicitations and contracts for commercial items. Making section 1651 applicable to acquisitions for commercial items would allow the amended versions of those clauses, reflecting the requirements of section 1651, to be included in such solicitations and contracts. Exclusion of those amended clauses from contracts for commercial items would create confusion among contractors and the Federal contracting workforce. Finally, the burden on contractors would not increase significantly if the requirements of section 1651 were applied to acquisitions for commercial items. Under the FAR clauses currently incorporated into contracts for commercial items, contractors are already required to comply with the limitations on subcontracting and the nonmanufacturer rule. The new requirements will result in substantial savings for contractors.

For these reasons, it is in the best interest of the Federal Government to apply the requirements of the rule to the acquisition of commercial items.

C. Applicability to Contracts for the Acquisition of COTS Items

Pursuant to 41 U.S.C. 1907, acquisitions of COTS items will be exempt from a provision of law unless the law (i) contains criminal or civil

penalties; (ii) specifically refers to 41 U.S.C. 1907 and states that the law applies to acquisitions of COTS items; (iii) concerns authorities or responsibilities under the Small Business Act (15 U.S.C. 644) or bid protest procedures developed under the authority of 31 U.S.C. 3551 *et seq.*, 10 U.S.C. 2305(e) and (f), or 41 U.S.C. 3706 and 3707; or (iv) the Administrator for Federal Procurement Policy makes a written determination and finding that would not be in the best interest of the Federal Government to exempt contracts for the procurement of COTS items from the provision of law. If none of these conditions are met, the FAR is required to include the statutory requirement(s) on a list of provisions of law that are inapplicable to acquisitions of COTS items.

The purpose of this rule is to implement section 1651 of the NDAA for FY 2013 (codified at 15 U.S.C. 657s). Section 1651 provides revised limitations on subcontracting that apply across all small business programs. It also requires that the limitations on subcontracting be determined based on the percentage of the overall award amount that a prime contractor spends on its subcontractors. In addition, section 1651 provides that the percentage of the award amount that the prime contractor spends on subcontractors who are similarly situated entities is not considered subcontracted for purposes of the limitations in section 1651.

These statutory requirements are reflected in SBA's final rule published in the **Federal Register** at 81 FR 34243, on May 31, 2016, which did not exempt acquisitions of COTS items.

The law is silent on the applicability of these requirements to acquisitions of COTS items and does not independently provide for criminal or civil penalties; nor does it concern bid protest procedures developed under the authority of the relevant statutes. Therefore, it does not apply to acquisitions of COTS items unless the Administrator for Federal Procurement Policy makes a written determination as provided at 41 U.S.C. 1907.

The law furthers the Administration's goal of simplifying the acquisition process and facilitating easier access to the Federal marketplace, in this case for small business contractors who make up an important component of the Government's industrial base. It advances the interests of small business prime contractors by making it easier to comply with the limitations on subcontracting, potentially allowing those contractors to compete for larger contracts than they could in the past.

The law also advances the interests of small business subcontractors by encouraging small business prime contractors to award more subcontracts to similarly situated small businesses. Exclusion of a large segment of Federal contracting, such as acquisitions for COTS items, would limit the full implementation of these objectives. Further, FAR clauses imposing limitations on subcontracting and the nonmanufacturer rule are currently prescribed for use in solicitations and contracts for COTS items. Making section 1651 applicable to acquisitions of COTS items would allow the amended versions of those clauses, reflecting the requirements of section 1651, to be incorporated into such solicitations and contracts. Exclusion of the amended clauses from those documents would create confusion among contractors and the Federal contracting workforce. Finally, the burden on contractors would not increase significantly if the requirements of section 1651 were applied to acquisitions for COTS items. Under the FAR clauses currently incorporated into contracts for those items, contractors are already required to comply with the limitations on subcontracting and the nonmanufacturer rule. The new requirements will result in substantial savings for contractors.

For these reasons, it is in the best interest of the Federal Government to apply the requirements of the rule to the acquisition of COTS items.

IV. Expected Cost Savings

The purpose of this rule is to implement statutory authorities and SBA regulations that are designed to make it easier and less burdensome for small business prime contractors to comply with requirements related to how much work they may subcontract under Federal contracts, including task and delivery orders under those contracts (*i.e.*, the "limitations on subcontracting"). The changes to these requirements would both ease compliance costs and provide more authorized ways to subcontract. Section 1651 of the NDAA for FY 2013 revised and standardized the limitations on subcontracting, including the nonmanufacturer rule. The nonmanufacturer rule is the requirement that the prime contractor, who is a reseller of a product (*i.e.*, a "nonmanufacturer"), provide an end product manufactured by a small business in the United States or its outlying areas. The limitations on subcontracting and the nonmanufacturer rule are meant to

ensure that the benefits of contracts and orders awarded to small businesses flow to the intended beneficiaries.

Prior to section 1651, the limitations on subcontracting and the nonmanufacturer rule were inconsistent across the small business programs. For example, under the 8(a) and WOSB Programs, the prime contractor was required to perform a certain percentage of work itself, whereas under the HUBZone and SDVOSB Programs, the prime contractor could include subcontracts to other HUBZone small business or SDVOSB concerns in the percentage of work it performed. Similarly, with regard to the nonmanufacturer rule, a prime contractor for a contract or order set aside or awarded on a sole-source basis under the HUBZone Program was required to provide products manufactured by another HUBZone small business, but for awards under the other small business programs, the prime contractor was required to provide products manufactured by any small business.

In addition, the basis of the limitations on subcontracting has

changed. Prior to section 1651, the limitations on subcontracting were calculated as a percentage of work to be performed by a prime contractor; the calculation was based on the contractor’s costs to perform the contract (e.g., salaries and other allowable costs under FAR part 31). As a result of section 1651, the limitations on subcontracting will be calculated as a percentage of the overall contract or order amount (i.e., the contract price, including costs and profit or fee) to be spent by the prime contractor on subcontractors. As a result, for the purpose of compliance with the limitations on subcontracting the prime contractor no longer has to track the percentage of costs incurred that it spends performing work itself. It only has to track the percentage of the overall award amount (i.e., contract price) that it spends on subcontractors. For small businesses, this change will reduce the burden associated with tracking and documenting compliance with the limitations on subcontracting.

Section 1651 also applied the concept of “similarly situated entities” to all small business programs. A similarly

situated entity is a small business subcontractor that has the same small business program status as that which qualified the prime contractor for the prime contract. The percentage of the contract or order amount that the prime contractor spends on subcontractors who are similarly situated entities is not considered subcontracted for purposes of compliance with the limitations on subcontracting. Prior to section 1651, small businesses that wanted to work together to comply with the limitations on subcontracting were required to form a joint venture or a new legal entity (except in small business programs where the concept of similarly situated entities was already applied). The concept of similarly situated entities eliminates the need for paperwork, coordination, and other costs associated with forming such a joint venture or new legal entity simply to comply with the limitations on subcontracting.

These important changes allow small businesses greater flexibility on how they choose to comply with the limitations on subcontracting. The impact is illustrated in the following example of a non-construction contract:

Limitations on subcontracting	Previous	New
Contract Value	\$1,000	\$1,000.
Small Business’ Cost of Contract Performance incurred for personnel.	\$800	Not tracked.
LOS Requirement	Contractor must spend \$400—i.e., 50 percent of the \$800 cost of contract performance incurred for its own personnel. The contract value (i.e., \$1,000) is not used to determine compliance under previous rule..	Contractor may pay up to \$500 (50 percent of the contract price) to a non-similarly situated entity, e.g., large business, AND/OR subcontract to a similarly situated entity without limitation.

Under the current limitations on subcontracting, the small business only has one way to comply. In the example above, it must spend at least \$400 on its own employees and, therefore, must be able to track its contract costs to ensure compliance with the requirement.

Under the new limitations on subcontracting, there are multiple and less costly ways to comply, and the small business can choose the most efficient option, as demonstrated below:

- The small business can continue to spend \$400 on its own employees and subcontract \$400 to any business, as it did to comply with the previous limitations on subcontracting. Because the prime contractor is not subcontracting more than \$500 to businesses that are not similarly situated entities, it will meet the new limitations on subcontracting.
- The small business can subcontract to any combination of similarly situated and non-similarly situated entities and remain in compliance with the new

limitations on subcontracting as long as the amount spent on non-similarly situated entities does not exceed \$500. For example, the small business can subcontract \$500 to any business and spend \$300 on its own employees, or subcontract \$500 to any business, \$100 to a similarly situated entity, and spend only \$200 on its own employees.

SBA’s final rule specified that similarly situated entities must also comply with the limitations on subcontracting. As part of implementing section 1651, the SBA made a few more revisions to their regulations that are reflected in this FAR rule:

- The nonmanufacturer rule does not apply to small business set-asides at or below the simplified acquisition threshold. Note that currently, the FAR applies the nonmanufacturer rule to small business set-asides above \$25,000.
- Waivers of the nonmanufacturer rule will now be allowed for procurements under the HUBZone Program. Such waivers allow a

HUBZone small business to provide the product of any size business.

- In the event SBA grants a nonmanufacturer rule waiver after the issuance of a solicitation, but before award, contracting officers are required to amend that solicitation to notify potential offerors of the waiver and to give them more time to submit proposals.

The above changes drive both costs and savings; however, the rule is expected to result in net savings to small entities, as well as to the Government. Since the rule will only revise regulations under the various small business programs, there will be no costs or savings to large businesses. The expected net savings of the rule, calculated at present value using a 7-percent discount rate over ten years, is estimated to be \$189,298,957.

To access the full regulatory cost analysis for this rule, go to the Federal eRulemaking Portal at <http://www.regulations.gov>, search for “FAR

Case 2016–011,” click “Open Docket,” and view “Supporting Documents.”

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Office of Information and Regulatory Affairs in the Office of Management and Budget has determined that this is a significant regulatory action and, therefore, was subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD, GSA and NASA will submit for an interim or final rule a report to each House of the Congress and to the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs in the Office of Management and Budget has determined that this is not a major rule under 5 U.S.C. 804.

VII. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

DoD, GSA, and NASA are amending the Federal Acquisition Regulation (FAR) to implement changes made by the Small Business Administration (SBA) in its final rule published in the **Federal Register** at 81 FR 34243 on May 31, 2016. SBA’s final rule implements the statutory requirements of section 1651 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013, which revised and standardized the limitations on subcontracting, including the nonmanufacturer rule, that apply to small business concerns under FAR part 19 procurements.

The objectives of this rule are to apply the limitations on subcontracting consistently to the small business concerns identified in FAR 19.000(a)(3) and to change the method of calculation to the percentage of the award amount to be spent on subcontractors.

There were no significant issues raised by the public in response to the Initial Regulatory Flexibility Analysis.

This rule may have a positive economic impact on small businesses, because it will make application of the limitations on subcontracting and the nonmanufacturer rule uniform across all small business programs and make it easier to calculate compliance with the limitations on subcontracting. Through the ability to meet the limitations by means of subcontracts with similarly situated entities, this rule will make it possible for small businesses to compete for larger contracts than they could in the past. The rule will encourage small business prime contractors to award subcontracts to other, similarly situated, small businesses.

According to the System for Award Management (SAM), there are 315,655 active registrants that are considered small for at least one North American Industry Classification System code. Firms looking to be prime contractors for Government contracts are required to register in SAM. However, firms do not need to register in SAM to participate in subcontracting. Thus, the number of small business firms impacted by this rule may be greater than the number of firms registered in SAM.

This rule does not include any new reporting or recordkeeping requirements for small entities. This rule does not include any new compliance requirements. The FAR already required compliance with the limitations on subcontracting and the nonmanufacturer rule for small business prime contractors receiving awards pursuant to part 19. This rule simply revises the limitations on subcontracting and the nonmanufacturer rule to match that required by section 1651 of the NDAA for FY 2013. According to the Federal Procurement Data System, there were approximately 70,992 contracts per year in fiscal years 2016–2018 under all the small business programs to which the limitations on subcontracting or the nonmanufacturer rule would apply.

This rule is not expected to have a negative impact on the majority of small entities.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of SBA.

VIII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 3245–0374, titled: *Certification for the Women-Owned Small Business Federal Contract Program*.

List of Subjects in 48 CFR Parts 19 and 52

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA are amending 48 CFR parts 19 and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 19 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 19—SMALL BUSINESS PROGRAMS

■ 2. Amend section 19.001 by removing the definition of “Nonmanufacturer” and adding, in alphabetical order, the definition of “Similarly situated entity” to read as follows:

19.001 Definitions.

* * * * *

Similarly situated entity means a first-tier subcontractor, including an independent contractor, that—

(1) Has the same small business program status as that which qualified the prime contractor for the award (*e.g.*, for a small business set-aside contract, any small business concern, without regard to socioeconomic status); and (2) Is considered small for the size standard under the NAICS code the prime contractor assigned to the subcontract.

■ 3. Revise section 19.505 to read as follows:

19.505 Limitations on subcontracting and nonmanufacturer rule.

(a) *Applicability.* (1) This section applies to small business set-asides above the simplified acquisition threshold and orders issued directly to a small business in accordance with 19.504(c)(1)(ii) above the simplified acquisition threshold.

(2) This section applies, regardless of dollar value, to the following awards under subparts 19.8, 19.13, 19.14, and 19.15:

(i) Contracts that are set aside.
(ii) Contracts that are awarded on a sole-source basis.
(iii) Orders that are set-aside as described in 8.405–5 and 16.505(b)(2)(i)(F).

(iv) Orders that are issued directly in accordance with 19.504(c)(1)(ii).

(v) Contracts that use the HUBZone price evaluation preference to award to a HUBZone small business concern unless the concern waived the evaluation preference.

(b)(1) *Limitations on subcontracting.* A small business concern subject to the limitations on subcontracting is required to comply with the following:

(i) For a contract or order assigned a North American Industry Classification System (NAICS) code for services (except construction), the concern will not pay more than 50 percent of the amount paid by the Government for contract performance to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the concern's 50 percent subcontract amount that cannot be exceeded. When a contract includes both services and supplies, the 50 percent limitation shall apply only to the service portion of the contract.

(ii) For a contract or order assigned a NAICS code for supplies or products (other than a procurement from a nonmanufacturer of such supplies or products), the concern will not pay more than 50 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the concern's 50 percent subcontract amount that cannot be exceeded. When a contract includes both supplies and services, the 50 percent limitation shall apply only to the supply portion of the contract.

(iii) For a contract or order assigned a NAICS code for general construction, the concern will not pay more than 85 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the concern's 85 percent subcontract amount that cannot be exceeded.

(iv) For a contract or order assigned a NAICS code for construction by special trade contractors, the concern will not pay more than 75 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the concern's 75 percent subcontract amount that cannot be exceeded.

(2) *Compliance period.* A small business contractor subject to the limitations on subcontracting is required to comply with the limitations on subcontracting—

(i) For a contract that has been set aside, either by the end of the base term

and then by the end of each subsequent option period, or by the end of the performance period for each order issued under the contract, at the contracting officer's discretion; and

(ii) For an order set aside under a contract as described in 19.504(a), (b), or (c)(1)(i) or an order issued in accordance with 19.504(c)(1)(ii), by the end of the performance period for the order.

(c) *Nonmanufacturer rule.* The nonmanufacturer rule applies to nonmanufacturers in accordance with paragraph (c)(1) of this section and to kit assemblers who are nonmanufacturers in accordance with paragraph (c)(2) of this section.

(1) *Nonmanufacturers.* Any concern, including a supplier, that is awarded a contract or order subject to the nonmanufacturer rule, other than a construction or service acquisition, but proposes to furnish an end item that it did not itself manufacture, process, or produce (*i.e.*, a "nonmanufacturer"), is required to—

(i) Provide an end item that a small business has manufactured, processed, or produced in the United States or its outlying areas (see paragraph (c)(3) of this section for determining the manufacturer of an end item);

(ii) Not exceed 500 employees;

(iii) Be primarily engaged in the retail or wholesale trade and normally sell the type of item being supplied; and

(iv) Take ownership or possession of the item(s) with its personnel, equipment, or facilities in a manner consistent with industry practice; for example, providing storage, transportation, or delivery.

(2) *Kit assemblers.* When the end item being acquired is a kit of supplies—

(i) The offeror may not exceed 500 employees; and

(ii) At least 50 percent of the total cost of the components of the kit shall be manufactured, processed, or produced in the United States or its outlying areas by business concerns that are small under the size standards for the NAICS codes of the components of the kit.

(3) *Identification of manufacturers.* For the purposes of applying the nonmanufacturer rule, the manufacturer, processor, or producer is the concern that manufactures, processes, or produces an end item with its own facilities (*i.e.*, transforms raw materials, miscellaneous parts, or components into the end item being acquired). See 13 CFR 121.406(b)(2).

(4) *Waiver of nonmanufacturer rule.*

(i) The SBA may grant an individual or a class waiver to the nonmanufacturer rule to allow a nonmanufacturer to provide an end item of an other than small business without regard to the

place of manufacture, processing, or production.

(A) *Class waiver.* An agency may request that SBA waive the requirement at paragraph (c)(1)(i) or (c)(2)(ii) of this section for a specific product or class of products. See 13 CFR 121.1202 for an explanation of when SBA will issue a class waiver.

(B) *Individual waiver.* The contracting officer may also request a waiver of the requirements at paragraph (c)(1)(i) or (c)(2)(ii) of this section for an individual acquisition once the contracting officer determines through market research that no known small business manufacturers, processors, or producers in the United States or its outlying areas can reasonably be expected to offer an end item meeting the requirements of the solicitation. This type of waiver is known as an individual waiver and would apply only to a specific acquisition.

(ii) *Waiver requests.* Requests for waivers shall include the content specified at 13 CFR 121.1204 and shall be sent via email to nmrwaivers@sba.gov or by mail to the—Director, Office of Government Contracting, Small Business Administration, 409 Third Street SW, Washington, DC 20416.

(iii) *List of class waivers.* For the most current listing of class waivers, contact the SBA Office of Government Contracting or go to <https://www.sba.gov/document/support-non-manufacturer-rule-class-waiver-list>.

(iv) *Notification of waiver.* The contracting officer shall provide potential offerors with written notification of any class or individual waiver in the solicitation. If providing the notification after solicitation issuance, the contracting officer shall provide potential offerors a reasonable amount of additional time to respond to the solicitation.

(5) *Multiple-item acquisitions.* (i) If at least 50 percent of the estimated contract value is composed of items that are manufactured, processed, or produced by small business concerns, then a waiver of the nonmanufacturer rule is not required. There is no requirement that each item acquired in a multiple-item acquisition be manufactured, processed, or produced by a small business in the United States or its outlying areas.

(ii) If more than 50 percent of the estimated acquisition cost is composed of items manufactured, processed, or produced by other than small business concerns, then a waiver is required. SBA may grant an individual waiver for one or more items in an acquisition in order to ensure that at least 50 percent

of the cost of the items to be supplied by the nonmanufacturer comes from small business manufacturers, processors, and producers in the United States or its outlying areas or are subject to a waiver.

(iii) If a small business offeror is both a manufacturer of item(s) and a nonmanufacturer of other item(s) for an acquisition, the contracting officer shall apply the manufacturer size standard.

■ 4. Amend section 19.507 by revising paragraphs (e) and (h) to read as follows:

19.507 Solicitation provisions and contract clauses.

* * * * *

(e) The contracting officer shall insert the clause at 52.219–14, Limitations on Subcontracting, in solicitations and contracts—

(1) For supplies, services, and construction, if any portion of the requirement is to be set aside for small business and the contract amount is expected to exceed the simplified acquisition threshold, and in any solicitations and contracts that are set aside or awarded on a sole-source basis in accordance with subparts 19.8, 19.13, 19.14, or 19.15, regardless of dollar value. This includes multiple-award contracts when orders may be set aside for small business concerns, as described in 8.405–5 and 16.505(b)(2)(i)(F), and when orders may be issued directly to a small business concern as described in 19.504(c)(1)(ii). For contracts that are set aside, the contracting officer shall indicate in paragraph (f) of the clause whether compliance with the limitations on subcontracting is required at the contract or order level;

(2) *Using the HUBZone price evaluation preference.* However, if the prospective contractor waived the use of the price evaluation preference, or is an other than small business, do not insert the clause in the resultant contract.

* * * * *

(h)(1) The contracting officer shall insert the clause at 52.219–33, Nonmanufacturer Rule, in solicitations and contracts (including multiple-award contracts when orders may be set aside for small business concerns as described in 8.405–5 and 16.505(b)(2)(i)(F), and when orders may be issued directly to a small business concern as described in 19.504(c)(1)(ii)), when—

(i) the item being acquired has been assigned a manufacturing or supply NAICS code, and—

(ii)(A) Any portion of the requirement is to be—

(1) Set aside for small business and is expected to exceed the simplified acquisition threshold; or

(2) Set aside or awarded on a sole-source basis in accordance with subparts 19.8, 19.13, 19.14, or 19.15, regardless of dollar value; or

(B) *Using the HUBZone price evaluation preference.* However, if the prospective contractor waived the use of the price evaluation preference, or is an other than small business, do not insert the clause in the resultant contract.

(2) The contracting officer shall not insert the clause at 52.219–33 when the Small Business Administration has waived the nonmanufacturer rule (see 19.505(c)(4)).

19.811–3 [Amended]

■ 5. Amend section 19.811–3 by removing from paragraph (d) “The clause at 52.219–18 with its Alternate I shall be used when” and adding “Use the clause at 52.219–18 with its Alternate I when” in its place.

19.1308 [Removed and Reserved]

■ 6. Remove and reserve section 19.1308.

■ 7. Revise section 19.1309 to read as follows:

19.1309 Contract clauses.

(a) The contracting officer shall insert the clause at 52.219–3, Notice of HUBZone Set-Aside or Sole-Source Award, in solicitations and contracts for acquisitions that are set aside or awarded on a sole-source basis to, HUBZone small business concerns under 19.1305 or 19.1306. This includes multiple-award contracts when orders may be set aside for HUBZone small business concerns as described in 8.405–5 and 16.505(b)(2)(i)(F) or when orders may be issued directly to one HUBZone small business concern in accordance with 19.504(c)(1)(ii).

(b) The contracting officer shall insert the clause at 52.219–4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns, in solicitations and contracts for acquisitions conducted using full and open competition.

(c) For use of clause 52.219–14, Limitations on Subcontracting, see the prescription at 19.507(e).

(d) For use of clause 52.219–33, Nonmanufacturer Rule, see the prescription at 19.507(h).

19.1403 [Amended]

■ 8. Amend section 19.1403 by removing from paragraph (d) “19.1407(c)” and adding “19.505” in its place.

19.1407 [Removed and Reserved]

■ 9. Remove and reserve section 19.1407.

■ 10. Revise section 19.1408 to read as follows:

19.1408 Contract clauses.

(a) The contracting officer shall insert the clause at 52.219–27, Notice of Service-Disabled Veteran-Owned Small Business Set-Aside, in solicitations and contracts for acquisitions that are set aside or awarded on a sole-source basis to, service-disabled veteran-owned small business concerns under 19.1405 and 19.1406. This includes multiple-award contracts when orders may be set aside for service-disabled veteran-owned small business concerns as described in 8.405–5 and

16.505(b)(2)(i)(F) or when orders may be issued directly to one service-disabled veteran-owned small business contractor in accordance with 19.504(c)(1)(ii).

(b) For use of clause 52.219–14, Limitations on Subcontracting, see the prescription at 19.507(e).

(c) For use of clause 52.219–33, Nonmanufacturer Rule, see the prescription at 19.507(h).

19.1507 [Removed and Reserved]

■ 11. Remove and reserve section 19.1507.

■ 12. Revise section 19.1508 to read as follows:

19.1508 Contract clauses.

(a) The contracting officer shall insert the clause at 52.219–29, Notice of Set-Aside for, or Sole-Source Award to, Economically Disadvantaged Women-owned Small Business Concerns, in solicitations and contracts for acquisitions that are set aside or awarded on a sole-source basis to, EDWOSB concerns under 19.1505(b) or 19.1506(a). This includes multiple-award contracts when orders may be set aside for EDWOSB concerns as described in 8.405–5 and 16.505(b)(2)(i)(F) or when orders may be issued directly to one EDWOSB contractor in accordance with 19.504(c)(1)(ii).

(b) The contracting officer shall insert the clause at 52.219–30, Notice of Set-Aside for, or Sole-Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program, in solicitations and contracts for acquisitions that are set aside or awarded on a sole-source basis to WOSB concerns under 19.1505(c) or 19.1506(b). This includes multiple-award contracts when orders may be set aside for WOSB concerns eligible under the WOSB Program as described in 8.405–5 and 16.505(b)(2)(i)(F) or when orders may be issued directly to one

WOSB contractor in accordance with 19.504(c)(1)(ii).

(c) For use of clause 52.219-14, Limitations on Subcontracting, see the prescription at 19.507(e).

(d) For use of clause 52.219-33, Nonmanufacturer Rule, see the prescription at 19.507(h).

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 13. Amend section 52.204-8 by—
a. Revising the date of the provision;
b. Revising paragraph (a)(3);
c. Revising the date of Alternate I; and
d. Revising paragraph (a)(2) of Alternate I.

The revisions read as follows:

52.204-8 Annual Representations and Certifications.

* * * * *

Annual Representations and Certifications (SEP 2021)

(a) * * *

(3) The small business size standard for a concern that submits an offer, other than on a construction or service acquisition, but proposes to furnish an end item that it did not itself manufacture, process, or produce is 500 employees if the acquisition—

(i) Is set aside for small business and has a value above the simplified acquisition threshold;

(ii) Uses the HUBZone price evaluation preference regardless of dollar value, unless the offeror waives the price evaluation preference; or

(iii) Is an 8(a), HUBZone, service-disabled veteran-owned, economically disadvantaged women-owned, or women-owned small business set-aside or sole-source award regardless of dollar value.

* * * * *

Alternate I (SEP 2021).

* * *

(a) * * *

(2) The small business size standard for a concern that submits an offer, other than on a construction or service acquisition, but proposes to furnish an end item that it did not itself manufacture, process, or produce, (i.e., nonmanufacturer), is 500 employees if the acquisition—

(i) Is set aside for small business and has a value above the simplified acquisition threshold;

(ii) Uses the HUBZone price evaluation preference regardless of dollar value, unless the offeror waives the price evaluation preference; or

(iii) Is an 8(a), HUBZone, service-disabled veteran-owned, economically disadvantaged women-owned, or women-owned small business set-aside or sole-source award regardless of dollar value.

* * * * *

- 14. Amend section 52.212-1 by revising the date of the provision and paragraph (a) to read as follows:

52.212-1 Instructions to Offerors—Commercial Items.

* * * * *

Instructions to Offerors—Commercial Items (SEP 2021)

(a) North American Industry Classification System (NAICS) code and small business size standard. The NAICS code(s) and small business size standard(s) for this acquisition appear elsewhere in the solicitation.

However, the small business size standard for a concern that submits an offer, other than on a construction or service acquisition, but proposes to furnish an end item that it did not itself manufacture, process, or produce is 500 employees if the acquisition—

(1) Is set aside for small business and has a value above the simplified acquisition threshold;

(2) Uses the HUBZone price evaluation preference regardless of dollar value, unless the offeror waives the price evaluation preference; or

(3) Is an 8(a), HUBZone, service-disabled veteran-owned, economically disadvantaged women-owned, or women-owned small business set-aside or sole-source award regardless of dollar value.

* * * * *

- 15. Amend section 52.212-5 by revising the date of the clause and paragraphs (b)(11), (b)(12), (b)(19), (b)(21), (b)(22), (b)(23), (b)(24), and (b)(26) to read as follows:

52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (SEP 2021)

* * * * *

(b) * * *

(11) 52.219-3, Notice of HUBZone Set-Aside or Sole-Source Award (SEP 2021) (15 U.S.C. 657a).

(12) 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns (SEP 2021) (if the offeror elects to waive the preference, it shall so indicate in its offer) (15 U.S.C. 657a).

* * * * *

(19) 52.219-14, Limitations on Subcontracting (SEP 2021) (15 U.S.C. 657s).

* * * * *

(21) 52.219-27, Notice of Service-Disabled Veteran-Owned Small Business Set-Aside (SEP 2021) (15 U.S.C. 657f).

(22)(i) 52.219-28, Post-Award Small Business Program Rerepresentation (SEP 2021) (15 U.S.C. 632(a)(2)).

(ii) Alternate I (MAR 2020) of 52.219-28.

(23) 52.219-29, Notice of Set-Aside for, or Sole-Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns (SEP 2021) (15 U.S.C. 637(m)).

(24) 52.219-30, Notice of Set-Aside for, or Sole-Source Award to, Women-Owned

Small Business Concerns Eligible Under the Women-Owned Small Business Program (SEP 2021) (15 U.S.C. 637(m)).

* * * * *

(26) 52.219-33, Nonmanufacturer Rule (SEP 2021) (15 U.S.C. 657s).

* * * * *

- 16. Amend section 52.219-1 by—
a. Revising the date of the provision;
b. Removing from paragraph (b)(1) “—” and adding a space in its place;
c. Revising paragraph (b)(3);
d. Revising the date of Alternate II; and
e. Revising paragraph (b)(2) of Alternate II.

The revisions read as follows:

52.219-1 Small Business Program Representations.

* * * * *

Small Business Program Representations (SEP 2021)

* * * * *

(b) * * *

(3) The small business size standard for a concern that submits an offer, other than on a construction or service acquisition, but proposes to furnish an end item that it did not itself manufacture, process, or produce (i.e., nonmanufacturer), is 500 employees if the acquisition—

(i) Is set aside for small business and has a value above the simplified acquisition threshold;

(ii) Uses the HUBZone price evaluation preference regardless of dollar value, unless the offeror waives the price evaluation preference; or

(iii) Is an 8(a), HUBZone, service-disabled veteran-owned, economically disadvantaged women-owned, or women-owned small business set-aside or sole-source award regardless of dollar value.

* * * * *

Alternate II (SEP 2021).

* * * * *

(b) * * *

(2) The small business size standard for a concern that submits an offer, other than on a construction or service acquisition, but proposes to furnish an end item that it did not itself manufacture, process, or produce (i.e., nonmanufacturer), is 500 employees if the acquisition—

(i) Is set aside for small business and has a value above the simplified acquisition threshold;

(ii) Uses the HUBZone price evaluation preference regardless of dollar value, unless the offeror waives the price evaluation preference; or

(iii) Is an 8(a), HUBZone, service-disabled veteran-owned, economically disadvantaged women-owned, or women-owned small business set-aside or sole-source award regardless of dollar value.

* * * * *

- 17. Amend section 52.219-3 by—
a. Revising the introductory text;
b. Revising the title and date of the clause;

- c. Revising paragraph (a);
 - d. In paragraph (b)(1) removing “sole source” and adding “sole-source” in its place;
 - e. In paragraph (b)(3) removing “set-aside” and adding “set aside” in its place;
 - f. Removing paragraphs (d), (e), and (f);
 - g. Redesignating paragraph (g) as paragraph (d); and
 - h. Removing Alternate I.
- The revisions read as follows:

52.219–3 Notice of HUBZone Set-Aside or Sole-Source Award.

As prescribed in 19.1309(a), insert the following clause:

Notice of HUBZone Set-Aside or Sole-Source Award (SEP 2021)

(a) *Definition.* “HUBZone small business concern,” as used in this clause, means a small business concern, certified by the Small Business Administration (SBA), that appears on the List of Qualified HUBZone Small Business Concerns maintained by the SBA (13 CFR 126.103).

* * * * *

- 18. Amend section 52.219–4 by—
 - a. In the introductory text removing “19.1309(b)(1)” and adding “19.1309(b)” in its place;
 - b. Revising the date of the clause;
 - c. Removing paragraphs (a), (d), and (e);
 - d. Redesignating paragraphs (b), (c) and (f) as paragraphs (a), (b) and (c), respectively;
 - e. Revising newly redesignated paragraph (b); and
 - f. Removing Alternate I.
- The revision reads as follows:

52.219–4 Notice of Price Evaluation Preference for HUBZone Small Business Concerns.

* * * * *

Notice of Price Evaluation Preference for HUBZone Small Business Concerns (SEP 2021)

* * * * *

(b) *Waiver of evaluation preference.* A HUBZone small business concern may elect to waive the evaluation preference, in which case the factor will be added to its offer for evaluation purposes.

Offeror elects to waive the evaluation preference.

* * * * *

- 19. Revise section 52.219–14 to read as follows:

52.219–14 Limitations on Subcontracting.

As prescribed in 19.507(e), insert the following clause:

Limitations on Subcontracting (SEP 2021)

(a) This clause does not apply to the unrestricted portion of a partial set-aside.

(b) *Definition. Similarly situated entity,* as used in this clause, means a first-tier subcontractor, including an independent contractor, that—

(1) Has the same small business program status as that which qualified the prime contractor for the award (e.g., for a small business set-aside contract, any small business concern, without regard to its socioeconomic status); and

(2) Is considered small for the size standard under the North American Industry Classification System (NAICS) code the prime contractor assigned to the subcontract.

(c) *Applicability.* This clause applies only to—

(1) Contracts that have been set aside for any of the small business concerns identified in 19.000(a)(3);

(2) Part or parts of a multiple-award contract that have been set aside for any of the small business concerns identified in 19.000(a)(3);

(3) Contracts that have been awarded on a sole-source basis in accordance with subparts 19.8, 19.13, 19.14, and 19.15;

(4) Orders expected to exceed the simplified acquisition threshold and that are—

(i) Set aside for small business concerns under multiple-award contracts, as described in 8.405–5 and 16.505(b)(2)(i)(F); or

(ii) Issued directly to small business concerns under multiple-award contracts as described in 19.504(c)(1)(ii);

(5) Orders, regardless of dollar value, that are—

(i) Set aside in accordance with subparts 19.8, 19.13, 19.14, or 19.15 under multiple-award contracts, as described in 8.405–5 and 16.505(b)(2)(i)(F); or

(ii) Issued directly to concerns that qualify for the programs described in subparts 19.8, 19.13, 19.14, or 19.15 under multiple-award contracts, as described in 19.504(c)(1)(ii); and

(6) Contracts using the HUBZone price evaluation preference to award to a HUBZone small business concern unless the concern waived the evaluation preference.

(d) *Independent contractors.* An independent contractor shall be considered a subcontractor.

(e) *Limitations on subcontracting.* By submission of an offer and execution of a contract, the Contractor agrees that in performance of a contract assigned a North American Industry Classification System (NAICS) code for—

(1) Services (except construction), it will not pay more than 50 percent of the amount paid by the Government for contract performance to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the prime contractor’s 50 percent subcontract amount that cannot be exceeded. When a contract includes both services and supplies, the 50 percent limitation shall apply only to the service portion of the contract;

(2) Supplies (other than procurement from a nonmanufacturer of such supplies), it will not pay more than 50 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly

situated entities. Any work that a similarly situated entity further subcontracts will count towards the prime contractor’s 50 percent subcontract amount that cannot be exceeded. When a contract includes both supplies and services, the 50 percent limitation shall apply only to the supply portion of the contract;

(3) General construction, it will not pay more than 85 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the prime contractor’s 85 percent subcontract amount that cannot be exceeded; or

(4) Construction by special trade contractors, it will not pay more than 75 percent of the amount paid by the Government for contract performance, excluding the cost of materials, to subcontractors that are not similarly situated entities. Any work that a similarly situated entity further subcontracts will count towards the prime contractor’s 75 percent subcontract amount that cannot be exceeded.

(f) The Contractor shall comply with the limitations on subcontracting as follows:

(1) For contracts, in accordance with paragraphs (c)(1), (2), (3) and (6) of this clause—

[Contracting Officer check as appropriate.]

___ By the end of the base term of the contract and then by the end of each subsequent option period; or

___ By the end of the performance period for each order issued under the contract.

(2) For orders, in accordance with paragraphs (c)(4) and (5) of this clause, by the end of the performance period for the order.

(g) A joint venture agrees that, in the performance of the contract, the applicable percentage specified in paragraph (e) of this clause will be performed by the aggregate of the joint venture participants.

(End of clause)

- 20. Amend section 52.219–27 by—
- a. Revising the date of the clause;
- b. Removing paragraphs (d) and (e);
- c. Redesignating paragraph (f) as paragraph (d); and
- d. Revising newly redesignated paragraph (d).

The revisions read as follows:

52.219–27 Notice of Service-Disabled Veteran-Owned Small Business Set-Aside.

* * * * *

Notice of Service-Disabled Veteran-Owned Small Business Set-Aside (SEP 2021)

* * * * *

(d) A joint venture may be considered a service-disabled veteran owned small business concern if—

(1) At least one member of the joint venture is a service-disabled veteran-owned small business concern, and makes the following representations:

(i) That it is a service-disabled veteran-owned small business concern, and

(ii) That it is a small business concern under the North American Industry Classification Systems (NAICS) code assigned to the procurement;

(2) Each other concern is small under the size standard corresponding to the NAICS code assigned to the procurement;

(3) The joint venture meets the requirements of 13 CFR 121.103(h); and

(4) The joint venture meets the requirements of 13 CFR 125.15(b).

■ 21. Amend section 52.219–28 by revising the date of the clause and paragraph (e) to read as follows:

52.219–28 Post-Award Small Business Program Rerepresentation.

* * * * *

Post-Award Small Business Program Rerepresentation (SEP 2021)

* * * * *

(e) The small business size standard for a Contractor providing an end item that it does not manufacture, process, or produce itself, for a contract other than a construction or service contract, is 500 employees if the acquisition—

(1) Was set aside for small business and has a value above the simplified acquisition threshold;

(2) Used the HUBZone price evaluation preference regardless of dollar value, unless the Contractor waived the price evaluation preference; or

(3) Was an 8(a), HUBZone, service-disabled veteran-owned, economically disadvantaged women-owned, or women-owned small business set-aside or sole-source award regardless of dollar value.

* * * * *

■ 22. Amend section 52.219–29 by—

■ a. Revising the section heading, clause heading, and date of the clause;

■ b. In paragraph (a) removing from the definition “Economically disadvantaged women-owned small business (EDWOSB) concern” “means- A small” and adding “means a small” in its place;

■ c. In paragraph (b)(1) removing “sole source” and adding “sole-source” in its place;

■ d. Removing paragraphs (d) and (e);

■ e. Redesignating paragraph (f) as paragraph (d);

■ f. In newly redesignated paragraph (d)—

■ i. In paragraph (1) removing “NAICS” and adding “North American Industry Classification System” in its place;

■ ii. In paragraph (3)(v) removing “venture.” and adding “venture; and” in its place;

■ iii. Removing paragraph (4);

■ iv. Redesignating paragraph (5) as (4); and

■ v. In newly redesignated paragraph (4) removing “procuring activity” and adding “Contracting Officer” in its place.

The revision reads as follows:

52.219–29 Notice of Set-Aside for, or Sole-Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns.

* * * * *

Notice of Set-Aside for, or Sole-Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns (SEP 2021)

* * * * *

■ 23. Amend section 52.219–30 by—

■ a. Revising the section heading, clause heading, date of the clause, and the introductory text of paragraph (a);

■ b. In paragraph (b)(1) removing “sole source” and adding “sole-source” in its place;

■ c. In the second sentence of paragraph (c)(1) removing “WOSB program” and adding “WOSB Program” in its place;

■ d. Removing paragraphs (d) and (e);

■ e. Redesignating paragraph (f) as paragraph (d);

■ f. In newly redesignated paragraph (d):

■ i. In paragraph (1) removing “NAICS” and adding “North American Industry Classification System” in its place;

■ ii. In paragraph (d)(3)(v) removing “venture.” and adding “venture; and” in its place;

■ iii. Removing paragraph (4);

■ iv. Redesignating paragraph (5) as (4); and

■ v. In newly redesignated paragraph (4) removing “procuring activity” and adding “Contracting Officer” in its place.

The revisions read as follows:

52.219–30 Notice of Set-Aside for, or Sole-Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program.

* * * * *

Notice of Set-Aside for, or Sole-Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program (SEP 2021)

(a) *Definitions.* As used in this clause—

* * * * *

■ 24. Revise section 52.219–33 to read as follows:

52.219–33 Nonmanufacturer Rule.

As prescribed in 19.507(h), insert the following clause:

Nonmanufacturer Rule (SEP 2021)

(a) *Definitions.* As used in this clause—

Manufacturer means the concern that transforms raw materials, miscellaneous parts, or components into the end item. Concerns that only minimally alter the item being procured do not qualify as manufacturers of the end item. Concerns that add substances, parts, or components to an existing end item to modify its performance

will not be considered the end item manufacturer, where those identical modifications can be performed by and are available from the manufacturer of the existing end item.

Nonmanufacturer means a concern, including a supplier, that provides an end item it did not manufacture, process, or produce.

(b) *Applicability.*

(1) This clause does not apply to contracts awarded pursuant to the unrestricted portion of a partial set-aside or to a contractor that is the manufacturer of the product or end item.

(2) This clause applies to—

(i) Contracts that have been awarded pursuant to a set-aside, in total or in part, for any of the small business concerns identified in 19.000(a)(3);

(ii) Contracts that have been awarded on a sole-source basis in accordance with subparts 19.8, 19.13, 19.14, and 19.15;

(iii) Orders expected to exceed the simplified acquisition threshold and that are—

(A) Set aside for small business under multiple-award contracts, as described in 8.405–5 and 16.505(b)(2)(i)(F); or

(B) Issued directly to a small business concern under multiple-award contracts as described in 19.504(c)(1)(ii);

(iv) Orders, regardless of dollar value, that are—

(A) Set aside in accordance with subparts 19.8, 19.13, 19.14, and 19.15 under multiple-award contracts as described in 8.405–5 and 16.505(b)(2)(i)(F); or

(B) Issued directly to concerns that qualify for the programs described in subparts 19.8, 19.13, 19.14, and 19.15 under multiple-award contracts as described in 19.504(c)(1)(ii); and

(v) Contracts using the HUBZone price evaluation preference to award to a HUBZone concern unless the Contractor waived the evaluation preference.

(c) *Requirements.*

(1) The Contractor shall—

(i) Provide an end item that a small business has manufactured, processed, or produced in the United States or its outlying areas; for kit assemblers who are nonmanufacturers, see paragraph (c)(2) of this clause instead;

(ii) Be primarily engaged in the retail or wholesale trade and normally sell the type of item being supplied; and

(iii) Take ownership or possession of the item(s) with its personnel, equipment, or facilities in a manner consistent with industry practice; for example, providing storage, transportation, or delivery.

(2) When the end item being acquired is a kit of supplies, at least 50 percent of the total cost of the components of the kit shall be manufactured, processed, or produced in the United States or its outlying areas by small business concerns.

(End of clause)

* * * * *

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Part 19**

[FAC 2021–07; FAR Case 2020–012; Item III; Docket No. FAR–2020–0012; Sequence No. 1]

RIN 9000–AO16

Federal Acquisition Regulation: Scope of Review by Procurement Center Representatives

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation to implement section 1811 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 to provide procurement center representatives with the discretion to review any acquisition.

DATES: Effective September 10, 2021.

FOR FURTHER INFORMATION CONTACT: Ms. Malissa Jones, Procurement Analyst, at 703–605–2815, or by email at Malissa.jones@gsa.gov, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or GSARegSec@gsa.gov. Please cite FAC 2021–07, FAR Case 2020–012.

SUPPLEMENTARY INFORMATION:**I. Background**

DoD, GSA, and NASA are amending the Federal Acquisition Regulation (FAR) to implement section 1811 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114–328, 15 U.S.C. 644(l)(9)(A)). Section 1811 allows procurement center representatives to review any solicitation for a contract or task order without regard as to whether the contract or order is set aside for small business concerns, or reserved in the case of a multiple-award contract, or whether or not the solicitation would result in a bundled or consolidated contract or order. The Small Business Administration (SBA) issued a final rule at 84 FR 65647, dated November 29, 2019, to implement section 1811 of the NDAA for FY 2017. In their final rule, SBA amended 13 CFR 125.2(b)(1)(i)(A) to allow procurement center

representatives to review any acquisition, regardless of whether it is set aside, partially set aside, or reserved for small business or other socioeconomic categories.

II. Discussion and Analysis

The changes to the FAR and the rationale for the changes are summarized in the following paragraphs.

A. Contracting Officer Requirements for Review of Acquisitions

Section 19.202–1, Encouraging small business participation in acquisitions, is amended to require that contracting officers provide the procurement center representative a copy of any proposed acquisition package and other reasonably obtainable information related to the acquisition, if the procurement center representative exercises their discretion to review any proposed acquisition. The specific procedures are typically articulated in agreements between procuring activities and procurement center representatives. Section 19.202–1 is also amended to clarify the acquisitions for which the contracting officer must provide the statement described in paragraph (e)(2). In addition, changes are made to paragraph (d) of section 19.501, General, to provide that SBA procurement center representatives may review any proposed acquisition in excess of the micro-purchase threshold.

B. Duties of Procurement Center Representatives

Section 19.402, Small Business Administration procurement center representatives, is amended to update the description of a procurement center representative's duties to better reflect SBA's regulation at 13 CFR 125.2(b). Specifically, changes to FAR 19.402(c) are made to provide that procurement center representatives may recommend the set-aside or sole-source award to a small business; the breakout of discrete components, items, and requirements for competition; and ways to improve competition. Paragraph (c)(7) in section 19.402 is relocated from section 19.403, Small Business Administration breakout procurement center representatives. This paragraph describes the appeal a procurement center representative may file if a contracting activity does not adopt the procurement center representative's recommendation.

C. Duties of Breakout Procurement Center Representative

The text of section 19.403, Small Business Administration breakout procurement center representatives, is

removed and marked “Reserved.” Paragraph (c)(8) in this section is relocated to section 19.402 (see section II.B. of this preamble). Breakout procurement center representatives were removed from the Small Business Act (15 U.S.C. 644) by section 1621 of the NDAA for FY 2013 (Pub. L. 112–239). Therefore, section 19.403 is no longer needed.

D. Technical Amendments

Section 19.502–8, Rejecting Small Business Administration recommendations, has a two working-day appeals period. There is a different appeals period for the HUBZone, Service-Disabled Veteran-Owned Small Business, and Women-Owned Small Business Programs, of five working days; therefore, a reference is added to FAR 19.502–8(b) for those sections.

III. Publication of This Final Rule for Public Comment Is Not Required by Statute

The statute that applies to the publication of the FAR is 41 U.S.C. 1707 entitled “Publication of Proposed Regulations.” Paragraph (a)(1) of the statute requires that a procurement policy, regulation, procedure or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because it amends requirements related to the review of proposed acquisitions by SBA's procurement center representatives. These requirements affect only the internal operating procedures of the Government.

IV. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This rule amends FAR part 19, Small Business Programs. The objective of this rule is to update requirements for contracting officers with regard to reviews of proposed acquisitions by SBA's procurement center representatives, to align with section 1811 of the NDAA for FY 2017 (Pub. L. 114–328, 15 U.S.C. 644(l)(9)(A)). This rule does not change the applicability or text of any FAR solicitation provisions or contract clauses.

V. Expected Impact of the Rule

The changes in this rule will affect Government operations, but not contractor operations.

As a result of this rule, contracting officers may have to provide additional acquisition packages to procurement center representatives for review prior to issuance of the solicitation. The number of additional acquisitions to be reviewed by PCRs is unknown, as the reviews will be conducted at the discretion of the procurement center representatives.

The cost impact for the Government will depend on how many additional acquisition packages contracting officers provide to procurement center representatives for review. This rule will have no cost impact for contractors.

VI. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VII. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD, GSA, and NASA will send the rule and the “Submission of Federal Rules Under the Congressional Review Act” form to each House of the Congress and to the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget has determined that this is not a major rule under 5 U.S.C. 804.

VIII. Regulatory Flexibility Act

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 41 U.S.C. 1707(a)(1) (see section III of this preamble), the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601–612) are not applicable. Accordingly, no regulatory flexibility

analysis is required, and none has been prepared.

IX. Paperwork Reduction Act

This rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

List of Subjects in 48 CFR Part 19

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR part 19 as set forth below:

PART 19—SMALL BUSINESS PROGRAMS

■ 1. The authority citation for 48 CFR part 19 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

- 2. Amend section 19.202–1 by—
 - a. In paragraph (e)(1)(ii) removing “; or” and adding “;” in its place;
 - b. In paragraph (e)(1)(iii) removing “Utilization.” and adding “Utilization; or” in its place;
 - c. Adding paragraph (e)(1)(iv); and
 - d. Revising paragraph (e)(2) introductory text.

The addition and revision read as follows:

19.202–1 Encouraging small business participation in acquisitions.

* * * * *

(e)(1) * * *

(iv) The acquisition will be reviewed at the PCR’s discretion.

(2) For acquisitions described in paragraph (e)(1)(i) through (iii) of this section, provide a statement explaining why the—

* * * * *

- 3. Amend section 19.402 by—
 - a. Revising paragraph (c)(1)(i);
 - b. Removing from the end of paragraph (c)(1)(ii) “and”;
 - c. Revising paragraph (c)(1)(iii); and
 - d. Adding paragraphs (c)(1)(iv) and (c)(7).

The revisions and additions read as follows:

19.402 Small Business Administration procurement center representatives.

* * * * *

(c) * * *

(1) * * *

(i) The set-aside or sole-source award to a small business of selected acquisitions;

* * * * *

(iii) Breakout of discrete components, items, and requirements for competitive acquisitions; and

(iv) Ways to improve competition.

* * * * *

(7) Appealing a contracting officer’s rejection of PCR’s recommendation. Such appeal must be in writing and shall be filed and processed in accordance with the appeal procedures set out in 19.502–8.

19.403 [Removed and Reserved]

- 4. Remove and reserve section 19.403.
- 5. Amend section 19.501 by revising paragraph (d) to read as follows:

19.501 General.

* * * * *

(d) At the request of an SBA PCR (or, if a PCR is not assigned, see 19.402(a)), the contracting officer shall make available for review at the contracting office (to the extent of the SBA representative’s security clearance) any proposed acquisition in excess of the micro-purchase threshold.

* * * * *

- 6. In section 19.502–8 amend paragraph (b) by revising the first sentence to read as follows:

19.502–8 Rejecting Small Business Administration recommendations.

* * * * *

(b) The SBA PCR (or, if a PCR is not assigned, see 19.402(a)) may appeal the contracting officer’s rejection to the head of the contracting activity within 2 working days after receiving the notice (except see 19.1305(d), 19.1405(d), and 19.1505(g)). * * *

* * * * *

[FR Doc. 2021–16365 Filed 8–10–21; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 19, 42, and 52**

[FAC 2021–07; FAR Case 2019–004; Item IV; Docket No. FAR–2019–0030, Sequence No. 1]

RIN 9000–AN87

Federal Acquisition Regulation: Good Faith in Small Business Subcontracting

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation to implement a section of the National Defense Authorization Act for Fiscal Year 2017, which requires examples of failure to make good faith efforts to comply with a small business subcontracting plan.

DATES: Effective September 10, 2021.

FOR FURTHER INFORMATION CONTACT: Ms. Dana Bowman, Procurement Analyst, at 202–803–3188, or by email at dana.bowman@gsa.gov, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755 or GSARegSec@gsa.gov. Please cite FAC 2021–07, FAR Case 2019–004.

SUPPLEMENTARY INFORMATION:**I. Background**

DoD, GSA, and NASA published a proposed rule on June 3, 2020, at 85 FR 34155, to implement section 1821 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (section 1821(c) of Pub. L. 114–328; 15 U.S.C. 637 note). Section 1821 requires the Small Business Administration (SBA) to amend its regulations to provide examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan. SBA issued a final rule at 84 FR 65647, dated November 29, 2019, to implement section 1821 of the NDAA for FY 2017. In its final rule, SBA amended 13 CFR 125.3(d)(3) to provide guidance on evaluating whether the prime contractor made a good faith effort to comply with its small business subcontracting plan and a list of examples of activities

reflective of a failure to make a good faith effort.

Additionally, SBA revised 13 CFR 125.3(c)(1)(iv) to require that prime contractors with commercial subcontracting plans include indirect costs in their subcontracting goals. Other than small business concerns that have a commercial subcontracting plan report on performance through a summary subcontract report (SSR). Prior to the publication of its final rule, SBA's regulations required that contractors using a commercial subcontracting plan must include all indirect costs in their SSRs, but did not require these contractors to include indirect costs in their subcontracting goals, which led to inconsistencies when comparing the data reported in the SSR to the goals in the commercial subcontracting plan.

Small business subcontracting plans are required from large prime contractors when a contract is expected to exceed \$750,000 (\$1.5 million for construction) and has subcontracting possibilities. FAR 19.704 lists the elements of the plan, which include the contractor's goals for subcontracting to small business concerns and a description of the efforts the contractor will make to ensure that small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns have an equitable opportunity to compete for subcontracts. Failure to make a good faith effort to comply with the plan may result in the assessment of liquidated damages per FAR 52.219–16, Liquidated Damages—Subcontracting Plan.

This final FAR rule requires that all indirect costs, with certain exceptions, are included in commercial plans and SSRs.

FAR 19.705–7 contains examples of a good faith effort, and examples of a failure to make a good faith effort.

Four respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments received and any changes made to the rule as a result of the public comments are provided as follows:

A. Summary of Significant Changes From the Proposed Rule

There are no changes made to the final rule.

B. Analysis of Public Comments

1. Clarify Applicability to Subcontracts for Commercial Items and Commercially Available Off-the-Shelf (COTS) Items

Comment: One respondent commented that the rule should clarify that the “good faith” requirement is not applicable to subcontracts for commercial and COTS items under prime contracts. The respondent commented that the proposed rule does not address FAR 52.219–9(j), which states that subcontracting plans are not required from subcontractors when the prime contract contains the clause at 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, or when the subcontractor provides a commercial item subject to the clause at 52.244–6, Subcontracts for Commercial Items, under a prime contract.

Response: This rule does not revise the conditions for when a subcontracting plan is required. If a subcontracting plan is not required, then the examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan are not applicable. No changes were made to the final rule as a result of this comment.

2. Material Breach

a. FAR Language Broader Than SBA Language

Comment: One respondent stated that the proposed FAR language at 19.705–7(d) is much broader than the SBA final rule and is unclear on whether “material breach” refers to the subcontracting plan or a breach of the contract itself.

Response: FAR 19.705–5(a)(5) requires that the subcontracting plan become a “material part of the contract upon award.” The final rule text at FAR 19.705–7(d), similar to the SBA final rule, cites FAR 52.219–16, Liquidated Damages—Subcontracting Plan, which provides the corrective actions available to all Federal Government contracting officers when a contractor fails to make a good faith effort to comply with the subcontracting plan, while also giving consideration to other Federal contracting regulations. In this context, a failure to make a good faith effort to comply with a subcontracting plan is a material breach, sufficient for the assessment of liquidated damages, and also for other remedies the Government may have. No changes were made to the final rule as a result of this comment.

b. Recommended Language To Be Added to Final Rule

Comment: One respondent requested the proposed FAR language at 19.705–7(d) include language to indicate that the contractor has an opportunity to rebut and appeal before a determination of noncompliance is rendered and provided recommended text.

Response: The clause at FAR 52.219–16, Liquidated Damages—Subcontracting Plan, which is cited in proposed FAR text 19.705–7(d), specifically 52.219–16(c), allows the contractor an opportunity to demonstrate what good faith efforts have been made and to discuss the matter, before the contracting officer’s final decision. No changes were made to the final rule as a result of this comment.

3. Clarifications

a. Ensure Consistency Between FAR 52.219–16 and Proposed FAR 19.705–7(b)(2)

Comment: One respondent recommended that to remain consistent, the proposed language at FAR 19.705–7(b)(2) should either include the language contained in 52.219–16 or include references to the intent of 52.219–16, as the examples provided at FAR 19.705–7(b)(2) may occur without willful or intentional behavior. The respondent also recommended that intent and examples should be read together providing that an occurrence of the examples without intent would not constitute a violation. Specifically, failure to make a good faith effort must meet the “willful or intentional” standard. The respondent also provided various reasons why the FAR should make it clear that an occurrence of the examples without intent would not constitute a violation.

Response: This final rule is implementing current SBA regulation. SBA’s language at 13 CFR 125.3(d)(3) provides guidance on evaluating whether the prime contractor made a good faith effort to comply with its small business subcontracting plan. This language parallels the language in SBA’s rule providing contracting officers with examples to consider, in the context of the contractor’s total effort, as possible indicators of a failure to make a good faith effort. SBA’s rule does not reference the “willful and intentional” language. The FAR text will not be revised to incorporate the requested language as the “willful and intentional” language already appears in the definition of “failure to make a good faith effort to comply with the subcontracting plan” at both FAR

19.701 and in the clause at FAR 52.219–16. No changes were made to the final rule as a result of this comment.

b. Clarify the Intent of the Proposed Language at FAR 19.705–7(b)(2)(vi)

Comment: One respondent stated FAR 19.705–7(b)(2)(vi), as written, could be misinterpreted to hold a lower-tier contractor to the terms of a prime contractor’s contract with the Government and recommended a revision to provide the intent of the text is to ensure a contractor pays its small business subcontractors in accordance with the terms of their contract with the small business.

Response: The current text states, “Failure to pay small business subcontractors in accordance with the terms of the contract with the prime contractor;” and provides that the intent pertains to the subcontractor’s contract with the prime contractor. The final rule FAR text will not be revised to include the recommended text.

c. Clarify Intent of FAR 19.705–7(b)(2)(vii)

Comment: One respondent stated that the language at FAR 19.705–7(b)(2)(vii) should be revised to expressly require prime contractors to attend training as a remedy to any performance review findings. The respondent further stated that this is necessary given that a failure to attend the training offered by the Government could be perceived as a failure to make a good faith effort. The respondent provided recommended revisions to 19.705–7(b)(2)(vii).

Response: The respondent’s interpretation of the language at FAR 19.705–7(b)(2)(vii) is correct. If a contractor does not either correct substantiated findings or participate in subcontracting plan management training offered by the Government, it could be perceived by the contracting officer as a failure to make a good faith effort. This is not all inclusive of failure to make a good faith effort, but is one of many instances and examples used to show a lack of good faith effort on behalf of the prime contractor. Additionally, the contracting officer has the choice of requiring or recommending other corrective remedies as deemed necessary. The respondent’s recommended language is more restrictive by suggesting “and” instead of “or” as written in the SBA rule. The final rule FAR text will not be revised to include the recommended text.

d. Clarify Applicability to Contracts at or Below the Simplified Acquisition Threshold

Comment: One respondent stated that the preamble to the proposed rule indicates that the FAR Council is considering expanding the scope of the rule to include contracts at or below the simplified acquisition threshold (SAT) and recommended that the final FAR rule under this case should specify that it does not apply to contracts at or below the SAT. The respondent further stated that contracts at or below the SAT must be exempt from any policy or regulatory requirements pertaining to Small Business Plans.

Response: Section 8(d) of the Small Business Act (15 U.S.C. 637(d)) requires subcontracting plans only for acquisitions valued above \$750,000 (\$1.5 million for construction contracts). As stated in section III of this preamble, the requirements of section 1821 of the NDAA for FY 2017 (Pub. L. 114–328; 15 U.S.C 637 note) do not apply to contracts at or below the SAT.

e. Clarify Intent of FAR 19.705–7(b)(1)(v)

Comment: One respondent stated that the language at FAR 19.705–7(b)(1)(v) does not make clear how a contracting officer would make a determination that a contractor has “negotiated in good faith with interested small business.” The respondent also states that it is not clear how a contractor would negotiate with a small business that is merely interested in participating as a subcontractor.

Response: The language at FAR 19.705–7(b)(1)(v) is broadly written, as the intent is not to restrict or limit the contracting officer’s authority or ability to determine the prime contractor’s effort to negotiate in good faith. No changes were made to the FAR final rule as a result of this comment.

4. Outside the Scope of This Rule

Comment: One respondent had no issue with the proposed changes and clarifications in the language (FAR text) and agreed that the requirements should be consistent. However, the respondent disagreed with commercial subcontracting plans allowing large businesses to “capture and be credited for small dollars spent” that have nothing to do with the specific awarded Federal contract. The respondent recommended a maximum cap proposed at 0.5 percent to the large business and that any remaining credit or subcontracting expenditure allowed be with the small business directly involved and subcontracted to the

specific awarded Federal contract. The respondent further reiterated the original intent of the subcontracting law was to encourage large business primes to work and subcontract with small businesses in support of the Federal contract awarded and not to receive credit for unrelated work. Another respondent acknowledged the importance of prime contractors making a good faith effort to comply with SBA's small business subcontracting plan. The respondent further stated that the country is in the midst of a deadly pandemic and offered additional political commentary irrelevant to the subject FAR case.

Response: The comments are outside the scope of this rule. The intent of this rule is to provide guidance on evaluating whether a prime contractor made a good faith effort to comply with its small business subcontracting plan and to provide a list of examples of activities reflective of a failure to make a good faith effort. Additionally, this rule is amending the FAR to require that all indirect costs, minus certain exceptions, are included in both commercial plans and summary subcontract reports.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This rule implements a statutory requirement to provide examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan. The Federal Acquisition Regulatory Council (FAR Council) does not intend to apply the requirements of section 1821 of the NDAA for FY 2017 (Pub. L. 114–328; 15 U.S.C 637 note) to contracts at or below the SAT, but intends to apply those requirements to contracts for the acquisition of commercial items, including COTS items. The clauses at FAR 52.219–9 and 52.219–16 are revised by this rule.

A. Applicability to Contracts at or Below the SAT

Pursuant to 41 U.S.C. 1905, a provision of law is not applicable to acquisitions at or below the SAT unless the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1905 and states that the law applies to acquisitions at or below the SAT; or (iii) the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT. If

none of these conditions are met, the FAR is required to include the statutory requirement(s) on a list of provisions of law that are inapplicable to acquisitions at or below the SAT.

The purpose of this rule is to implement section 1821 of the NDAA for FY 2017. Section 1821 requires SBA to provide examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan.

The FAR Council does not intend to apply this rule to acquisitions at or below the SAT.

B. Applicability to Contracts for the Acquisition of Commercial Items

Pursuant to 41 U.S.C. 1906, acquisitions of commercial items (other than acquisitions of COTS items, which are addressed in 41 U.S.C. 1907) are exempt from a provision of law unless the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1906 and states that the law applies to acquisitions of commercial items; or (iii) the FAR Council makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of commercial items from the provision of law. If none of these conditions are met, the FAR is required to include the statutory requirement(s) on a list of provisions of law that are inapplicable to the acquisition of commercial items.

The purpose of this rule is to implement section 1821 of the NDAA for FY 2017 and SBA's implementing regulations. Section 1821 requires SBA to provide examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan. Both the FAR and SBA's regulations require contractors with small business subcontracting plans—including commercial plans—to make a good faith effort to comply with the plans. SBA's final rule did not exempt the acquisition of commercial items.

Section 1821 furthers the Administration's goal of supporting small business. It advances the interests of small business subcontractors by promoting good faith efforts by large prime contractors to find and use small business concerns as subcontractors, thereby providing valuable opportunities for small business concerns.

For these reasons, it is in the best interest of the Federal Government to apply the requirements of this rule to the acquisition of commercial items.

C. Applicability to Contracts for the Acquisition of COTS Items

Pursuant to 41 U.S.C. 1907, acquisitions of COTS items will be exempt from a provision of law unless the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1907 and states that the law applies to acquisitions of COTS items; (iii) concerns authorities or responsibilities under the Small Business Act (15 U.S.C. 644) or bid protest procedures developed under the authority of 31 U.S.C. 3551 *et seq.*, 10 U.S.C. 2305(e) and (f), or 41 U.S.C. 3706 and 3707; or (iv) the Administrator for Federal Procurement Policy makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of COTS items from the provision of law. If none of these conditions are met, the FAR is required to include the statutory requirement(s) on a list of provisions of law that are inapplicable to the acquisition of COTS items.

The purpose of this rule is to implement section 1821 of the NDAA for FY 2017 and SBA's implementing regulations. Section 1821 requires SBA to provide examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan. Both the FAR and SBA's regulations require contractors with small business subcontracting plans—including commercial plans—to make a good faith effort to comply with the plans. SBA's final rule did not exempt the acquisition of COTS items.

Section 1821 furthers the Administration's goal of supporting small business. It advances the interests of small business subcontractors by promoting good faith efforts by large prime contractors to find and use small business concerns as subcontractors, thereby providing valuable opportunities for small business concerns.

For these reasons, it is in the best interest of the Federal Government to apply the requirements of this rule to the acquisition of COTS items.

IV. Expected Impact of the Rule

This rule provides examples of activities that contracting officers may consider when evaluating whether the prime contractor made a good faith effort to comply with its small business subcontracting plan. The contracting officers also have consistent and uniform examples to identify and hold large prime contractors accountable for failing to make a good faith effort to

comply with their subcontracting plans. Encouraging large prime contractors to meet their subcontracting goals may have a positive economic impact on any small business entity that wishes to participate in Federal procurement as a subcontractor.

The final rule also requires prime contractors with commercial subcontracting plans to include indirect costs, with certain exceptions, in their subcontracting goals. This will ensure that the data reported in the summary subcontract report is consistent with the goals in the commercial subcontracting plan.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD, GSA, and NASA will send the rule and the “Submission of Federal Rules Under the Congressional Review Act” form to each House of the Congress and to the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget has determined that this is not a major rule under 5 U.S.C. 804.

VII. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601–612. The FRFA is summarized as follows:

The objective of this final rule is to implement section 1821 of the NDAA for FY 2017 and SBA’s implementing regulations, which provide examples of activities that would be considered a failure to make a good faith effort to comply with a small business subcontracting plan. SBA amended 13 CFR 125.3(d)(3) to provide guidance on evaluating whether the prime contractor made a good

faith effort to comply with its small business subcontracting plan and a list of examples of activities reflective of a failure to make a good faith effort.

Additionally, SBA amended 13 CFR 125.3(c)(1)(iv) to require that large prime contractors with commercial subcontracting plans include indirect costs in the commercial subcontracting plan goals. Large prime contractors that have a commercial subcontracting plan report on performance through a Summary Subcontract Report (SSR) in the Electronic Subcontracting Reporting System (eSRS). The FAR currently requires—as SBA’s regulations required prior to publication of SBA’s final rule—that a contractor using a commercial subcontracting plan include all indirect costs in its SSR. However, these regulations did not require contractors to include indirect costs in their commercial subcontracting plan goals, which leads to inconsistencies when comparing the data reported in the SSR to the goals in the commercial subcontracting plan.

There were no significant issues raised by the public comments in response to the initial regulatory flexibility analysis.

This rule may have a positive economic impact on any small entity that wishes to participate in Federal procurement as a subcontractor.

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities. This rule provides guidance to the contracting officer on evaluating whether the prime contractor made a good faith effort to comply with its small business subcontracting plan and a list of examples of activities reflective of a failure to make a good faith effort.

By providing examples of a failure to make a good faith effort to comply with small business subcontracting plans, the FAR will enable contracting officers to determine more easily whether large prime contractors have made a good faith effort to comply with their subcontracting plans and to hold large prime contractors accountable for failing to make a good faith effort to comply with their subcontracting plans. More diligence in developing and meeting subcontracting goals on the part of large prime contractors could have a positive impact of giving small business concerns more opportunities to subcontract on Federal contracts.

Data from the Federal Procurement Data System for fiscal years 2018 through 2020 indicate that there were 7,656 entities with 30,414 new awards that required subcontracting plans. Of the 30,414 new awards, 18 percent or 5,399 required commercial subcontracting plans. Additionally, 31 percent or 2,318 of the 7,656 unique awardees required commercial subcontracting plans. According to the Federal Funding Accountability and Transparency Act Subaward Reporting System (FSRS), there are 19,596 unique entities who are subcontractors. Approximately 80 percent of the entities registered in the System for Award Management are small entities. Therefore, we estimate that 80 percent (15,677) of the subcontractors in FSRS are small entities. These small entities may benefit from this rule.

This final rule requires a large prime contractor with a commercial subcontracting plan to include indirect costs in its subcontracting goals. The benefit of requiring that indirect costs be included in subcontracting goals in commercial subcontracting plans is that it will increase the small business subcontracting goal and thus, increase the amount of funds the prime contractor will subcontract to small business concerns, providing more opportunities for subcontract awards to small business concerns.

This final rule does not include any new reporting, recordkeeping, or other compliance requirements for small entities.

There are no known significant alternative approaches that would accomplish the stated objectives of the applicable statute.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VIII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. 3501–3521) applies to this rule; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000–0007, Subcontracting Plans.

List of Subjects in 48 CFR Parts 19, 42, and 52

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 19, 42, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 19, 42, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 19—SMALL BUSINESS PROGRAMS

- 2. Amend section 19.704 by—
- a. In paragraph (a)(6) removing the phrase “subcontracting goals” and adding the phrase “subcontracting goals (for commercial plans, see paragraph (d) of this section)” in its place;
- b. Revising paragraph (d) introductory text; and
- c. In paragraph (d)(4) removing the phrase “one SSR” and adding the phrase “one SSR that includes all indirect costs, except as described in paragraph (d) of this section,” in its place.

The revision reads as follows:

19.704 Subcontracting plan requirements.

* * * * *

(d) A commercial plan (as defined in 19.701) is the preferred type of subcontracting plan for contractors furnishing commercial items. The subcontracting goals established for a commercial plan shall include all indirect costs with the exception of those such as the following: Employee salaries and benefits; payments for petty cash; depreciation; interest; income taxes; property taxes; lease payments; bank fees; fines, claims, and dues; original equipment manufacturer relationships during warranty periods (negotiated up front with the product); utilities and other services purchased from a municipality or an entity solely authorized by the municipality to provide those services in a particular geographical region; and philanthropic contributions. Once a contractor's commercial plan has been approved, the Government shall not require another subcontracting plan from the same contractor while the plan remains in effect, as long as the product or service being provided by the contractor continues to meet the definition of a commercial item. The contractor shall—

* * * * *

19.705-4 [Amended]

■ 3. In section 19.705-4 amend paragraph (c), in the fourth sentence, by removing the phrase “faith effort” and adding the phrase “faith effort (see 19.705-7)” in its place.

■ 4. Amend section 19.705-6 by revising paragraphs (g)(1), (h), and (i) to read as follows:

19.705-6 Postaward responsibilities of the contracting officer.

* * * * *

(g) * * *

(1) Assess whether the prime contractor made a good faith effort to comply with its small business subcontracting plan. See 19.705-7(b) for more information on the determination of good faith effort.

* * * * *

(h) Initiate action to assess liquidated damages in accordance with 19.705-7 upon a recommendation by the administrative contracting officer, if one is assigned, or receipt of other reliable evidence to indicate that assessing liquidated damages is warranted.

(i) Take action to enforce the terms of the contract upon receipt of a notice from the contract administration office under 19.706(f).

* * * * *

■ 5. Amend section 19.705-7 by—

■ a. Revising the section heading;

■ b. In paragraph (a)—

■ i. Adding a paragraph heading;

■ ii. Removing the phrase “small disadvantaged business” and adding the phrase “small disadvantaged business,” in its place;

■ c. Revising paragraphs (b), (c), (d), and (e);

■ d. Adding a paragraph heading to the introductory text of paragraph (f);

■ e. Removing paragraph (g); and

■ f. Redesignating paragraph (h) as paragraph (f)(5).

The revisions and additions read as follows:

19.705-7 Compliance with the subcontracting plan.

(a) *General.* * * *

(b) *Determination of good faith effort.*

(1) In determining whether a contractor failed to make a good faith effort to comply with its subcontracting plan, a contracting officer must look to the totality of the contractor's actions, consistent with the information and assurances provided in its plan. The fact that the contractor failed to meet its subcontracting goals does not, in and of itself, constitute a failure to make a good faith effort (see 19.701). For example, notwithstanding a contractor's diligent effort to identify and solicit offers from any of the small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns, factors such as unavailability of anticipated sources or unreasonable prices may frustrate achievement of the contractor's subcontracting goals. The contracting officer may consider any of the following, though not all inclusive, to be indicators of a good faith effort:

(i) Breaking out work to be subcontracted into economically feasible units, as appropriate, to facilitate small business participation.

(ii) Conducting market research to identify potential small business subcontractors through all reasonable means, such as searching SAM, posting notices or solicitations on SBA's SUBNet, participating in business matchmaking events, and attending preproposal conferences.

(iii) Soliciting small business concerns as early in the acquisition process as practicable to allow them sufficient time to submit a timely offer for the subcontract.

(iv) Providing interested small businesses with adequate and timely information about plans, specifications, and requirements for performance of the

prime contract to assist them in submitting a timely offer for the subcontract.

(v) Negotiating in good faith with interested small businesses.

(vi) Directing small businesses that need additional assistance to SBA.

(vii) Assisting interested small businesses in obtaining bonding, lines of credit, required insurance, necessary equipment, supplies, materials, or services.

(viii) Utilizing the available services of small business associations; local, state, and Federal small business assistance offices; and other organizations.

(ix) Participating in a formal mentor-protégé program with one or more small business protégés that results in developmental assistance to the protégés.

(x) Although failing to meet the subcontracting goal in one socioeconomic category, exceeding the goal by an equal or greater amount in one or more of the other categories.

(xi) Fulfilling all of the requirements of the subcontracting plan.

(2) When considered in the context of the contractor's total effort in accordance with its plan, the contracting officer may consider any of the following, though not all inclusive, to be indicators of a failure to make a good faith effort:

(i) Failure to attempt through market research to identify, contact, solicit, or consider for contract award small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, or women-owned small business concerns, through all reasonable means including outreach, industry days, or the use of Federal systems such as SBA's Dynamic Small Business Search or SUBNet systems.

(ii) Failure to designate and maintain a company official to administer the subcontracting program and monitor and enforce compliance with the plan.

(iii) Failure to submit an acceptable ISR, or the SSR, using the eSRS, or as provided in agency regulations, by the report due dates specified in 52.219-9, Small Business Subcontracting Plan.

(iv) Failure to maintain records or otherwise demonstrate procedures adopted to comply with the plan including subcontracting flowdown requirements.

(v) Adoption of company policies or documented procedures that have as their objectives the frustration of the objectives of the plan.

(vi) Failure to pay small business subcontractors in accordance with the

terms of the contract with the prime contractor.

(vii) Failure to correct substantiated findings from Federal subcontracting compliance reviews or participate in subcontracting plan management training offered by the Government.

(viii) Failure to provide the contracting officer with a written explanation if the contractor fails to acquire articles, equipment, supplies, services, or materials or obtain the performance of construction work as described in 19.704(a)(12).

(ix) Falsifying records of subcontract awards to small business concerns.

(c) *Documentation of good faith effort.* If, at completion of the basic contract or any option, or in the case of a commercial plan, at the close of the fiscal year for which the plan is applicable, a contractor has failed to comply with the requirements of its subcontracting plan, which includes meeting its subcontracting goals, the contracting officer shall review all available information for an indication that the contractor has not made a good faith effort to comply with the plan. If no such indication is found, the contracting officer shall document the file accordingly.

(d) *Notice of failure to make a good faith effort.* If the contracting officer decides in accordance with paragraph (b) of this section that the contractor failed to make a good faith effort to comply with its subcontracting plan, the contracting officer shall give the contractor written notice in accordance with 52.219-16, Liquidated Damages—Subcontracting Plan, specifying the material breach, which may be included in the contractor’s past performance information, advising the contractor of the possibility that the contractor may have to pay to the Government liquidated damages, and providing a period of 15 working days (or longer period as necessary) within which to respond. The notice shall give the contractor an opportunity to demonstrate what good faith efforts have been made before the contracting officer issues the final decision and shall further state that failure of the contractor to respond may be taken as an admission that no valid explanation exists.

(e) *Payment of liquidated damages.* (1) If, after consideration of all the pertinent data, the contracting officer finds that the contractor failed to make a good faith effort to comply with its subcontracting plan, the contracting officer shall issue a final decision to the contractor to that effect and require the payment of liquidated damages in an amount stated. The contracting officer’s

final decision shall state that the contractor has the right to appeal under the clause in the contract entitled Disputes. Calculations and procedures shall be in accordance with 52.219-16, Liquidated Damages—Subcontracting Plan.

(2) The amount of damages attributable to the contractor’s failure to comply shall be an amount equal to the actual dollar amount by which the contractor failed to achieve each subcontracting goal. For calculations for commercial plans see paragraph (f) of this section.

(3) Liquidated damages shall be in addition to any other remedies that the Government may have.

(f) *Commercial plans.* * * *

19.706 [Amended]

■ 6. In section 19.706 amend paragraph (f) by removing the phrase “subcontracting plan” and adding the phrase “subcontracting plan (see 19.705-7(b) for more information on the determination of good faith effort)” in its place.

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 7. Amend section 42.1501 by redesignating paragraphs (a)(5) thru (a)(7) as paragraphs (a)(6) thru (a)(8) and adding a new paragraph (a)(5) to read as follows:

42.1501 General.

(a) * * *

(5) Complying with the requirements of the small business subcontracting plan (see 19.705-7(b));

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 8. Amend section 52.212-5 by revising the date of the clause and paragraphs (b)(17)(i), (b)(17)(v), and (b)(20) to read as follows:

52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items (SEP 2021)

* * * * *

(b) * * *

_____(17)(i) 52.219-9, Small Business Subcontracting Plan (SEP 2021) (15 U.S.C. 637(d)(4)).

* * * * *

_____(v) Alternate IV (SEP 2021) of 52.219-9.

* * * * *

_____(20) 52.219-16, Liquidated Damages—Subcontracting Plan (SEP 2021) (15 U.S.C. 637(d)(4)(F)(i)).

* * * * *

- 9. Amend section 52.219-9 by—
- a. Revising the date of the clause;
- b. In paragraph (d)(2)(i) removing the word “subcontracts” and adding the phrase “subcontracts, including all indirect costs except as described in paragraph (g) of this clause,” in its place;
- c. Adding a new fifth sentence to paragraph (g);
- d. Revising the date of Alternate IV, and paragraph (d)(2)(i) of Alternate IV.

The revised and added text reads as follows:

52.219-9 Small Business Subcontracting Plan.

* * * * *

Small Business Subcontracting Plan (SEP 2021)

* * * * *

(g) * * * A Contractor authorized to use a commercial subcontracting plan shall include in its subcontracting goals and in its SSR all indirect costs, with the exception of those such as the following: Employee salaries and benefits; payments for petty cash; depreciation; interest; income taxes; property taxes; lease payments; bank fees; fines, claims, and dues; original equipment manufacturer relationships during warranty periods (negotiated up front with the product); utilities and other services purchased from a municipality or an entity solely authorized by the municipality to provide those services in a particular geographical region; and philanthropic contributions. * * *

* * * * *

Alternate IV (SEP 2021). * * *

(d) * * *

(2) * * *

(i) Total dollars planned to be subcontracted for an individual subcontracting plan; or the Contractor’s total projected sales, expressed in dollars, and the total value of projected subcontracts to support the sales for a commercial plan, including all indirect costs, with the exception of those such as the following: Employee salaries and benefits; payments for petty cash; depreciation; interest; income taxes; property taxes; lease payments; bank fees; fines, claims, and dues; original equipment manufacturer relationships during warranty periods (negotiated up front with the product); utilities and

other services purchased from a municipality or an entity solely authorized by the municipality to provide those services in a particular geographical region; and philanthropic contributions;

* * * * *

- 10. Amend 52.219–16 by—
- a. Revising the date of the clause; and
- b. In paragraph (b) in the second sentence removing the phrase “plan, established” and adding “plan (see 19.705–7), established” in its place.

The revision reads as follows:

52.219–16 Liquidated Damages—Subcontracting Plan.

* * * * *

Liquidated Damages—Subcontracting Plan (SEP 2021)

* * * * *

[FR Doc. 2021–16366 Filed 8–10–21; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 42 and 52

[FAC 2021–07; Item V; Docket No. FAR–2021–0052; Sequence No. 3]

Federal Acquisition Regulation; Technical Amendments

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: This document makes amendments to the Federal Acquisition Regulation (FAR) in order to make needed editorial changes.

DATES: Effective September 10, 2021.

FOR FURTHER INFORMATION CONTACT: Ms. Lois Mandell, Regulatory Secretariat Division (MVCB), at 202–501–4755 or GSARegSec@gsa.gov. Please cite FAC 2021–07, Technical Amendments.

SUPPLEMENTARY INFORMATION: This document makes editorial changes to 48 CFR parts 42 and 52.

List of Subjects in 48 CFR Parts 42 and 52

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 42 and 52 as set forth below:

- 1. The authority citation for 48 CFR parts 42 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

42.709–0 through 42.709–6 [Redesignated as 42.709–1 through 42.709–7]

- 2. Redesignate sections 42.709–0 through 42.709–6 as sections 42.709–1 through 42.709–7.

42.709–3 [Amended]

- 3. Amend newly redesignated section 42.709–3 by—
- a. In paragraph (a)(1) removing “42.709–1(a)” and adding “42.709–2(a)” in its place;
- b. In paragraph (a)(2) removing “42.709–5” and adding “42.709–6” in its place; and
- c. In paragraph (b)(1) removing “42.709–1(a)” and adding “42.709–2(a)” in its place.

42.709–4 [Amended]

- 4. Amend newly designated section 42.709–4 by—
- a. In the introductory text removing “42.709–5” and adding “42.709–6” in its place;
- b. In paragraph (a) removing “42.709–1(a)(1)” and adding “42.709–2(a)(1)” in its place; and
- c. In paragraph (b) introductory text removing “42.709–1(a)(2)” and adding “42.709–2(a)(2)” in its place.

42.709–5 [Amended]

- 5. Amend newly designated section 42.709–5 by removing from the introductory text “42.709–1(a)(1)(ii)” and adding “42.709–2(a)(1)(ii)” in its place.

42.709–6 [Amended]

- 6. Amend newly designated section 42.709–6 by—
- a. In the introductory text removing “42.709–1(a)” and adding “42.709–2(a)” in its place; and
- b. In paragraph (b) removing “42.709(b)” and adding “42.709–1(b)” in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 7. Amend section 52.242–3 by—
- a. Removing from the prescription text “42.709–6” and adding “42.709–7” in its place;
- b. Revising the date of the clause;
- c. Removing from paragraph (c) “Subpart” and adding “subpart” in its place; and
- d. Removing from paragraph (g) “42.709–5” and adding “42.709–6” in its place.

The revision reads as follows:

52.242–3 Penalties for Unallowable Costs.

* * * * *

Penalties for Unallowable Costs (SEP 2021)

* * * * *

- 8. Amend section 52.245–1 by—
- a. Revising the date of clause; and
- b. Removing paragraphs (j)(2)(iii)(A) through (G).

The revision reads as follows:

52.245–1 Government Property.

* * * * *

Government Property (SEP 2021)

* * * * *

[FR Doc. 2021–16367 Filed 8–10–21; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR–2021–0051, Sequence No. 4]

Federal Acquisition Regulation; Federal Acquisition Circular 2021–07; Small Entity Compliance Guide

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of DoD, GSA, and NASA. This *Small Entity Compliance Guide* has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of the rules appearing in Federal Acquisition Circular (FAC) 2021–07, which amends the Federal Acquisition Regulation (FAR).

Interested parties may obtain further information regarding these rules by referring to FAC 2021–07, which precedes this document.

DATES: August 11, 2021.

ADDRESSES: The FAC, including the SECG, is available via the internet at <https://www.regulations.gov>.
FOR FURTHER INFORMATION CONTACT: For clarification of content, contact the analyst whose name appears in the table below. Please cite FAC 2021–07 and the

FAR Case number. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755 or GSARegSec@gsa.gov. An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared.

RULES LISTED IN FAC 2021–07

Item	Subject	FAR Case	Analyst
* I	Section 508-Based Standards in Information and Communication Technology	2017–011	Jackson.
* II	Revision of Limitations on Subcontracting	2016–011	Uddowla.
III	Scope of Review by Procurement Center Representatives	2020–012	Jones.
* IV	Good Faith in Small Business Subcontracting	2019–004	Bowman.
V	Technical Amendments.		

SUPPLEMENTARY INFORMATION:

Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these FAR rules, refer to the specific item numbers and subjects set forth in the documents following these item summaries. FAC 2021–07 amends the FAR as follows:

Item I—Section 508-Based Standards in Information and Communication Technology (FAR Case 2017–011)

This final rule amends the FAR to implement the Access Board’s final rule published January 17, 2017. Section 508 of the Rehabilitation Act of 1973 requires the FAR to incorporate revised accessibility standards developed by the Access Board for information and communication technology (ICT). The Access Board is also known as the Architectural and Transportation Barriers Compliance Board. This rule ensures that Federal employees with disabilities have comparable access to, and use of, such information and data relative to other Federal employees. Section 508 also requires Federal agencies to ensure that members of the public with disabilities have comparable access to publicly available information and data.

Item II—Revision of Limitations on Subcontracting (FAR Case 2016–011)

This rule amends the FAR to implement regulatory changes made by the Small Business Administration (SBA) in its final rule published in the **Federal Register** at 81 FR 34243, on May 31, 2016. SBA’s final rule implements the statutory requirements of section 1651 of the National Defense Authorization Act for Fiscal Year 2013. Section 1651 revised and standardized the limitations on subcontracting, including the nonmanufacturer rule, that apply to small business concerns under FAR part 19 procurements. Section 1651 shifts the limitations on

subcontracting from the concept of a required percentage of work to be performed by a prime contractor to the concept of a limit on the percentage of the overall award amount to be spent by the prime on subcontractors. Significantly, section 1651 excludes from this calculation the percentage of the award amount that the prime contractor spends on subcontractors who are similarly situated entities. This rule implements the revised and standardized limitations on subcontracting through the use of a single FAR clause for every small business program, instead of continuing to implement through multiple FAR clauses that were specific to a particular small business program. This rule also revises the FAR clause implementing the nonmanufacturer rule to reflect the standardized requirements across all the small business programs.

This rule may have a positive economic impact on small businesses. Through the ability to meet the limitations by means of subcontracts with similarly situated entities, this rule will make it possible for small businesses to compete for larger contracts than they could in the past.

Item III—Scope of Review by Procurement Center Representatives (FAR Case 2020–012)

This final rule amends the FAR to implement section 1811 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114–328), as implemented in the Small Business Administration (SBA) final rule published at 84 FR 65647 on November 29, 2019. Section 1811 allows SBA’s procurement center representatives to review any solicitation for a contract or task order, without regard to whether it is set aside for small business concerns, or reserved in the case of a multiple-award contract, or whether it would

result in a bundled or consolidated contract or order.

Item IV—Good Faith in Small Business Subcontracting (FAR Case 2019–004)

This final rule amends the FAR to implement section 1821(c) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (15 U.S.C 637 note, Pub. L. 114–328), as implemented in the Small Business Administration (SBA) final rule published at 84 FR 65647, dated November 29, 2019.

Specifically, the final FAR rule at FAR 19.705–7 includes examples of a good faith effort to comply with the subcontracting plan, and examples of a failure to make a good faith effort. Failure to make a good faith effort to comply with the plan may result in assessment of liquidated damages.

Additionally, the final rule amends the FAR to require that prime contractors with a commercial subcontracting plan include indirect costs in their subcontracting goals. Previously, prime contractors were required to include indirect costs in the summary subcontract report (SSR) but not in their subcontracting goals, which led to inconsistencies when comparing the SSR to the goals in the commercial subcontracting plan. Including indirect costs in both the SSR and subcontracting goals established in the commercial subcontracting plan will allow for consistency.

Item V—Technical Amendments

Editorial changes are made at FAR 42.709–1 through 42.709–7, 52.242–3, and 52.245–1.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

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